Surajmani Stella Kujur v. *Durga Charan Hansdah*

AIR 2001 SC 938 : (2001) 3 SCC 13

R.P. SETHI, J. - 2. Who is a "Hindu" for the purposes of the applicability of the Hindu Marriage Act, 1955 ("the Act") is a question of law to be determined in this appeal.

3. Section 2 of the Act specifies the persons to whom the Act is applicable. Clauses (*a*), (*b*) and (*c*) of sub-section (1) of Section 2 make the Act applicable to a person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj and to a person who is a Buddhist, Jain or Sikh by religion. It is also applicable to any other person domiciled in the territories of India who is nota Muslim, Christian, Parsi or Jew by religion. The applicability of the Act is, therefore,comprehensive and applicable to all persons domiciled in the territory of India who are not Muslims, Christians, Parsis or Jews by religion.

4. The term "Hindu" has not been defined either under the Act or the Indian Succession Act or any other enactment of the legislature. As far back as in 1903 the Privy Council in ***Bhagwan Koer* v. *J.C. Bose*** [ILR (1902) 31 Cal 11, 15] observed:

> We shall not attempt here to lay down a general definition of what is meant by the term 'Hindu'. To make it accurate and at the same time sufficiently comprehensive as well as distinctive is extremely difficult. The Hindu religion is marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimitedfreedom of private worship. Its social code is much more stringent, but amongst its different castes and sections exhibits wide diversity of practice. No trait is more markedof Hindu society in general than its horror of using the meat of the cow. Yet the Chamars who profess Hinduism, but who eat beef and the flesh of dead animals, are however low in the scale included within its pale. It is easier to say who are not Hindus,and practically the separation of Hindus from non-Hindus is not a matter of so much difficulty. The people know the differences well and can easily tell who are Hindus andwho are not.

5. The Act, is, therefore, applicable to: (1) All Hindus including a Virashaiva, a Lingayat, a Brahmo, Prarthana Samajist and an Arya Samajist, (2) Buddhists; (3) Jains; (4) Sikhs.

6. In this appeal the parties are admittedly tribals, the appellant being an Oraon and the respondent a Santhal. In the absence of a notification or order under Article 342 of the Constitution they are deemed to be Hindus. Even if a notification is issued under the Constitution, the Act can be applied to Scheduled Tribes as well by a further notification in terms of sub-section (2) of Section 2 of the Act. It is not disputed before us that in the Constitution (Scheduled Tribes) Order, 1950 as amended by Scheduled Castes and Scheduled Tribes Order (Amendment) Acts 63 of 1956, 108 of 1976, 18 of 1987 and 15 of 1990, both the tribes to which the parties belong are specified in Part XII. It is conceded even by the appellant that "the parties to the petition are two tribals, who otherwise profess Hinduism, but their marriage being out of the purview of the Hindu Marriage Act, 1955 in light of Section 2(2) of the Act, are thus governed only by their Santhal customs and usage".

7. The appellant has, however, relied upon an alleged custom in the tribe which mandates monogamy as a rule. It is submitted that as the respondent has solemnised a second marriage during the subsistence of the first marriage with the appellant, the second marriage being void, the respondent is liable to be prosecuted for the offence punishable under Section 494 of the Indian Penal Code.

8. No custom can create an offence as it essentially deals with the civil rights of the parties and no person can be convicted of any offence except for violation of law in force at the time of commission of the act charged. Custom may be proved for the determination of the civil rights of the parties including their status, the establishment of which may be used for the purposes of proving the ingredients of an offence which, under Section 3(37) of the General Clauses Act, would mean an act or omission punishable by any law by way of fine or imprisonment. Article 20 of the Constitution, guaranteeing protection in respect of conviction of offence, provides that no person shall be convicted of any offence except for violation of law in force at the time of commission of the act charged as an offence. Law under Article 13 clause (3) of the Constitution means the law made by the legislature including intra vires statutory orders and orders made in exercise of powers conferred by the statutory rules.

9. The expression "custom and usage" has been defined under Section 3(*a*) of the Act as:

> 3. (*a*) the expression 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:
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> Provided that the rule is certain and not unreasonable or opposed to public policy; and
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> Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

10. For custom to have the colour of a rule or law, it is necessary for the party claiming it, to plead and thereafter prove that such custom is ancient, certain and reasonable. Custom being in derogation of the general rule is required to be construed strictly. The party relying upon a custom is obliged to establish it by clear and unambiguous evidence. In ***Ramalakshmi Ammal*** **v.** ***Sivanantha Perumal Sethurayar*** [(1871-72) 14 Moo IA 570, 585-86] it was held:

> It is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence, and that they possess the conditions of antiquityand certainty on which alone their legal title to recognition depends.

12. The importance of the custom in relation to the applicability of the Act has been acknowledged by the legislature by incorporating Section 29 saving the validity of a marriage solemnised prior to the commencement of the Act which may otherwise be invalid after passing of the Act. Nothing in the Act can affect any right, recognised by custom or conferred by any said enactment to obtain the dissolution of a Hindu marriage whether solemnised before or after the commencement of the Act even without the proof of the conditions precedent for declaring the marriage invalid as incorporated in Sections 10 to 13 of the Act.

13. In this case the appellant filed a complaint in the Court of Chief Metropolitan Magistrate, New Delhi stating therein that her marriage was solemnised with the respondent in

Delhi "according to Hindu rites and customs". Alleging that the respondent has solemnised another marriage with Accused 2, the complainant pleaded:

> That Accused 1 has not obtained any divorce through the court of law up to this date and hence the action of Accused 1 is illegal and contravenes the provision of law as laid down under Section 494 IPC.

14. Nowhere in the complaint the appellant has referred to any alleged custom having the force of law which prohibits the solemnisation of second marriage by the respondent and the consequences thereof. It may be emphasised that mere pleading of a custom stressing for monogamy by itself was not sufficient unless it was further pleaded that second marriage was void by reason of its taking place during the life of such husband or wife. In order to prove the second marriage void, the appellant was under an obligation to show the existence of a custom which made such marriage null, ineffectual, having no force of law or binding effect, incapable of being enforced in law or non est. The fact of second marriage being void is a sine qua non for the applicability of Section 494 IPC. It is settled position of law that for fastening the criminal liability, the prosecution or the complainant is obliged to prove the existence of all the ingredients constituting the crime which are normally and usually defined by a statute. The appellant herself appears to be not clear in her stand inasmuch as in her statement in the court recorded on 24-10-1992 she has stated that "I am a Hindu by religion". The complaint was dismissed by the trial court holding, "there is no mention of any such custom in the complaint nor is there evidence of such custom. In the absence of pleadings andevidence reference to book alone is not sufficient". The High Court vide the judgment impugned in this appeal held that in the absence of notification in terms of sub-section (2) of Section 2 of the Act no case for prosecution for the offence of bigamy was made out against the respondent because the alleged second marriage cannot be termed to be void either under the Act or any alleged custom having the force of law.

15. In view of the fact that parties admittedly belong to the Scheduled Tribes within the meaning of clause (25) of Article 366 of the Constitution as notified by the Constitution (Scheduled Tribes) Order, 1950 as amended by the Scheduled Castes and Scheduled Tribes Order (Amendment) Acts 63 of 1956, 108 of 1976, 18 of 1987 and 15 of 1990 passed in terms of Article 342 and in the absence of specific pleadings, evidence and proof of the allegedcustom making the second marriage void, no offence under Section 494 of the Indian Penal Code can possibly be made out against the respondent. The trial Magistrate and the High Court have rightly dismissed the complaint of the appellant.

17. There is no merit in this appeal which is accordingly dismissed.

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S. Nagalingam v. *Sivagami*
(2001) 7 SCC 487

K.G. BALAKRISHNAN, J. - 3. The appellant S. Nagalingam married respondent complainant Sivagami on 6-9-1970. Three children were born from that wedlock. The respondent alleged that the appellant started ill-treating her and on many occasions she was physically tortured. As a result of ill-treatment and severe torture inflicted by the appellant as well as his mother, she left her marital home and started staying with her parents. While so, the respondent came to know that the appellant had entered into a marriage with another woman on18-6-1984, by the name of Kasturi, and that the marriage was performed in a marriage hall at Thiruthani. The respondent then filed a criminal complaint before the Metropolitan Magistrate against the appellant and six others All the accused were acquitted by the trial court. Aggrieved thereby, the respondent filed Criminal Appeal No. 67 of 1992 before the High Court of Madras.The learned Single Judge, by his judgment dated 1-11-1996 upheld the acquittal of Accused 2- 7, but as regards the acquittal of the appellant, the matter was remitted to the trial court permitting the complainant to adduce evidence regarding the manner in which the marriage wassolemnized. Upon remand, the priest (PW 3), who is alleged to have performed the marriage of the appellant with the second accused, Kasturi, on 18-6-1984, was further examined and the appellant was allowed further cross-examination. The learned Metropolitan Magistrate by his judgment dated 4-3-1999 acquitted the accused. Aggrieved by the said judgment, the respondent preferred a criminal appeal before the High Court of Madras. By the impugned judgment, the learned Single Judge held that the appellant had committed the offence punishable under Section 494 IPC. This is challenged before us.

5. The short question that arises for our consideration is whether the second marriage entered into by the appellant with the second accused, Kasturi, on 18-6-1984 was a valid marriage under Hindu law so as to constitute an offence under Section 494 IPC.

6. The essential ingredients of the offence under Section 494 IPC are: (*i*) the accused must have contracted the first marriage; (*ii*) whilst the first marriage was subsisting, the accused must have contracted a second marriage; and (*iii*) both the marriages must be valid in the sense that necessary ceremonies governing the parties must have been performed.

7. Admittedly, the marriage of the appellant with the respondent, entered into by them on 6-9-1970, was subsisting at the time of the alleged second marriage. The Metropolitan Magistrate held that an important ceremony, namely, "saptapadi" had not been performed and therefore, the second marriage was not a valid marriage and no offence was committed by the appellant. The learned Single Judge reversing this decision in appeal held that the parties are governed by Section 7-A of the Hindu Marriage Act as the parties are Hindus residing within the State of Tamil Nadu. It was held that there was a valid second marriage and the appellant was guilty of the offence of bigamy.

8. In the complaint filed by the respondent, it was alleged that the appellant had contracted the second marriage and this marriage was solemnised in accordance with Hindu rites on 18-6-1984 at RCC Mandapam, Thiruthani Devasthanam. To support this contention, PWs 2 and 3 were examined. PW 3 gave detailed evidence regarding the manner in which the marriage on 18-6-1984 was performed.

9. Learned counsel for the appellant contended that as per the evidence of PW 3, it is clear that "saptapadi", an important ritual which forms part of the marriage ceremony, was not performed and therefore, there was no valid marriage in accordance with Hindu rites.

10. It is undoubtedly true that the second marriage should be proved to be a valid marriage according to the personal law of the parties, though such second marriage is void under Section 17 of the Hindu Marriage Act having been performed when the earlier marriage is subsisting. The validity of the second marriage is to be proved by the prosecution by satisfactory evidence.

11. In ***Kanwal Ram* v. *H.P. Admn*** [AIR 1966 SC 614] this Court held that in a bigamy case, the second marriage is to be proved and the essential ceremony required for a valid marriage should have been performed. It was held that mere admission on the part of the accused may not be sufficient.

12. The question as to whether "saptapadi" is an essential ritual to be performed, came up for consideration of this Court in some cases. One of the earliest decisions of this Court is ***PriyaBala Ghosh* v. *Suresh Chandra Ghosh*** [(1971) 1 SCC 864] wherein it was held that the second marriage should be a valid one according to the law applicable to the parties. In that case, there was no evidence regarding the performance of the essential ceremonies, namely, "datta homa" and "saptapadi". In para 25 of the judgment, it was held that the learned Sessions Judge and the High Court have categorically found that "homa" and "saptapadi" are theessential rites for a marriage according to the law governing the parties and there is no evidencethat these two essential ceremonies have been performed when the respondent is stated to have married Sandhya Rani. It is pertinent to note that in para 9 of the judgment it is stated that both sides agreed that according to the law prevalent amongst the parties, "homa" and "saptapadi" were essential rites to be performed to constitute a valid marriage. Before this Court also, the parties on either side agreed that according to the law prevalent among them, "homa" and "saptapadi" were essential rites to be performed for solemnization of the marriage and there was no specific evidence regarding the performance of these two essential ceremonies.

13. ***Lingari Obulamma* v. *L. Venkata Reddy*** [(1979) 3 SCC 80] was a case where the High Court held that two essential ceremonies of a valid marriage, namely, "datta homa" and "saptapadi" (taking seven steps around the sacred fire) were not performed and, therefore, the marriage was void in the eye of the law. This finding was upheld by this Court. The appellant therein contended that among the "Reddy" community in Andhra Pradesh, there was no such custom of performing "datta homa" and "saptapadi", but the High Court held that under the Hindu law, these two ceremonies were essential to constitute a valid marriage and rejected the plea of the appellant on the ground that there was no evidence to prove that any of these two ceremonies had been performed. The finding of the High Court was upheld by this Court that there was no evidence to prove a second valid marriage.

14. In ***Santi Deb Berma* v. *Kanchan Prava Devi*** [1991 Supp (2) SCC 616] also, the appellant was acquitted by this Court as there was no proof of a valid marriage as the ceremonial "saptapadi" was not performed. This Court noticed in this case also that the High Court proceeded on the footing that according to the parties, performance of "saptapadi" is one of the essential ceremonies to constitute a valid marriage.

15. Another decision on this point is ***Laxmi Devi* v. *Satya Narayan*** [(1994) 5 SCC 545] wherein this Court, relying on an earlier decision in ***Priya Bala*** held that there was no proof that "saptapadi" was performed and therefore, there was no valid second marriage and that no offence of bigamy was committed.

16. In the aforesaid decisions rendered by this Court, it has been held that if the parties to the second marriage perform traditional Hindu form of marriage, "saptapadi" and "datta homa" are essential ceremonies and without there being these two ceremonies, there would not be a valid marriage.

17. In the instant case, the parties to the second marriage, namely, the appellant Nagalingam, and his alleged second wife, Kasturi, are residents of the State of Tamil Nadu and their marriage was performed at Thiruthani Temple within the State of Tamil Nadu. In the Hindu Marriage Act, 1955, there is a State amendment by the State of Tamil Nadu, which has been inserted as Section 7-A. The relevant portion thereof is as follows:

> 7-A. ***Special provision regarding suyamariyathai and seerthiruththa marriages***.- (1) This section shall apply to any marriage between any two Hindus, whether called suyamariyathai marriage or seerthiruththa marriage or by any other name, solemnised in the presence of relatives, friends or other persons -
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> (a) by each party to the marriage declaring in any language understood by the parties that each takes the other to be his wife or, as the case may be, her husband; or
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> (b) by each party to the marriage garlanding the other or putting a ring upon any finger of the other; or
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> (c) by the tying of the thali.
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> (2) (*a*) Notwithstanding anything contained in Section 7, but subject to the other provisions of this Act, all marriages to which this section applies solemnised after the commencement of the Hindu Marriage (Tamil Nadu Amendment) Act, 1967, shall be good and valid in law.
>
> (b) Notwithstanding anything contained in Section 7 or in any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of the Hindu Marriage (Tamil Nadu Amendment) Act, 1967, or in any other law in force immediately before such commencement or in any judgment, decree or order of any court, but subject to sub-section (3), all marriages to which this section applies solemnised at any time before such commencement, shall be deemed to have been, with effect on and from the date ofthe solemnization of each such marriage, respectively, good and valid in law.

18. Section 7-A applies to any marriage between two Hindus solemnised in the presence of relatives, friends or other persons. The main thrust of this provision is that the presence of a priest is not necessary for the performance of a valid marriage. Parties can enter into a marriage in the presence of relatives or friends or other persons and each party to the marriage should declare in the language understood by the parties that each takes the other to be his wife or, as the case may be, her husband, and the marriage would be completed by a simple ceremony requiring the parties to the marriage to garland each other or put a ring upon any finger of the other or tie a thali. Any of these ceremonies, namely, garlanding each other or putting a ring upon any finger of the other or tying a thali would

be sufficient to complete a valid marriage. Sub-section (2)(*a*) of Section 7-A specifically says that notwithstanding anything contained in Section 7, all marriages to which this provision applies and solemnised after the commencement of the Hindu Marriage (Tamil Nadu Amendment) Act, 1967, shall be good and valid in law. Sub-section (2)(*b*) further says that notwithstanding anything contained in Section 7 or in any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of the Hindu Marriage (Tamil Nadu Amendment) Act, 1967, or in any other law in force immediately before such commencement or in any judgment, decree or order of any court, all marriages to which this section applies solemnised at any time before such commencement, shall be deemed to have been valid. The only inhibition provided is that this marriage shall be subject to sub-section (3) of Section 7-A. We neednot elaborately consider the scope of Section 7-A(3) as that is not relevant for our purpose.

19. The evidence in this case as given by PW 3 clearly shows that there was a valid marriage in accordance with the provisions of Section 7-A of the Hindu Marriage Act. PW 3 deposed that the bridegroom brought the "thirumangalam" and tied it around the neck of the bride and thereafter the bride and the bridegroom exchanged garlands three times and the fatherof the bride stated that he was giving his daughter to "kanniyathan" on behalf of and in the witness of "agnidevi" and the father of the bridegroom received and accepted the "kanniyathan". PW 3 also deposed that he performed the marriage in accordance with the customs applicable to the parties.

20. Under such circumstances, the provisions of Section 7-A, namely, the State amendment inserted in the statute are applicable and there was a valid marriage between the appellant and Kasturi. Moreover, neither the complainant nor the appellant had any case that for a valid marriage among the members of the community to which they belong, this ceremony of "saptapadi" was an essential one to make it a valid marriage. Section 7 of the Hindu Marriage Act says that a Hindu marriage may be solemnised in accordance with the customary rites and ceremonies of either party thereto and where such rites and ceremonies include the saptapadi i.e. the taking of seven steps by the bridegroom and the bride jointly before the sacred fire, the marriage becomes complete and binding when the seventh step is taken.

21. "Saptapadi" was held to be an essential ceremony for a valid marriage only in cases where it was admitted by the parties that as per the form of marriage applicable to them that was an essential ceremony. The appellant in the instant case, however, had no such case that "saptapadi" was an essential ceremony for a valid marriage as per the personal law applicable whereas the provisions contained in Section 7-A are applicable to the parties. In any view of the matter, there was a valid marriage on 18-6-1984 between the appellant and the second accused Kasturi. Therefore, it was proved that the appellant had committed the offence of bigamy as it was done during the subsistence of his earlier marriage held on 6-9-1970. The learned Single Judge was right in holding that the appellant committed the offence of bigamy and the matter was correctly remanded to the trial court for awarding appropriate sentence. We see no merit in this appeal and the same is dismissed accordingly.

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Bhaurao Shankar Lokhande v. *State of Maharashtra*

AIR 1965 SC 1564 : (1965) 2 SCR 837

RAGHUBAR DAYAL, J. - Bhaurao Shankar Lokhande, Appellant 1, was married to the complainant Indubai in about 1956. He married Kamlabai in February 1962, during the lifetime of Indubai. Deorao Shankar Lokhande, Appellant 2, is the brother of the first appellant. These two appellants, together with Kamlabai and her father and Accused 5, a barber, were tried for an offence under Section 494 IPC. The latter three were acquitted by the Magistrate. Appellant 1 was convicted under Section 494 IPC and Appellant 2 for an offence under Section 494 read with Section 114 IPC. Their appeal to the Sessions Judge was dismissed. Their revision to the High Court also failed. They have preferred this appeal by special leave.

2. The only contention raised for the appellants is that in law it was necessary for the prosecution to establish that the alleged second marriage of the Appellant 1 with Kamlabai in 1962 had been duly performed in accordance with the religious rites applicable to the form of marriage gone through. It is urged for the appellants that the essential ceremonies for a valid marriage were not performed during the proceedings which took place when Appellant 1 and Kamlabai married each other. On behalf of the State it is urged that the proceedings of that marriage were in accordance with the custom prevalent in the community of the appellant for gandharva form of marriage and that therefore the second marriage of Appellant 1 with Kamlabai was a valid marriage. It is also urged for the State that it is not necessary for the commission of the offence under Section 494 IPC that the second marriage be a valid one.

Prima facie, the expression "whoever ...marries" must mean "whoever … marries validly" or "whoever ... marries and whose marriage is a valid one". If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriageis not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife.

4. Apart from these considerations, there is nothing in the Hindu law, as applicable to marriages till the enactment of the Hindu Marriage Act of 1955, which made a second marriage of a male Hindu, during the lifetime of his previous wife, void. Section 5 of the Hindu Marriage Act provides that a marriage may be solemnized between any two Hindus if the conditions mentioned in that section are fulfilled and one of those conditions is that neither party has a spouse living at the time of the marriage. Section 17 provides that any marriage between two Hindus solemnized after the commencement of the Act is void if at the date of such marriage either party had a husband or wife living, and that the provisions of Sections 494 and 495 IPC shall apply accordingly. The marriage between two Hindus is void in view of Section 17 if two conditions are satisfied: (*i*) the marriage is solemnized after the commencement of the Act; (*ii*) at the date of such marriage, either party had a spouse living. If the marriage which took place between the appellant and Kamlabai in February 1962 cannot be said to be "solemnized", that marriage will not be void by virtue of Section 17 of the Act and Section 494 IPC will not apply

to such parties to the marriage as had a spouse living. The word "solemnize" means, in connection with a marriage, "to celebrate the marriage with proper ceremonies and in due form", according to the ***Shorter Oxford Dictionary*.** It follows, therefore, that unless the marriage is "celebrated or performed with proper ceremonies and due form" it cannot be said tobe "solemnized". It is therefore essential, for the purpose of Section 17 of the Act, that the marriage to which Section 494 IPC applies on account of the provisions of the Act, should havebeen celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make them ceremonies Prescribed by law or approved by any established custom.

5. We are of opinion that unless the marriage which took place between Appellant 1 and Kamlabai in February 1962 was performed in accordance with the requirements of the law applicable to a marriage between the parties, the marriage cannot be said to have been "solemnized" and therefore Appellant 1 cannot be held to have committed the offence under Section 494 IPC.

6. We may now determine what the essential ceremonies for a valid marriage between the parties are. It is alleged for the respondent that the marriage between Appellant 1 and Kamlabai was in "gandharva" form, as modified by the custom prevailing among the Maharashtrians. It is noted in **Mulla's *Hindu Law***, 12th Edn., at p. 605:

> The Gandharva marriage is the voluntary union of a youth and a damsel which springs from desire and sensual inclination. It has at times been erroneously described as an euphemism for concubinage. This view is based on a total misconception of the leading texts of the *Smritis*. It may be noted that the essential marriage ceremonies are as much a requisite part of this form of marriage as of any other unless it is shown that some modification of those ceremonies has been introduced by custom in any particular community or caste.
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> At p. 615 is stated:
>
> (1) There are two ceremonies essential to the validity of a marriage, whether the marriage be in the Brahma form or the Asura form, namely—
>
> (1) invocation before the sacred fire, and
>
> (2) saptapadi, that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire….
>
> (2) A marriage may be completed by the performance of ceremonies other than those referred to in sub-section (1), where it is allowed by the custom of the caste to which the parties belong.

7. It is not disputed that these two essential ceremonies were not performed when Appellant 1 married Kamlabai in February 1962. There is no evidence on record to establish that the performance of these two essential ceremonies has been abrogated by the custom prevalent in their community. In fact, the prosecution led no evidence as to what the custom was. It led evidence of what was performed at the time of the alleged marriage. It was the counsel for the accused in the case who questioned certain witnesses about the performance of certain ceremonies and to such questions the witnesses replied that they were not necessary for the "gandharva" form of marriage in their community. Such a statement does not mean that the

custom of the community deemed what took place at the "marriage" of the Appellant 1 and Kamlabai, sufficient for a valid marriage and that the performance of the two essential ceremonies had been abrogated. There ought to have been definite evidence to establish that the custom prevalent in the community had abrogated these ceremonies for such form of marriage.

8. What took place that night when Appellant 1 married Kamlabai, has been stated thus, by PW 1:

> The marriage took place at 10 p.m. *Pat* - wooden sheets - were brought. A carpet was spread. Accused 1 then sat on the wooden sheet. On the other sheet Accused 3 sat. She was sitting nearby Accused 1. Accused 4 then performed some Puja by bringing a Tambya - pitcher. Betel leaves and coconut was kept on the Tambya. Two garlands were brought. Accused 2 was having one-and Accused 4 having one in his hand. Accused 4 gave the garland to Accused 3 and Accused 2 gave the garland to Accused 1. Accused nos. 1 and 3 then garlanded each other. Then they each struck each other's forehead.

In cross-examination this witness stated:

> It is not that Gandharva according to our custom is performed necessarily in a temple. It is also not that a Brahmin Priest is required to perform the Gandharva marriage. No 'Mangala Ashtakas' are required to be chanted at the time of Gandharva marriage. At the time of marriage in question, no Brahmin was called and Mangala Ashtakas were chanted. There is no custom to blow a pipe called 'Sher' in vernacular.

Sitaram, Witness 2 for the complainant, made a similar statement about what happened at the marriage ceremony and further stated, in the examination-in-chief:

> Surpan is the village of Accused 3's maternal uncle and as the custom is not to perform the ceremony at the house of maternal uncle, so it was performed at another place. There is no custom requiring a Brahmin Priest at the time of Gandharva.

He stated in cross-examination:

> A barber is not required and Accused 5 was not present at the time of marriage. There is a custom that the father of girl should make to touch the foreheads of the girl and boy to each other and the Gandharva is completed by the act.

9. It is urged for the respondent that as the touching of the forehead by the bridegroom and the bride is stated to complete the act of Gandharva marriage, it must be concluded that the ceremonies which, according to this witness, had been performed, were all the ceremonies which, by custom, were necessary for the validity of the marriage. In the absence of a statementby the witness himself that according to custom these ceremonies were the only necessary ceremonies for a valid marriage, we cannot construe the statement that the touching of the foreheads completed the gandharva form of marriage and that the ceremonies gone throughwere all the ceremonies required for the validity of the marriage.

10. Bhagwan, Witness 3 for the complainant, made no statement about the custom, but stated in cross-examination that it was not necessary for the valid performance of gandharva marriage in their community that a Brahmin priest was required and mangala ashtakas were to

be chanted. The statement of Jeebhau, Witness 4 for the complainant, does not show how the custom has modified the essential forms of marriage. He stated in cross-examination:

> I had witnessed two Gandharvas before this. For the last 5 or 7 years a Brahmin Priest, a Barber and a Thakur is not required to perform the Gandharva but formerly it was essential. Formerly the Brahmin used to chant Mantras and Mangala ashtakas. It was necessary to have a maternal uncle or any other person to make touch the foreheads of the sponsors together. A Brahmin from Kasara and Dhandana comes toour village for doing rituals but I do not know their names.

This statement too, does not establish that the two essential ceremonies are no more necessary to be performed, for a Gandharva marriage. The mere fact that they were probably not performed in the two Gandharva marriages Jeebhau had attended, does not establish that their performance is no more necessary according to the custom in that community. Further, Jeebhauhas stated that about five or seven years earlier the performance of certain ceremonies which,till then, were essential for the marriage, were given up. If so, the departure from the essentials cannot be said to have become a custom, as contemplated by the Hindu Marriage Act.

11. Clause (*a*) of Section 3 of the Act provides that the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family.

12. We are therefore of opinion that the prosecution has failed to establish that the marriage between Appellant 1 and Kamlabai in February 1962 was performed in accordance with the customary rites as required by Section 7 of the Act. It was certainly not performed in accordance with the essential requirements for a valid marriage under Hindu law.

13. It follows therefore that the marriage between Appellant 1 and Kamlabai does not come within the expression "solemnized marriage" occurring in Section 17 of the Act and consequently does not come within the mischief of Section 494 IPC even though the first wife of Appellant1 was living when he married Kamlabai in February 1962.

14. We have not referred to and discussed the cases referred to in support of the contention that the "subsequent marriage" referred to in Section 494 IPC need not be a valid marriage, as it is unnecessary to consider whether they have been correctly decided, in view of the fact that the marriage of Appellant 1 with Kamlabai could be a void marriage only if it came within the purview of Section 17 of the Act.

15. The result is that the conviction of Appellant 1 under Section 494 IPC and of Appellant 2 under Section 494 read with Section 114 IPC cannot be sustained. We therefore allow their appeal, set aside their convictions and acquit them. The bail bonds of Appellant 1 will stand discharged. Fines, if paid, will be refunded.

* * * * *

Lily Thomas v. *Union of India*

AIR 2000 SC 1650 : (2000) 6 SCC 224

S. SAGHIR AHMAD, J. - I respectfully agree with the views expressed by my esteemed brother, Sethi, J., in the erudite judgment prepared by him, by which the writ petitions and the review petition are being disposed of finally. I, however, wish to add a few words of my own.

2. Smt Sushmita Ghosh, who is the wife of Shri G.C. Ghosh (Mohd. Karim Ghazi) filed a writ petition [Writ Petition (C) No. 509 of 1992] in this Court stating that she was married to Shri G.C. Ghosh in accordance with Hindu rites on 10-5-1984 and since then both of them were happily living at Delhi. The following paragraphs of the writ petition, which arerelevant for this case, are quoted below:

> *15.* That around 1-4-1992, Respondent 3 told the petitioner that she should in her own interest agree to a divorce by mutual consent as he had anyway taken to Islam so that he may remarry and in fact he had already fixed to marry one Miss Vanita Gupta, resident of D-152, Preet Vihar, Delhi, a divorcee with two children in the second week of July 1992. Respondent 3 also showed a certificate issued by the office of the Maulana Qari Mohammad Idris, Shahi Qazi dated 17-6-1992 certifying that Respondent 3 had embraced Islam. True copy of the certificate is annexed to the present petition and marked as Annexure II.
>
> *16.* That the petitioner contacted her father and aunt and told them about her husband's conversion and intention to remarry. They all tried to convince Respondent 3 and talk him out of the marriage but to no avail and he insisted that Sushmita must agree to a divorce otherwise she will have to put up with the second wife.
>
> *17.* That it may be stated that Respondent 3 has converted to Islam solely for the purpose of remarrying and has no real faith in Islam. He does not practise the Muslim rites as prescribed nor has he changed his name or religion and other official documents.
>
> *18.* That the petitioner asserts her fundamental rights guaranteed by Article 15(1) not to be discriminated against on the ground of religion and sex alone. She avers thatshe has been discriminated against by that part of the Muslim personal law which is enforced by the State action by virtue of the Muslim Personal Law (Shariat) Act, 1937. It is submitted that such action is contrary to Article 15(1) and is unconstitutional.
>
> *19.* That the truth of the matter is that Respondent 3 has adopted the Muslim religion and become a convert to that religion for the sole purpose of having a secondwife which is forbidden strictly under the Hindu law. It need hardly be said that the said conversion was not a matter of Respondent 3 having faith in the Muslim religion.
>
> *20.* The petitioner is undergoing great mental trauma. She is 34 years of age and is not employed anywhere.
>
> *21.* That in the past several years, it has become very common amongst the Hindu males who cannot get a divorce from their first wife, they convert to Muslim religion

solely for the purpose of marriage. This practice is invariably adopted by those erring husbands who embrace Islam for the purpose of second marriage but again become reconverts so as to retain their rights in the properties etc. and continue their service and all other business in their old name and religion.

22. That a woman's organisation 'Kalyani' terribly perturbed over this growing menace and increase in a number of desertions of the lawfully married wives under the Hindu law and splitting up and ruining of the families even where there are children and when no grounds of obtaining a divorce successfully on any of the grounds enumerated in Section 13 of the Hindu Marriage Act are available, to resort to conversion as a method to get rid of such lawful marriages, has filed a petition in this Hon'ble Court being Civil Writ Petition No. 1079 of 1989 in which this Hon'ble Court has been pleased to admit the same. True copy of the order dated 23-4-1990 and the order admitting the petition is annexed to the present petition and marked as Annexure III (collectively)."

3. She ultimately prayed for the following reliefs:

(a) by an appropriate writ, order or direction, declare polygamous marriages by Hindus and non-Hindus after conversion to Islam religion as illegal and void;

(b) issue appropriate directions to Respondents 1 and 2 to carry out suitable amendments in the Hindu Marriage Act so as to curtail and forbid the practice of polygamy;

(c) issue appropriate direction to declare that where a non-Muslim male gets converted to the 'Muslim' faith without any real change of belief and merely with a view to avoid an earlier marriage or enter into a second marriage, any marriage entered into by him after conversion would be void;

(d) issue appropriate direction to Respondent 3 restraining him from entering into any marriage with Miss Vanita Gupta or any other woman during the subsistence of his marriage with the petitioner; and

(e) pass such other and further order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

4. This petition was filed during the summer vacation in 1992. Mr Justice M.N. Venkatachaliah (as he then was), sitting as Vacation Judge, passed the following order on 9- 7-1992:

The writ petition is taken on board.

Heard Mr Mahajan, learned Senior Counsel for the petitioner. Issue notice.

Learned counsel says that the respondent who was a Hindu by religion and who has been duly and legally married to the petitioner purports to have changed his religion and embraced Islam and that he has done only with a view to take another wife, which would otherwise be an illegal bigamy. Petitioner prays that there should be interdiction of the proposed second marriage which is scheduled to take place tomorrow, i.e. 10th July, 1992. It is urged that the respondent, whose marriage with the petitioner is legal and subsisting cannot take advantage of the feigned conversion so as to be able to take a second wife.

All that needs to be said at this stage is that if during the pendency of this writ petition, the respondent proceeds to contract a second marriage and if it is ultimately held that respondent did not have the legal capacity for the second marriage, the purported marriage would be void.

8. Thus, in view of the pleadings in ***Sushmita Ghosh*** case and in view of the order passed by this Court in the writ petitions filed separately by Smt Sarla Mudgal and Ms Lily Thomas, the principal question which was required to be answered by this Court was that where a non-Muslim gets converted to the "Muslim" faith without any real change of belief and merely with a view to avoid an earlier marriage or to enter into a second marriage, whether the marriage entered into by him after conversion would be void.

9. Smt Sushmita Ghosh, in her writ petition, had clearly spelt out that her husband, Shri G.C. Ghosh, had not really converted to the "Muslim" faith, but had only feigned conversion to solemnise a second marriage. She also stated that though freedom of religion is a matter of faith, the said freedom cannot be used as a garb for evading other laws where the spouse becomes a convert to "Islam" for the purpose of avoiding the first marriage. She pleaded in clear terms that *it may be stated that respondent 3 has converted to islam solely for the purpose of remarrying and has no real faith in islam. he does not practise the muslim rites as prescribed nor has he changed his name or religion and other official documents.*

10. She further stated that the truth of the matter is that Respondent 3 has adopted the "Muslim" religion and become a convert to that religion for the sole purpose of having a second wife, which is forbidden strictly under the Hindu law. It need hardly be said that the said conversion was not a matter of Respondent 3 having faith in the Muslim religion.

11. This statement of fact was supported by the further statement made by her in para 15 of the writ petition in which she stated that her husband, Shri G.C. Ghosh, told her that he had taken to "Islam" "so that he may remarry and in fact he had already fixed to marry one Miss Vanita Gupta, resident of D-152, Preet Vihar, Delhi, a divorcee with two children in the second week of July 1992".

12. At the time of hearing of these petitions, counsel appearing for Smt Sushmita Ghosh filed certain additional documents, namely, the birth certificate issued by the Government of the Union Territory of Delhi in respect of a son born to Shri G.C. Ghosh from the second wife on 27-5-1993. In the birth certificate, the name of the child's father is mentioned as "G.C. Ghosh" and his religion is indicated as "Hindu". The mother's name is described as "Vanita Ghosh" and her religion is also described as "Hindu". In 1994, Smt Sushmita Ghosh obtained the copies of the relevant entries in the electoral list of Polling Station 71 of Assembly Constituency 44 (Shahdara), in which the name of Shri G.C. Ghosh appeared at Sl.No. 182 while the names of his father and mother appeared at Sl. Nos. 183 and 184 respectively and the name of his wife at Sl. No. 185.

13. In 1995, Shri G.C. Ghosh had also applied for Bangladeshi visa. A photostat copy of that application has also been filed in this Court. It indicates that in the year 1995 Shri G.C. Ghosh described himself as "Gyan Chand Ghosh" and the religion which he professed to follow was described as "Hindu". The marriage of Shri G.C. Ghosh with Vanita Gupta had taken place on 3-9-1992. The certificate issued by Mufti Mohd. Tayyeb Qasmi described the

husband as “Mohd. Karim Ghazi”, s/o Biswanath Ghosh, 7 Bank Enclave, Delhi. But, in spite of his having become “Mohd. Karim Ghazi”, he signed the certificate as “G.C. Ghosh”. The bride is described as “Henna Begum”, D-152, Preet Vihar, Delhi. Her brother, Kapil Gupta, is the witness mentioned in the certificate and Kapil Gupta has signed the certificate in English.

14. From the additional documents referred to above, it would be seen that though the marriage took place on 3-9-1992, Shri G.C. Ghosh continued to profess “Hindu” religion as described in the birth certificate of his child born out of the second wedlock and also in the application for Bangladeshi visa. In the birth certificate as also in the application for Bangladeshi visa, he described himself as “G.C. Ghosh” and his wife as “Vanita Ghosh” and both were said to profess “Hindu” religion. In the electoral roll also, he has been described as “Gyan Chand Ghosh” and the wife has been described as “Vanita Ghosh”.

15. It, therefore, appears that conversion to “Islam” was not the result of exercise of the right to freedom of conscience, but was feigned, subject to what is ultimately held by the trial court where G.C. Ghosh is facing criminal trial, to get rid of his first wife, Smt Sushmita Ghosh and to marry a second time. In order to avoid the clutches of Section 17 of the Act, if aperson renounces his “Hindu” religion and converts to another religion and marries a second time, what would be the effect on his criminal liability is the question which may now be considered.

23. We have already seen above that under the Hindu Marriage Act, one of the essential ingredients of a valid Hindu marriage is that neither party should have a spouse living at the time of marriage. If the marriage takes place in spite of the fact that a party to that marriage had a spouse living, such marriage would be void under Section 11 of the Hindu Marriage Act. Such a marriage is also described as void under Section 17 of the Hindu Marriage Act under which an offence of bigamy has been created. This offence has been created by reference. By providing in Section 17 that provisions of Sections 494 and 495 would be applicable to such a marriage, the legislature has bodily lifted the provisions of Sections 494 and 495 IPC and placed them in Section 17 of the Hindu Marriage Act. This is a well-known legislative device. The important words used in Section 494 are “*marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife*”. These words indicate that before an offence under Section 494 can be said to have beenconstituted, the second marriage should be shown to be void in a case where such a marriage would be void by reason of its taking place in the lifetime of such husband or wife. Thewords “husband or wife” are also important in the sense that they indicate the personal law applicable to them which would continue to be applicable to them so long as the marriage subsists and they remain “husband and wife”.

24. Chapter XX of the Indian Penal Code deals with offences relating to marriage. Section 494 which deals with the offence of bigamy is a part of Chapter XX of the Code. Relevant portion of Section 198 of the Code of Criminal Procedure which deals with the prosecution for offences against marriage provides as under:

> **198.** ***Prosecution for offences against marriage***.—(1) No court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that—

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the armed forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under Section 494 or Section 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister, or, with the leave of the court, by any other person related to her by blood, marriage or adoption.

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said Code:

Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the court, make a complaint on his behalf.

25. It would thus be seen that the court would take cognizance of an offence punishable under Chapter XX of the Code only upon a complaint made by any of the persons specified in this section. According to clause (*c*) of the proviso to sub-section (1), a complaint for the offence under Section 494 or 495 can be made by the wife or on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister. Such complaint may also be filed, with the leave of the court, by any other person related to the wife by blood, marriage or adoption. If a Hindu wife files a complaint for the offence under Section 494 on the ground that during the subsistence of the marriage, her husband had married a second wife under some other religion after converting to that religion, the offence of bigamy pleaded by her would have to be investigated and tried in accordance with the provisions of the Hindu Marriage Act. It is under this Act that it has to be seen whether the husband, who has married a second time, has committed the offence of bigamy or not. Since under the Hindu Marriage Act, a bigamous marriage is prohibited and has been constituted as an offence under Section 17 of the Act, any marriage solemnised by the husband during the subsistence of that marriage, in spite of his conversion to another religion, would be an offence triable under Section 17 of the Hindu Marriage Act read with Section 494 IPC. Since taking of cognizance of the offence under Section 494 is limited to the complaints made by the persons specified in Section 198 of the Code of Criminal Procedure, it is obvious that the person making the complaint would have to be decided in terms of the personal law applicable to the complainant and the respondent (accused) as mere conversion does not dissolve the marriage automatically and they continue to be "husband and wife".

26. It may be pointed out that Section 17 of the Hindu Marriage Act corresponds to Sections 43 and 44 of the Special Marriage Act. It also corresponds to Sections 4 and 5 of the PaRsi Marriage & Divorce Act, Section 61 of the Indian Divorce Act and Section 12 of the Matrimonial Causes Act which is an English Act.

28. In ***Gopal Lal* v. *State of Rajasthan*** [AIR 1979 SC 713] Murtaza Fazal Ali, J., speaking for the Court, observed as under:

> Where a spouse contracts a second marriage while the first marriage is still subsisting the spouse would be guilty of bigamy under Section 494 if it is proved thatthe second marriage was a valid one in the sense that the necessary ceremonies required by law or by custom have been actually performed. The voidness of the marriage under Section 17 of the Hindu Marriage Act is in fact one of the essential ingredients of Section 494 because the second marriage will become void only because of the provisions of Section 17 of the Hindu Marriage Act.

29. In view of the above, if a person marries a second time during the lifetime of his wife, such marriage apart from being void under Sections 11 and 17 of the Hindu Marriage Act, would also constitute an offence and that person would be liable to be prosecuted under Section 494 IPC. While Section 17 speaks of marriage between two "Hindus", Section 494 does not refer to any religious denomination.

30. Now, conversion or apostasy does not automatically dissolve a marriage already solemnised under the Hindu Marriage Act. It only provides a ground for divorce under Section 13.

31. Under Section 10 which provides for judicial separation, conversion to anotherreligion is now a ground for a decree for judicial separation after the Act was amended by the Marriage Laws (Amendment) Act, 1976. The first marriage, therefore, is not affected and it continues to subsist. If the "marital" status is not affected on account of the marriage still subsisting, his second marriage qua the existing marriage would be void and in spite of conversion he would be liable to be prosecuted for the offence of bigamy under Section 494.

32. Change of religion does not dissolve the marriage performed under the Hindu Marriage Act between two Hindus. Apostasy does not bring to an end the civil obligations or the matrimonial bond, but apostasy is a ground for divorce under Section 13 as also a ground for judicial separation under Section 10 of the Hindu Marriage Act. Hindu law does not recognise bigamy. As we have seen above, the Hindu Marriage Act, 1955 provides for "monogamy". A second marriage, during the lifetime of the spouse, would be void under Sections 11 and 17, besides being an offence.

33. In ***Govt. of Bombay* v. *Ganga*** [ILR (1880) 4 Bom. 330] which obviously is a case decided prior to the coming into force of the Hindu Marriage Act, it was held by the Bombay High Court that where a Hindu married woman having a Hindu husband living marries a Mohammedan after conversion to "Islam", she commits the offence of polyandry as, by mere conversion, the previous marriage does not come to an end. In ***Sayeda Khatoon* v. *M. Obadiah*** [(1944-45) 49 CWN 745] it was held that a marriage solemnised in India according to one personal law cannot be dissolved according to another personal law simply becauseone of the parties has changed his or her religion. In ***Amar Nath* v. *Amar Nath*** [AIR 1948

Lah. 129] it was held that the nature and incidence of a Vedic marriage bond, between the parties are not in any way affected by the conversion to Christianity of one of them and the bond will retain all the characteristics of a Hindu marriage notwithstanding such conversion unless there shall follow upon the conversion of one party, repudiation or desertion by the other, and unless consequential legal proceedings are taken and a decree is made as provided by the Native Converts Marriage Dissolution Act.

34. In the case of ***Gul Mohd.*** **v.** ***Emperor*** [AIR 1947 Nag. 121] the High Court held that the conversion of a Hindu wife to Mohammedanism does not, ipso facto, dissolve themarriage with her Hindu husband. It was further held that she cannot, during his lifetime, enter into a valid contract of marriage with another person. Such person having sexual relations with a Hindu wife converted to Islam, would be guilty of adultery under Section 497IPC as the woman before her conversion was already married and her husband was alive.

35. From the above, it would be seen that mere conversion does not bring to an end the marital ties unless a decree for divorce on that ground is obtained from the court. Till a decree is passed, the marriage subsists. Any other marriage, during the subsistence of the first marriage would constitute an offence under Section 494 read with Section 17 of the Hindu Marriage Act, 1955 and the person, in spite of his conversion to some other religion, wouldbe liable to be prosecuted for the offence of bigamy. It also follows that if the first marriage was solemnised under the Hindu Marriage Act, the "husband" or the "wife", by mere conversion to another religion, cannot bring to an end the marital ties already established on account of a valid marriage having been performed between them. So long as that marriage subsists, another marriage cannot be performed, not even under any other personal law, andon such marriage being performed, the person would be liable to be prosecuted for the offence under Section 494 IPC.

36. The position under the Mohammedan law would be different as, in spite of the first marriage, a second marriage can be contracted by the husband, subject to such religious restrictions as have been spelled out by brother Sethi, J. in his separate judgment, with which I concur on this point also. This is the vital difference between Mohammedan law and other personal laws. Prosecution under Section 494 in respect of a second marriage under Mohammedan law can be avoided only if the first marriage was also under the Mohammedan law and not if the first marriage was under any other personal law where there was a prohibition on contracting a second marriage in the lifetime of the spouse.

37. In any case, as pointed out earlier in the instant case, the conversion is only feigned, subject to what may be found out at the trial.

38. *Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a supernatural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry*. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce

the previous marriage and desert the wife, cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu law, marriage is a sacrament. Both have to be preserved.

39. I also respectfully agree with brother Sethi, J. that in the present case, we are not concerned with the status of the second wife or the children born out of that wedlock as in the instant case we are considering the effect of the second marriage qua the first subsisting marriage in spite of the husband having converted to "Islam".

40. I have already reproduced the order of this Court passed in *Sarla Mudgal case* on 23-4-1990 in which it was clearly set out that the learned counsel appearing in that case had, after taking instructions, stated that the prayers were limited to a single relief, namely, a declaration that where a non-Muslim male gets converted to the Muslim faith without any real change of belief and merely with a view to avoid any earlier marriage or to enter into a second marriage, any marriage entered into by him after conversion would be void.

42. It may also be pointed out that in the counter-affidavit filed on 30-8-1996 and in the supplementary affidavit filed on 5-12-1996 on behalf of the Government of India in the case of ***Sarla Mudgal*** it has been stated that the Government would take steps to make a uniform code only if the communities which desire such a code approach the Government and take the initiative themselves in the matter.

R.P. SETHI, J. - IA No. 2 of 1995 in Writ Petition (C) No. 588 of 1995 is allowed.

47. Interpreting the scope and extent of Section 494 of the Indian Penal Code this Court in ***Sarla Mudgal, President, Kalyani* v. *Union of India*** [AIR 1995 SC 1531] held:

> [T]hat the second marriage of a Hindu husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in terms of the provisions of Section 494 IPC and the apostate husband would be guilty of the offence under Section 494 IPC.

The findings were returned answering the questions formulated by the Court in para 2 of its judgment.

48. The judgment in ***Sarla Mudgal*** case is sought to be reviewed, set aside, modified and quashed by way of the present review and writ petitions filed by various persons and Jamat-e-Ulema Hind and another. It is contended that the aforesaid judgment is contrary to the fundamental rights as enshrined in Articles 20, 21, 25 and 26 of the Constitution of India.

59. We are not impressed by the arguments to accept the contention that the law declared in ***Sarla Mudgal*** case cannot be applied to persons who have solemnised marriages inviolation of the mandate of law prior to the date of judgment. This Court had not laid down any new law but only interpreted the existing law which was in force. It is a settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the date of the judgment because concededly the court does not legislate but only gives an interpretation to an existing law. We do not agree with the arguments that the second marriage by a convert male Muslim has been made an offence only

by judicial pronouncement. The judgment has only interpreted the existing law after taking into consideration various aspects argued at length before the Bench which pronounced the judgment. The review petition alleging violation of Article 20(1) of the Constitution is without any substance and is liable to be dismissed on this ground alone.

60. Even otherwise we do not find any substance in the submissions made on behalf of the petitioners regarding the judgment being violative of any of the fundamental rightsguaranteed to the citizens of this country. The mere possibility of taking a different view has not persuaded us to accept any of the petitions as we do not find the violation of any of the fundamental rights to be real or prima facie substantiated.

61. The alleged violation of Article 21 is misconceived. What is guaranteed under Article 21 is that no person shall be deprived of his life and personal liberty except according to the procedure established by law. It is conceded before us that actually and factually none of the petitioners has been deprived of any right of his life and personal liberty so far. The aggrieved persons are apprehended to be prosecuted for the commission of offence punishable under Section 494 IPC. It is premature, at this stage, to canvass that they would be deprived of their life and liberty without following the procedure established by law. The procedure established by law, as mentioned in Article 21 of the Constitution, means the law prescribed by the legislature. The judgment in ***Sarla Mudgal*** has neither changed the procedure nor created any law for the prosecution of the persons sought to be proceeded against for the alleged commission of the offence under Section 494 IPC.

62. The grievance that the judgment of the Court amounts to violation of the freedom of conscience and free profession, practice and propagation of religion is also far-fetched and apparently artificially carved out by such persons who are alleged to have violated the law by attempting to cloak themselves under the protective fundamental right guaranteed under Article 25 of the Constitution. No person, by the judgment impugned, has been denied the freedom of conscience and propagation of religion. The rule of monogamous marriage amongst Hindus was introduced with the proclamation of the Hindu Marriage Act. Section 17of the said Act provided that any marriage between two Hindus solemnised after the commencement of the Act shall be void if at the date of such marriage either party had a husband or wife living and the provisions of Sections 494 and 495 of the Indian Penal Code (45 of 1860) shall apply accordingly. The second marriage solemnised by a Hindu during the subsistence of a first marriage is an offence punishable under the penal law. Freedom guaranteed under Article 25 of the Constitution is such freedom which does not encroach upon a similar freedom of other persons. Under the constitutional scheme every person has a fundamental right not merely to entertain the religious belief of his choice but also to exhibit this belief and ideas in a manner which does not infringe the religious right and personal freedom of others It was contended in ***Sarla Mudgal*** that making a convert Hindu liable for prosecution under the Penal Code would be against Islam, the religion adopted by such person upon conversion. Such a plea raised demonstrates the ignorance of the petitioners about the tenets of Islam and its teachings. The word “Islam” means “peace and submission”. In its religious connotation it is understood as “submission to the will of God”; according to Fyzee (***Outlines of Mohammedan Law***, 2nd Edn.), in its secular sense, the establishment of peace. The word “Muslim” in Arabic is the active principle of Islam, which means

acceptance of faith, the noun of which is Islam. Muslim law is admitted to be based upon a well-recognised system of jurisprudence providing many rational and revolutionary concepts, which could not be conceived of by the other systems of law in force at the time of its inception. Sir Ameer Ali in his book ***Mohammedan Law***, Tagore Law Lectures, 4th Edn., Vol. 1 has observed that the Islamic system, from a historical point of view was the most interesting phenomenon of growth. The small beginnings from which it grew up and the comparatively short space of time within which it attained its wonderful development markedits position as one of the most important judicial systems of the civilised world. The concept of Muslim law is based upon the edifice of the Shariat. Muslim law as traditionally interpreted and applied in India permits more than one marriage during the subsistence of one and another though capacity to do justice between co-wives in law is a conditionprecedent. Even under the Muslim law plurality of marriages is not unconditionally conferred upon the husband. It would, therefore, be doing injustice to Islamic law to urge that the convert is entitled to practise bigamy notwithstanding the continuance of his marriage under the law to which he belonged before conversion. The violators of law who have contracted a second marriage cannot be permitted to urge that such marriage should not be made the subject-matter of prosecution under the general penal law prevalent in the country. The progressive outlook and wider approach of Islamic law cannot be permitted to be squeezed and narrowed by unscrupulous litigants, apparently indulging in sensual lust sought to be quenched by illegal means, who apparently are found to be guilty of the commission of the offence under the law to which they belonged before their alleged conversion. It is nobody's case that any such convertee has been deprived of practising any other religious right for the attainment of spiritual goals. Islam which is a pious, progressive and respected religion with arational outlook cannot be given a narrow concept as has been tried to be done by the alleged violatoRs of law.

63. Learned counsel appearing for the petitioners have alleged that in view of the judgment in ***Sarla Mudgal*** their clients are liable to be convicted without any further proof. Such an apprehension is without any substance inasmuch as the person seeking conviction of the accused for a commission of offence under Section 494 is under a legal obligation to prove all the ingredients of the offence charged and conviction cannot be based upon mere admission made outside the court. To attract the provisions of Section 494 IPC the second marriage has to be proved besides proving the previous marriage. Such marriage is further required to be proved to have been performed or celebrated with proper ceremonies. This Court in ***Kanwal Ram* v. *H.P. Admn***. [AIR 1966 SC 614] held that in a bigamy case the second marriage as a fact, that is to say the essential ceremonies constituting it, must be proved. Admission of marriage by the accused by itself was not sufficient for the purpose of holding him guilty even for adultery or for bigamy. In ***Bhaurao Shankar Lokhande* v. *State of Maharashtra*** [AIR 1965 SC 1564] this Court held that a marriage is not proved unless the essential ceremonies required for its solemnisation are proved to have been performed.

65. Besides deciding the question of law regarding the interpretation of Section 494 IPC, one of the Hon'ble Judges (Kuldip Singh, J.) after referring to the observations made by this Court in ***Mohd. Ahmed Khan* v. *Shah Bano Begum*** [AIR 1985 SC 945] requested the Government of India through the Prime Minister of the country to have a fresh look at Article

44 of the Constitution of India and "endeavour to secure for the citizens a uniform civil code throughout the territory of India". In that behalf direction was issued to the Government of India, Secretary, Ministry of Law & Justice to file an affidavit of a responsible officer indicating therein the steps taken and efforts made towards securing a uniform civil code for the citizens of India. On the question of a uniform civil code R.M. Sahai, J. the other Hon'ble Judge constituting the Bench suggested some measures which could be undertaken by the Government to check the abuse of religion by unscrupulous persons, who under the cloak of conversion were found to be otherwise guilty of polygamy. It was observed that:

> Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre.

It was further remarked that:

> The Government would be well advised to entrust the responsibility to the Law Commission which may in consultation with Minorities Commission examine the matter and bring about a comprehensive legislation in keeping with modern-day concept of human rights for women.

66. In ***Maharshi Avadhesh*** **v.** ***Union of India*** [1994 Supp (1) SCC 713] this Court had specifically declined to issue a writ directing the respondents to consider the question of enacting a common civil code for all citizens of India holding that the issue raised being a matter of policy, it was for the legislature to take effective steps as the Court cannot legislate.

70. In the circumstances the review petition as also the writ petitions having no substance are hereby disposed of finally with a clarification regarding the applicability of Article 44 of the Constitution. All interim orders passed in these proceedings including the stay of criminal cases in subordinate courts, shall stand vacated. No costs.

ORDER OF THE COURT

71. In view of the concurring, but separate judgments the review petition and the writ petitions are disposed of finally with the clarifications and interpretation set out therein. All interim orders passed in these petitions shall stand vacated.

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> ***NOTE*****:** The Supreme Court in ***John Vallamattom*** **v.** ***Union of India*** [(2003) 6 SCC 611] has observed: "It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies."

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Pinninti Venkataramana v. *State*

AIR 1977 AP 43

B. J. DIVAN, C. J. – Since both these matters raise a common point of law, both of them have been placed before the Full Bench for deciding the following question:

> Whether a Hindu marriage governed by the provisions of the Hindu Marriage Act, 1955 where the parties to the marriage or either of them are below their respective ages as set out in Clause (iii) of Section 5 of the Hindu Marriage Act, is void ab initioand is no marriage in the eye of law?

In Crl. R. C. 190 of 1975, the facts are that the petitioner No. 1 was convicted by the Judicial First Class Magistrate, Rajam, for an offence punishable under Section 494 I. P. C. and petitioner No. 2 was convicted for an offence punishable under Section 494 read with Section 109, I. P. C. Both of them were sentenced to rigorous imprisonment for six months. Both of them filed appeals and the appellate Court confirmed the convictions of both the petitioners, but modified their sentences to that of payment of Rs 200/- and in default of payment of fine, each of the petitioners was sentenced to undergo rigorous imprisonment for one month. Against their convictions and sentences, the petitioners came by way of revisionto this High Court.

2. When the revision application came up before one of us (Muktadar J.), on behalf of the petitioners, reliance was placed on the judgment of the Division Bench of this Court in ***P. A. Saramma*** **v.** ***G. Ganapatulu*** [AIR 1975 AP 193]. In that case, the Division Bench has held that a marriage, which is in contravention of Clause (iii) of Section 5 of the Hindu Marriage Act is void ab initio and is no marriage in the eye of law. Since it was felt that the view taken by the Division Bench was not in accordance with the provisions of the Hindu Marriage Act, the matter was referred to a larger Bench. Thereafter, the matter came up before Chinnappa Reddy and Punnayya, JJ. and, by their order dated March 22, 1976, they referred the matter toa Full Bench and thereafter the matter has come before us.

3. In Criminal Miscellaneous Petition No. 809 of 1976, the Ist petitioner is the husband and others are co-accused with him in a complaint filed by the Ist respondent wife in the Court of the Judicial First Class Magistrate, Siddipet, Medak District. The Ist respondent in this Criminal Miscellaneous Petition filed a criminal complaint, C. C. No. 323 of 1976, in the Court of the Judicial First Class Magistrate, Siddipet, against her husband (Ist petitioner) and ten others alleging that her husband had committed an offence punishable under Section 494 of the Indian Panel Code and that the other accused had committed an offence punishable under Section 494 read with Section 109 I. P. C. According to the petitioner in this petition, atthe time of the marriage i.e. in the year 1959 he was 13 years of age and the Ist respondent was 9 years of age. The husband contends that in view of the decision of the Division Bench of this Court in ***P.A. Saramma*** **v.** ***G. Ganapatulu***, the marriage between him and the Ist respondent was void ab initio and no marriage in the eye of law and hence the action of theIst petitioner in marrying a girl did not amount to an offence punishable under Section 494. Under these circumstances, in this criminal miscellaneous petition, the petitioners have prayed that the prosecution in C. C. No. 323 of 1976 on the file of the Judicial First Class

Magistrate, Siddipet, be quashed. Since the question involved in this criminal miscellaneous petition is the same as the one raised in Criminal Revision Application No. 190/75, which stood referred to a Full Bench, this criminal miscellaneous petition was also directed to be posted along with the criminal revision application. It is under these circumstances that both these matters have been heard together by this Full Bench.

4. In order to appreciate the rival contentions in these cases, it is necessary to refer to some of the provisions of the Hindu Marriage Act, 1955. The preamble of the Act shows that it is an Act to amend and codify the law relating to marriage among Hindus. Section 4 provides:

> Save as otherwise expressly provided in this Act,-
> (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
> (b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

It is well settled law that the old Hindu law, as it prevailed prior to the enactment of the Hindu Marriage Act is to continue in force except to the extent to which that law was altered by the provisions of the Hindu law, as it prevailed prior to the enactment of the Hindu Marriage Act, 1955. It is in the light of this well settled principle that we have to approach thequestion that arises for our consideration.

5. Section 5 lays down the conditions for a Hindu marriage and it is in these terms:

> A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely;
> (i) neither party has a spouse living at the time of the marriage;
> (ii) neither party is an idiot or a lunatic at the time of the marriage;
> (iii) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage;
> (iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;
> (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;
> (vi) where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage.

Section 11 lays down as to when marriages governed by the Act are to be considered void marriages. It is in these terms:

> Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any of the conditions specified in clauses (i), (iv) and (v) of Section 5.

It is thus clear that, by virtue of Section 11, any marriage which is solemnized in contravention of any of the conditions specified in clauses (i) (iv) and (v) of Section 5 is null and void and if a Court of competent jurisdiction is called upon to make a pronouncement, the court may, on an application presented by either party to the marriage, declare such a marriage to be null and void. Thus, out of the six clauses of Section 5, it is only in connectionwith clauses (i), (iv) and (v) of Section 5 that the Legislature has declared that the contravention of any one of the conditions mentioned in those three clauses will render the marriage null and void. These, three situations are: (1) that neither party to the marriage has a spouse living at the time of the marriage ; (2) that the parties are not within the degrees of prohibited relationship, unless, the custom or usage governing each of them permits of a marriage between the two; (3) that the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two. It is only if the marriage solemnized after the commencement of the Hindu Marriage Act, 1955 contravenes any one of those categories of clauses (i) (iv) and (v) of Section 5 that under Section 11, it is to be treated as null and void.

6. Section 12 of the Hindu Marriage Act deals with voidable marriages. Sub-section (1) provides that any marriage whether solemnized before or after the commencement of the Act, shall be voidable and may be annulled by a decree of nullity on any one grounds specified in clauses (a) to (d). Clause (b) of sub-section (1) provides that, if the marriage is in contravention of the condition specified in clause (ii) of Section 5, the marriage shall be voidable and may be annulled by a decree of nullity. Clause (c) provides that, if the consentof the petitioner or where the consent of the guardian in marriage of the petitioner is required under Section 5, the consent of such guardian was obtained by force or fraud, the marriage may be annulled by a decree of nullity. Clause (ii) of Section 5 requires that neither party isan idiot or a lunatic at the time of the marriage and clause (vi) provides that, where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, has to be obtained.

7. Now the following points of distinction between Sections 11 and 12 have to be noted: (1) Section 11 applies only to marriages solemnized after the commencement of the Hindu Marriage Act; whereas Section 12 (1) applies to any marriage whether solemnized before or after the commencement of the Act and (2) whereas violation of the provisions of Clauses (i) (iv) and (v) of Section 5 renders the marriage null and void, violation of the different clauses of Section 5 mentioned in Section 12 (1) renders the marriage voidable and if the requirement of one or the other clauses of Section 12 are satisfied, the marriage may be annulled by a decree of nullity of a Court having competent jurisdiction. Now, it is worth noting that violation of clause (ii) of Section 5 renders the marriage viodable and not null and void. Though, under clause (vi) of Section 5, in case the bride has not completed the age of eighteen years, the consent of her guardian is obtained it is not the absence of the consent of the guardian that renders the marriage voidable, but it is only when the consent of theguardian in marriage, which is required under Section 5, is vitiated by force or fraud that the marriage is liable to be annulled by a decree of nullity on the ground that it is voidable. Even though none of the clauses of S. 5 refers to the requirement of consent of the petitioner, it is only if the consent of the petitioner before the court is vitiated by force or fraud that the

marriage becomes voidable and liable to be annulled by a court of competent jurisdiction. It is thus clear that neither is Section 11 nor in Section 12 is there any provision for what is to happen if the condition regarding the ages of the parties to the marriage, by clause (iii) of Section 5, is voilated in any particular case. When the provisions of Sections 11 and 12 are read together, it becomes clear that, out of the six clauses of Section 5, violation of Clauses (i) (iv) and (v) renders the marriage null and void, whereas violation of clause (ii), renders the marriage voidable. Voilation of clause (vi) in the sense that the consent of the guardian in marriage has been obtained by force or fraud, again renders the marriage voidable. But neither in Section 11 nor in Section 12 is there any provision for what is to happen if a marriage is soleminzed in violation of the provisions of cl. (iii) of Section 5.

8. It is true that the opening words of Section 5 would indicate that each one of the six clauses can be construed as laying down a condition precedent for solemnization of marriage. However, the legislature has given an indication in Section 11 that it is only contravention of clauses (i) (iv) and (v) of S. 5 that renders the marriage void ab initio i.e. null and void andthe court may subsequently declare the marriage null and void by a decree of nullity if either party chooses to present a petition in that behalf. The Legislature has also indicated that a marriage solemnized in contravention of clause (ii) of Section 5 does not render the marriage null and void, but renders it voidable and liable to be annulled by a decree of nullity; whereas,if the bride has not completed the age of eighteen years, it is not the absence of the consent ofthe guardian in marriage that renders the marriage voidable and liable to be annulled, but it is only if the consent of the guardian was obtained by (force) or fraud, in a case governed by clause (vi) of Section 5 that the marriage becomes voidable and liable to be annulled by a decree of nullity. Thus the scheme of the Act is that it is not the violation of any one of thesix conditions in Section 5 that renders the marriage null and void or voidable but it is only the violation of clauses (i), (iv) and (v) which renders the marriage null and void. Violation ofclause (ii) renders the marriage voidable and violation of clause (vi) ipso facto does notrender the marriage voidable, but it is only when the consent of the guardian, is obtained by force or fraud, that the marriage becomes voidable. In view of the scheme of the Act, we haveto examine as to what are the consequences of violation of clause (iii) since the legislature in terms, has not provided for what is to happen in case of violation of clause (iii) of Section 5. The only indication that is to be found in the Hindu Marriage Act is in Section 18, which provides punishment for contravention of certain conditions.

But violation of clause (i) of Section 5, which requires that neither party has a spouse living at the time of the marriage is punishable not under Section 18, but under Section 17, which provides that any marriage between two Hindus solemnized after the commencement of the Act is void if, at the date of such marriage, either party had a husband or wife living; and the provisions of Sections 494 and 495 of the Indian Penal Code shall apply accordingly. It is noticeable that, in case of contravention of clause (i), both Section 17 and Section 11 provide that the marriage is void, but Section 17 further provides for punishment for such contravention. Thus, the Legislature has not thought fit to provide for punishment for any contravention of clause (ii) of Section 5.

9. This analysis of the different provisions of the Hindu Marriage Act clearly brings out the fact that the Legislature itself has made a distinction between contravention of tone or the

other clauses of Section 5 and such contravention is to be visited with different consequences. In case of contravention of some clauses, the marriage is null and void and in case of contravention of some other clauses, it becomes voidable and in case of contravention of another clause, it is voidable if the consent of guardian is vitiated by force or fraud; but the Legislature, in terms, has not provided except by way of punishment in Section 18 for violation of Clause (iii) of Section 5. Therefore, it is not possible to read the different clauses of Sec. 5 as laying down conditions precedent.

10. It may be pointed out that, under the Child Marriage Restraint Act, 1929 which was in force prior to the enactment of the Hindu Marriage Act 1955, the legal position was that though the persons connected with the solemnization of a marriage in contravention of the provisions of the Child Marriage Restraint Act were liable for punishment, the marriage itself was not rendered void or null and void.

11. This position was clarified by the decision of Jagadisan, J. sitting singly, in ***Sivanandy* v. *Bhagavathyamma*** [AIR 1962 Mad. 400]. There, it was pointed out that a child marriage, though prohibited by Child Marriage Restraint Act is not rendered invalid by any provision therein and that the contravention of the provisions of that Act does not render the marriage invalid as the validity of the marriage is a subject beyond the scope of the Act. It was also laid down in that decision:

> A marriage under the Hindu law by a minor male is valid even though the marriage was not brought about on his behalf by his natural or lawful guardian. The marriage under the Hindu Law is a sacrament and not a contract. The minority of an individual may operate as a bar to his or her incurring contractual obligations. But it cannot be impediment in the matter of performing a necessary 'samskars'. A minor's marriage without the consent of the guardian can be held to be valid also on the application of the doctrine of factum valet. Consequently the marriage of a Hindu minor cannot be held to be invalid for want of proof that his guardian consented to it.

In this connection, Jagadisan, J., relied upon the earlier decision of the Madras High Court in ***Venkatachayulu* v. *Rangacharyulu*** [(1891) ILR 14 Mad 316]. In that case, the factsbefore the Division Bench of the Madras High Court were that a Vaishnava Brahmin girl was given to the plaintiff in marriage by her mother without the consent of her father who subsequently repudiated the marriage. It appeared that the mother falsely informed the Brahman, who solemnized the marriage, that the father had consented to it. It was held thatthe plaintiff was entitled to a declaration that the marriage was valid and to an injunction restraining the parents from marrying the bride to any one else. At page 318 of the report, the Division Bench observed:

> There can be no doubt that a Hindu marriage is a religious ceremony. According to all the texts it is a samskaram or sacrament, the only one prescribed for a woman and one of the principal religious rites prescribed for purification of the soul. It is binding for life because the marriage rite completed by saptapadi or the walking of seven steps before the consecreted fire creates a religious tie when once created, cannot be untied. It is not a mere contract in which a consenting mind is indispensable. The

person married may be minor or even of unsound mind, and yet if the marriage rite is duly solemnized, there is a valid marriage.

We respectfully agree with this statement of law as it prevailed prior to the enactment of the Hindu Marriage Act, 1955. As Jagadisan, J. pointed out in ***Sivanandy* v. *Bhagavathyamma,*** the doctrine of factum valet was applicable to a case of this kind. The doctrine of factum valet was quite well known to Hindu Law text-writers and the relevant Sanskrit quotation is:

> (I.)e. a fact cannot be altered by a hundred texts. The doctrine in the case of the marriage of a minor was that the factum of marriage, which was solemnized, could not beundone by reason of a large number of legal prohibitions to the contrary. Under section 4 of the Hindu Marriage Act, it is only when there is a clear provision in the Hindu marriage Act that any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Hindu Marriage Act shall cease to have effect in so far as it is inconsistent with any of the provisions of the Act.

12. In ***P.A. Saramma* v. *G. Ganapatulu***, a Division Bench of this High Court consisting of Obul Reddi, C. J. and Madhusudan Rao, J. held that a Marriage between the bridegroom and the bride, if their ages do not satisfy the requirements of clause (iii) of Section 5, cannot be solemnized as it is prohibited under clause (iii) of Section 5, and that it is not necessary that, in the event of contravention of clause (iii) of Section 5, either party to the marriage should rush to the Court for declaring that marriage as null and void and that such a marriage is void ab initio and is no marriage in the eye of law. The Division Bench proceeded to hold that violation of clause (iii) of Section 5 would render the marriage null and void ab initio, though no specific provision is made for the consequence of contravention of clause (iii) of Section 5 either in Section 11 or in Section 12. The learned Judges of the Division Bench readthe different clauses of Section 5 as laying down conditions precedent. With respect, we are unable to agree with this conclusion of the learned Judges of the Division Bench in ***P.A. Saramma* v. *Ganapatulu.*** We find that the consequences of accepting the view of the Division Bench would be very serious. It is well settled principle in the law relating to marriages that the Court should lean against the interpretation of any provision of law whichis liable to render innocent children of the marriages bastards. It seems that this aspect of bastardized children, who were otherwise innocent and who would be treated as illegitimate children of the couple was not present to the minds of the learned Judges who decided thecase in ***P.A. Saramma* v. *G. Ganapatulu***. At this juncture, it may be pointed out that, under Section 16 of the Hindu Marriage Act, 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. It is obviousthat this provision regarding legitimacy of children would not apply to children begotten by a couple that was married in contravention of the provisions of clause (iii) of Section 5, becauseneither Section 11 nor Section 12 provides for any consequence that might result from contravention of clause (iii) of Section 5 and the children would be bastards taking the view

that appealed to the Division Bench in ***P.A. Saramma* v. *G. Ganapatulu***.

13. If each of the clauses in Section 5 is to be treated as a condition precedent, the violation of which would render the marriage void ab initio, the Legislature itself would not have given out its mind by providing for contravention of the different clauses of Section 5 differently. This is a further ground on which we respectfully disagree with the view taken by the learned Judges in ***P.A. Saramma* v. *G. Ganapatulu***.

15. In ***Panchadi Chitti Venkanna* v. *Panchadi Mahalakshmi***, Transferred Appeal No. 578 of 1973 and T. A. No. 546 of 1972 decided by Kondiah, and Lakshmaiah, JJ. on December 23, 1975 (1976 2 AWR 45), which arose out of matrimonial litigation, the husbandsought to rely upon the decision in ***P.A. Saramma* v. *G. Ganapatulu***. But the Division Benchconsisting of Kondaiah and Lakshmaiah, JJ. distinguished that earlier decision on the ground that, in the case before them, the marriage was solemnized in 1953 prior to the enactment of the Hindu Marriage Act, 1955, and, therefore, the provisions of the Hindu Marriage Act would not apply and it could not be said that there was violation of clause (iii) of Section 5 of the Hindu Marriage Act, when the marriage was performed.

16. We find that barring the view taken by a single Judge of the Punjab and Haryana High Court in ***Krishni Devi* v. *Tulsan Devi*** [AIR 1972 P & H 305] there is no other reported case taking the same view as the view which appealed to Obul Reddi, C. J. and Madhusudan Rao, J. ***P.A. Saramma* v. *G. Ganapatulu***. On the other hand, we find that there are several decisions of the other High Courts including the decision of a Division Bench of the Punjab and Haryana High Court which have taken a contrary view. In ***Mohinder Kaur* v. *Major Singh*** [AIR 1972 P & H 184] the Division Bench of the Punjab and Haryana High Court consisting of Pandit and Gopal Singh, JJ. held that the marriage in contravention of the clauseis not a nullity and hence such contravention cannot be pleaded as a ground in answer to a petition for restitution of conjugal rights. The Division Bench further held:

> The question for decision is whether a contravention of Section 5 (iii) of the Act is a ground for judicial separation or for nullity of marriage or for divorce. If it is not so, then it cannot be pleaded in defence by the appellant to a petition for restitution of conjugal rights made by the respondent in this case. The grounds for judicial separation, nullity of marriage and divorce are given in Sections 10, 11 and 13 of the Act respectively. The contravention of Section 5 (iii) of the Act does not admittedly find any mention in any of these three sections.

It was also observed that the infringement of clause (iii) of Section 5 did not affect the tie of marriage itself and render the marriage either void or voidable. The view of a learned single Judge was confirmed by the Division Bench. But it must be pointed out that there is noelaborate discussion beyond what has been pointed out above in the decision of this Division Bench of the Punjab and Haryana High Court.

17. In ***Kalawati* v. *Devi Ram*** [AIR 1961 HP 1] the Judicial Commissioner of Himachal Pradesh held that the minority of the wife or of her guardian in marriage is by itself, not a ground for getting it declared null and void under Sec. 11 or for its annulment under Section 12 and there it could not be said that the Legislature was oblivious and had inadvertently omitted to provide for the avoidance of marriage on that ground of minority of the bride and

her guardian in marriage: that the omission was deliberate and that it is not for the Courts to scan the wisdom of the legislature and speculate on the reasons which led the legislature to make or not to make certain provisions. We find that the learned Judicial Commissioner has carefully gone into the different provisions of the Hindu Marriage Act and come to his own conclusions on these lines.

18. In ***Premi* v. *Daya Ram*** [AIR 1965 HP 15] which was also decided by the then Judicial Commissioner of Himachal Pradesh, it was held:

> It was not the intention of the legislature that contravention of every and any condition, specified in Section 5 would render a Hindu Marriage void. The contravention of only any of the three conditions specified in clauses (i), (iv) and (v) of Section 5 would render a Hindu Marriage null and void. Therefore the marriage of a minor wife is neither void nor voidable, though it contravened the condition,specified in clause (vi) of Section 5 of the Act inasmuch as the consent of her guardian to the marriage was not obtained.

19. In ***Ma Hari v. Director of Consolidation*** [1969 All LJ 623], Satish Chandra, J. sitting singly, held that, though the conduct of solemnizing a marriage in contravention of clause (iii) of Section 5 of the Hindu Marriage Act may result in the punishment of the marrying spouses, yet the marriage would not become null and void with its far reaching and serious consequences and that the marriage would remain valid in law and enforceable and recognizable in a court of law. The same view was also taken by the Orissa High Court in ***Budhi Sahu* v. *Lohurani Sahuni*** [ILR (1970) Cut 1215]. Sa Acharya, J. sitting singly held:

> Clause (iii) of Section 5, providing for the age of the bridegroom and the bride is thus specifically excluded from the operation of the provisions of Section 11 of the Act. The conditions rendering a Hindu Marriage null and void mentioned in Section 11 of the Act are exhaustive, and it is only on those grounds a court can declare by a decreeof nullity that a marriage solemnised after the commencement of the Act is null and void. Therefore, a marriage between a bridegroom, who has not completed the age of eighteen years and a bride who has not completed the age of fifteen years at the time of the marriage, coming within the provisions of clause (iii) of Section 5, and/or a marriage in which the permission as required under clause (vi) of the said section is not obtained, is not ipso jure, void under the provisions of Section 11 of the Act.

20. In ***Gindan* v. *Barelal*** [AIR 1976 MP 83], a Division Bench of the Madhya Pradesh High Court held that a marriage solemnized in contravention of age mentioned in Section 5 (iii) is neither void ab initio nor even voidable; that such violation of Section 5 (iii) does not find place either in section 11 or in Section 12 of the Act; that it is only punishable as an offence under Section 18; and that the marriage selemnized would remain valid, enforceable, and recognizable in Courts of law.

21. This review of the case law discloses that barring a single Judge of the Punjab and Haryana High Court in ***Krishni Devi* v. *Tulsan Devi*** and the Division Bench of this Court in ***P.A. Saramma* v. *G. Ganapatulu*** in all other reported cases, different High Courts have held that the contravention of clause (iii) of Section 5 does not render the marriage void ab initio or voidable. In our opinion, the view taken by these different High Courts is correct and we

got confirmation of the view, which we are adopting on the basis of the reasoning set out hereinabove, from the decisions of the different High Courts.

22. It may be pointed out that when the provisions of the Hindu Marriage Act were extensively amended in 1976, by the Marriage Laws (Amendment) Act, 1976 (Act No. 68 of 1976) the provisions of clause (iii) of Section 5 have not been interfered with. Section 13 of the Hindu Marriage Act, which provides for different grounds on which decree for dissolution of marriage can be granted, has been amended and under sub-section (2) of Section 13, a new clause (iv) has been inserted so that after the amendment, a wife may present a petition for dissolution of her marriage by a decree of divorce on the ground that hermarriage (whether consummated or not) was solemnized before she attained the age of fifteenyears and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years and the Explanation to clause (iv) provides: This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, "This clause (iv) inserted in sub-section (2) of Section 13 clearly indicates the mind of the Legislature that the violation of Clause (iii) of Section 5 is not to render the marriage either void or voidable; but in case the bride was below the age of fifteen years at the time of solemnization of the marriage and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years, a decree for divorce can be obtained, whether the marriage was consummated or not. If the marriage performed incontravention of clause (iii) of Section 5 was void ab initio, there was no necessity to insert clause (iv) in sub-section (2) of Section 13. It may be pointed out that, by insertion of this clause (iv), the Legislature has given to Hindu besides an option of what is known in Mohammadan Law as Khyar-ul-bulugh (Option of Puberty). But the Legislature has not proceeded on the footing that the marriage between the spouses, when it is performed in violation of clause (iii) of Section 5, is void ab initio. This amendment reinforces and confirms the view that we are taking on a pure interpretation of the different provisions of theHindu Marriage Act, 1955 even as it stood prior to its amendment by the Marriage Laws (Amendment) Act 1976.

23. For these reasons we hold that the decision of the Division Bench of this High Court in ***P.A. Saramma*** **v.** ***G. Ganapatulu*** does not lay down the correct law and it must be heldthat any marriage solemnized in contravention of clause (iii) of Section 5 is neither void nor voidable, the only consequence being that the persons concerned are liable for punishment under Section 18 and further if the requirements of clause (iv) of sub-section (2) of Section13, as inserted by the Marriage Laws (Amendment) Act 1976 are satisfied, at the instance of the bride, a decree for divorce can be granted. Barring these two consequences, one arising under Section 18 and the other arising under clause (iv) of sub-section (2) of Section 13, after the enactment of the Marriage Laws (Amendment) Act, 1976, there is no other consequence whatsoever resulting from the contravention of the provisions of clause (iii) of Section 5.

Under these circumstances so far as Criminal Revision Case No. 190/75 is concerned, the matter will now go before a single Judge for decision according to law as explained by us. So far as Criminal Miscellaneous Petition No. 809/76 is concerned, the only ground on which the order of the Judicial First Class Magistrate, Siddipet, is sought to be quashed is that the

marriage between the parties was void, since the marriage was solemnized in 1959 when the bridegroom was 13 years of age and the bride was 9 years of age and relying upon the decision in ***P.A. Saramma*** **v.** ***G. Ganapatulu*** it was sought to be argued that the complaint filed by the wife alleging that the husband had committed an offence punishable under Section 494 I. P. C. and that the other accused had committed an offence punishable under Section 494 read with Section 109, I. P. C. must be quashed. This relief cannot be granted in the view we have taken. Criminal Miscellaneous petition No. 809/76 is therefore, dismissed. Ordered accordingly.

* * * * *

Asha Qureshi v. *Afaq Qureshi*

AIR 2002 MP 263

V.K. AGARWAL, J. – This appeal is under S. 29 of the Special Marriage Act, 1954 ("Act"), is directed against the judgment and decree dated 14.10.1996, in Civil Suit No. 59- A/90, by Fourth Additional District judge, Jabalpur, declaring the marriage between the parties as null and void, by a decree of nullity.

2. Facts not in dispute are that the parties were married on 23.1.1990 at Jabalpur, in accordance with the 'Act.' They lived as husband and wife for a period of about one year. Subsequently, the relations between the parties became strained and they started living separately. The respondent filed a petition under Ss. 34 and 25 of the 'Act,' seeking a decree of nullity and of declaration of their marriage as null and void. It was averred by the respondent/husband that after the marriage between the parties on 23.1.1990, the respondent/husband came to know that the appellant/wife was already married to one Motilal Vishwakarma. Motilal Vishwakarma had died prior to marriage of the parties. It was further averred by the respondent/husband that the fact of her marriage with Motilal Vishwakarma was suppressed by the appellant/wife, and that the respondent/husband agreed to marry her believing that she was a virgin. It was averred by the respondent/husband that the appellant/wife by suppressing from him the aforesaid fact has exercised fraud on him.

3. The appellant/wife denied the allegations as above. It was denied by her that she suppressed any material fact or exercised fraud. According to her, at the time of marriage of parties the respondent/husband was fully aware that the appellant/wife is a widow.

4. The learned Trial Court framed several issues in the case including as to whether the appellant/wife suppressed the fact that she was a widow and married the respondent/husband by practicing fraud? Some other issues were also framed which are not relevant for the disposal of this appeal.

5. The learned Trial Court held that the appellant/wife suppressed the fact of her earlier marriage with Motilal Vishwakarma, and thus the consent of the respondent/ husband for the marriage was obtained by fraud.

6. The learned counsel for the appellant/wife assailed the finding as above. It was submitted that the appellant and the respondent were known to each other for a long time prior to the marriage and the respondent/husband was fully aware that the appellant/wife was married earlier and her first husband had died. It was, therefore, submitted that there was no suppression of any material fact so as to constitute exercise of fraud by the appellant/wife.

7. The learned counsel for the respondent/husband however, supported the impugned judgment. It was submitted by the learned counsel for the respondent/husband that material facts, viz. her earlier marriage were never intimated by her to the respondent/husband. It was submitted that had the respondent/husband known about the earlier marriage of the appellant, he would not have entered into marital ties with her. It was, therefore, submitted that the trial Court was justified in holding that consent of the respondent/husband for marriage was obtained by the appellant/wife by exercising fraud. It would be useful to reproduce S. 25 of

the Act which lays down the conditions in which the marriage solemnized under the 'Act' be avoided

8. The respondent/husband appears to have prayed for the decree of nullity of marriage under S. 25(iii) of the 'Act.' It has, therefore, to be considered as to whether consent of the respondent was obtained by fraud as defined in the Indian Contract Act, 1872?

9. Section 17 of the Indian Contract Act defines 'fraud' as below:

> 17. 'Fraud' – 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract –
>
> (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true,
>
> (2) The active concealment of a fact by one having knowledge or belief of the fact,
>
> (3) A promise made without any intention of performing it,
>
> (4) Any other act fitted to deceive;
>
> (5) Any such act or omission as the law specially declares to be fraudulent.
>
> *Explanation* – Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

10. Therefore, the question that arises for consideration is: as to whether the appellant/wife suppressed the material fact, i.e., her earlier marriage with MotilalVishwakarma and whether the suppression as above would amount to fraud?

11. It may be noticed that the respondent/husband Mohd. Afaq Qureshi (AW/1) stated that he married the appellant/wife on 23.1.1990 under the 'Act.' They resided together for about 7 or 8 months. A dispute thereafter arose between them as the appellant/wife had suppressed that she was already married with Motilal Vishwakarma. He states that thereafter a document captioned as 'Iqrarnama' (Ex. P/1) was executed by the appellant/wife. The said document bears signature of the appellant/wife as well as of Jugal Kishore – the brother ofthe appellant/wife as well as one Mohd. Salim. During cross-examination, the respondent/husband Mohd. Afaq Qureshi (AW/1) has admitted that he was known to the appellant/wife for about 5-6 years prior to the marriage. He further stated that on enquiry from the appellant/wife as to why she was not married despite her advanced age she had told the respondent/husband that as there was no responsible person in her family, she could not get married earlier. He denied suggestion in his cross-examination that he was aware about the earlier marriage of the appellant when he married her.

12. As against the above statement, the appellant Smt. Asha Qureshi (NAW/1) has admitted that she was married earlier before she married the respondent. She, however, further states that about 8 years back when she befriended the respondent/husband she had told him that she was married and that she was a widow from her childhood. It is, however, noticed that the statement as above of the appellant/wife is not supported by her pleadings. The appellant/wife in her written statement nowhere specifically averred that she had intimated the respondent/husband about her marriage. In Para 5 of her written statement, she

had vaguely asserted that the present respondent/husband was aware that the appellant was a widow. However, as mentioned above, she did not plead that she herself informed the respondent about her earlier marriage prior to marriage with the respondent/husband. It may also be noticed that the appellant Smt. Asha Qureshi has earlier stated that the respondent came to know from her neighbours that she was a widow and then making an improvement has later stated that she herself informed the respondent about the above fact. As noticed above, the later statement of the appellant is not supported by her pleadings and does not appear to be reliable.

13. The learned counsel for the appellant submitted that the document according to the respondent/husband was written after the disclosure to him about the earlier marriage of the appellant/wife. However, the fact of earlier marriage and the disclosure thereof was not mentioned in the document it was, therefore, submitted that it should be inferred from the above that the dispute leading to the execution of Ex. P/1 in fact was not the disclosure or knowledge of the respondent/husband about the earlier marriage of the appellant, and that the said document was got executed by the respondent/husband from the appellant by exercising force or deception on her.

14. The contention as above cannot be accepted. It does not have any bearing on the real controversy between the parties. It may be noticed that though the respondent/husband states that dispute had arisen between the parties after the marriage, on the disclosure by the appellant/wife of the above fact, where after document was executed. It is noticed that in the document it was only stated that there was dispute between the parties, but the reason of dispute was not mentioned therein. It may be mentioned that the said document does not appear to have been drafted by any legal expert and appears to have been executed by the appellant/wife, in the presence of her brother and some other witnesses. It only contains an averment that in view of the dispute between them the parties wish to obtain divorce.Therefore, mere non-mention of the cause of dispute, in the said document would not by itselfbe indicative of the fact that the appellant had disclosed to the respondent before their marriage that the appellant was married earlier.

15. As noticed earlier, the pleadings in the above regard of the appellant/wife are vague. No particulars of date, time and period when the disclosure was allegedly made by her, have been mentioned in the written statement. In fact, there is no specific pleading that she herself intimated the respondent about her earlier marriage. In view of the above, the statement of respondent Mohd. Afaq Qureshi that before their marriage, the appellant never told him about her earlier marriage deserves to be accepted in preference to the appellant's statement that she did make such a disclosure. In the foregoing circumstances, the finding of the learned trial Court in the above regard is affirmed.

16. It is, therefore, clear from the above that the appellant was married from before and was a widow at the time of her marriage with the respondent, was a material fact. It was not disclosed by the appellant to her husband the respondent. The suppression of material fact as above would amount to exercise of fraud. It may be noticed in the above context that in view of sub-section (4) of S. 17 of the Contract Act, to constitute fraud, it is not essential that there should be any misrepresentation by express words. It is sufficient if it appears that the party deceiving knowingly induced the defendant to enter into a contract by leading him to believe

that which the party deceiving knew to be false. It also appears from the facts and circumstances of the case that it was the obligation and duty of the appellant to haveintimated and apprised the respondent about her earlier marriage. She has failed to do so.The respondent/husband has stated that had he known that the appellant was married from before, he would not have entered into wedlock with the appellant. It is, therefore, clear that suppression and active concealment of the fact of her earlier marriage and she being a widow would amount to material misrepresentation.

17. In view of the above, the appellant is entitled to a decree of nullity under S. 25(iii) of the 'Act' as has been prayed by him. The impugned decree granted as above, by the trial Court is, therefore, justified. There is no substance in this appeal. It is accordingly dismissed.

* * * * *

Court On Its Own Motion Lajja ... vs State

2012 (193) DLT 61

ACTING CHIEF JUSTICE HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE V.K. SHALI A.K. SIKRI (Acting Chief Justice)

1. Five questions are formulated by the Division Bench in its order dated 31.7.2008 passed in WP(Crl.) No.338/2008 for reference to the larger Bench. Though we shall take note of these questions at a later and more appropriate stage, we would like to point out at the outset that the issues raised can be put in two compartments, viz., (i) what is the status of marriage under Hindu Law when one of the parties to the marriage is below the age of 18 years prescribed under Section 5(iii) of the Hindu Marriage Act, 1955 and Section 2 (a) of Prohibition of Child Marriage Act, 2006 (hereinafter referred as the PCM Act) and (ii) when the girl is minor (but the boy has attained the age of marriage as prescribed) whether the husband he can be regarded as the lawful guardian of the minor wife and claim her custody in spite of contestand claim by the parents of the girl. What is the effect of the Prohibition of Child Marriage Act, 2006?

2. After the aforesaid reference was made, as some other petitions involving same questions came up for adjudication, they were also directed to be listed along with Writ Petition (Crl.) No.338/2008.That is the raison detre that all these petitions were heard together. We would be in a better position to appreciate the issues involved if facts in each of these cases are taken note of in the first instance. Writ Petition (Crl.) No.338/2008

3. A letter was addressed by Smt. Lajja Devi wife of Sh.Het Ram, R/o Village Mohra, P.L. Jagat, P.S. Musa Jhag, District Badayun, Uttar Pradesh to the Honble the Chief Justice of this Court. In the letter, it was alleged by Smt. Lajja Devi that her daughter named Ms.Meera, who was around 14 years of age (date of birth being 6.7.1995) was kidnapped by Promod, Vinod, Satish, Manoj S/o Shri Raj Mal. This kidnapping is purported to have taken place when Ms. Meera had visited Delhi to meet the brother-in- law of the Complainant at A- 113, Rajiv Nagar Extension, Near Village Begumpur, Delhi-110086. On the basis of the said information, an FIR bearing No.113/2008 under Section 363 IPC had been registered at P.S. Sultanpuri on 21st February, 2008 against the aforesaid accused persons.

4. This letter was treated as a Writ Petition and was placed before the appropriate Bench on 14th March, 2008 whereupon notice was issued to the State directing it to file the Status Report. Four Status Reports have been filed by the Police from time to time. These Reports are dated 02.4.2008, 12.5.2008, 11.5.2008 and 11.7.2008. The local Police, as a consequence of registration of this FIR, had arrested Shri Charan Singh from Village Sakatpur District Badayun, U.P. wherefrom the minor girl Ms.Meera was also recovered, as both of them were living together. The girl had made a statement under Section 164 of Cr.P.C. before the learned Metropolitan Magistrate, Rohini Courts Delhi that she had gone along with the accused Charan Singh of her own free will as her Uncle and Aunt were marrying her against her wishes. Charan Singh was taken in Judicial Custody on 8.6. 2008. Admittedly, Ms. Meerawas a minor, and in all probabilities is aged around 13 years and a month as on that date.

5. Initially, Ms. Meera refused to go along with her parents, her natural guardians, on the ground that they intended were intending to marry her off with some other person. She was,

thus, sent to Nirmal Chhaya in judicial custody. However, when the matter came up for hearing on 31.7.2008, she desired to reside with her parents on the assurance given by the parents that they would not marry her to someone else.

6. When the matter was taken up for arguments on 31.7.2008, the aforesaid facts were taken note of which points out that Ms. Meera was not abducted by Shri Charan Singh. On the contrary, she went with him on her own accord and they got married. However, she was not only minor but even less than 15 years of age. She had initially expressed her apprehension in joining her parental home. On the other hand, her husbands family wanted to have the custody of Ms. Meera as her husband was in judicial custody. In this backdrop, the question arose as to what would be the status of such a marriage. Can it be treated as a valid marriage? Or was it the voidable by law? Or it was simply an illegal marriage not recognized. The question of entitlement of husband to have the custody of a minor person with whom he married could depend upon the answer to the aforesaid question.

7. This petition is filed under Section 482 of the Code of Criminal Procedure seekingquashing of FIR registered against the petitioner No.2 under Sections 363/366/376/465/467/494/497/120B and 506 of the Indian Penal Code. It is stated that the petitioner No.1 had of her own will joined the company of the petitioner No.2 and got married with him according to Hindu rites and ceremonies on 4.3.2010. However, the respondent No.2, father of the petitioner No.1, lodged a missing report on 5.3.2010 in the Police Station. It is alleged that in the said missing report he had stated that the petitioner No.1 aged 20 years was missing. Thereafter, in April, 2010 he filed habeas corpus petition taking the stand that the petitioner No.1 was minor and she had been married by the respondent no.2 to someone else at Rajasthan when she returned from her in laws from Rajasthan to Delhi. She was enticed away by the petitioner No.2. The notice was issued in thesaid writ petition and production of the petitioner No.1 was ordered. The Police recovered herand produced before the Court on 19.4.2010. She stated that she had married the petitioner No.2 on her own accord and without any pressure and wanted to live with the petitioner No.2,who was her husband. In view of the conflicting claims about her age, direction was given to the I.O. to verify her age. The Court sent the petitioner No.1 to Nirmal Chhaya Nari Niketan for protective custody. Ossification test was conducted and the age of the petitioner No.1 was found between 17-19 years. The respondent No.2, father of the petitioner No.1, had produced the school leaving certificate which showed her date of birth as 3.3.1993 and on this basis, she was 17 years of age on the date when the parties allegedly solemnised marriage.

The father of the petitioner No.1 wanted her custody. However, she gave the statement that she would like to stay at Nari Niketan rather than joining her parents. In view of this statement, the Court sent the petitioner No.1 to Nari Niketan till the time she attained the age of majority vide orders dated 31.5.2010. However, at the same time the petitioner No.2 was allowed to meet her twice a week at least for two hours on each occasion vide orders dated 29.10.2011. As per the school leaving certificate she completed the age of 18 years on 3.3.2011. She was, thus, released from Nari Niketan and she decided to join the company of the petitioner No.2 and has been living with him.

However, on 25.2.2011 the petitioner No.2 was arrested in the FIR No.31/2011, PS Dabri under Sections 363/366/376/465/467/494/ 497/120-B/506 IPC. This FIR was registered on

the basis of the directions given by the learned MM upon the complaint filed by the respondent No.2 on 3.4.2010. It is, in these circumstances, both the petitioners filed the aforesaid petition seeking quashing of the FIR.

11. It would be clear from the facts of all the aforesaid cases that in all these cases the girls have given the statement that they were not kidnapped but eloped with the respective persons of their own and got married with them. All the four girls maintained that the marriage was solemnized with their free consent. However, all the four girls were below 18 years whenthey got married, whereas there is no dispute about the ages of the boys with whom they got married as they were above 21 years of age at the time of marriage.

12.In some cases, the girls were even less than 15 years. It is under these circumstances questions that have arisen in all these cases are common. Now, we proceed to reproduce the questions formulated by the Division Bench in its order dated 31.7.2008 in W.P. (Crl.) No.338/2008, which are as follows:

1) Whether a marriage contracted by a boy with a female of less than 18 years and a male of less than 21 year could be said to be valid marriage and the custody of the said girl be given to the husband (if he is not in custody)?

2) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody?

3) If yes, can she be kept in the protective custody of the State?

4) Whether the FIR under Section 363 IPC or even 376 IPC can be quashed on the basis of the statement of such a minor that she has contracted the marriage of her own?

5) Whether there may be other presumptions also which may arise?"

13.We would like to mention here that the reason for referring the aforesaid questions for consideration by Larger Bench arose on account of three Division Bench judgments of this Court wherein view was taken that marriage of a minor girl would neither be void nor voidable under the Hindu Marriage Act, 1955 (hereinafter referred to as the HM Act).

14.The Division Bench, however, was not willing to accept the decision of the aforesaid three judgments as, according to it, in these cases there was no consideration of all extent statutes.

15.The three judgments of the Division Bench, on the one hand and the views expressed by the Division Bench in its orders dated 31.7.2008 reflect the conflicting views on the issues involved. However, much detailed submissions were made before us at the time of arguments and we would point out these submissions while giving our opinion on the questions referred. The Division bench made it clear in para 9 that the position regarding Muslim Law was different as the said law recognizes marriage of minor, who has attained puberty as valid and therefore, the status of marriage under Muslim Law is specifically excluded from reference. Question 1: Whether a marriage contracted by a boy with a female of less than 18 years and a female of less than 21 year could be said to be valid marriage and the custody of the said girl be given to the husband (if he is not in custody)? Statutory provisions of various enactments which have bearing on this issue may be taken note of in the first instance.

Prohibition of Child Marriage Act 2006 "Section 2 - Definition In this Act, unless the context otherwise requires,--

(a) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

xxxxx xxxxx xxxxxx

(f) "minor" means a person who, under the provisions of the Majority Act, 1875 (9 of 1875) is to be deemed ot to have attained his majority.

xxxxx xxxxx xxxxxx

3. Child marriages to be voidable at the option of contracting party being a child.-(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:

Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

(2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.

(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.

16.Interpreting the provisions of HM Act, the three Division Benches of this Court, aspointed out earlier, held the view that the marriage of a minor under the HM Act was valid. The genesis of arriving at such a conclusion is discussed in brief by the Division Bench in its order dated 31.7.2008 in paras 4 to 8, which are as under:-

"4. It may be pertinent here to mention that there are three judgments of the Division Bench of this Court which are having bearing so far as the questions arising in the instant case are concerned. In the first case titled as Neetu Singh vs. State and Ors. 1999 (1) JCC (Delhi) 170, the Division Bench was called upon to test the validity of an order passed by the Additional Metropolitan Magistrate remanding the minor to Nari Niketan for the purpose of custody, against her own wishes. The Division Bench of the High Court quashed the order of remanding the minor girl to Nari Niketan by observing that a marriage of a minor girl in contravention of Section 5(iii) of the Hindu Marriage Act is neither void nor voidable and the only sanction which is provided under Section 18 of the Act is a sentence of 15 days and a fine of Rs.1,000/-. The girl was released to the husband. Reference was made to the judgments of other High Courts namely Mrs. Kalyani Chaudhary vs. The State of U.P. and Ors. 1978 Cr.L.J. 1003 and Seema Devi alias Simaran Kaur vs. State of H.P. 1998 (2) Crime 168, which however did not consider the Child Marriage Restraint Act, 1929 which now stands repealed by Prohibition of Child Marriage Act, 2006.

5. In the recent years, there have been two judgments of a Division Bench both headed by Honble Mr. Justice Manmohan Sarin. In the first judgment titled as Manish Singh Vs. State Govt. of NCT and Ors. reported in 2006 (1) CCC (HC) 208 and Sunil Kumar Vs. State NCT

of Delhi and Anr. 2007 (2) LRC 56 (Del) (DB), wherein the Division Bench has affirmed its earlier view approving Neetu Singhs

case.

6. The Division Bench also referred to its own judgments in Ravi Kumar Vs. The State and Anr. 2005 (124) DLT and Phoola Devi vs. The State and Ors. 2005 VIII AD Delhi 256. The sum and substance of these authorities is that marriage solemnized in contravention of the age prescribed under Section 5(iii) of the Hindu Marriage Act i.e. 21 years for male and 18 years for female are neither void nor voidable under Sections 11 and 12 of the Hindu Marriage Act. The only sanction prescribed against such marriages was noticed to be a punishment prescribed under Section 18 of the said Act which was to the extent of 15 days and a fine of Rs.1,000/-.

7. The Honble Division Bench was at pains to explain that by making such pronouncement, the Court was only interpreting the provisions of law and it could not have been perceived as reducing the age of marriage, reducing the age of consent or declining to nullify marriages of minors. It was observed that this was neither the intent of the Court nor was any such prayer made in these petitions and it was primarily for the legislature to consider as to whether the present provisions under the Hindu Marriage Act and the Child Marriage Restraint Act are insufficient or being failed to discourage child marriages and take such remedial actions as may deemed appropriate in their wisdom.

8. In Manish Singhs and Ram Ladle Chaturvedis case, the Division Bench directed quashing of FIR under Section 363 against Ram Ladle Chaturvedi while as in Sunil Kumars case the Division Bench permitted the girl who was aged 16 years to reside with her husband-the alleged kidnapper on the ground that the girl had come of age of discretion. We are of the opinion of these judgments have not taken into consideration of the prohibition of Child Marriage Act, 2006 which makes the contracting of a marriage by a boy above the age of 18 with a girl who is less than 18 as a cognizable and non- bailable offence."

17. However, in the reference order the Division Bench has recorded a discordant note and the reason given in the reference order is that the provisions of the PCM Act were not taken into consideration, which would materially change the legal position.

Discussion in this behalf is contained in para-10, which is as under:-

"10. The easiest course for us would have been to follow the Division Bench judgments of our own High Court on this question with regard to legality of marriage as well as custody of the minor spouse. However, we are of the view that a question of public importance is involved in the matter which needs consideration by a Full Bench on account of the absence of consideration of all extant statutes:-

(a) The first reason why prima facie, we hesitate to agree with the observations passed by the Division Bench of this Court is on account of the fact that although there may be different definitions of the word child with regard to the age of the minor girl given in different enactments but the purpose of each enactment is to be seen. The enactment which is of utmost importance with regard to the child marriage or for that matter the marriage with a minor girl would be the Prohibition of Child Marriage Act, 2006.

(b) According to Section 2 (a) of the Prohibition of Child Marriage Act, 2006, a child means a person who, if a male, has not completed twenty-one years of age, and if female, has not completed eighteen years of age.

(c) Section 12(a) of the said Act makes the marriage of a minor girl who has been taken or enticed out of the keeping of the lawful guardian shall be null and void. The language of Section 12(a) of the said Act is mandatory in nature and does not admit of any reservation. Further it makes the marriage of a child, or a minor girl as null and void. That means the marriage itself is non-existent and the law does not recognize the same. Section 9 of the said Act provides for punishment for a male adult above 18 years of age contracting a child marriage punishable with rigorous imprisonment which may extend to two years or with fine which may extend to Rs. 1 lac or with both.

(d) The offence carries a punishment which may extend up to 2 years and, therefore, clearly the offence would be bailable and non-cognizable. Despite this, by virtue of the non-obstante clause of the Section 15 of the Act, such offence is a cognizable and non-bailable offence under Cr.P.C. This aspect of the matter has not been previously considered by the Court and accordingly quashing of FIR under Section 363 or in the instant case under Section 363 and 376 would not only be in contravention of law but also against the letter and spirit of the Act by observing that the girl has attained the age of discretion with the reference to Sections 5(iii), 11, 12 and 18 of the Hindu Marriage Act."

18. We would also like to point out in the interregnum, this very issue is discussed by other Courts as well and the judgments to that effect were placed before us by the learned counsel for the parties. In Amnider Kaur and Anr. v. State of Punjab and Ors., 2010 Crl.L.J. 1154 decided by Punjab and Haryana High Court, the Single Judge of the said Court has taken a view that having regard to the provisions of Section 12 of the PCM Act, marriage with a minor girl would be void. A perusal of this judgment would show that the learned Judge has proceeded almost on same lines as taken by the Division Bench in the present reference order, which is clear from the following passages of this judgment:-

"14. In this case the facts are not in dispute. Petitioner No. 1 was a minor girl being 16 years and 2 months of age at the time of alleged marriage. According to Section 3 of The Majority Act, 1875 every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before. According to Section 2(f) of the Act "minor" means a person who, under the provisions of the Majority Act, 1875 (9 of 1875) is to be deemed not to have attained his majority.

According to Section 2(a) of the Act, "child" means a person, who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age and according to Section 2(b) of the Act, "child marriage" means a marriage to which eitherof the contracting parties is a child. Then according to Section 12(a), the marriage of petitioner No. 1 which falls within the definition of child and within the definition of minor being the age of 16 years and 2 months who has been enticed away out of the keeping of the lawful guardian cannot contract the marriage and her marriage shall be null and void.

15. In view of those provisions, I have no other choice but to hold that marriage of petitioners No. 1 and 2 which is alleged to have been performed on 21.10.2009 as per Marriage

Certificate (Annexure P-1 undated) as void marriage and none of the judgments which have been cited by the learned Counsel for the petitioners in support of their case, is applicable to the facts and circumstances of the present case because in the case of Ravi Kumar (supra), the Division Bench had considered only the provisions of Sections 5 and 18 of the Act of 1955 to observe that in case of violation of Section 5(iii) of the Act of 1955, the punishment is only15 days simple imprisonment with fine of Rs. 1000/- or both but the marriage is not illegal or void. However, much water has flown thereafter and now for the contravention of Section 5(iii) of the Act of 1955, the punishment under Section 18 (a) has been enhanced to 2 years, rigorous imprisonment and/or with fine up to of lac or with both. Moreover, the case of Ravi Kumar (supra) was decided on 5.10.2005. At that time, the Act was not in force as it did not receive the assent of President of India and has been notified w.e.f 1.11.2007. Therefore, the learned Counsel for the petitioners cannot take the advantage of the observations made in the case of Ravi Kumar (supra). Insofar as the case of Ridhwana and another (supra) is concerned, in that case also this Court had prima-facie found that there is evidence collected by the police that girl was more than 18 years of age but still while parting with the judgment for the sake of argument, it was decided that even if girl is 16 years and 2 months age and hasmarried with her own sweet will, no offence is said to have been committed. This Court had no occasion to refer to the provisions of Section 12 of the Act. Therefore, the ratio laid down in these cases is not applicable. The case of Lata Singh (2006 Crl.LJ 3309) (supra) itself talks about the persons who were major at that time when they got married and on that premise, it was held that if the persons are major and have got married on their own, their life and libertyshould not be threatened by the persons who are against their marriage. Hence, the said judgment is also of no help to the present petitioners. In the case of Pardeep Kumar Singh (supra) this Court had laid down as many as nine directions but in none of the directions ithas been provided that if the girl is minor and has been enticed away for the purpose of marriage by alleged husband, the said marriage is valid. Hence, I have found that provisions of Section 12 of the Act would apply with full rigour in the present case and the marriage which has been solemnised by petitioner No. 2 with petitioner No. l, who is child and aminor, is unsustainable in the eyes of law and is thus, declared as void.

16. The second question involved in this case is that whether the persons, who have performed the marriage are also liable for punishment. In this regard Sections 10 and 11 ofthe Act provides for punishment for such persons and Section 15 of the Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence shall be cognizable and non-bailable. Therefore, I hold that the person who has performed or abetted the child marriage of petitioner No. 1, is also equally liable and for that purpose, I direct the State to take appropriate action by lodging the case against the persons who are responsible for the performance of the child marriage in the present case. In respect of the third question, the petitioners cannot be allowed to take the benefit of the constitutional remedy of protection of their life and liberty on the pretext of their void marriage. The life and liberty of petitioners No. 1 and 2 is only endangered and is being threatened by respondent No. 4 so long their marriage legally subsists but once their marriage is declared to be void, there is no threat left to their life and liberty. Moreover, such a case where the allegation against the husband is of enticing away minor girl from the lawful keeping of guardian/parents and a case has been registered under Sections 363/366-A IPC, no protection

under Section 482 Cr.P.C. can be granted by this Court because in that eventuality police protection has to be granted to a fugitive of law."

19.Then, we have T. Sivakumar v. The Inspector of Police, (HCP No.907/11 decided on 3.10.2011), which is a judgment by the Full Bench of the Madras High Court. In that case also five questions were referred for answer by the Division Bench as under:-

"(1) Whether a marriage contracted by a person with a female of less than 18 years could be said to be valid marriage and the custody of the said girl be given to the husband (if he is not in custody)?

(2) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody?

(3) If yes, can she be kept in the protective custody of the State?

(4) Whether in view of the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000, a minor girl, who claims to have solemnized her marriage with another person would not be a juvenile in conflict with law and whether in violation of the procedure mandated by the Juvenile Justice (Care and Protection of Children) Act, 2000, the Court dealing with a Writ of Habeas Corpus, has the power to entrust the custody of the minor girlto a person, who contracted the marriage with the minor girl and thereby committed an offence punishable under Section 18 of the Hindu Marriage Act and Section 9 of the Prohibition of Child Marriage Act, 2006? And

(5) Whether the principles of Section 17 and 19(a) of the Guardians and Wards Act, 1890, could be imported to a case arising out of the alleged marriage of a minor girl, admittedly in contravention of the provisions of the Hindu Marriage Act?" 20.The Full Bench of the Madras High Court referred to the provisions of HM Act as well as PCM Act. It observedthat the position, which was under the HM Act as well as Child Marriage Restraint Act (hereinafter referred to as the CMRA), was that these Acts do not declare marriage of a minoreither as void or voidable and such marriage of a child was treated all along as valid. There were number of judicial pronouncements to this effect. In this legal scenario, Hindu Minority and Guardianship Act also provided that the husband of a wife is her natural guardian.

After taking note of this position, which prevailed on the reading of HM Act and CMRA the Court discussed the reason for enacting the PCM Act, namely, which replaced the CMRA and it has been pointed out that "it is manifestly clear that this Act is secular in nature which has crossed all barriers of personal laws." Thus, irrespective of personal laws, under this Act child marriages are prohibited. Section 3 of this Act makes the child marriage to be voidable at the option of contracting party being a child. The Full Bench noted that this is a great departure from the position in HM Act. When the PCM Act, 2006 was enacted, the Parliament was aware of the provisions of Sections 5, 11, 12 and 18 of the HM Act. By declaring that the PCM Act shall apply to all citizens, the Parliament has intended to allowthe PCM Act to override the provisions of HM Act to the extent of inconsistencies between these two enactments. Similarly, PCM Act will override the personal law.

21. On that basis, view of the Full Bench of Madras High Court was that the law was enacted for the purpose of effectually preventing evil practice of solemnisation of child marriages and

also to enhance the health of the children and the status of the marriage and therefore, it was a special enactment in contrast with the HM Act, which is a general law regulating Hindu marriages. Thus, the PCM Act, being a special law, will have overriding effect over the HM Act to the extent of any inconsistency between the two enactments. For this reason, the Court took the view that Section 3 of this Act would have overriding effect over the HM Act and the marriage with a minor child would not be valid but voidable and would become valid if within two years from the date of attaining 18 years in the case of female and 21 years in the case of male, a petition is not filed before the District Court under Section 3(1) of the PCM Act for annulling the marriage. Similarly, after attaining eighteen years of age in the case of female, or twenty-one years of age in the case of a male, if she or he elects to accept the marriage, the marriage shall become a full-fledged valid marriage. Until such an event of acceptance of the marriage or lapse of limitation period, the marriage shall continue to remainas a voidable marriage.

22.The circumstances under which this voidable marriage will become valid or would be treated as annulled as per Section 3 of the Act, is stated by the Full Bench in para 21 of the said judgment in the following manner:

"21. In our considered opinion, the marriage shall remain voidable (vide Section 3) and the said marriage shall be subsisting until it is avoided by filing a petition for a decree of nullity by the child within the time prescribed in Section 3(3) of the Prohibition of Child Marriage Act. If, within two years from the date of attaining eighteen years in the case of a female and twenty-one years in the case of a male, a petition is not filed before the District Court under Section 3(1) of the Prohibition of Child Marriage Act for annulling the marriage, the marriage shall become a full-fledged valid marriage. Similarly, after attaining eighteen years of age in the case of female, or twenty-one years of age in the case of a male, if she or he elects to accept the marriage, the marriage shall become a full-fledged valid marriage.Until such an event of acceptance of the marriage or lapse of limitation period as provided in Section 12(3) occurs, the marriage shall continue to remain as a voidable marriage. If the marriage is annulled as per Section 3(1) of the Prohibition of Child Marriage Act, the same shall take effect from the date of marriage and, in such an event, in the eye of law there shall be no marriage at all between the parties at any point of time.

xxxxx xxxxx xxxxx

26. But, in Saravanans case cited supra, the Division Bench has held that such a marriage between a boy aged more than 21 years and a girl aged less than 18 years is not voidable. In other words, according to the Division Bench such a child marriage celebrated in contravention of the Prohibition of Child Marriage Act is a valid marriage. With respect, we are of the opinion that it is not a correct interpretation. A plain reading of Section 3 of the Prohibition of Child Marriage Act would make it clear that such child marriage is only voidable. Therefore, we hold that though such a voidable marriage subsists and though some rights and liabilities emanate out of the same, until it is either accepted expressly or impliedlyby the child after attaining the eligible age or annulled by a court of law, such voidable marriage, cannot be either stated to be or equated to a valid marriage strict sensu as per the classification referred to above." 23.We would be failing in our duty if we do not refer to another Division Bench judgment of this Court delivered on 11.08.2010 in W.P. (Crl.)

No.1003/2010 in the case entitled Sh. Jitender Kumar Sharma v. State and Another. That was a case where both the boy and the girl were minors, who had fallen in love; eloped together and got married as per the Hindu rites and ceremonies. The Division Bench specifically considered the issue of validity of marriage. The Court took note of the earlier DivisionBench judgments as well as the provisions of PCM Act, 2006. The Division Bench was, however, of the view that the validity of marriage is primarily to be judged from the standpoint of personal law applicable to the parties to the marriage. The Court was of the opinion that a Hindu marriage, which is not a void marriage under the HM Act, would continue to be such provided the provisions of Section 12 of the PCM Act, 2006 are not attracted. A marriage in contravention of Clause (3) of Section 5 of the HM Act was neither void nor voidable. However, Section 3 of the PCM Act had introduced the concept of a voidable marriage. This was a secular law. In view of Section 3 thereof, which made child marriages to be voidable at the option of the contracting party being a child, the Division Bench observed that the position contained in Clause (3) of Section 5 of the HM Act holding that such a marriage was neither void nor voidable was the legal position prior to theenactment and enforcement of PCM Act, 2006 and after this enactment the marriage in contravention of Clause (3) of Section 5 of the HM Act would not be ipso facto void butcould be void if any of the circumstances enumerated in Section 12 of the PCM Act, 2006 is triggered and the effect of Section 3 of PCM Act and the interplay of Section 3 of the PCM Act and Clause (3) of Section 5 of the HM Act is summarised in the following manner:-

"15. Returning to the facts of the present case, we find that, merely on account of contravention of clause (iii) of Section 5 of the HMA, Poonams marriage with Jitender is neither void under the HMA nor under the Prohibition of Child Marriage Act, 2006. It is, however, voidable, as now all child marriage are, at the option of both Poonam and Jitender, both being covered by the word child at the time of their marriage. But, neither seeks to exercise this option and both want to reinforce and strengthen their marital bond by living together. We also find that stronger punishments for offences under the Prohibition of Child Marriage Act, 2006 have been prescribed and that the offences have also been made cognizable and non-bailable but, this does not in any event have any impact on the validity of the child marriage. This is apparent from the fact that while the legislature brought about these changes on the punitive aspects of child marriages it, at the same time brought about conscious changes to the aspects having a bearing on the validity of child marriages. It madea specific provision for void marriages under certain circumstances but did not render allchild marriages void. It also introduced the concept of a voidable child marriage. The flip- side of which clearly indicated that all child marriages were not void. For, one cannot make something voidable which is already void or invalid."

24.Detailed submissions were made before us in the light of the provisions of various enactments and the views expressed by the Court in various judgments taken note of above. Instead of reproducing arguments in detail, it would be suffice to point out that whereas Mr. Arvind Jain primarily argued on the lines of the Full Bench judgment rendered by Madras High Court in T. Sivakumar v. The Inspector of Police (supra), Mr. Chandhiok, learned ASG,argued that view taken by the Division Bench of this Court in Sh. Jitender Kumar Sharma v. State and Another (supra) was in tune with law.

32. It is distressing to note that the Indian Penal Code, 1860 acquiesces child marriage. The exception to Section 375 specifically lays down that sexual intercourse of man with his own wife, the wife not being under fifteen years of age is not rape, thus ruling out the possibility of marital rape when the age of wife is above fifteen years. On the other hand, if the girl is not the wife of the man, but is below sixteen, then the sexual intercourse even with the consent of the girl amounts to rape?

It is rather shocking to note the specific relaxation is given to a husband who rapes his wife, when she happens to be between 15-16 years. This provision in the Indian Penal Code, 1860 is a specific illustration of legislative endorsement and sanction to child marriages. Thus by keeping a lower age of consent for marital intercourse, it seems that the legislature has legitimized the concept of child marriage. The Indian Majority Act, 1875 lays down eighteen years as the age of majority but the non obstante clause (notwithstanding anything contrary) excludes marriage, divorce, dower and adoption from the operation of the Act with the result that the age of majority of an individual in these matters is governed by the personal law to which he is a subject. This saving clause silently approves of the child marriage which is in accordance with the personal law and customs of the religion. It is to be specifically noted that the other legislations like the Indian Penal Code and Indian Majority Act are pre independence legislations whereas the Hindu Minority and Guardianship Act is one enacted in the post independent era. Another post independent social welfare legislation, the Dowry Prohibition Act, 1961 also contains provisions which give implied validity to minor's marriages. The words 'when the woman was minor' used in section 6(1)(c) reflects the implied legislative acceptance of the child marriage. Criminal Procedure Code, 1973 also contains a provision which incorporates the legislative endorsement of Child Marriage. The Code makes it obligatory for the father of the minor married female child to provide maintenance to her in case her husband lacks sufficient means to maintain her.

33. The insertion of option of dissolution of marriage by a female under Section 13(2)(iv) to the Hindu Marriage Act through an amendment in 1976 indicates the silent acceptance of child marriages. The option of puberty provides a special ground for divorce for a girl who gets married before attaining fifteen years of age and who repudiates the marriage between 15- 18 years.

34. Legislative endorsement and acceptance which confers validity to minor's marriage in other statutes definitely destroys the very purpose and object of the PCM Act-to restrain and to prevent the solemnization of Child Marriage. These provisions containing legal validity provide an assurance to the parents and guardians that the legal rights of the married minors are secured. The acceptance and acknowledgement of such legal rights itself and providing a validity of Child Marriage defeats the legislative intention to curb the social evil of Child Marriage.

35. Thus, even after the passing of the new Act i.e. the Prohibition of Child Marriage Act 2006, certain loopholes still remain, the legislations are weak as they do not actually prohibit child marriage. It can be said that though the practice of child marriage has been discouraged by the legislations but it has not been completely banned.

36. Mr. Deep Ray of NALSAR University of Law, Hyderabad has pointed out the following three loopholes in his article "Child Marriage and the Law". Firstly, Child Marriages are made voidable at the option at the parties but not completely void. That means Child Marriages are still lawful. Making such marriages voidable doesnt really help matter in most cases as girls on attaining majority dont have the agency or adequate support from their families to approach the court and go for annulment of the marriage. The reason behind not making such marriages void probably is that child marriages, once solemnized and consummated makes it very difficult, if not impossible for girls to deny and step out of those marriages. Therefore, it is in keeping with the social reality that such marriages are not declared void. If the social reality largely remains the same, the likelihood that young girls will now choose to nullify their marriages, which would probably be consummated by the time she attains maturity and decides to approach the courts, seems very unlikely.

37. Secondly, the applicability of Prohibition of Child Marriage Act, on various marriages of different communities and religion is unclear. Social customs and personal laws of different religious groups in India allows marriage of minor girls and the Prohibition Child Marriage Act,2006 does not mention whether it prohibit all the underage marriages that are sanctioned by religious laws.

38. Thirdly, registration of marriages has still not been made compulsory. Compulsory registration mandates that the age of the girl and the boy getting married have to be mentioned. If implemented properly, it would discourage parents from marrying off their minor children since a written document of their ages would prove the illegality of such marriages. This would probably be able to tackle the sensitive issue of minor marriages upheld by personal laws.

39. As held above, PCM Act, 2006 does not render such a marriage as void but only declares it as voidable, though it leads to an anomalous situation where on the one hand child marriage is treated as offence which is punishable under law and on the other hand, it still treats this marriage as valid, i.e., voidable till it is declared as void. We would also hasten to add that there is no challenge to the validity of the provisions and therefore, declaration by the legislature of such a marriage as voidable even when it is treated as violation of human rights and also punishable as criminal offence as proper or not, cannot be gone into in these proceedings. The remedy lies with the legislature which should take adequate steps by not only incorporating changes under the PCM Act, 2006 but also corresponding amendments in various other laws noted above. In this behalf, we would like to point out that the Law Commission has made certain recommendations to improve the laws related to child marriage.

40. Be as it may, having regard to the legal/statutory position that stands as of now leaves us to answer first part of question No.1 by concluding that the marriage contracted with a female of less than 18 years or a male of less than 21 years would not be a void marriage butvoidable one, which would become valid if no steps are taken by such "child" within the meaning of Section 2(a) of the PCM Act, 2002 under Section 3 of the said Act seeking declaration of this marriage as void.

41. With this we come to the second part of the question relating to custody of the female of less than 18 years to the husband. This would be taken up along with Question Nos.2 and 3 hereinbelow. Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody? If yes, can she be kept in the protective custody of the State?

43. Section 6 of the Hindu Minority and Guardianship Act, 1956, reads:- "6. Natural guardians of a Hindu minor.- The natural guardian of a Hindu minor, in respect of the minor'sperson as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are- (a) In the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother; (b) In case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father; (c) In the case of a married girl-the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section- (a) If he has ceased to be a Hindu, or (b) If he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.- in this section, the expression "father" and "mother" do not include a step-father and a step-mother."

44. It was stated that in the case of a minor married girl, the husband is the guardian and in case of an unmarried minor girl father or the mother, is her guardian. It was accordingly submitted that the husband, even if a minor, would be the guardian of his wife. Fortunately, this argument has to be rejected. The overriding and compelling consideration governing custody of guardianship of the child is the childs welfare and claim to the status as a guardian under the said section is not a right. This was declared long back in 1973 in Rosy Jacob Vs. Jacob Chakramakkal, AIR 1973 SC 2090.

45. We may also refer Section 13 of the Minority and Guardianship Act, 1956, which reads:- "13 . Welfare of minor to be paramount consideration.- (1) In the appointment of 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." The said section has been interpreted and it has been repeatedly held that while deciding the question of custody of a minor child, it is the interest of the child, which is paramount and important. (See Kumar V. Jahgirdar Vs. Chetana K. Ramatheertha AIR 2001 SC 2179 and AIR 2004 SC 1525).

46. In such circumstances, allowing the husband to consummate a marriage may not be appropriate more so when the purpose and rationale behind the PCM Act, 2006 is that there should be a marriage of a child at a tender age as he or she is not psychologically or medically fit to get married. There is another important aspect which is to be borne in mind. Such a marriage, after all, is voidable and the girl child still has right to approach the Court seeking to exercise her option to get the marriage declared as void till she attains the age of 20 years. How she would be able to exercise her right if in the meantime because the marriage is consummated when she is not even in a position to give consent which also could lead to pregnancy and child bearing. Such marriages, if they are made legally enforceable

will have deleterious effect and shall not prevent anyone from entering into such marriages. Consent of a girl or boy below the age of 16 years in most cases a figment of imagination is an anomaly and a mirage and, and will act as a cover up by those who are economically and/or socially powerful to pulverize the muted meek into submission. These are the considerations which are to be kept in mind while deciding as to whether custody is to be given to the husband or not. There would be many other factors which the Court will have to keep in mind, particularly in those cases where the girl, though minor, eloped with the boy (whether below or above 21 years of age) and she does not want to go back to her parents. Question may arise as to whether in such circumstances, the custody can be given to the parents of the husband with certain conditions, including the condition that husband wouldnot be allowed to consummate the marriage. Thus, we are of the opinion that there cannot bea straight forward answer to the second part of this question and depending upon the circumstances the Court will have to decide in an appropriate manner as to whom the custodyof the said girl child is to be given.

Question No.4 Whether the FIR under Section 363 IPC or even 376 IPC can be quashed on the basis of the statement of such a minor that she has contracted the marriage of her own? 47.This brings us to the anomaly with and in the Indian Penal Code. Consent below the age of16 years is immaterial, except when the rape is committed by a male who is married to the girl. Section 376 IPC does not treat the rape committed by a husband on his wife above the age of 15 years as an offence. This certainly requires a relook. This provision is not in consonance with the PCM Act.

Section 376 IPC is required to be rationalized and amended in consonance with the PCM Act, and it may be difficult to implement and effectively enforce the PCM Act otherwise. The question of age of consent for the purpose of Indian Penal Code is a larger issue, and not being a subject matter of the reference, has not been examined by us.

49.In case the girl is below 16 years, the answer is obvious that the consent does not matter. Offence under Section 376 IPC is made out. The chargesheet cannot be quashed on the ground that she was a consenting party. However, there can be special or exceptional circumstances which may require consideration, in cases where the girl even after attaining majority affirms and reiterates her consent exception can be made to the said constitutional mandate and the same has to be strictly and diligently enforced. Consent in such cases is completely immaterial, for consent at such a young age is difficult to conceive and accept. It makes no difference whether the girl is married or not. Personal law applicable to the partiesis also immaterial.

51. If the girl is more than 16 years, and the girl makes a statement that she went with her consent and the statement and consent is without any force, coercion or undue influence, the statement could be accepted and Court will be within its power to quash the proceedings under Section 363 or 376 IPC. Here again no straight jacket formula can be applied. The Court has to be cautious, for the girl has right to get the marriage nullified under Section 3 of the PCM Act. Attending circumstances including the maturity and understanding of the girl, social background of girl, age of the girl and boy etc. have to be taken into consideration. Question No.5 Whether there may be other presumptions also which may arise?

52. In view of our discussion on questions No.1 to 4, no further observations need to be made in so far as this question is concerned.

53. Having answered the aforesaid questions we now take up each case as was agreed by the counsel for the parties and it is not necessary to refer the case to the Division Bench. WP (Crl.) No.388/2008 54.As per the facts noted in paras 3-6 above, Ms.Meera is the girl in question whose date of birth is 6.7.1995. When she married Charan Singh she was 13 years ofage. She had made a statement under Section 164 of the Cr.P.C. before the learned MM, Rohini that she had gone with Charan Singh of her own free will. This petition was registeredon the basis of letter written by her mother Smt. Lajja Devi. During the pendency of this petition, order dated 31.7.2008 was passed permitting her to go with her parents as she desired to live with them on assurance given by her parents that they would not marry her to anyone else. She is still 17 years of age. This marriage, as per our discussion above, is voidable. Since she has not attained majority and is residing with her parents, this arrangement would continue. When she becomes major it would be for her to exercise her right under the PCM Act if she so desires and future course of action would depend threon. With these directions, the petition is disposed of. Crl.M.C. No.1001/2011 & Crl.M.A. No.3737/201 55.Facts of this case have already been noted above. As per the ossification test,the girl/petitioner No.1 was found between 17-19 years of age. As per the school leaving certificate, she was 17 years of age on the date when the parties solemnised marriage. Since she has given the statement that she married of her own accord to the petitioner No.2 and wasmore than 16 years of age, FIR No.31 of 2011, P.S. Dabri under Sections 363/366/376/465/467/494/497/120-B/506 IPC registered against the petitioner No.2 is herebyquashed.

56. In this Writ Petition, the question is only of validity of marriage and guardianship. Even if the age of the girl is taken as 15 years at the time of incident, i.e., 27.10.2006, she would be 21 years of age as of now. She has not filed any proceedings for declaring the marriage as void. Therefore, the marriage becomes valid now. The question of guardianship does notarise at this stage as she is major and during the period she was minor she resided at Nirmal Chhaya. Thus, the Writ Petition is disposed of in the aforesaid terms.

57. As per the facts noted in para 10 above, Shivani @ Deepika at the time of her marriage was less than 16 years of age, her date of birth being 3.6.1994. It was directed that she would remain at Nirmal Chhaya. However, as per the aforesaid date of birth, i.e., 3.6.1994 she has attained majority on 3.6.20012. The petition was filed by Sh. Devender Kumar who married her habeas corpus and was claiming her custody. She has attained majority, she is free to go anywhere.

58. With these directions, this petition stands disposed of.

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Under-Age Marriage In Pluralist Asia: An Analysis Of Religious And Secular Laws Of South Asian Countries

Usha Tandon*

Prohibition of Child Marriage Act, 2006

The Prohibition of Child Marriage Act, 2006 (hereinafter referred as PCMA) has repealed the Child Marriage Restraint Act, 1929. Since long there has been a growing demand for making the provisions of 1929 Act more effective. The National Commission for Women[1] recommended inter alia that the Government should appoint child marriage prevention officers; the punishment provided under the Act should be made more stringent; marriages performed in contravention of the Act should be made void and the offences under the Act should be made cognizable. The National Human Rights Commission[2] made recommendations for comprehensive amendments to the 1929 Act. To give effect to the recommendations of the Commissions, the Central Government instead of amending the Child Marriage Restraint Act, 1929 repealed it and passed new Act entitled Prohibition of Child Marriage Act, 2006, which came into force on January 10, 2007.[3] PCMA defines'child' as a person who, if a male has not completed 21 years of age and if a female has not completed 18 years of age.[4] 'Child marriage' means a marriage to which either of thecontracting party is a child.[5] Section 3 of the Act makes child marriage voidable at the option of the contracting party who was a child at the time of marriage. The petition for the nullity ofmarriage may be filed at any time but before the child filing the petition completes two years of attaining majority.[6] Provision is made for the maintenance and residence of the female contracting party to the marriage until her remarriage.[7] The Act also makes a provision forthe custody and maintenance of children of child marriage.[8] Section 12 declares the marriage of a minor child (emphasis added) to be void under three circumstances: where the childbeing a minor (i) is taken or enticed out of the keeping of the lawful guardian; or 52 National Commission for Women, Annual Report, (1995-96). 53 National Human Rights Commission,Annual Report, (2000-01). 54 Act No. 6 of 2007. 55 The Prohibition of Child Marriage Act,
2006, S. 2 (a). 56 Ibid., S. 2 (b). 57 Ibid., S. 3. 58 Ibid., S. 4. 59 Ibid., S. 5. 304 IIUM LAW JOURNAL VOL. 18 NO. 2, 2010 (ii) by force compelled, or by any deceitful means induced to go from any place; or (iii) is sold for the purpose of marriage and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used

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* For Full text visit http://journals.iium.edu.my/iiumlj/index.php/iiumlj/article/view/26/25

1 National Commission for Women, Annual Report (1995-96)

2 National Human Right Commission Annual Report (2000-01)

3 Act no. 6 of 2007

4 The Prohibition of Child Marriage Act, 2006, S. 2 (a)

5 Sec. 2 (b) of The Prohibition of Child Marriage Act, 2006

6 Sec. 3 of The Prohibition of Child Marriage Act, 2006

7 Sec. 4 of The Prohibition of Child Marriage Act, 2006

8 Sec. 5 of The Prohibition of Child Marriage Act, 2006

for immoral purposes. In Aminder Kaur v State of Punjab[9] which is a case of run away marriage, the Punjab and Haryana High Court ruled the marriage of 16 years old girl, solemnized as per Hindu rites, to be void under section 12 (a) of PCMA, as she was enticed away from the lawful keeping of a guardian by her alleged husband. Section 14 of the Act provides another ground for making child marriage as void ab initio i.e where it is solemnized in contravention of an injunction order passed by the court. The Act confers the status of legitimacy on the children born of child marriage.[10] All punishments for contracting child marriage have been enhanced.[11] It is worth noting that no woman can be punished with imprisonment.[12] The Act also makes all offences under it cognizable and non-bailable.[13] One of the special features of the Act is the appointment of Child Marriage Prohibition Officers by the State Government who have been empowered to prevent and prosecute the solemnization of child marriage and to create awareness on the problem.[14] Special powers have been given to the District magistrate to prevent the solemnization of mass child marriages on certain days such as Akhaya trutiya by employing appropriate measures and using minimum force required.[15]. Under-Age Marriage in Pluralist Asia 305.

Criticism of The Prohibition of Child Marriage Act, 2006

The Prohibition of Child Marriage Act, 2006 is definitely an improvement over the Sarda Act of 1929 in the following respects:-

1. For the first time, in the history of Indian law the marriage of a minor child is declared to be null and void by the central legislation. It needs to be emphasized, however, that section 12 of PCMA does not, make 'child marriage' to be a void marriage. It makes provision for the marriage of minor child (emphasis added) to be void on specific grounds. Though every minor is a child under PCMA, vice-versa is not true. A boy of 19 years, for example is not minor but he is child within the meaning of PCMA. However a girl of 19 years is both major as well as adult. Looking to the nature of three grounds mentioned in section 12 of PCMA, which are also criminal offences under the Penal Code and also to the vulnerability of girls to these offensive practices, this provision incorporates the substantive model of equality. However, it would have been better if the legislature had widened the scope of void marriage to include any violation of the Act.
2. In case of annulled voidable marriage, court is empowered to make an order requiring the contracting party or his guardian to pay maintenance and make provision for the residence of the female contracting party till her remarriage. Since

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9 In the Punjab and Haryana High Court at Chandigarh CRM-M 29790 of 2009 (O&M) decided on Nov. 27, 2009, available at www. indiankanoon.org/doc/942424/ visited on March 19, 2010. see also Kammu v State of Haryana, (CRP No. 623 0f 2009 (O&M) decided on Feb. 16, 2010 available at www.indiankanoon.org/doc/1725622/ visited on March 19, 2010

10 S. 6 of The Prohibition of Child Marriage Act, 2006

11 SS 9-11 of The Prohibition of Child Marriage Act, 2006

12 Proviso to Sec 11 (1) of The Prohibition of Child Marriage Act, 2006

13 Sec 15 of The Prohibition of Child Marriage Act, 2006

14 Sec 16 of The Prohibition of Child Marriage Act, 2006

15 Sec 13, Sub SS 3 & 4 of The Prohibition of Child Marriage Act, 2006

child marriage has disproportionately negative impact on the girl child, section 4 of the Act incorporates the human rights dimensions of child marriage within a feminist perspective.

3. All punishments under the Act have been enhanced. However no woman shall be punishable with imprisonment. Sections 11 and 13 of PCMA are other examples of gender sensitivity of Indian Legislature.
4. Offences under PCMA are cognizable for the purpose of investigation and for other purposes. An offence under the Act is also non- bailable. This conveys the seriousness of legislature to combat child marriage which was lacking under the old Sarda Act of 1929.
5. For the proper implementation of the Act, it makes provision for the appointment of Child Marriage Prohibition Officers, whose duties have also been listed under the Act. They can be invested with such powers of a police officer as may be specified. For preventing the solemnization of mass marriages on certain auspicious days, the District Magistrate is regarded as the Child Marriage Prohibition Officer with all necessary powers. This provision was totally absent under the Sarda Act. The inclusion of provisions with respect to the implementation of the Act and monitoring of child marriage makes PCMA a meaningful legislation.

The Prohibition of Child Marriage Act, 2006 however, is also a classic case of poor draftsmanship. The Act is full of anomalies. Some of them are mentioned here:-

1. Section 6 of PCMA confers the status of legitimacy on the children born of child marriage which has been annulled by a decree of nullity under section 3 of the Act. It may be noted that a marriage may be annulled by a decree of nullity under Sections 12 and 14 of the Act, which make the marriage in contravention of their provisions asnull and void. The children born of child marriage annulled under these provisions have not been legitimized. The legislature should have deleted the words 'under section 3' in section 6 to widen the scope of legitimacy of children.

2. Section 4 of the Act deals with the provision for maintenance and residence to female contacting party to child marriage. The benefit of maintenance and residence has only been provided to the girl who had been a party to annulled voidable marriage under section 3 of the Act. The beneficial provision has not been extended to girls who had been party to void marriage under sections 12 and 14.
3. Drafting of Section 12 suffers from lacunae. Clauses (a) and (b) of section 12 are simply incomplete. They do not make any reference to 'marriage'. The opening part of section 12 also does not make any reference to 'marriage.' Only Clause (c) of Section 12 mentions 'marriage' of a minor which has been Under-Age Marriage in Pluralist Asia 307 declared null and void.[16] It should be amended to include the word 'child marriage' in the opening part of section 12.

[16] S. 12. Marriage of a minor child to be void in certain circumstances - Where a child, being a minor- (a) is taken or enticed out of the keeping of the lawful guardian; or (b) by force compelled, or by any deceitful means induced to go from any place; or is sold for the purpose

4. Section 5 provides for the custody and maintenance of children of child marriages. The way section 5 has been drafted is the height of ill framed legislation. It does not make any reference to Section 3 or Sections 12 and 14 of the Act. So, if marriage has not been annulled under section 3 or is not covered by sections 12 and 14, where is the need making any provision for the legislature for the custody and maintenance of children of child marriage?
5. Section 20 PCMA reminds one of the old British jingle.[17] It provides for the amendment of Hindu Marriage Act, 1955 to enhance the punishment under Section 18 clause (a). Surprisingly, no provision is made under section 20 for the amendment of Sections 11, 12 and 13 (2) (iv) of HMA. Consequently even after passing the PCMA the under-age marriage under HMA is neither void nor voidable. It is perfectly valid though punishable and furnishes a ground of divorce to the girl under Section 13 (2) (iv). These provisions of HMA should have been suitably amended in view of the provisions of PCMA.

of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes' such marriage shall be null and void.

17 "I am the parliamentary draftsman. I compose the country's laws. And of half of the litigation, I am undoubtedly the cause." Palace Administrative Board v. RVB Thampuran, AIR 1980 SC 1187 at 1195 in G.P. Singh, Principles of Statutory Interpretation, 23 (1999).

P. v. *K.*

AIR 1982 Bom. 400

MODY, J. - The appellant (original petitioner) the husband, and the respondent (the original respondent) were married on 20th June 1976. The appellant and the respondent were both Hindus and were about 36 and 27 years of age respectively at the time of marriage. Due to certain unfortunate circumstances, the husband was driven to file a petition for nullity within a short time which he did on or about 30th Nov. 1976.

2. The petition proceeds to make the following allegations. The marriage had not been consummated owing to the impotency of the respondent. On the very first night the respondent refused to have sexual intercourse saying that for one year she would not have sexual intercourse with the appellant. The respondent appeared to be very much upset at the approach of the appellant to consummate the marriage and was averse to any sexual act. Itwas decided by the petitioner and his elders to take the respondent on a pilgrimage so that there might be a change in her mentality and outlook by the blessings of God. Even during pilgrimage the matter did not improve. Soon after return from pilgrimage on 29-7-1976 the respondent's father had come to the petitioner's house and the petitioner complained to her father about the behaviour of the respondent. Father ignored the complaint. The respondent's attitude continued. Then followed a medical check up on 27-8-1976 by Dr. Bhatia when itwas discovered by the petitioner that the respondent was suffering from second degree prolapse of the uterus. This was indicative of non-virginity. Taking into consideration the medical report and the odd behaviour of the respondent and the surrounding circumstances, the petitioner had reasons to suspect that the respondent wanted to conceal facts from the petitioner and that was one of the main reasons why she was refusing to have sexualintercourse with the petitioner and have the marriage consummated. It was clear from the conduct of the respondent and that of her parents that fraud was committed and that the marriage had been brought about by fraud and misrepresentation. The respondent and her parents had suppressed material facts about the sexual lapse and defect. The petitioner's consent to the marriage was obtained by fraud and misrepresentation as to the material fact orcircumstances concerning the respondent. In any event, the respondent was impotent at the relevant time, and there was non-consummation by reason thereof. The petitioner prayed for annulment of the marriage under Sec. 12 (1) (a) and (c). In the written statement the respondent denied that marriage was not consummated or that she refused to consummate the marriage or was averse to sexual act or that she was impotent at any time. It is alleged thatshe was taken to Dr. Bhatia on 27th Aug. 1976 but the respondent did not understand the result of the said examination. It is denied that the respondent suffered from sexual defects before her marriage and it is averred that neither she nor her parents were aware of any defectat any time before or after the marriage.

3. Mr. Nesari for the appellant has taken me through the evidence and the judgment and contended that the learned trial judge has not correctly appraised the evidence and on the balance ought to have accepted the evidence of the petitioner and Dr. Bhatia and rejected the evidence of the respondent as unreliable and that of Dr. Pancholi as not very reliable on certain aspects of the matter in view of contradictions and that if the evidence of petitioner and Dr. Bhatia is accepted, the grounds for nullity stand proved.

4. Before considering the evidence of the petitioner. I will deal with the evidence of the respondent as in my view her evidence is completely unreliable and the petitioner's evidence not being inherently unreliable will have to be accepted, irrespective of some discrepancies.

7. Mr. Dalvi has attacked the evidence of the petitioner and contended that the case now made out by the petitioner is different from the one in the petition. He says that initially in the notice of the advocate, case was made out of misrepresentation as to the virginity of the respondent, while the case sought to be made out in the petition is that of concealment of the evidence of prolapse and of impotency and in the evidence there are further embellishments. In support he refers to a statement "my client has reasons to suspect, taking into consideration, the medical report and your behaviour and the surrounding circumstances, that you were not a virgin and you wanted to conceal the fact from my client, and that, that was one of the main reasons why you were refusing to have sexual intercourse with my client and have the marriage consummated". However, the notice has to be read as a whole. Moreover, anotice is not a pleading and not to be interpreted as a pleading. The notice does mention that the marriage had not been consummated till the date of the notice due to the impotency of the respondent. It is further stated that she was examined by Dr. Bhatia and she had given a certificate to the effect that it was found that the hymen was torn and that there was a second decree prolapse of the uterus, indicative of non-virginity. It would appear that words indicative of non-virginity' are the inference drawn by the petitioner or his advocate based onthe facts disclosed in the certificate. Then follows a sentence relied on by Mr. Dalvi followed by another sentence in the same paragraph, "that you have suppressed the material facts and your sexual lapse and defect, which were within your own knowledge". It is therefore, clear that the notice proceeds on the basis of non-disclosure of sexual lapse i.e. loss of virginity before marriage as also concealment of sexual defect viz: prolapse. I do not think that either the petition or petition read with notice is open to the attack made by Mr. Dalvi.

8. The evidence of the petitioner practically follows the petition. However, it gives more details than the petition and the notice. Mr. Dalvi attacks the evidence of the petitioner by contending that certain details given in the evidence do not find place in either the notice or the petition and therefore, should not be believed. I must here point out what is normally required of a notice and a petition. Notice is supposed to give only the bare outlines of the grievances of the party sending the notice. How much to reveal, how much not to reveal, will depend on the opinion of the advocate who is sending the notice. Not mentioning of a particular fact in the notice unless it is so material as ought to have found place in the notice, cannot be a subject of any serious comment nor can such an omission by itself affect the veracity of the evidence. In fact, often a notice is sent even though not necessary as notice is rarely a part of the cause of action. The function of the petition is to give material facts which give rise to the cause of action: it should not contain evidence or other unnecessary details. In my view the petition in the present case contains sufficient particulars in respect of the facts which constitute that cause of action and no fact which forms material part of the cause of action has come out for the first time in the evidence. The cause of action of the petitioner is that the respondent was suffering from second degree prolapse of uterus and this fact was concealed from him at the time of marriage. That the respondent showed disinclination to anysexual intercourse and repelled the attempts of the petitioner to consummate marriage and

which he subsequently came to know could be because of the prolapse. He claims that he is entitled to annulment on the ground of concealment of material fact concerning the respondent and non-consummation due to impotency. This case is brought out in the petition. It is averred that sexual lapse and the defect of the nature described were known to her but they were not disclosed before the marriage, and therefore, he is entitled to annulment on the ground of fraud (what is meant thereby is obviously concealment) of material facts relating tothe respondent. Having asserted non-consummation of the marriage, it was not necessary to mention in the petition each and every approach the petitioner made to the respondent and which was repulsed. It was sufficient to say generally that from the very first night till the relevant date, there was no consummation of marriage. Therefore, I do not see any substance in the attack of Mr. Dalvi that facts brought out in the evidence of the petitioner do no t find place either in the notice or the petition and so the petitioner is improving upon the story fromtime to time and his evidence should not be accepted. I do not see any substance in Mr. Dalvi's attack as the notice or the petition are not proper place for minute details and entire evidence is not required to be stated in them.

14. Mr. Dalvi then attacks the evidence on the ground that except the details as to what happened on the first night, there are no details given regarding the attempts made to approach the respondent by the petitioner and as to what was the response either in the advocate's notice or the petition or the evidence. This attack of Mr. Dalvi has no substance. Itis not necessary for the petitioner to prove each and every approach made with dates and other details. It is sufficient if he says that he made attempts which were repulsed by the petitioner. It is obvious that the attempt of first night only is described as that would be the most important and it is stated and maintained by the petitioner in his evidence that there was no change in the situation after the first night. It is the respondent who will have to say that it is not true, give some details as to when the relations took place and then the question will be as to whom to believe: but the minute details as contended by Mr. Dalvi are not required to begiven in the notice, petition or examination in chief when the case is of complete non- consummation and impotency. If it is the allegation of cruelty by reason of some positiveacts, the details are obviously necessary with dates and particulars, but in respect of anegative case, such as non-consummation, a statement that throughout the period there has not been consummation will normally suffice, with details of one or two attempts. Moreover, if it is believed that the respondent was aware of her condition since prior to marriage as appears to be the case, it is possible that she will try to repulse the petitioner's advances and the petitioner's version becomes probable.

17. The evidence therefore, establishes that the respondent must be deemed to be aware of her condition of prolapse since prior to marriage and that either she wanted to hide her condition from the petitioner or had developed abhorrence or repugnance towards intercourse. Not only did she not inform the petitioner about the same at or before the time of marriage but also did not submit to the petitioner with the result that the marriage remained unconsummated.

18. This bring me to the question as to whether it can be said that the respondent was impotent at the relevant time or that the non-disclosure of a known prolapse amounts to

obtaining consent of the petitioner "by force or by fraud as to the nature of the ceremony or as to the material fact or circumstances concerning the respondent".

19. Dealing first with the second aspect of the matter, it is to be considered as to what amounts to fraud as to any material fact or circumstance concerning the respondent. Prior to the amendment of the Hindu Marriage Act by Act 68 of 1976.

These words were interpreted by this Court in ***Raghunath Gopal* v. *Vijaya Raghunath***, [AIR 1972 Bom. 132]. In that case the consent to the marriage was procured by concealing from the husband the fact that the wife was suffering from curable epilepsy and false representation that she was healthy and it was held that this concealment and representation though otherwise fraudulent did not amount to fraud within the meaning of S. 12 (1) (c) as then existing. The reason for coming to this conclusion is that the Hindu Marriage thoughmay be in the nature of a contract for some purpose was still a sacrament and therefore, 'fraud' cannot be interpreted in light of its definition in the Contract Act. After relying on certain well-known treatises on the law of divorce prevailing in England, and the commentaryin Mulla's ***Hindu Law*** (13th Edn.) p. 862, and on Derrett's ***Introduction to Modern Hindu Law*** (1963 Edn.) p. 193, it was held by Malvankar J.:

> It would thus be seen that the word "fraud" used in S. 12 (1) (c) of the Hindu Marriage Act does not speak of fraud in any general way, nor does it mean every misrepresentation or concealment which may be fraudulent. If the consent given by the parties is a real consent to the solemnization of the marriage, the same cannot be avoided on the ground of fraud. The marriage, therefore, solemnized under the Hindu Marriage Act cannot be avoided by showing that the petitioner was induced to marry the respondent by fraudulent statement relating to her health.

Malvankar J. then proceeded to consider Indian Cases in which the physical deficiency or illness or suppression of the fact that the wife was a naikin by profession or of her having been kept by more than one person prior to the marriage were not considered as amounting tofraud. After considering all these authorities, it was stated.

> These, decision, therefore, before and after the Hindu Marriage Act 1955, came into force definitely show that the Indian Contract Act, 1872, does not apply to the marriage under the Hindu Marriage Act, 1955, and that the word "fraud" used in S. 12 (1) (c) of the Hindu Marriage Act does not mean any fraudulent representation or concealment. The test to be applied is whether there is any real consent to the solemnization of the marriage.

It was then held:

> A person who freely consents to a solemnization of the marriage under the Hindu Marriage Act with the other party in accordance with customary ceremonies, that is, with knowledge of the nature of the ceremonies and intention to marry, cannot object to the validity of the marriage on the ground of fraudulent representation or concealment. Moreover, in the present case, the fraud alleged is non-disclosure or concealment of epilepsy from which the respondent was suffering since before her marriage, and false representation that she was healthy. I have found that the type of epilepsy she suffering from is curable. I am also, therefore, of the opinion that non-

> disclosure or concealment of such curable epilepsy and false representation that the respondent was healthy does not amount to fraud within the meaning of that word used in Sec. 12 (1) (c) of the Hindu Marriage Act, 1955. The petitioner, therefore, hasfailed to prove that his consent was obtained by the respondent or her relations by fraud.

It is therefore; clear that according to the learned Judge the fraud contemplated was such as must be regarding the ceremony or the identity of the respondent and not as regards the condition of the respondent or her life at the time of or before the marriage. This judgment was followed in ***David* v. *Kalpana*** [(1976) 78 Bom LR 85] which was a case under the Indian Divorce Act.

20. If the matter rested there the things would have been simple and I would had no alternative but to hold that no fraud could be said to have been committed in the present case. However, the wordings have now been changed by the amendment of Section 12 (1) (c) which now reads as follows:-

> 12 (1) (c) - that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under Sec. 5, the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent.

This amendment clearly contemplates change in law and brings into the ambit of fraud, misrepresentation or concealment of any material fact or circumstance concerning the respondent. Fraud must mean representing as existing what is not and concealing what is material. The misrepresentation or concealment necessarily presupposes that the respondent was aware of the facts and circumstances which were misrepresented or concealed. In the present case as I have already held that the fact of the prolapse of uterus was known to the respondent and the only question is whether the non-disclosure thereof can be fraud as to any material fact or circumstance concerning the respondent. Every fact and circumstance cannot be material. Therefore concealment of misrepresentation of every fact and circumstances cannot be said to be fraud sufficient for annulment. It is difficult to define with any certainty what can be said to be material fact or circumstance but it may be safely said that the fact or circumstance which is of such nature as would materially interfere with the marital life and pleasure including sexual pleasure will be a material fact or circumstance. The only limitation is that the material fact or circumstance must be concerning the respondent, meaning thereby that it must be in respect of the person or character of the respondent. It is immaterial whether such fact or circumstance is curable or remediable. If a party to a marriage is suffering from some abhorrent disease such as leprosy or venereal disease and this is not disclosed it will be definitely concealment and consequently fraud as to material fact and circumstance. Similar would be the case with suppression of the fact of immoral life prior to the marriage. Without going into the detail or definition as to what may or may not constitute material fact or circumstance, it can be said that existence of a condition in the respondent which materially interferes with the sexual intercourse or its pleasure or which makes its indulgence in a normal way difficult or is such as is likely to cause dislike or abhorrence in the mind of the other spouse to have sexual intercourse will be material fact or circumstance even though it may or may not amount to impotency. In the present case as I have already held the sexual

intercourse was not possible without manipulation of the protruding uterus by hand, which obviously is likely to cause dislike, abhorrence or disgust to a newly wed husband. The concealment of such a fact will be fraud as to material fact or circumstance concerning the respondent as now contemplated by Section 12 (1) (c). In the circumstance, the marriage solemnised between the petitioner and the respondent is voidable and is liable to be annulled.

21. This brings me to the question of impotency. This question was considered by the Full Bench of Madras High Court in ***K. Balavendram* v. *S. Harry*** [AIR 1954 Mad 316 (FB)]. In that case, the petitioner had alleged that the respondent's male organ was so abnormally big as to render sexual intercourse with her impracticable. It had proved to be positively dangerous to the life of the petitioner. She stated that on several occasions when the respondent attempted to have intercourse with her the petitioner evinced great aversion to the act and also suffered great pain on each occasion with the result she had to push therespondent away or jump out of the bed and in the circumstances, the marriage had not been consummated and that the consummation of marriage was impossible. The respondent in his reply asserted that intercourse was possible and that it had taken place on several occasions. The facts alleged by the petitioner were held to be proved as the respondent did not give evidence or appear. On the basis of these facts the question arose whether these facts amounted to impotency. The said judgment has considered various authorities to come to the conclusion as to what amounts to impotency. The relevant portion of the judgment is as follows:

> (4) Impotency has been understood by Judges in England in matrimonial cases as meaning incapacity to consummate the marriage, that is to say incapacity to have sexual intercourse, which undeniable is one of the objects of marriage. The question is, what does "sexual intercourse" mean? We cannot do better than refer to what has been considered to be the leading decision on this topic, namely – ***D. E.* v. *A. G.*** [1845)163 ER1039]. In that case,the husband prayed for a declaration of nullity of his marriage with therespondent who was married to him on the ground that carnal consummation was impossible by reason of malformation of his wife's sexual organ. Dr. Lushington dealt with the point namely, what exactly is to be understood by the term "sexual intercourse", because as he said everyone was agreed that in order to constitute the marriage bond between young persons, there must be the power, present or to come, of sexual intercourse, Dr. Lushington stated.
>
> Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse, it does not mean partial and imperfect intercourse; Yet, I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with, but if so imperfect as scarcely to be natural.I should not hesitate to say that legally speaking, it is no intercourse at all. If there be a reasonable probability that the lady can be made capable of a 'Vera copula' of the naturalsort of coitus, though without power of conception I cannot pronounce this marriagevoid. If, on the contrary, she is not and cannot be made capable of more than incipient, imperfect and unnatural coitus, I would pronounce the marriage void.

In ***G* v. *G*** [(1871) 2 P & D 287] the rule laid down by Dr. Lushington was followed. The ground on which the husband in that case sought a declaration of nullity of marriage was the wife's peculiar condition which made it impossible for him to consummate the marriage. The

wife was suffering from excessive sensibility. Lord Penzance in dealing with the case, after laying down the law that the ground of interference of the courts in cases of impotence is the practical impossibility of consummation said:-

> The invalidity of the marriage, if it cannot be consummated on account of some structural difficulty, is undoubted; but the basis of the interference of the Court is not the structural difficulty but the impracticability of consummation." The learned Judge was prepared to hold that even in the absence of a physical structural defect, there may be other circumstances which render sexual intercourse practically impossible.
>
> "The question is a practical one." he said "and I cannot help asking myself what is the husband to do in the event of being obliged to return to cohabitation in order to effect consummation of the marriage? Is he by mere brute force to oblige his wife to submit to connection? Everyone must reject such an idea.

Taking what he described as a practical and reasonable view of the evidence, he thought that the consummation of the marriage in that case was practically impossible, owing to the peculiar mental reaction of the wife. The rule in (1845) 163 ER 1039 was again followed in ***Dickson* v. *Dickinson*** (913 p. 198) though that was a case of impossibility to perform the intercourse on account of the willful and persistent refusal of the wife.

> (5) In the present case, the evidence leaves us in no doubt that the marriage cannot be consummated in the ordinary and normal way on account of the abnormal size of the respondent's organ. According to the petitioner's evidence which must be accepted ordinary and complete intercourse is physically impossible. It must be held, therefore, that the respondent was impotent so far as the petitioner was concerned both at the timeof the marriage and at the time of the institution of the suit.

22. The next decision relied on by Mr. Nesri is ***Digvijay Singh v. Pratap Kumari*** (AIR 1970 SC 137) where it is held:

> A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree ofnullity, as prayed for by him he will have to establish that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings.

23. Mr. Nesri then relied on the case of ***M.* v. *M.*** [(1956) 3 All ER 769]. In that case the respondent was suffering from vaginismus which was curable by operation. Till the petition was filed the respondent had not undergone any operation but offered to do so after the petition was filed. It is observed in that judgment, while considering this as follows:-

> It is suggested that there is still time, and that as there is a possibility of a cure I ought not in the present case to pronounce a decree on the ground that she was incapable if there is a reasonable prospect of her incapacity being cured. I have to apply my mind to the history of the case. I think that the respondent knew very well before the separation that the petitioner was at any rate not satisfied with the sexual intercourse between them, and I have not the slightest doubt, having heard the medical evidence, that the husband

had grave cause for his anxieties if that word is suitable, and for his complaints in that regard.

The learned Judge then proceeded to observe that he had to deal with the matter by looking at the practical aspect if the marriage can be consummated. The basis for interferenceof the Court is not the structural defect but the impracticability of consummation. He heldthat the evidence showed that the wife knew about her condition but took no steps to rectify itearlier and then granted decree of nullity.

24. The next case is ***Samar* v. *Sadhana*** [AIR 1975 Cal 413]. That was the case of a wife who had prior to the marriage undergone operation for removal of uterus and as such was alleged to be impotent at the time of marriage and unfit for consummation or bearing child. It is held in that case:-

9. The principal case of appellant was that the respondent was impotent inasmuch as her uterus was removed by an operation before the marriage. It cannot be disputed that a woman without a uterus is quite fit for sexual intercourse. Impotency is incapacity for sexual intercourse or when coition is difficult or painful. As has been stated already the presence or absence of uterus is quite immaterial to the question whether a woman is impotent or not. The learned Judge has rightly held that because the uterus of therespondent was removed, she could not be held to be impotent and that accordingly, the marriage could not be declared to be void.

Therefore, even when coition is difficult or painful it will amount to impotency but just because a woman cannot bear a child will not be impotency as contemplated by the laws governing divorce. I would like to add to this definition the words “that the condition of the partner is such as to cause aversion or abhorrence in other partner to having intercourse.”

25. Then comes the case of ***Samar* v. *Snigdha*** (AIR 1977 Cal 213). Prior to the amendment of 1976, the ground for nullity under Hindu Marriage Act was “that the respondent was impotent at the time of the marriage and continued to be so until institution ofthe proceedings.” There is a change in law, with the amendment of the relevant provisions which now reads “that the marriage has not been consummated owing to the impotency of therespondent.” While interpreting the amended provisions, the Calcutta High Court has held:-

Sexual intercourse or consummation is sometimes referred to as Vera copula. Vera copula consists of erection and intromission, that is, of erection and penetration by the male of the woman. Full and complete penetration is an essential ingredient of ordinary and complete intercourse. The degree of sexual satisfaction obtained by the parties is irrelevant. Thus where the respondent wife was suffering from the disease of vaginismus and the coitus or complete penetration was not possible, held, the petitioner was entitledto a decree.

27. Mr. Dalvi on the other hand places strong reliance on ***Rajendra Pershad* v. *Shanti Devi*** [AIR 1978 P. & H. 181]. This case also arose after the amendment of the 1976. In this case the wife had a vagina which was only 1½" long. There was an all round septum at the junction of upper 1/3 with the 2/3rd lower of the vagina and the septum loosely admitted of two fingers She was fit for cohabitation and could give birth to children. In cross-examinationshe (the doctor) stated that the organ could go into the vagina easily and that the length of the

vagina was normal and was about 1 ½". She denied that the septum would obstruct the sexual enjoyment of the male partner. She also stated that the wife had told her that she was operated upon in connection with the septum. There was no further cross-examination about the capacity of the respondent for sexual intercourse and to give normal satisfaction to the male partner. The material available as to the condition of wife and on other aspect of the matter was scanty. It is in view of this position that the husband's petition for nullity on the groundof impotency was dismissed and in the last paragraph it was observed:-

> In the absence of any other material, it is impossible to hold that the wife is impotent. Whatever might have been the position at the time of the marriage, it is clear, be it due to the operation or otherwise, that the marriage is now capable of consummation. No decree for annulment of marriage can, therefore, be granted.

This is not an authority for the proposition that if the impotency is cured after the petition, there cannot be a decree for nullity. In the case cited it is not even clear that the impotency existed or was cured after the filing of the petition.

28. However, following observations in the case are material:-

> Before the Marriage Laws (Amendment) Act, 1976, it was necessary to prove that the respondent was impotent at the time of marriage and continued to be so until the institution of the proceedings. As a result of the Marriage Laws (Amendment) Act, 1976, the petitioner has now to establish that the marriage has not been consummated owing to the impotence of the respondent. It is common case that the provisions of Amended Act are attracted in view of the express provisions made by Sec. 39 of the Marriage laws (Amendment) Act, 1976.

As regards the meaning of impotency it is observed:-

> 13. Impotence simply means inability to perform the sexual act. It may be pathological or psychological, permanent or temporary complete or partial. The judgment of Ramaswamy J. in *Rangaswami* v. *Arvindammal*, AIR 1957 Mad 243, contains a full and comprehensive discussion of what impotence means. It is unnecessary to refer to the wealth of literature on the subject. I will confine myself to the consideration of a few cases where problems similar to the one before me had arisen.

Then reference is made to the observation of Dr. Lushington. These observations of Dr. Lushington show that the sexual intercourse in the proper meaning of the term is "ordinary and complete intercourse". It does not mean "partial and imperfect intercourse". He then observes that he cannot go to the length of saying that every degree of imperfection would deprive the intercourse of its essential character. There must be degree difficult to deal with; but if so imperfect as scarcely to be natural (sic) he would not hesitate to say that legally speaking, it is no intercourse at all. Then the observation proceeds to say that if it is curable the marriage cannot be declared void. But that observation appears to be made in the light of the law applicable then. Here as already held by Calcutta High Court, with which I respectfully agree, the question of curability is immaterial and that appears to be the present law in England also as is apparent from the case of ***M.* v. *M***. referred to earlier.

29. In my view, therefore, if the condition of a spouse is such as to make intercourse imperfect or painful it would amount to impotency. Even the aversion or abhorrence shown

by spouse to having intercourse caused by prolapse can amount to impotency. In the present case in my view the respondent was impotent for two reasons. Firstly, it is proved that the respondent resisted all the approaches of the petitioner to consummate the marriage, possibly with a view to conceal the condition or prevent the pain which may possibly result because of the inter-course and secondly because with such a prolapse the intercourse is possible only after manipulation with hands. The sight of the protruding uterus is more likely than not to cool down the ardour and desire of the husband to perform the sexual act resulting in frustration for the husband. Even if the ardour and desire survive the sight of the protruding organ, the manipulation itself will cool it down. In any case an intercourse which demands previous manipulation of the uterus before penetration cannot be said to be an intercourse in the normal way. Therefore, both reasons independently of each other are indicative of impotency and this coupled with non-consummation which I have already held, to have been established entitled the petitioner to annulment of the marriage.

30. The learned trial Judge in my view has not appreciated the evidence properly and has come to erroneous conclusions. He has wrongly not believed the evidence of Dr. Bhatia, particularly when the evidence of the respondent is absolutely unreliable and has failed to appreciate the effect of the evidence of Dr. Bhatia which clearly leads to the conclusion that the respondent was aware of her condition since prior to marriage. He has no doubt strongly relied on the fact that certificate at D-1 did not mention that the respondent was having masturbation for last 3 years though Dr. Bhatia said so in her evidence. He has erroneously come to the conclusion that Dr. Bhatia's enquiry about masturbation was unnecessary: as I have already pointed out she has not been cross-examined on this point and that the question could have arisen naturally in the course of discussion with the respondent. He has failed to take notice of the fact that Dr. Bhatia had maintained notes on the basis of which she was giving evidence and though a question was asked about maintaining of notes to which she replied in the affirmative, she was not called upon to produce the notes. He has disbelieved Ex. D1 which ought not to have been discarded. He has failed to notice material discrepanciesin the evidence of Dr. Pancholi. He has failed to appreciate the fact that the father of the respondent has not stepped in to the box to contradict the evidence of the petitioner that hehad informed the father about the respondent's behaviour on 25th July 1976 and has also not appreciated that the evidence of the respondent is thoroughly unbelievable and useless. In the circumstances, the judgment of the learned Judge cannot stand. He had also failed to notice that there is now change in S. 12 (1) (c) and the position is now different from what it was prior to 1976, when the decision of Malvankar J. was given.

31. In the circumstances, I set aside the Judgment and decree of the trial Court dismissing the petition and make the petition absolute in terms of prayer (a).

32. As regards the quantum of maintenance and alimony it is agreed between Mr. Nesri for the petitioner and Mr. Dalvi for the respondent that the respondent should be paid a lump sum of Rs 13,500/- as and by way of permanent alimony. I pass order for alimony accordingly. This amount will be paid within 2 months from today.

Babui Panmato Kuer v. *Ram Agya Singh*

AIR 1968 Pat. 190

G.N. PRASAD. J. – This is an appeal under section 28 of the Hindu Marriage Act, 1955 (the Act). The appellant is the plaintiff whose petition for dissolution of her marriage with the respondent has been dismissed by the learned Additional District Judge of Saran.

2. The petition was founded on the ground of fraud within the meaning of clause (c) of sub-section (1) of section 12 of the Act.

3. The petitioner was admittedly a little above 18 years of age at the time of the impugned marriage, which took place in May, 1959. Therefore, in order to succeed in the present proceeding the petitioner had to prove that her marriage with the respondent had been solemnized by procuring her consent to the marriage by fraud.

4. The case of the petitioner as made out in the petition and also supported by her ex parte evidence in court is as follows. Just before her marriage had been solemnized she had over-heard her father telling her mother that he had fixed up a husband for the petitioner who was in an affluent financial condition and was between 25 and 30 years of age. Having heard these particulars, the petitioner raised no objection to the proposed marriage; and it might be said that she impliedly consented to the marriage through silence. At the time of solemnization of the marriage, she was, as is customary in a Hindu family, particularly in a rural area, under a heavy veil, in consequence of which she should not see the bridegroom. The bridegroom, viz., the respondent, left on the very next morning of the marriage without petitioner's roksadi having been performed.

Some time in the early part of 1960, the respondent filed a criminal case against her father under section 498, Indian Penal Code. Thereupon, her father, who had earlier declined to send the petitioner to the respondent's house, agreed to her going there and the prosecutionagainst him was withdrawn. On the 15th April, 1960 the father took her to the respondent's house where for the first time in the night she discovered that besides being a man of very ordinary means the respondent was aged even more than her father, that is to say over 60 years She wept and wept, took no food for two days and insisted upon being sent back to her father's house, whereupon the respondent beat her. However she later stealthily escaped to her father's place, but father chided her; and so she left his place as well and took shelter at her uncle's place.

Thereupon, the defendant started another case under section 498, Indian Penal Code, against her parents and uncle. However, the respondent succeeded in taking her to his house, where she was confined in a room. The petitioner again succeeded in escaping from the respondent's house: and this time she took shelter in her nanihal. Ultimately, in March 1961, the petitioner filed the present petition for dissolution of marriage with the respondent on the ground of fraud in the matter of procurement of her consent whereby her marriage was solemnized. According to the petitioner, she had no cohabitation with the respondent at all.

5. The respondent appeared in the proceeding and filed written statement denying the allegations contained in the petition, but he did contest the petition at the time of hearing. The petitioner accordingly pleaded her oath in support of her allegations, which remained

uncontroversial and which have been substantially accepted by the learned Judge to be correct.

6. The learned Judge has, however, rejected the petition substantially on two grounds: (1) that there was no misrepresentation to the petitioner herself inasmuch as the particulars of the bridegroom were not conveyed to the petitioner directly and had been merely over-heard by the petitioner while her father was mentioning them to her mother; and (2) that fraudulent misrepresentation within the meaning of section 12(1)(c) must be made at the time of the solemnization of the marriage and not earlier, that is to say, at the time of negotiations of the marriage.

7. In my opinion, the learned Judge has gone wrong on both these points. "Fraud" has been defined in section 17 of the Contract Act. According to that definition,

> "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> (2) The active concealment of a fact by one having knowledge or belief of the fact;
>
> (3) Any other act fitted to deceive."

Here, the petitioner was sui juris; and, therefore, her consent to the marriage should have been obtained directly, but that was not done; and it was obviously with a view to procuring her consent to the marriage that the particulars of the bridegroom were conveyed to her mother, who, in the circumstances, was acting as her agent in the matter. The suggestions made to the petitioner's mother were in respect of certain facts, which the petitioner's father could not possibly have believed to be true. The petitioner's father must have seen the respondent and he must have known that he was nowhere between 25 and 30 years of age at that time. Therefore, the petitioner's father had made suggestions to the petitioner's agent, viz. her mother, of certain facts which the petitioner's father himself could not possibly have believed to be true.

Even upon the footing that her father intended to procure her consent indirectly employing her mother for the purpose, he had a duty towards her of making true disclosure offacts particularly with regard to the age of the proposed bridegroom. By giving out that the bridegroom was only 25 to 30 years of age, while, in fact, he was in the region of 60 years, the petitioner's father had resorted to the active concealment of a fact which was within his knowledge or belief. If the petitioner's father had conveyed true facts to her mother and yet the petitioner, who overheard the talks, did not protest, then the position could have been materially different. But, here the relevant facts were suppressed from her knowledge, although it was the duty of her father to convey the true position to her. This view receives ample support from illustration (b) to Section 17 of the Central Act.

> Illustration (a) embodies a situation where there is no duty to disclose any defect in the matter which is the subject of bargain between the parties. In the Illustration, mention is made of a horse, which is sold by A to B by auction. Regarding the same

matter, it is provided by Illustration (b) that where the purchaser is a daughter who has just come of age, it is incumbent upon the seller, viz., A, on account of his relation with the purchaser, viz., B, to disclose to B if the horse is unsound. Consequently, in the instant case it was the duty of the petitioner's father to disclose to the petitioner that the respondent was a man of nearly 60 years so that she might befree to give or withhold her consent to the proposed marriage. Therefore, the elements of fraud were undoubtedly present in this case.

8. The learned Judge, is not right in holding that there was no fraudulent misrepresentation to the petitioner since the talks were between her father and her mother. The learned Judge has missed to note the purpose of this talk was to convey relevantinformation to the petitioner through her mother so that the petitioner might be in a positionto give her consent to the proposed marriage. Anybody, who is familiar with the family life of an average Hindu, knows that talks about marriage between a father and a daughter are not carried on directly but are conveyed indirectly through the agency of female relative particularly the mother, if she is available. I am, therefore, of the opinion that there was a fraudulent misrepresentation to the petitioner, intended to procure her consent to the marriage.

9. It is manifest that the impression which was created in the mind of the petitioner by the talks between her father and her mother, continued even at the time of solemnization of the marriage, because upon the evidence it must be held that the petitioner, being under a heavy veil, at the time of the marriage, could have no opportunity to have a look at her husband so as to make her in a position to withdraw her consent even at that stage. However, the evidence disclose that it was not until the 15th April 1960, when the true facts with regard to the age of the respondent came to the petitioner's knowledge.

10. In support of his view that the fraudulent representation envisaged in section 12(1) of the Act must be made at the time of the solemnization of the marriage and not earlier, viz., at the time of settlement of the marriage, the learned Judge has relied upon the decision of a learned single Judge of the Calcutta High Court in ***Anath Nath De* v. *Lajjabati Devi*** [AIR 1959 Cal]. The view taken in the Calcutta case undoubtedly supports the conclusion of the learned Judge in the present case, but the Calcutta view is really not borne out by the terms ofsection 12(1) of the Act. To accede to the Calcutta view would amount to the adding in clause (c) certain words to indicate that the consent was obtained by force or by fraud "at the time of the marriage" but there can be no justification for adding such words in clause (c). It will be noticed that the expression "at the time of the marriage" is to be found in clause (a) as well as in clause (d) but it is non-existent in clause (c). Therefore, the scheme of sectionleaves no room for doubt that in a case falling under clause (c) it is not necessary to prove that consent was obtained by force or fraud at the time of the marriage. All that the section requires is that the consent should have been obtained by force or fraud before the marriage was solemnized. The Calcutta decision has not proceeded upon the examination of thevarious clauses of section 12(1) of the Act. Therefore, with respect, I am unable to follow that decision.

11. In my view, the case of the petitioner falls quite clearly within the ambit of clause (c) of section 12(1) of the Act. I, therefore, set aside the decision of the court below and annul

the petitioner's marriage with the respondent under clause (c) of section 12(1) of the Act. The petition succeeds and this appeal is allowed.

* * * * *

NOTE: In ***Som Dutt*** **v.** ***Raj Kumari*** [AIR 1986 P & H 191], the husband sought annulment of marriage for fraud committed upon him by his wife in concealing her true age from him and thereby inducing him to marry a woman much older than him in age. Date of birth of wife as mentioned in her horoscope compared with that of her husband showed her to be a year younger than her husband. Her matriculation certificate showed her seven years older than her husband. Wife was also suffering from recurrent attacks of hysteria and garruting. Hence, marriage was liable to be annulled due to gross matrimonial fraud committed upon husband with regard to age of his wife as also her mental state.

* * * * *

Seema v. *Ashwani Kumar*

(2006) 2 SCC 578

ARIJIT PASAYAT, J. - The origin of marriage amongst Aryans in India, as noted in Mayne's Hindu Law and Usage, as amongst other ancient peoples is a matter for the Science of anthropology. From the very commencement of the Rigvedic age, marriage was a well-established institution, and the Aryans ideal of marriage was very high.

The Convention on the Elimination of All Forms of Discrimination Against Women (in short 'CEDAW') was adopted in 1979 by the United Nations General Assembly. India was a signatory to the Convention on 30th July, 1980 and ratified on 9th July, 1993 with two Declaratory Statements and one Reservation. Article 16(2) of the Convention says "though India agreed on principle that compulsory registration of marriages is highly desirable, it was said as follows:

> It is not practical in a vast country like India with its variety of customs, religions and level of literacy' and has expressed reservation to this very clause to make registration of marriage compulsory.

While a transfer petition was being heard it was noted with concern that in large number of cases some unscrupulous persons are denying the existence of marriage taking advantage of the situation that in most of the States there is no official record of the marriage. Notice was issued to various States and Union Territories and learned Solicitor General and Mr. Ranjit Kumar, learned senior counsel were requested to act as Amicus Curiae to assist the Court in laying down guidelines in the matter of registration of marriages. Without exception,all the States and the Union Territories indicated their stand to the effect that registration of marriages is highly desirable.

It has been pointed out that compulsory registration of marriages would be a step in the right direction for the prevention of child marriages still prevalent in many parts of the country. In the Constitution of India, 1950 (in short the 'Constitution') List III (the ConcurrentList) of the Seventh

Schedule provides in Entries 5 and 30 as follows:

> 5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.
>
> 30. Vital statistics including registration of births and deaths.

It is to be noted that vital statistics including registration of deaths and births is covered by Entry 30. The registration of marriages would come within the ambit of the expression ‘vital statistics’.

From the compilation of relevant legislations in respect of registration of marriages, it appears that there are four Statutes which provide for compulsory registration of marriages. They are: (1) The Bombay Registration of Marriages Act, 1953 (applicable to Maharashtra and Gujarat), (2) The Karnataka Marriages (Registration and Miscellaneous Provisions) Act,

1976, (3) The Himachal Pradesh Registration of Marriages Act, 1996, and (4) The Andhra Pradesh Compulsory Registration of Marriages Act, 2002. In five States provisions appear to have been made for voluntary registration of Muslim marriages. These are Assam, Bihar, West Bengal, Orissa and Meghalaya. The "Assam Moslem Marriages and Divorce Registration Act, 1935," the "Orissa Muhammadan Marriages and Divorce Registration Act, 1949" and the "Bengal Muhammadan Marriages and Divorce Registration Act, 1876" are the relevant statutes. In Uttar Pradesh also it appears that the State Government has announced a policy providing for compulsory registration of marriages by the Panchayats and maintenanceof its records relating to births and deaths. Under the Special Marriage Act, 1954 which applies to Indian citizens irrespective of religion each marriage is registered by the Marriage Officer specially appointed for the purpose. The registration of marriage is compulsory under the Indian Christian Marriage Act, 1872. Under the said Act, entries are made in the marriage register of the concerned Church soon after the marriage ceremony along with the signatures of bride and bridegroom, the officiating priest and the witnesses. The Parsi Marriage and Divorce Act, 1936 makes registration of marriages compulsory. Under Section 8 of the Hindu Marriage Act, 1955 (in short the 'Hindu Act') certain provisions exist for registration of marriages. However, it is left to the discretion of the contracting parties to either solemnize the marriage before the Sub-Registrar or register it after performing the marriage ceremony in conformity with the customary beliefs. However, the Act makes it clear that the validity of the marriage in no way will be affected by omission to make the entry in the register. In Goa,the Law of Marriages which is in force in the territories of Goa, Daman and Diu w.e.f. 26.11.1911 continues to be in force. Under Articles 45 to 47 of the Law of Marriages, registration of marriage is compulsory and the proof of marriage is ordinarily by productionof Certificate of Marriage procured from the Register maintained by the Civil Registrar and issued by the concerned Civil Registrar appointed for the purpose by the Government. The procedural aspects about registration of marriages are contained in Articles 1075 to 1081 of the Portuguese (Civil) Code which is the common Civil Code in force in the State. It is pointed out in the affidavit filed on behalf of the respondent-State of Goa that the Hindu Actis not in force in the said State since it has not been extended to the State either by the Goa, Daman and Diu Laws Regulations, 1962 or by the Goa, Daman and Diu Laws No.2 Regulations, 1963 by which Central Acts have been extended to the State after the liberation of the State. Procedure for marriages is also provided in Code of Civil Registration (Portuguese) which is in force in the State. The Foreign Marriage Act, 1969 also provides for registration of marriages.

As noted above, the Hindu Act enables the State Government to make rules with regard to the registration of marriages. Under Sub-section (2) of Section 8 if the State Government is of the opinion that such registration should be compulsory it can so provide. In that event, the person contravening any rule made in this regard shall be punishable with fine.

In various States different marriage Acts are in operation e.g. in Jammu and Kashmir, Jammu and Kashmir Hindu Marriage Act, 1980 empowers the Government to make rules to provide that the parties (Hindus) shall have their particulars relating to marriages entered in such a manner as may be prescribed for facilitating proof of such marriages. Admittedly, no rules have been framed. As regards Muslims, Section 3 of the Jammu and Kashmir Muslim

Marriages Registration Act, 1981 provides that marriage contracted between Muslims after the commencement of the Act shall be registered in the manner provided therein within 30 days from the date of conclusion of Nikah ceremony. However, the Act has not been enforced. So far as Christians are concerned, the Jammu and Kashmir Christian Marriage andDivorce Act, 1957 provides for registration of marriages in terms of Sections 26 and 37 for registration of marriages solemnized by Minister of Religion and marriages solemnized by, orin the presence of a Marriage Registrar respectively.

In exercise of powers conferred by Section 8 of the Hindu Act the State of U.P. has framed U.P. Hindu Marriage Registration Rules, 1973 which have been notified in 1973. In the affidavit filed by the State Government it is stated that the marriages are being registered after enactment of the Rules.

In Pondicherry, the Pondicherry Hindu Marriage (Registration) Rules, 1969 have come into force w.e.f. 7th April, 1969. All Sub-Registrars of Pondicherry have been appointed under Section 6 of the Indian Registration Act, 1908 (in short the 'Registration Act') as Marriage Registrars for the purposes of registering marriages. In the State of Haryana, the Haryana Hindu Marriage Registration Rules, 2001 under Section 8 of the Hindu Act have been notified. In the State of West Bengal, Hindu Marriage Registration Rules, 1958 have been notified.

From the affidavit filed on behalf of the State of Tripura, it appears that the said State has introduced rules called Tripura Hindu Marriage Registration Rules, 1957. It has also introduced Tripura Special Marriage Rules, 1989 under the Special Marriage Act, 1954. Sofar as the State of Karnataka is concerned, it appears that Registration of Hindu Marriages (Karnataka) Rules, 1966 have been framed. It further appears that Karnataka Marriages (Registration and Miscellaneous Provisions) Act, 1976 has been introduced. Section 3 of the Act requires compulsory registration of all marriages contracted in the State. So far as the Union Territory of Chandigarh is concerned, Hindu Marriage Registration Rules, 1966 have been framed.

In the affidavit filed on behalf of the National Commission for Women (in short the 'National Commission') it has been indicated as follows:

> That the Commission is of the opinion that non-registration of marriages affects the most and hence has since its inception supported the proposal for legislation on compulsory registration of marriages. Such a law would be of critical importance to various women related issues such as:
>
> (a) prevention of child marriages and to ensure minimum age of marriage.
> (b) prevention of marriages without the consent of the parties.
> (c) Check illegal bigamy/polygamy
> (d) Enabling married women to claim their right to live in the matrimonial house, maintenance, etc.
> (e) Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband.
> (f) Deterring men from deserting women after marriage.
> (g) Deterring parents/guardians from selling daughters/young girls to any person

including a foreigner, under the garb of marriage.

As noted supra, except four statutes applicable to States of Maharashtra, Gujarat, Karnataka, Himachal Pradesh and Andhra Pradesh registration of marriages is not compulsory in any of the other States.

As is evident from narration of facts though most of the States have framed rulesregarding registration of marriages, registration of marriage is not compulsory in several States. If the record of marriage is kept, to a large extent, the dispute concerning solemnization of marriages between two persons is avoided. As rightly contended by the National Commission, in most cases non registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place. Though, the registration itself cannot be a proof of valid marriage per se, and would not bethe determinative factor regarding validity of a marriage, yet it has a great evidentiary valuein the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage. That being so, it would be in the interest of the society if marriages are made compulsorily registrable. The legislative intent in enacting Section 8 of the Hindu Marriage Act is apparent from the use of the expression "for the purpose of facilitating the proof of Hindu Marriages".

As a natural consequence, the effect of non registration would be that the presumption which is available from registration of marriages would be denied to a person whose marriage is not registered.

Accordingly, we are of the view that marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable in their respective States, where the marriage is solemnized.

Accordingly, we direct the States and the Central Government to take the following steps:

(i) The procedure for registration should be notified by respective States within three months from today. This can be done by amending the existing Rules, if any, or by framing new Rules. However, objections from members of the public shall be invited before bringing the said Rules into force. In this connection, due publicity shall be given by the States and the matter shall be kept open for objections for a period of one month from the date of advertisement inviting objections. On the expiry of the said period, the States shall issue appropriate notification bringing the Rules into force.

(ii) The officer appointed under the said Rules of the States shall be duly authorized to register the marriages. The age, marital status (unmarried, divorcee) shall be clearly stated. The consequence of non-registration of marriages or for filing false declaration shall also be provided for in the said Rules. Needless to add that the object of the said Rules shall be to carry out the directions of this Court.

(iii) As and when the Central Government enacts a comprehensive statute, the same shall be placed before this Court for scrutiny.

(iv) Learned counsel for various States and Union Territories shall ensure that the directions given herein are carried out immediately.

The Registry is directed to handover a copy of this order to learned Solicitor General for necessary follow-up action.

Kailash Wati v. *Ajodhia Parkash*

1971 CLJ 109 (P & H)

S. S. SANDHAWALIA, J. – Does the Hindu Marriage Law countenance or sanctify the concept of (what may be conveniently so called) a weekend marriage as of right at the unilateral desire of the wife, is the rather interesting and significant question which falls for determination by this Full Bench.

2. Originally before the Letters Patent Bench, two questions had arisen upon which there was apparent conflict of authority, and had thus necessitated this reference. Firstly, whether the relief of conjugal rights could be declined to a husband on any other ground except those envisaged in the then unamended section 9 of the Hindu Marriage Act? Allied thereto was the ancillary issue of the burden of proof therefore. Secondly, whether a wife, who was gainfully employed at a place away from her matrimonial home, would be justified in law to refuse to leave her job and join her husband to live in the matrimonial home despite the insistent demand of the husband to do so? The first question upon which the various High Courts had differed, as noticed in the referring order, now stands amply resolved by the recent amendment of section 9 of the Marriage Laws (Amendment Act of 1976). Section 3 of this Act now provides that sub section (2) of section 9 shall be omitted and further that the following explanation shall be added to the original sub section (1)-

> Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person whohas withdrawn from the Society.

3. The appellant Smt. Kailash Wati was married to the respondent Ajodhia Parkash on the 29th June, 1964, and at that time both of them were employed at village level teachers-the appellant at her parental village of Bilga in Tehsil Phillaur and the respondent at village Kot Ise Khan. After the Marriage, the appellant was transferred to the station of her husband's posing and in all they stayed together in the matrimonial home for a period of 8 to 9 months. The allegation of the respondent-husband which is well borne out from the record is that the appellant maneuvered to get herself transferred again to village Bilga and virtually ever since has been residing there with her parents against his wishes. It is the common case that but for a paltry spell of 3 or 4 days in September, 1971 when the appellant accompanied therespondent to Moga, the couple has not lived together. Ajodhia Parkash respondent, therefore, filed an application for the restitution of conjugal rights under section 9 of the Hindu Marriage Act (hereinafter called as the Act) on the 4th of November, 1971, and in her written statement the appellant took up the plea that she had never refused to honour her matrimonial obligations but was firm in her stand that in the existing situation she would not revert to the matrimonial home. It was categorically stated that she was not prepared to resignher job and to return to the conjugal home despite the insistence of the respondent. The Trial Court decreed the suit of the husband respondent on the 5th of February, 1973. On an appeal preferred by the wife the learned Single Judge, whilst placing reliance on a Single Bench judgment of this court reported in ***Smt. Tirath Kaur*** **v.** ***Kirpal Singh*** [AIR 1964 Pun. 28] upheld the findings and the decree of the trial court. It, however, deserves mention forth with that the view in ***Smt Tirath Kaur*** case above mentioned was substantially modified

(apparently by way of compromise) by the Letters Patent Bench on the 2nd of December, 1963, but the judgment appears to have been reported rather belatedly in ***Smt Tirath Kaur* v. *Kirpal Singh.***

4. Here I come to the legal issues involved, it is apt to notice with some precision the firm stands taken on behalf of each of the contending spouses which has been accepted by the court below. The husband's stand is that even at the time of the original presentation of the petition in 1971, his wife had unilaterally withdrawn from the matrimonial home for a continuous period of six years He claims to be in a position to maintain his wife in dignified comfort at his place of posting with his salary, income from agricultural land and from other sources. It is highlighted on his behalf that for the twelve long and best years of his life the wife has denied him the society and substance of conjugal life and if she persists in her adamance, there is little possibility of her returning home till perhaps her superannuation from Government service.

5. On the other hand the wife's consistent position is that the husband at the time of marriage with his eyes open had accepted her as a working wife and she was, therefore, under no obligation to live with her husband because considerations of employment prevented her to do so. She claims a right to live separately because of the fact of her posting elsewhere. Her stand is that she has never positively denied access to her husband as and when possible in the peculiar circumstances and in her own words (in the written statement) she avers-

> (T)he respondent never refused to go with the petitioner on holidays. Hence she is justified in not leaving service and thus accompanying him….

In her statement on oath in court she was even more forthright at the stage of the examination-in-chief in the following terms:-

> (T)he petitioner also insists that I should leave the job. I am not prepared to leave the service and thus reside with the petitioner on that condition….

It deserves notice that even at the stage of argument before us the stand of the learned counsel for the appellant still was that the appellant wife was willing to allow access to her husband as an when it may be possible at her place of posting at Bilga where she was residing with her parents. In the present case where both the spouses are employed at a place more than eighty miles apart, the practical position is that the husband might on an alternative week end or on any holiday make a visit to his wife and perhaps at her option the wife if so inclined may return a visit in similar circumstances.

6. From the aforesaid stand of the quarrelling spouses, the direct issue that arises herein is whether the hallowed concept of the matrimonial home can be whittled down to a weekend or an occasional nocturnal meeting, at the unilateral desire of the wife to live separately?

7. In examining this question it may first be forthrightly stated that such an arrangement poses not the least difficulty where the two spouses willingly agree to the same. Indeed in the peculiar circumstances of modern times such a situation arises quite often and perhaps is likely to arise with greater frequency in the future. So long as it is consensual such an arrangement may indeed be to the mutual benefit of both the spouses. In this country with its paucity of employment, instances are not lacking where as the wage earner husband is

compelled to live far apart from the matrimonial home and returns to live with his wife and family for perhaps a fragmentary portion in a whole year. Similarly the wife may be so gainfully employed and the husband so willing in such an arrangement that she may conveniently live elsewhere and either return to conjugal home occasionally or meet the husband elsewhere as and when possible. To emphasise the point as long as the matter is consensual the spouses may not only live separately but may even live separate in countries without in any way either jeopardising their marriage or infringing their legal duties to each other. The difficulty or the legal conundrum arises only when the wife unilaterally breaks away from the matrimonial home and claims a legal right to live apart on the ground of having been already employed prior to the Marriage or having procured employment thereafter.

8. I do not propose in the first instance to examine this issue from the standpoint of the dicta of Hindu Sages which might look somewhat archaic in modern times. The Hindu Marriage Act has made significant and radical changes in the earlier concept of HinduMarriage, as a sacrament. However on matters which are not directly covered by the provisions of this Act, the Hindu Law is binding and consequently reference thereto would be inevitable. However at this stage it is both instructive and refreshing to examine the matter ongeneral principles.

9. To my mind, the idea of the matrimonial home appears to lie at the very centre of the concept of marriage in all civilised societies. It is [sic] indeed around it that generally the marriage tie revolves. The home epitomizes the finer nuances of the marital status. The bundle of indefinable right and duties which bind the husband and the wife can perhaps be best understood only in the context of their living together in the marital home. The significance of the conjugal home in the marriage tie is indeed so patent that it would perhapsbe wasteful to elaborate the same at any great length. Indeed, the marital status and the conjugal home have been almost used as interchangeable terms.

While the meaning of the term 'conjugal rights' is vague and indefinite, it has been defined as matrimonial rights; the right which husband and wife have to each other's society, comfort and affection. Marital or conjugal rights include the enjoyment of association, sympathy, confidence, domestic enjoyment of association, sympathy, confidence, domestic happiness, the comforts of dwelling together in the same habitation, eating meals at the same table and profiting by the joint property rights as well as the intimacies of domestic relations."

It is evident from the above that withdrawal from the matrimonial home by either spouse would inevitable involve a total or partial loss of consortium to either spouse and, as noticed earlier, consortium lies at the very root of the marital relationship. The issue, therefore, is whether a wife (on one ground or another) and in particular for reasons of employment can unilaterally withdraw from the marital home and substitute therefore a mere right of access to the husband as and when it may be possible for him to do so.

10. To particularise, three situations obviously come to the mind in such a withdrawal by the wife from the matrimonial home. The first one is, as in the present case, where the husband marries a woman already in public or private service. Does he by doing so impliedly give up his right to claim a common matrimonial home with his wife? I feel, the answer to

this must necessarily be returned in the negative for reasons which appear in detail hereinafter. Indeed, to my mind, the true position in law appears to be that any working woman entering into matrimony, by necessary implication consents to the obvious and knownmarital duty of living with a husband as a necessary incident of Marriage. As already noticed earlier, if by common consent the parties agree to live apart, there can obviously be not the least objection. However, the mere fact of a marriage of two working spouses does not, in myview, without more, entitle either one of them to claim that (because of that fact) each one of them is entitled to live apart. Such a claim would be robbing the marriage of one of its essential ingredients. Therefore, far from there being any implicit waiver of the husband's right to claim the society of his wife in the home set up by him, there is on the other hand a clear acceptance of the marital obligation to live with the husband by a working wife when she knowingly enters the bonds of matrimony.

11. To obviate any hardship, I may perhaps mention that though by implication such right to live separately arises to the wife in the situation envisaged above, it may perhaps be possible for the parties to expressly bind themselves to this effect by a clear agreement. It has been held in English Law that a mutual agreement by husband and wife not to insist on the right and obligation of each to live together is not against public policy. However, the matter has not been at all debated before us in this light and I would, therefore, refrain from expressing any final opinion one way or the other. This is particularly so because here we are concerned with the concept of marriage according to Hindu Law which certainly has very distinctive features of its own.

12. The second possibility that arises is where a husband either encourages or at least allows his wife to take up employment after marriage. Does he by doing so again abandon his legal right of having his wife live within the matrimonial home? Herein again, to my mind, the answer would be in the negative. A particular situation or financial circumstances at oneor the other stage of marriage, require that both the spouses may have to seek work. In such a situation, either by mutuality or even at the instance of the husband, a wife might obtain gainful employment away from the matrimonial home. Merely from this to infer that thereafter the said condition must necessarily continue or a permanent right accrues to the wife to live away from the matrimonial home on the ground of employment elsewhere, does not appear to me as supportable either on principle or authority. As noticed earlier, in such a position also the rights of the parties may perhaps be capable of change by express agreement. I would however, firmly opine that no necessary inference arises from the mere fact of a husband at one or the other stage having consented to his wife's taking employment that thereafter he would not be entitled to claim her society and companionship within the matrimonial home.

13. The third and the last situation does not present any serious difficulty. This is where a wife against the wishes of her husband accept employment away from the matrimonial home and unilaterally withdraws therefrom. This, to my mind, would be an obvious case of a unilateral and unreasonable withdrawal from the society of the husband and thus a patent violation of the mutual obligation of husband and wife to live together.

14. The view expressed in the context of the aforesaid three situations, however, is subject to two plain qualifications. Firstly, the husband must actually establish a matrimonial

home wherein he can maintain his wife in dignified comfort in accordance with the means and standards of living of the parties. Secondly, it must be crystal clear that the husband whilst claiming the society of his wife in the marital home should be acting in good faith and not merely to spite his wife.

Where the demand to return to the matrimonial home is made *mala fide* and with an intention to spite the wife or with an intent to thrust her into committing a matrimonial offence then obviously the wife in those special circumstances may have a reasonable causein refusing to return to the husband.

15. With the aforesaid two qualifications, it appears to me that on general principles alone a wife is not entitled to unilaterally withdraw from the matrimonial home and live elsewhere merely by taking shelter behind the plea that she would not deny access to the husband as and when possible. Considerations only of employment elsewhere also would not furnish her reasonable ground for withdrawal from the society and companionship of the husband which in practical terms is synonymous with withdrawal from the matrimonial home.

16. The aforesaid conclusion, however, does not adequately resolve the legal tangle. It was forcefully pressed before us on behalf of the appellant that even though the wife may not be entitled to withdraw from the conjugal home at her own wish, yet the crucial issue still isas to locus of the matrimonial home. It was in terms contended that in the present times the husband had no superior right to determine the location of the matrimonial and the wife was equally entitle to do so. In the particular context of this case, it was suggested that the husband was welcome to set up house with the wife at her place of posting and thus live with her. Indeed in all seriousness, it was urged that in case of the working spouses the wife is equally in a position to claim and perhaps command if she is in a superior financial status thatthe husband should come and live with her at a place of her choice.

17. The issue squarely arises and it would be shirking one's duty if it is not frontally faced. If a unilateral withdrawal from the matrimonial home is deemed to be unwarranted by law, then it must necessarily be determined as to where the locus of the matrimonial home is to be.

18. As would be apparent from the discussion hereafter, the issue is not free from difficulty but nevertheless commands a clear and categorical answer unless the law is to be left in a vacillating state. As in the context of the earlier question, it is first useful to examine this matter also *dehors* the strict rules of Hindu Law and upon larger principles. However,two broad factors must always be kept in the background. Firstly, that almost as a matter of unanimity all civilised marriage law impose upon the husband a burden to maintain not only the wife but also the children from the wedlock, whilst there is no such corresponding obligation on the wife to maintain either the husband or the family despite the fact that she may independently be in comfortable financial circumstances. Closely connected to this legal liability is the factor that the husband usually, if not invariable, is the wage earner of the family and is thus compelled to live near his place of work. It stands to reason, therefore, that the right of choosing a home wherefrom he can effectively discharge his legal duty of being the bread winner of the family should fall upon him:

> I want to say a word also on the proposition that a husband has the right to say where the home should be, for indeed, it is the same fallacy in anthor form. If the proposition were a proposition of law it would put a legal burden on the wife to justify her refusal; but it is not a proposition of law and I am sure Henn C lins J. in ***Mansey* v. *Mansey***, did not intend it as such. It is simply a proposition of ordinary good sense arising from the fact that the husband is usually the wage earner and hasto live near his work. It is not a proposition which applies to all cases. The decision where the home should be is a decision which affects both the parties and their children. It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over that of the other. Each is entitled to an equal voice in the ordering of the affairs which are their concern. Neither has a casting vote, though to be sure they should try so to arrange their affairs that they spend their time together as a family and not apart.

19. Coming now to the rationale of the view expressed by Denning L. J. in ***Dunu*** case, it is, of course, a commonplace that the decision of the locus of the matrimonial home affects all the three parties, namely the husband, the wife and the children. Equally plain it is that where possible they should decide the location of the home with reasonableness and mutuality and in a spirit of give and take. This is indeed a case of perfection and if it were always so possible, there need necessarily be no reason for a rule of law on the point. However, cases are galore where it is not so possible. The difficulty and the necessity for a rule of law obviously arises where the parties are not in agreement and neither side is either considerate enough or willing to attribute reasonableness to the other. In such a situation it appears to me that it is the duty of the law to decide between them and lay down a clear ruleof conduct. Not doing so would perhaps be evading the issue and would leave the law in a state of flux where neither of the parties would know as to where they stand. To leave each individual case to the trial Judge for deciding as to the reasonableness or unreasonableness of the view of the either spouse regarding the choice of a home would make the parties mere grist to the mill of litigation. As noticed above, it appears to be well settled that the husbandin the choice of the home must be acting *bona fide* and not merely to spite the wife. However,once this pre-requisite is there, then the issue of the reasonableness or unreasonableness ofthe choice of a matrimonial home becomes ethereal and so and so thin a line would their bounds divide that it would perhaps be placing an equally unreasonable burden in every case on the trial Judge to adjudicate between the contending choice of a place to live can sometimes be so entirely subjective and conditioned by so many variables that to call either view reasonable or otherwise would become extremely difficult.

20. I would, therefore, conclude that even on general principles, subject to the qualification of the husband acting *bona fide,* he is entitled in law to determine the locus of the matrimonial home.

21. I have so far considered the matter in the larger perspective and on general principles and it remains to examine the same in the special context of our own statutes and the dictates of Hindu Law. Herein, what deserves particular notice is the legal obligation which both the general and the Hindu Law attach to the status of the husband. What may first be borne in mind is the fact that even under the general law a husband is bound to support his wife and

children, both legitimate and illegitimate. Reference in this connection may be made to the relevant portions of section 125(1) of the Criminal Procedure Code, 1973:-

> 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 reasons of any physical or mental abnormality or injury unable to maintain itself, or
>
> (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct.

Further by virtue of sub-section (3) of section 125 of the Criminal Procedure Code, 1973, the allowance in favour of the wife or the children is recoverable by issuing of a warrant for levying the amount due in the manner provided for levying fines and the husband or thefather is further liable to imprisonment for a term which may extend to one month for each month's allowance or part thereof which remains unpaid until he complies with the order. It isplain from the provisions of section 125 of the said Code that apart from the rules of Hindu Law, a husband is obliged to maintain his wife and family on pain of stringent processes on par with these applicable in the field of criminal law itself. Reference to the earlier section 488 of the Criminal Procedure Code, 1898, would show that this obligation has indeed been heightened by the new Code.

22. Coming now to the rules of Hindu Law itself, it is instructive to first refer to section 18 of the Hindu Adoption and Maintenance Act, 1956. The relevant part thereof is in the following terms:-

> 18(1). Subject to the provisions of the section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.
>
> (2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,-
>
> (a) if he guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or willfully neglecting her;
>
> (3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to other religions.

It is obvious from the above quoted provisions that a general right inheres in Hindu wife to be maintained by her husband during her lifetime and in the special circumstances of prescribed matrimonial misconduct by the husband, she is even entitled to live separately and

nevertheless claim maintenance from him. This ancillary right, however, is forfeited if she is unchaste or converts herself to another religion.

23. Section 22 of the said Act further lays down an obligation on the heir of a deceased Hindu (subject to the qualification laid down) to maintain the dependents of the deceased out of the estate inherited by him. Section 19 of the said Act further provides for the obligation of a Hindu to maintain his widowed daughter-in-law in the circumstances spelled out in that section. In this context it has to be kept in mind that by virtue of section 3(b) of this Act, maintenance herein includes the provision for food, clothing, residence, education and medical assistant and treatment in all cases and in the particular case of an unmarrieddaughter also the reasonable expenses of and incident to her marriage. Reference in passing must also be made to section 6 of the Hindu Minority and Guardianship Act, 1956. From the provisions thereof, it is evident that though a Hindu father is the natural guardian of his minorchildren, yet the custody of infants up to the age of 5 years is ordinarily to be with the mother.Therefore, in a particular situation a Hindu father is obliged to maintain a child below the age of 5 years even though such a child may be in the custody of his wife living separately due to estrangement.

24. It is thus plain from even a bird's eye view of the aforementioned statutory provisions that Hindu Law impose clear and sometimes burden some obligations on a Hindu male. He is bound to maintain his wife during her lifetime Equally, he must maintain his minor children and this obligation is irrespective of the fact whether he possesses any property or not. The obligation to maintain these relations is personal and legal and it arises from mere fact of the existence of the relationship between the parties. Further, the sacred concept of the Hindu family, which has apparently received statutory recognition, obliges the Hindu male to maintain his unmarried daughter and his aged or infirm parents in the eventuality of their being unable to maintain themselves. With certain qualifications, the obligation to maintain a widowed daughter-in-law and the dependents of a deceased from whom any property may be inherited would also fall upon the Hindu male. As against this, the thing is that the Hindu wife even though in independently prosperous financial circumstances is under no similar obligation to maintain her husband and perhaps in his presence is not obliged to support even the children of the family.

25. The issue arises whether the Hindu male is entitled to discharge the aforementioned onerous obligation in a home of his own choice or is he even further obliged to sustain his wife and children at a place other than where he may choose to reside. Other things apart, particular attention deserves to be focused in this context on the children born out of the wedlock. If the wife were to be unilaterally entitled to live apart from a husband, then where indeed is the place of the children in a house so divided? Should a husband be obliged to discharge his legal duty of the custody and maintenance of his infant and minor children whilst the wife chooses to live away from him? Then, should the wife be entitled to claim the custody and control of the infant children at a place away from the matrimonial home and yet claim maintenance from the father in view of his legal obligation to maintain them? To my mind, the answer to these questions is a plain and categorical one. The onerous obligation, which the law imposes on the Hindu husband, is at least co-related to the right to determine the location of the matrimonial home. To put it in other words, as against the right of

maintenance always inhering a Hindu wife, there is a corresponding obligation to live together with the husband in his home. That rights and duties must concur, is a principle which is too elementary to deserve elaboration. In my view, therefore, the logical concomitant to the obligation to maintain the wife and the family by the Hindu husband isthat he at least has the right to claim that the wife shall live with him in a matrimonial home determined by his choice.

26. Coming now to the specific rules of Hindu Law, these appears to be unmistakable unequivocal. It, therefore, suffices to refer to the statement of the law in the authoritative treatise Mulla's ***Principles of Hindu Law*** contained in paras 442 and 555 thereof:-

> 442 Marital duties- (1) *The wife is bound to live with the husband and to submit herself to his authority.* And agreement enabling the wife to avoid a Marriage or to live separate from her husband if he leaves the village in which his wife, and her parents reside, or ifhe marries another wife, is void. Such an agreement is against public policy and contrary to the spirit of the Hindu law. An agreement of this kind is no answer to a suit for restitution of conjugal rights by a husband against his wife.
>
> (2) The husband is bound to live with his wife and to maintain her.
>
> **555. Separate residence and maintenance**.- (1) A wife's first duty to her husband is to submit herself obediently to his authority, *and to remain to under his roof and protection.*- She is not, therefore, entitled to separate residence or maintenance, unlessshe proves that, by reason of his misconduct or by his refusal to maintain her in his own place or residence or for other justifying cause, she is compelled to live apart from him.

The above quoted statement of the law is so plain as to require no further elaboration. Indeed the learned counsel for the appellant did not attempt to place any contrary construction on the same but merely argued that these rules were no longer applicable in viewof section 4 of the Hindu Marriage Act. This contention is without substances. That section merely provides for exclusion of those rules of Hindu Law with respect to specific matter for which provision has been made in the Hindu Marriage Act. Plainly enough this Act does not even remotely attempt to define the general marital duties and obligations of the husband and the wife to each other. Therefore, the applicable rules of Hindu Law cannot possibly be excluded from their valid field of operation. Similarly sub-clause (b) of section 4 only provides that a ny other law which is inconsistent with any of the provisions of Hindu Marriage Act shall cease to have effect in so far as it inconsistent with any of the provisions contained in the said Act. Learned counsel for the appellant has been wholly unable to point out any provision in the Hindu Marriage Act which is inconsistent or in conflict with the rulesof Hindu Law quoted above.

27. Under Hindu law, the obligation of the wife to live with her husband in his home and under his roof and protection is clear and unequivocal. It is only in the case of some distinct and specified marital misconduct on the part of the husband, and not otherwise, that Hindu law entitles the wife to live separately and claim maintenance therefore. This marital obligation has been further buttressed by clear statutory recognition by section 9 of the HinduMarriage Act. This provides for an immediate remedy where either of the spouses falters in

his or her obligation to provide the society and sustenance to the other. Indeed, the obligation to live together under a common roof is inherent in the concept of a Hindu Marriage and, to my mind, it cannot be torn unilaterally by the desire of the wife to live separately and away from the matrimonial home merely for the reason of either securing or holding a job elsewhere. Such an act would be clearly in violation of a legal duty and it is plain, therefore that this cannot be deemed either reasonable or a sufficient excuse for the withdrawal of the wife from the society of her husband, as visualised under section 9 of the Act.

28. Again, under Hindu Law, it is more than amply clear that the husband is entitled to determine the locus of the matrimonial home. Indeed, the obligation here is on the part of the wife to remain with him and under his roof. It deserves repetition that this legal obligation on the part of the wife is not without its co-related right. The husband in Hindu Law is obliged to maintain his wife during her lifetime and equally is under heavy obligations to sustain the minor children from the wedlock, the unmarried daughters till their marriage, his aged and infirmed parents unable to maintain themselves, and a host of other duties to which detailed reference has been made in the earlier part of the judgment.

29. It was said that the view I am inclined to take is titled a little in favour of the husband. A closer and incisive analysis would, however, show that this is not necessarily so. Indeed, a contrary view or even vacillating statement of the law would be more burdensome not only to one but to both of the spouses. The concept of the Hindu Marriage of earlier time has slid down from its high alter of being sacramental to the more mundane concept where the rights and the duties of the wife are governed by status, though as yet it has not reached the stage of being a mere civil contract as in some western countries. The Hindu Marriage Act now provides for the restitution of conjugal rights, judicial separation, divorce annulment ofmarriage, and a number of other conjugal reliefs. As is evident from the recent and substantialchanges brought about in the Hindu Marriage Act (which have substantially relaxed the conditions and the grounds of divorce etc.), Hindu Marriage Law now no longer conceives marriage either as a sacrament or viewed from a rather cynical angle as a chain which shackles unwilling spouses together irrevocably. It is best perhaps that in present time it should be a silken bond between affectionate spouses or at least cooperative partners Where both of them cannot even mutually agree upon sometime so basic as either living apart (may be for reasons of the wife's employment) or even upon a common place to live together, then it is plain that the marriage has reached dangerously near that precipice which, in legal terminology, has been summarised as-that it has irretrievably and irrevocably broken down.In such a situation (as modern trends and the recent change in law shows) it is obviously in the interest of the both that they should clearly and determinedly make their choice and decide to part and go their individual ways rather than be condemned by the law to live together unhappily ever afterwards.

30. Testing the present case on the touchstone of the abovementioned legal conclusions, it is plain that this appeal cannot succeed. Even on facts it is evident, and therefore, the courts below are right in holding, that the appellant wife here deliberately and ingeniously secured her transfer away from the matrimonial home and the place of posting of the respondent husband at Kot Ise Khan in order to go back to her parental village at Bilga. For the lastnearly one decade the wife has virtually refused to live with her husband except for a paltry

spell of the two or three days and that also under some pressure. She is categorical in her stand that she would not confirm to her legal obligation to live with her husband for the sake of job even though he is willing and is in a position to support her in reasonable comfort in accordance with the style of life to which the parties are used to. The time perhaps has come when the appellant must make her choice between the job and the husband. A unilateral withdrawal from the society of her husband in the present situation cannot possibly be deemed a reasonable excuse so as to come within the ambit of the definition provided under section 9 of the Hindu Marriage Act. As was said earlier an act contrary to a legal obligation obviously cannot be deemed reasonable for the purpose of this provision. The respondent husband her has waited patiently in the wings for the best part of his life and it would perhapsbe bordering on the cruel to require him to keep on waiting endlessly in suspense. The appeal is without merit and is hereby dismissed. The parties are, however, left to bear their own costs.

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Swaraj Garg v. *K. M. Garg*

AIR 1978 Del. 296

V. S. DESHPANDE, J. - When the husband and the wife are both gainfully employed at two different places from before their marriage, where will be the matrimonial home after the marriage? With more and more women taking up jobs and wanting to retain them even after their marriage, the question becomes increasingly important, topical and controversial. It has arisen in this case and requires consideration in some depth.

2. The wife, Swaraj, was working as a teacher at Sunam, District Sangrur, from 1956 and was the Headmistress of Government High School, when she was examined as a witness in 1969. The parties were married on 12th July, 1964 at Sunam. The husband was abroad for some years and though he seems to be well qualified he did not get a satisfactory job in India.He was employed in M/s. Hastinapur Metals from Sept., 1966 to Sept., 1967 at Rs 500/- p.m. without any allowances and from 14th Sept., 1967 by Master Sathe and Kothari at Rs 600/- p.m. without any other allowances. The father of the wife, a petition writer, lives at Sunam, while the father of the husband, a farmer, lives at Village Lehra. The husband has no house in Delhi of his own. Before the marriage or at any time after the marriage the parties did not discuss, much less come to any agreement, as to where their matrimonial home should be after the marriage. Therefore, even after the marriage the wife continued to live at Sunam andthe husband at Delhi. The wife came to Delhi to live with her husband from 12th July, 1964to 28th Aug., 1964 and then went back to Sunam on 2nd Feb., 1965 but did not return to Delhi thereafter.

3. The husband filed a petition for the restitution of conjugal rights against the wife on the ground that she had withdrawn herself from the society of the husband without reasonable excuse within the meaning of S. 9 of the Hindu Marriage Act, 1955 ('the Act'). The husband complained in the petition that the causes of her estrangement form him appear to be as follows:

(a) She felt the separation from her parents keenly and longed to go back to them;
(b) She pressed the husband that the latter's aged father should not live with him;
(c) The parents of the wife wanted to live on her income and urged her to return to their home;
(d) That the wife was abusive, short tempered and quarrelsome; and
(e) That the wife imagined that she was not capable of leading a married life and this made her irritable and frigid.

4. The wife defended the petition and replied to the grounds on which the petition was based as follows:

(a) There was nothing unnatural if she felt lonely for sometime after marriage, but this was no
cause for the alleged estrangement. The husband himself had left the wife at her parent's place;
(b) The wife never asked the husband that his father should not live with him;
(c) The parents of the wife never wanted to live on her income;
(d) & (e) These grounds were said to be false allegations and were denied.

The wife further pleaded that it was the husband who treated her badly. All through he was bent upon taking out the maximum amount of money from her and her parents. The husband has already extracted a huge dowry from the parents of the wife and has deprivedher of jewellery, clothes and other valuable presents which had been given to her by her parents. The husband has kept all this money and has deliberately left the wife without good treatment at home or any proper medical treatment when she was ill and when she was in the family way and delivered a daughter. The reason why she could not join the husband was the cruelty meted out to her by the husband.

5. The petition was dismissed by the trial Court, but was allowed in appeal by a learned single Judge of this Court. Hence this Letters Patent Appeal. Both the trial Court and the first appellate court were of the view that the oral evidence adduced by the parties was unhelpful and the contentions of the parties had to be decided on the correspondence which passed between the parties. While the husband has not adduced in evidence the letters received by him from his wife, the wife has produced eleven letters, Ex. R1 to R11, written by the husband to her and to her father. On this evidence two opposite conclusions were drawn by the trial Court and the first appellate court. The trial Court held that the husband only wanted as much money as he could get out of his wife and her father, but had no intention to keep heras his wife. The first appellate court took note of the prevalent custom and observes “as the age of the girl advances the amount (the dowry) also increases". It observed that “these settlements of money which should be looked down upon in the present day of civilised society unfortunately keep on increasing in some sections of the society. However, from thisit cannot be said that the only object was to make money and there was no intention on the part of the appellant to run the matrimonial home.” The learned single Judge further observedthat “it does not show that he had the lust for her money. On the contrary it shows that because of the circumstances he is trying to tame the shrew by giving various warnings.”

6. After carefully balancing the pros and cons of the divergent decisions of the trial Court and the appellate court in the light of the evidence on record and the arguments of both sides, the following two conclusions seem to emerge, which require to be discussed fully hereafter:

1. In the absence of a pre-marital agreement between the parties, it cannot be said that the wife who had a permanent job with good prospects was expected to resign it, leave Sunam and come to live with the husband when the husband did not earn enough to maintain the family at Delhi where life was costlier.
2. The conduct of the husband was such as to frighten the wife from joining him and thus giving her reasonable excuse for not joining him.

Choice of matrimonial home:

7. The basic principles on which the location of the matrimonial home is to be determined by the husband and the wife are based on common convenience and benefit of the parties. They would be the same in English Law as in the Indian Law. The law in England is stated in13 **Halsbury’s *Laws of England***, Fourth Edition (1975-76), para. 623, as follows:

> Choice of matrimonial home - It is a husband’s duty to provide his wife with a home according to his circumstances. There is no absolute rule whereby either party is entitled to dictate to the other where the matrimonial home shall be, the matter is to be settled by

agreement between the parties, by a process of give and take, and by reasonable accommodation.

It is not against public policy for the parties to agree before marriage on what is to be the matrimonial home, and unless the reasons on which the agreement was based cease to exist, or if some changed circumstances give good reason for change in the matrimonial home, the agreement stands. The location of a husband's work is a most important consideration to be borne in mind in selecting the situation of the matrimonial home, although in some cases the wife's business and livelihood may be a predominant consideration.

Neither party, it has been said, has a casting vote; it has further been suggested, that if the parties are both unreasonable each might be entitled to a decree on the ground of the other's desertion, but this proposition has been doubted and disapproved. The parties should so arrange their affairs that they spend their time together and not apart, and where there is a difference of view, reason must prevail.

A wife does not succeed in establishing that a husband has not provided her with a reasonable home by showing that, having left him unreasonably, she has, by her independent action, found accommodation somewhere else, which he is unwilling to accept.

8. The same statement of law is repeated in para. 93 of Rayden on Divorce, 12th Edition, probably because both of them are written by Joseph Jackson, a leading authority on Marriage Law in England.

9. The reason underlying the statement of law is obvious. The spouses cannot live on love alone. They have to eat, be clothed, have a shelter and have such other amenities of life as may be obtained from the income of that spouse who is earning more. Normally, the husband would be earning more than the wife and, therefore, as a rule the wife may have to resign her lesser job and join the husband, who would be expected to set up the matrimonial home. But, as Lord Denning L. J. said in ***Dunn* v. *Dunn*** [(1949) PD 98, 103], "it is not a proposition of law. It is simply a proposition of ordinary good sense arising from the fact
that the husband is usually the wage earner and has to live near his work. It is not a proposition which applies to all cases". If, as in this case, it is the wife who alone has the job which is also a good job, and the husband does not have sufficient income, can it be said that even then the husband has a right to decide that the matrimonial home must be at the place where he happens to reside and the wife must resign her job and come to live with him there? There is absolutely no principle or authority in law which compels the wife to do so. A Full Bench of the the Punjab and Haryana High Court in ***Smt. Kailash Wati* v. *Ayodhia Parkash*** [1977 Hindu LR 175] seems to have, however, come to such a conclusion which was strongly relied upon by Mr.R.K.Makhija, learned counsel for the respondent husband. A carefulconsideration of the reasoning of the Full Bench brings out the following results:

Though the husband and the wife before marriage served at two different places, after marriage the wife was transferred to the station of her husband' posting and the two stayed together in the matrimonial home. Later the wife manoeuvred to get herself transferred back to the place where she had served before marriage. This constituted her withdrawal from the society of her husband and no reasonable excuse was forthcoming from her for doing so. These facts are contrasted with the facts of the present case.

The parties in the case before us lived at two different places before marriage. At the time of the marriage there was neither an express nor an implied understanding between them that the wife was to leave Sunam and come to Delhi to live with her husband. For, at the marriage the wife was 32 years old, had already put in eight years service as a teacher and was looking forward to a promotion in her job. The husband does not appear to have any worthwhile job when he married. It could not have occurred to the parties that the wife would have to resign her job after marriage. This is why in Ex. R1, dated 2nd September, 1964 the husband admitted that it was due to the service and financial conditions that the parties had partedfrom each other implying thereby that their living away from each other was inevitable. InEx. R2, dated 15th September, 1964, written to the wife's father, he says that he wanted the wife to resign and come to live with him in Delhi but she wanted to go on serving till April, probably because, as is mentioned in Ex. R5, she was expecting promotion in April. In Ex. R5, dated 24th September, 1965, he says "I quite agree you went there (Sunam) with my permission, I too requested you in my letters to leave the bloody service because I am facing unbearable difficulties. I could have tolerated these difficulties if the promotion you are worried for is to be maintained forever. I may tell you in case you did not know that you will not be allowed to do service after the first delivery." A daughter was born to the wife in August, 1965 and till then the husband had apparently prepared himself to bear to theseparation from her. But in the same letter he again says "First of all you are not sure whetheryou can get promotion before April, secondly I am not sure whether I would succeed posting in Punjab in or after April. Then you know in any circumstances, you are going to leave service in a year. If my salary will not be sufficient, we can starve, at least will be happy together, than miles away working for money at the cost of our comfort and enjoyments". It seems from this letter the husband had some kind of a job, but the salary was not sufficientfor their comfort and enjoyment. If the wife in these circumstances hesitated to leave her job, particularly because the husband also was thinking of leaving Delhi and going to Punjab to live near his wife she cannot be blamed. In Ex. R6, dated 14th February, 1965, the husband isseen trying to get a job in the Punjab with a salary of Rs 400 per month. This would mean that he did not want her to resign, but was trying to get a job near her place. The circumstances of this case do not, therefore, show that there was any duty on the wife to resign her job and come to live with her husband.

10-11. Our view as to the choice of the location of the matrimonial home thus respectfully differs from the view of the Punjab & Haryana High Court Full Bench in *KailashWati's* case. We would, therefore, take up each of the legal propositions advanced by the learned Full Bench and after stating it give reasons for our inability to agree with it.

(1) Paragraph 442 of Mulla's ***Hindu Law***, 14th Edition, is as follows:

> (1) The wife is bound to live with her husband and to submit herself to his authority. An agreement enabling the wife to avoid a marriage or to live separate from her husband if he leaves the village in which his wife, and her parents reside, or if he marries another wife, is void. Such an agreement is against public policy and contrary to the spirit of the Hindu law. An agreement of this kind is no answer to a suit for restitution of conjugal rights by a husband against his wife.
>
> (2) The husband is bound to live with his wife and to maintain her.

Somewhat similar statements of law are found in decisions of State Courts in United States of America cited by the Full Bench.

12. With respect, this statement of law should not be taken superficially to mean that whatever the circumstances, it is always the wife who must resign her job howsoever better it may be than the job of her husband, and must come to live with her husband even though the husband may not be able to maintain himself and his wife at the appropriate standard of living. The uncodified part of the Hindu law is based partly on the Dharma Shastras andpartly on custom. According to Prof. J. Duncan M. Derrett, "the Dharma Shastra authorities did not lay down law, they taught righteousness to a population eager to acquire it, and it was this that they taught whether or not any ruler acted as their mouthpiece or coadjutor" ("***The Death of a Marriage Law***" (1978) pages 49-50). The Dharma Shastras, therefore, reflected the law as it ought to be. While this may have largely coincided with the law as it was, the coincidence was not complete. If the Dharma Shastras preached that the wife should always submit to the husband whatever the financial circumstances of each of them, this was only theideal aimed at by the authors of the Dharma Shastras. In so far as the right to set up the matrimonial home as being given to the husband alone at all times in preference to the wife isbased on custom, this reflected the conditions of the age in which the custom was practised. The process by which a custom becomes law is well known. The custom must be ancient, certain and enforceable. The last requirement is expressed by saying that it must be supportedby the opinio necessitatis. The Indian decisions cited at the foot of paragraph 442 of Mulla's Hindu Law are of the 1898 and 1901. Whatever may be the conditions in that distant past more than three quarters of a century later the conditions are greatly altered. It would be difficult to say now that there is any custom which obliges an earning wife to resign her job and join her husband even though on merits it is she who is better placed to choose the place of the matrimonial home rather than the husband. What happens to the custom when it becomes law? C. K. Allen gives a two-fold answer to this question. Firstly, just as a proposition of law may be rejected either because it is an incorrect formulation, or because, though correct, it is not applicable to the instant case, a custom may be rejected becauseeither it is not applicable to the parties or it is held to be malus usus. Both these reasons are applicable to show that no enforceable custom exists as law to require the wife to abandon all her rights in favour of the husband in this respect. Secondly, just as a proposition of law may be adopted as being both a correct formulation and applicable to the case in hand, a custom may be held to be law for these reasons. No such custom, much less law, can be said to exist. Further, even if it ever existed, it may now be rejected as being mischievous or contrary to the general policy of the law. It is now generally recognised, especially since the decision in *T.* ***Nordenfelt*** **v.** ***Maxim-Nordenfelt G. & A. Co****.* [(1894) AC 535] that public policy is "the policy of the day"-i.e. that its standards change from age to age in accordance with the prevailing notions and social institutions of the time (see also ***Fender*** **v.** ***Mildmay****,* (1938 AC 1). (K. C. Allen, ***Law in the Making***, 7th Edn., pp. 152 to 156). Page 481).

13. At the present day numerous women have taken up jobs to help their families and also to be useful members of the society. It may be that the wife is financially and in other respects better situated to choose the place of the matrimonial home than the husband. The existence of such circumstances in a particular case would make the law stated in paragraph

442 of Mulla's ***Hindu Law*** inapplicable to such a case. It would appear, therefore, that the said statement of law deserves to be reconsidered. It may be brought in line with the modern conditions as has been done in Halsbury and Rayden referred to above. Alternatively, an exception to paragraph 442 deserves to be added to apply to working wives who are better situated than their husbands to choose the place of the matrimonial home.

14. It has been recognised that social change among the Hindus has been generally accompanied by appropriate changes in the Hindu law, particularly that part which relates to the unequal conditions in which Hindu women had been placed. This movement for the uplift of the status of the Hindu women is not nearly a century old.

15. In the light of the above observations, it would appear that there is no warrant in Hindu law to regard the Hindu wife as having no say in choosing the place of matrimonial home. Art. 14 of the Constitution guarantees equality before law and equal protection of the law to the husband and the wife. Any law which would give the exclusive right to thehusband to decide upon the place of the matrimonial home without considering the merits of the claim of the wife would be contrary to Art 14 and unconstitutional for that reason.

(2) It is true that under the Hindu law, it is the duty of the husband to maintain his wife, but the wife is not under a corresponding duty to maintain her husband. This also is due to the fact that normally the husband is the wage earner. If, however, the wife also has her own income it will be taken into account and if her income is sufficient to maintain herself the husband will not be required to pay her any maintenance at all. It is also true that the wife is not entitled to separate residence and maintenance except for justification and otherwise the husband and the wife are expected to live together in the matrimonial home. This is also where the wife depends on the husband financially. If, as in this case, the wife earns better than the husband, firstly she will not expect to be maintained by the husband and secondly, it will not be a matter of course for her to resign her job and come to live with her husband. Some kind of agreement and give and take is necessary.

(3) The domicile of the wife is the same as that of the husband. This has no bearing on the choice of the matrimonial home at all. The domicile is of a country, while the matrimonial home has to be at a place where one of the spouses or both of them would be earning enough to maintain the family. Domicile is even different from residence not to speak of the place of matrimonial home

(4) When the husband and the wife did not agree where they should stay, the husband must have a casting vote. With respect, a casting vote is only a tiebreaker. It is useful when a stalemate is to be broken because the matter has to be decided one way or the other. Between the husband and the wife, the decision as to the matrimonial home has to be taken on the balance of circumstances. If the circumstances are equally balanced in favour of the wife and the husband, then there would be a stalemate and neither of them would be able to sue the other for restitution of conjugal rights. Such a breakdown of marriage for which either ofthem or none of them can be blamed has now been made a ground for obtaining divorce in the United Kingdom by S. 1 of the Matrimonial Causes Act, 1973. A similar consideration might have led to the abolition of right to claim restitution of conjugal rights by S. 20 of the Matrimonial Proceedings and Property Act, 1970 in the United Kingdom.

Conduct of the husband

16. In Ex. R2, dated 15th Sept. 1964, written by the husband to the father of the wife, the husband asked for more money for Sandhara from him after having received Rs 40,000 as dowry. But the wife maintained that the husband had actually received Rs 42,000 and the husband showed his willingness to return Rs 2,000 (i. e. Rs 42,000 minus Rs 2,000) (sic). The husband justifies the taking of this huge dowry by saying that his father had spent Rs 60,000 on his education. The learned single Judge has expressed his awareness of the custom by which the boys and their fathers expect such extraction of dowry and money from the wives and their fathers With respect, the presence of such unhealthy expectations and customs among certain sections of the society is no justification for the courts upholding them. On the other hand, by law we are bound to refuse to recognise them and to decide that demands for dowry and money are unjustified. In Ex. R3 the husband again refers to Rs 35,000 having been paid as dowry. In Ex. R4 he does every thing to alienate her and frighten her from coming to him. He tells that she was not the first girl in his life. If not more than at least 100 girls had come into his life and they had always loved him and did everything for him. In Ex. R5 the husband further spoils the chances of his wife coming to him by writing as follows:

> If you are under the impression that your safe deposit what you earned and what your father gave you on Sandhara, would be yours, you are badly mistaken. If you come to stay with me as my wife, your all belongings are mine. You too would be mine. You will not be able to move even a step without my permission. If I want I can starve you for days and keep you thirsty for months. By the way of your arrival, you have to give me theaccount for your earnings a + cash you got from me, etc. + what your father gave you on Sandhara - the expenditure. Here also I have arranged two tutions for you of Rs 100 each.All the money you earn or given to you from other sources, will be mine. Immediately you have to give that to me. Then if I like I can give you for your personal use. If I do notwant to give you, you have to go without it. It all depends on my sweet will. But you willhave nothing to say regarding this. Regarding the clothes I bought for you, if you do not wish to use them I will definitely return them. Do not you worry, it is my business not yours. What comes from there (that is from wife's parents) I must be brought in the picture, not in the dark as the last time. Because so many people do ask me what came from Sunam on such a festival..... By the way I feel my duty to warn you that I have agreed to take you on two months probationary period. If you still keep on progressing with your habits, you will be the loser not me. But if you become pregnant in next two months and would not leave your habits, obviously I get fed up with you and leave you for ever, then you will be in the worse condition. So I advise you that this is the best time for divorce. ..... Please come to Lehra on 2nd otherwise for your own sake do not come.

17. The grounds on which the claim for restitution was based by the husband in the petition may now be dealt with as follows:

> (a) The wife's feelings for separation from her parents during her first visit to her husband is natural and almost universal.
>
> (b) The husband's father lived at village Lehra and the allegation that the wife wanted her husband's father not to live with the husband is not proved at all.

(c) The husband's stand that the parents of the wife wanted to live on her income is self-contradictory. It is the same husband who has taken a huge dowry from the wife's parents and who is trying to extract more money from her and her father. He cannot, therefore, be heard to say that the parents of the wife were too poor to live on their own income and wanted her to live with them.

(d) The husband says that his wife never said that she was not capable of leading a married life.

18. Due to the financial difficulties of the husband and comfortable position of the wife and also due to the discouraging conduct of the husband towards the wife, we are of the view that the wife had a reasonable excuse for not resigning her job and for not coming to live with the husband at Delhi. The question of the wife withdrawing herself from the society of the husband did not arise at all because the husband and the wife had not been able to decide where the matrimonial home should be set up. The fault, if any, for the lack of any agreementbetween them on this point was not of the wife and may be said to be of the husband.

19. We, therefore, hold that the husband has failed to prove the grounds for awarding him restitution of conjugal rights.

20. What is the position? The wife has not asked for any relief and we cannot give it to her under S. 23-A of the Act. The relief asked for by the husband cannot be granted to him. This must be very frustrating to the husband. His position is like the factory worker (Stephen Blackpool) in the novel 'Hard Times' by Charles Dickens, Blackpool seeks advice on how he can end his unhappy marriage and is told that there is no legal way in which the law can assist him.

"If I do her any hurt, sir there's a law to punish me?"
"Of course there is."
"If I flee from her, there's a law to punish me?"
"Of course there is."
"If I marry T'oother dear lass, there's a law to punish me?"
"Of course there is..... "
"Now, a God's name', said Stephen Blackpool, 'show me the law to help me'."

Quoted from Bernard Schwartz's "***The Law in America' the American Heritage History*** (1975 page 147).

As Schwartz says "Blackpool's plaint echoed the popular attitude towards the law". The feeling of the unsuccessful litigants in matrimonial causes would be similar. Where there is a breakdown of the marriage, this in itself should be a cause for which divorce should be available under law. It would then be immaterial to enquire as to which of the two parties is atfault. The principle of breakdown of marriage as enabling the parties to obtain a divorce recognised in the U.K. since 1973 is at present only partially recognised by the Hindu Marriage Act by the insertion of sub-section (1-A) in Section 13 of the Act by the Amendment Act 44 of 1964. It is understood that the question whether divorce should be directly obtainable after such breakdown of marriage is under consideration. Instances, such as the present one, would help the authorities to amend the law to enable the parties to obtaina divorce when the marriage is apparently broken down, as seems to be the case between the parties before us. With such an amendment, the law would come in line with the English law.

Saroj Rani v. *Sudarshan Kumar*

AIR 1984 SC 1562

SABYASACHI MUKHARJI, J. - The parties herein were married at Jullundur City according to Hindu Vedic rites on or about January 24, 1975. The first daughter of the marriage Menka was born on January 4, 1976. On February 28, 1977 second daughter Guddi was born. It is alleged that May 16, 1977 was the last day of cohabitation by the parties. It is further alleged that on May 16, 1977, the respondent husband turned the appellant out of his house and withdrew himself from her society. The second daughter unfortunately expired in the house of the respondent-father on August 6, 1977. On October 17, 1977, the wife- appellant filed a suit against the husband-respondent herein under Section 9 of the Hindu Marriage Act, 1955 hereinafter referred to as the said Act for restitution of conjugal rights.

2. In view of the argument now sought to be advanced, it is necessary to refer to the said petition. In the said petition, the wife had set out the history of the marriage as hereinbefore briefly mentioned and alleged several maltreatments both by the husband as well as by her in-laws and thereafter claimed decree for restitution of conjugal rights. On March 21, 1978, the learned Sub-Judge First Class passed an order granting Rs 185 per month as maintenance pendente lite and Rs 300 as the litigation expenses. On March 28, 1978, a consent decree was passed by the learned Sub-Judge First Class for restitution of conjugal rights. It may be mentioned that on the petition of the wife for restitution of conjugal rights, the husband-respondent appeared and filed his written statement admitting therein the factum of marriage between the parties but denied the fact that the respondent had ever made any demand from the petitioner as alleged or had ever disliked her or had withdrawn from her society or turned her out from his house as alleged by the wife-petitioner in her petition for restitution of conjugal rights. The respondent there after made a statement in the court that the application of the petitioner under Section 9 of the said Act be granted and decree thereof be passed. Accordingly the learned Sub-Judge First Class on March 28, 1978 passed the decree for the restitution of conjugal rights between the parties. It was alleged by the petitioner-wife that theappellant had gone to the house of the respondent and lived with him for two days as husbandand wife. This fact has been disbelieved by all the courts. The courts have come to the conclusion and that conclusion is not challenged before us that there has been no cohabitationafter the passing of the decree for restitution of conjugal rights.

3. On April 19, 1979, the respondent husband filed a petition under Section 13 of the said Act against the appellant for divorce on the ground that one year had passed from the date of the decree for restitution of conjugal rights, but no actual cohabitation had taken place between the parties. The appellant filed her reply to the said petition. The categorical case in reply of the appellant was that it was incorrect that after passing of the decree, there had been no restitution of conjugal rights between the parties, positive case of the appellant was that after passing of the decree, the wife was taken to the house of the husband by the parents of the wife after one month of the decree and that the husband kept the wife in his house for two days and she was again turned out. It was further alleged that the wife had filed an applicationunder Section 28-A of the said Act in the Court of Sub-Judge, First Class, Jullundur on January 22, 1979 with the request that the husband should be directed to comply with the

decree passed against him under Section 9 of the said Act and the application was pending at the time when the reply was filed by the wife to the petition for divorce.

4. The learned District Judge on October 15, 1979 dismissed the petition of the husband for divorce. The learned Judge framed two issues, one was whether there has been no restitution of conjugal rights after the passing of the decree for the restitution of conjugal rights, and secondly to what relief was the husband entitled to? After considering the evidence of civil and criminal proceedings pending between the parties, the learned Judge came to the conclusion that there has been no resumption of cohabitation between the parties after March 28, 1978 and decided the issue in favour of the husband but on the question of relief the learned Judge was of the view that in view of the provisions of Section 23 of thesaid Act and in view of the fact that the previous decree was a consent decree and at that time there was no provision like provision of Section 13-B of the said Act i.e. "divorce by mutual consent", the learned Judge was of the view that as the decree for restitution of conjugalrights was passed by the consent of the parties, the husband was not entitled to a decree for divorce.

5. Being aggrieved by the said decision, there was an appeal before the High Court of Punjab and Haryana. So far as last mentioned ground was concerned, the High Court held that in view of the decision of this Court in the case of ***Dharmendra Kumar* v. *Usha Kumar*** [AIR 1977 SC 2218], this contention was not open to the wife. The Court was of the opinion that in view of the said decision of this Court, it could not be said that the husband was taking advantage of his 'wrongs'. In the said decision this Court noted that it would not be reasonable to hold that the relief which was available to the spouse against whom a decree forrestitution of conjugal rights had been passed should be denied to the one who does not comply with the decree passed against him or her. The expression "in order to be a 'wrong' within the meaning of Section 23(1)(*a*) the conduct alleged has to be something more than 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 to. In that view of the matter, the High Court rejected the contention.

6. So far as the other aspect was concerned, the learned Judge expressed the view that the decree for restitution of conjugal rights could not be passed with the consent of the parties and therefore being a collusive one disentitled the husband to a decree for divorce. This view was taken by the learned trial Judge relying on a previous decision of the High Court. Mr Justice Goyal of the High Court felt that this view required reconsideration and he therefore referred the matter to the Chief Justice for constitution of a Division Bench of the High Court for the consideration of this question.

7. The matter thereafter came up before a Division Bench of Punjab and Haryana High Court and Chief Justice Sandhawalia for the said Court on consideration of different authorities came to the conclusion that a consent decree could not be termed to be a collusive decree so as to disentitle the petitioner to decree for restitution of conjugal rights. It may be mentioned that before the Division Bench on behalf of the appellant-wife, counsel did not assail the factual finding of the trial Court that there was no cohabitation after the decree for restitution of conjugal rights, nor did he press the first ground of defence namely that the appellant could not take advantage of his 'wrong' because of having refused cohabitation in

execution of the decree. However, the ground that the decree for restitution of conjugal rights was in a sense a collusive decree was pressed before the Division Bench. In view of the Full Bench decision of the Punjab and Haryana High Court in the case of ***Joginder Singh* v. *Pushpa*** [AIR 1969 P & H 397] wherein the majority of the Judges of the Full Bench held thata consent decree in all cases could not be said to be a collusive decree and where the parties had agreed to passing of a decree after attempts had been made to settle the matter, in view ofthe language of Section 23 if the court had tried to make conciliation between the parties and conciliation had been ordered, the husband was not disentitled to get a decree.

8. In this case from the facts on record it appears that there was no collusion between the parties. The wife petitioned against the husband on certain allegations, the husband denied these allegations. He stated that he was willing to take the wife back. A decree on that basis was passed. It is difficult to find any collusion as such in the instant case. Apart from that we are in agreement with the majority of the learned Judges of the Division Bench of Punjab and Haryana High Court in the case of ***Joginder Singh* v. *Pushpa*** that all cases of consent decrees cannot be said to be collusive. Consent decrees per se in matrimonial matters are not collusive. As would be evident from legislative intent of Section 13-B that divorce by mutual consent is no longer foreign to Indian law of divorce but of course this is a subsequent amendment and was not applicable at the time when the decree in question was passed. In thepremises we accept the majority view of the Division Bench of Punjab and Haryana High Court on this point.

9. In this appeal before this Court, counsel for the wife did not challenge the finding of the Division Bench that the consent decree as such was not bad or collusive. What he tried to urge before us was that in view of the expression 'wrong' in Section 23(1)(*a*) of the Act, the husband was disentitled in this case to get a decree for divorce. It was sought to be urged that from the very beginning the husband wanted that decree for divorce should be passed. He therefore did not deliberately oppose the decree for restitution of conjugal rights. It was submitted on the other hand that the respondent-husband had with the intention of ultimately having divorce allowed the wife a decree for the restitution of conjugal rights knowing fully well that this decree he would not honour and thereby he misled the wife and the Court and thereafter refused to cohabit with the wife and now, it was submitted, cannot be allowed to take advantage of his 'wrong'. There is, however, no whisper of these allegations in the pleadings. As usual, on this being pointed out, the counsel prayed that he should be given an opportunity of amending his pleadings and, the parties, with usual plea, should not suffer for the mistake of the lawyers. In this case, however, there are insurmountable difficulties. Firstlythere was no pleading, secondly this ground was not urged before any of the courts below which is a question of fact, thirdly the facts pleaded and the allegations made by the wife in the trial court and before the Division Bench were contrary to the facts now sought to be urged in support of her appeal. The definite case of the wife was that after the decree for restitution of conjugal rights, the husband and wife cohabited for two days. The ground now sought to be urged is that the husband wanted the wife to have a decree for judicial separation(*sic* restitution of conjugal rights) by some kind of a trap and then not to cohabit with her and thereafter obtain this decree for divorce. This would be opposed to the facts alleged in the defence by the wife. Therefore quite apart from the fact that there was no pleading which is a

serious and fatal mistake, there is no scope of giving any opportunity of amending the pleadings at this stage permitting the wife to make an inconsistent case. Counsel for the appellant sought to urge that the expression "taking advantage of his or her own wrongs" in clause (*a*) of sub-section (1) of Section 23 must be construed in such a manner as would not make the Indian wives suffer at the hands of cunning and dishonest husbands. Firstly even if there is any scope for accepting this broad argument, it has no factual application to this case and secondly if that is so then it requires a legislation to that effect. We are therefore unableto accept the contention of counsel for the appellant that the conduct of the husband sought tobe urged against him could possibly come within the expression 'his own wrongs' in Section 23(l)(*a*) of the Act so as to disentitle him to a decree for divorce to which he is otherwise entitled to as held by the courts below. Furthermore we reach this conclusion without any mental compunction because it is evident that for whatever be the reasons this marriage has broken down and the parties can no longer live together as husband and wife; if such is the situation it is better to close the chapter.

10. Our attention, however, was drawn to a decision of a learned Single Judge of the Andhra Pradesh High Court in the case of ***T. Sareetha* v. *T. Venkata Subbaiah*** [AIR 1983 AP 356]. In the said decision the learned Judge has observed that the remedy of restitution of conjugal rights provided for by Section 9 of the said Act was a savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution. Hence, according to the learned Judge, Section 9 was constitutionally void. Any statutory provision that abridged the rights guaranteed by Part III of the Constitution would have to be declared void in terms of Article 13 of the Constitution. According to the said learned Judge, Article 21 guaranteed right to life and personal liberty against the State action. Formulated in simple negative terms, its range of operation positively forbidding the State from depriving any person of his life or personal liberty except according to the procedure established by lawwas of far-reaching dimensions and of overwhelming constitutional significance. Learned Judge observed that a decree for restitution of conjugal rights constituted the grossest form of violation of any individual's right to privacy. According to the learned Judge, it denied the woman her free choice whether, when and how her body was to become the vehicle for the procreation of another human being. A decree for restitution of conjugal rights deprived, according to the learned Judge, a woman of control over her choice as and when and by whom the various parts of her body should be allowed to be sensed. The woman loses her control over her most intimate decisions. The learned Judge therefore was of the view that theright to privacy guaranteed by Article 21 was flagrantly violated by a decree for restitution of conjugal rights. The learned Judge was of the view that a wife who was keeping away from her husband because of permanent or even temporary estrangement cannot be forced, withoutviolating her right to privacy to bear a child by her husband. During a time when she was probably contemplating an action for divorce, the use and enforcement of Section 9 of thesaid Act against the estranged wife could irretrievably alter her position by bringing about forcible conception permanently ruining her mind, body and life and everything connected with it. The learned Judge was therefore clearly of the view that Section 9 of the said Act violated Article 21 of the Constitution. He referred to the Scarman Commission's report in England recommending its abolition. The learned Judge was also of the view that Section 9of the said Act, promoted no legitimate public purpose based on any conception of the

general good. It did not therefore subserve any social good. Section 9 of the said Act was, therefore, held to be arbitrary and void as offending Article 14 of the Constitution. Learned Judge further observed that though Section 9 of the said Act did not in form offend the classification test, inasmuch as it made no discrimination between a husband and wife, on the other hand, by making the remedy of restitution of conjugal rights equally available both to wife and husband, it apparently satisfied the equality test. But bare equality of treatment regardless of the inequality of realities was neither justice nor homage to the constitutional principles. He relied on the decision of this Court in the case of ***Murthy Match Works*** **v.** ***Assistant Collector of Central Excise*** [AIR 1974 SC 497]. The learned Judge, however, was of the opinion based on how this remedy worked in life that in our social reality, the matrimonial remedy was found used almost exclusively by the husband and was rarely resorted to by the wife.

11. The learned Judge noticed and that is a very significant point that decree for restitution of conjugal rights can only be enforced under Order 21, Rule 32 of Code of Civil Procedure. He also referred to certain trend in the American law and came to the conclusion that Section 9 of the said Act was null and void. The above view of the learned Single Judge of Andhra Pradesh was dissented from in a decision of the learned Single Judge of the Delhi High Court in the case of ***Harvinder Kaur*** **v.** ***Harmander Singh Choudhry*** [AIR 1984 Del 66]. In the said decision, the learned Judge of the Delhi High Court expressed the view that Section 9 of the said Act was not violative of Articles 14 and 21 of the Constitution. The learned Judge noted that the object of restitution decree was to bring about cohabitation between the estranged parties so that they could live together in the matrimonial home in amity. The leading idea of Section 9 was to preserve the marriage. From the definition of cohabitation and consortium, it appeared to the learned Judge that sexual intercourse was one of the elements that went to make up the marriage, but that was not the summum bonum. The courts do not and cannot enforce sexual intercourse. Sexual relations constituted an important element in the conception of marriage, but it was also true that these did not constitute its whole content nor could the remaining aspects of matrimonial consortium be said to bewholly unsubstantial or of trivial character. The remedy of restitution aimed at cohabitation and consortium and not merely at sexual intercourse. The learned Judge expressed the view that the restitution decree did not enforce sexual intercourse. It was a fallacy to hold that the restitution of conjugal rights constituted "the starkest form of governmental invasion" of "marital privacy".

12. This point namely validity of Section 9 of the said Act was not canvassed in the instant case in the courts below, counsel for the appellant, however, sought to urge this point before us as a legal proposition. We have allowed him to do so.

13. Having considered the views of the learned Single Judge of the Andhra Pradesh High Court and that of learned Single Judge of Delhi High Court, we prefer to accept on this aspect namely on the validity of Section 9 of the said Act the views of the learned Single Judge of the Delhi High Court. It may be mentioned that conjugal rights may be viewed in its proper perspective by keeping in mind the dictionary meaning of the expression "conjugal". ***Shorter Oxford English Dictionary***, Third Edn., Vol. I, page 371 notes the meaning of 'conjugal' as

"of or pertaining to marriage or to husband and wife in their relations to each other". In the ***Dictionary of English Law***, 1959 Edn. at page 453, Earl Jowitt defines 'conjugal rights' thus:

> The right which husband and wife have to each other's society and marital intercourse. The suit for restitution of conjugal rights is a matrimonial suit, cognisable in the Divorce Court, which is brought whenever either the husband or thewife lives separate from the other without any sufficient reason, in which case the court will decree restitution of conjugal rights (Matrimonial Causes Act, 1950, Section 15), but will not enforce it by attachment, substituting however for attachment, if the wife be the petitioner, an order for periodical payments by the husband to the wife (Section 22).
>
> Conjugal rights cannot be enforced by the act of either party, and a husband cannot seize and detain his wife by force (***R.*** **v.** ***Jackson****,* (1891) 1 QB 671).

14. In India it may be borne in mind that conjugal rights i.e. right of the husband or the wife to the society of the other spouse is not merely creature of the statute. Such a right is inherent in the very institution of marriage itself. See in this connection Mulla's ***Hindu Law*** — Fifteenth Edn., p. 567, Para 443. There are sufficient safeguards in Section 9 to prevent it from being a tyranny. The importance of the concept of conjugal rights can be viewed in the light of Law Commission - Seventy-first Report on the Hindu Marriage Act, 1955 - "Irretrievable Breakdown of Marriage as a Ground of Divorce", Para 6.5 where it is stated thus:

> Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage — "breakdown" — and if it continues for a fairly long period, it would indicate destruction of the essence of marriage — "irretrievable breakdown.

15. Section 9 is only a codification of pre-existing law. Rule 32 of Order 21 of the Code of Civil Procedure deals with decree for specific performance for restitution of conjugal rights or for an injunction. Sub-rule (1) of Rule 32 is in these terms:

> Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed,has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract, or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

16. It is significant to note that unlike a decree of specific performance of contract, for restitution of conjugal rights, the sanction is provided by court where the disobedience to such a decree is wilful i.e. is deliberate, in spite of the opportunities and there are no other impediments, might be enforced by attachment of property. So the only sanction is by

attachment of property against disobedience of a decree for restitution of conjugal rights where the disobedience follows as a result of a wilful conduct i.e. where conditions are there for a wife or a husband to obey the decree for restitution of conjugal rights but disobeys the same in spite of such conditions, then only financial sanction, provided he or she has properties to be attached, is provided for. This is so as an inducement by the court in appropriate case when the court has decreed restitution for conjugal rights and that the court can only decree if there is no just reason for not passing decree for restitution of conjugal rights to offer inducement for the husband or wife to live together in order to give them an opportunity to settle up the matter amicably. It serves a social purpose as an aid to the prevention of break-up of marriage. It cannot be viewed in the manner the learned Single Judge of Andhra Pradesh High Court has viewed it and we are therefore unable to accept the position that Section 9 of the said Act is violative of Article 14 or Article 21 of the Constitution if the purpose of the decree for restitution of conjugal rights in the said Act is understood in its proper perspective and if the method of its execution in cases of disobedience is kept in view.

17. Another decision to which our attention was drawn is also a Bench decision of the Andhra Pradesh High Court in the case of ***Geeta Lakshmi*** **v.** ***G.V.R.K. Sarveswara Rao*** [AIR 1983 AP 111].There on the admitted misconduct of the husband is not only in not complying with the decree for restitution of conjugal rights but ill-treating the wife and finally driving her away from the house, it was held that the husband was not entitled to a decree under Section 13(1-A) of the said Act in view of the wrong as contemplated under Section 23 (1)(*a*)of the Act. The facts of that case were entirely different from the facts of the instant case before us. There is no such allegation or proof of any ill-treatment by the husband or any evidence of the husband driving the wife out of the house. In that view of the matter, this decision cannot be of any assistance to the appellant in the instant case.

18. Counsel for the appellant, however, contended before us that in the social reality of the Indian society, a divorced wife would be materially at a great disadvantage. He is right in this submission. In view, however, of the position in law, we would direct that even after the final decree of divorce, the husband would continue to pay maintenance to the wife until she remarries and would maintain the one living daughter of the marriage. Separate maintenance should be paid for the wife and the living daughter. Until altered by appropriate order on application on proper materials such maintenance should be Rs 200 per month for the wife/appellant and Rs 300 per month for the daughter Menka. Wife would be entitled to such maintenance only until she remarries and the daughter Menka to her maintenance until she is married. Parties will be at liberty to ask for variation of the amounts by proper application on proper materials made before Sub-Judge First Class, Jullundur. The respondent would pay costs of this appeal to appellant assessed at Rs 1500.

19. The appeal is dismissed with the aforesaid directions.

* * * * *

N.G. Dastane v. *S. Dastane*

(1975) 2 SCC 326

Y.V. CHANDRACHUD, J. - This is a matrimonial dispute arising out of a petition filed by the appellant for annulment of his marriage with the respondent or alternatively for divorce or for judicial separation. The annulment was sought on the ground of fraud, divorce on the ground of unsoundness of mind and judicial separation on the ground of cruelty.

2. 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.

3. The appellant, Dr Narayan Ganesh Dastane, passed his M.Sc. in Agriculture from the Poona University. He was sent by the Government of India for 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 he is said to be working on a foreign assignment. His father was a solicitor-cum-lawyer practising in Poona.

4. 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.

5. In April, 1956 her parents arranged her marriage with the appellant. But beforefinalising the proposal, her father- B. R. Abhyankar - wrote 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 some time". 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 the 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 avowedly in order that the appellant andhis people "should not' be in the dark about an important episode" in the life of the respondent, which "fortunately, had ended happily".

6. Dr Deshmukh confirmed what was stated in the letters and being content with his assurance, the appellant and his father made no enquiries with 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.

7. 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 bom. The respondent delivered at Poona where the appellant's parents lived and returned to Delhiin August, 1959. Her parents were living at this time in Djakarta, Indonesia.

8. 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 in 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 incharge 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 hers, Mrs Gokhale. On the evening of the 27th, she packed her tit-bits 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 wasof unsound mind and she was being lured to walk into that trap. February 27, 1961 was the last that they lived together. But on the day of parting she was three months in the familyway. The third child, again a girl, named Pratibha was bom on August 19, 1961 when her parents were in the midst of a marital crisis.

9. 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 the 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 lose the opportunity of giving youa 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-wear in a public place.

10. 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.

11. 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.

12. 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.

13. 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 women 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.

14. The appellant asked for annulment of his marriage by a decree of nullity under Section 12(l)(*c*) of The Hindu Marriage 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(l)(*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 (!)(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.

15. The appellant alleged that prior to the marriage, the respondent was treated in the Yeravada Mental Hospital for schizophrenia but her father fraudulently represented that she was treated for sunstroke 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.

16. 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.

17. 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.

18. We are thus not concerned with the question whether the appellant's consent to the marriage was obtained by fraud or whether the respondent had 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 cannot be reopened.

19. 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 -treated 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 besetwith practical difficulties.

20. 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 rebukesfrom 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.

21. 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 subsection (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 toremind themselves of the line that divides an inference from guess-work. If it is proved, asthe 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 wasevidence, 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 againstthe wife because, according to the High Court, it was established on the evidence that she haduttered the particular words of abuse and insult.

22. 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.

23. 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 easier 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 to judge whether the burden has been discharged?

24. The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a fact is said to be proved when the court either believes it to exist or considers its 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 prudentman 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[Per Dixon, J. in ***Wright* v. *Wright*** [(1948) 77 CLR 191, 210]; 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". But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities 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.

25. 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, not a vascillating, mind cannot find where the preponderance lies, a doubt arises regardingthe 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.

26. 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.

27. The misconception regarding the standard of proof m 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 marry 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 inthe 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.

28. 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 ***Bfyth* v. *Bfyth*** [(1966) 1 All ER 524, 336], 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 Australia in ***Wright* v. *Wright*** [(1948) 77 CLR 191, 210], 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.

29. Then, as regards the meaning of "Cruelty". The High Court on this question begins with the decision in ***Moanshee Bazloor Raheem* v. *Shumsoonnissa Begum*** [(1866) 11 MIA 551] 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 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 English 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 a case, in my judgment, I find that none of the acts complained of against the respondent can be considered to be so sufficiently grave and weighty as to be described as cruel according to the matrimonial law.

30. 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 ofa 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 a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;

The inquiry 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 togive rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or healthor a reasonable apprehension of it is a higher requirement than a reasonable apprehension thatit is harmful or injurious for one spouse to live with the other.

32. One other matter which needs to be clarified is that though under Section 10(1)(b), the apprehension of the petitioner that it will be harmful or injurious to live with the other

party has to be reasonable, it is wrong, except in the context of such apprehension, to import the concept of a reasonable man as known to the law of negligence for judging of matrimonial relations. Spouses are undoubtedly supposed and expected to conduct their joint venture as best as they might but it is no function of a court inquiring into a charge of cruelty to philosophise on the modalities of married life. Someone may want to keep late hours to finish the day's work and someone may want to get up early for a morning round of golf. TheCourt 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.

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. As said by Lord Reid in his speech in ***Gollins* v. *Gollin*** [(1963) 2 All ER 966]at 970:

> In matrimonial cases we are not concerned with the reasonable man, as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it ishard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people.

33. 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. The only rider is the interdict of Section 23(l)(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.

34. 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 ofmarriage. We will therefore have regard only to grave and weighty incidents and consider these to find what place they occupy on the marriage canvas.

35. 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 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 incold print, must come from her oral word and that has to be examined with care.

36. 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 ofthese were habitually written as the first thing in the morning like a morning cup of tea while some were written in the silence of midnight 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.

37. 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 everyone connected with this couple has 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: "*Gauriharachi Goad. Kahani"* ("the sweet story of Gaurihar") Quite a few of the wife's 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 father wrote to the husband's father while the marriage negotiations were in progress. The marriage took place on May 13, 1956.

38. 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 Ex. 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.

39. 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 parents 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' had 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 herwhat he was stating in the letter. It may be stated that the respondent admits that the appellanthad shown her this letter before it was posted to her father. On March 21, 1960 the respondent wrote a letter to the appellant's parents admitting the truth of the allegations madeby the appellant. 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 thatthe 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".

40. 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 appellant's 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 on which oblations arc 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.

41. 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 hardheaded, arrogant, mercilvoo, 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 back 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 nagging me every night uttering abuses and insults.

43. On July 18, 1960 the respondent wrote a letter to the appellant admitting that within the hearing 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, he should not have procreated the children. She has also admitted in this letter that in relation to her daughters she had said that there will be a world deluge because of the birth of those "ghosts". On or about July 20, 1960 she wrote another letter to the appellant admitting that she had described him as "a monster in a human body", that she had said that he 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 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.

44. The respondent then went to Poona for the appellant's brother's marriage, was examined by Dr Seth of the Yeravada Hospital and the spouses parted company on February 27, 1961.

45. 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.

46. 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 whenthe marriage had gone as under and the respondent sent to the appellant formal lettersresembling 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 bedrawn in this behalf to the letters Exs. 299 and 314 dated March 23 and May 6, 1961 or to theelaborate complaint Ex. 318 dated May 19, 1961, which she made to the Secretary to the Government of India, Ministry of Food and Agriculture. Prior to that, on September 23, 1960 she had drawn up a list of her complaints, 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

47. 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 self-defence. 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 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 mirror.
> (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 notebook 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, Dodascolin 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 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 handwriting, to take a good paper, to write straight and legibly in 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 and as years roll by they see the folly of their ways. But we do not 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.

48. 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.

49. 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".

50. 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*** [(1950) 2 All ER 398, 403] 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 lest we slip into a state of affairs where the institution of marriage itself is imperilled.

But we think that to 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 at the mercy of her inflexible temper. She delights in causing misery to her husband and his relations 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 hag of your father was forfeited"; "I want to see the ruination of the whole Dastane dynasty"; "burn 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 regularily, a menace to the peace and well-being of the household. Acts like the tearing of theMangal-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 feverand 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.

51. The conduct of the respondent clearly amounts to cruelty within the meaning of Section 10 (!)(b) of the Act. Under that provision, the relevant consideration is to see whetherthe 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 anend to her own life or that she will set the house on fire, the threat that she will make him losehis 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'ssense of personal safety, mental happiness, job satisfaction and reputation. Her once-too- frequent apologies do not reflect genuine contrition but were merely impromptu devices to tide over a crisis temporarily.

52. 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 thecruelty".

53. The respondent did not take up the plea in her written statement that the appellant had 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 first appellate Court on the issue of cruelty and it further held that in any case the alleged cruelty was condoned bythe appellant. The condonation, according to the High Court, consisted in the circumstance that the spouses cohabited till February 27, 1961 and a child was born to them in August, 1961.

54. Before us, the question of condonation was argued by both the sides. It is urged on behalf of the appellant that there is no evidence of condonation while the argument of the respondent is that condonation is implicit in the act of cohabitation and is proved by the fact that on February 27, 1961 when the spouses parted, the respondent was about 3 months pregnant. Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of Section 23(!)(b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if we are satisfied "but not otherwise", that the petitioner has not in any manner condoned the cruelty. It is, of course, necessary that there should be evidence on the record of the case to show that the appellant had condoned the cruelty.

55. Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things: forgiveness and

restoration [***The Law and Practice of Divorce and Matrimonial Causes*** by D. Tolstoy, Sixth Ed., p. 75]. The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty. But that evidence does not consist in the mere fact that the spouses continued to share a common home during or for some time after the spell of cruelty. Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued cohabitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws.

56. 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 cohabitation the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which characterises normal matrimonialrelationship, 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 imagine 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 beenreceived 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 lifewith the respondent, even after a series of acts of cruelty on her part.

57. 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" [See ***Words and Phrases : Legally Defined,*** 1969 Ed., Vol.1, p. 305 ("Condonation")] 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 [See **Halsbury's *Laws of England***, 3rd Ed., Vol 12, p. 306]. Condoned cruelty can therefore be revived, say, by desertion or adultery.

58. 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 me circumstance 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 [See Rayden on Dovorce, 11th Ed., (1971) pp. 11, 12, 2368, 2403] 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 understtood [***Words and Phrases*** : ***Legally Defined,*** 1969 Ed., p. 306]. In England condoned adultery could not be revived 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 [See ***Ferrers*** **v.** ***Ferrers*** (1791) 1 Hag Con 130, 131]. 'Condonation' under Section 23(1)(b) therefore means conditional forgiveness, the implied condition being that no further matrimonial offence shall be committed.

59. 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 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.

60. 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 [**Halsbury's :** ***Laws of England***, 3rd Ed., vol. 12, p. 306, para 609] or desertion for less than the statutory period ***Beard*** **v.** ***Beard*** [(1945) 2 All Er 306] may be enough to revive a condoned offence.

61. The incident of March 19, 1961 is too trifling to deserve any notice. That incident is described by the appellant himself in the complaint, 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 dated the 19th itself, the articles, which she took away were some

petty odds and ends like a doll, 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.

62. As regards the children, it does seem that ever since February 27, 1961 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 andthey could not have been sent to meet their father unescorted. The one person who could so escort them was the mother who had left or had to leave the matrimonial home for good. The appellant's going to the house of the respondent's parents where she was living was in the circumstances an impracticable proposition. Thus, the wall that divided the parents denied to the appellant access to his children.

63. 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 foodand clothing; (5) The parents of the 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 Yeravada 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 withthe 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.

64. 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

65. 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 wasconsulted 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-lawDeolalkar, 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 insteadof digging the past the husband and wife should live in peace and happiness. The letter bears mostly the handwriting 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 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.

66. 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 cooperatewith Dr Seth in the psychiatric exploration. She did not leave the house of her own volition.

67. 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 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".

68. On April 20, 1961 the appellant wrote a letter to the respondent charging her once again of being in an "unsound state of mind". The appellant declared by that letter that he willnot be liable for any expenses incurred by her during her stay in her parents' house. On the same date he wrote a letter 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 wrotea letter to the Director of Social Welfare, Delhi Administration, in which he took especialcare 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.

69. On May 6, 1961 the respondent sent a reply 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 ill-spent and that, whatever amount he would send her will be accounted for fully.

70. 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".

71. 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 therespondent 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.

72. It is true that the more serious the original offence, the less grave need be the subsequent acts to constitute a revival ***Cooper* v. *Cooper*** [(1950) WN 200 (HL)] 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" Per Scott, L.J. in ***Bertram* v. *Bertram*** [(1944) 59, 60]. But the conductof 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 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.

73. 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 arevival of the original cause of action. Accordingly, we dismiss the appeal and direct the appellant to pay the costs of the respondent.

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Samar Ghosh v. *Jaya Ghosh*

2007 (3) SCJ 253

DALVEER BHANDARI, J. - This is yet another unfortunate matrimonial dispute which has shattered the twenty two year old matrimonial bond between the parties. The appellant and the respondent are senior officials of the Indian Administrative Service, for short 'IAS'. The appellant and the respondent were married on 13.12.1984 at Calcutta under the Special Marriage Act, 1954. The respondent was a divorcee and had a female child from her first marriage. The custody of the said child was given to her by the District Court of Patna where the respondent had obtained a decree of divorce against her first husband, Debashish Gupta, who was also an I.A.S. officer.

The appellant and the respondent knew each other since 1983. The respondent, when she was serving as the Deputy Secretary in the Department of Finance, Government of West Bengal, used to meet the appellant between November 1983 and June 1984. They cultivated close friendship, which later developed into courtship.

The respondent's first husband, Debashish Gupta filed a belated appeal against the decree of divorce obtained by her from the District Court of Patna. Therefore, during the pendency of the appeal, she literally persuaded the appellant to agree to the marriage immediately so that the appeal of Debashish Gupta may become infructuous. The marriage between the parties was solemnized on 13.12.1984. According to the appellant, soon after the marriage, the respondent asked the appellant not to interfere with her career. She had also unilaterally declared her decision not to give birth to a child for two years and the appellant should not be inquisitive about her child and he should try to keep himself aloof from her as far as possible. According to the appellant, there was imposition of rationing in emotions in the arena of love,affection, future planning and normal human relations though he tried hard to reconcile himself to the situation created by the respondent.

The appellant asserted that the apathy of the respondent and her inhuman conduct towards him became apparent in no time. In February 1985, the appellant suffered prolonged illness. The respondent's brother was working in Bareilly. Her parents along with her daughter went there for sojourn. The appellant could not go because of high temperature and indifferent health. She left him and went to Bareilly even when there was no one to look afterhim during his illness. On her return, the respondent remained in Calcutta for about four days,but she did not care to meet the appellant or enquire about his health. According to the appellant, he made all efforts to make adjustments and to build a normal family life. He even used to go to Chinsurah every weekend where the respondent was posted but she showed no interest and was overtly indifferent to him. The appellant usually returned from Chinsurah totally dejected. According to the appellant, he felt like a stranger in his own family. The respondent unilaterally declared that she would not have any child and it was her firm decision. The appellant felt that his marriage with the respondent was merely an eye-wash because immediately after the marriage, serious matrimonial problems developed between them which kept growing.

The respondent was transferred to Calcutta in May 1985. Their residential flat at the Minto Park Housing Estate stood allotted to the appellant. The respondent used to come to their flat intermittently. One Prabir Malik, a domestic servant-cum-cook also used to live in the said flat. He used to cook food and carry out household work for the appellant. According to the appellant, the respondent used to say that her daughter was being neglected and that she might even be harmed. The indication was towards Prabir Malik. The appellant and the respondent virtually began to live separately from September, 1985.

The appellant was transferred to Murshidabad in May 1986 but the respondent continued to stay in Calcutta. The appellant stayed in Murshidabad up to April 1988 and thereafter he went on deputation on an assignment of the Government of India but there he developed some health problem and, therefore, he sought a transfer to Calcutta and came back there in September 1988. On transfer of the appellant to Murshidabad, the flat in which they were staying in Minto Park was allotted to the respondent as per the standard convention. The appellant and the respondent again began living together in Calcutta from September 1988. The appellant again tried to establish his home with the respondent after forgetting the entire past.

According to the appellant, the respondent never treated the house to be her family home. The respondent and her mother taught respondent's daughter that the appellant was not her father. The child, because of instigation of the respondent and her mother, gradually began to avoid the appellant. The respondent in no uncertain terms used to tell the appellant that he was not her father and that he should not talk to the child or love her. The appellant obviously used to feel very offended.

The appellant also learnt that the respondent used to tell her mother that she was contemplating divorce to the appellant. The respondent's daughter had also disclosed to the appellant that her mother had decided to divorce him. According to the appellant, though they lived under the same roof for some time but the respondent virtually began to live separately from April 1989 at her parent's house. In April 1990 the appellant's servant Prabir Malik had left for Burdwan on getting a job. The respondent used to come from her parents house to drop her daughter to her school La Martinere. She used to come to the flat at Minto Park from the school to cook food only for herself and leave for the office. The appellant began to take his meals outside, as he had no other alternative.

According to the appellant, the said Prabir Malik came to the flat on 24th August 1990 and stayed there at the night. The next two days were holidays. The respondent and her father also came there on 27th August 1990. On seeing Prabir, the respondent lost her mentalequanimity. She took strong exception to Prabir's presence in her flat and started shouting that the appellant had no self-respect and as such was staying in her flat without any right. According to the appellant, he was literally asked to get out of that flat. The respondent's father was also there and it appeared that the act was pre-conceived. The appellant felt extremely insulted and humiliated and immediately thereafter he left the flat and approached his friend to find a temporary shelter and stayed with him till he got a government flat allottedin his name on 13.9.1990.

Admittedly, the appellant and the respondent have been living separately since 27th August, 1990. The appellant further stated that the respondent refused cohabitation and also stopped sharing bed with him without any justification. Her unilateral decision not to have any child also caused mental cruelty on the appellant. The appellant was not permitted to even show his normal affection to the daughter of the respondent although he was a loving father to the child. The appellant also asserted that the respondent desired sadistic pleasure at the discomfort and plight of the appellant, which eventually affected his health and mental peace. In these circumstances, the appellant has prayed that it would not be possible to continue the marriage with the respondent and he eventually filed a suit for the grant of divorce.

In the suit for divorce filed by the appellant in Alipur, Calcutta, the respondent filed her written statement and denied the averments. According to the version of the respondent, Prabir Malik, the domestic servant did not look after the welfare and well being of the child. The respondent was apprehensive that Prabir Malik may not develop any affection towards the respondent's daughter.

According to the version of the respondent, the appellant used to work under the instructions and guidance of his relations, who were not very happy with the respondent and they were interfering with their family affairs. The respondent stated that the appellant has filed the suit for divorce at the behest of his brothers and sisters. The respondent has not denied this fact that from 27th August, 1990 they have been continuously living separately and thereafter there has been no interaction whatsoever between them.

The appellant, in support of his case, has examined himself as witness no.1. He has also examined Debabrata Ghosh as witness no.2, N. K. Raghupatty as witness no.3, Prabir Malik as witness no.4 and Sikhabilas Barman as witness no.5.

Debabrata Ghosh, witness no.2 is the younger brother of the appellant. He has stated that he did not attend the marriage ceremony of the appellant and the respondent. He seldom visited his brother and sister-in-law at their Minto Park flat and he did not take any financial assistance from his brother to maintain his family. He mentioned that he noticed some rift between the appellant and the respondent.

The appellant also examined N. K. Raghupatty, witness no.3, who was working as the General Secretary at that time. He stated that he knew both the appellant and the respondent because both of them were his colleagues. He was occupying a suite in the Circuit House at Calcutta. He stated that two weeks before the Puja vacation in 1990, the appellant wanted permission to stay with him because he had some altercation with the respondent. According to this witness, the appellant was his close friend, therefore, he permitted him to stay with him. He further stated that the appellant after a few days moved to the official flat allotted to him.

Prabir Malik was examined as witness no.4. He narrated that he had known the appellant for the last 8/9 years. He was working as his servant-cum-cook. He also stated that since April 1990 he was serving at the Burdwan Collectorate. He stated that after getting the job atBurdwan Collectorate, he used to visit the Minto Park flat of the appellant on 2nd and 4th Saturdays. He stated that the relationship between the appellant and the respondent was not

cordial. He also stated that the appellant told him that the respondent cooks only for herself but does not cook for the appellant and he used to eat out and sometimes cooked food for himself. He stated that the brothers and sisters of the appellant did not visit Minto Park flat. He also stated that the daughter of the respondent at times used to say that the appellant was not her father and that she had no blood relationship with him. He stated that on 4th Saturday,in the month of August 1990, he came to the flat of the appellant. On seeing him the respondent got furious and asked him for what purpose he had come to the flat? She further stated that the appellant had no residence, therefore, she had allowed him to stay in her flat. She also said that it was her flat and she was paying rent for it. According to the witness, shefurther stated that even the people living on streets and street beggars have some prestige, but these people had no prestige at all. At that time, the father of the respondent was also present.According to Prabir Malik, immediately after the incident, the appellant left the flat.

The appellant also examined Sikhabilas Barman as witness no.5, who was also an IAS Officer. He stated that he had known the appellant and his wife and that they did not have cordial relations. He further stated that the appellant told him that the respondent cooks for herself and leaves for office and that she does not cook for the appellant and he had to take meals outside and sometimes cooked food for himself. He also stated that the respondent had driven the appellant out of the said flat.

The respondent has examined herself. According to her statement, she indicated that she and the appellant were staying together as normal husband and wife. She denied that she ill-treated Prabir Malik. She further stated that the brothers and sisters of the appellant used to stay at Minto Park flat whenever they used to visit Calcutta. She stated that they were interfering in the private affairs, which was the cause of annoyance of the respondent. She denied the incident, which took place after 24.8. 1990. However, she stated that the appellanthad left the apartment on 27.8.1990. In the cross-examination, she stated that the appellant appeared to be a fine gentleman. She admitted that the relations between the appellant and the respondent were not so cordial. She denied that she never mentioned to the appellant that she did not want a child for two years and refused cohabitation.

The respondent also examined R. M. Jamir as witness no. 2. He stated that he had known both of them and in the years 1989-90 he visited their residence and he found them quite happy. He stated that in 1993 the respondent enquired about the heart problem of the appellant.

The respondent also examined her father A. K. Dasgupta as witness no. 3. He stated that his daughter neither insulted nor humiliated her husband in presence of Prabir Malik nor asked him to leave the apartment. He stated that the appellant and the respondent were living separately since 1990 and he never enquired in detail about this matter. He stated that the appellant had a lot of affection for the respondent's daughter. He stated that he did not know about the heart trouble of the appellant. He stated that he was also unaware of appellant's bye-pass surgery.

The learned Additional District Judge, 4th Court, Alipur, after examining the plaint, written statements and evidence on record, framed the follows issues:

1. Is the suit maintainable?

2. Is the respondent guilty of cruelty as alleged?
3. Is the petitioner entitled to decree of divorce as claimed?
4. To what other relief or reliefs the petitioner is entitled?

Issue no. 1 regarding maintainability of the suit was not pressed, so this issue was decided in favour of the appellant. The trial court, after analyzing the entire pleadings and evidence on record, came to the conclusion that the following facts led to mental cruelty:

1. Respondent's refusal to cohabit with the appellant.
2. Respondent's unilateral decision not to have children after the marriage.
3. Respondent's act of humiliating the appellant and virtually turning him out of the Minto Park apartment. The appellant in fact had taken shelter with his friend and he stayed there till official accommodation was allotted to him.
4. Respondent's going to the flat and cooking only for herself and the appellant was forced to either eat out or cook his own meals.
5. The respondent did not take care of the appellant during his prolonged illness in 1985 and never enquired about his health even when he underwent the bye-pass surgery in 1993.
6. The respondent also humiliated and had driven out the loyal servant-cum-cook of the appellant, Prabir Malik.

The learned Additional District Judge came to the finding that the appellant has succeeded in proving the case of mental cruelty against the respondent, therefore, the decree was granted by the order dated 19.12.1996 and the marriage between the parties was dissolved.

The respondent, aggrieved by the said judgment of the learned Additional District Judge, filed an appeal before the High Court. The Division Bench of the High Court vide judgment dated 20.5.2003 reversed the judgment of the Additional District Judge on the ground that the appellant has not been able to prove the allegation of mental cruelty. The findings of the High Court, in brief, are recapitulated as under:

I. The High Court arrived at the finding that it was certainly within the right of the respondent-wife having such a high status in life to decide when she would like to have a child after marriage.

II. The High Court also held that the appellant has failed to disclose in the pleadings when the respondent took the final decision of not having a child.

III. The High Court held that the appellant also failed to give the approximate date when the respondent conveyed this decision to the appellant.

IV. The High Court held that the appellant started living with the respondent, therefore, that amounted to condonation of the acts of cruelty.

V. The High Court disbelieved the appellant on the issue of respondent's refusing to cohabit with him, because he failed to give the date, month or the year when the respondent conveyed this decision to him.

VI. The High Court held that the appellant's and the respondent's sleeping in separate rooms did not lead to the conclusion that they did not cohabit.

VII. The High Court also observed that it was quite proper for the respondent with such high status and having one daughter by her previous husband, not to sleep in the same bed with the appellant.

VIII. The High Court observed that refusal to cook in such a context when the parties belonged to high strata of society and the wife also has to go to office, cannot amount to mental cruelty.

IX. The High Court's findings that during illness of the husband, wife's not meeting the husband to know about his health did not amount to mental cruelty.

The High Court was unnecessarily obsessed by the fact that the respondent was also an IAS Officer. Even if the appellant had married an IAS Officer that does not mean that the normal human emotions and feelings would be entirely different.

The finding of the Division Bench of the High Court that, considering the position and status of the respondent, it was within the right of the respondent to decide when she would have the child after the marriage. Such a vital decision cannot be taken unilaterally after marriage by the respondent and if taken unilaterally, it may amount to mental cruelty to the appellant.

The finding of the High Court that the appellant started living with the respondent amounted to condonation of the act of cruelty is unsustainable in law. The finding of the High Court that the respondent's refusal to cook food for the appellant could not amount to mental cruelty as she had to go to office, is not sustainable. The High Court did not appreciate the evidence and findings of the learned Additional District Judge in the correct perspective. The question was not of cooking food, but wife's cooking food only for herself and not for the husband would be a clear instance of causing annoyance, which may lead to mental cruelty.

The High Court has seriously erred in not appreciating the evidence on record in a proper perspective. The respondent's refusal to cohabit has been proved beyond doubt. The High Court's finding that the husband and wife might be sleeping in separate rooms did not lead to a conclusion that they did not cohabit and to justify this by saying that the respondent was highly educated and holding a high post was entirely unsustainable. Once the respondent accepted to become the wife of the appellant, she had to respect the marital bond and discharge obligations of marital life.

The finding of the High Court that if the ailment of the husband was not very serious and he was not even confined to bed for his illness and even assuming the wife under such circumstances did not meet the husband, such behaviour can hardly amount to cruelty, cannot be sustained. During illness, particularly in a nuclear family, the husband normally looks after and supports his wife and similarly, he would expect the same from her. The respondent's total indifference and neglect of the appellant during his illness would certainly lead to great annoyance leading to mental cruelty.

It may be pertinent to mention that in 1993, the appellant had a heart problem leading to bye-pass surgery, even at that juncture, the respondent did not bother to enquire about his health even on telephone and when she was confronted in the cross-examination, she falsely stated that she did not know about it.

Mr. A. K. Dasgupta, father of the respondent and father-in-law of the appellant, was examined by the respondent. In the cross-examination, he stated that his daughter and son-in-law were living separately and he never enquired about this. He further said that theappellant left the apartment, but he never enquired from anybody about the cause of leaving the apartment. He also stated that he did not know about the heart trouble and bye-pass surgery of the appellant. In the impugned judgment, the High Court has erroneously placed reliance on the evidence submitted by the respondent and discarded the evidence of the appellant. The evidence of this witness is wholly unbelievable and cannot stand the scrutiny of law.

The High Court did not take into consideration the evidence of Prabir Malik primarily because of his low status in life. The High Court, in the impugned judgment, erroneously observed that the appellant did not hesitate to take help from his servant in the matrimonial dispute though he was highly educated and placed in high position. The credibility of the witness does not depend upon his financial standing or social status only. A witness which is natural and truthful should be accepted irrespective of his/her financial standing or social status. In the impugned judgment, testimony of witness no.4 (Prabir Malik)is extremely important being a natural witness to the incident. He graphically described the incident of 27.8.1990. He also stated that in his presence in the apartment at Minto Park, the respondent stated that the appellant had no place of residence, therefore, she allowed him to stay in her flat, but she did not like any other man of the appellant staying in the flat. According to this witness, she said that the flat was hers and she was paying rent for it. According to this witness, the respondent further said that even people living on streets and street beggars have some prestige, but these people have no prestige at all. This witness also stated that immediately thereafter the appellant had left the flat and admittedly since 27.8.1990, both the appellant and the respondent are living separately. This was a serious incident and the trial court was justified in placing reliance on this evidence and to come to a definite conclusion that this instance coupled with many other instances led to grave mental cruelty to the appellant. The trial Court rightly decreed the suit of the appellant. The High Court was not justified in reversing the judgment of the trial Court.

The High Court also failed to take into consideration the most important aspect of the case that admittedly the appellant and the respondent have been living separately for more than sixteen and half years (since 27.8.1990). The entire substratum of the marriage has already disappeared. During this long period, the parties did not spend a single minute together. The appellant had undergone bye-pass surgery even then the respondent did not bother to enquire about his health even on telephone. Now the parties have no feelings and emotions towards each other.

The respondent appeared in person. Even before this Court, we had indicated to the parties that irrespective of whatever has happened, even now, if they want to reconcile their differences then the case be deferred and they should talk to each other. The appellant was not even prepared to speak with the respondent despite request from the Court. In this view of the matter, the parties cannot be compelled to live together.

The learned Additional District Judge decreed the appellant's suit on the ground of mental cruelty. We deem it appropriate to analyze whether the High Court was justified in reversing

the judgment of the learned Additional District Judge in view of the law declared by a catena of cases. We deem it appropriate to deal with the decided cases.

Before we critically examine both the judgments in the light of settled law, it has become imperative to understand and comprehend the concept of cruelty.

The ***Shorter Oxford Dictionary*** defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'. The term "mental cruelty" has been defined in the Black's Law Dictionary [8th Edition, 2004] as under:

> Mental Cruelty - As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse.

The concept of cruelty has been summarized in ***Halsbury's Laws of England*** [Vol.13, 4th Edition Para 1269] as under:

> The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits.

In 24 ***American Jurisprudence*** 2d, the term "mental cruelty" has been defined as under:

> Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse.

In the instant case, our main endeavour would be to define broad parameters of the concept of 'mental cruelty'. Thereafter, we would strive to determine whether the instances ofmental cruelty enumerated in this case by the appellant would cumulatively be adequate to

grant a decree of divorce on the ground of mental cruelty according to the settled legal position as crystallized by a number of cases of this Court and other Courts.

This Court has had an occasion to examine in detail the position of mental cruelty in ***N.G. Dastane*** **v.** ***S. Dastane*** [(1975) 2 SCC 326, 337, para 30] observed as under :-

> The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent.

In the case of ***Sirajmohmedkhan Janmohamadkhan*** **v.** ***Haizunnisa Yasinkhan***. [(1981) 4 SCC 250], this Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement ofour social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuousill treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors, which lead to mental or legal cruelty.

In the case of ***Shobha Rani*** **v.** ***Madhukar Reddi*** [(1988) 1 SCC 105] this Court had an occasion to examine the concept of cruelty. The word 'cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(i)(a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations.It is a course of conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained ofit is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilfulill treatment.

Again, this Court had an occasion to examine in great detail the concept of mental cruelty. In the case of ***V. Bhagat*** **v.** ***D. Bhagat (Mrs.)*** [(1994) 1 SCC 337] the Court observed, in para 16 at page 347, as under:

> 16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put

up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.

This Court aptly observed in ***Chetan Dass*** **v.** ***Kamla Devi*** [(2001) 4 SCC 250] para 14 at pp.258-259, as under:

Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case.

The mental cruelty has also been examined by this Court in ***Parveen Mehta*** **v.** ***Inderjit Mehta*** [(2002) 5 SCC 706] at pp.716-17 [para 21] which reads as under:

Cruelty for the purpose of Section 13(1)(i-a) is to be taken as behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidenceon record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.

In this case the Court also stated that so many years have elapsed since the spouses parted company. In these circumstances it can be reasonably inferred that the marriage between the parties has broken down irretrievably.

In ***A. Jayachandra*** **v.** ***Aneel Kaur*** [(2005) 2 SCC 22] the Court observed as under:

> The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse, same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.
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> To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would beimpossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting

immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mentalpeace of the other party.

The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty,it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it.It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent.

This Court in ***Vinita Saxena* v. *Pankaj Pandit*** [(2006) 3 SCC 778] aptly observed as under:

As to what constitutes the required mental cruelty for the purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home.

If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer.

In ***Shobha Rani*** case at pp.108-09, para 5, the Court observed as under:

5. Each case may be different. We deal with the conduct of human beings who are no generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conductcomplained of. Such is the wonderful (sic) realm of cruelty.

In this case, the Court cautioned the lawyers and judges not to import their own notions of life in dealing with matrimonial problems. The judges should not evaluate the case from their own standards. There may be a generation gap between the judges and the parties. It is always prudent if the judges keep aside their customs and manners in deciding matrimonial cases in particular.

In a recent decision of this Court in the case of ***Rishikesh Sharma* v. *Saroj Sharma*** [2006 (12) SCALE 282] this Court observed that the respondent wife was living separately from the year 1981 and the marriage has broken down irretrievably with no possibility of the parties living together again. The Court further observed that it will not be possible for the parties to live together and therefore there was no purpose in compelling both the parties to live together. Therefore the best course was to dissolve the marriage by passing a decree of divorce so that the parties who were litigating since 1981 and had lost valuable part of life could live peacefully in remaining part of their life. The Court further observed that her desire to live with her husband at that stage and at that distance of time was not genuine. This Court observed that under such circumstances, the High Court was not justified in refusing to exercise its jurisdiction in favour of the appellant who sought divorce from the Court."Mental cruelty" is a problem of human behaviour. This human problem unfortunately exists all over the world. Existence of similar problem and its adjudication by different courts of other countries would be of great relevance, therefore, we deem it appropriate to examine similar cases decided by the Courts of other jurisdictions. We must try to derive benefit of wisdom and light received from any quarter.

ENGLISH CASES:

William Latey, in his celebrated book ***The Law and Practice in Divorce and Matrimonial Causes*** (15th Edition) has stated that there is no essential difference betweenthe definitions of the ecclesiastical courts and the post-1857 matrimonial courts of legal cruelty in the marital sense. The authorities were fully considered by the Court of Appeal andthe House of Lords in ***Russell* v. *Russell*** [(1897) AC 395] and the principle prevailing in the Divorce Court (until the Divorce Reform Act, 1969 came in force), was as follows:

> Conduct of such a character as to have caused danger to life, limb, or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger.

In England, the Divorce Reform Act, 1969 came into operation on January 1, 1971. Thereafter the distinction between the sexes is abolished, and there is only one ground of divorce, namely that the marriage has broken down irretrievably. The Divorce Reform Act, 1969 was repealed by the Matrimonial Causes Act, 1973, which came into force on January 1, 1974. The sole ground on which a petition for divorce may be presented to the court by either party to a marriage is that the marriage has broken down irretrievably. Lord Stowell's proposition in ***Evans* v. *Evans*** [(1790) 1 Hagg Con 35] was approved by the House of Lords and may be put thus: before the court can find a husband guilty of legal cruelty towards his wife, it is necessary to show that he has either inflicted bodily injury upon her, or has so conducted himself towards her as to render future cohabitation more or less dangerous to life, or limb, or mental or bodily health. He was careful to avoid any definition of cruelty, but he did add: “The causes must be grave and weighty, and such as to show an absolute impossibility that the duties of married life can be discharged”. But the majority of their Lordships in ***Russell* v. *Russell*** (1897) declined to go beyond the definition set out above. In this case, Lord Herschell observed as under:

> It was conceded by the learned counsel for the appellant, and is, indeed, beyond controversy, that it is not every act of cruelty in the ordinary and popular sense of that

word which amounted to saevitia, entitling the party aggrieved to a divorce; that there might be many wilful and unjustifiable acts inflicting pain and misery in respect of which that relief could not be obtained.

In ***Simpson*** **v.** ***Simpson*** [(1951) 1 All E R 955] the Court observed that:

> When the legal conception of cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger, it is vital to bear in mind that it comprises two distinct elements: first, the ill-treatment complained of, and, secondly, the resultant danger or the apprehension thereof. Thus, it is inaccurate, and liable to lead to confusion, if the word "cruelty" is used as descriptive only of the conduct complained of, apart from its effect on the victim.

Lord Reid, concurring, reserved opinion as to cases of alleged cruelty in which the defender had shown deliberate intention, though he did not doubt that there were many cases where cruelty could be established without its being necessary to be satisfied by evidence thatthe defender had such an intention. Lord Tucker, also concurring, said:'Every act must be judged in relation to its attendant circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse and the offender's knowledge of the actual or probable effect of his conduct on the other's health are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies.'

Cases involving the refusal of sexual intercourse may vary considerably and in consequence may or may not amount to cruelty, dependent on the facts and circumstances of the parties. In ***Sheldon*** **v.** ***Sheldon*** [(1966) 2 All E R 257] Lord Denning, M.R. stated at p. 259:

> The persistent refusal of sexual intercourse may amount to cruelty, at any rate when it extends over a long period and causes grave injury to the health of the other. One must of course, make allowances for any excuses that may account for it, such asill-health, or time of life, or age, or even psychological infirmity. These excuses mayso mitigate the conduct that the other party ought to put up with it. It after making all allowances however, the conduct is such that the other party should not be called upon to endure it, then it is cruelty.

Later, Lord Denning, at p. 261, said that the refusal would usually need to be corroborated by the evidence of a medical man who had seen both parties and could speak to the grave injury to health consequent thereon. In the same case, Salmon, L. J. stated at p. 263:

> For my part, I am quite satisfied that if the husband's failure to have sexual intercourse had been due to impotence, whether from some psychological or physical cause, this petition would be hopeless. No doubt the lack of sexual intercourse might in such a case equally have resulted in a breakdown in his wife's health. I would however regard the husband's impotence as a great misfortune, which has befallen both of them.

There can be cruelty without any physical violence, and there is abundant authority for recognizing mental or moral cruelty, and not infrequently the worst cases supply evidence of both. It is for the judges to review the married life of the parties in all its aspects. The several acts of alleged cruelty, physical or mental, should not be taken separately. Several acts considered separately in isolation may be trivial and not hurtful but when considered cumulatively they might well come within the description of cruelty.

While dealing with the matter of extreme cruelty, the Supreme Court of South Dakota in the case of ***Hybertson* v. *Hybertson*** [(1998) 582 N.W. 2d 402] held as under:

> Any definition of extreme cruelty in a marital setting must necessarily differ according to the personalities of the parties involved. What might be acceptable and even common place in the relationship between rather stolid individuals could well be extraordinary and highly unacceptable in the lives of more sensitive or high-strung husbands and wives. Family traditions, ethnic and religious backgrounds, local customs and standards and other cultural differences all come into play when trying to determine what should fall within the parameters of a workable marital relationship and what will not.

In the case of ***Fleck* v. *Fleck*** (79 N.D. 561) the Supreme Court of North Dakota dealt with the concept of cruelty in the following words:"The decisions defining mental cruelty employ such a variety of phraseology that it would be next to impossible to reproduce any generally accepted form. Very often, they do not purport to define it as distinct from physical cruelty, but combine both elements in a general definition of 'cruelty,' physical and mental. The generally recognized elements are:

(1) A course of abusive and humiliating treatment;

(2) Calculated or obviously of a nature to torture, discommode, or render miserable the life of the opposite spouse; and

(3) Actually affecting the physical or mental health of such spouse."

In ***Donaldson* v. *Donaldson*** [(1917) 31 Idaho 180, 170 P. 94], the Supreme Court of Idaho also came to the conclusion that no exact and exclusive definition of legal cruelty is possible. The Court referred to 9 RCL p. 335 and quoted as under:

> It is well recognized that no exact inclusive and exclusive definition of legal cruelty can be given, and the courts have not attempted to do so, but generally content themselves with determining whether the facts in the particular case in question constitute cruelty or not. Especially, according to the modern view, is the question whether the defending spouse has been guilty of legal cruelty a pure question of fact to be resolved upon all the circumstances of the case.

CANADIAN CASES:

In a number of cases, the Canadian Courts had occasions to examine the concept of 'cruelty'. In ***Chouinard* v. *Chouinard*** [10 D.L.R. (3d) 263] the Supreme Court of New Brunswick held as under:"Cruelty which constitutes a ground for divorce under the Divorce Act, whether it be mental or physical in nature, is a question of fact. Determination of such a fact must depend on the evidence in the individual case being considered by the court. No

uniform standard can be laid down for guidance; behaviour, which may constitute cruelty in one case, may not be cruelty in another. There must be to a large extent a subjective as well as an objective aspect involved; one person may be able to tolerate conduct on the part of his or her spouse which would be intolerable to another. Separation is usually preceded by marital dispute and unpleasantness. The court should not grant a decree of divorce on evidence of merely distasteful or irritating conduct on the part of the offending spouse. The word 'cruelty' denotes excessive suffering, severity of pain, mercilessness; not mere displeasure, irritation, anger or dissatisfaction; furthermore, the Act requires that cruelty mustbe of such a kind as to render intolerable continued cohabitation."

In choosing the words 'physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses' Parliament gave its own fresh complete statutory definition of the conduct which is a ground for divorce under s. 3(d) of the Act."

AUSTRALIAN CASES:

In ***Dunkley* v. *Dunkley*** [(1938) SASR 325], the Court examined the term "legal cruelty" in the following words: "'Legal cruelty', means conduct of such a character as to have caused injury or danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of danger. Personal violence, actual or threatened, may alone be sufficient; on the other hand, mere vulgar abuse or false accusations of adultery are ordinarilynot enough; but, if the evidence shows that conduct of this nature had been persisted in until the health of the party subjected to it breaks down, or is likely to break down, under thestrain, a finding of cruelty is justified."

In ***La Rovere* v. *La Rovere*** [4 FLR 1], the Supreme Court of Tasmania held as under:

> When the legal conception of cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger, it is vital to bear in mind that it comprises two distinct elements: first, the ill-treatment complained of, and, secondly, the resultant danger or the apprehension thereof. Thus it is inaccurate and liable to lead toconfusion, if the word 'cruelty' is used as descriptive only of the conduct complained of, apart from its effect on the victim.

We have examined and referred to the cases from the various countries. We find strong basic similarity in adjudication of cases relating to mental cruelty in matrimonial matters. Now, we deem it appropriate to deal with the 71st report of the Law Commission of India on "Irretrievable Breakdown of Marriage".

The ***71st Report*** of the Law Commission of India briefly dealt with the concept of irretrievable breakdown of marriage. This Report was submitted to the Government on 7th April, 1978. In this Report, it is mentioned that during last 20 years or so, and now it would be around 50 years, a very important question has engaged the attention of lawyers, social scientists and men of affairs, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory. It would be relevant to recapitulate recommendation of the said Report.

In the Report, it is mentioned that the germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case ***Lodder* v. *Lodder*** (1921 *New Zealand Law Reports* 786). Salmond J., in a passage which has now become classic, enunciated the breakdown principle in these words:

> The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this court, as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous.

In the said Report, it is mentioned that restricting the ground of divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet such a situation has arisen in which the marriage cannot survive. The marriage has all the external appearances of marriage, but none in reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a fagade, when the emotional and other bonds, which are of the essence of marriage, have disappeared.

It is also mentioned in the Report that in case the marriage has ceased to exist insubstance and in reality, there is no reason for denying divorce, then the parties alone can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage, which has long ceased to be effective, are bound to be a source of greater misery for the parties.

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

This Court in ***Naveen Kohli*** **v.** ***Neelu Kohli*** [(2006) 4 SCC 558] dealt with the similar issues in detail. Those observations incorporated in paragraphs 74 to 79 are reiterated in the succeeding paragraphs.

> 74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.
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> 75. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.
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> 76. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist."
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> 77. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems then are sought to be solved.
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> 78. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.
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> 79. When we carefully evaluate the judgment of the High Court and scrutinize its findings in the background of the facts and circumstances of this case, it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory.

On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. hat may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. here can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

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

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

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

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

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

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

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

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

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

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

When we take into consideration aforementioned factors along with an important circumstance that the parties are admittedly living separately for more than sixteen and half years (since 27.8.1990) the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the respondent.

The High Court in the impugned judgment seriously erred in reversing the judgment of the learned Additional Sessions Judge. The High Court in the impugned judgment ought to have considered the most important and vital circumstance of the case in proper perspective that the parties have been living separately since 27th August 1990 and thereafter, the parties did not have any interaction with each other. When the appellant was seriously ill and the surgical intervention of bye-pass surgery had to be restored to, even on that occasion, neither the respondent nor her father or any member of her family bothered to enquire about the health of the appellant even on telephone. This instance is clearly illustrative of the fact that now the parties have no emotions, sentiments or feelings for each other at least since 27.8.1990. This is a clear case of irretrievable breakdown of marriage. In our considered view, it is impossible to preserve or save the marriage. Any further effort to keep it alive would prove to be totally counter-productive.

In the backdrop of the spirit of a number of decided cases, the learned Additional District Judge was fully justified in decreeing the appellant's suit for divorce. In our view, in a case of this nature, no other logical view is possible.

On proper consideration of cumulative facts and circumstances of this case, in our view, the High Court seriously erred in reversing the judgment of the learned Additional District Judge, which is based on carefully watching the demeanour of the parties and their respective witnesses and the ratio and spirit of the judgments of this Court and other Courts. The High Court erred in setting aside a well-reasoned judgment of the trial court based on the correct analysis of the concept of mental cruelty. Consequently, the impugned judgment of the High Court is set aside and the judgment of the learned Additional District Judge granting the decree of divorce is restored.

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Bipinchandra Jaisinghbai Shah v. *Prabhavati*

AIR 1957 SC 176

B.P. SINHA, J. - This is an appeal by special leave against the judgment and decree of the High Court of Judicature at Bombay dated August 22, 1952, reversing those of a Single Judge of that Court on the original side, dated March 7, 1952, by which he had granted a decree for dissolution of marriage between the appellant and the respondent.

2. 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 Jalgaon 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 January8, 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 Gujarati except a few words written in faulty English. This letter is dated April 1, 1947, written from the plaintiff's house at Patan, where the defendant had 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 abroad on 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 thaton the first night after his return, his bed had been made in the hall occupied by his father andthat night he slept away from his wife. As this incident is said to have some significance inthe 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 aforesaidto the plaintiff, who recognised it as being in the familiar handwriting of his wife. He decidedto 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 that 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 thedefendant 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 solicitoron July 15, 1947, charging her with intimacy between herself and Mahendra and asking her tosend back the little boy. The parties violently differ on the intent and effect of this letterwhich 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 had been posted. The defendant denied that any such letter had been received by her or by her father. Hence the original, if any, is not on therecord. 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.

The plaintiff stated that he 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 plaintiff's mother about sending the defendant to Bombay and to the fact that the plaintiff had 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 ofthe 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 had 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 had 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.

3. 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, 1947. 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 downtheir 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 wilfully 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.

4. 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 no order as to the costs of the suit.

5. 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 heldthat even assuming that the defendant was in desertion as a result of what had happened on May 24, and subsequently, the letter aforesaid had 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 inrefusing to take the wife back. The plaintiff made an application to the High Court for leaveto appeal to this Court. The leave asked for was refused by another Division Bench consistingof 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.

6. 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 thetestimony of the defendant's father and cousin which, if believed, would give an entirely different colour to the case.

7. Before we deal with the points in controversy, it is convenient here to make certain general 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, clause (*d*) of the Bombay Hindu Divorce Act, 22 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 degradationin 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 clause (*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 Section 3, clause (*d*).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 aHindu husband and "wife" means a Hindu wife.

8. 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 lawhas 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.

9. 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 an 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.
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> 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 abandons 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 presentcase. 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 paenitentiae* thus, provided by law and decides to come back to the deserted spouse bya bona fide offer of resuming the matrimonial home 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 insistupon 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*** [(1955) 1 All ER 341, 342] 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 aview to discharging marital duties and, if so, whether there was an unreasonable refusal onthe part of the husband to take her back.

10. 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 occupied by his father and that it was the plaintiff and not she who was responsible for their sleeping apart that night. As the learned trial Judge has preferred the plaintiff’s testimony to that of the defendant on all matters on which there was simply oath against oath, we would not go behind that finding. This incident by itself is capable of an innocent explanation and therefore has to be viewed along with the other incidents deposed to by the plaintiff in order to prove his case of desertion by the defendant. There was no reason why the husband should have thought of sleeping apart from the wife because there was no suggestion in the record that the husband was aware till then of the alleged relationship between the defendant and Mahendra. But the wife may have been apprehensive that the plaintiff had known of her relations with Mahendra. That apprehension may have induced her to keep out of the plaintiff’s way.

11. 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 cause of the trouble is, in its relevant parts, in these terms:

> Mahendrababu,
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> 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 constrainedin 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).
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> 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 atmy hands and really nobody will. You know the natures of all. Many a time I gettired and keep on being uneasy in my mind, and in the end I weep and pray God and say, O Lord, kindly take me away soon: I am not obsessed by any kind of anxiety andso 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" finds place. 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 something 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 had no explanation to give as to how I wrote such a letter". She also admitted that she took good careto 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 had admitted having received at least one letter from Mahendra. Though it would appear from the trend of her cross-examination that she received more than one letters, 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’”.

12. 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 disingenous. 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 photostat copy of that letter on May 23, 1947, and that she thenadmitted having written that letter and that she had tender feelings for Mahendra can easily bebelieved. 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 onlycapable 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 arenot prepared to say that the contents of the letter are capable of only that interpretation and noother. 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 counselfor 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 thatthey have said in respect of the letter in question.

13. 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 had 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 viewedin 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 toconsortium, 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 case that she had not any such intention i.e. being in desertion? The following observations of Pollock, M.R. in ***Thomas* v. *Thomas*** (1924) P 194, 199) 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 thepurpose with which it is done, as revealed by conduct or other expressions of intention: see ***Charters* v. *Charter*** [84 LT 272]. 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*** [4. 58 JP 415] that desertion is not a specific act, but a course of conduct. As Corell Barnes, J. said in *Sickert* v. *Sickert* (1899) P 278, 282): '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."

14. The defendant's further case that she had 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 had 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 not who left the matrimonial home first. [See ***Lang* v. *Lang*** (1955) AC 402, 417]. If one spouse by hiswords 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 that she had been compelled to leave her marital home by the threats of the plaintiff.

15. 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 case as actually pleaded in her written statement, but with the facts 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*** [(1939) AC 417, 420] 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 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 24th May, 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 case and in corroboration of his evidence in court.

16. 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.

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 fulfil 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. Ithas been said that a petitioner should be able honestly to say that he or she was all along willing to fulfil 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 he or she actually wanted the other spouse to come back, for the intention to desert is presumed to continue. Thatpresumption may, however, be rebutted.

17. Applying those observations to the facts of the present case, can the plaintiff honestly say that he was all along willing to fulfil 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 further 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 a confused state of mind that despite my repeated attempts my wife puts me off.

18. 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, hewas 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 plaintiffwas 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 havingthe courage to face him after that discovery. But that will not render her in the eye of the lawa deserter, as observed by Pollock, M.R. in ***Bowron* v. *Bowron*** [(1925) P 187, 192] 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 whoseconduct in reality causes its termination, commits the act of desertion: See also ***Graves* v. *Graves*** [(1864) 3 Sw & Tr 350]*;* ***Pulford* v. *Pulford*** [(1923) P 18]*;* ***Jackson* v. *Jackson*** [(1924) P 19]*;* where Sir Henry Duke P. explains the same doctrine. You must look at the conduct of the spouses and ascertain their "real intention.

19. 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.

20. 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*** 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?"

21. 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. Buton 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 fakein 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, whichthe 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 fides 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.

22. This brings us to a consideration of the three attempts alleged by the plaintiff to have been made by him to induce his wife to return to the matrimonial home when he made two journeys to Patan in 1948 and the third journey in April-May 1949 to Jalgaon. These three visits are not denied by the defendant. The only difference between the parties is as to the purpose of the visit and the substance of the talk between them. That the plaintiff's attachment for the defendant had not completely dried up is proved by the fact that when he came to know that she had been suffering from typhoid he went to Patan to see her. On this occasion which was the second visit the plaintiff does not say that he proposed to her to comeback 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 comeback 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 write any 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 thedefendant'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 toBombay. 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 gone 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 November 13, and November 15, 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 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 notonly 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 considered 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 farthat the wife was not in desertion though she left her husband's home without any fault on thepart 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.

23. 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 defendant'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 he 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 tostay there without the mother. This was in August-September 1948 when the defendant deposes to having questioned her husband why she has 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 deposedto 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 plaintiffcould 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 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.

24. 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.

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Dharmendra Kumar **v.** *Usha Kumar*

AIR 1977 SC 2213

A.C. GUPTA, J. – 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 Sec. 13(1A)(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(1A)(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:
>
> (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 13(1A)(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 23(1)(a) of the Act.

(2) 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 ILR (1971) 1 Del. 6 [***Ram Kali* v. *Gopal Dass***], and a later decision of a learned single Judge of that court reported in AIR 1977 Del. 178 [***Gajna Devi* v. *Purshotam Giri***] held that no such circumstance has been alleged in the instant case from which it could besaid 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 this present appeal the husband questions the validity of the decree of divorce granted in favour of the petitioner.

3. Sec. 13(1A)(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 (1A) was introduced in Sec. 13 by Section 2 of the Hindu Marriage (Amendment) Act, 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 byway of divorce; the party against whom the decree was passed was not given that right. The grounds for granting relief under Section 13 including sub-section (1A) however continue to be subject to the provisions of Section 23 of the Act. We have quoted above the part of Sec. 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 invitationsto live with him meant that she was trying to take advantage of her own wrong for the purpose of relief under Section 13 (1A)(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*** case [ILR (1971) 1 Delhi 6] 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 23(1)(a). Relying on and explaining this decision in the later case of ***Gajna Devi*** **v.** ***Purshotam Giri*** 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 Sec. 23 of the Act, not entitled to obtain divorce then it would have inserted an exception to Section 13(1A) 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 toobtain 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.
>
> (T)he expression "petitioner is not in any way taking advantage of his or her own wrong" occurring in Cl. (a) of S. 23(1) of the Act does not apply to taking advantage of the statutory right to obtain dissolution of the marriage which has been conferred on him by Sec. 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*.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 ofer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.

4. 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 live 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.

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T. Srinivasan v. *T. Varalakshmi*

1 (1991) DMC 20 (Mad.)

K.M. NATARAJAN, J. – 2. These two appeals by the husband arose out of a common judgment passed by the VIII Additional Judge, City Civil Court, Madras, in A.S. No. 49 of 1981 and C.M.A. No. 33 of 1981.

3. The brief facts which are necessary for the disposal of these appeals are as follows: The respondent-wife filed the suit in O.S. No. 9654 of 1977 before the V Assistant Judge for separate maintenance against the appellant. According to her, their marriage took place on 31.01.1975 at Madras and the consummation of the marriage took place on 01.02.1975. The appellant took her to his parents' house after 2 or 3 days in respondent's place. Thereafter he started teasing her alleging insufficiency of gifts by her parents and also the presence of a small congenital lump on the respondent's shoulder. Even though it was known to him even before marriage, he ignored it as inconsequential. On 13.02.1975 the respondent-wife was sent away from the house by the appellant-husband asking her to come back with larger presents and jewels. The parents of the respondent were unable to fulfil his desire. On 28.07.1975 the appellant issued a notice to the respondent alleging that she had left the house on her own accord, to which she sent a suitable reply on 02.08.1975 denying the allegations and stating she was deserted by the appellant and that she was anxious to join the appellant. The appellant issued a rejoinder. Thereupon, he filed a petition for restitution of conjugal rights in O.P. No. 430 of 1975. The respondent in her counter submitted that she was willingand anxious to join the appellant by narrating the circumstances under which she was deserted by her husband. On 21.02.1977 the court allowed the petition and granted a decree for restitution of conjugal rights on the basis of the averments made in the counter filed by therespondent. Thereafter on 08.03.1977 the respondent wife sent a notice through her Counsel to the appellant that she was willing to join with the appellant and lead a conjugal life with the appellant and requested him to send some relation to take her back to his house. The appellant did not send any reply. Again, on 19.05.1977 she sent word to the appellant that shewould be returning to him on 23.05.1977. The appellant sent a reply through the emissary that final orders have not been passed by court and that he would lock up the house and go away on 23.05.1977. The respondent who went to the house of the appellant on 23.05.1977, was not allowed to enter the house by the appellant and his mother. Thereupon, she issued anotice on 28.05.1977 setting out the facts and the appellant's refusal to take her back. The respondent made two more attempts on 07.08.1977 and 28.09.1977 to join the appellant, but in vain. On 15.10.1977 she along with her parents went to the appellant's house, but she was not allowed to enter the house by the appellant. Thereupon the respondent gave a complaintat the Elephant Gate Police Station. At the police station the appellant gave in writing that he declined to take her back to his house. Hence, she claimed maintenance under Section 18 of the Hindu Adoptions and Maintenance Act at the rate of Rest. 300/- and also past maintenance, as the appellant is employed as Upper Division Clerk in the Police Department drawing a salary of Rs. 500/- p.m., and also getting income from the undivided joint family property of himself and his father.

4. The suit was resisted by the appellant and in the written statement he admitted the marriage and submitted that the respondent and her parents played a deception on him by not disclosing a large lump on the back of the respondent which was discovered by him only on the nuptial night. He would further state that the respondent agreed to remove the lump by surgery and hence she went to her parents' house on 13.02.1975. He denied having ill- treated the respondent on the inadequacy of gifts etc. He would state that all his attempts to get back his wife, the respondent, proved to be of no avail. Hence he filed O.P. No. 420 of 1975 for restitution and obtained a decree. But in spite of the decree, she did not care to join him. Hence, he filed O.P. No. 271/78 for divorce on the ground that she has not joined him for more than one year after the decree for restitution of conjugal rights. He stated that he was not liable to pay any maintenance to the respondent. The respondent is running a nursery school and earning Rs. 500/- per mensem. He would state that he was getting Rs. 375/- as clerk in the police department. O.P. No. 271 of 1978 which is the subject matter of C.M.A. No. 33 of 1981 was filed by the appellant under Section 13 (IA) (ii) of the Hindu Marriage Act, for a decree of divorce on the ground that he obtained decree for restitution of conjugal rights on 21.02.1977 in O.P. No. 420 of 1975, the parties have not lived together. According to him, since one year has lapsed from the date of the decree and that there has been no restitution between the parties, he is entitled to the said relief. The said application was resisted by the respondent who would state that it is only the appellant who deserted her without reasonable or probable cause and all attempts made by her to go and live with him after the decree for restitution have become futile and as such, he is not entitled to a decree for divorce.

5. The trial Judge after holding a joint trial, in a common judgment came to the conclusion that it is only the appellant who deserted the respondent without reasonable or probable cause and the respondent-wife is entitled to maintenance at the rate of 100 per mensem and also past maintenance at the above rate for 6 months. The trial court also dismissed O.P. No. 271 of 1978 holding that it was only the appellant who had rejected the offer of the respondent to come and live with him and that there was a fault on the part of the respondent to give restitution of conjugal rights. Aggrieved by the same, A.S. No. 49 of 1981 and C.M.A. No. 33 of 1981 were filed and the appellant was unsuccessful. Hence these two second appeals. They were admitted on the following substantial questions of law:-

C.M.S.A. No. 39 of 1981

1. Whether the court below failed to apply the principle laid down in Section 13 (IA) of the Hindu Marriage Act, 1955 ?

2. Whether a decree for divorce should automatically follow on the expiry of the period of one year from the date of decree for restitution of conjugal rights ?

3. Whether the Court below is justified in refusing a decree for divorce for the appellant on the basis of Section 23(1) of the Hindu Marriage Act, 1955 ?

6. The learned counsel for the appellant submitted that though Section 13(IA)(ii) of the Hindu Marriage Act is controlled by Section 23(I)(a), yet mere refusal on the part of the appellant to take back the respondent will not amount to wrong so as to disentitle him to get a decree for dissolution of marriage. According to the learned counsel even accepting the case of the respondent that after the decree she attempted to join the appellant but the

appellant refused to take her back, that cannot be a ground for refusing to grant a decree of divorce since one year period has lapsed from the date of the decree and the refusal would not amount to "wrong" as contemplated in Section 23(I)(a). In support of his contention, he relies on the decisions in ***Dharamendra Kumar* v. *Usha Kumar*** [([AIR 1977 SC 2218], ***Bimla Devi* v. *Singh Raj*** [AIR 1977 P & H 167], ***Madhukar Bhaskar Sheorey* v. *Smt. Saral Madhukar Sheorey*** [AIR 1973 Bombay 55], ***Soundarammal* v. *Sundara Mahalinga Nadar*** [(1980) II MLJ 121]. On the other hand the learned counsel for the respondent drew the attention of this court to the finding of the courts below and submitted that those decisions are not at all helpful to the case of the appellant, as in the instant case the appellant filed the very petition for restitution of conjugal rights only to obtain a decree of divorce and with thatview, even after the decree of restitution of conjugal rights was passed on his application when the respondent did not contest the same but expressed her readiness and willingness to join the appellant and in spite of many requests by means of notices through advocate and mediators and when the respondent herself went along with her parents, she was not allowed to join the appellant and in the circumstances, the appellant cannot take advantage of his own wrong and obtain a decree of divorce. In this connection, the learned counsel drew the attention of this Court to the findings of the trial court as well as the lower appellate court. It is seen that the findings of the trial Court in para 21 are: "Though the defendant got a decree for restitution of conjugal rights, it is evident from the evidence let in that he has got this order only to see that he gets a further order of divorce." He further observed: "The claim of the plaintiff that the defendant deserted her without any reasonable cause and in spite of several attempts she could not go and live with the defendant appears to be more probable." The lower appellate court held as follows: "It is clear from the notices that passedbetween the parties and also from the evidence of PWs. 1 and 2 that the plaintiff made severalattempts to live with the defendant and that she has always been anxious to live with the defendant, but the defendant has not made any attempt to get back the plaintiff and live with her." According to the lower appellate court, the Court would not accept the contention that the appellant is entitled to a decree of divorce as the respondent has not joined the appellant within a period of one year from the date of the order.

7. Let us first consider the decisions relied on by the learned counsel for the appellant and see how far they are helpful to the case of the appellant. The learned counsel first citedthe decision in ***Dharamendra Kumar* v. *Usha Kumar***. That was a case where the wife filed a petition under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights. On the expiry of two years, she filed a petition under Section 13 (I-A) (ii) of the Act for dissolution of marriage and for a decree of divorce. The said application was resisted by the husband on the ground that there has been no restitution of conjugal rights between the parties after passing of the decree in the earlier proceedings. Further, he made attempt to comply with the decree by writing several letters to the petitioner and otherwise inviting herto live with him. But the petitioner refused to live with him and never replied to his letters. He contended that she now wants to make capital out of her own wrong. In the circumstances it was held as follows:-

> In order to be a 'Wrong' within the meaning of Section 23(IA), 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 ***Bimla Devi* v. *Singh Raj*** [AIR 1977 P & H 157 (F.B.)] it was held:

> The provisions of Section 23(1)(a) cannot be invoked to refuse the relief under Section 13(I-A) (ii) on the ground of non-compliance of a decree of restitution of conjugal rights where there has not been restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of decree for restitution of conjugal rights in proceedings in which they were parties. There is no provision in the Code of Civil Procedure by which the physical custody of the spouse, who has suffered the decree, can be made over to the spouse who obtained the decree for restitution of conjugal rights. Thus, merely because the spouse, who suffered the decree, refused to resume cohabitation, would not be a ground to invoke the provisions of Section 23(1)(a) so as to plead that the said spouse is taking advantage of his or her own wrong.

The lower court considered the decision of the Bombay High Court in ***Madhukar* v. *Saral*** for the proposition that in granting relief under Section 13(I-A) the Court must takeinto consideration Section 23(1) and consider the conduct of the petitioner subsequent to the passing of the decree for judicial separation or restitution of conjugal rights and not grant relief to a party who is taking advantage of his own wrong. The decision of our High Court in ***Soundrammal* v. *Sundara Mahalinga Nadar*** [1980 (II) MLJ 121], was referred by the lower appellate court. This Court came to the conclusion in the above quoted case:

> After deep consideration, in my view, the claim made, and which found acceptance in the Full Bench decision of the Punjab and Haryana High Court and in the decision of the Delhi High Court, that the law on the aspect of divorce has been liberalized so as to facilitate even the defaulting spouse / wrong-doer husband to secure divorce, cannot be acceded to.

That was a case where the husband filed the petition under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights and it was allowed. The petition filed by the wife for restitution of conjugal rights was later on withdrawn. The wife filed another O.P.for a declaration that the marriage is null and void or in the alternative for judicialseparation. That petition was allowed and permanent alimony at the rate of Rs. 25 per mensem was ordered. After the expiry of the statutory period of two years, the respondent filed O.P. for dissolution of marriage under Section 13(I-A) of the Hindu Marriage Act. The said application was resisted by the wife on the ground that the husband cannot take advantage of his own wrong. He had with a wicked intention married another woman and lived with her and the restitution of conjugal rights asked for by him was a pretence and a farce, and that it is only the respondent-husband who made it impossible for her to lead a married life and he being in the wrong, he cannot allge his own wrong and wickedness in living with another woman as the basis for securing relief in the petition. Further, he had not paid maintenance so far. The trial court dismissed the petition on the ground that the respondent cannot take advantage of his own mistake while the appellant court allowed the appeal. This Court elaborately considered the earlier decisions of the Supreme Court and Full

Bench of the Punjab and Haryana High Court and decisions of the Delhi High Court and other High Courts and held as follows:-

> The points which have come up for consideration before the High Courts of Punjab and Haryana, and Delhi in the decisions above referred to, can be resolved by holding that the two amending Acts have now enabled defaulting spouses to seek for the relief of divorce, provided he or she satisfies the Court, that Section 23 of the Act is not attracted since non-compliance of a decree for judicial separation or restitution of conjugal rights is not a 'wrong' within the meaning of Section 23 (1)(a) of the Act. Thus, in all those instances in which Section 23 is not attracted, the two amending acts have enabled even defaulting spouses to get relief under Section 13 (I-A) of the Act. The amending Acts (Central Acts XLIV of 1964 and LXVIII of 1976) have not enabled wrong-doers who would come within the ambit of Section 23(1)(a) of the Act to get therelief of divorce on the plea that liberalization had been brought about towards divorce tosuch an unlimited extent. In my view, the amending Acts XLIV of 1964 and LXVIII of 1976 have not enabled all sorts of defaulting spouses to get relief for divorce, which was not at all available earlier, but it would be available only in such of those instances wherein Section 23 of the Act cannot be applied. Hence, I hold that the respondentherein, a continuing wrongdoer, cannot plead that, after the said two amending Acts, Section 23 (1)(a) cannot be invoked against him, and therefore the decision of the lower appellate Court is hereby set aside.

I am in entire agreement with the view expressed by the learned Judge. The learned counsel for the respondent drew my attention to the decision of Division Bench in ***Geetha Lakshmi*** **v.** ***G.V.N.K. Sarveswara Rao*** (AIR 1983 AP 111) where also the learned Judges after considering the decision of the Supreme Court as well as the Full Bench decisions of Punjab and Haryana held as follows:-

> Before and after the amendment of the Hindu Marriage Act, the provisions of Section 13 are subject to provisions of Section 23(1)(a) of the Act. The amendment to Section 13 must be limited to the extent to which the amendments have been made. They cannot be given an extended operation. Section 13 cannot be taken out of the limits of Section 23(1)(a). If it were otherwise, the Parliament would have added the words "notwithstanding anything to the contrary" in Section 23(1)(a) or would have suitable amended Section 23 (1)(a) itself, as it was well aware of the provisions of Section 23(1)(a) when Section 13 was amended.
>
> A decree for restitution of conjugal rights was obtained by the wife under Section 9of the Act on the ground that the husband had without reasonable cause withdrawn from her society. A decree for restitution of conjugal rights was granted to the wife. After the decree, the husband not only, not complied with the decree, but did positive acts by ill- treating her and finally drove her away from the house. It was not a case of mere non- compliance of the decree, but fresh positive acts of wrong. In such a case, the husband was not entitled to the relief under Section 13(1A) of the Act.

Applying the ratio in the abovesaid case to the facts of this case, it is seen that the marriage between the appellant and the respondent took place on 31.01.1975 and that the appellant and the respondent lived together in the house of the respondent for 2 or 3 days and thereafter they live d in the house of the appellant for 10 days. According to the respondent

wife, the appellant husband was pressing her to get gifts from her parents' house and so she left the appellant's house on 13.02.1975. She could not return back to the house of the appellant in view of the demand. It is seen that though the wife left the house of the husband on 13.02.1975, the husband was keeping quiet till July, 1975. The case of the wife is that she was always ready and willing to live with her husband and that it was only the appellant-husband who did not allow her to live with him without getting gifts from her father. To a notice issued by the husband under Ex. A-1 on 28.07.1975, the wife immediately sent a reply Ex. A-2 denying the allegations made in Ex. A-1 that she has withdrawn from the society of her husband without reasonable cause. But, on the other hand, she hasspecifically stated that she was always anxious to live with her husband and she neverthought of living away from the respondent. In spite of the reply, the husband filed O.P. No. 420 of 1975 for restitution of conjugal rights. In the counter, which has been marked as Ex. A-3, the wife has specifically stated that she is always ready and willing to live with the husband, that she never thought of living alone and that she is willing to join her husband. Thereupon the said petition was allowed on 21.02.1977. Within a few days, namely, on 08.03.1977 the respondent-wife sent a notice to the husband appellant wherein she has stated that she is willing to join her husband and lead a happy life and requested him to send some female relations to take her back to his house. Though the husband received the notice Ext. A-4, he did not send any reply. Again, another notice was sent on 25.05.1977 to the effect that the respondent sent one Rajabadar, who is related to the husband on 19.05.1977 to inform the appellant about her coming to the appellant's house on 23.05.1977. But her husband informed the emissary that he would lock up the house and go away elsewhere. In spite of the same, the wife went to the house on 23.05.1977 accompanied by her grandfather, grand-mother and others to join her husband. The husband turned the wife away and refused to allow her to enter the house. He did not also send any reply to Ex. A-5 notice. The wife sent another notice Ex. A-6 dated 13.08.1977 stating that her husband did not allow her to enter the house and deserted her without any reasonable cause and claimed maintenance, to which he sent a reply. Ex. A-8 is the rejoinder of the wife wherein she has reiterated her earlier stand that she was ready and willing to join her husband but the husband was never willing to take her back and on the other hand, he wantonly refused to take her back and thereby deserted her. The respondent also went to the nearest police station and requested thehelp of the police for joining her husband. Though the Inspector sent for the appellant and asked him to live with the respondent in his house, he refused to take her and gave in writing to the effect that he would not take her back to his house on any account. The wife had to filea suit for maintenance on 08.11.1977 within a period of one year. The husband did not deny these facts. Besides examining herself as PW-1, the respondent-wife examined her brother- in-law as PW-2 in support of her contention. Both the courts have concurrently found that it is only the husband who deserted his wife without probable and reasonable cause and thewife is entitled to claim maintenance. Further, the husband cannot take advantage of his own wrong within the meaning of Section 23 (1)(a) of the Hindu Marriage Act and in view of hisconduct in filing the petition for restitution of conjugal rights and subsequently not allowing her to enter into the house and join him and provide maintenance and driving her away, he isnot entitled to the relief of dissolution under Section 13(I-A) of the Hindu Marriage Act. It is also worthwhile to note that the petition for dissolution of marriage under section 13(I-A)

was filed during the pendency of the maintenance proceedings instituted by the wife and also long after the institution of the said proceedings, wherein it is alleged that the appellantwillfully neglected to maintain her and consequently deserted her without probable and reasonable cause and inspite of repeated requests and notices. The above conduct of the appellant is also relevant in deciding the question of "wrong" as contemplated under Section23 (I-A) of the Act. It is not a case of mere failure to render conjugal rights but something more and it is a case of misconduct serious enough so as to justify negativing the claim for dissolution of marriage. As rightly observed by the learned counsel for the respondent, it is clear from the materials available in the case that the appellant has got the decree for restitution of conjugal rights only to see that he gets a further decree for divorce. The finding of both the courts below is that the husband obtained the decree for restitution of conjugal rights, not to act as per the decree, and on the other hand, from the various acts attributed to him, it is clear that he deserted the wife without reasonable and probable cause, and as such,the wife was granted a decree for separate maintenance and in spite of her attempts to join herhusband, her husband refused to allow her to enter the house and on the other hand, he turned out her request and her relations and drove her away. As observed by the courts below, it is not mere non-compliance of decree, but it is an act of positive wrong on the part of the husband and in view of the Section 23 (I-A), he is not entitled to the relief under Section 13 (I-A). Hence, I answer substantial questions of law 1 to 3 in C.M.S.A. 39/81 in favour of the respondent and against the appellant. As rightly observed by the learned counselfor the respondent-wife, in view of the findings on substantial questions of law and in viewof the concurrent findings of both the courts below that the appellant-husband deserted the respondent-wife without reasonable and probable cause and the wife is entitled to maintenance and in view of the fact that the concurrent finding with regard to liability as well as quantum have not been disputed in the appeal, I find that the substantial questions 1 to 3 in the second appeal S.A. 2237/81 are answered in favour of the respondent and against the appellant.

8. In the result, both the appeals fail and are dismissed.

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T. Srinivasan v. *T. Varalakshmi*

AIR 1999 SC 595

JUDGMENT **-** The finding recorded by the Courts below is that the husband obtained a decree for restitution of conjugal rights not to act in obedience thereof but, on the other hand, to keep the wife deprived of her right to perform her conjugal duties. The wife made ademand of the husband to let her join him but he refused to allow her enter the house, rather he drove her away as also her relations, whoever attempted to rehabilitate the wife. These actsof the husband were positive wrongs amounting to 'misconduct', uncondonable for the purposes of S. 23(1)(a) of the Hindu Marriage Act, 1955. Hence, he was rightly denied relief under S. 13 (1A) of the said Act. The appeals, therefore, fail and are hereby dismissed.

2. It is stated by learned counsel for the respondent that a sum of Rs. 3,000/- lies deposited with the Registry towards costs of these appeals. Learned counsel says that the same be remitted to the wife-respondent directly by the Registry. Appeals dismissed.

Hirachand Srinivas Managaonkar v. *Sunanda*

AIR 2001 SC 1285

D.P. MOHAPATRA, J. - The point that arises for determination in this case is short but by no means simple. The point is this: whether the husband who has 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 ("the Act") can be declined relief on the ground that he has failed to pay maintenance to his wife and daughter despite an order of the court.

2. The relevant facts of the case necessary for determination of the question may be stated thus: The appellant is husband of the respondent. On the petition filed by the respondent under Section 10 of the Act seeking judicial separation on the ground of adultery on the part of the appellant a decree for judicial separation was passed by the High Court of Karnatakaon 6-1-1981. In the said order the Court considering the petition filed by the respondent, ordered that the appellant shall pay as maintenance Rs 100 per month to the wife and Rs 75 per month for the daughter. Since then the order has not been complied with by the appellant and the respondent has not received any amount towards maintenance. Thereafter, on 13-9- 1983 the appellant presented a petition for dissolution of marriage by a 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.

3. The respondent contested the petition for divorce on the ground, inter alia, that the appellant having failed to pay the maintenance as ordered by the Court the petition for divorce filed by him is liable to be rejected as he is trying to take advantage of his own wrongfor getting the relief. The High Court by the judgment dated 10-4-1995 in MFA No. 1436 of 1988 accepted the plea taken by the respondent and refused to grant the appellant's prayer fordivorce. The said order is assailed by the appellant in this appeal by special leave.

5. Ms Kiran Suri, learned counsel appearing for the appellant contended that the only condition for getting a divorce under Section 13(1-A) 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 a decree for judicial separation in a proceeding to which both the spouses were parties. If this precondition is satisfied, submitted Ms Suri, the court is to pass a decree of divorce. According to Ms Suri, Section 23(1)(*a*) has no application to a case under Section 13(1-A)(*i*). Alternatively, she contended that the "wrong" allegedly committed by the appellant has no connection with the relief sought in the proceeding i.e. to pass a decree of divorce. According to Ms Suri, an order for payment of maintenance is an executable order and it is open to the respondent to realise the amount due by initiating a proceeding accordingto law.

6. Per contra Mr K.R. Nagaraja, learned counsel for the respondent contended that in the facts and circumstances of the case as available from the record the High Court rightly rejected the prayer of the appellant for a decree of divorce on the ground that the move was not a bona fide one, that he continues to live in adultery even after the decree for judicial separation was passed and that he has failed to maintain his wife and daughter. Mr Nagaraja submitted that granting his prayer for a decree of divorce will be putting a premium on the

wrong committed by the appellant towards the respondent and her child. Shri Nagaraja also raised the contention that the High Court while directing the appellant to pay maintenance to his wife and daughter (Rs 100 + Rs 75 per month) did not pass any order on the prayer made by the respondent for education expenses and marriage expenses of the daughter.

8. Originally nine different grounds were available to a husband or wife for obtaining a decree of divorce under sub-section (1) of Section 13. Under clause (*viii*) of the sub-section a marriage could be dissolved by a decree of divorce on a petition presented by the husband or the wife on the ground that the other party has not resumed cohabitation for a period of two years or upwards after the passing of a decree for judicial separation against that party. Under clause (*ix*) of the sub-section, a marriage could be dissolved by a decree of divorce on a petition presented by the husband or the wife on the ground that the other party had failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of a decree of restitution against that party.

9. Amending Act 44 of 1964, which came into force on 20-12-1964, effected two significant changes. Clauses (*viii*) and (*ix*) which constituted two of the nine grounds onwhich a marriage could be dissolved by a decree of divorce were deleted from sub-section (1)and secondly, a new sub-section i.e. sub-section (1-A) was added to Section 13. It is clear from these amendments introduced by Act 44 of 1964 that whereas prior to the amendment a petition for divorce could be filed only by a party which had obtained a decree for judicial separation or for restitution of conjugal rights, this right is now available to either party to the marriage irrespective of whether the party presenting the petition for divorce is a decree- holder or a judgment-debtor under the decree for judicial separation or the decree for restitution of conjugal rights, as the case may be. This position is incontrovertible.

10. The question is: whether in a petition for divorce filed under sub-section (1-A) of Section 13, it is open to the court to refuse to pass a decree on any of the grounds specified in Section 23 of the Act, insofar as any one or more of them may be applicable.

11. The contention that the right conferred by sub-section (1-A) of Section 13 is absolute and unqualified and that this newly conferred right is not subject to the provisions of Section 23 is fallacious. This argument appears to be based on the erroneous notion that to introduce consideration arising under Section 23(1) into the determination of a petition filed under sub-section (1-A) of Section 13 is to render the amendments made by amending Act 44 of 1964 wholly meaningless. As noted earlier, prior to the amendment under clauses (*viii*) and (*ix*) of Section 13(1) the right to apply for divorce was restricted to the party which had obtained a decree for judicial separation or for restitution of conjugal rights. Such a right was not available to the party against whom the decree was passed. Sub-section (1-A) of Section 13 which was introduced by the amendment confers such a right on either party to the marriage so that a petition for divorce can, after the amendment, be filed not only by the party which had obtained a decree for judicial separation or for restitution of conjugal rights but also by the party against whom such a decree was passed. This is the limited object and effect of the amendment introduced by Act 44 of 1964. The amendment was not introduced in order that the provisions contained in Section 23 should be abrogated and that is also not the effect ofthe amendment. The object of sub-section (1-A) was merely to enlarge the right to apply for divorce and not to make it compulsive that a petition for divorce presented under sub-section

(1-A) must be allowed on a mere proof that there was no cohabitation or restitution for the requisite period. The very language of Section 23 shows that it governs every proceeding under the Act and a duty is cast on the court to decree the relief sought only if the conditions mentioned in the sub-section are satisfied, and not otherwise. Therefore, the contention raised by the learned counsel for the appellant that the provisions of Section 23(1) are not relevant in deciding a petition filed under sub-section (1-A) of Section 13 of the Act, cannot be accepted.

12. The next contention that arises for consideration is whether the appellant by refusing to pay maintenance to the wife has committed a "wrong" within the meaning of Section 23 and whether in seeking the relief of divorce he is taking advantage of his own "wrong". [The court then quoted **Mulla's *Hindu Law,*** 17th ed., p. 121]

13. After the decree for judicial separation was passed on the petition filed by the wife it was the duty of both the spouses to do their part for cohabitation. The husband was expected to act as a dutiful husband towards the wife and the wife was to act as a devoted wife towards the husband. If this concept of both the spouses making sincere contribution for the purpose of successful cohabitation after a judicial separation is ordered then it can reasonably be said that in the facts and circumstances of the case the husband in refusing to pay maintenance to the wife failed to act as a husband. Thereby he committed a "wrong" within the meaning of Section 23 of the Act. Therefore, the High Court was justified in declining to allow the prayer of the husband for dissolution of the marriage by divorce under Section 13(1-A) of the Act.

14. In this connection it is also necessary to clear an impression regarding the position that once a cause of action for getting a decree of divorce under Section 13(1-A) of the Act arises the right to get a divorce crystallises and the court has to grant the relief of divorce sought by the applicant. This impression is based on a misinterpretation of the provision in Section 13(1-A). All that is provided in the said section is that either party to a marriage may present a petition for dissolution of the marriage by a decree of divorce on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of one year or more after the passing of a decree for judicial separation in a proceeding to which they were parties or that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or more after the passing of a decree for restitution of conjugal rights in a proceeding to which both the spouses were parties. The section fairly read only enables either party to a marriage to file an application for dissolution of the marriage by a decree of divorce on any of the grounds stated therein. The section does not provide that once the applicant makes an application alleging fulfilment of one of the conditions specified therein the court has no alternative but to grant a decree of divorce. Such an interpretation of the section will run counter to the provisions in Section 23(1)(*a*) or (*b*) of the Act. In Section 23(1) it is laid down that if the court is satisfied that any of the grounds forgranting relief exists and further that the petitioner is not in any way taking advantage of hisor her own "wrong" or disability for the purpose of such relief and in clause (*b*) a mandate is given to the court to satisfy itself that in the case of a petition based on the ground specifiedin clause (*i*) of sub-section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground ofthe petition is cruelty the petitioner has not in any manner condoned the cruelty and in clause

(*bb*) when a divorce is sought on the ground of mutual consent such consent has not been obtained by force, fraud or undue influence. If the provisions in Section 13(1-A) and Section 23(1)(*a*) are read together the position that emerges is that the petitioner does not have a vested right for getting the relief of a decree of divorce against the other party merely on showing that the ground in support of the relief sought as stated in the petition exists. It has tobe kept in mind that relationship between the spouses is a matter concerning human life. Human life does not run on dotted lines or charted course laid down by statutes. It has also to be kept in mind that before granting the prayer of the petitioner to permanently snap the relationship between the parties to the marriage every attempt should be made to maintain thesanctity of the relationship which is of importance not only for the individuals or their children but also for the society. Whether the relief of dissolution of the marriage by a decree of divorce is to be granted or not depends on the facts and circumstances of the case. In sucha matter it will be too hazardous to lay down a general principle of universal application.

15. In this connection, the decision of this Court in the case of ***Dharmendra Kumar* v. *Usha Kumar*** [(1977) 4 SCC 12] is very often cited. Therein this Court taking note of the factual position that the only allegation made in the written statement was that the petitioner refused to receive some of the letters written by the appellant and did not respond to his other attempts to make her live with him, held that the allegations even if true, did not amount to misconduct grave enough to disentitle the wife to the relief she had asked for. In that connection this Court observed that in order to be a "wrong" within the meaning of Section 23(1) 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. The decision cannot be read to be laying down ageneral principle that the petitioner in an application for divorce is entitled to the relief merely on establishing the existence of the ground pleaded by him or her in support of the relief; nor that the decision lays down the principle that the court has no discretion to decline relief to the petitioner in a case where the fulfilment of the ground pleaded by him or her is established.

16. In this connection another question that arises for consideration is the meaning and import of Section 10(2) of the Act in which it is laid down that where a decree for judicial separation has been passed it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so. The question is whether applying this statutory provision to the case in hand can it be said that the appellant was relieved of the duty to cohabit with the respondent since the decree for judicial separation has been passed on the application filed by the latter. On a fair reading of sub-section (2) it is clear that the provision applies to the petitioner on whose application the decree for judicial separation has been passed. Even assuming that the provision extends to both the petitioner as well as the respondent it does not vest any absolute right in the petitioner or the respondent not to make any attempt for cohabitation with the other party after the decree for judicial separation has been passed. As the provision clearly provides, the decree for judicial separation is not final in the sense that it is irreversible; power is vested in the court to rescind the decree if it considers it just and

reasonable to do so on an application by either party. 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 purposeof the Act is to maintain the marital relationship between the spouses and not to encourage snapping of such relationship.

17. Now we come to the crucial question which specifically arises for determination in the case: whether refusal to pay alimony by the appellant is a "wrong" within the meaning of Section 23(1)(*a*) of the Act so as to disentitle the appellant to the relief of divorce. The answer to the question, as noted earlier, depends on the facts and circumstances of the case and no general principle or straitjacket formula can be laid down for the purpose. We have already held that even after the decree for judicial separation was passed by the Court on the petition presented by the wife, it was expected that both the spouses will make sincere efforts for a conciliation and cohabitation with each other, which means that the husband should behave as a dutiful husband and the wife should behave as a devoted wife. In the present casethe respondent has not only failed to make any such attempt but has also refused to pay the small amount of Rs 100 as maintenance for the wife and has been marking time for expiry of the statutory period of one year after the decree of judicial separation so that he may easilyget a decree of divorce. In the circumstances, it can reasonably be said that he not only commits the matrimonial wrong in refusing to maintain his wife and further estrange the relation creating acrimony rendering any rapprochement impossible but also tries to take advantage of the said "wrong" for getting the relief of divorce. Such conduct in committing a default cannot in the facts and circumstances of the case be brushed aside as not a matter of sufficient importance to disentitle him to get a decree of divorce under Section 13(1-A).

18. In this connection the decision of a Single Judge of the Calcutta High Court in the case of ***Sumitra Manna* v. *Gobinda Chandra Manna*** [AIR 1988 Cal. 192] may be referred where it was held that if alimony or maintenance is ordered to be paid under the provisions ofthe Hindu Adoptions and Maintenance Act, 1956 or the Codes of Criminal Procedure of 1973or of 1898 and the husband does not comply with the order, the same may under certain circumstances secure an advantage to the wife in obtaining a decree for divorce under Section 13(2)(*iii*) of the Act. But no advantage can or does accrue to a husband for his failure to pay any alimony or maintenance to the wife in obtaining a decree for divorce against the wife under Section 13(1-A) and, therefore, the husband cannot be said to be in any way taking advantage of such non-payment within the meaning of Section 23(1)(*a*) in prosecuting his petition for divorce under Section 13(1-A). This decision, which proceeds upon a narrow

construction of the relevant provisions throwing overboard the laudable object underlying Section 23(1)(*a*) of the Act, in our view, does not lay down the correct position of law.

19. The question that remains to be considered is whether in the facts and circumstances of the case in hand the appellant husband can be said to have committed and to be committing a "wrong" within the meaning of Section 23(1)(*a*) by continuing to live with his mistress even after passing of the decree for judicial separation on the ground of adultery. Therespondent presented the petition seeking a decree of judicial separation on the ground that the appellant has been living in adultery since he is living with another lady during the subsistence of the marriage with her. The Court accepted the allegation and passed the decree for judicial separation. Even after the decree the appellant made no attempt to make any change in the situation and continued to live with the mistress. To pursue still such an adulterous life with no remorse, even thereafter, is yet another "wrong" which he deliberately continued to commit, to thwart any attempt to reunite and, in such circumstances can it be said that the passing of a decree for judicial separation has put an end to the allegation of adultery; or that the chapter has been closed by the decree for judicial separation and therefore he cannot be said to have committed a "wrong" by continuing to live with the mistress. The learned counsel appearing for the appellant placed reliance on a Division Benchdecision of the Gujarat High Court in the case of ***Bai Mani* v. *Jayantilal Dahyabhai*** [AIR 1979 Guj. 209] in which the view was taken that matrimonial offence of adultery hadexhausted 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 successfully obtain the relief which he claims in the divorce proceedings, and contended that the question should be answered in favour of the husband as has been done by the Gujarat High Court. We are unable to accept the contention. Living in adultery on the part of the husband in this case is a continuing matrimonial offence. The offence does not get frozen or wiped out merely on passing of a decree for judicial separation which as noted earlier merely suspends certain duties and obligations of thespouses in connection with their marriage and does not snap the matrimonial tie. In that view of the matter accepting the contention raised on behalf of the appellant would, in our view, defeat the very purpose of passing the decree for judicial separation. The decision of the Gujarat High Court does not lay down the correct position of law. On the other hand, the decision of the Madras High Court in the case of ***Soundarammal* v. *Sundara Mahalinga Nadar*** [AIR 1980 Mad. 294] in which a Single Judge took 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, has our approval. Therein the learned Judge held, and in our view rightly, that illegality and immorality cannot be countenanced as aids for a person to secure relief in matrimonial matters

20. On the discussions and the analysis in the foregoing paragraphs the position that emerges is that the question formulated earlier is to be answered in the affirmative. Therefore, the High Court, in the facts and circumstances of the case, was right in declining the relief of a decree of divorce to the appellant. Accordingly the appeal is dismissed with costs. Hearing fee assessed at Rs 15,000.

Sureshta Devi v. *Om Prakash*

AIR 1992 SC 1904

K. JAGANNATHA SHETTY, J. - 2. This appeal from a decision of the Himachal Pradesh High Court concerns the validity of a decree of dissolution of marriage by mutual consent, and is said, probably rightly, to raise an important issue. The issue is whether a partyto a petition for divorce by mutual consent under Section 13-B of the Hindu Marriage Act, 1955 ('Act') can unilaterally withdraw the consent or whether the consent once given is irrevocable.

3. The appellant is the wife of the respondent. They were married on November 21, 1968. They lived together for about six to seven months. Thereafter, it is said that the wife did not stay with the husband except from December 9, 1984 to January 7, 1985. That was pursuant to an order of the court, but it seems that they did not live like husband and wife during that period also. On January 8, 1985, both of them came to Hamirpur. The wife was accompanied by her counsel, Shri Madan Rattan. After about an hour's discussion, they moved a petition under Section 13-B for divorce by mutual consent in the District Court at Hamirpur. On January 9, 1985 the court recorded statements of the parties and left the matter there.

4. On January 15 1985, the wife filed an application in the court, inter alia, stating that her statement dated January 9, 1985 was obtained under pressure and threat of the husband and she was not even allowed to see or meet her relations to consult them before filing the petition for divorce. Nor they were permitted to accompany her to the court. She said that she would not be party to the petition and prayed for its dismissal. The District Judge made certain orders which were taken up in appeal before the High Court and the High Court remanded the matter to the District Judge for fresh disposal. Ultimately, the District Judge dismissed the petition for divorce. But upon appeal, the High Court has reversed the order of the District Judge and granted a decree for dissolution of the marriage by mutual consent. TheHigh Court has observed that the spouse who has given consent to a petition for divorce cannot unilaterally withdraw the consent and such withdrawal, however, would not take awaythe jurisdiction of the court to dissolve the marriage by mutual consent, if the consent was otherwise free. The High Court also recorded a finding that the wife gave her consent to the petition without any force, fraud or undue influence and therefore she was bound by that consent.

5. Section 13-B was not there in the original Act. It was introduced by the Amending Act 68 of 1976, Section 13-B provides:

> 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.

6. It is also necessary to read Section 23(1)(*bb*):

23. ***Decree in proceedings***.- (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that -

(*bb*) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and ...

7. Section 13-B is in pari materia with Section 28 of the Special Marriage Act, 1954. Sub-section (1) of Section 13-B requires that the petition for divorce by mutual consent must be presented to the court jointly by both the parties. Similarly, sub-section (2) providing for the motion before the court for hearing of the petition should also be by both the parties.

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.

9. The 'living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression 'living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they 'have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved.

10. Under sub-section (2) the parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than 18 months after the said date. This motion enables the court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. The court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If the court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutuallyagreed that the marriage should be dissolved, it must pass a decree of divorce.

11. The question with which we are concerned is whether it is open to one of the parties at any time till the decree of divorce is passed to withdraw the consent given to the petition. The need for a detailed study on the question has arisen because of the fact that the High Courts do not speak with one voice on this aspect. The Bombay High Court in ***Jayashree Ramesh Londhe*** **v.** ***Ramesh Bhikaji Londhe*** [AIR 1984 Bom 302] has expressed the view that the crucial time for the consent for divorce under Section 13-B was the time when the petition was filed. If the consent was voluntarily given it would not be possible for any party to nullify the petition by withdrawing the consent. The court has drawn support to this conclusion from the principle underlying Order 22 Rule 1 of the Code of Civil Procedure which provides that if a suit is filed jointly by one or more plaintiffs, such a suit or a part of a claim cannot be abandoned or withdrawn by one of the plaintiffs or one of the parties to the suit. The High Court of Delhi adopted similar line of reasoning in ***Chander Kanta*** **v.** ***Hans Kumar*** [AIR 1989 Delhi 73] and the Madhya Pradesh High Court in ***Meena Dutta*** **v** ***AnirudhDutta*** [(1984) 2 DMC 388]also took a similar view.

12. But the Kerala High Court in ***K.I. Mohanan*** **v.** ***Jeejabai*** [AIR 1988 Kerala 28] and the Punjab and Haryana High Court in ***Harcharan Kaur*** **v.** ***Nachhattar Singh*** [AIR 1988 P&H 27] and Rajasthan High Court in ***Santosh Kumari*** **v.** ***Virendra*** **Kumar** [AIR 1986 Raj 128] have taken a contrary view. It has been inter alia, held that it is open to one of the spouses to withdraw the consent given to the petition at any time before the court passes a decree for divorce. The satisfaction of the court after holding an inquiry about the genuineness of the consent, necessarily contemplates an opportunity for either of the spouses to withdraw the consent. The Kerala High Court in particular has ruled out the application of analogy under Order 23 Rule 1 of the Code of Civil Procedure since it is dissimilar to the situation arising under Section 13-B of the Act.

13. From the analysis of the section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under sub-section (2). There is nothing in the section which prevents such course. The section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree.

This approach appears to be untenable. 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 partiesand against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.

14. Sub-section (2) requires the court to hear the parties which means both the parties. If one of the parties at that stage says that "I have withdrawn my consent", or "I am not a willing party to the divorce", the court cannot pass a decree of divorce by mutual consent. 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 ***Laws of England Halsbury's*** and consent for divorce. Mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section13-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*), 4th edn., vol. 13 para 645; (*ii*) ***Rayden on Divorce,*** 12th edn., vol. 1, p. 291; and (*iii*) ***Beales* v. *Beales*** (1972)2 All ER 667 at p.674.

15. In our view, the interpretation given to the section by the High Courts of Kerala, Punjab and Haryana and Rajasthan in the aforesaid decisions appears to be correct and we affirm that view. The decisions of the High Courts of Bombay, Delhi and Madhya Pradesh (*supra)* cannot be said to have laid down the law correctly and they stand overruled.

16. In the result, we allow the appeal and set aside the decree for dissolution of the marriage. In the circumstances of the case, however, we make no order as to costs.

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Amar Kanta Sen v. *Sovana Sen*

AIR 1960 Cal 438

S. DATTA, J. - On or about the 17th August 1959 this application was made by Sovana Sen inter alia for an order that the permanent maintenance at a sum of Rs. 350/- or any sum which this Honble Court may think proper be directed to be paid to her by the respondent Mr. Amar Kanta Sen.

2. This application arises out of a judgment delivered by me on 10-7-1959 whereby the marriage between her and Amar Kanta Sen was dissolved. She stated in her petition that she came of a very respectable family and was married to a respectable person and was throughout accustomed to a decent way of living. She cannot marry nor does she intend to marry in her life over again and wants to lead a very chaste and decent life dedicating herself to the welfare of her son and to her musical pursuit and painting for which she has special aptitude. She further stated that she was not in good health and was unable to support herself and that she was now practically without means and had no friends or relations who would support her. She further stated that her monthly expenses came to about Rs. 315/- per month for which she has given particulars. She also further stated that she had incurred heavy debts to the extent of Rs. 4000/- to maintain herself in her lonely and destitute condition.

3. The husband was drawing a salary of Rs. 1700/- per month.

4. She further asserted that she was entitled under the Hindu Law to be maintained by her husband so long as she lived a decent life according to the standard she had so long been accustomed to and so long as her husband was capable to bear such expenses; the obligation to maintain her was his moral and personal obligation.

5. In the affidavit in opposition dated 28-8-1959, it was asserted that he received a net salary of Rs. 879 and 90 np. And the salary was not Rs. 1700/-. It was also pointed out that she had committed adultery not only with Purnendu Roy but also with two other gentlemen according to my findings. She was not accordingly entitled to maintenance because she had betrayed her obligations as a wife. It was further denied that her monthly expenses amounted to Rs. 315/- or that she had incurred a debt of Rs. 4000/-.

6. In the affidavit in opposition he further asserted in paragraph 13 thereof on the basis of information received by him from Delhi that Sobhana Sen was selected for appointment and offered an appointment as Assistant Producer (Music), All India Radio, New Delhi.

7. In her opposition filed by her on 7-9-1959 she denied the allegation made in paragraph 13 is of the affidavit in opposition and prayed that the court should not take any notice of the said allegation in the affidavit in opposition.

9. In this case there was dissolution of the marriage on the ground of adultery of the applicant. The applicant's case that her husband had committed adultery was found to be not supported by evidence. The applicant is a graduate and an adept in music. She according to her own petition earned about the time of making the petition a sum of about Rs. 90/- per month. After she joined the All India Radio at Delhi she has been earning a sum of about Rs. 300/- per month. The respondent's salary is Rs. 1360/- out of which a sum of Rs. 475/- was shown in the suspense account and the sum of Rs. 879/- was shown as payable for the month

of August 1959. Before the dissolution of the marriage there was an order for the payment of maintenance at Rs. 200/- per month from May 1956.

10. It is clear from the evidence before me that the applicant was appointed an Assistant Producer (Music) of the All India Radio on a salary of Rs. 300/- (consolidated) prior to 7-9-1959 and she joined her duties at Delhi on 17-9-1959.

11. There is no evidence before me as to any misconduct of the applicant after the judgment.

12. In this background the application has to be considered in the light of S. 25 of the Hindu Marriage Act 1955.

13. This follows more or less S. 37 of the Indian Divorce Act 1869 except that in the Hindu Marriage Act like obligation is imposed in similar circumstances upon the wife to maintain her husband. The Indian Divorce Act 1869 is modelled in its turn on S. 32 of the Matrimonial Causes Act 1857.

14. In 1902 p. 270. ***Ashcroft* v. *Ashcroft and Roberts*** it was held inter alia that the Court has an absolute discretion vested in it by the section (meaning S. 32 of the Matrimonial Causes Act, 1857) to be exercised according to the circumstances of each case. Thus, it will order the husband to secure a provision for his guilty wife, even though his own conduct has been unimpeachable, if the wife is proved to be entirely without means of support and unable through ill-health to earn her own living. The relevant portion of the judgment of his Lordship Lord Justice Vaughan Williams is as follows:

> In this particular case there is no suggestion whatever of any misconduct on thepart of the husband; but the learned Judge is of opinion that what is proved is that the wife has no means or subsistence, and that she is unable to earn any. This, then, is nota case in which the guilty wife is able to earn her own living; it is a case in which, owing to the state of her health she is unable to do so. Under the circumstances Ithink we ought not to interfere with the order of the learned Judge and that we ought to affirm and approve of it.

15. In 1905 p. 4 ***Squire* v. *Squire and O' Callaghan*** it was held as follows:

> The Court, in exercising its discretion in favour of and granting a divorce to a husband who had previously been judicially separated on the ground of his cruelty, ordered that the decree dissolving the marriage should not be made absolute unless and until the husband should secure an allowance of pound 52 a year, payable weeklyto the divorced wife.

16. The relevant portion of the judgment of Jeune P. is as follows:

> I certainly think that the petitioner ought to make the respondent an allowance, and I think the ground for that the respondent should not be caused, by being left without some allowance to pursue a course of life which I should much regret if she were let to pursue. She ought to be preserved from imminent temptation. In this connection I do not lay much stress on the husband's past conduct towards his wife. In my view the main ground for ordering him to make her an allowance is not his own conduct in the past, but that shemay be reasonably safe from the terrible temptation which might otherwise assail her.The conduct of the husband is not, in my view, materially in issue in dealing with this matter. But, in the view take of this class of case, it is material that the dum casta clause

should be inserted. The wife should know and should be made to feel that her livelihood depends on her leading a chaste life in the future.

17. It may be noticed that in both cases the allowance given works out at the rate of pound 1 per week.

18. Let us now turn to the position of an unchaste wife under the Hindu Law without forgetting that there was no provision for Divorce therein as marriage "according to the Hindu Law, was a holy union for the performance of religious duty." In ***Principles of Hindu Law*** by D.F. Mulla 12th Edition, the law on this point is summarised as follows:

> A wife who persists in following a vicious course of life, forfeits her right to maintenance even though it is secured by a decree. But is would seem that if she completely renounces her immoral course of conduct, her husband is liable to furnish her with a bare or what is also called starving maintenance that is, food and raiment just sufficient to support her life. The burden of proving that the erring wife has returned to purity is on the wife herself.

19. It will be seen that even under the Hindu Law a wife who was found unchaste was only entitled to a bare or starving allowance. In this respect there seems to be very little difference in principle between the English Law and the Hindu Law, before the Hindu Marriage Act, 1955.

20. In my opinion on the authorities referred to she is entitled to a bare subsistence allowance or starving allowance. When she is earning a living and is not in helpless position her right to maintenance, even of the bare subsistence disappears for the allowance is meant to prevent 'starvation'. In these circumstances she is not at all entitled to any allowance after 17-9-1959 when she joined the service.

21. The next question for consideration is the maintenance she is entitled from her former husband from the date of the dissolution of marriage between the parties on 10-7-1959 till 17-9-1959 when she joined the All India Radio at Delhi.

22. The amount of Rs. 315/- which she assessed as her expenses in the petition is much more than a starving allowance. It exceeds the interim maintenance of Rs. 200/-. In my opinion the starving allowance cannot exceed even in the circumstances of the case taking a very liberal view a sum of Rs. 125/- per month. It is this amount of Rs. 125/- which she would have been entitled if she had no income at all.

23. She, however, earned a sum of Rs. 90/- per month during the said period.

24. Therefore the alimony per month which she can legally claim from Mr. Sen is the difference between Rs. 125/- and Rs. 90/- that is to say, Rs. 35/- per month. The total figure works out to Rs. 79.33 np. in all for the said period. Hence, Mr. Sen the respondent should pay Rs. 79.33 np. to the petitioner who has described herself as Sovana Sen.

25. It appears from the affidavits as well as a circular issued by one Mr. Bhatt, Deputy Director and a letter dated 27-8-1958 by Mr. Uma Shankar, Director of Planning, All India Radio, Delhi that the applicant deliberately persisted in her case that she did not obtain an appointment from the All India Radio, Delhi until the 24th September 1958 with a view to obtain an undue advantage in this application.

D.Velusamy vs D.Patchaiammal
(2010) 10SCC

1. Leave granted.
2. Heard learned counsel for the appellant. None has appeared for the respondent although shehas been served notice. We had earlier requested Mr. Jayant Bhushan, learned Senior counselto assist us as Amicus Curiae in the case, and we record our appreciation of Mr. Bhushan whowas of considerable assistance to us.

3. These appeals have been filed against the judgment of the Madras High Court dated12.10.2009.

4. The appellant herein has alleged that he was married according to the Hindu CustomaryRites with one Lakshmi on 25.6.1980. Out of the wedlock with Lakshmi a male child wasborn, who is now studying in an Engineering college at Ooty. The petitioner is working as aSecondary Teacher in Thevanga Higher Secondary School, Coimbatore.

5. It appears that the respondent-D. Patchaiammal filed a petition under Section 125 Cr.P.C. inthe year 2001 before the Family Court at Coimbatore in which she alleged that she wasmarried to the appellant herein on 14.9.1986 and since then the appellant herein and she livedtogether in her father's house for two or three years. It is alleged in the petition that after twoor three years the appellant herein left the house of the respondent's father and started livingin his native place, butwould visit the respondent occasionally.

6. It is alleged that the appellant herein (respondent in the petition under Section 125 Cr.P.C.)deserted the respondent herein (petitioner in the proceeding under Section 125 Cr.P.C.) two orthree years after marrying her in 1986. In her petition under Section 125 Cr.P.C. she allegedthat she did not have any kind of livelihood and she is unable to maintain herself whereas therespondent (appellant herein) is a Secondary Grade Teacher drawing a salary of Rs.10000/- per month. Hence it was prayed that the respondent (appellant herein) be directed to payRs.500/- per month as maintenance to the petitioner.

7. In both her petition under Section 125 Cr.P.C. as well as in her deposition in the case therespondent has alleged that she was married to the appellant herein on 14.9.1986, and that heleft her after two or three years of living together with her in her father's house.

8. Thus it is the own case of the respondent herein that the appellant left her in 1988 or 1989 (i.e. two or three years after the alleged marriage in 1986). Why then was the petition underSection 125 Cr.P.C. filed in the year 2001, i.e. after a delay of about twelve years, shall haveto be satisfactorily explained by the respondent. This fact also creates some doubt about thecase of the respondent herein.

9. In his counter affidavit filed by the appellant herein before the Family Court, Coimbatore, it was alleged that the respondent (appellant herein) was married to one Lakshmi on 25.6.1980 as per the Hindu Marriage rites and customs and he had a male child,who isstudying in C.S.I. Engineering college at Ooty. To prove his marriage with Lakshmi theappellant produced the ration card, voter's identity card of his wife, transfer certificate of hisson, discharge certificate of his wife Lakshmi from hospital, photographs of the wedding, etc.

10. The learned Family Court Judge has held by his judgment dated 5.3.2004 that theappellant was married to the respondent and not to Lakshmi. These findings have been upheldby the High Court in the impugned judgment.

11. In our opinion, since Lakshmi was not made a party to the proceedings before the FamilyCourt Judge or before the High Court and no notice was issued to her hence any declarationabout her marital status vis-`- vis the appellant is wholly null and void as it will be violativeof the rules of natural justice. Without giving a hearing to Lakshmi no such declaration couldhave validly be given by the Courts below that she had not married the appellant herein sincesuch as a finding would seriously affect her rights. And if no such declaration could have beengiven obviously no declaration could validly have been given that the appellant was validlymarried to the respondent, because if Lakshmi was the wife of the appellant then withoutdivorcing her the appellant could not have validly married the respondent.

12. It may be noted that Section 125 Cr.P.C. provides for giving maintenance to the wife andsome other relatives. The word `wife' has been defined in Explanation (b) to Section 125(1) ofthe Cr.P.C. as follows : "Wife includes a woman who has been divorced by, or has obtained adivorce from, her husband and has not remarried."

13. In Vimala (K) vs. Veeraswamy (K) [(1991) 2 SCC 375], a three- Judge Bench of thisCourt held that Section 125 of the Code of 1973 is meant to achieve a social purpose and theobject is to prevent vagrancy and destitution. Explaining the meaning of the word `wife' theCourt held: "..the object is to prevent vagrancy and destitution. It provides a speedy remedyfor the supply of food, clothing and shelter to the deserted wife. When an attempt is made bythe husband to negative the claim of the neglected wife depicting her as a kept- mistress on thespecious plea that he was already married, the court would insist on strictproof of the earliermarriage. The term `wife' in Section 125 of the Code of Criminal Procedure, includes awoman who has been divorced by a husband or who has obtained a divorce from her husbandand has not remarried. The woman not having the legal status of a wife is thus brought withinthe inclusive definition ofthe term `wife' consistent with the objective. However, under thelaw a second wife whose marriage is void on account of the survival of the first marriage isnot a legally wedded wife, and is, therefore, not entitled to maintenance under this provision."

14. In a subsequent decision of this Court in Savitaben Somabhat Bhatiya vs. State of Gujaratand others, AIR 2005 SC 1809, this Court held that however desirable it may be to take noteof the plight of an unfortunate woman, who unwittingly enters into wedlock with a marriedman, there is no scope to include a woman not lawfully married within the expression of`wife'. The Bench held that this inadequacy in law can be amended only by the Legislature.

15. Since we have held that the Courts below erred in law in holding that Lakshmi was notmarried to the appellant (since notice was not issued to her and she was not heard), it cannotbe said at this stage that the respondent herein is the wife of the appellant. A divorced wife istreated as a wife for the purpose of Section 125 Cr.P.C. but if a person has not even beenmarried obviously that person could not be divorced. Hence the respondent herein cannotclaim to be the wife of the appellant herein, unless it is established that the appellant was notmarried to Lakshmi.

16. However, the question has also be to be examined from the point of view of TheProtection of Women from Domestic Violence Act, 2005. Section 2(a) of the Act states :"2(a)"aggrieved person" means any woman who is, or has been, in a domestic relationship with therespondent and who alleges to have been subjected to any act of domestic violence by therespondent"; Section 2(f) states :"2(f) "domestic relationship" means a relationship between two persons who live or have, atany point of time, lived together in a shared household, when they are related byconsanguinity, marriage, or through a relationship in the nature of marriage, adoption or arefamily members living together as a joint family"; Section 2(s) states :"2(s) "shared household" means a household where the person aggrieved lives or at any stagehas lived in a domestic relationship either singly or along with the respondent and includessuch a household whether owned or tenanted either jointly by the aggrieved person and therespondent, or owned or tenanted by either of them in respect of which either the aggrievedperson or the respondent or both jointly or singly have any right, title, interest or equity andincludes such a household which may belong to the joint family of which the respondent is amember, irrespective of whether the respondent or the aggrieved person has any right, title orinterest in the shared household." Section 3(a) states that an act will constitute domesticviolence in case it- "3(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrievedperson or tends to do so and includescausing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse;" or(emphasis supplied)

17. The expression "economic abuse" has been defined to include : "(a) deprivation of all orany economic or financial resources to which the aggrieved person is entitled under any lawor custom whether payable under an order of a court or otherwise or which the aggrievedperson requires out of necessity including, but not limited to, household necessities for theaggrieved person and her children, if any, stridhan, property, jointly or separately owned bythe aggrieved person, payment of rental related to the shared household and maintenance".(emphasis supplied)

18. An aggrieved person under the Act can approach the Magistrate under Section 12 for therelief mentioned in Section 12(2). Under Section 20(1)(d) the Magistrate can grantmaintenance while disposing of the application under Section 12(1).

19. Section 26(1) provides that the relief mentioned in Section 20 may also be sought in anylegal proceeding, before a civil court, family court or a criminal court.

20. Having noted the relevant provisions in The Protection of Women from DomesticViolence Act, 2005, we may point out that the expression `domestic relationship' includes notonly the relationship of marriage but also a relationship `in the nature of marriage'. Thequestion, therefore, arises as to what is the meaning of the expression `a relationship in thenature of marriage'. Unfortunately this expression has not been defined in the Act. Since thereis no direct decision ofthis Court on the interpretation of this expression we think it necessaryto interpret it because a large number of cases will be coming up before the Courts in ourcountry on this point, and hence an authoritative decision is required.

21. In our opinion Parliament by the aforesaid Act has drawn a distinction between therelationship of marriage and a relationship in the nature of marriage, and has provided that ineither case the person who enters into either relationship is entitled to the benefit of the Act.

22. It seems to us that in the aforesaid Act of 2005 Parliament has taken notice of a new socialphenomenon which has emerged in our country known as live-in relationship. This newrelationship is still rare in our country, and is sometimes found in big urban cities inIndia, butit is very common in North America and Europe. It has been commented upon by this Courtin S. Khushboo vs. Kanniammal & Anr. (2010) 5 SCC 600 (vide para 31).

23. When a wife is deserted, in most countries the law provides for maintenance to her by herhusband, which is called alimony. However, earlier there was no law providing formaintenance to a woman who was having a live-in relationship with a man without beingmarried to him and was then deserted by him.

24. In USA the expression `palimony' was coined which means grant of maintenance to awoman who has lived for a substantial period of time with a man without marrying him, andis then deserted by him (see `palimony' on Google). The first decision on palimony was thewell known decision of the California Superior Court in Marvin vs. Marvin (1976) 18C3d660. This case related to the famous film actor Lee Marvin, with whom a lady Michellelived for many years without marrying him, and was then deserted by him and she claimedpalimony. Subsequently in many decisions of the Courts in USA, the concept of palimony hasbeen considered and developed. The US Supreme Court has not given any decision onwhether there is a legal right to palimony, but there are several decisions of the Courts invarious States in USA. These Courts in USA have taken divergent views, some grantingpalimony, some denying it altogether, and some granting it on certain conditions. Hence inUSA the law is still in a state of evolution on the right to palimony.

25. Although there is no statutory basis for grant of palimony in USA, the Courts there whichhave granted it have granted it on a contractual basis. Some Courts in USA have held thatthere must be a written or oral agreement between the man and woman that if they separatethe man will give palimony to the woman, while other Courts have held that if a man andwoman have lived together for a substantially long period without getting married therewould be deemed to be an implied or constructive contract that palimony will be given ontheir separation.

26. In Taylor vs. Fields (1986) 224 Cal. Rpr. 186 the facts were that the plaintiff Taylor had arelationship with a married man Leo. After Leo died Taylor sued his widow alleging breach ofan implied agreement to take care of Taylor financially and she claimed maintenance from theestate of Leo. The Court of Appeals in California held that the relationship alleged by Taylorwas nothing more than that of a married man and his mistress. It was held that the allegedcontract rested on meretricious consideration and hence was invalid and unenforceable. TheCourt of Appeals relied onthe fact that Taylor did not live together with Leo but onlyoccasionally spent weekends with him. There was no sign of a stable and significantcohabitation between the two.

27. However, the New Jersey Supreme Court in Devaney vs. L' Esperance 195 N.J., 247(2008) held that cohabitation is not necessary to claim palimony, rather "it is the promise to support, expressed or implied, coupled with a marital type relationship, that are indispensableelements to support a valid claim for palimony". A law has now been passed in 2010 by theState legislature of New Jersey that there must be a written agreement between the parties toclaim palimony.

28. Thus, there are widely divergent views of the Courts in U.S.A. regarding the right topalimony. Some States like Georgia and Tennessee expressly refuse to recognize palimonyagreements.

29. Written palimony contracts are rare, but some US Courts have found implied contractswhen a woman has given up her career, has managed the household, and assisted a man in hisbusiness for a lengthy period of time. Even when there is no explicit written or oral contractsome US Courts have held that the action of the parties make it appear that a constructive orimplied contract for grant of palimony existed.

30. However, a meretricious contract exclusively for sexual service is held in all US Courts asinvalid and unenforceable.

31. In the case before us we are not called upon to decide whether in our country there can bea valid claim for palimony on the basis of a contract, express or implied, written or oral, sinceno such case was set up by the respondent in her petition under Section 125 Cr.P.C.

32. Some countries in the world recognize common law marriages. A common law marriage,sometimes called de facto marriage, or informal marriage is recognized in some countries as amarriage though no legally recognized marriage ceremony is performed or civil marriagecontract is entered into or the marriage registered in a civil registry (see details on Google).

33. In our opinion a `relationship in the nature of marriage' is akin to a common lawmarriage.Common law marriages require that although not being formally married :-(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 beingunmarried.(d) They must have voluntarily cohabited and held themselves out to the world as being akinto spouses for a significant period of time. (see `Common Law Marriage' in Wikipedia onGoogle) In our opinion a
`relationship in the nature of marriage' under the 2005 Act must alsofulfill the above requirements, and in addition the parties must have lived together in a`shared household' as defined in Section 2(s) of the Act. Merely spending weekends togetheror a one night stand would not make it a `domestic relationship'.

34. In our opinion not all live in relationships will amount to a relationship in the nature ofmarriag8e to get the benefit of the Act of 2005. To get such benefit the conditions mentionedby us above must be satisfied, and this has to be proved by evidence. If a man has a `keep'whom he maintains financially and uses mainly for sexual purpose and/or as a servant itwould not, in our opinion, be a relationship in the nature of marriage'.

35. No doubt the view we are taking would exclude many women who have had a live inrelationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression `relationship in the nature of marriage' andnot `live inrelationship'. The Court in the grab of interpretation cannot change the language ofthe statute.

36. In feudal society sexual relationship between man and woman outside marriage wastotally taboo and regarded with disgust and horror, as depicted in Leo Tolstoy's novel `AnnaKarenina', Gustave Flaubert's novel `Madame Bovary' and the novels of the great Bengaliwriter Sharat Chandra Chattopadhyaya.

37. However, Indian society is changing, and this change has been reflected and recognizedby Parliament by enacting The Protection of Women from Domestic Violence Act,2005.

38. Coming back to the facts of the present case, we are of the opinion that the High Courtand the learned Family Court Judge erred in law in holding that the appellant was not marriedto Lakshmi without even issuing notice to Lakshmi. Hence this finding has to be set aside andthe matter remanded to the Family Court which may issue notice to Lakshmi and after hearingher give a fresh finding in accordance with law. The question whether the appellant

wasmarried to the respondent or not can, of course, be decided only after the aforesaid finding.

39. There is also no finding in the judgment of the learned Family Court Judge on thequestion whether the appellant and respondent had lived together for a reasonably long periodof time in a relationship which was in the nature of marriage. In our opinion such findingswere essential to decide this case. Hence we set aside the impugned judgment of the HighCourt and Family Court Judge, Coimbatore and remand the matter to the Family Court Judgeto decide the matter afresh in accordance with law and in the light of the observations madeabove. Appeals allowed.....J.(MARKANDEY KATJU)
.....J.(T. S. THAKUR) NEW DELHI..

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***Badshah v. Sou. Urmila Badshah Godse* & Anr**
(2014) 1SCC 188

A.K.SIKRI,J. 1. There is a delay of 63 days in filing the present Special Leave Petition and further delay of 11 daysin refilling Special Leave Petition. For the reasons contained in the application for condonation ofdelay, the delay in filing and refilling of SLP is condoned.

2. The petitioner seeks leave to appeal against the judgment and order dated 28.2.2013 passed by theHigh Court of Judicature at Bombay, Bench at Aurangabad in Criminal Writ Petition No.144/2012. Bymeans of the impugned order, the High Court has upheld the award of maintenance to respondentNo.1 at the rate of Rs.1000/- per month and to respondent No.2 (daughter) at the rate of Rs.500/- permonth in the application filed by them under Section 125 of the Code of Criminal Procedure (Cr.P.C.)by the learned Trial Court and affirmed by the learned Additional Sessions Judge. Respondents hereinhad filed proceedings under Section 125, Cr.P.C. before Judicial Magistrate First Class (JMFC)alleging therein that respondent No.1 was the wife of the petitioner herein and respondent No.2 wastheir daughter,who was born out of the wedlock.

3. The respondents had stated in the petition that respondent No.1 was married with Popat Fapale.However, in the year 1997 she got divorce from her first husband. After getting divorce from her firsthusband in the year 1997 till the year 2005 she resided at the house of her parents. On demand of the petitioner for her marriage through mediators, she married him on 10.2.2005 at Devgad Templesituated at Hivargav-Pavsa. Her marriage was performed with the petitioner as per Hindu Rites andcustoms. After her marriage, she resided and cohabited with the petitioner. Initially for 3 months, thepetitioner cohabited and maintained her nicely. After about three months of her marriage withpetitioner, one lady Shobha came to the house of the petitioner and claimed herself to be his wife. Oninquiring from the petitioner about the said lady Shobha, he replied that if she wanted to cohabit withhim, she should reside quietly. Otherwise she was free to go back to her parents house. When Shobhacame to the house of petitioner, respondent No.1 was already pregnant from the petitioner. Therefore,she tolerated the ill-treatment of the petitioner and stayed alongwith Shobha. However, the petitionerstarted giving mental and physical torture to her under the influence of liquor. The petitioner also usedto doubt that her womb is begottenfrom somebody else and it should be aborted. However, when theill-treatment of the petitioner became intolerable, she came back to the house of her parents.Respondent No.2, Shivanjali, was born on 28.11.2005. On the aforesaid averments, the respondentsclaimed maintenance for themselves.

4. The petitioner contested the petition by filing his written statement. He dined his relation withrespondent Nos.1 and 2 as his wife and daughter respectively. He alleged that he never entered withany matrimonial alliance with respondent No.1 on 10.2.2005, as claimed by respondent No.1 and infact respondent No.1, who was in the habit of leveling false allegation, was trying to blackmail him.He also denied co-habitation with respondent No.1 and

claimed that he was not the father ofrespondent No.2 either. According to the petitioner, he had married Shobha on 17.2.1979 and fromthat marriage he had two children viz. one daughter aged 20 years and one son aged 17 years andShobha had been residing withhim ever since their marriage. Therefore, respondent No.1 was not andcould not be his wife during the subsistence of his first marriage and she had filed a false petitionclaiming her relationship with him.

5. Evidence was led by both the parties and after hearing the arguments the learned JMFC negativethe defence of the petitioner. In his judgment, the JMFC formulated four points and gave his answerthereto as under:Diagram

6. It is not necessary to discuss the reasons which prevailed with the learned JMFC in giving hisfindings on Point Nos.1 and 2 on the basis of evidence produced before the Court. We say so becauseof the reason that these findings are upheld by the learned Additional Sessions Judge in his judgmentwhile dismissing the revision petition of the petitioner herein as well as the High Court.
These are concurrent findings of facts with no blemish or perversity. It was not even argued before usas the argument raised was that in any case respondent No.1 could not be treated as wife of thepetitioner as he was already married and therefore petition under Section 125 of the Cr.P.C. at herinstance was not maintainable. Since, we are primarily concerned with this issue, which is the bone ofcontention, we proceed on the basis that the marriage between the petitioner and respondent No.1 wassolemnized; respondent No.1 co-habited with the petitioner after the said marriage; and respondentNo.2 is begotten as out of the said co- habitation, whose biological father is the petitioner. However, itwould be pertinent to record that respondent No.1 had produced overwhelming evidence, which wasbelieved by the learned JMFC that the marriage between the parties took place on 10.2.2005 atDevgad Temple. This evidence included photographs of marriage. Another finding of fact was arrivedat, namely, respondent No.1 was a divorcee and divorce had takenplace in the year 1997 between her and her first husband, which fact was in the clear knowledge of thepetitioner, who had admitted the same even in his cross-examination.

7. The learned JMFC proceeded on the basis that the petitioner was married to Shobha and washaving two children out of the wedlock. However, at the time of solemnizing the marriage withrespondent No.1, the petitioner intentionally suppressed this fact fromher and co-habited withrespondent No.1 as his wife.

8. The aforesaid facts emerging on record would reveal that at the time when the petitioner marriedthe respondent No.1, he had living wife and the said marriage was still subsisting. Therefore, underthe provisions of Hindu Marriage Act, the petitioner could not have married second time. At the sametime, it has also come on record that the petitioner duped respondent No.1 by not revealing the fact ofhis first marriage and pretending that he was single. After this marriage both lived together andrespondent No.2 was also born from this wedlock. In such circumstances, whether respondents couldfiled application under Section 125 of the Cr.P.C., is the issue. We would like to pin point that in so faras respondent No.2 is concerned,

who is proved to be the daughter of the petitioner, in no case he canshun the liability and obligation to pay maintenance to her. The learned counsel ventured to disputethe legal obligation qua respondent No.1 only.

9. The learned counsel for the petitioner referred to the judgment of this Court in Yamunabai AnantraoAdhav vs. Anantrao Shivram Adhay & Anr.[1] In that case, it was held that a Hindu lady who marriedafter coming into force Hindu Marriage Act, with a person who had a living lawfully wedded wifecannot be treated to be legally wedded wife and consequently her claim for maintenance underSection 125, Cr.P.C. is not maintainable. He also referred to later judgments in the case of SavitabenSomabai Bhatiya vs. State of Gujarat & Ors.[2] wherein the aforesaid judgment was followed. On thestrength of these two judgments, the learned counsel argued that the expression wife in Section 125cannot be stretched beyond the legislative intent, which means only a legally wedded-wife. He arguedthat Section 5(1) (i) of the Hindu Marriage Act, 1955 clearly prohibits 2nd marriage during thesubsistence of the 1st marriage, and so respondent No.1 cannot claim any equity; that the explanationclause
(b) to Section 125 Cr.P.C. mentions the term divorce as a category of claimant, thus showing that onlya legally wedded-wife can claim maintenance. He, thus, submitted that since the petitioner had provedthat he was already married to Shobha and the said marriage was subsisting on the date of marriagewith respondent No.1, this marriage was void and respondent No.1 was not legally wedded wife andtherefore had no right to move application under Section 125 of the Cr.P.C.

10. Before we deal with the aforesaid submission, we would like to refer two more judgments of thisCourt. First case is known as Dwarika Prasad Satpathy vs. Bidyut Prava Dixit & Anr.[3] In this case itwas held: The validity of the marriage for the purpose of summary proceeding under s.125 Cr.P.C. is to bedetermined on the basis of the evidence brought on record by the parties. The standard of proof ofmarriage in such proceeding is not as strict as isrequired in a trial of offence under section 494 of theIPC. If the claimant in proceedings under s.125 of the Code succeeds in showing that she and therespondent have lived together as husband and wife, the court can presume that they are legally wedded spouse, and in such a situation, the party who denies the marital status can rebut the presumption. Once it is admitted that the marriage procedure was followed then it is not necessary tofurther probe into whether the said procedure was complete as per the Hindu Rites in the proceedingsunder S.125,Cr.P.C. From the evidence which is led if the Magistrate is prima facie satisfied withregard to the performance of marriage in proceedings underS.125, Cr.P.C. which are of summarynature strict proof of performance of essential rites isnot required. It is further held:It is to be remembered that the order passed in an application under section 125 Cr.P.C. does notfinally determine the rights and obligations of the parties and the said section is enacted with a view toprovide summary remedy for providing maintenance to a wife, children and parents. For the purposeof getting his rights determined, the appellant has also filed Civil Suit which is spending before thetrial court. In such a situation, this Court in S.Sethurathinam Pillai vs. Barbara alias DollySethurathinam, (1971) 3 SCC 923, observed that maintenance under section 488, Cr.P.C. 1898 (similar to Section 125, Cr.P.C.) cannot be denied where

there was some evidence on whichconclusion for grant of maintenance could be reached. It was held that order passed under Section 488is a summary order which does not finally determine the rights and obligations of the parties; thedecision of the criminal Court that there was a valid marriage between the parties will not operate asdecisive in any civil proceeding between the parties.

11. No doubt, it is not a case of second marriage but deals with standard of proof under Section 125,Cr.P.C. by the applicant to prove her marriage with the respondent and was not a case of secondmarriage. However, at the same time, this reflects the approach which is to be adopted whileconsidering the cases of maintenance under Section 125,Cr.P.C. which proceedings are in the natureof summary proceedings.

12. Second case which we would like to refer is Chanmuniya vs. Virendra Kumar Singh Kushwaha &Anr.[4] The Court has held that the term wife occurring in Section 125, Cr.P.C. is to be given verywide interpretation. This is so stated in the following manner:A broad and expansive interpretation should be given to the term wife to include even those caseswhere a man and woman have been living together as husband and wife for reasonably long period oftime, and strict proof of marriage should not be a pre- condition for maintenance under Section 125 ofthe Cr.P.C. so as to fulfill the true spirit and essence of the beneficial provision of maintenance underSection 125.

13. No doubt, in Chanmuniya (supra), the Division Bench of this Court took the view that the matterneeds to be considered with respect to Section 125,Cr.P.C., by larger bench and in para 41, threequestions are formulated for determination by a larger bench which are as follows: 1. Whether the living together of a man and woman as husband and wife for a considerable period oftime would raise the presumption of a valid marriage between them and whether such a presumptionwould entitle the woman to maintenance under Section 125,Cr.P.C.? 2. Whether strict proof of marriage is essential for a claim of maintenance under Section 125,Cr.P.C.having regard to the provisions of the Domestic Violence Act, 2005? 3. Whethera marriage performed according to the customary rites and ceremonies, without strictlyfulfilling the requisites of Section 7(1) of the Hindu Marriage Act, 1955, or any other personal lawwould entitle the woman to maintenance under Section 125,Cr.P.C.?

14. On this basis, it was pleaded before us that this matter be also tagged along with the aforesaidcase. However, in the facts of the present case, we do not deem it proper to do so as we find that theview taken by the courts below is perfectly justified. We are dealing with a situation where themarriage between the parties has been proved. However, the petitioner was already married. But heduped the respondent by suppressing the factum of alleged first marriage. On these facts, in ouropinion, he cannot be permitted to deny the benefit of maintenance to the respondent, takingadvantage of his own wrong. Our reasons for this course of action are stated hereinafter.

15. Firstly, in Chanmuniya case, the parties had been living together for a long time and on that basisquestion arose as to whether there would be a presumption of marriage between the two because ofthe said reason, thus, giving rise to claim of maintenance under Section 125,Cr.P.C. by interpreting theterm wife widely. The Court has impressed that if man and

woman have been living together for along time even without a valid marriage, as in that case, term of valid marriage entitling such a
woman to maintenance should be drawn and a woman in such a case should be entitled to maintainapplication under Section 125,Cr.P.C. On the other hand, in the present case, respondent No.1 hasbeen able to prove, by cogent and strong evidence, that the petitioner and respondent No.1 had beenmarried each other.
16. Secondly, as already discussed above, when the marriage between respondent No.1 and petitionerwas solemnized, the petitioner had kept the respondent No.1 in dark about her first marriage. A falserepresentation was given to respondent No.1 that he was single and was competent to enter intomartial tie with respondent No.1. In such circumstances, canthe petitioner be allowed to takeadvantage of his own wrong and turn around to say thatrespondents are not entitled to maintenanceby filing the petition under Section 125,Cr.P.C. as respondent No.1 is not legally wedded wife of thepetitioner? Our answer is in the negative. We are of the view that at least for the purpose of Section125 Cr.P.C., respondent No.1 wouldbe treated as the wife of the petitioner, going by the spirit of thetwo judgments we have reproduced above. For this reason, we are of the opinion that the judgments ofthis Court in Adhav and Savitaben cases would apply only in those circumstances where a womanmarrieda man with full knowledge of the first subsisting marriage.In such cases, she should knowthat second marriage with such a person is impermissible and there isan embargo under the Hindu Marriage Act and therefore she has to suffer the consequences thereof.The said judgment would not apply to those cases where a man marriages second time by keeping thatlady in dark about the first surviving marriage. That is the only way two sets of judgmentscan bereconciled and harmonized.

17. Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section125,Cr.P.C. While dealing with the application of destitute wife or hapless children or parents underthis provision, the Court is dealing with the marginalized sections of the society. The purpose is toachieve social justice which is the Constitutional vision, enshrined in the Preamble of the Constitutionof India. Preamble to the Constitution of India clearly signals that we have chosen the democratic pathunder rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality andfraternity. It specifically highlights achieving their social justice. Therefore, it becomes the boundenduty of the Courts to advance the cause of the social justice. While giving interpretation to a particularprovision, the Court is supposedto bridge the gap between the law and society.

18. Of late, in this very direction, it is emphasized that the Courts have to adopt different approachesin social justice adjudication, which is also known as social context adjudication as mere adversarialapproach may not be very appropriate. There are number of social justice legislations giving specialprotection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes iteloquently: It is, therefore, respectfully submitted that social context judging is essentially the application ofequality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presentedbefore courts where unequal parties are pitted in adversarial proceedings and where courts are calleduponto dispense equal justice. Apart from the social- economic inequalities

accentuating thedisabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantageof the weaker party. In such a situation, the judge has to be not only sensitive to the inequalities ofparties involved but also positively inclined to the weaker party if the imbalance were not to result inmiscarriage of justice. This result is achieved by what we call social context judging or social justiceadjudication.[5]

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

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

21. Cardozo acknowledges in his classic[6] .no system of jus scriptum has been able to escape theneed of it, and he elaborates: It is true that Codes and Statutes do not render the Judge superfluous,nor his work perfunctory and mechanical. There are gaps to be filled. There are hardships and wrongsto be mitigated if not avoided. Interpretation is often spokenof as if it were nothing but the search andthe discovery of a meaning which, however, obscure and latent, had none the less a real andascertainable pre- existence in the legislators mind. The process is, indeed, that at times, but it is oftensomething more. The ascertainment of intention may be the least of a judges troubles in ascribingmeaning to a stature. Says Gray in his lecture[7] The fact is that the difficulties of so- calledinterpretation arise when the legislature has had no meaning at all; when the question which is raisedon the statute never occurred to it; when what the judges have to do is, not to determine that thelegislature did mean on a point which was present to its mind, but to guess what is would haveintended on a point not present to its mind, if the point had been present.

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

23.This approach is particularly needed while deciding the issues relating to gender justice. We alreadyhave examples of exemplary efforts in this regard. Journey from Shah Bano[8] to Shabana Bano[9]guaranteeing maintenance rights to Muslim women is a classical example.

24. In Rameshchandra Daga v. Rameshwari Daga[10], the right of another womanin a similarsituation was upheld. Here the Court had accepted that Hindu marriages have continued to bebigamous despite the enactment of the Hindu Marriage Act in 1955. The Court had commented thatthough such marriages are illegal as per the provisions of the Act, they are not immoral and hence social reality. Indeed, when social reality changes, the law must change too. Just as change in socialreality is the law of life, responsiveness to change in social reality is the life of the law. It can be saidthat the historyof law is the history of adapting the law to societys changing needs. InbothConstitutional and statutory interpretation, the Court is supposed to exercise direction in determiningthe proper relationship between the subjective and objective purpose of the law.

25. Thus, while interpreting a statute the court may not only take into consideration the purpose forwhich the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, firstpropounded in Heydons Case[11] which became the historical source of purposive interpretation. Thecourt would also invoke the legal maxim construction ut res magis valeat guam pereat, in such casesi.e. where alternative constructions are possible the Court must give effect to that which will beresponsible for the smooth working of the system for which the statute has been enacted rather thanone which will put a road block inits way. If the choice is between two interpretations, the narrowerof which would fail to achieve the manifest purpose of the legislation should be avoided. We shouldavoid a construction which would reduce the legislation to futility and should accept the bolderconstruction based on the view that Parliament would legislate only for the purpose of bringing aboutan effective result. If this interpretation is not accepted, it would amount to giving a premium to thehusband for defrauding the wife. Therefore, at least for the purpose ofclaiming maintenance underSection 125, Cr.P.C., such a woman is to be treated as the legally wedded wife.

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

27. In taking the aforesaid view, we are also encouraged by the following observations of this Court inCapt.Ramesh Chander Kaushal vs. Veena Kaushal [12]: The brooding presence of the Constitutionalempathy 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 twoalternatives which advances the cause the cause of the derelicts.

28. For the aforesaid reasons, we are not inclined to grant leave and dismiss this petition.

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Brajendra Singh v. *State of M.P.*

AIR 2008 SC 1058

ARIJIT PASAYAT, J. - 1. The present appeal involves a very simple issue but when the background facts are considered it projects some highly emotional and sensitive aspects of human life.

2. Challenge in this appeal is to the judgment of the Madhya Pradesh High Court at Jabalpur in a Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (in short the 'C.P.C.').

3. Background facts sans unnecessary details are as follows:

Sometime in 1948, one Mishri Bai, a crippled lady having practically no legs was given in marriage to one Padam Singh. The aforesaid marriage appears to have been solemnized because under the village custom, it was imperative for a virgin girl to get married. Evidence on record shows that Padam Singh had left Mishri Bai soon after the marriage and since then she was living with her parents at Village Kolinja. Seeing her plight, her parents had givenher a piece of land measuring 32 acres out of their agricultural holdings for her maintenance. In 1970, Mishri Bai claims to have adopted appellant Brajendra Singh. Padam Singh died in the year 1974. The Sub-Divisional Officer, Vidisha served a notice on Mishri Bai under Section 10 of the M.P. Ceiling on Agricultural Holdings Act, 1960 (in short the 'Ceiling Act') indicating that her holding of agricultural land was more than the prescribed limit. Mishri Bai filed a reply and contended that Brajendra Singh is her adopted son and both of themconstituted a Joint family and therefore are entitled to retain 54 acres of land. On 28.12.1981, the Sub Divisional officer by order dated 27.12.1981 disbelieved the claim of adoption on theground inter alia that in the entries in educational institutions adoptive father's name was not recorded. On 10.1.1982, Mishri Bai filed Civil Suit No. SA/82 seeking a declaration that Brajendra Singh is her adopted son. On 19.7.1989, she executed a registered will bequeathingall her properties in favour of Brajendra Singh. Shortly thereafter, she breathed her last on 8.11.1989. The trial court by judgment and order dated 3.9.1993 decreed the suit of Mishri Bai. The same was challenged by the State. The first appellate court dismissed the appeal and affirmed the judgment and decree of the trial court. It was held concurring with the view of the trial court that Mishri Bai had taken Brajendra Singh in adoption and in the will executed by Mishri Bai the factum of adoption has been mentioned. Respondents filed Second Appeal No. 482 of 1996 before the High Court. A point was raised that the adoption was not valid in the absence of the consent of Mishri Bai's husband. The High Court allowed the appeal holding that in view of Section 8(c) of Hindu Adoption and Maintenance Act, 1956 ('Act') stipulated that so far as a female Hindu is concerned, only those falling within the enumeratedcategories can adopt a son.

4. The High Court noted that there was a great deal of difference between a female Hindu who is divorced and who is leading life like a divorced woman. Accordingly the High Court held that the claimed adoption is not an adoption and had no sanctity in law. The suit filed by Mishri Bai was to be dismissed.

5. In support of the appeal learned Counsel for the appellant submitted that as the factual position which is almost undisputed goes to show, there was in fact no consummation of marriage as the parties were living separately for a very long period practically from the date of marriage. That being so, an inference that Mishri Bai ceased to be a married woman, has been rightly recorded by the trial court and the first appellate court. It was also pointed out that the question of law framed proceeded on a wrong footing as if the consent of husbandwas necessary. There was no such stipulation in law. It is contented that the question as was considered by the High Court was not specifically dealt with by the trial court or the first appellate court. Strong reliance has been placed on a decision of this Court in Jolly Das (Smt.) Alias Moulick v. Tapan Ranjan Das [1994(4)SCC 363] to highlight the concept of "Sham Marriage"

6. It was also submitted that the case of invalid adoption was specifically urged and taken note of by the trial court. Nevertheless the trial court analysed the material and evidence on record and came to the conclusion that Mishri Bai was living like a divorced woman.

7. Learned Counsel for the respondents on the other hand submitted that admittedly Mishri Bai did not fall into any of the enumerated categories contained in Section 8 of the Actand therefore, she could not have validly taken Brajendra Singh in adoption.

8. It is to be noted that in the suit there was no declaration sought for by Mishri Bai either to the effect that she was not married or that the marriage was sham or that there was any divorce. The stand was that Mishri Bai and her husband were living separately for very long period.

9. section 8 of the Act reads as follows:

"8. Capacity of a female Hindu to take in adoption - Any female Hindu –

(a) who is of sound mind,

(b) who is not minor, and

(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has capacity to take a son or daughter in adoption.

10. We are concerned in the present Clause (c) of section 8. The section brings about a very important and far reaching change in the law of adoption as used to apply earlier in case of Hindus. It is now permissible for a female Hindu who is of sound mind and has completed the age of 18 years to take a son or daughter in adoption to herself in her own right provided that (a) she is not married; (b) or is a widow; (c) or is a divorcee or after marriage herhusband has finally renounced the world or is ceased to be a Hindu or has been declared to beof unsound mind by a court having jurisdiction to pass a declaratory decree to that effect. It follows from Clause (c) of Section 8 that Hindu wife cannot adopt a son or daughter to herself even with the consent of her husband because the Section expressly provides for casesin which she can adopt a son or daughter to herself during the life time of the husband. She can only make an adoption in the cases indicated in Clause (c). It is important to note that Section 6(1) of the Act requires that the person who wants to adopt a son or a daughter must

have the capacity and also the right to take in adoption. Section 8speaks of what is described as 'capacity'. Section 11 which lays down the condition for a valid adoption requires that in case of adoption of a son, the mother by whom the adoption is made must not have a Hindu son or son's son or grand son by legitimate blood relationship or by adoption living at the time of adoption. It follows from the language of Section 8 read with Clauses (i)& (ii) of Section 11 that the female Hindu has the capacity and right to have both adopted son and adopted daughter provided there is compliance of the requirements and conditions of such adoption laid down in the Act. Any adoption made by a female Hindu who does not have requisite capacity to take in adoption or the right to take in adoption is null and void. It is clear that only a female Hindu who is married and whose marriage has been dissolved i.e. who is a divorcee has the capacity to adopt. Admittedly in the instant case there is no dissolution of the marriage. All that the evidence led points out is that the husband and wife were staying separately for a very long period and Mishri Bai was living a life like a divorcedwoman. There is conceptual and contextual difference between a divorced woman and one who is leading life like a divorced woman. Both cannot be equated. Therefore in law Mishri Bai was not entitled to the declaration sought for. Here comes the social issue. A lady because of her physical deformity lived separately from her husband and that too for a very long period right from the date of marriage. But in the eye of law they continued to be husband and wife because there was no dissolution of marriage or a divorce in the eye of law.Brajendra Singh was adopted by Mishri Bai so that he can look after her. There is no dispute that Brajendra Singh was in fact doing so. There is no dispute that the property given to him by the will executed by Mishri Bai is to be retained by him. It is only the other portion of the land originally held by Mishri Bai which is the bone of contention.

11.section 5 provides that adoptions are to be regulated in terms of the provisionscontained in Chapter II. Section 6 deals with the requisites of a valid adoption. Section 11 prohibits adoption; in case it is of a son, where the adoptive father or mother by whom the adoption is made has a Hindu son, son's son, or son's son's son, whether by legitimate blood relationship or by adoption, living at the time of adoption.

Prior to the Act under the old Hindu law, Article 3 provided as follows:

3. (1) A male Hindu, who has attained the age of discretion and is of sound mind, may adopt a son to himself provided he has no male issue in existence at the date of the adoption. (2) A Hindu who is competent to adopt may authorize either his (i)wife, or (ii) widow (except in Mithila) to adopt a son to himself.

12. Therefore, prior to the enactment of the Act also adoption of a son during the lifetime of a male issue was prohibited and the position continues to be so after the enactment of the Act. Where a son became an outcast or renounced the Hindu religion, his father became entitled to adopt another. The position has not changed after the enactment of the Caste Disabilities Removal Act (21 of 1850), as the outcast son does not retain the religious capacity to perform the obsequial rites. In case parties are governed by Mitakshara law, additionally adoption can be made if the natural son is a congenital lunatic or an idiot.

14. As held by this Court in ***V.T.S. Chandrasekhara Mudaliar*** **v.** ***Kulandaivelu Mudaliar*** [AIR 1963 SC 185] substitution of a son for spiritual reasons is the essence of

adoption, and consequent devolution of property is mere accessory to it; the validity of an adoption has to be judged by spiritual rather than temporal considerations and devolution of property is only of secondary importance.

15. In Hem Singh v. Harnam Singh (AIR 1954 SC 581) it was observed by this Court that under the Hindu law adoption is primarily a religious act intended to confer spiritual benefit on the adopter and some of the rituals have, therefore, been held to be mandatory, and compliance with them regarded as a condition of the validity of the adoption. The first important case on the question of adoption was decided by the Privy Council in the case of Amarendra Man Singh Bhramarbar v. Sanatan Singh (AIR 1933 PC 155). The Privy Council said:

> Among the Hindus, a peculiar religious significance has attached to the son, through Brahminical influence, although in its origin the custom of adoption was perhaps purely secular. The texts of the Hindus are themselves instinct with this doctrine of religious significance. The foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites.

16. With these observations it decided the question before it viz. that of setting the limits to the exercise of the power of a widow to adopt, having regard to the well-established doctrine as to the religious efficacy of sonship. In fact, the Privy Council in that case regardedthe religious motive as dominant and the secular motive as only secondary.

17. The object is further amplified by certain observations of this Court. It has been held that an adoption results in changing the course of succession, depriving wife and daughters of their rights, and transferring the properties to comparative strangers or more remote relations. [See:***Kishori Lal* v. *Chaltibai,*** AIR 1959 SC 504] *Tho*ugh undeniably in most of the cases, motive is religious, the secular motive is also dominantly present. We are not concerned much with this controversy, and as observed by Mayne, it is unsafe to embark upon an enquiry in each case as to whether the motives for a particular adoption were religious or secular and an intermediate view is possible that while an adoption may be a proper act, inspired in many cases by religious motives, courts are concerned with an adoption, only as the exercise of a legal right by certain persons. The Privy Council's decision in ***Amarendra Man Singh*** case has reiterated the well-established doctrine as to the religious efficacy of sonship as the foundation of adoption. The emphasis has been on the absence of a male issue. An adoption may either be made by a man himself or by his widow on his behalf with his authority conveyed therefore. The adoption is to the male and it is obvious that an unmarried woman cannot adopt, for the purpose of adoption is to ensure spiritual benefit for a man after his death and to his ancestors by offering of oblations of rice and libations of water to them periodically. A woman having no spiritual needs to be satisfied, was not allowed to adopt for herself. But in either case it is a condition precedent for a valid adoption that he should be without any male issue living at the time of adoption.

18. A married woman cannot adopt at all during the subsistence of the marriage except when the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. If the

husband is not under such disqualification, the wife cannot adopt even with the consent of the husband whereas the husband can adopt with the consent of the wife. This is clear from Section 7 of the Act. Proviso thereof makes it clear that a male Hindu cannot adopt except with the consent of the wife, unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be ofunsound mind. It is relevant to note that in the case of a male Hindu the consent of the wife is necessary unless the other contingency exists. Though Section 8 is almost identical, the consent of the husband is not provided for. The proviso to Section 7 imposes a restriction in the right of male Hindu to take in adoption. In this respect the Act radically depicts from the old law where no such bar was laid down to the exercise of the right of a male Hindu to adoptoneself, unless he dispossess the requisite capacity. As per the proviso to Section 7 the wife's consent must be obtained prior to adoption and cannot be subsequent to the act of adoption. The proviso lays down consent as a condition precedent to an adoption which is mandatory and adoption without wife's consent would be void. Both proviso to Sections 7 and 8(c) refer to certain circumstances which have effect on the capacity to make an adoption.

19. At this juncture it would be relevant to take note of Jolly Das's case (supra). The decision in that case related to an entirely different factual scenario. There was no principle of law enunciated. That decision was rendered on the peculiar factual background. That decision has therefore no relevance to the present case.

20. Learned Counsel for the appellant submitted that in any event, the land which is declared to be in excess of the prescribed limit vests in the Government to be allotted to persons selected by the Government. It was submitted that in view of the peculiar background, the Government may be directed to consider the appellant's case for allotment ofthe land from the surplus land so that the purpose for which adoption was made and the fact that the appellant nourished a crippled lady treating her to be his own mother would set a healthy tradition and example. We express no opinion in that regard. It is for the State Government to take a decision in the matter in accordance with law. But while dismissing theappeal, we permit the appellant to be in possession of land for a period of six months by which time the Government may be moved for an appropriate decision in the matter. We make it clear that by giving this protection we have not expressed any opinion on the acceptability or otherwise of the appellant's request to the State Government to allot the land to him.

21.The appeal is dismissed subject to the aforesaid observations.

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Re: Adoption of Payal @ Sharinrr Vinay Pathak and his wife Sonika Sahay

2010 (1) BomCR434

Hon'ble Judges/Coram: Dr. D.Y. Chandrachud, J. **JUDGMENT : D.Y. Chandrachud, J. :**

1. The Petition before the Court raises an issue of the interpretation of the Hindu Adoptions and Maintenance Act, 1956 and the Juvenile Justice (Care and Protection of Children) Act, 2000. The Hindu Adoptions and Maintenance Act, 1956 amends and codifies the law relating to adoptions and maintenance among Hindus and specifies conditions for valid adoption. One of them is that if the adoption is of a daughter, the father or mother who wish to adopt the child must not have a Hindu daughter (or a son's daughter) living at the time of adoption. Parliament enacted the Juvenile Justice (Care and Protection of Children) Act, 2000 toregulate the interface of the law with children in conflict with the law and to provide for the rehabilitation and social integration of orphaned, abandoned or surrendered children. Adoption is one of the techniques recognized by Parliament to facilitate the object of rehabilitation. The Juvenile Justice Act does not incorporate a restrictive condition foreclosing the right of parents who have a child to adopt another child of the same gender. The Act recognises the right of parents to adopt children irrespective of the number of living biological sons or daughters.

2. The issue which arises before the Court is as to whether a Hindu couple governed by the Hindu Adoptions and Maintenance Act, 1956, with a child of their own can adopt a child of the same gender under the provisions of the Juvenile Justice Act of 2000. The issue raised presents significant ramifications on the entitlement of individuals and couples across the spectrum of religious and social groups in India to adopt children. The Juvenile Justice Act, 2000 is legislation of a secular nature. The human tragedies of orphaned and abandoned children straddle social and religious identity. The urge to adopt is a sensitive expression of the human personality. That urge again is not constricted by religious identity. The Court must harmonise personal law with secular legislation.

The facts

3. The First and Second Petitioners who are Hindus married on 29th June, 2001. Both of them are actors by profession, though the Second Petitioner, with two young children to look after, is on a sabbatical. The First Petitioner was born on 27th July, 1967 while the Second Petitioner was born on 19th January, 1977. Both of them have a daughter, who was born on 4th February, 2003.

4. In a Guardianship Petition Indian Guardianship Petition 83 of 2001 instituted under the Guardians and Wards Act, 1890 before this Court on 13th April, 2005 the Petitioners sought their appointment as guardians of a female child. The child was born on 12th November, 2004 to a mother whose identity is in the interests of her privacy not necessary to be disclosed here. The mother and her spouse executed a declaration on 16th November, 2004, four days after the child was born, recording the circumstances in which they had decided to surrender the child at the nursing home where the child was born. The declaration stated that the mother and her spouse had

been counseled by a social worker at Bal Vikas which is a placement agency recognised by the Government of India and that they had voluntarily agreed tosurrender the child. At the foot of the declaration, a Scrutiny officer of the Indian Council for Social Welfare made an endorsement of having counseled the parents of the contents of the document and of making the mother aware of the fact that she had a period of two months to reclaim the child, failing which the child may be placed either in adoption or guardianship. The parents have not come forth to claim the child.An affidavit was filed before this Court on 13th April, 2005 by the managing trustee of Bal Vikas certifying the facts and recording an opinion that it would be in the interest of the child to place her under guardianship.

5. By an order of Hon'ble Mr. Justice A.M. Khanwilkar dated 8th June, 2005 the Petitioners were appointed guardians of the child. The child has since lived with the Petitioners for over four years. A petition has been filed seeking a declaration that the Petitioners are the adoptive parents of the child with consequential rights, privileges and responsibilities under the law.

The Hindu Adoptions and Maintenance Act, 1956

6. The Hindu Adoptions and Maintenance Act, 1956 was enacted by Parliament "to amend and codify the law relating to adoptions and maintenance among Hindus". Section 4 gives overriding force and effect to the Act over any text, rule or interpretation of Hindu law or any custom or usage prevalent before the commencement of the Act and over any other law in force immediately before the commencement of the Act insofar as it was inconsistent withthe provisions of the legislation. Section 5 stipulates that no adoption shall be made after the commencement of the Act by or to a Hindu except in accordance with the provisionscontained in the Chapter. Any adoption made in contravention of the provisions is void. Consequently, under Sub-section (2), any adoption which is void does not create any right in the adoptive family in favour of any person which he or she could not have acquired exceptby reason of the adoption. The requisites of a valid adoption are specified in Section 6. Among them is the requirement that the person adopting must have the capacity and the right to take in adoption while the person adopted must be capable of being taken in adoption. Sub-section (4) of Section 9 contains a reference to children who have been abandoned byproviding that in such a case the guardian of the child is empowered to give the child in adoption with the previous permission of the Court to any person including the guardian himself. For a person to be adopted, Section 10 provides that (i) the person should be a Hindu; (ii) the person should not already have been adopted; (iii) the person should not have been married unless there is a custom or usage to the contrary; (iv) the person should not havecompleted the age of fifteen, unless there is a custom or usage to the contrary.

7. Section 11 provides that in every adoption certain conditions must be complied with. Clauses (i) and (ii) of Section 11 are as follows:

(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate bloodrelationship or by adoption) living at the time of adoption;

(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption.

What these clauses stipulate is a prohibition on the adoption of a child of the same gender where the adoptive father or mother already have a child living at the time of the adoption. If the adoption is of a daughter, the adoptive father or mother must not have a Hindu daughter or a son's daughter living at the time of adoption. Where the adoption is of a son, the condition is more stringent because the adoptive father or mother should not have a Hindu son, son's son or son's son's son living.

Constitutional provisions

8. Article 15 of the Constitution empowers the State, in Clause (3), to make special provisions for women and children. Article 39 is part of the Directive Principles of State policy. Clause (e) of Article 39 directs the State in framing its policies to secure that thetender age of children is not abused. In Clause (f) the State has to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedomand dignity so as to ensure that childhood and youth are protected against exploitation and against moral and material abandonment. By Article 45 the State has to endeavour to provide early childhood care and education for all children until they complete the age of six. Article 47 requires the State to raise levels of nutrition. Under Article 51A it is the fundamental duty of every citizen who is a parent or guardian to provide opportunities for education to his orher child or, as the case may be, ward between the age of six and fourteen.

9. Fundamental as they are in the governance of the country, these provisions are part of a sensitive vision of the founding fathers. The human tragedy of the exploitation of children, of child abuse and of malnutrition among children was in contemplation as these provisions were drafted. Those provisions are a composite part of our constitutional ethos which places freedom and dignity as one of the foremost values of governance in civil society. Freedomand dignity of the young must count above all. The young are amongst the most vulnerable todisease and deprivation which follow upon abandonment and isolation. Poverty has noreligion.

The convention on the Rights of the Child

10. India ratified the Convention on the Rights of the Child on 11th December, 1992. Article 3 of the Convention provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. All States have undertaken to ensure to children such protection and care as is necessary for their well being and to take all appropriate legislative and administrative measures. Article 20 of the Convention provides that a child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the State. Such care could include foster placement and adoption amongst other alternatives. Under Article 21 States who are parties to the Convention recognized that the system of adoption shall ensure that the best interests of the child shall be the paramount consideration.

The Juvenile Justice Act, 2000

11. The Juvenile Justice (Care and Protection of Children) Act was enacted in 2000, "to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection". The object of the Act is to provide for "care, protection and treatment by catering to their development needs and by adopting a child friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation". The Preamble to the Act makes reference to several constitutional provisions which have a bearing on the welfare of children and to the obligation assumed by India as a responsible member of the international community.

12. Parliament enacted the Juvenile Justice (Care and Protection of Children) Act, 2000 to effectuate constitutional provisions and fulfill India's international obligations. The Act as now enacted is intended to provide effective provisions and various alternatives for rehabilitation and social reintegration such as adoption, foster care, sponsorship and aftercare of abandoned, destitute, neglected and delinquent juveniles and children. The Act was amended in 2006 in order to effectuate the beneficial objects of the legislation and in order to remove the anomalies which had arisen in the implementation of the Act.

Rehabilitation and Social Integration

13. Chapter IV of the Juvenile Justice Act is entitled "Rehabilitation and Social Reintegration". Section 40 of the Act provides that rehabilitation and social reintegration of a child shall be carried out alternatively by (i) adoption, (ii) foster care, (iii) sponsorship and (iv) sending the child to an after care organisation. Sub-section (1) of Section 41 provides that the primary responsibility for providing care and protection to a child is to be that of his or her family. By Sub-section (2) adoption is to be resorted "for the rehabilitation of children who are orphaned, abandoned or surrendered" through such mechanism as may be prescribed.Sub-section (3) of Section 41 empowers the Court to give children in adoption subject to satisfaction of investigations having been carried out, as are required for giving children in adoption. Sub-section (4) empowers the State Government to recognize one or more of its institutions or voluntary organizations in each district as specialised adoption agencies for theplacement of orphaned, abandoned or surrendered children for adoption. Sub-section (5) of Section 41 contains the following stipulations for offering children in adoption:

(5) No child shall be offered for adoption

(a) until two members of the Committee declare the child legally free for placement in the case of abandoned children,

(b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and

(c) without his consent in the case of a child who can understand and express his consent.

14. Sub-section (6) emphasizes that the Court may allow a child to be given in adoption (a) to a person irrespective of marital status; or (b) to parents to adopt a child of the same sex irrespective of the number of living biological sons or daughters; or (c) to childless couples.

These provisions of the Juvenile Justice Act must be read in the context of some of the definitions. The expression "adoption" is defined by Clause (aa) of Section 2 as follows:

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

15. Section 2(d) defines the expression "child in need of care and protection". Clause (v) includes within this category a child who does not have a parent and whom no one is willing to take care of or whose parents have abandoned or surrendered the child.

16. Rules have been framed under the Act and Rule 33 provides for rules for implementing Chapter IV which deals with rehabilitation and social integration. Harmonising the Act of 1956 and the Juvenile Justice Act, 2000

17. The Hindu Adoptions and Maintenance Act, 1956 regulates adoptions by or to a Hindu. The Act spells out requisites of valid adoptions, defines capacities for men and women professing the Hindu religion to take in adoption and to give in adoption, for persons who may be adopted and the conditions for adoption. The Act enunciates consequences or effects of a valid adoption in law. The Act establishes rules of general applicability to Hindus in specific areas of family law - adoption and maintenance. The Juvenile Justice (Care and Protection of Children) Act, 2000 is beneficent secular legislation. The Act makes special provisions for a limited sub class of children - those juveniles in conflict with law and children in need of care andprotection. Adoption under the Act of 2000 is an instrument of legislative policy to rehabilitate and provide social integration to children who are in need of care and protection. The Preamble to the Act emphasizes that the legislation was enacted to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection. Rehabilitation and social integration of orphaned, abandoned and surrendered children is a matter of legislative regulation by the Juvenile Justice Act. Adoption is a technique contemplated by the law in order to facilitate rehabilitation and reintegration of children of a particular class governed by Chapter IV. The mission of the law is to provide special rules to govern the adoption of a narrow sub class of children namely, those who are orphaned, surrendered or abandoned. In construing the provisions of the Juvenile Justice Act the effort of the Court must be to ensure that the beneficent object with which the legislation was enacted must be facilitated and furthered. Beneficial legislation, it is a trite principleof interpretation, must be construed liberally.

18. The provisions of the Juvenile Justice Act came up for consideration before a Constitution bench of the Supreme Court in Pratap Singh v. State of Jharkhand MANU/SC/0075/2005 : (2005) 3 SCC 551. The Supreme Court held that the Act was not only beneficial legislation but that it was also remedial in character. The Constitution bench held that the statute must be construed in a manner that would make it effective and operative on the principle of ut res magis valet quam pereat. A similar approach had been adopted by a Bench of three Learned

Judges of the Supreme Court in Umesh Chandra v. State of Rajasthan MANU/SC/0125/1982 : (1982) 2 SCC 202. The Rajasthan Children Act, 1970 was regarded as a piece of social legislation which the Court held, would have to be "liberally and meaningfully construed".

19. Adoption is a facet of the right to life under Article 21 of the Constitution. The right to live that is asserted is, on the one hand, the right of parents and of individuals women andmen who seek to adopt a child to give meaning and content to their lives. Equally significant, in the context of the Juvenile Justice Act, 2000, the right to life that is specially protected is the right of children who are in need of special care and protection. The legislature has recognized their need for rehabilitation and social integration to obviate the disruptive social consequences of destitution, abandonment and surrender. There is legislative recognition of adoption as a means to subserve the welfare of orphaned, abandoned and surrendered children.

20. The Hindu Adoptions and Maintenance Act, 1956 and the Juvenile Justice Act, 2000 must be harmoniously construed. The Hindu Adoptions and Maintenance Act, 1956 deals with conditions requisite for adoption by Hindus. The Juvenile Justice Act of 2000 is a special enactment dealing with children in conflict with law and children in need of care and protection. While enacting the Juvenile Justice Act 2000 the legislature has taken care to ensure that its provisions are secular in character and that the benefit of adoption is not restricted to any religious or social group. The focus of the legislation is on the condition of the child taken in adoption. If the child is orphaned, abandoned or surrendered, that condition is what triggers the beneficial provisions for adoption. The legislation seeks to ensure social integration of such children and adoption is one method to achieve that object. The religious identity of the child or of the parents who adopt is not a precondition to the applicability of the law. The law is secular and deals with conditions of social destitution which cutacross religious identities. The legislature in its wisdom clarified in Sub-section (6) ofSection 41 that the Court may allow a child to be given in adoption to parents to adopt a child of the same sex irrespective of the number of living biological sons or daughters. This provision is intended to facilitate the rehabilitation of orphaned, abandoned or surrendered children. The condition must apply to all persons irrespective of religious affiliation who seek to adopt children of that description. Theobject of rehabilitation and providing for social reintegration to orphaned, abandoned or surrendered children is a matter of high legislative policy. It is in effectuation of that policy that the legislature has stipulated that adoption of such a child must proceed irrespective of the marital status of a person taking in adoption and irrespective of the number of living biological children of the parents seeking adoption. Consequently, where the child which is sought to be adopted falls withinthe description of an orphaned, abandoned or surrendered child within the meaning ofSub-section (2) of Section 41 or a child in need of care and protection under Clause
(d) of Section 2, the provisions of the Juvenile Justice (Care and Protection ofChildren) Act 2000 must prevail. In such a case the embargo that is imposed on

adopting a child of the same sex by a Hindu under Clauses (i) and (ii) of Section 11 of the Hindu Adoptions and Maintenance Act, 1956 must give way to the salutary provisions made by the Juvenile Justice Act. Where, however, the child is not of a description falling under the purview of Chapter IV of the Juvenile Justice Act, 2000, a Hindu desirous of adopting a child continues to be under the embargo imposed by Clauses (i) and (ii) of Section 11 of the Act of 1956. If the two pieces of legislation, both of which are enacted by Parliament are harmoniously construed, there is no conflict of interpretation. Resolution of Conflicting provisions the alternate hypothesis

21. Alternatively, even if there were to be a conflict between the provisions of the Hindu Adoptions and Maintenance Act, 1956 and the Juvenile Justice Act of 2000, it is the latter Act which would prevail. This is on the well settled principle that when there are two special Acts dealing with the same subject matter, the legislation which has been enacted subsequently should prevail. The Supreme Court applied this principle in the context of a conflict between the Companies Act 1956 and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 in its decision in Allahabad Bank v. Canara Bank MANU/SC/0262/2000 : (2000) 4 SCC 406. Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them. Bennion on Statutory Interpretation (5th ed., 2008) ' 80: Implied amendment.

22. Here, the 1956 Act prohibits a Hindu from adopting a child when he or she already has a child of the same gender, and the 2000 Act creates a general right to adopt abandoned, surrendered, or orphaned children. While there is a presumption against implied amendment or repeal under Indian law, the Supreme Court has recognized that "this presumption may be rebutted where the inconsistency cannot be reconciled." Municipal Council, Palai v. T.J. Joseph AIR 1963 SC 156, 1, 1564. If the 2000 Act is held to be inconsistent with the 1956 Act, when passing the later Act Parliament impliedly amended the Hindu Adoptions and Maintenance Act, 1956, to permit adoption of children in the specified subclass, irrespective of whether a person has children of the same sex.

23. Special laws V. general laws: Courts examining implied amendments of earlier Acts distinguish special laws from general laws. Under Indian law, an Act is only special or general relative to other Acts; it may be general in some situations but special in others. "There can be a situation in law where the same statute is treated as a special statute vis`vis one legislation and again as a general statute vis`vis yet another legislation." Allahabad Bank v. Canara Bank (supra) . "In determining whether a statute is a special or general one, the focus must be on the principal subject matter plus the particular perspective." Life Ins. Co. of India v. D.J. Bahadur MANU/SC/0305/1980 : AIR 1980 SC 2181, 2200.

24. In the LIC case, the Supreme Court considered a conflict between the Industrial Disputes Act and the Life Insurance Corporation Act. The Court concluded that theID Act was a special Act relative to the LIC Act under the circumstances of the case.

Id. "The ID Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionality for the nature of industrial disputes coming within its ambit." Id. "From alpha to omega, the ID Act has one special mission - the resolution of industrial disputes through specialized agencies according to specialized procedures and with special reference to the weaker categories of employees coming within the definition of workmen." Id.

25. Here, the Hindu Adoptions and Maintenance Act, 1956, establishes rules of general applicability in Hindu family matters, including rules for adoption. Considered against the entire swathe of Personal Law in India, it is a special act, providing rules applicable only to Hindus. In the field of adoption, however, it provides general principles of application to Hindus.

26. The Juvenile Justice Act, 2000, establishes specific rules for the adoption of a limited subclass of persons-abandoned, surrendered, or orphaned children. The special provision modifies the operation of the general rule without completely overriding it: in general,Hindus cannot adopt a child of the same gender as an existing child, but there is a special rulein the case of abandoned, surrendered, or orphaned children. As in Bahadur, here the later act "has one special mission" - establishing rules of adoption for a limited subclass of persons. Therefore, in these circumstances, the Juvenile Justice Act is a special act that overrides the general provisions of the Hindu Adoptions and Maintenance Act.

27. The Juvenile Justice Act, 2000, is best viewed as impliedly amending the conflicting provision of the Hindu Adoptions and Maintenance Act, rather than repealing it. The general prohibition of the earlier Act remains in force; the later Act simply creates an exception in the case of abandoned children.

28. Arguments to the contrary: There are three possible submissions which can be urged to the contrary. First, the Hindu Adoptions and Maintenance Act applies only to Hindus; it does not limit the ability of Muslims, Christians, Parsis and other communities to adopt children ofthe same sex as their existing children. Thus it would be possible to give effect to the Juvenile Justice Act, 2000, by holding that Sections 11(i) and (ii) are applicable to Hindu adoptions because the conflicting section of the Hindu Adoptions and Maintenance Act remains operable.

29. Second, it is possible to view the Hindu Adoptions and Maintenance Act as a special act and the Juvenile Justice Act as a general act, in which case, under general principles of statutory interpretation, the second (general) act would not impliedly amend the first (special)act. See generally Bennion ' 88: Generalia Specialibus Non Derogant. The Hindu Adoptions and Maintenance Act establishes rules for Hindus, a subclass of the overall population; since its provisions are not applicable to all Indians, it is a special act in some respects. On theother hand, the Juvenile Justice Act is a law of general applicability, in so far as it applies without respect to religious affiliation, and any child can be abandoned, surrendered, or orphaned.

30. Third, the Juvenile Justice Act contains language expressly repealing some conflicting statutes, but not statutes that conflict with the adoption provisions. Section 1(4) of theJuvenile Justice Act, 2000 provides that:

1(4) Notwithstanding anything, contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other law.

The Act expressly overrides a limited class of conflicting laws.

31. None of the three criticisms is ultimately persuasive. The first criticism fails to focus on "the principal subject matter plus the particular perspective." Life Ins. Co. of India v. D.J. Bahadur (supra). The principal subject matter of the Juvenile Justice Act is adoption of a particular subclass of children, while the Hindu Adoptions and Maintenance Act provides only general adoption principles applicable to Hindus. The focus of the 2000 Act is on the status of the child. Hence, in the adoption of surrendered, abandoned or orphaned children, Section 41(6)(b) lifts the restrictive condition imposed by Section 11(i) and (ii) of the 1956 Act. For children falling in the particular class, the Act of 2000 is a special provision.

32. The second criticism fails because, even if the Juvenile Justice Act is better viewed as a general act, labeling an act "general" or "special" is not necessarily outcome determinative. As the Supreme Court has explained:

There is no rule of law to prevent repeal of a special by a later general statute and, therefore, where the provisions of the special statute are wholly repugnant to the general statute, it would be possible to infer that the special statute was repealed by the general enactment." Municipal Council, Palai v. T.J. Joseph, supra.

33. The third criticism is also not fatal. The conditions requiring implied repeal remain: two laws, one earlier and one subsequent, contain conflicting provisions that cannot both receive effect. However, it would be necessary to emphasize that the provisions of Section 11(i) and (ii) of the Hindu Adoptions and Maintenance Act, 1956 can be harmonised with those of the Juvenile Justice Act, 2000. The later Act of 2000 carves out special provisions for dealing with the rehabilitation and integration of juveniles in conflict with law and children in need ofspecial care and protection. Adoption of surrendered, abandoned and orphaned children is themission of the law. That mission has to be achieved by allowing the adoption of children within the subclass, irrespective of the number of living biological children of the same gender. To that extent there is an exception to the embargo under Clauses (i) and (ii) of Section 11 of the Act of 1956. The embargo is to that extent lifted. The Conclusion on facts

34. The Petitioners profess the Hindu religion. They already have a biological daughter. They have obtained guardianship under the provisions of the Guardian and Wards Act, 1890 of a minor child of the same sex. The child of whom they assumed guardianship did fit the description of a child in need of care and protection under Section 2(d)(v) of the Juvenile Justice Act, 2000 and of a surrendered child under Sub-section (2) of Section 41. ThePetitioners were eligible to adopt the child under the Juvenile Justice Act, 2000 and the order of guardianship does not destroy that entitlement. The child was a surrendered child and was legally free for adoption. The substance and effect of the procedures prescribed under the Juvenile Justice (Care and Protection of Children) Act, 2000 have been complied with. Both

the children are pursuing their education in the Kindergarten Class of a nursery school at Vile Parle. The report of the school has been placed on the record. There is abundant material before the Court for the Court to conclude that it is manifestly in the interest and welfare of the child that the petition for adoption should be allowed. The child has already been with the Petitioners for a period in excess of four years.

35. The Petition is accordingly disposed of in terms of the reliefs sought before the Court. There shall be a declaration that the Petitioners are the adoptive parents of Sharinee with all the rights, privileges, responsibilities and consequences under the law.

36. There shall be an order in terms of the Judge's Order separately signed.

37. Before concluding this Court would wish to record its appreciation of the able assistance rendered to the Court by Mr. Vishal Kanade, learned Counsel appearing on behalf of the Petitioners.

Githa Hariharan v. *Reserve Bank of India*

(1999) 2 SCC 228

DR A.S. ANAND, C.J. - We have had the advantage of reading the draft judgment of our learned Brother Banerjee, J. While agreeing with the conclusion, we wish to add our own reasons.

2. The first petitioner is the wife of the second petitioner. The first petitioner is a writer and several of her books are said to have been published by Penguin. The second petitioner is a Medical Scientist in Jawaharlal Nehru University, New Delhi. They jointly applied to the Reserve Bank of India (first respondent) on 10-12-1984 for 9% Relief Bonds in the name of their minor son Rishab Bailey for Rs 20,000. They stated expressly that both of them agreed that the mother of the child, i.e., the first petitioner would act as the guardian of the minor for the purpose of investments made with the money held by their minor son. Accordingly, in the prescribed form of application, the first petitioner signed as the guardian of the minor. The first respondent replied to the petitioners advising them either to produce the application formsigned by the father of the minor or a certificate of guardianship from a competent authorityin favour of the mother. That lead to the filing of this writ petition by the two petitioners with prayers to strike down Section 6(*a*) of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the HMG Act) and Section 19(*b*) of the Guardian and Wards Act, 1890 (hereinafter referred to as the GW Act) as violative of Articles 14 and 15 of the Constitution and to quash and set aside the decision of the first respondent refusing to accept the deposit from the petitioners and to issue a mandamus directing the acceptance of the same after declaring the first petitioner as the natural guardian of the minor.

3. In the counter-affidavit filed on behalf of the first respondent, it is stated that the first petitioner is not the natural guardian of the minor son and the application was not rightly accepted by the Bank. It is also stated that under Section 6(*a*) of the HMG Act, the father of a Hindu minor is the only natural guardian. The first respondent prayed for the dismissal of the writ petition.

4. In WP (C) No. 1016 of 1991, the petitioner is the wife of the first respondent. The latter has instituted a proceeding for divorce against the former and it is pending in the District Court of Delhi. He has also prayed for custody of their minor son in the same proceeding. According to the petitioner, he had been repeatedly writing to her and the school in which the minor was studying, asserting that he was the only natural guardian of the minor and no decision should be taken without his permission. The petitioner has in turn filed an application for maintenance for herself and the minor son. She has filed the writ petition for striking down Section 6(*a*) of the HMG Act and Section 19(*b*) of the GW Act as violative of Articles 14 and 15 of the Constitution.

5. Since challenge to the constitutionality of Section 6(*a*) of the HMG Act and Section 19(*b*) of the GW Act was common in both cases, the writ petitions were heard together. The main contention of Ms Indira Jaising, learned Senior Counsel for the petitioners is that the two sections, i.e., Section 6(*a*) of the HMG Act and Section 19(*b*) of the GW Act are violative of the equality clause of the Constitution, inasmuch as the mother of the minor is relegated to an inferior position on the ground of sex alone since her right, as a natural

guardian of the minor, is made cognizable only "after" the father. Hence, according to the learned counsel, both the sections must be struck down as unconstitutional.

6. Section 6 of the HMG Act reads as follows:

> 6. The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are -
>
> (a) in the case of a boy or an unmarried girl - the father, and after him, the mother: Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
>
> (b) in the case of an illegitimate boy or an illegitimate unmarried girl - the mother, and after her, the father;
>
> (c) in the case of a married girl - the husband:
>
> Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section -
>
> (a) if he has ceased to be a Hindu, or
>
> (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).
>
> *Explanation*.- In this section, the expressions 'father' and 'mother' do not include a stepfather and a stepmother.

7. The expression "*natural guardian*" is defined in Section 4(*c*) of the HMG Act as any of the guardians mentioned in Section 6 (*supra*). The term "*guardian*" is defined in Section 4(*b*) of the HMG Act as a person having the care of the person of a minor or of his property or of both, his person and property, and includes a natural guardian among others. Thus, it is seen that the definitions of "guardian" and "natural guardian" do not make any discriminationagainst mother and she being one of the guardians mentioned in Section 6 would *undoubtedly*be a *natural guardian* as defined in Section 4(*c*). The only provision to which exception is taken is found in Section 6(*a*) which reads "*the father, and after him, the mother*". That phrase, on a cursory reading, does give an impression that the mother can be considered to be the natural guardian of the minor only *after the lifetime of the father*. In fact, that appears tobe the basis of the stand taken by the Reserve Bank of India also. It is not in dispute and is otherwise well settled also that the welfare of the minor in the widest sense is the paramount consideration and even during the lifetime of the father, if necessary, he can be replaced by the mother or any other suitable person by an order of the court, where to do so would be in the interest of the welfare of the minor.

8. Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a court of law, the word "after" in the section would have no significance, as the court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. The question, however, assumes importance only when the motheracts as the guardian of the minor *during* the lifetime of the father, without the matter going to the court, and the validity of such an action is challenged on the ground that she is *not* the legal guardian of the minor in view of Section 6(*a*) (*supra*). In the present case, the Reserve Bank of India has questioned the authority of the mother, even when she had acted with the

concurrence of the father, because in its opinion she could function as a guardian only *after* the lifetime of the father and not during his lifetime.

9. Is that the correct way of understanding the section and does the word "after" in the section mean only "after the lifetime"? If this question is answered in the affirmative, the section has to be struck down as unconstitutional as it undoubtedly violates gender equality, one of the basic principles of our Constitution. The HMG Act came into force in 1956, i.e., six years after the Constitution. Did Parliament intend to transgress the constitutional limits or ignore the *fundamental rights* guaranteed by the Constitution which essentially prohibits discrimination on the grounds of sex? In our opinion — No. It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction which may be open, the statute remains within the constitutional limits, the court will prefer the latter on the ground that the legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions.

10. We are of the view that Section 6(*a*) (*supra*) is capable of such construction as would retain it within the constitutional limits. The word "after" need not necessarily mean "after the lifetime". In the context in which it appears in Section 6(*a*) (*supra*), it means "*in the absence of*", the word "absence" therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be *absent* and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of a harmonious construction of Section 4 and Section 6 of the HMG Act, without causing any violence to the language of Section 6(*a*) (*supra*).

11. The above interpretation has already been adopted to some extent by this Court in ***Jijabai Vithalrao Gajre* v. *Pathankhan*** [(1970) 2 SCC 717]. The appellant in that case filed an application before the Tehsildar concerned under the provisions of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 for termination of the tenancy of the respondent therein after notice to him on the ground of personal requirements. The Tehsildar found that the application was maintainable and within time but held that the lease deed executed by the tenant in favour of the appellant's mother during his minority when his father was alive was not valid. However, the Tehsildar took the view that it could be considered as a lease created after 1-4-1957 and therefore the tenant could be dislodged.

In the words of the Bench:

> We have already referred to the fact that the father and mother of the appellant had fallen out and that the mother was living separately for over 20 years. It *was the mother who was actually managing the affairs of her minor daughter, who was underher care and protection*. From 1951 onwards the mother in the usual course of

management had been leasing out the properties of the appellant to the tenant.Though from 1951 to 1956 the leases were oral, for the year 1956-57 a written lease was executed by the tenant in favour of the appellant represented by her mother. *It is no doubt true that the father was alive but he was not taking any interest in the affairs of the minor and it was as good as if he was non-existent so far as the minor appellant was concerned*. We are inclined to agree with the view of the High Court that in the particular circumstances of this case, the mother can be considered to be the natural guardian of her minor daughter. It is needless to state that even before the passing of the Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956), the mother is the natural guardian after the father. The above Act came into force on August 25, 1956 and under Section 6 the natural guardians of a Hindu minor in respect of the minor's person as well as the minor's property are the father and after him the mother. The position in Hindu law before this enactment was also the same. That is why we have stated that *normally when the father is alive he is the natural guardian and it is only after him that the mother becomes the natural guardian. But on the facts found above the mother was rightly treated by the High Court as the natural guardian*."

Consequently, the Bench dismissed the appeal. The interpretation placed by us above in the earlier part of this judgment on Section 6(*a*) (*supra*) is, thus, only an *expansion* of the principle set out by the Bench in ***Jijabai Vithalrao Gajre***.

12. The Court referred to the judgment in ***Jijabai Vithalrao Gajre*** and observed: (pages. 40-41, para 6)

In this behalf our attention was invited to this Court's judgment in ***Jijabai Vithalrao Gajre* v. *Pathankhan***. This was a case in which it was held that the position in Hindu law was that when the father was alive he was the natural guardian and it was only after him that the mother became the natural guardian. Where the father was *alive* but had fallen out with the mother of the minor child and *was living separately for several years without taking any interest in the affairs of the minor*, who was in the keeping and care of the mother, it was held that, in the peculiar circumstances, the *father should be treated as if non-existent* and, therefore, the mother could be considered as the natural guardian of the minor's person as well as property, having power to bind the minor by dealing with her immovable property.

Distinguishing the facts in ***Jijabai Vithalrao Gajre*** the Court observed that there was *no evidence to show that the father of the minor respondents was not taking any interest in their affairs or that they were in the keeping and care of the mother to the exclusion of the father*. An inference was drawn from the factum of attestation of the sale deed that the father was very much "present" and in the picture. The Bench held that the sale by the mother notwithstanding the fact that the father had attested the deed, could not be held to be a sale bythe father and the natural guardian, satisfying the requirements of Section 8. Confirming the decree of the courts below, the Bench opined:

8. The provisions of Section 8 are devised to fully protect the property of a minor, even from the depredations of his parents. Section 8 empowers only the legal guardian to

alienate a minor's immovable property provided it is for the necessity or benefit of the minor or his estate and it further requires that such alienation shall be effected after the permission of the court has been obtained. It is difficult, therefore, to hold that the sale was voidable, not void, by reason of the fact that the mother of the minor respondents signed the sale deed and the father attested it.

14. The message of international instruments - the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 ("CEDAW") and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. India is a signatory to CEDAW having accepted and ratified it in June 1993. The interpretation that we have placed on Section 6(*a*) (*supra*) gives effect to the principles contained in these instruments. The domestic courts are under an obligation to give due regard to international conventions and norms for construing domestic laws when there is no inconsistency between them. [***Apparel Export Promotion Council* v. *A.K. Chopra*** (1999) 1 SCC 759].

15. Similarly, Section 19(*b*) of the GW Act would also have to be construed in the same manner by which we have construed Section 6(*a*) (*supra*).

16. While both the parents are duty-bound to take care of the person and property of their minor child and act in the best interest of his welfare, we hold that in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as *natural guardian* of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to be "absent" for the purposes of Section 6(*a*) of the HMG Act and Section 19(*b*) of the GW Act.

17. Hence, the Reserve Bank of India was not right in insisting upon an application signed by the father or an order of the court in order to open a deposit account in the name of the minor particularly when there was already a letter jointly written by both the petitioners evidencing their mutual agreement. The Reserve Bank now ought to accept the application filed by the mother.

18. We are conscious of the fact that till now, many transactions may have been invalidated on the ground that the mother is not a natural guardian when the father is alive. Those issues cannot be permitted to be reopened. This judgment, it is clarified, will operate prospectively and will not enable any person to reopen any decision already rendered or question the validity of any past transaction on the basis of this judgment.

19. The Reserve Bank of India and similarly placed other organisations, may formulate appropriate methodology in the light of the observations made above to meet the situations arising in the contextual facts of a given case.

20. In the light of what we have said above, the dispute between the petitioner and the first respondent in Writ Petition No. 1016 of 1991 as regards custody and guardianship of their minor son shall be decided by the District Court, Delhi where it is said to be pending.

21. The writ petitions are disposed of in the aforesaid manner but without any order as to costs.

BANERJEE, J. - Though nobility and self-denial coupled with tolerance mark the greatest features of Indian womanhood in the past and the cry for equality and equal status being at a very low ebb, but with the passage of time and change of social structure, the same is, however, no longer dormant but presently quite loud. This cry is not restrictive to any particular country but world over with variation in degree only. Article 2 of the Universal Declaration of Human Rights [as adopted and proclaimed by the General Assembly in its Resolution No. 217-A(III)] provided that everybody is entitled to all rights and freedom without distinction of any kind whatsoever such as race, sex or religion and the ratification of the Convention for Elimination of All Forms of Discrimination Against Women (for short CEDAW) by the United Nations Organisation in 1979 and subsequent acceptance and ratification by India in June 1993 also amply demonstrate the same.

23. We, the people of this country, gave ourselves a written Constitution, the basic structure of which permeates equality of status and thus negates gender bias and it is on this score, the validity of Section 6 of the Hindu Minority and Guardianship Act of 1956 has been challenged in the matters under consideration, on the ground that dignity of women is a right inherent under the Constitution which as a matter of fact stands negatived by Section 6 of the Act of 1956.

24. In order, however, to appreciate the contentions raised, it would be convenient to advert to the factual aspect of the matters at this juncture. The facts in WP (C) No. 489 of 1995 can be stated as below.

25. The petitioner and Dr Mohan Ram were married at Bangalore in 1982 and in July 1984, a son named Rishab Bailey was born to them. In December 1984, the petitioner appliedto the Reserve Bank of India for 9% Relief Bonds to be held in the name of their minor son Rishab along with an intimation that Petitioner 1 being the mother, would act as the natural guardian for the purposes of investments. The application, however, was sent back to the petitioner by the RBI Authority advising her to produce the application signed by the father and in the alternative, the Bank informed that a certificate of guardianship from a competent authority in her favour ought to be forwarded to the Bank forthwith so as to enable the Bank to issue the Bonds as requested and it is this communication from the RBI Authorities which is stated to be arbitrary and opposed to the basic concept of justice in this petition under Article 32 of the Constitution challenging the validity of Section 6 of the Act as indicated above.

26. The factual backdrop in WP (C) No. 1016 of 1991 centres round a prayer for custody of the minor son born through the lawful wedlock between the petitioner and the first respondent. Be it noted that a divorce proceeding is pending in the District Court of Delhi and the first respondent has prayed for custody of their minor son in the same proceeding. The petitioner in turn, however, also has filed an application for maintenance for herself and the minor son. On further factual score, it appears that the first respondent has been repeatedly writing to the petitioner, asserting that he was the only natural guardian of the minor and no decision should be taken without his permission. Incidentally, the minor has been staying

with the mother and it has been the definite case of the petitioner in this petition under Article 32 that in spite of the best efforts of the petitioner, the father has shown total apathy towards the child and as a matter of fact, is not interested in the welfare and benefit of the child excepting, however, claiming the right to be the natural guardian without, however, discharging any corresponding obligation. It is on these facts that the petitioner moved this Court under Article 32 of the Constitution praying for declaration of the provisions of Section6(*a*) of the Act read with Section 19(*b*) of the Guardian and Wards Act as violative of Articles 14 and 15 of the Constitution.

28. Ms Indira Jaising, appearing in support of the petitions strongly contended that the provisions of Section 6 of the Act seriously disadvantage woman and discriminate man against woman in the matter of guardianship rights, responsibilities and authority in relationto their own children.

29. It has been contended that on a true and proper interpretation of Section 4 and the various provisions thereunder and having due regard to the legislative intent which is otherwise explicit, the question of putting an embargo on the mother in the matter of exercise of right over the minor as the guardian or ascribing the father as the preferred guardian does not arise, but unfortunately, however, the language in Section 6 of the Act runs counter to such an equality of rights of the parents to act as guardian to the minor child.

32. As regards the concept of guardianship, both the parents under the Hindu law were treated as natural guardians, of the persons and the separate property of their minor children, male or female except, however, that the husband is the natural guardian of his wife howsoever young she might be and the adopted father being the natural guardian of the adopted son. The law, however, provided that upon the death of the father and in the event of there being no testamentary guardian appointed by the father, the mother succeeds to the natural guardianship of the person and separate property of their minor children. Conceptually, this guardianship, however, is in the nature of a sacred trust and the guardian cannot, therefore, during his lifetime substitute another person to be the guardian in his place though, however, entrustment of the custody of the child for education or purposes allying may be effected temporarily with a power to revoke at the option of the guardian.

33. The codification of this law pertaining to guardianship, however, brought about certain changes in regard thereto, to which we will presently refer, but it is interesting to note that prior to the enactment, the law recognised both de facto and de jure guardian of a minor:a guardian de facto implying thereby one who has taken upon himself the guardianship of a minor whereas the guardian de jure is a legal guardian who has a legal right to guardianship of a person or the property or both as the case may be. This concept of legal guardian includes a natural guardian: a testamentary guardian or a guardian of a Hindu minor appointed or declared by a court of law under the general law of British India.

34. Incidentally, the law relating to minority and guardianship amongst Hindus is to be found not only in the old Hindu law as laid down by the smritis, shrutis and the commentaries as recognised by the courts of law but also statutes applicable amongst others to Hindus, to wit, the Guardian and Wards Act of 1890 and the Indian Majority Act of 1875. Be it further noted that the Act of 1956 does not as a matter of fact in any way run counter to the earlier

statutes in the subject but they are supplemental to each other as reflected in Section 2 of the Act of 1956 itself which provides that the Act shall be in addition to and not in derogation of the Acts as noticed above.

35. Before proceeding further, however, on the provisions of the Act in its true perspective, it is convenient to note that lately the Indian courts following the rule of equality as administered in England have refused to give effect to inflexible application of paternal right of minor children. In equity, a discretionary power has been exercised to control the father's or guardian's legal rights of custody, where exercise of such right cannot but be termed to be capricious or whimsical in nature or would materially interfere with the happiness and the welfare of the child. In ***McGrath, Re*** [(1893) 1 Ch 143 : 62 LJ Ch 208] Lindley, L.J. observed:

> The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.

Lord Esher, M.R. in ***Gyngall, Re*** [(1893) 2 QB 232 stated:

> The court has to consider", therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child, so far as it can be said to have any religion, and the happiness of the child. Prima facie, it would not be for the welfare of the child to be taken away from its natural parent and given over to other people who have not that natural relation to it. Every wise man would say that, generally speaking, the best place for a child is with its parent. If a child is brought up, as one may say from its mother's lap in one form of religion, it would not, I should say be for its happiness and welfare that a stranger should take it away in order to alter its religious views. Again, it cannot be merely because the parent is poor and the person who seeks to have the possession of the child as against the parent is rich, that, without regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child, the child ought not to be taken away from its parent merely because its pecuniary position will be thereby bettered. No wise man would entertain such suggestions as these.

The English law, therefore, has been consistent with the concept of welfare theory of the child. The Indian law also does not make any departure therefrom. In this context, reference may be made to the decision of this Court in the case of ***J.V. Gajre*** **v.** ***Pathankhan*** in which this Court in para 11 of the Report observed:

> We have already referred to the fact that the father and mother of the appellant had fallen out and that the mother was living separately for over 20 years. It was the mother who was actually managing the affairs of her minor daughter, who was under her care and protection. From 1951 onwards the mother in the usual course of management had been leasing out the properties of the appellant to the tenant.Though from 1951 to 1956 the leases were oral, for the year 1956-57 a written lease

was executed by the tenant in favour of the appellant represented by her mother. It is no doubt true that the father was alive but he was not taking any interest in the affairs of the minor and it was as good as if he was non-existent so far as the minor appellant was concerned. We are inclined to agree with the view of the High Court that in the particular circumstances of this case, the mother can be considered to be the natural guardian of her minor daughter. It is needless to state that even before the passing of the Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956), the mother is the natural guardian after the father. The above Act came into force on August 25, 1956 and under Section 6 the natural guardians of a Hindu minor in respect of the minor's person as well as the minor's property are the father and after him the mother. The position in the Hindu law before this enactment was also the same. That is why we have stated that normally when the father is alive he is the natural guardian and it is only after him that the mother becomes the natural guardian. But on the facts found above the mother was rightly treated by the High Court as the natural guardian.

36. Obviously, a rigid insistence of strict statutory interpretation may not be conducive for the growth of the child, and welfare being the predominant criterion, it would be a plain exercise of judicial power of interpreting the law so as to be otherwise conducive to a fuller and better development and growth of the child.

37. Incidentally, the Constitution of India has introduced an equality code prohibiting discrimination on the ground of sex and having due regard to such a mandate in the Constitution, is it justifiable to decry the rights of the mother to be declared a natural guardian or have the father as a preferred guardian? Ms Indira Jaising answers it with an emphatic "No" and contended that the statute in question covering this aspect of the personal law has used the expression "after" in Section 6(*a*) but the same cannot run counter to the constitutional safeguards of gender justice and as such cannot but be termed to be void and ultra vires the Constitution.

38. Be it noted here that the expressions "guardian" and "natural guardian" have been given statutory meanings as appears from Section 4(*b*) wherein guardian is said to mean a person having the care of the person of a minor or his property and includes:

(i) natural guardian;
(ii) a guardian appointed by the Will of the minor's father or mother;
(iii) a guardian appointed or declared by court, and
(iv) a person empowered to act as such by or under any enactment relating to any court of wards;

39. It is pertinent to note that sub-section (*c*) of Section 4 provides that a natural guardian means a guardian mentioned in Section 6. This definition section, however, obviously in accordance with the rule of interpretation of a statute, ought to be read subject to Section 6 being one of the basic provisions of the Act and it is this Section 6 which records 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. The statute, therefore, on a plain reading with literal meaning being ascribed to the words used depicts that the mother's right to act as a natural guardian stands suspended during the lifetime of the father and it is only in the event of the death of thefather, the mother obtains such a right to act as the natural guardian of a Hindu minor. It is

this interpretation which has been ascribed to be having a gender bias and thus opposed to the constitutional provision. It has been contended that the classification is based on marital status depriving a mother's guardianship of a child during the lifetime of the father whichalso cannot but be stated to be a prohibited marker under Article 15 of the Constitution.

40. The whole tenor of the Act of 1956 is to protect the welfare of the child and as such interpretation ought to be in consonance with the legislative intent in engrafting the statute on the statute-book and not dehors the same and it is on this perspective that the word "after" appearing in Section 6(*a*) shall have to be interpreted. It is now settled law that a narrow pedantic interpretation running counter to the constitutional mandate ought always to be avoided unless, of course, the same makes a violent departure from the legislative intent in the event of which a wider debate may be had having due reference to the contextual facts.

41. The contextual facts in the decision noticed above depict that since the father was not taking any interest in the minor and it was as good as if he was non-existing so far as the minor was concerned, the High Court allowed the mother to be the guardian but without the expression of any opinion as regards the true and correct interpretation of the word "after" or deciding the issue as to the constitutionality of the provision as contained in Section 6(*a*) of the Act of 1956 — it was decided upon the facts of the matter in issue. The High Court in fact recognised the mother to act as the natural guardian and the findings stand accepted and approved by this Court. Strictly speaking, therefore, this decision does not lend any assistance in the facts of the matter under consideration excepting, however, that the welfare concept had its due recognition.

42. There is yet another decision of this Court in the case of ***Panni Lal* v. *Rajinder Singh*** wherein the earlier decision in ***Gajre*** case was noted but in our view, ***Panni Lal*** case does not lend any assistance in the matter in issue since the decision pertains to protection of the properties of a minor.

43. Turning attention on the principal contention as regards the constitutionality of the legislation, in particular Section 6 of the Act of 1956, it is to be noted that the validity of a legislation is to be presumed and efforts should always be there on the part of the law courts in the matter of retention of the legislation in the statute-book rather than scrapping it and it is only in the event of gross violation of constitutional sanctions that law courts would be within their jurisdiction to declare the legislative enactment to be an invalid piece of legislation and not otherwise and it is on this perspective that we may analyse the expressions used inSection 6 in a slightly more greater detail. The word "guardian" and the meaning attributed toit by the legislature under Section 4(*b*) of the Act cannot be said to be restrictive in any way and thus the same would mean and include both the father and the mother and this is more so by reason of the meaning attributed to the words as "a person having the care of the person ofa minor or his property or of both his person and property ...". It is an axiomatic truth thatboth the mother and the father of a minor child are duty-bound to take due care of the person and the property of their child and thus having due regard to the meaning attributed to the word "guardian", both the parents ought to be treated as guardians of the minor. As a matterof fact, the same was the situation as regards the law prior to the codification by the Act of 1956. The law, therefore, recognised that a minor has to be in the custody of the person who

can subserve his welfare in the best possible way - the interest of the child being theparamount consideration.

44. The expression "natural guardian" has been defined in Section 4(*c*) as noticed above to mean any of the guardians as mentioned in Section 6 of the Act of 1956. This section refersto three classes of guardians, viz., father, mother and in the case of a married girl, the husband. The father and mother, therefore, are natural guardians in terms of the provisions of Section 6 read with Section 4(*c*). Incidentally, it is to be noted that in the matter of interpretation of a statute, the same meaning ought to be attributed to the same word used by the statute as per the definition section. In the event, the word "guardian" in the definition section means and implies both the parents, the same meaning ought to be attributed to the word appearing in Section 6(*a*) and in that perspective, the mother's right to act as the guardian does not stand obliterated during the lifetime of the father and to read the same on the statute otherwise would tantamount to a violent departure from the legislative intent. Section 6(*a*) itself recognises that both the father and the mother ought to be treated as natural guardians and the expression "after" therefore shall have to be read and interpreted in a manner so as not to defeat the true intent of the legislature.

45. Be it noted further that gender equality is one of the basic principles of our Constitution and in the event the word "after" is to be read to mean a disqualification of a mother to act as a guardian during the lifetime of the father, the same would definitely run counter to the basic requirement of the constitutional mandate and would lead to a differentiation between male and female. Normal rules of interpretation shall have to bow down to the requirement of the Constitution since the Constitution is supreme and the statute shall have to be in accordance therewith and not dehors the same. The father by reason of a dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category and in that view of the matter,the word "after" shall have to be interpreted in terms of the constitutional safeguard and guarantee so as to give a proper and effective meaning to the words used.

46. In our opinion, the word "after" shall have to be given a meaning which would subserve the need of the situation, viz., the welfare of the minor and having due regard to the factum that law courts endeavour to retain the legislation rather than declare it to be void, we do feel it expedient to record that the word "after" does not necessarily mean after the death of the father, on the contrary, it depicts an intent so as to ascribe the meaning thereto as "in the absence of" - be it temporary or otherwise or total apathy of the father towards the childor even inability of the father by reason of ailment or otherwise and it is only in the event of such a meaning being ascribed to the word "after" as used in Section 6 then and in that event, the same would be in accordance with the intent of the legislation, viz., the welfare of the child.

47. In that view of the matter, the question of ascribing the literal meaning to the word "after" in the context does not and cannot arise having due regard to the object of the statute, read with the constitutional guarantee of gender equality and to give a full play to the legislative intent, since any other interpretation would render the statute void and which situation, in our view, ought to be avoided.

48. In view of the above, Writ Petition (C) No. 489 of 1995 stands disposed of with a direction that the Reserve Bank Authorities are directed to formulate appropriate methodology in the light of the observations as above so as to meet the situation as called for in the contextual facts.

49. Writ Petition (C) No. 1016 of 1991 also stands disposed of in the light of the observations as recorded above and the matter pending before the District Court, Delhi as regards custody and guardianship of the minor child shall be decided in accordance therewith.

50. In the facts of the matters under consideration, there shall, however, be no order as to costs.

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Mt. Ghulam Kubra Bibi v. *Mohammad Shafi Mohammad Din*

AIR 1940 Pesh. 2

MIR AHMAD, J. – Mohammad Shafi sued Mt. Ghulam Kubra fcr restitution of conjugal rights. He also impleaded her parents and asked that an injunction should be issued against them to restrain them from interfering in his marital relations with his wife. The defence taken by Mt. Ghulam Kubra was that she was never married to Mohammad Shafi. There was also a question whether the woman was of age at the time when she was married. Evidence was led by either side. The Mullah appeared and he said that he read the nikah at the instance of the grandfather of the girl. He categorically denied that anyone was sent to the girl to enquire from her whether she agreed to the marriage. One Mistri Abdul Karim, on the other hand, vaguely deposed that there were two witnesses of the nikah. He did not give their names. Two witnesses, Mohammad Ramzan and Mohammad Din were produced who alleged that they were the witnesses of the nikah. They were again laconic, because they stopped at that, and did not give any detail as to what was done by them. Mohammad Ramzan admitted that he was the neighbour of the plaintiff. Mohammad Din did not deny that the plaintiff was working with him for the last 8 or 9 years.

The trial Judge held that the girl was of age when she was married. He was of the view that the marriage had been proved. He, therefore, granted a decree as prayed for against all the defendants. An appeal was preferred to the District Court. It was admitted by both the parties before the learned Additional Judge that the girl was of age when the marriage was held. The Judge maintained the decree for restitution of conjugal rights. But he did not thinkit necessary to issue an injunction to the parents of the girl. He, therefore, accepted the appeal to this extent, that he set aside the portion of the order relating to injunction. Mt. Ghulam Kubra has come upon further appeal to this Court against the decree granting restitution of conjugal rights. Mohammad Shafi has also come up on appeal with a request that the order issuing injunction should be restored. This judgment will cover both the cases.

According to Mahomedan law, it is absolutely necessary that the man or someone on his behalf and the woman or someone on her behalf should agree to the marriage at one meeting, and the agreement should be witnessed by two adult witnesses. As women are in pardah in this part of the country it is customary to send a relation of the woman to her inside the house accompanied by two witnesses. The relation asks the girl within the hearing of the witnesses whether she authorizes him to agree to the marriage on her behalf for the dower money offered by the husband. He explains to her the detail of the dower proposed. When the girl says “yes” or signifies her consent by some other method, the three persons come out. The future husband and those three persons are then placed before the Mullah. The Mullah asks the boy whether he offers to marry the girl on payment of the specified dower. He says “yes”.Then the relation, who had gone inside, tells the Mullah that he is the agent of the girl. The Mullah asks him whether he agrees to the marriage on payment of the specified dower. The relation says “yes”. The witnesses are present there so that if the Mullah has any doubt he should question them as to whether the relation is a duly authorized agent of the girl. Directly both sides have said “yes” the Mullah reads the scriptures and the marriage is complete.

I have been at pains to describe the method which is usually adopted in this part of the country for effecting a marriage in order to show that the vague allegation that there were two witnesses of the nikah has no value and that it should be proved that the whole procedure has been gone through: in particular when the man who read the nikah is positive that no one was sent to the girl to enquire from her whether she was a willing party. It is on the record that the girl was 17 years of age when her marriage was solemnised. It appears that the parties did not know then that according to Mahomedan law a girl becomes major for the purposes of marriage when she reaches the age of puberty, which is presumed to be the age of 15 years. I think they were under the impression that she could not be major up to 18 years of age, as is the general law, and I guess that the girl was, therefore, given away by the grandfather andnot personally consulted. For when a girl is minor it is permissible in Mahomedan law thather father or grandfather or other paternal relations should give her away. The marriage is valid and is called a nikah all the same.

It is interesting in this connection to point out that such nikah also requires two adult witnesses. The witnesses produced in this case have only said that they were the witnesses of the nikah. Who knows whether they were not the witnesses of the giving away of the girl by the grandfather. For the reasons given above I hold that no valid marriage has taken place in this case, and that the plaintiff has, therefore, no right to sue for restitution of conjugal rights. The appeal of Mt. Ghulam Kubra is accepted and the suit of Mohammad Shafi is dismissed with costs throughout. The appeal of Mohammad Shafi is dismissed.

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Chand Patel v. *Bismillah Begum*

1 (2008) DMC 588 (SC)

ALTAMAS KABIR,J. - 2. The application for condonation of delay in filing the Special Leave Petition is allowed and the delay in filing the same is condoned.

3. This appeal raises an interesting question of law as to whether a marriage performed by a person professing the Muslim faith with his wife's sister, while his earlier marriage with the other sister was still subsisting, would be void in law or merely irregular or voidable even though the subsequent marriage may have been consummated.

4. The facts which give rise to the aforesaid question, in brief, are set out hereunder.

5. The respondent No.1 herein, Bismillah Begum, filed an application for her maintenance and for the maintenance of her minor daughter, Taheman Bano, under Section 125 of the Code of Criminal Procedure, against one Chand Patel, in the Court of the JudicialMagistrate, First Class, Chincholi, being Criminal Misc. No.6 of 2001. In her petition she claimed that she was the legally wedded wife of the appellant herein and that her marriage with the appellant had taken place about eight years prior to the filing of the said petition. Her further case was that the marriage was consummated and two years after the marriage a daughter was born from the wedlock and she has been made petitioner No.2 in the application for maintenance. The petitioner No.2 Taheman Bano being a minor, is under the care and guardianship of her mother, the petitioner No.1, in the said application. 6. In her petition the respondent No.1 herein categorically admitted that the appellant herein was married to her elder sister, Mashaq Bee, and that the appellant, with the consent of his first wife married the respondent No.1 and a Nikahnama was also executed but the same had been misplaced. It was also admitted that the appellant herein lived with his first wife MashaqBee and the respondent No.1 under one roof and the appellant had even accepted the petitioner No.2 as his daughter and had brought her up.

7. That with the passage of time the relationship between the appellant and the respondent No.1 began to deteriorate and he started neglecting the respondents who have no means to support themselves. The respondent No.1 prayed for maintenance for herself and forher minor daughter @ Rs.1,000/- per month for each of them from the date of filing of the petition.

8. The case made out on behalf of the respondent No.1 was denied on behalf of the appellant herein. He categorically denied that he had married the respondent No.1. The defence put up by the appellant was not accepted by the learned Trial Court, which prima facie came to a finding that the respondent No.1 was, in fact, the wife of the appellant and that the petitioner No.2 is his daughter. The Trial Court also came to the finding that the appellant had neglected the respondents and had failed to maintain them, which he was in lawrequired to do, and accordingly, directed the appellant to pay Rs.1,000 per month to the respondent No.1 towards her life support maintenance and to the respondent No.2 till she reached adulthood.

9. The aforesaid decision was challenged by the appellant herein in the revision filed by him, being Criminal Revision No.76 of 2003, in the Court of the District and Sessions Judge

at Gulbarga. The respondent No.1 herein, both on her own behalf and on behalf of her minor daughter, also filed Criminal Revision No.96 of 2003 before the same learned Judge and both the revision petitions were taken up together for disposal and wee disposed of by a common order. After considering several decisions of different High Courts and this Court the learned Fourth Additional District Judge, Gulbarga, dismissed both the revision petitions and confirmed the order passed by the Judicial Magistrate, First Class, Chincholi, in Criminal Misc. No.6 of 2001. While arriving at the aforesaid decision, the learned revisional Court held that the personal law of the parties could not come in the way of a Muslim to pray forand obtain maintenance under Section 125 of the Code of Criminal Procedure since an obligation is cast upon the appellant herein to maintain his wife and children till the marriage between them was declared null and void by a competent court. While referring to various decisions of different High Courts, the revisional Court relied to a large extent on a decisionof this Court in the case of ***Nanak Chand* v. *Chandra Kishore Aggarwal*** [AIR 1970 SC 446] in which it was, inter alia, held that Section 488 of the old Code which corresponds to Section125 of the new Code is applicable to all persons belonging to all religions and has no relationship to the personal law of the parties. The learned Judge also referred to the decision of this Court in the case of ***Re Hussain Saheb*** [1985 Cri LJ 1505 (A.P.) (W.P. No.858 of 1985)] wherein it was held that the provisions of maintenance of a divorced wife under Section 125 of the Code of Criminal Procedure could not be struck down on the ground of inconsistency between the said provisions and the personal laws of the parties. On the basis of the above, the learned Additional Sessions Judge held as follows:Thus in the above said dictum the personal law of the Muslim no way coming in the way of right to maintenance of the respondent. Moreover the Magistrate cannot go into validity of the marriage while dealingunder Section 125 of Cr.P.C. The petitioner must maintain the wife and children till the marriage between them declares null and void by the competent court. Therefore, by relying upon the rulings of the Hon'ble Supreme Court the marriage between the petitioner and respondent No.1 is presumed to be legal and validity of the marriage cannot be decided underproceedings u/sec. 125 of Cr.P.C. or Section 391 of Cr.P.C. Therefore, I do not find any illegality or irregularity committed by the Magistrate while granting maintenance to the respondents. Hence I answer Point no.1 and 2 in the negative.

10. Subsequently, the appellant herein filed an application under Section 482 of the Criminal Procedure Code for setting aside the order dated 28.6.2003 passed by the Judicial Magistrate 1st Class in Criminal Misc. No.6 of 2001. From the order disposing of the said petition it is apparent that the High Court had occasion to look into the orders passed both by the Trial Court as well as the revisional Court and after considering the same was of the view that there was no merit in the petition and dismissed the appellant's application under Section 482 of the said Code.

11. Much the same arguments as had been advanced before the Courts below have been advanced on behalf of the respective parties in these proceedings.

12. On behalf of the appellant it has been urged that the Muslim law specifically prohibits 'unlawful conjunction' which has been interpreted to mean that a man could not marry his wife's sister in his wife's life time. It was urged that in the instant case the appellant had from the very initial stage denied having married the respondent No.1 herein, who is his

wife's younger sister and that he did not have any sexual relations with her, thereby disputing the paternity of the respondent No.2 through him. It was also submitted that since such unlawful conjunction is prohibited, even if the marriage had been performed the same was void in law and did not confer any rights either on the respondent No.1 or on respondent No.2 since from the very inception the marriage was void and invalid.

13. In support of his aforesaid contention Mr.Raja Venkatappa Naik, learned counsel for the appellant, firstly referred to the decision of this Court in ***Rameshchandra Rampratapji Daga*** **v.** ***Rameshwari Rameshchandra Daga*** [(2005) 2 SCC 33], in which this Court had occasionto consider, inter alia, the provisions of Sections 11 and 12 as also Section 5(i) of the Hindu Marriage Act, 1955. The facts of the said case are to some extent similar to the facts of this case, although, the same involved the provisions of the Hindu Marriage Act, 1955. In the said case the wife was first married to someone but according to her the customary rituals of the marriage had not been completed, inasmuch as, during the marriage ceremony the family members quarrelled over dowry. She, thereafter, filed a petition for divorce but did not prosecute the same and no decree of divorce was passed in the said proceedings. However, in accordance with the prevalent customs in the Maheshwari community, a chhor chithhi or a document of dissolution of marriage was executed between the wife and the said person and it was also registered. The said documents were shown and also given to the person with whom the second marriage was performed and a daughter was also born from the second marriage. According to the wife, her second husband began to ill treat her, and, ultimately, she had to file proceedings in the Family Court for grant of a decree of judicial separation andmaintenance of Rupees three thousand per month both for herself and for her minor daughter.The second husband filed a counter petition seeking a declaration that his marriage with his present wife was a nullity on the ground that on the date of the second marriage her earlier marriage with her previous husband had not been dissolved by any Court in accordance with the provisions of the Hindu Marriage Act, 1955. The Family Court allowed the petition of thewife and granted a decree of judicial separation as also the maintenance claimed by her and dismissed the counter petition filed by the husband. The High Court, however, reversed the finding of the Family Court and held that since the first marriage of the present wife with the previous husband had not been dissolved by the Court, the second marriage was in contravention of Section 5(i) of the aforesaid Act and was, therefore, a nullity under Section 11 of the Act. The High Court granted a decree of separation holding that the marriage was a nullity, though it maintained the decree granted in respect of maintenance to the respondent No.1 and her daughter.

14. Dismissing the two appeals preferred both by husband and the wife, the Supreme Court held that in the facts of the case the Courts below were fully justified in granting maintenance both to the wife and the daughter since the evidence of the wife had been rightlybelieved by the Courts below. The High Court accepted the validity of the document of dissolution of marriage executed between the parties and also took into consideration the fact that they had lived as husband and wife for about 9 years. On such consideration, both the appeals came to be dismissed.

15. Mr. Naik also relied on another decision of this Court in the case of ***Savitaben Somabhai Bhatiya*** **v.** ***State of Gujarat*** [(2005) 3 SCC 636], in which it was observed that the

legislature had considered it necessary to include within the scope of Section 125 of the Code an illegitimate child, but it had not done so in respect of a woman not lawfully married. It was observed that however desirable it may be, to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in Section 125 of the Code, there was no scope for enlarging its scope by introducing any artificial definition to include a woman not lawfully married in the expression "wife".

16. On the basis of the aforesaid two decisions, learned counsel for the appellant submitted that having regard to the letter and spirit of Section 125 of the Code, the Courts below had erred in granting maintenance to the respondent No.1 when her marriage itself wasvoid from its very inception.

17. Mrs. K. Sarada Devi, learned counsel for the respondents, however, questioned the decision of the High Court on the ground that in a proceeding under Section 125 of the Code, the Court was not required to adjudicate upon the validity of a marriage and on a prima facie view it could pass an order for maintenance of both the wife and her daughter. She however, also contended that the marriage between the parties had been solemnised inspite of the existing facts which were known to both the parties. She urged that it was the appellant who, despite having married her elder sister, not only chose to marry the respondent No.1 as well, but was now taking recourse to technicality to avoid payment of maintenance which he was required to pay under the provisions of Section 125 of the Code.

18. She urged that till such time as the marriage between the appellant and the respondent No.1 was not declared to be void by a competent Court of law, it continued to subsist and all rights flowing from a valid marriage continued to be available to the respondent No.1 and her minor daughter till such time a competent Court of law directed such marriage to be invalid and void.19. The answer to the question, which we are called upon to answer in this case, will depend on the legal status of the union effected by the appellant with the respondent No.1. Though the factum of marriage between them was denied by the appellant, the courts below negated the appellant's case and proceeded on the basis that a marriage had been performed between them. If the marriage which was said to have been performed between the appellant and the respondent No.1 is held to be void then, in such event, the respondent No.1 will not be entitled to maintenance from the appellant under Section 125 Cr.P.C. If, on the other hand, the marriage is held to be irregular, then in such event, the marriage will subsist for all purposes, unless declared to be void by a competent court. Till such a declaration is made, along with the respondent No.2, the respondent No.1 will also be entitled to maintenance under Section 125 Cr.P.C. Although, the law applicable in this case is under the personal lawof Muslims, it has many similarities with the provisions of Sections 11 and 12 of the Hindu Marriage Act, 1955. Section 11 of the 1955 Act, defines "Void Marriages" and provides that any marriage solemnized after the commencement of the Act shall be null and void and on a petition presented by either party thereto, be so declared by a decree of nullity if it contravened any one of the conditions specified in clauses (i), (iv) and (v) of Section 5 of the Act. In *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav* [AIR 1988 SC 644], this Court had held that marriages covered by Section 11 are void ipso-jure, that is void from the very inception and have to be ignored as not existing in law at all. A marriage in contravention of Section 11 must be treated as null and void from its very inception.

20. Section 12 of the 1955 Act defines "voidable marriages" and provides that any marriage solemnized before or after the commencement of the Act shall be voidable and may be annulled by a decree of nullity on any of the grounds enumerated in the Section. In the case of a marriage covered by Section 12 of the 1955 Act, the marriage is not void ipso-jure from its inception, but a decree would have to be obtained from the competent court declaringthe marriage to be void and so long as such declaration is not made, the marriage will continue to subsist.

21. Under the Muslim law also a distinction has been drawn between void marriages and irregular marriages. The same has been dealt with in *Mulla's Principles of Mahomedan Law* in paragraphs 260 to 264. Paragraphs 260, 261 and 262 deal with complete prohibition of marriage between a man and the persons included therein and any marriage in violation of such provision would be void from its very inception (*batil*). Paragraph 263 which is relevantfor our purpose reads as follows:-"263. Unlawful conjunction - A man may not have at the same time two wives who are so related to each other by consanguinity, affinity and fosterage, that if either of them had been a male, they could not have lawfully intermarried, asfor instance, two sisters, or aunt and niece. The bar of unlawful conjunction renders a marriage irregular, not void."

22. The above provision fell for the consideration of different High Courts and the earliest decision is that of the Calcutta High Court in the case of *Aizunnissa* v. *Karimunissa* [(ILR (1895) 23 Cal. 130] which was decided on 23rd July, 1895. After discussing the various authorities on the subject the Calcutta High Court took the view that a marriage with a wife's sister while the earlier marriage was still subsisting was void and the children of such marriage were illegitimate and were not entitled to inherit. It was held that the sister of a person's wife was prohibited from the very inception and a marriage contracted with her would from the very inception be void (*batil*).

23. The said decision subsequently came to be considered by the Bombay High Court in the case of ***Tajbi Abalal Desai* v.** ***Mowla Alikhan Desai*** [39 IC 1917] and was decided on 6th February, 1917. The Bombay High Court differed with the decision rendered in *Aizunnissa's case* (supra) and placing reliance on the views expressed in *Fatawa-i-Alamgiri* held that a marriage with the sister of an existing wife was not void (*batil*) but irregular (*fasid*). The reasoning adopted was that marriage with a permanently prohibited woman had always been considered by the exponents of Muslim law to be void and has no legal consequence, but marriage with a temporarily prohibited woman if consummated may have legal consequences. The logic behind the aforesaid reasoning was that a marriage with the sister ofan existing wife could always become lawful by the death of the first wife or by the husband divorcing his earlier wife and thereby making the marriage with the second sister lawful to himself. The Bombay High Court after considering various authorities, and in particular *Fatawa-i-Alamgiri*, ultimately observed as follows:-

> Taking the whole current of authority and the general trend of informed thought on this subject, it points clearly to some such distinctions having always been recognized by the Muhammadan Law. Where that is so and a particular case on the borderland of such distinctions, to which it may be doubtful whether they can be applied in the ordinary way, arises, surely the Courts would be well advised to accept

the authoritative statement of the law as it was then understood by the authors of the Fatawa-i-Alamgiri. It is impossible to say that that statement conflicts with thetextual authority of the Kuran. Speaking generally, it appears to us to harmonize with the course the law took during the intervening period, and to be in consonance with the soundest practical principles. It has the support of such a great modern text-book writer as Baillie. The eighth chapter of his first book appears to us to reach conclusions by unanswerable reasoning, and while those conclusions may be his own, they are the conclusions of a writer of profound knowledge intimately versed at first hand with all the best writings of Muhammadan lawyers. The modern Muhammadan text-book writers, Ameer Ali, Tyabji and Abdur Rahim, are in substantial agreement. All authority appears to us to point one way. Against this is nothing but the judgment of the Calcutta High Court in Aizunnissa's case and after having given it and the materials upon which it avowedly rests our most careful and respectful attention, we find ourselves wholly unconvinced by its reasoning and unable to agree with the law it lays down.24. The aforesaid question also fell for the consideration of the Oudh Chief Court in the case of ***Mussammat Kaniza* v. *Hasan Ahmad Khan*** [92 IC1926] decided on 24th November, 1925 and by the Lahore High Court in ***Taliamand* v. *Muhammad Din*** [129 IC 1931] decided on 16th July, 1930, and also by the Madras High Court in *Rahiman Bibi* ***Saheba* v. *Mahboob Bibi Saheba*** [ILR 1938 page 278] which was decided on 1st September, 1937. All the said courts favoured the view taken by the Bombay High Court in *Tajbi* case and were of the view that the decision of the Calcutta High Court in *Aizunnissa Khatun* case was incorrect.

25. Paragraph 264 which deals with the distinction between void and irregular marriages reads as follows:-264. Distinction between void and irregular marriages(1) A marriage which is not valid may be either void or irregular

(2) A void marriage is one which is unlawful in itself the prohibition against the marriage being perpetual and absolute. Thus a marriage with a woman prohibited by reason of consanguity, affinity, or fosterage is void, the prohibition against marriage with such a woman being perpetual and absolute.

(3) An irregular marriage is one which is not unlawful in itself, but unlawful "for something else," as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses.
Thus the following marriages are irregular, namely

(a) a marriage contracted without witness;
(b) a marriage with a fifth wife by a person having four wives;
(c) a marriage with a woman undergoing iddat;
(d) a marriage prohibited by reason of difference of religion;
(e) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried.

The reason why the aforesaid marriages are irregular, and not void, is that in cl.(a) the irregularity arises from a accidental circumstance; in cl. (b) the objection may be removed by the man divorcing one of his four wives; in cl. (c) the impediment ceases on

the expiration of the period iddat; in cl.(d) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith; and in cl(e) the objection may be removed by the man divorcing the wife who constitutes the obstacle; thus if a man who has already married one sister marries another, he may divorce the first, and make the second lawful to himself.

26. Paragrph 266 deals with the effects of a void (*batil*) marriage and provides that a void marriage is no marriage at all. It does not create any civil rights or obligations between the parties. The offspring of a void marriage are illegitimate. Paragraph 267 which deals with the effects of irregular (*fasid*) marriages reads as follows:-267.

Effect of an irregular (*fasid*) marriage

(1) An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other "I have relinquished you". An irregular marriage has no legal effect before consummation.

(2) If consummation has taken place

(i) the wife is entitled to dower, proper or specified, whichever is less;

(ii) she is bound to observe the iddat, but the duration of the iddat both on divorce and death is three courses;

(iii) the issue of the marriage is legitimate. But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife (*Baillie*, 694, 701).

27. On consideration of the decisions of the various High Courts referred to hereinabove and the provisions relating to void marriages and marriages which are merely irregular, we are also of the view that the decision rendered by the Bombay High Court in the case of *Tajbi's* case is correct. Since a marriage, which is temporarily prohibited may be rendered lawful once the prohibition is removed, such a marriage is in our view irregular (*fasid*) andnot void (*batil*).

28. The answer to the question raised at the very outset, therefore, is that the bar of unlawful conjunction (*jama bain-al-mahramain*) renders a marriage irregular and not void. Consequently, under the Hanafi law as far as Muslims in India are concerned, an irregular marriage continues to subsist till terminated in accordance with law and the wife and the children of such marriage would be entitled to maintenance under the provisions of Section 125 of the Code of Criminal Procedure.

29. The decisions cited during the hearing of this case do not really come to the aid of the parties, except to the extent that a marriage which is merely irregular or voidable continues to subsist till it is set aside or declared to be void in accordance with law.

30. In view of what has been stated hereinabove, we hold that the unlawful conjunction and/or marriage between the appellant and respondent No.1 continues to subsist not having been declared void by any competent forum and that accordingly, the respondent No.1 and the respondent No.2 will both be entitled to maintenance under Section 125 of the Code of Criminal Procedure. There is, therefore, no reason to interfere with the order passed on

20.6.2005 by the Karnataka High Court in Criminal Petition No. 3002 of 2004 or that of the Judicial Magistrate, First Class, Chincholi, on 28.6.2003 in Criminal Misc. No. 6 of 2001. The appeal is accordingly dismissed and the interim stay granted on 14.8.2006 is vacated.

31.The appellant shall pay to the respondents all the arrears of maintenance, within a period of six months from the date of this Judgment and will also go on paying the current maintenance with effect from the month of March, 2008.

* * * * *

Saiyid Rashid Ahmad v. *Mt. Anisa Khatun*

AIR 1932 PC 25

LORD THANKERTON – This is an appeal from a decree of the High Court at Allahabad, dated 1st February 1927, which reversed a decree of the Court of the Subordinate Judge of Bijnor at Moradabad, dated 15th December 1923. The dispute relates to the succession to the estate of Ghiyas Uddin, a Mahomedan, who died on 4th April 1920, leaving considerable moveable and immoveable property.

The appellants are plaintiffs in the suit, which was instituted on 28th June 1922, and are a brother and sister of Ghiyas Uddin, and, along with respondents 10 to 12, who were impleaded as pro forma defendants, would be heirs to Ghiyas Uddin according to Mahomedan law, if respondents 1 to 6 (who were defendants 1 to 6), are unable to establish their claim to be the widow and legitimate children of Ghiyas Uddin.

The main controversy turns on four stages in the matrimonial history of Anis Fatima, respondent 1, viz. (1) her marriage to Manzur Husain in 1901; (2) her divorce by Manzur Husain early in 1905; (3) her marriage to Ghiyas Uddin on 28th August 1905; and (4) her divorce by Ghiyas Uddin on or about 13th September 1905. It is admitted that Anis Fatima was married to Manzur Husain in 1901, but the respondents maintain that the marriage was invalid on the ground that both parties were minor at the time. The Subordinate Judge held the marriage to be valid on the ground that Anis Fatima was then adult, and Manzur's marriage was contracted through his mother as his guardian, and this conclusion appears to have been accepted by the High Court.

The alleged divorce by Manzur Husain early in 1905 was challenged by the appellants on the grounds that it was not proved, and that, even if proved, it was invalid in respect that Manzur had not then attained the age of discretion. Manzur himself was the only witness as to the fact of divorce, and his evidence was rejected by the Subordinate Judge, but was accepted by the High Court as proving the fact. On consideration of the conflicting evidence as to Manzur's age, the Subordinate Judge held that he had not then reached the age of discretion, but the High Court reached the opposite conclusion. The subordinate Judge held that the marriage of Ghiyas Uddin to Anis Fatima was not proved, but this finding was reversed by the High Court, and the appellant acquiesced in the decision of the High Court, and merely maintained the invalidity of this marriage in the event of it being held that Anis Fatima was then the undivorced wife of Manzur.

The fourth stage was the alleged divorce by Ghiyas Uddin in September 1905. The appellants' case was that on 13th September 1905, Ghiyas Uddin pronounced the triple talak of divorce in the presence of witnesses, though in the absence of the wife, and that the latter received Rs. 1,000 in payment of her dower on the same day, for which a registered receipt is produced, there was also produced a talaknama, or deed of divorce, dated 17th September 1905, which narrates the divorce, and which is alleged to have been given to Anis Fatima.The respondents denied the fact of the divorce, and, in any event, they challenged its validity and effect for reasons which will be referred to later. They maintained that the payment of Rs.1,000 was a payment of prompt dower, and that the deed of divorce was not genuine, in that it

was not written or signed by Ghiyas Uddin. There are concurrent findings by the Courts below that Ghiyas Uddin did pronounce the triple talak of divorce, and that the deed of divorce is genuine, and their Lordships have seen no reason to depart in this case from their usual practice of not disturbing such findings.

The Subordinate Judge held that Ghiyas Uddin irrevocably divorced Anis Fatima, and that she was therefore not his wife at the date of his death in 1920, and also that respondents 2 to 6, who were admittedly their offspring, but all born after the date of divorce, were not legitimate. The High Court came to the contrary conclusion on the ground that the divorce was fictitious and inoperative because it was a mock ceremony performed by Ghiyas Uddinto satisfy his father, but without any intention on his part that it should be real or effective.

As it was obvious that, in the event of their Lordships agreeing with the conclusions of the Subordinate Judge on this stage of the case, consideration on the earlier stages of the case would be rendered unnecessary, counsel were requested to confine their arguments to this stage in the first instance, and, after full consideration of these arguments, their Lordships are of opinion that the decision of the Subordinate Judge was right, and therefore it will be sufficient to deal with this stage alone.

There is nothing in the case to suggest that the parties are not Sunni Mahomedans governed by the ordinary Hanafi law, and, in the opinion of their Lordships, the law of divorce applicable in such a case is correctly stated by Sir R. K. Wilson, in his ***Digest of Anglo-Mahomedan Law*** (5th Edition) at p. 136, as follows:

> The divorce called "talak" may be either irrevocable (bain) or revocable (raja). A talak bain, while it always operates as an immediate and complete dissolution of the marriage bond, differs as to one of its ulterior effects according to the form in which it is pronounced. A talak bain may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage either: (a) once, followed by abstinence from sexual intercourse, for the period called the iddat; or (b) three times during successive intervals of purity, i.e., between successive menstruations, no intercourse taking place during any of the three intervals, or (c) three times at shorter intervals, or even in immediate succession; or, (d) once, by words showing a clear intention that the divorce shall immediately become irrevocable. The first named of the above methods is called ahsan (best), the second hasan (good), the third andfourth are said to be bidaat (sinful), but are, nevertheless, regarded by Sunni lawyers as legally valid.

In the present case the words of divorce addressed to the wife, though she was not present, were repeated three times by Ghiyas Uddin as follows:

> "I divorce Anisa Khatun for ever and render her haram for me"

> which clearly showed an intention to dissolve the marriage. There can be no doubt that the method adopted was the fourth above described, and this is confirmed by the deed of divorce, which states that the three divorces were given "in the abominable form," i.e. bidaat. The learned Judges of the High Court have erred in treating the divorce as in the ahsan form, instead of the bidaat form.

The talak was addressed to the wife by name, and the case is not affected by the decision of the High Court of Calcutta in ***Farzund Hossein* v. *Janu Bibee*** [(1878) 4 Cal. 588] where the words of divorce were alone pronounced. In the bidaat form the divorce at once becomes irrevocable, irrespective of the iddat (**Baillie's *Digest***, 2nd Edn., p. 206). It is not necessary that the wife should be present when the talak is pronounced and though her right to alimony may continue until she is informed of the divorce.

Their Lordships are of opinion that the pronouncement of the triple talak by Ghiyas Uddin constituted an immediately effective divorce, and, while they are satisfied that the High Court were not justified in such a conclusion on the evidence in the present case, they are of opinion that the validity and effectiveness of the divorce would not be affected by Ghiyas Uddin's mental intention that it should not be a genuine divorce, as such a view is contrary to all authority. A talak actually pronounced under compulsion or in jest is valid andeffective.

The respondents sought to found on the admitted fact that for about fifteen years after the divorce Ghiyas Uddin treated Anis Fatima as his wife and his children as legitimate, and on certain admissions of their status said to have been made by appellant 1 and respondent pro forma 10, who are brothers of Ghiyas Uddin; but once the divorce is held proved such facts could not undo its effect or confer such a status on the respondents.

While admitting that upon divorce by the triple talak, Ghiyas Uddin could not lawfully remarry Anis Fatima until she had married another and the latter had divorced her or died, the respondents maintained that the acknowledgement of their legitimacy by Ghiyas Uddin, subsequent to the divorce raised the presumption that Anisa Fatima had in the interval married another who had died or divorced her, and that Ghiyas Uddin had married her again, and that it was for the appellants to displace that presumption. In support of this contention, they founded on certain dicta in the judgment of this Board in ***Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury*** [AIR 1922 P.C. 159]. Their Lordships find it difficult to regard this contention as a serious one, for these dicta directly negative it. The passage relied on, which related to indirect proof of a Mahomedan marriage by acknowledgment of a son as a legitimate son, is as follows:

> It must not be impossible upon the face of it, i.e., it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgment has more than evidential value. It raises a presumption of marriage – a presumption which may be taken advantage of either by a wife-claimant or a claimant. Being however a presumption of fact, and not juris et de jure, it is, like every other presumption of fact, capable of being set aside by contrary proof.

The legal bar to remarriage created by the divorce in the present case would equally prevent the raising of the presumption. If the respondents had proved the removal of that bar by proving the marriage of Anisa Fatima to another after the divorce and the death of the

latter or his divorce of her prior to the birth of the children and their acknowledgment as legitimate, the respondents might then have had the benefit of the presumption but not otherwise. Their Lordships are therefore of opinion that the appeal should be allowed, that the decree of the High Court should be reversed, and that the decree of the Subordinate Judge should be restored.

* * * * *

Shamim Ara v. *State of U.P.*

2002 Cri. L.J. 4726 (SC)

R.C. LAHOTI, J. – Shamim Ara, the appellant and Abrar Ahmed, the respondent No. 2 were married some time in 1968 according to Muslim Shariyat Law. Four sons were born outof the wedlock. On 12.4.1979, the appellant, on behalf of herself and for her two minor children, filed an application under Section 125, Cr.P.C. complaining of desertion and crueltyon the part of respondent No. 2 with her. By order dated 3.4.1993 the learned Presiding Judge of the Family Court at Allahabad refused to grant any maintenance to the appellant on the ground that she was already divorced by the respondent and hence not entitled to any maintenance. However, maintenance at the rate of Rs. 150/- per month was allowed for one son of the appellant for the period during which he remained a minor, the other one having become major during the pendency of the proceedings.

2. The respondent No. 2 in his reply (written statement) dated 5.12.1990, to the application under Section 125, Cr.P.C. denied all the averments made in the application. Oneof the pleas taken by way of additional pleas is that he had divorced the appellant on 11.7.1987 and since then the parties had ceased to be spouses. He also claimed protection behind the Muslim Women (Protection of Rights on Divorce) Act, 1986 and submitted that the respondent No. 2 had purchased a house and delivered the same to the appellant in lieu of Mehar (Dower), and therefore, the appellant was not entitled to any maintenance. Noparticulars of divorce were pleaded excepting making a bald statement as already stated hereinabove.

3. The appellant emphatically denied having been divorced at any time. The respondent No. 2, when he appeared in the witness-box, stated having divorced the appellant on 11.7.1987 at 11 a.m. in the presence of Mehboob and other 4-5 persons of the neighbourhood.He further stated that since 1988 he had not paid anything either to the appellant or to any of the four sons for their maintenance. The divorce said to have been given by him to the appellant was a triple talaq though such a fact was not stated in the written statement.

4. The Family Court in its order dated 3.4.1993 dealt with and upheld a strange story of divorce totally beyond the case set up by the respondent No. 2. The learned Presiding Judge referred to some affidavit dated 31.8.1988 said to have been filed by the respondent No. 2 in some civil suit details whereof are not available from the record of the present case but certainly to which litigation the appellant was not a party. In that affidavit it was stated by the respondent No. 2 that he had divorced the applicant 15 months before. The learned Judgeheld that from such affidavit the plea of the respondent No. 2 found corroboration of his having divorced the appellant. The learned Judge concluded that the appellant was not entitled to any maintenance in view of her having been divorced.

5. The appellant preferred a revision before the High Court. The High Court held that the divorce which is alleged to have been given by the respondent No. 2 to the appellant was not given in the presence of the appellant and it is not the case of the respondent that the same was communicated to her. But the communication would stand completed on 5.12.1990 with

the filing of the written statement by the respondent No. 2 in the present case. Therefore, the High Court concluded that the appellant was entitled to claim maintenance from 1.1.1988 to 5.12.1990 (the later date being the one on which reply to application under Section 125, Cr.P.C. was filed by the respondent No. 2 in the Court) whereafter her entitlement to have maintenance from respondent No. 2 shall cease. The figure of maintenance was appointed bythe High Court at Rs. 200/-.

6. The appellant has filed this appeal by special leave. The singular issue arising for decision is whether the appellant can be said to have been divorced and the said divorce communicated to the appellant so as to become effective from 5.12.1990, the date of filing of the written statement by the respondent No. 2 in these proceedings.

7. None of the ancient holy books or scriptures of Muslims mentions in its text such a form of divorce as has been accepted by the High Court and the Family Court. No such text has been brought to our notice which provides that a recital in any document, whether a pleading or an affidavit, incorporating a statement by the husband that he has alreadydivorced his wife on an unspecified or specified date even if not communicated to the wife would become an effective divorce on the date on which the wife happens to learn of such statement contained in the copy of the affidavit or pleading served on her.

The statement of law by Mulla as contained in para 310 and footnotes thereunder is based on certain rulings of Privy Council and the High Courts. The decision of A.P. High Court in (1975) 1 APLJ 20 has also been cited by Mulla in support of the proposition that the statement by husband in pleadings filed in answer to petition for maintenance by wife that he had already divorced the petitioner (wife) long ago operates as divorce.

11. V. Khalid, J., as His Lordship then was, observed in ***Mohammed Haneefa* v. *Pathummal Beevi*** [1972 Ker LT 512]:

> I feel it my duty to alert public opinion towards a painful aspect that this case reveals. A Division Bench of this Court, the highest Court for this State, has clearly indicated the extent of the unbridled power of a Muslim husband to divorce his wife. I am extracting below what Their Lordships have said in ***Pathayi* v. *Moideen*** (1968 Ker LT 763):
>
> The only condition necessary for the valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at that time. He can effect divorce whenever he desires. Even if he divorces his wife under compulsion, or in jest, or in anger that is considered perfectly valid. No special form is necessary for effecting divorce under Hanafi law… The husband can effect it by conveying to the wife that he is repudiating the alliance. It need not even be addressed to her. It takes effect the moment it comes to her knowledge.
>
> 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 (p. 514).

12. In an illuminating judgment, virtually a research document, the eminent Judge and jurist V.R. Krishna Iyer, J., as His Lordship then was, has made extensive observations. The

judgment is reported as ***A. Yousuf Rawther*** **v.** ***Sowramma*** [AIR 1971 Ker. 261]. It would suffice for our purpose to extract and reproduce a few out of the several observations made by His Lordship:

> The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute" (para 6).
>
> Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim Jurists that the Indo-Anglian judicial exposition of the Islamic Law of Divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture – law is largely the formalized and enforceable expression of a community's cultural norms – cannot be fully understoodby alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. (para 7)
>
> It is a popular fallacy that a Muslim man enjoys, under the Quaranic Law, unbriddled authority to liquidate the marriage. The whole Quran 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." (Quran 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. (para 7)
>
> Commentators on the Quran have rightly observed – and this tallies with the law now administered in some Muslim countries like Iraq – that the husband must satisfy theCourt 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 Quran laid down and the same misconception vitiates the law dealing with the wife's right to divorce. (para 7)
>
> After quoting from the Quran and the Prophet, Dr. Galwash concludes that "divorce is permissible in Islam only in cases of extreme emergency. When all efforts foreffecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by Talaq or by 'Khula' … Consistently with the secular concept of marriage and divorce, the law insists that at the time of Talaq the husband must pay off the settlement debt to the wife and at the time of Khula she has to surrender to the husband her dower or abandon some of her rights, as compensation. (para 7)

13. There is yet another illuminating and weighty judicial opinion available in two decisions of Gauhati High Court recorded by Baharul Islam, J. sitting singly in ***Jiauddin Ahmed*** **v.** ***Anwara Begum*** [(1981) 1 GLR 358] and later speaking for the Division Bench in ***Rukia Khatun*** **v.** ***Abdul Khalique Laskar*** [(1981) 1 GLR 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 underthe 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 decree of sanctity is attached toit. But in spite 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-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 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 view 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 High Courts. We must note that the observations were made 20-30 years before and our country has in recent times marched steps ahead in all walks of life including progressive interpretation of law which cannot be lost sight of except by compromising with regressive trends. What this Court observed in ***Bai Tahira* v. *Ali Hussain*** [AIR 1979 SC 362] dealing with right to maintenance of a muslim divorcee is noteworthy. To quote:

> The meaning of meanings is derived from values in a given society and its legal system. Article 15(3) has compelling compassionate relevance in the context of S. 125 and the benefit of doubt, if any, in statutory interpretation belongs to the ill-used wife and the derelic divorcee. This social perspective granted, the resolution of all the disputes projected is easy. Surely, Parliament, in keeping with Art. 15(3) and deliberate by design, made a special provision to help women in distress cast away bydivorce. Protection against moral and material abandonment manifest in Art. 39 is part of social and economic justice, specificated in Art. 38, fulfilment of which is fundamental to the governance of the country (Art. 37). From this coign of vantage we must view the printed text of the particular Code. (para 7)
>
> Law is dynamic and its meaning cannot be pedantic but purposeful. (para 12)

15. The plea taken by the husband-respondent No. 2 in his written statement may be re-noticed. The respondent No. 2 vaguely makes certain generalized accusations against the wife-appellant and states that ever since the marriage he found his wife to be sharp, shrewd and mischievous. Accusing the wife of having brought disgrace to the family, the RespondentNo. 2 proceeds to state vide para 12 (translated into English): "The answering respondent,

feeling fade up with all such activities unbecoming of the wife-petitioner, has divorced her on 11.7.1987". The particulars of the alleged talaq are not pleaded nor the circumstances under which and the persons, if any, in whose presence talaq was pronounced have been stated. Such deficiency continued to prevail even during the trial and the respondent No. 2, except examining himself, adduced no evidence in proof of talaq said to have been given by him on 11.7.1987. There are no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq.

16. We are also of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare to,utter, to articulate (See ***Chambers 20th Century Dictionary***, New Edition, p. 1030). There is no proof of talaq having taken place on 11.7.1987. What the High Court has upheld as talaqis the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5.12.1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effecting talaq on the date of delivery of the copy of the written statement to the wife. The respondent No. 2 ought to have adduced evidence and proved the pronouncement of talaq on 11.7.1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr. Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So also the affidavit dated 31.8.1988, filed in some previous judicial proceedings not inter partes, containing a self-serving statement of respondent No. 2, could not have been read in evidence as relevant and of any value.

17. For the foregoing reasons, the appeal is allowed. Neither the marriage between the parties stands dissolved on 5.12.1990 nor does the liability of the respondent No. 2 to pay maintenance comes to an end on that day. The respondent No. 2 shall continue to remain liable for payment of maintenance until the obligation comes to an end in accordance with law. The costs in this appeal shall be borne by the respondent No. 2.

* * * * *

Masroor Ahmed v. *State (NCT of Delhi)*

2008 (103) DRJ 137 (Del.)

BADAR DURREZ AHMED, J. 2. The case is unusual because of the facts which led to the registration of the FIR in question.The complainant, Aisha Anjum, filed a written complaint at the police station on 12.12.2006. In her written complaint, she stated that her marriage was solemnised with the petitioner on 2.4.2004 in accordance with Muslim rites.She further stated that out of this marital relationship a daughter was born to her. She alleged that the petitioner and his family members threw her out of the house on account of non- fulfillment of dowry demands for which she had already complained to the crime against women cell. It was then alleged that the petitioner had filed a case for restitution of conjugal rights and on 13.4.2006, from the court itself, she went with her husband to their matrimonial home. It is further alleged in the written complaint that after her return to her matrimonial home her husband committed rape on her upto 19.4.2006 because she had later come to learn that he had already given her talaq earlier and that he had lied in court that she was still his wife and on this misrepresentation he had taken her home. She further submitted that the petitioner's family members also knew about the talaq but they participated in the fraud committed against her. It is further alleged that on 19.4.2006 a second nikah was performed which came to light only when she obtained a duplicate copy of the nikahnama. She alleged that the petitioner had unlawful relations with her during that time as he was not her husband then. She further stated that had she known, at that point of time, that he was not her husband and that he had already given her talaq, she would never have agreed to have conjugal relations with him. She alleged that her consent was taken by playing a fraud upon her and that the petitioner, in the guise of being her lawful husband, had unlawful relations with herby deceitful means. She reiterated that had she known of the truth at that point of time she would never have given her consent. She therefore requested that legal action against the petitioner and other accused persons be taken under sections 376/34 IPC.

3. It is an admitted position that the complainant and the petitioner got married on 2.4.2004 and that they lived together till 8.4.2005. On that date, according to the complainant,she was thrown out of the house on account of non- fulfillment of dowry demands. But, according to the petitioner, the complainant left their house without informing him and of her own will. On 22.10.2005, the complainant gave birth to a baby girl (the said Sara @ Ushna, who is now about 2 years old). It is alleged by the petitioner that towards the end of October 2005, his brother-in-law and his sister attempted to arrange for the return of the complainant to her matrimonial home. But, this was in vain. It is further alleged by the petitioner that uponhearing of the failure of this mission, he became very sad and extremely angry and in this mental condition, in the presence of his brother-in-law and another man, he uttered the words giving talaq to his wife (the complainant) approximately three times or even more. Accordingto the petitioner, he forgot about this incident and continued to make efforts for the return of his wife. Admittedly, the factum of the purported talaq was not communicated to the complainant.

4. On 23.3.2006, the petitioner, wanting the return of his wife, filed a suit for restitution of conjugal rights in the court of the Senior Civil Judge, Delhi. In paragraph 1 of the plaint,

the petitioner stated that the complainant was married to the petitioner on 2.4.2004 at Delhi and was still the wife of the petitioner. The purported talaq of late October 2005 was not mentioned in the plaint. On 13.4.2006, statements of the complainant and the petitioner were recorded in the said suit for restitution of conjugal rights. The complainant stated:- I am readyto join the company of the plaintiff/ husband and from the court I am going to my matrimonial home with my husband.

The petitioner made the following statement:-

I have heard the statement of defendant. I am ready to take the defendant/ my wife to my home. My suit stand[s] satisfied and I do not want to pursue the present matter. My suit may be disposed of as satisfied. On the basis of these statements, on 13.4.2006 itself, the learned Civil Judge passed the following order:- It is stated that matter has been settled between the parties and defendant is ready to join the company of the plaintiff. Statement of parties recorded. In view of the same suit of the plaintiff is disposed of as satisfied. File be consigned to Record Room.

5. The complainant returned with the petitioner to their matrimonial home on 13.4.2006 from court itself. Thereafter, another remarkable event allegedly took place. As mentioned in the FIR, a second nikah was performed between the petitioner and the complainant on 19.4.2006 Which, according to the complaint, the complainant got to know only upon receiving a duplicate copy of the nikahnama from the Qazi who performed the ceremony. According to the petitioner, the second nikah was necessitated because after the settlement of 13.4.2006, he was reminded by his brother-in-law that he had already divorced the complainant by way of a triple talaq in october 2005. Faced with this situation, the petitioner, who did not want any illegitimacy in his marital status, allegedly sought an opinion from a mufti on 16.4.2006. The mufti reportedly gave a fatwa on 17.4.2006 that three talaqs pronounced in one sitting would be regarded as one talaq-e-rajai and, consequently, the petitioner could have taken back the complainant within the iddat period of three months.But, as that period had elapsed, the petitioner and the complainant could renew their matrimonial relationship only by performing a fresh nikah. According to the petitioner, it is because of this fatwa that the second nikah was performed on 19.4.2006 which, according to the petitioner, was witnessed by the complainant's brother (Shahid Naeem) who also signed as a witness on the nikahnama (as also the compromise deed dated 01.09.2007). It was, of course, earlier alleged by the complainant that the factum of the nikah was not in her knowledge and came to light much later, before the CAW cell. According to her, signatures were taken on the pretext that the documents had to be filed in court as a formality.

6. After her return to the matrimonial home on 13.04.2006, the complainant continued to reside with the petitioner. Once again, there was discord between them and the petitioner pronounced talaq (again) on 28.08.2006. On 30.8.2006, the petitioner left the matrimonial home. Since then, she is residing at her parental home. On 6.9.2006, she filed a complaint before the crime against women cell. It is further alleged by her that during the inquiry it came to light that the petitioner had given her talaq earlier also (ie., in October, 2005). According to the complainant, on 3.10.2006 when the petitioner appeared before the CAW cell, he disclosed that he had already given the first talaq to the complainant in October 2005. It is then, according to the complaint, that the complainant came to know for the first time

that a fraud had been played upon her and that the petitioner had sexual intercourse with her during 13.4.2006 and 19.4.2006 when, in law, he was not her husband. However, she filed her written complaint only on 12.12.2006 with regard to the alleged rape committed during 13.4.2006 and 19.4.2006. The FIR under section 376 IPC was registered on the same date (12.12.2006).

7. The prosecution case is that the sexual intercourse which allegedly took place between the petitioner and the complainant during 13.4.2006 and 19.4.2006 constituted rape under section 375 IPC as the complainant had been deceived into believing that the petitioner was still her husband on 13.4.2006, when the order in the suit for restitution of conjugal rights was passed. It is contended that the petitioner knew of the talaq, yet, he misrepresented that the complainant was still his wife and the complainant, believing this, returned to her matrimonial home. Her consent to re-establish the conjugal relationship was, therefore, based upon a fraud played by the petitioner and his family members.

8. It is pertinent to mention that the petitioner's bail application was dismissed by the learned Additional Sessions Judge on 20.12.2006 holding that the petitioner had not disclosed the factum of talaq, either to the complainant or to the court, in his suit for restitution of conjugal rights. It was further held that-

> Pronouncement of triple 'talak' amounts to talaq-ul-Biddat which became rrevocable and it does not lie in the mouth of the applicant to say that the complainant was his wife. As far as case of re-marriage is concerned, there should be an intermediate marriage with some other person, consummation of marriage andthen divorce and thereafter applicant can marry the complainant. Therefore, second marriage on 19.4.06 nowhere answers religious tenets of the parties. Consent, given by the complainant from 13.4.2006 till 19.4.2006, was a tainted consent, which can not be termed as free consent by her.

These observations in respect of Muslim law as applicable in India are not correct. The foundation of the prosecution case as also the decision of the learned sessions judge is that the marriage stood dissolved by the purported triple talaq of October, 2005. On the contrary, as indicated below, the foundation is illusory and is not supported by the facts stated in the complaint considered in the light of the principles of Muslim law as applicable in India. This would be clear from the discussion below.

On merits: submission that the offence u/s 375 IPC is not made out 11. The settlement between the petitioner and the complainant would in itself have been sufficient for this court to exercise its inherent powers to put to an end the FIR in question as also proceedings emanating from it. This is so because I am of the view that the parties have genuinely settled all their disputes and have decided to part with each other in terms of the compromise which brings to an end bitter legal matrimonial battles. The present case being one of them. It is alsoworth keeping in mind that the petitioner and the complainant have a daughter, who shall always remain their daughter even though they no longer remain as husband and wife.

Apart from this, it was also stressed by the learned counsel for the petitioner (and, not opposed by the learned counsel for the complainant) that on merits The learned counsel for the petitioner, submitted that-

(1) The alleged triple talaq of october 2005 did not result in a divorce in law. The talaq was invalid. And, it was not even communicated to the complainant. He relied upon the following decisions:-

(i) ***Riaz Fatima* v. *Mohd Sharif*** [135 (2006) DLT 205];
(ii) ***Dagdu Chotu Pathan* v. *Rahimbi Dagdu Pathan*** [2002 (3) MhLJ 602(FB)];
(iii) ***Dilshad Begum Ahmadkhan Pathan* v. *Ahmadkhan Hanifkhan Pathan*** [Criminal Revision Applications 313 and 314/1997 decided on 17.1.2007 (Bombay High Court)];
(iv) ***Shamim Ara* v. *State of U.P.*** [AIR 2002 SC 355].

(2) Consequently, the complainant continued to be the petitioner's wife. Therefore, there was no question of any rape during 13.4.2006 and 19.4.2006 inasmuch as a wife is excepted under section 375 IPC itself.

(3) In any event, the triple talaq pronounced in a single sitting could, at best, be regarded as one talaq and therefore the second nikah performed on 19.4.2006 was permissible and valid under Muslim personal law.

(4) Consequently, consent can well be presumed for sexual acts prior to the nikah of 19.4.2006. Reliance was placed on ***State of Andhra Pradesh* v. *P Narasimha*** [1994 SCC (Cri) 1180].

Five questions:-

12. Several questions impinging upon Muslim law concepts arise for consideration. They are :-

(1) What is the legality and effect of a triple talaq ?
(2) Does a talaq given in anger result in dissolution of marriage?
(3) What is the effect of non-communication of the talaq to the wife?
(4) Was the purported talaq of October 2005 valid?
(5) What is the effect of the second nikah of 19.4.2006 ?

Certain Muslim Law Concepts

13. Before I examine these questions it would be necessary to set out certain concepts of Muslim law (shariat) which are oft ignored. Islamic jurisprudence (fiqh) has developed from four roots (usul al-fiqh):- (1) The Quran; (2) the hadis or sunna; (3) Ijma; and (iv) Qiyas. Employing these usul al-fiqh, the ulema (the learned) conducted a scientific and systematic inquiry. This is known as the process of ijtihad. Through this process of ijtihad sprung out various schools of law each of which owed its existence to a renowned master. For example, the jurisprudence (fiqh) developed by Abu Hanifah and continued by his disciples came to be known as the Hanafi school. The Maliki school owed its origin to Malik b. Anas, the Shafie school to al- Shafi'i, the Hanbali school to Ibn-Hanbal and so on. These are the sunni schools. Similarly, there are shia schools such as the Ithna Ashari, Jaffariya and Ismaili schools. In India, Muslims are redominantly sunnis and, by and large, they follow the hanafi school. Theshias in India largely follow the Ithna Ashari school.

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 or aql as the case may be.

15. The question which arises is, given the shariat and its various schools, how does a person proceed on an issue which is in dispute? The solution is that in matters which can be settled privately, a person need only consult a mufti (jurisconsult) of his or her school. The mufti gives his fatwa or advisory decision based on the Shariat of his school. However, if a matter is carried to the point of litigation and cannot be settled privately then the qazi (judge) is required to deliver a qaza (judgment) based upon the Shariat. The difference between a fatwa and a qaza must be kept in the forefront. A fatwa is merely advisory whereas a qaza is binding. Both, of course, have to be based on the shariat and not on private interpretation de hors the shariat. The Muslim Personal Law (Shariat) Application Act, 1937 and the various forms of dissolution of marriage recognised by it.

16. In India, the confusion with regard to application of customary law as part of Muslim law was set at rest by the enactment of The Muslim Personal Law (Shariat) Application Act, 1937. Section 2 of the 1937 Act reads as under:-

> **2.** ***Application of Personal Law to Muslims***.- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, 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).

The key words are notwithstanding any customs or usage to the contrary and the rule of decision in cases where the parties are Muslims shall be the Muslim personal law (shariat). This provision requires the court before which any question relating to, inter-alia, dissolution of marriage is in issue and where the parties are Muslims to apply the Muslim personal law (shariat) irrespective of any contrary custom or usage. This is an injunction upon the court. What is also of great significance is the expression -- dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat.. This gives statutory recognition to the fact that under muslim personal law, a dissolution of marriage can be brought about by various means, only one of which is talaq. Although islam considers divorce to be odious and abominable, yet it is permissible on grounds of pragmatism, at the core of which is the concept of an irretrievably broken marriage. An elaborate lattice of modes of dissolution of marriage has been put in place, though with differing amplitude and width under the different schools, in an attempt to take care of all possibilities. Khula, for example, is the mode of dissolution when the wife does not want to continue with the marital tie. She proposes to her husband for dissolution of

the marriage. This may or may not accompany her offer to give something in return. Generally, the wife offers to give up her claim to Mahr (dower). Khula is a divorce which proceeds from the wife which the husband cannot refuse subject only to reasonable negotiation with regard to what the wife has offered to give him in return. Mubaraat is where both the wife and husband decide to mutually put an end to their marital tie. Since this is divorce by mutual consent there is no necessity for the wife to give up or offer anything to thehusband. It is important to note that both under khula and mubaraat there is no need for specifying any reason for the divorce. It takes place if the wife (in the case of khula) or the wife and husband together (in the case of mubaraat) decide to separate on a no fault/no blamebasis. Resort to khula (and to a lesser degree, mubaraat) as a mode of dissolution of marriage is quite common in India.

17. Ila and Zihar as modes of divorce are virtually non-existent in India. However, lian is sometimes resorted to. If a man accuses his wife of adultery (zina), but is unable to prove the allegation, the wife has the right to approach the qazi for dissolution of marriage. In India, a regular suit has to be filed. Once such a suit is filed by the wife, the husband has the option of retracting his charge of adultery, whereupon the suit shall fail. However, if he persists then he is required to make four oaths in support of the charge. The wife makes four oaths of her innocence, after which the court declares the marriage dissolved. This is the process of dissolution of marriage by lian.

The Dissolution of Muslim Marriage Act, 1939

18. At this juncture it would be relevant to mention the Dissolution of Muslim Marriages Act, 1939 which enabled muslim women of all sects to seek dissolution of marriage by a decree of the court under the various grounds enumerated in section 2 thereof which included the husband's cruelty, impotency, failure to maintain, leprosy, virulent venereal disease, etc.. Section 2(ix) of the 1939 Act contained the residuary clause entitling a Muslim woman to seek dissolution of her marriage through a court on any other ground which is recognised as valid for the dissolution of marriages under Muslim law. So, the position after the 1937 and 1939 Acts is that dissolution of a Muslim marriage is permissible by the modes of talaq, ila, zihar, lian, khula and mubaraat (as mentioned in the 1937 Act) as also on a wife's suit under the 1939 Act, on any of the grounds mentioned therein or on any other ground which is recognised as valid for the dissolution of marriages under Muslim law which would include lian. Divorce through talaq, ila, zihar, khula and mubaraat takes place without the intervention of the court. Divorce under the 1939 Act (which would also include lian) is through a wife's suit and by a decree of the court. The muslim wife, therefore, can seek divorce either outside the court (through khula) or through court (under the 1939 Act or lian). She can also put an end to the marital tie by pronouncing talaq upon herself in the case of talaq-e- tafwiz where the husband delegates the power of pronouncing talaq to his wife.

On the other hand, the Muslim husband can dissolve the marriage only outside court through talaq (ila and zihar being virtually non-existent in India). Both the husband and wife can mutually decide to dissolve the marriage, again without the intervention of court, through mubaraat.

19. The 1939 Act introduced a very salutary principle into Muslim law as it is administered in India. This is the principle of applying beneficial provisions of one school to adherents of other schools as well. The Statement of Objects and Reasons of the 1939 Act clearly indicates the application of Maliki law to all Muslim women seeking divorce through court. It was specifically noted in the said Statement of Objects and Reasons that the Hanafi Jurists, however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the Maliki, Shafii or Hambali Law.

Talaq and its three forms

20. I now return to the central point in this case -- talaq. This mode of dissolving a marriage is unique to Mslim law. In this connection the Supreme Court, in ***Zohara Khatoon*** v. ***Mohd. Ibrahim*** [(1981) 2 SCC 509], observed :-

There can be no doubt that under the Mahomedan law the commonest form of divorce is a unilateral declaration of pronouncement of divorce of the wife by the husband according to the various forms recognised by the law. A divorce given unilaterally by the husband is especially peculiar to Mahomedan law. In no other law has the husband got a unilateral right to divorce his wife by a simple declaration because other laws viz. the Hindu law or the Parsi Marriage and Divorce Act, 1936, contemplate only a dissolution of marriage on certain grounds brought about by one of the spouses in a Court of law.

Three forms of talaq have been in existence (1) Ahsan talaq; (2) Hasan talaq; and (3) Talaq-e-bidaat.

21. Ahsan talaq: When the husband makes a single pronouncement of talaq during a period of purity (tuhr) followed by abstinence from sexual intercourse for the period of iddat, such a talaq is called ahsan talaq. A divorce of this kind is revocable during the period of iddat. It becomes irrevocable when the period of iddat expires. It is irrevocable in the sense that the former husband and wife cannot resume a legitimate marital relationship unless they contract a fresh nikah with a fresh mahr. This is subject to a limitation and that is that if the talaq was the third time such a talaq was pronounced, then they cannot re-marry unless the wife were to have, in the intervening period, married someone else and her marriage had beendissolved either through divorce or death of that person and the iddat of divorce or death has expired. This latter process is known as halala. However, the process of halala cannot be employed as a device to re-marry the same spouse but, it must happen in the natural course ofevents. It is, in effect, a near impossibility and, for all intents and purposes, the third talaq brings about a final parting of the erstwhile spouses.

22. Hasan talaq: Where the husband makes a single pronouncement of divorce during three successive tuhrs, without any sexual intercourse during the said tuhrs, the divorce is known as hasan talaq. The first two pronouncements are revocable. The third is irrevocable. The first two pronouncements can be revoked during iddat. The third, cannot be. And, after iddat, the former husband and wife cannot even enter into a nikah unless the said process of halala is completed.

23. Talaq-e-bidaat: Where three pronouncements are made in one go (triple talaq) either in one sentence or in three sentences signifying a clear intention to divorce the wife, for instance, the husband saying 'I divorce you three times' or 'I divorce you, I divorce you, I divorce you' or the much publicised 'Talaq, talaq, talaq'.

Sanctity and effect of Talaq-e-bidaat or triple talaq.

24. There is no difficulty with ahsan talaq or hasan talaq. Both have legal recognition under all fiqh schools, sunni or shia. The difficulty lies with triple talaq which is classed as bidaat (an innovation). Generally speaking, the shia schools do not recognise triple talaq as bringing about a valid divorce. There is, however, difference of opinion even within the sunnischools as to whether the triple talaq should be treated as three talaqs, irrevocably bringing to an end the marital relationship or as one rajai (revocable) talaq, operating in much the same way as an ahsan talaq.

26. It is accepted by all schools of law that talaq-e-bidaat is sinful31. Yet some schools regard it as valid. Courts in India have also held it to be valid. The expression 'bad in theology but valid in law' is often used in this context. The fact remains that it is consideredto be sinful. It was deprecated by prophet Muhammad. It is definitely not recommended or even approved by any school. It is not even considered to be a valid divorce by shia schools. There are views even amongst the sunni schools that the triple talaq pronounced in one go would not be regarded as three talaqs but only as one. Judicial notice can be taken of the fact that the harsh abruptness of triple talaq has brought about extreme misery to the divorced women and even to the men who are left with no chance to undo the wrong or any scope to bring about a reconciliation. It is an innovation which may have served a purpose at a particular point of time in history but, if it is rooted out such a move would not be contrary to any basic tenet of Islam or the Quran or any ruling of the

Prophet Muhammad.

27. In this background, I would hold that a triple talaq (talaq-e-bidaat), even for sunni Muslims be regarded as one revocable talaq. This would enable the husband to have time to think and to have ample opportunity to revoke the same during the iddat period. All this while, family members of the spouses could make sincere efforts at bringing about a reconciliation. Moreover, even if the iddat period expires and the talaq can no longer be revoked as a consequence of it, the estranged couple still has an opportunity to re-enter matrimony by contracting a fresh nikah on fresh terms of mahr etc.

Importance of the attempt at reconciliation

28. The attempt at reconciliation which is recommended under the shariat, has been assigned a key role by the Supreme Court. This, we shall see presently. It all began with the decision of Baharul Islam J. of the Gauhati High Court in a case under section 125 CrPC for maintenance by a wife in Sri ***Jiauddin*** **v.** ***Mrs Anwara Begum*** [(1981) 1 Gauhati Law Reports 358]. When the wife (Anwara Begum) filed the petition for maintenance, Jiauddin alleged in his written statement before the Magistrate that he had pronounced talaq earlier andthat Anwara Begum was no longer his wife. No evidence of the pronouncement of talaq was produced. When the matter reached the High Court, the question was -- whether there had

been a valid talaq? Baharul Islam J. observed that while a Muslim marriage was a civil contract, a high degree of sanctity attached to it.

The necessity of dissolution was recognized but, only under exceptional circumstamces. He held that:-

> talaq must be for reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters one from the wife's family the other from the husbands. If the attempts fail, talaq may be effected.

29. In arriving at this conclusion, Baharul Islam J. considered various verses of the Quran and opinions of scholars and jurists such as Mohammad Ali, Yusuf Ali, Ameer Ali and Fyzee. The learned Judge went on to hold:-

In other words, an attempt at reconciliation by two relatives one each of the parties, is an essential condition precedent to talaq.

30. In a subsequent decision of a Division Bench (Baharul Islam CJ and D. Pathak J. of the Gauhati High Court in the case of ***Mst Rukia Khatun* v. *Abdul Khalique Laskar*** [(1981)1 Gauhati Law Reports 375], the decision in ***Jiauddin*** was held to have correctly laid down the law on the subject and the decisions of the Calcutta and Bombay High Courts in ILR 59 Calcutta 83335 and ILR 30 Bombay 53736 were observed to be not correct law. In ***Rukia Khatun*,** the said Division Bench held:-

> In our opinion the correct law of talaq as ordained by Holy Quran is: (i) that talaq must be for a reasonable cause; and (ii) that it must be preceded by an attempt at reconciliation between the husband and 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.

31. Now I come to the decision of the Supreme Court in ***Shamim Ara*** v. ***State of U.P.***: [AIR 2002 SC 3551] which was also a case arising out of an application for maintenance under section 125 CrPC filed by a wife. To avoid the payment of maintenance, the husband had taken the plea in his written statement that he had already divorced her by pronouncing talaq. The Supreme Court referred to the two decisions of the Gauhati High Court in ***Jiauddin*** and ***Rukia Khatun*** and expressed its agreement with the abovementioned observations made in those judgments. Thereafter, examining the facts of the case before it, the Supreme Court noted that no evidence in proof of the alleged talaq had been adduced by the husband and that there were no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq. The Supreme Court held that a talaq has to be pronounced to be effective. It said:-

> A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on wife on the date of the filing of the written statement in the court followed by delivery of a copy thereof to the wife.

32. In these circumstances, 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,*** the position of the law relating to talaq, where it is contested by either spouse, is that, if 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. This would apply to ahsan talaq, hasan talaq as also talaq-e-bidaat. The latter, also because of the view taken by me that a talaq-e-bidaat or triple talaq (so called) shall be regarded as one revocable talaq. An issue which needs to be un-knotted is does the attempt at reconciliation necessarily have to precede the pronouncement of talaq or can it be after the pronouncement also? The two Gauhati High Court decisions and that of the Supreme Court in ***Shamim Ara*** have gone on the understanding that the attempt at reconciliation must precede the pronouncement of talaq itself. But, those decisions did not consider the distinction between a revocable and anirrevocable talaq. Those decisions, in my respectful view, proceeded on the basis that thetalaq in each of the cases was of an irrevocable nature. Once a talaq is of the irrevocable kind,it is obvious that the effort at reconciliation must precede its pronouncement. But, where a talaq is revocable, the attempts at reconciliation can take place even after the pronouncement. This is so, because, in a revocable talaq, the dissolution of marriage does not take place at the time of pronouncement but is automatically deferred till the end of the iddat period. This duration is specifically provided so that the man may review his decision and a reconciliation can be attempted. A hasan talaq is revocable. So also are the first two talaq pronouncementsin the case of ahsan talaq. Now, talaq-e-bidaat has also been held by me to be operative as a single revocable talaq. In all these cases of revocable talaq, the attempt at reconciliation may, in my view, take place after the pronouncement of talaq. The crucial point is that for a pronouncement of talaq to result in the dissolution of the marital tie there must be an attempt at reconciliation. In the case of an irrevocable talaq, it must precede the pronouncement andin the case of a revocable talaq, it may precede or it may be after the pronouncement but before the end of the iddat period.

Pronouncement of talaq and dissolution of marriage

33. In this connection it would be relevant to note that pronouncement of talaq does not ipso facto amount to a dissolution of the marital tie between husband and wife. Some assistance may be taken of traditional English law in explaining the concept. As indicated in ***Jowitt's Dictionary of English Law***, Edition-II, Sweet and Maxwell, divorce was a term usedby the ecclesiastical courts to signify an interference by them with the relation of husband andwife. It was of two kinds a divorce a mensa et thoro (from bed and board), granted in cases where the husband or wife had been guilty of such conduct as to make conjugal intercourse impossible (as in the case of adultery, cruelty, etc.); and a divorce a vinculo matrimonii (fromthe bond of marriage), granted where the marriage was voidable or void ipso jure (as in the case of the parties being within the prohibited degrees, or one of them having been already married, or being impotent when married). The former is now represented by judicial separation, the latter by a decree of nullity of marriage.

34. In ***Halsbury's Law of England***, Fourth Edition, Volume 13, in paragraphs 501 and 502 it is mentioned that the law relating to matrimonial causes was much influenced by the ecclesiastical canons and former practice of the ecclesiastic courts. That influence gradually diminished, and modern legislation has very considerably cut it down. It was also noted that from the middle of the twelfth century the ecclesiastic courts were recognized as having

exclusive jurisdiction in matters of marriage and divorce, as that term was then understood, and since the Church of Rome was the supreme ecclesiastic authority in England the ecclesiastic courts applied the canon law in matrimonial causes. Christian marriage was indissoluble, but divorce a mensa et thoro, in the nature of the present day judicial separation,that is divorce without the right thereafter to marry another person while the former spouse still lives, was granted for certain causes. Subsequently, there developed in course of time a method of divorce a vinculo matrimonii, that is divorce in its current meaning of dissolution with the right thereafter to marry another person while the former spouse still lives. It was also noted that after the enactment of Matrimonial Causes Act, 1857 in England, divorce means dissolution of marriage with the right thereafter to marry another person while the former spouse still lives.

35. From the above discussion, it is clear that the marital relations between husband and wife under English law could be interfered with by way of judicial separation, annulment of marriage or dissolution of marriage. The last of the expressions has now become synonymous with the word divorce. It is, however, important to note that traditional divorce included the concept of judicial separation without resulting in a dissolution of marriage. Principles under Muslim Law are somewhat different from the straightforward classification of a divorce implying dissolution of marriage. When a talaq is pronounced, the marital relationship may not terminate immediately. If the talaq is revocable then the same can be revoked during the iddat period. If it is so revoked, then the marital tie between the husband and the wife is not severed and no dissolution of marriage takes place. However, if the talaq is not revoked during the period of iddat, then upon the termination of such period, dissolution of marriage takes place. During the period of iddat, under Muslim Law, the wife upon whom talaq has been pronounced, has the right of residence as well as of maintenance and she cannot be disturbed from where she was residing at the time of pronouncement of talaq. She continuesto be the wife of the petitioner for the entire duration of the period of iddat and, therefore, her status would be akin to that of a wife under traditional English law in the case of divorce a mensa et thoro. The dissolution of marriage takes place only upon

the completion of the iddat period provided the talaq is not revoked. It is then that the parties are released from their marital bond and a divorce a vinculo matrimonii takes place amounting to dissolution of marriage. These are also important factors to be kept in mind while construing the question of divorce under Muslim Law. It is, therefore prescribed thatthe period during which the marital tie remains in suspense ought to be utilized for the purposes of bringing about a reconciliation between the husband and the wife and it is for thispurpose that the courts have recognized that a reconciliation must be attempted in the manner indicated in the Quran.

Can talaq be pronounced in the absence of the wife? Is communication of the pronouncement of talaq necessary?

36. The Supreme Court made it clear in ***Shamim Ara*** that a talaq, to be effective, has to be pronounced. The manner of pronouncement of oral talaq also brings in differences in hanafi and ithna ashari schools. For one, the latter requires the presence of two competent witnesses, while the former does not. Then there is the issue of communication. A talaq may be pronounced in the absence of the wife. But, does it not need to be communicated to her?

As discussed above, pronouncement of talaq materially alters the status of the wife. Her rights and liabilities flow from the nature of the talaq. Is it a revocable talaq or is it an irrevocable talaq? Then there is the question of iddat. Her right to residence. Her right to maintenance. Her right to mahr (if deferred). Custody of children, if any. Her right of pledging her husband's credit for obtaining the means of subsistence. How would she know that it is time for her to exercise these rights (or time for her not to exercise them, as in the case of pledging her husband's credit) if she does not even know that her husband has pronounced talaq? So, linked with the question of her rights is the issue of communication of the talaq to her Furthermore, as pointed out above, the iddat period, in the case of a revocable talaq, is also a period during which the husband and wife have a re-think and attemptreconciliation. How would this be possible if the husband pronounces talaq secretly and does not at all inform the wife about it? Consequently, while it may not be essential that the talaq has to be pronounced in the presence of the wife, it is essential that such pronouncement, tobe effective, is made known to her, communicated to her, at the earliest. Otherwise she wouldbe deprived of her rights post talaq and pre-dissolution. What is the earliest will depend onthe facts and circumstances of each case and would necessarily be a function of the access to communication that the husband and wife have. In the modern day, where every nook and cranny has landline or cellular coverage, in almost every case it would mean the same day.To my mind, communication is an essential element of pronouncement. Where the pronouncement of talaq is made in the presence of the wife, the acts of pronouncement and communication take place simultaneously. The act of pronouncement includes the act of communication. Where the wife is not present, pronouncement and communication are separated by time. The pronouncement would be valid provided it is communicated to the wife. The talaq would be effective from the date the pronouncement is communicated to the wife. In case it is not communicated at all, even after a reasonable length of time, a vital ingredient of pronouncement would be missing and such a talaq would not take effect.

The answers to the five questions

37. (1) What is the legality and effect of a triple talaq ?

It is not even considered to be a valid divorce by shia schools. I hold that a triple talaq which is talaq-e-bidaat, even for sunni muslims be regarded as onerevocable talaq.

(2) Does a talaq given in anger result in dissolution of marriage ?

If a talaq is pronounced in extreme anger where the husband has lost con trol of himself it would not be effective or valid.

(3) What is the effect of non-communication of the talaq to the wife?

If the pronouncement of talaq is communicated to the wife, the talaq shall take effect on the date it is so communicated. However, if it is not communicated at all the talaq would not take effect.

(4) Was the purported talaq of October 2005 valid? No. First of all, it was given, if at all, in extreme anger. Secondly, it was never communicated to the complainant, at least not by the relevant period (i.e., till 13.04.2006 or even by 19.04.2006). Thirdly, there was no attempt at reconciliation in the manner suggested in the Quran either before or after the purported

pronouncement of talaq in October 2005. Consequently, the marital tie of the petitioner and the complainant subsisted during the relevant period (ie.,13.04.2006 to 19.04.2006). Therefore, the offence of rape is not made out even on the basis of allegations contained inthe complaint.

(5) What is the effect of the second nikah of 19.4.2006 ?

It was not necessary. Since the marriage was subsisting, the second nikah between them would be of no effect. However, had the purported talaq of October, 2005 been valid, it would have operated as a single revocable talaq and it would have been permissible for the couple to re-marry. In that case, the second nikah would have been effective and valid. And, then, the presumption of consent just prior to the marriage would be available to the petitioner. But, we need not labour on that aspect as the talaq of October, 2005 itself was invalid and their first marriage subsisted.

* * * * *

Ghulam Sakina v. *Falak Sher Allah Bakhsh*

AIR 1950 Lah. 45

MOHD. SHARIF, J. – This second appeal by the plaintiff arises out of her suit for dissolution of marriage. It was alleged that she was never given in marriage to the defendant as he proclaimed it to be, that if any such marriage be held to have taken place during her infancy she never approved of it and had repudiated it and that she was a Sunni girl and the defendant was a Shia and the marriage between them was not good. The defendant maintained that the marriage was performed by her father when she was five years' old, that his marriage was an exchange marriage in lieu of the marriage of his own sister with the uncle of the plaintiff and that the parties had lived for some time as husband and wife and the marriage had been consummated. It was denied that the defendant was a Shia; both the parties belonged to the Sunni sect. The trial Judge found that the plaintiff was married by herfather during her infancy in 1932 and that there was no credible proof of the consummationof marriage. The issue as to the parties belonging to different sects was not pressed. On these finding the plaintiff was awarded a decree. On appeal by the defendant, the learned District Judge, Mianwali, came to a contrary conclusion as to the consummation of marriage and for that reason accepted the appeal. The plaintiff has now come up in second appeal.

2. The marriage between the parties is recorded in the marriage register marked Ex. D-2. It was performed by the father as guardian on 23rd November 1932. The father examined as P.W. 1 had to admit this. The plaintiff according to the birth entry produced by her, was born on 13th November 1931, i.e., she was about a year old when the marriage is said to have been celebrated. It is common ground that the plaintiff is the only daughter of her parents. This, coupled with the statement of Ghulam Rasul, D.W. 7, the Nikah Khawan, that the girl was, at the time of the marriage, stated to be 3 or 4 months old and Falak Sher defendant about 5 or 7 years old, would demonstrate that the birth entry of 13th November 1931 related to the plaintiff herself. This is not in any way weakened by the evidence of Dr. Utam Chand P.W. 10 who examined the plaintiff as to her age and according to his estimate, she was about 17 years old at the time of the examination.

3. The sole question for decision in this case is whether the plaintiff had repudiated her marriage in accordance with the requirements of S. 2, Dissolution of Muslim Marriages Act, 1939. The relevant portion is reproduced below:

> ***Section 2.*** A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely-
>
> (vii) that she having been given in marriage by her father or other guardian before she attained the age of 15 years repudiated the marriage before attaining the age of 18 years provided that the marriage has not been consummated.

4. It would not be disputed that the plaintiff was married by her father long long before she was 15 years old and the suit for dissolution of marriage was instituted on 29th August 1945 when she was about 14 years old according to her birth entry and about 17 years old according to medical testimony; in any case before she attained the age of 18 years.

5. The evidence as to the alleged consummation is of very unsatisfactory character. The approximate time at which this took place, was not at all specified in the statement filed by the defendant. In para 2, "about one year ago" was written but these words were scored through. Before the issues, the plaintiff made a request to the Court that the defendant be directed to disclose the exact time when the marriage was consummated. The defendant evaded this enquiry by stating that the matter could be ascertained during the course of his cross-examination and the trial Court left it at that. It was desirable that the defendant should have been made to specify approximately, if not exactly, the time when the parties were said to have lived as husband and wife.

6. The learned District Judge held the consummation of the marriage proved as

> (N)o less than two persons who were examined as respectable witnesses by the plaintiff, admitted in the lower Court that the marriage had been consummated. It is immaterial that they were related to the defendant because in cases of the present type the relations of the parties are the most natural witnesses and their evidence is entitled to due weight. Nor is this all. The plaintiff was pointedly asked to submit herself to medical examination in order to ascertain whether she was still a *virgo intacta* as claimed by her. She had not however the courage to be examined by the doctor and a very strong presumption naturally arises that the marriage has been consummated.

7. The two persons referred to by the learned District Judge were apparently P.W. 2 Muhammad Niwaz and P.W. 7 Allah Bakhsh, the former is the brother of the defendant and the latter is the father. Both these persons had to be examined with reference to some of the letters exchanged between the father of the plaintiff and the defendant's father. These letters indicated that the plaintiff's father was not willing to send her to the house of the defendant and the marriage was said to be no longer in force. The correspondence clearly revealed that during the year 1944 there were dissensions between the couple and they did not livetogether. The production by the plaintiff of P.W. 2 and P.W. 7 could not attract the remarks made by their Lordships in ***Shatrugan Das* v. *Sham Das*** [AIR 1938 PC 59]. There the plaintiff himself refrained from giving evidence on his own behalf and adopted instead the tactics of calling Sham Das defendant 1 as a witness for the plaintiff with the usual result that important features of his case were denied by his own witness. Their Lordships condemned this practice and approved of the course taken by the High Court in treating the plaintiff as a person who put defendant 1 forward as a witness of truth.

8. The case for the defendant as disclosed during the course of the trial was that there was a rapprochement between the parties about December 1944 and after that the plaintiff went to live with the defendant as his wife. The evidence of this rapprochement has been discussed and examined in detail by the 1st Court and the lower appellate Court had nothing to sayabout it. On a reconsideration of this evidence, there does not appear to be any reason to differ from the conclusions of the trial Court. There was a good deal of discrepancy in the statements of the witnesses regarding the taking of a second marriage party to the house ofthe plaintiff after the alleged compromise and no good reason could be adduced to discredit the evidence led by the plaintiff that she all along lived in her father's house and did not go tothe house of the defendant.

9. Much capital was sought to be made out of the refusal of the plaintiff to submit to medical examination. It was urged that she had once been examined by a male doctor and if she was honest in her assertions, there should have been no objection on her part to an examination by a lady doctor. The medical examination was evidently made in support of her claim that she was below 18 years as required by S. 2, Dissolution of Muslim Marriages Act. A similar argument was advanced with success in ***Atkia Begum* v. *Muhammad Ibrahim*** [36 I.C. 20]. At p. 25, Col. 1, it was noted that the learned Judges of the High Court had thought that the lady's refusal to submit to medical examination was very significant that it showed the respondent's *bona fides* in the truth of his case; that he was suggesting a test which if his case was false, would have put him out of Court; that a lady doctor could have given most valuable evidence on these points even without a minute examination as to whether the appellant was a virgin or not and that a medical examination would have been of the utmost value... Their Lordships of the Privy Council did not agree with these remarks.

The refusal of the plaintiff to have her examined by a lady doctor could not, therefore, be taken to be a proof of the consummation of marriage which should have been proved as a fact on the consideration of the entire evidence in the case.

10. The real significance of "option of puberty" and the manner how is it to be exercised, seems to have been not properly grasped or appreciated. The marriage under Muhammadan law is in the nature of a contract and as such, requires the free and unfettered consent of the parties to it. Normally speaking, a man and a woman should conclude the contract between themselves but in the case of minors, i.e., who have not attained the age of puberty as recognised by Muhammadan law, the contract might be entered into by their respective guardians. Before the Dissolution of Muslim Marriages Act, 1939, a minor girl given in marriage by the father or the father's father, had no option to repudiate it on the attainment of her puberty but this has now been changed. The contract of the father or the father's father stands on no higher footing than that of any other guardian and the minor could repudiate or ratify the contract made on his or her behalf during the minority, after the attainment of puberty. "Puberty" under Muhammadan law is presumed, in the absence of evidence, on completion of the age of 15 years. It would, therefore, necessarily follow that the minor should exercise the option after the age of 15 years unless there was evidence to the contrary that the puberty had been attained earlier and the burden of proving this shall lie upon the person so pleading. Anything done by the minor during the minority would not destroy the right which could accrue only after puberty. The co-habitation of a minor girl would not thus put an end to the "option" to repudiate the marriage after puberty. The assent should come after puberty and not before, for the simple reason that the minor is incompetent to contract; nor should the consummation have taken place without her consent [***Baillie*** 1.59 and ***Abdul Karim* v. *Amina Bai,*** AIR 1935 Bom 308]. This assent might either be express or implied. It might be by words or by conduct like cohabitation with the husband. It is also essential that agirl should be aware of the marriage before she could be expected to exercise her option.

11. In the present case, the plaintiff at the time of the alleged consummation, was still below 15 years and assuming consummation to be a fact, it could not destroy her right to repudiate the marriage after she had attained the age of 15. She had three years within which

to proclaim the exercise of that right and the institution of a suit was one mode of proclaiming it. The plaintiff had not therefore lost her right to repudiate the marriage given to her by law.

12. For the reasons given above I would accept this appeal, set aside the judgment and decree of the learned District Judge and restore that of the trial Judge and decree the plaintiff's suit with costs throughout.

* * * * *

A. Yousuf Rawther v. *Sowramma*

AIR 1971 Ker. 266

V.R. KRISHNA IYER, J. - This case, like most others, reveals a human conflict, over-dramatised by both sides and dressed up in legal habiliments, as usual; and when, as here, parties project a matrimonial imbroglio on the forensic screen, the court attempts a reconciliation between law and justice. What deeply disturbs a judge in such case-situations is the conflict between doing justice by promoting a rapprochement and enforcing the law heedless of consequence. Sowramma, a Hanafi girl, around 15, married in 1962 Yusuf Rowthan, nearly twice her age, but the husband's home hardly found them together for more than a few days and after a long spell of living apart, an action for dissolution was instituted by the wife against the husband. The matrimonial court should, and I did, suggest to counsel, in vain though, to persuade the parties to repair the broken bond. Unhappily, irreversible changes in the conjugal chemistry baulked the effort, the husband having taken another wife and the latter having wed again after dissolution was granted in appeal. And thus their hearts are pledged to other partners. The prospect of bringing together the sundered ends of the conjugal knot being absent a decision on the merits, according to the law of the parties, has tobe rendered now. Even so, the legal impact of such subsequent events on granting or moulding the relief falls to be considered.

2. A brief narration of the facts will help to appreciate the questions argued before me, with thoroughness and fairness, by counsel for the appellant and his learned friend opposite. (A young advocate of this court, Sri Manhu, who has impressed me with his industrious bent and depth of preparation on questions of Muslim law, has, as amicus curiae, brought into my judicial ken old texts and odd material which are outside the orbit of the practising lawyer). The plaintiff had attained puberty even before her marriage and soon after the wedding, the bridal pair moved on to the husband's house. The very next day the defendant left for Coimbatore where he was running a radio dealer's business. A month's sojourn in the house of the husband, and then the girl went back to her parents, the reason for her return being blamed by each on the other. This separation lasted for over two years during which span the defendant admittedly failed to maintain the wife, the ground alleged by the defendant being that he was willing and, indeed, anxious to keep her with him but she wrongfully refused to return to the conjugal home-thanks to the objectional inhibition by the father of the girl. The husband, finding the young wife recalcitrant, moved the mosque committee, through his brother (Ext. D2) but the effort failed and so they reported that divorce was the only solution (Ext. D4). Anyway, after preliminary skirmishes, in the shape of lawyer notices, a litigation for dissolution of marriage erupted. The trial court dismissed the suit but the Subordinate Judge's Court granted a decree for dissolution of the marriage. The aggrieved husband has come up to this court challenging the validity of the decree of the lower appellate court. His counsel, Shri Chandrasekhara Menon, has highlighted a seminal issue of Muslim law – the right of a female wrongfully leaving the matrimonial home to claim dissolution through court for mere failure of the husband to maintain the erring wife for 2 years.

3. The concurrent findings are that the plaintiff was 15 years old, that she had attained puberty and the marriage had been consummated. Again, while both the courts have held that

the defendant had failed to provide maintenance for the plaintiff for a period of two years, they have also recorded a crucial finding "that it was through her own conduct that she ledher husband to stop maintenance for a period of 2 years".

4. The claim of a Muslim wife to divorce is now provided for and canalised by the Dissolution of Muslim Marriages Act, Act 8 of 1939 (for short, referred to as the Act). Section 2 is the charter of the wife and, in this case, the plaintiff has pressed into service sub- sections (ii), (vii) and (ix) thereof. I shall deal briefly with the second ground, which has beennegatived by both the courts, and then pass on to the first and the last which, in the circumstances of this case, require detailed consideration. Section 2, cl (vii) vests in the woman, who has been given in marriage by her father or other guardian before she attains the age of 15 years, the right to repudiate the marriage before attaining the age of 18 years, provided that the marriage has not been consummated. The plaintiff and her father had no qualms in pleading notwithstanding the Child Marriage Restraint Act, 1929, that the girl was only 13 ½ years old at the time of the marriage. Social legislation without the community's militant backing, is often a flop. However, the court held: "as there is no evidence to show that the plaintiff was under the age of 15 years when her marriage was solemnised and as the probabilities establish that the marriage had been consummated it is obvious that the second ground which the plaintiff relied upon for dissolution of her marriage with the defendant has not been made out". On these findings, Section 2 (vii) is off altogether. However, theassumption of the learned Subordinate Judge that if the marriage has been consummated Section 2 (vii) is excluded irrespective of the tender age of the female partner, may be open toquestion. The Lahore High Court had occasion to consider the import to this provision in a ruling reported in ***Mt. Ghulam Sakina* v. *Falak Sher Allah Baksh*** [AIR 1950 Lah 45]. The learned Judge expatiated on the real significance of the option of puberty thus:

> The marriage under Muhammadan law is in the nature of a contract and as such requires the free and unfettered consent of the parties to it. Normally speaking, a man and a woman should conclude the contract between themselves but in the case of minors i.e., who have not attained the age of puberty as recognised by Muhammadan law, the contract might be entered into by their respective guardians. Before the Act 8 of 1939 (The Dissolution of Muslim Marriages Act 1939) a minor girl given in marriage by the father or the father's father, had no option to repudiate it on the attainment of her puberty but this has now been changed. The contract of the father or the father's father stands on no higher footing than that of any other guardian and the minor could repudiate or ratify the contract made on his or her behalf during the minority after the attainment of puberty. 'Puberty' under Muhammadan law is presumed in the absence of evidence, on completion of the age of 15 years. It would, therefore, necessarily follow that the minor should exercise the option after the age of 15 years unless there was evidence to the contrary that the puberty had been attained earlier and the burden of proving this shall lie upon the person so pleading. Anything done by minor during the minority would not destroy the right which could accrue only after puberty. The co-habitation of a minor girl would not thus put an end to the'option' to repudiate the marriage after puberty.

There is persuasiveness in this reasoning but on the facts found in the present case, even the Lahore view cannot sustain the plaintiff's claim, while another ruling reported in ***Rabia Khatoon* v. *Mohd. Mukhtar Ahmad*** [AIR 1966 All 548] goes against her stand.

5. Now, to the other grounds. Section 2 (ix) of the Act is of wide import and preserves the woman's right to dissolution of her marriage on any ground recognised as good underMuslim law. Thus, it is perfectly open to a female spouse to press into service not merely the ground set out in Cls. (i) to (viii) but also any other which has enjoyed recognition under the Shariat. Section 2 (ii) liberates a woman from her matrimonial bondage if her husband "has neglected or has failed to provide for her maintenance for a period of two years". We have, therefore, to examine whether the plaintiff has been able to make out any ground sanctioned by the Muslim law or set out in Section 2 (ii) of the Act. There is a sharp cleavage of opinion in India on the scope and meaning of this latter provision while the former clause has notbeen expressly pronounced upon.

6. The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute.

7. There has been considerable argument at the bar – and precedents have been piled up by each side – as to the meaning to be given to the expression 'failed to provide for her maintenance' and about the grounds recognised as valid for dissolution under Muslim law. Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture – law is largely the formalised and enforceable expression of a community's cultural norms – cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. The statement that the wife can buy a divorce only with the consent of or as delegated by the husband is also not wholly correct. Indeed, a deeper study ofthe subject discloses a surprisingly rational, realistic and modern law of divorce and this is a relevant enquiry to apply Section 2 (ix) and to construe correctly Section 2 (ii) of the Act.

> Marriage under Islam is but a civil contract, and not a sacrament, in the sense that those who are once joined in wed-lock can never be separated. It may be controlled, and under certain circumstances, dissolved by the will of the parties concerned. Public declaration is no doubt necessary but it is not a condition of the validity of the marriage. Nor is any religious ceremony deemed absolutely essential. [***The Religion of Islam*** by Ahmad A. Galwash, p. 104]

It is impossible to miss the touch of modernity about this provision; for the features emphasised are precisely what we find in the civil marriage laws of advanced countries and also in the Special Marriage Act, Act 43 of 1954. Religious ceremonies occur even in Muslim weddings although they are not absolutely essential. For that matter, many non-Muslim

marriages, (e.g. Marumakkathayees) also do not insist, for their validity, on religious ceremonies and registered marriages are innocent of priestly rituals. It is a popular fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage. "The whole Quran 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". (Quran 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." As the learned author, Ahmad A. Galwash notices, the pagan Arab, before the time of the Prophet, was absolutely free to repudiate his wife whenever it suited his whim, but when the Prophet came. He declared divorce to be "the most disliked of lawful things in the sight of God. He was indeed never tired of expressinghis abhorrence of divorce. Once he said: "God created not anything on the face of the earth which He loveth more than the act of manumission (of slaves) nor did He create anything on the face of the earth which He detesteth more than the act of divorce". Commentators on the Quran 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 whatthe Prophet or the Holy Quran laid down and the same misconception vitiates the law dealing with the wife's right to divorce. Dr. Galwash deduces.

> Marriage being regarded as a civil contract and as such not indissoluble, the Islamic law naturally recognises the right in both the parties, to dissolve the contract under certain given circumstances. Divorce, then, is a natural corollary to the conception of marriage as a contract,
>
> It is clear, then, that Islam discourages divorce in principle, and permits it only when it has become altogether impossible for the parties, to live together in peace and harmony. It avoids, therefore, greater evil by choosing the lesser one, and opens a way for the parties to seek agreeable companions and, thus, to accommodate themselves more comfortably in their new homes. We have to examine whether the Islamic law allows the wife to claim divorce when she finds the yoke difficult to endure "for such is marriage without love. a hardship more cruel than any divorce whatever". The learned author referred to above states, "Before the advent of Islam, neither the Jews nor the Arabs recognised the right of divorce for women: and it was the Holy Quran that, for the first time in the history of Arabia, gave this great privilege to women". After quoting from the Quran and the Prophet, Dr. Galwash concludes that "divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed toa dissolution of the marriage by 'Talaq' or by 'Khola'. When the proposal of divorce proceeds from the husband, it is called 'Talaq', and when it takes effect at the instance of the wife it is called 'Kholaa'." Consistently with the secular concept of marriage and divorce, the law insists that at the time of Talaq the husband must pay

off the settlement debt to the wife and at the time of Kholaa she has to surrender to the husband her dower or abandon some of her rights, as compensation.

9. The decisions of court and the books on Islamic law frequently refer to the words and deeds of the Prophet in support of this truly forward step. He said "if a woman be prejudiced by a marriage, let it be broken off". "The first 'kholaa' case in Islam is quoted by Bukhari in the following words: The wife of Thabit-ibn-Quais came to the Prophet and said 'O Messenger of God, I am not angry with Thabet for his temper or religion; but I am afraid that something may happen to me contrary to Islam, on which account I wish to be separated fromhim.' The Prophet said: 'Will you give back to Thabit the garden which he gave to you as your settlement?" She said, 'Yes': Then the Prophet said to Thabit. 'Take your garden and divorce her at once'." (Bukhari is the greatest commentary of Mohammadan orthodox traditions). "This tradition clearly tells us that Thabit was blameless, and that the proposal for separation emanated from the wife who feared she would not be able to observe the boundsset by God namely not to perform her functions as a wife. The Prophet here permitted the woman to release herself by returning to the husband the ante-nuptial settlement, as compensation for the release granted to her." Asma, one of the wives of the Holy Prophet, asked for divorce before he went to her , and the Prophet released her as she had desired.

10. The Indian Judges have been sharply divided on the woman's right to divorce. Is she eligible only if she has not violated her conjugal duties? Or can she ask for it on mere failure of the husband to provide maintenance for her for two years, the wife's delinquency being irrelevant? If the latter view be the law, judges fear that women, with vicious appetite, may with impunity desert their men and yet demand divorce – forgetting, firstly that even under the present law, as administered in India, the Muslim husband has the right to walk out of the wedlock at his whim and secondly, that such an irreparably marred married life was not worth keeping alive. The learned Munsif chose to follow the leading case in AIR 1951 Nag 375, while in appeal, the Subordinate Judge was impressed by the reasoning in AIR 1950Sind 8. Neither the Kerala High Court nor the Supreme Court has spoken on the issue and, speaking for myself, the Islamic law's serious realism on divorce, when regarded as the correct perspective, excludes blameworthy conduct as a factor and reads the failure to provide maintenance for two years as an index of irreconcilable breach, so that the mere fact of non-maintenance for the statutory period entitles the wife to sue for dissolution.

11. Mulla, in his book on ***Mahomedan Law***, commenting on the failure to maintain the wife as a ground for divorce under the Act, says:

> Failure to maintain the wife need not be wilful. Even if the failure to provide for her maintenance is due to poverty, failing health, loss of work, imprisonment or to any other cause, the wife would be entitled to divorce. unless, it is submitted, her conduct has been such as to disentitle her to maintenance under the Mahomedan Law. In 1942 it was held by the Chief court of Sind that the Act was not intended to abrogate the general law applicable to Mahomedans, and 'the husband cannot be said to have neglected or failed to provide maintenance for his wife unless under the general Mahomedan Law he was under an obligation to maintain her'. The wife'ssuit for divorce was dismissed as it was found that she was neither faithful not

obedient to her husband, So also was the wife's suit dismissed, where the wife, who lived separately, was not ready and willing to perform her part of marital duties.

The Nagpur High Court read Section 2(ii) of the Act to mean that where the wife voluntarily stayed away from her husband's house despite the husband's request to return to his house and live with him, there was no neglect or failure to maintain the wife merely because he did not send any money to her during this period and the wife was not entitled to claim divorce. Mudholkar, J. was of the view that the words "to provide for her maintenance" occurring in Cl. (ii) would apply only when there was a duty to maintain under the general Mahomedan law.

12. The learned Judge explained the need to answer the question with reference to the Muslim law:

> It is true that Act 8 of 1939 observed his Lordship, "crystallises a portion of the Muslim law. but it is precisely for that reason that it must be taken in conjunction with the whole of the Muslim law as it stands. Under the Muslim law, it is the duty of the wife to obey her husband and to live with him unless he refuses to live with her or unless he makes it difficult for her to live with him When the law enjoins a duty on the husband to maintain his wife, it is obvious that the wife can only be maintained at the place where she ought properly to be. If she wants for no reason to be maintained elsewhere, she can clearly claim no maintenance from husband under the Mahomedan law. Since her right to claim maintenance is limited to this extent by the Mahomedan law, it must necessarily follow that in Cl. (ii) of Section 2 of the Act 8 of 1939 the Legislature intended to refer only to this limited right and to no other It would be against all canons of judicial interpretation to hold that a wife's right of maintenance, in so far as Act 8 of 1939 is concerned, is different from that contained in the rest of the Mahomedan law.

13. A Division Bench of the Rajasthan High Court (AIR 1956 Raj 102 at p. 103) agreed with the construction and observed:

> (W)e are of opinion that the failure or neglect to provide maintenance in order to give rise to claim for dissolution, must be without any justification. For if there is justification, there cannot be said to be neglect. Neglect or failure implies non-performance of a duty. But if the husband is released from the duty on account of the conduct of the lady herself, the husband cannot be said to have neglected or failed to provide maintenance.

The Peshawar court also was of opinion that where the wife was entirely to blame, it could not be said that the husband had failed or neglected to provide for her maintenance within the meaning of Section 2 (ii) of the Act. Their Lordships harked back to and endorsed the opinion expressed in AIR 1944 All 23 "that the word 'neglect' implies wilful failure and that the words 'has failed to provide' are not very happy, but even they imply an omission of duty." Allsop Ag. C. J., speaking on behalf of the Bench in AIR 1947 All 3, said:

> The Act does not mean that the husband is bound to follow his wife wherever she may go and force money or food or clothes upon her.....If she refused to avail

herself of the shelter which was offered to her, she cannot complain and is certainly not entitled to a decree.

14. Even here, I may mention that Section 2 (ii) does not speak of the wife's right of maintenance but only of the fact of her being provided with maintenance and this is the ratio of the ruling in AIR 1950 Sind 8. Tyabji, C. J., elaborately examined this branch of Muslim jurisprudence as well as the precedents under Section 2 (ii) of the Act and wound up:

> Having very carefully considered the reasoning in all these cases (His Lordship adverts to the rulings pro and con) I can see no reason for taking a different view of the question before us from that which I expressed in Hajra's case (Suit No. 288 of 1942). The plain ordinary grammatical meaning of the words: 'Has failed to provide maintenance' in Cl. (ii) appears to me to be very clear. It is true that these words occur in an enactment which deals with the dissolution of Muslim marriages, but the meaning of these words cannot therefore be different from what it would be for instance, if these words were used with reference to a Hindu or a Christian or a Parsi husband .....The question whether there was a failure to maintain was a pure question of fact, which did not in any manner depend upon the circumstances in which the failure had occurred. As I pointed out in Hajra's case, Muslim morals
> and ideas undoubtedly expect every husband to maintain his wife as long as the marriage subsists, even when the wife does not in law be able to enforce any claim for maintenance. It is therefore no less correct to speak of a man's failure to maintain his wife even when she is not entitled to claim maintenance, than it is to speak of a man's failure to pay his debts of honour on bets or his debts which have become time barred.....In the cases in which it has been held that there could be no failure to maintain, unless the wife was entitled to enforce a claim for maintenance, the plain ordinary meaning of the words, it seems to me, was intentionally departed from, on the express ground that the ordinary meaning of the words was not the one which could really have been intended, that the really intended meaning had been sought to be expressed, rather unhappily, by the use of words which in fact had a different meaning; and the supposed intended meaning which necessarily involved importing into the enacted words something which was not there, was then preferred to the ordinary meaning; on the supposition that unless that was done an abrogation of the general Muhammadan law and a startling state of affairs would result.....

The learned Chief Justice expatiated on the Muslim law and observed:

> The principles upon which maintenance is enforced during the subsistence of a marriage, and those upon which a dissolution is allowed, are entirely different. A dissolution of a marriage is allowed when a cessation of the state of marriage has in reality taken place, or the continuance of the marriage has become injurious to the wife. The continuance of a state of affairs in which a marriage had ceased to be a reality, when the husband and the wife no longer lived 'within the limits of Allah' is abhorred in Islam, and the prophet enjoined that such a state of affairs should be ended. The main object of enacting the Dissolution of Muslim Marriages Act was to bring the law as administered in this sub-continent into conformity with the authoritative texts.

15. Tyabji, C. J. relied on Beckett, J., (AIR 1943 Sind 65) who had made a like approach. In AIR 1941 Lah 167, Abdul Rashid, J. stated:

> Where the words of the statute are unambiguous, effect must be given to them whatever the consequences. It is laid down expressly in Cl. (iv) of Section 2, that where the husband has failed to perform without reasonable cause his marital obligations for a period of three years the wife is entitled to a dissolution of her marriage. In Cl. (ii), however, the words 'without reasonable cause' do not occur. It must, therefore, be held that whatever the cause may be the wife is entitled to a decree for the dissolution of her marriage, if the husband fails to maintain her for a period of two years, even though the wife may have contributed towards the failure of the maintenance by her husband.:

This observation was extracted, with approval, in the Sind decision and the ancient texts, traditions and fatwaas were adverted to for holding that the Indian Hanafis had all along allowed divorce for simple failure by the husband to maintain his wife. The most compelling argument in the Sind ruling runs thus:

> The Muslim marriage differs from the Hindu and from most Christian marriages in that it is not a sacrament. This involves an essentially different attitude towards dissolutions. There is no merit in preserving intact the connection of marriage when the parties are not able and fail 'to live within the limits of Allah', that is to fulfil their mutual marital obligations, and there is no desecration involved in dissolving a marriage which has failed. The entire emphasis is on making the marital union a reality, and when this is not possible, and the marriage becomes injurious to the parties, the Quran enjoins a dissolution. The husband is given an almost unfettered power of divorce, the only restraints upon him being those imposed by the law relating to dower and by his own conscience. He has to remember the Prophet's words: "Of all things permitted by the law, the worst is divorce.' The Quran enjoins ahusband either to render to his wife all her rights as a wife and to treat her with kindness in the approved manner, or to set her free by divorcing her, and enjoins him not to retain a wife to her injury (Cf. verses II, 229 and 231). Any suspension of the marriage is strongly condemned (Cf. e.g. Quran IV, 129). The attitude of the Prophet is illustrated by the well-known instance of Jameela, the wife of Sabit Bin Kais, who hated her husband intensely although her husband was extremely fond of her. According to the account given in Bukhari (Bu. 68:11) Jameela appeared before the Prophet and admitted that she had no complaint to make against Sabit either as regards his morals or as regards his religion. She pleaded, however, that she could notbe wholeheartedly loyal to her husband, as a Muslim wife ought to be, because she hated him, and she did not desire to live disloyally ('in Kufr'). The Prophet asked her whether she was willing to return the garden which her husband had given to her, andon her agreeing to do so, the Prophet sent for Sabit, asked him to take back the garden, and to divorce Jameela. From the earliest times Muslim wives have been heldto be entitled to a dissolution when it was clearly shown that the parties could not live'within the limits of Allah', when (1) instead of the marriage being a reality, a suspension of the marriage had in fact occurred, or (2) when the continuance of the

> marriage involved injury to the wife. The grounds upon which a dissolution can be claimed are based mainly on these two principles When a husband and a wife have been living apart, and the wife is not being maintained by the husband, a dissolution is not permitted as a punishment for the husband who had failed to fulfil one of the obligations of marriage, or allowed as a means of enforcing the wife's rights to maintenance. In the Muslim law of dissolutions, the failure to maintain whenit has continued for a prolonged period in such circumstances, is regarded as an instance where a cessation or suspension of the marriage had occurred. It will be seentherefore that the wife's disobedience or refusal to live with her husband does not affect the principle on which the dissolution is allowed.

16. I am impressed with the reasoning of Tyabji, C. J. which, in my humble view, accords with the holy Islamic texts and the ethos of the Muslim community which together serve as a backdrop for the proper understanding of the provisions of the Act 8 of 1939.

17. I may also point out with satisfaction that this secular and pragmatic approach of the Muslim law of divorce happily harmonises with contemporary concepts in advanced countries.

One of the serious apprehensions judges have voiced, if the view accepted in AIR 1950 Sind 8 were to be adopted, is that the women may be tempted to claim divorce by their own delinquency and family ties may become tenuous and snap. Such a fear is misplaced and (sic) has been neatly expressed by Bertrand Russel in his "***Marriage and Morals***".

> One of the most curious things about divorce is the difference which has often existed between law and custom. The easiest divorce laws by no means always produce the greatest number of divorces. I think this distinction between law and custom is important, for while I favour a somewhat lenient law on the subject, there are to my mind, so long as the biparental family persists as the norm, strong reasons why custom should be against divorce, except in somewhat extreme cases. I take this view because I regard marriage not primarily as a sexual partnership, but above all as an undertaking to co-operate in the procreation and rearing of children.

The law of the Marumakkathayees provides a large licence for divorce but actual experience allays the alarm. The law has to provide for possibilities; social opinion regulates the probabilities. For all these reasons, I hold that a Muslim woman, under Section 2 (ii) of the Act, can sue for dissolution on the score that she has not as a fact been maintained even if there is good cause for it--the voice of the law, echoing public policy is often that of the realist, not of the moralist.

18. The view I have accepted has one other great advantage in that the Muslim woman (like any other woman) comes back into her own when the Prophet's words are fulfilled, when roughly equal rights are enjoyed by both spouses, when the talaq technique of instant divorce is matched somewhat by the Khulaa device of delayed dissolution operated under judicial supervision. The social imbalance between the sexes will thus be removed and the inarticulate major premise of equal justice realised.

19. Act 8 of 1939 does not abrogate the grounds already available to a woman and Section 2 (ix) is clearly a statutory preservation of prior Islamic rights. I have dilated on the

incidents of Khulaa the last gateway for a Muslim woman out of an irreparably embittered co-existence. Having affirmed the decree under Section 2 (ii) of the Act, the applicability of Section 2 (ix) is, perhaps, supererogatory. I do not decide the plaintiff's claim to Khulaa under Section 2 (ix) of the Act. Having succeeded on the ground set out in Section 2 (ii) ofthe Act the respondent is entitled to a divorce. The appeal fails and is dismissed.

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Itwari v. *Asghari*

AIR 1960 All. 684

S.S. DHAWAN, J. - This is a Muslim husband's appeal against the decision of the learned District Judge, Rampur, dismissing his suit for restitution of conjugal rights against his first wife who refused to return to him after he had taken a second wife and accused him of cruelty to her. The appellant Itwari was married to Smt. Asghari about the year 1950 and lived with her for sometime. Then things went wrong and the wife ultimately left him to live with her parents; but he took no steps to bring her back and married another woman.

The first wife filed an application for maintenance under Sec. 488 Cr. P. C. Thereupon the husband filed a suit against her for restitution of conjugal rights. For some reasons he impleaded her father and two brothers as co-defendants. The wife contested the suit and alleged that she had been turned out by her husband who had formed an illicit union with another woman whom he subsequently married. She alleged that he had beaten her, deprived her of her ornaments and thus caused her physical and mental pain. He had also not paid her dower.

2. The learned Munsif decreed the husband's suit and held that the wife had failed to prove that she was really ill-treated and that the husband had not been guilty of such crueltyas would disentitle him to a decree for restitution of conjugal rights against her. He held that the mere fact that the husband had taken a second wife raised no presumption that Smt. Asghari had suffered inequitable treatment at his hands, and was influenced by the husband's explanation that he had not taken his second wife to live in his house with Smt. Asghari.

He also took the view that if the wife felt aggrieved by her husband's second marriage she should have obtained a decree for dissolution of marriage and expressed surprise that she had not done so, thereby adopting the strange and inconsistent view that the husband's conduct in taking a second wife is a good ground for the first wife to sue for dissolution ofher marriage and put an end to all the rights of the husband but no ground for contesting the husband's suit for assertion of the same rights under the same marriage.

The fact that the wife had taken things lying down weighed with the learned Munsif in disbelieving her allegation of cruelty against Itwari. He decreed the husband's suit and also passed an order directing Smt. Asghari's father and brother not to prevent her from going back to him.

3. On appeal, the learned District Judge, Rampur reversed the finding of the trial court and dismissed the husband's suit with costs. He was of the opinion that Itwari had filed his suit for restitution of conjugal rights only as a counter-blast to the wife's claim for maintenance under Sec. 488 Cr. P. C., and pointed out that, after the wife had left him and been living with her parents for so many years, he took no steps to get her back and that his long silence was an indication that he never really cared for her. He observed,

> In view of this circumstance I am prepared to believe Smt. Asghari's evidence that she was ill-treated and turned out by her husband and that the latter is nowputting up a show to get her back only to escape from the liability to pay maintenance allowance.

He took the view that the wife who had been deserted and not taken care of by the husband for so many years would not find peace with him after another woman had already been installed as his wife. Accordingly he allowed the wife's appeal. Against this decision Itwari had come to this Court in second appeal.

4. Mr. N. A. Kazmi, learned counsel for the appellant urged the following arguments in support of the appeal. First, in a suit for restitution of conjugal rights the question whether the husband has been guilty of such cruelty as will defeat his right to consortium is a mixed question of law and fact, and the High Court in second appeal can re-examine the evidence and form its own conclusion whether cruelty has been established against the husband.

Secondly, the mere fact that the husband had taken a second wife is no proof of cruelty as every Muslim has the right to take several wives upto a maximum of four and the view taken by the District Judge is wrong in law. Thirdly, to defeat a husband's suit for assertion of his conjugal rights there must be proof of cruelty of such a character as to render it unsafe for the wife to return to her husband's dominion. I shall now proceed to consider these contentions on merits.

5 The first question is whether the conduct of the husband in taking a second wife is any ground for the first wife to refuse to live with him or for dismissing his suit for restitution of conjugal rights. Learned counsel for the husband vehemently argued that a Muslim husband has the right under his personal law to take a second wife even while the first marriage subsists. But this right is not in dispute in this case.

The question before the Court is not whether the husband had the right to take a second wife but whether this Court, as a court of equity, should lend its assistance to the husband by compelling the first wife, on pain of severe penalties, to live with him after he has taken a second wife in the circumstances in which he did.

6 A marriage between Mohammedans is a civil contract and a suit for restitution of conjugal rights is nothing more than an enforcement of the right to consortium under this contract. The Court assists the husband by an order compelling the wife to return to cohabitation with the husband. "Disobedience to the order of the Court would be enforceable by imprisonment of the wife or attachment of her property, or both". ***Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum*** [11 Moo I.A.551, 609], ***Abdul Kadir* v. *Salima*** [ILR 8 All 149 (FB)].

But a decree for specific performance of a contract is an equitable relief and it is within the discretion of the Court to grant or refuse it in accordance with equitable principles. In ***Abdul Kadir*** case, it was held that in a suit for conjugal rights, the Courts in India shall function as mixed Courts of equity and be guided by principles of equity well-established under English Jurisprudence. One of them is that the Court shall take into consideration the conduct of the person who asks for specific performance.

If the Court feels, on the evidence before it, that he has not come to the Court with clean hands or that his own conduct as a party has been unworthy, or his suit has been filed with ulterior motives and not in good faith, or that it would be unjust to compel the wife to live with him, it may refuse him assistance altogether. The Court will also be justified in refusing specific performance where the performance of the contract would involve some hardship on

the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

7. It follows, therefore, that, in a suit for restitution of conjugal rights by a Muslim husband against the first wife after he has taken a second, if the Court after a review of the evidence feels that the circumstances reveal that in taking a second wife the husband has beenguilty of such conduct as to make it inequitable for the Court to compel the first wife to live with him, it will refuse relief.

8. The husband in the present case takes his stand on the right of every Muslim under his personal law to have several wives at a time upto a maximum of four. He contends that if the first wife is permitted to leave the husband merely because he has taken a second, this would be a virtual denial of his right. It is necessary to examine this argument.

9. Muslim Law permits polygamy but has never encouraged it. The sanction for polygamy among Muslim is traced to the Koran IV. 3,

> "If Ye fear that ye cannot do justice between orphans, then marry what seems good to you of women, by twos, or threes, or fours or if ye fear that ye cannot be equitable, then only one, or what your right hand possesses."

This injunction was really a restrictive measure and reduced the number of wives to four at a time; it imposed a ceiling on conjugal greed which prevailed among males on an extensive scale. The right to four wives appears to have been qualified by a 'better not' advice, and husbands were enjoined to restrict themselves to one wife if they could not be impartial between several wives – an impossible condition according to several Muslim jurists; who rely on it for their argument that Muslim Law in practice discourages polygamy.

10. A Muslim has the undisputed legal right to take as many as four wives at a time. But it does not follow that Muslim Law in India gives no right to the first wife against a husband who takes a second wife, or that this law renders her helpless when faced with the prospect of sharing her husband's consortium with another woman. In India, a Muslim wife can divorce her husband, under his delegated power in the event of his taking a second wife, ***Badu Mia* v. *Badrannessa,*** (AIR 1919 Cal 511).

Again a Muslim wife can stipulate for the power to divorce herself in case of the husband availing of his legal right to take another wife ***Sheikh Moh*. v. *Badrunnissa Bibee*** [7 Beng LR App 5 (sic)], ***Badarannissa Bibi* v. *Mafiattala*** [7 Beng LR 442]. In ***Ayatunnessa Beebee* v. *Karam Ali*** [ILR 36 Cal 23], it was held that a Muslim wife, who has the power given to her by the marriage contract to divorce herself in the event of the husband taking a second wife does not lose her option by failing to exercise it the very moment she knows that he has done so, for "a second marriage is not a single but a continuing wrong to the first wife."

The court significantly described a second marriage as a "continuing wrong" to the first wife. The implications of these rights of the first wife are unmistakable. To say the least, a law cannot regard the husband's right to compel all his wives to submit to his consortium as fundamental and inviolate if it permits a wife to make a stipulation that she will break up her marriage on his taking a second wife. Further, the moral foundation of this right is considerably weakened if the law, while tolerating it, calls it "a continuing wrong" to the first

wife and permits her to stipulate that she will repudiate her marriage vows on the coming ofa second wife.

If Muslim law had regarded a polygamous husband's right to consortium with the first wife as fundamental and inviolate, it would have banned such stipulations by the wife as against Muslim public policy. But it has done no such thing. On the contrary Muslim law has conferred upon the wife stipulated right to dissolve her marriage on her husband taking a second wife a force overriding the sanctity of the first marriage itself.

If Mohammadan Law permits and enforces such agreements it follows that it prefers the breaking up of the first marriage to compelling the first wife to share her husband with the second. The general law, too, recognises the sanctity of such agreements, and it has been held that a contract restraining a Muslim husband from entering into a second marriage during the life time of the first is not void under Sec. 23 of the Contract Act which bans agreements in restraint of marriage.

11. I am, therefore, of the opinion that Muslim Law as enforced in India has considered polygamy as an institution to be tolerated but not encouraged, and has not conferred upon the husband any fundamental right to compel the first wife to share his consortium with another woman in all circumstances. A Muslim husband has the legal right to take a second wife even while the first marriage subsists, but if he does so and then seeks the assistance of the Civil Court to compel the first wife to live with him against her wishes on pain of severe penalties including attachment of property, she is entitled to raise the question whether the court, as a court of equity, ought to compel her to submit to co-habitation with such a husband. In that case the circumstances in which his second marriage took place are relevant and material in deciding whether his conduct in taking a second wife was in itself an act of cruelty to the first.

12. Mr. Kazmi contended that the first wife is in no case entitled to consider the second marriage as an act of cruelty to her. I cannot agree. In ***Shamsunnissa Begum*** case, the Privy Council observed that "the Mohammedan Law, on a question of what is legal cruelty between man and wife, would probably not differ materially from the English Law". It follows that Indian Law does not recognise various types of cruelty such as 'Muslim' cruelty, 'Christian' cruelty, 'Hindu' cruelty, and so on, and that the test of cruelty is based on universal and humanitarian standards that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger the wife's safety or health.

13. What the Court will regard as cruel conduct depends upon the prevailing social conditions. Not so very long ago in England a husband could inflict corporal chastisement on the wife without causing comment. Principles governing legal cruelty are well established and it includes any conduct of such a character as to have caused danger to life, limb, orhealth (bodily or mental) or as to give a reasonable apprehension of such a danger (**Rayden on *Divorce*** 5th Edition p. 80).

But in determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties and their character and social status (ibid p. 80). In deciding what constitutes cruelty, the Courts have always taken into consideration the prevailing social conditions, and the same

test will apply in a case where the parties are Mohammadans, Muslim society has never remained static and to contend otherwise is to ignore the record of achievements of Muslim civilisation and the rich development of Mohammedan jurisprudence in different countries. Muslim jurisprudence has always taken into account changes in social conditions in administering Mohammedan Law.

> Necessity and the wants of social life are the two all-important guiding principles recognised by Mohammedan Jurisprudence in conformity to which Laws should be applied to actual cases, subject only to this reservation that rules, which are covered by a clear text of the Quran or a precept of indisputable authority, or have been settled by agreement among the learned, must be enforced as we find them. It seems to me beyond question that, so long as this condition is borne in mind, the Court in administering Mohammedan Law is entitled to take into account the circumstances ofactual life and the change in the people's habits, and modes of living: ***Mohammedan Jurisprudence*** by Sri Abdur Rahim, Tagore Law Lecture – 1908 p. 43.

14. The most convincing proof of the impact of social changes on Muslim Law is the passing of the Dissolution of Muslim Marriages Act 1939 by which the legislature enabled a Muslim wife to sue for the dissolution of her marriage on a number of grounds which were previously not available. One of them is the failure of the husband who has more wives than one to treat all of them equitably in accordance with the injunctions of the Quran.

> It is but a short step from this principle to ask a husband who has taken it into his head to have a second wife during the subsistence of the first marriage to explain the reasons for this conduct and in the absence of a convincing explanation, to conclude that there is little likelihood of the first wife By this Act the legislature has made a distinct endeavour to ameliorate the lot of the wife and we (the Courts) must apply the law in consonance with the spirit of the legislature. – Sinha J., in ***Mt. Sofia Begum* v. *Zaheer Hasan*** [AIR 1947 All 16].

I respectfully agree, and would like to add that in considering the question of cruelty in any particular case, the Court cannot ignore the prevailing social conditions, thecircumstances of actual life and the change in the people's habits and modes of living.

15. Today Muslim woman move in society, and it is impossible for any Indian husband with several wives to cart all of them around. He must select one among them to share his social life, thus making impartial treatment in polygamy virtually impossible under modern conditions. Formerly, a Muslim husband could bring a second wife into the householdwithout necessarily meaning any insult or cruelty to the wife. Occasionally, a secondmarriage took place with the consent or even at the suggestion of the first wife.

But social condition and habits among Indian Mussalmans have changed considerably, and with it the conscience of the Muslim community. Today the importing of a second wife into the household ordinarily means a stinging insult to the first. It leads to the asking of awkward questions the raising of unsympathetic eyebrows and the pointing of derisive fingers at the first wife who is automatically degraded by society. All this is likely to prey upon her mind and health if she is compelled to live with her husband under the altered circumstances.

A husband who takes a second wife in these days will not be permitted to pretend that he did not realise the likely effect of his action on the feelings and health of the first wife. Under the law, the husband will be presumed to intend the natural consequences of his own conduct. ***Simpson* v. *Simpson*** [(1951) 1 All ER 955]. Under the prevailing conditions the very act of taking a second wife, in the absence of a weighty and convincing explanation, raises a presumption of cruelty to the first. (The Calcutta High Court called it a "continuing wrong").

The onus today would be on the husband who takes a second wife to explain his action and prove that his taking a second wife involved no insult or cruelty to the first. For example,he may rebut the presumption of cruelty by proving that his second marriage took place at the suggestion of the first wife or reveal some other relevant circumstances which will disprove cruelty. But in the absence of a cogent explanation the Court will presume, under modern conditions, that the action of the husband in taking a second wife involved cruelty to the first and that it would be inequitable for the Court to compel her against her wishes to live with such a husband.

16. Mr. Kazmi relied on an observation of the late Sir Din Shah Mulla in his ***Principles of Mohammedan Law***, 14th edition page 246, that:

> cruelty, when it is of such a character as to render it unsafe for the wife to return to her dominion, is a valid defence.

to a suit for restitution of conjugal rights by the husband. Learned counsel argued that cruelty which would fall short of this standard is no defence. I do not read any such meaning in that eminent author's observation which is really borrowed from the judgment of the Privy Council in ***Shamsunnisa Begum*** case. But I have indicated that the Privy Council observed in that case that the Mohammedan Law is not very different from the English Law on the question of cruelty.

The Court will grant the equitable relief of restitution in accordance with the social conscience of the Muslim community, though always regarding the fundamental principles of the Mohammedan Law in the matter of marriage and other relations as sacrosanct. That law has always permitted and continues to permit a Mohammedan to marry several wives upto the limit of four. But the exercise of this right has never been encouraged and if the husband, after taking a second wife against the wishes of the first, also wants the assistance of the Civil Court to compel the first to live with him, the Court will respect the sanctity of the second marriage, but it will not compel the first wife, against her wishes, to live with the husband under the altered circumstances and share his consortium with another woman if it concludes,on a review of the evidence, that it will be inequitable to compel her to do so.

17. Counsel for the appellant argued vehemently that dismissal of the husband's suit against the first wife virtually means a denial of his right to marry a second time while the first marriage subsists. I do not agree. A Muslim husband has always the right to take a second wife. If he does so, he cannot be prosecuted for bigamy, the second marriage is valid, the children of the second wife are legitimate and he is entitled to the enjoyment of his rights (subject to his obligations) under the second marriage.

But it is not at all necessary for the enjoyment and consummation of his rights under the second marriage that he should apportion his consortium between two women. On the

contrary, nothing is more likely to mar the conjugal bliss of his second marriage than that his new wife should be asked to share it with the old. The second wife is not likely to view with sympathy her husband's attempt to compel the old wife to return to his consortium and, to put it very mildly, the dismissal of her husband's suit for restitution against the first wife is not likely to break the second wife's heart.

Therefore, if, in his conjugal greed, the husband does not rest content with the enjoyment of his new connubial bliss but, like Oliver, asks for more, and is refused relief by the Court, he cannot complain that his rights under the first marriage have been impaired. The Court will be justified in inquiring whether it will be equitable to compel his first wife to submit to his consortium in the altered circumstances.

18. Even in the absence of satisfactory proof of the husband's cruelty, the Court will not pass a decree for restitution in favour of the husband if, on the evidence, it feels that the circumstances are such that it will be unjust and inequitable to compel her to live with him. In ***Hamid Hussain* v. *Kubra Begum*** [AIR 1918 All 235], a Division Bench of this Court dismissed a husband's prayer for restitution on the ground that the parties were on the worst of terms, that the real reason for the suit was the husband's desire to obtain possession of the wife's property and the Court was of the opinion that by a return to her husband's custody the wife's health and safety would be endangered though there was no satisfactory evidence of physical cruelty.

In ***Nawab Bibi* v. *Allah Ditta*** [AIR 1924 Lah 188], Shadi Lal, C.J. and Zafar Ali, J. refused relief to a husband who had been married as an infant to the wife when she was a minor but had not even cared to bring her to live with him even after she had attained the age of puberty. In ***Khurshid Begum* v. *Abdul Rashi*** [AIR 1926 Nag 234], the Court refused reliefto a husband because it was of the opinion that the husband and wife had been "on the worst of terms" for years and the suit had been brought in a struggle for the possession of property.

19. These principles apply to the present case. The lower appellate court has found that the appellant never really cared for his first wife and filed his suit for restitution only to defeather application for maintenance. In the circumstances, his suit was mala fide and rightly dismissed.

20. Lastly, the appellate court, reversing the finding of the trial court, believed the wife's allegation of specific acts of cruelty committed by the husband and held that she had been deserted and neglected by the husband for so many years. In the circumstances, I concur in the opinion of the District Judge that it will be inequitable to compel the first wife to live withsuch a husband. The appeal is dismissed under O. 41, R. 11, C.P.C.

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Danial Latifi v. *Union of India*

(2001) 7 SCC 740

S. RAJENDRA BABU, J. - The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 ("the Act") is in challenge before us in these cases.

2. The facts in ***Mohd. Ahmed Khan*** **v.** ***Shah Bano Begum*** [AIR 1985 SC 945] 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 ofRs 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 husband's 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 theiddat period and he sought thereafter to have the petition dismissed on the ground that shehad 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 upany 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 5000 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.

3. Thus, the principal 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 provisionsof Section 125 CrPC. 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 isrelevant 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 factoabsolve the husband's liability under the Act.

4. 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 of Section 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 him 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 textbooks on Muslim law, held that the divorced wife's 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 textbooks 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 (***TheHoly Quran***, Chapter II, Suras 241-42) 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.

5. There was a big uproar thereafter and Parliament enacted the Act perhaps, with the intention of making the decision in ***Shah Bano*** case ineffective.

6. The Statement of Objects and Reasons to the Bill, which resulted in the Act, reads as follows:

> The Supreme Court, in ***Mohd. Ahmed Khan*** **v.** ***Shah Bano Begum*** (AIR 1985 SC 945) has held that although the Muslim law limits the husband's 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 husband's 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 datesof 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 husband's relatives. If the above benefits are not given to her at the time of divorce, she is entitled toapply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the delivery 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 groundof 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 hasnot 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.

7. The object of enacting the Act, as stated in the Statement of Objects and Reasons to the Act, is that this Court, in ***Shah Bano*** case held that Muslim law limits the husband's 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.

8. As held in ***Shah Bano*** case 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 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 onthe question of the Muslim husband's 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*** **v.** ***Ali Hussain Fidaalli Chothia*** [(1979) 2 SCC 316] and ***Fuzlunbi*** **v.** ***K. Khader Vali*** [1980) 4 SCC 125].

9. Smt.Kapila Hingorani and Smt.Indira Jaising 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 125 CrPC 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 Parsis, pagans or heathens. It is submitted that Section 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 offset 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 Bano*** 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 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 of Section 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 anyother 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 125 CrPC, notwithstanding the fact that the conditions precedent for availing of the said remedies are satisfied.

10. 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 the 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 Bano*** 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.

11. 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 ***Shah Bano*** case. He submitted that this Court has hazarded the 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*** **v.** ***Koolsom Bee Bee*** [ILR 25 Cal 9 (PC)] 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 Actis not to penalise the husband but to avoid vagrancy and in this context Section 4 of the Act isgood 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 the social ethos of Muslim society spreads a wider net to take care of a Muslim divorced wife and not atall 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 tothe 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 under Section 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 is different and the enactment is consistent with law and justice.

12. It was further contended on behalf of the respondents that 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 the 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 (*sic* vagrancy) and from being a destitute; that therefore, the Act is not invalid or unconstitutional.

13. 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 Bano*** 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 the 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 textbooks, 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 Bin Usman Az-Zahbi;
5. Al-Maratu Bayn Al-Fiqha Wa Al Qanun by Dr Mustafa-as-Sabayi;
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.

14. On the basis of the aforementioned textbooks, it is contended that the view taken in ***Shah Bano*** case on the expression "mata" is not correct and the whole object of the enactment has been to nullify the effect of ***Shah Bano*** case so as to exclude the application ofthe provision of Section 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 Muslims and there should not be erosion ofthe personal law.

15. 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 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. Asad's 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 submittedthat neither are they 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 the 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 atypical case of a divorce before consummation to the woman whose mahr was not stipulated and deals with obligatory rights of maintenance for observing the iddat period or for breastfeeding 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.

16. 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 ableto extend requisite support. Therefore, realistic appreciation of the matter will have to be taken and this provision will have to be decided on the touchstone of Articles 14, 15 and also Article 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 by Section 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.

17. This Court in ***Shah Bano*** case held that although Muslim personal law limits the husband's 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 husband's 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 the 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.

18. The learned counsel have also raised certain incidental questions arising in these matters to the following effect:

(1) Whether the husbands 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?

19. The learned counsel for the parties have elaborately argued on a very wide canvas. 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.

20. 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 dependent 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 — asacramental sacrifice of her individual self and is far too enormous to be measured in terms ofmoney. 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 kindof 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.

21. 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;

22. 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 thata 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 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.

23. 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 anyone 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.

24. 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 remarried 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 ofthe 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 anyone of them has not enough means to pay the maintenance ordered by the Magistrate orthe 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 that Section 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.

25. Section 5 of the Act provides for option to be governed by the provisions of Sections 125 to 128 CrPC. 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.

26. 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 solemnised either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either under the Indian Divorce Act, 1869 or theIndian 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 durationof 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 norelatives, or no relatives are able to support the divorcee, then the court can order the State Wakf Boards to pay the maintenance.

27. 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 formerhusband. The judicial enforceability of the Muslim divorced woman's right to provision and maintenance under Section 3(1)(*a*) of the Act has been subjected to the condition of the 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.

28. A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was 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 clothes, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

29. The important section in the Act is Section 3 which provides that a divorced woman is entitled to obtain from her former husband "maintenance", "provision" and "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 wife's mahr and restored her dowry as per Sections 3(1)(*c*) and 3(1)(*d*) of the Act. Precisely, the point that arose for consideration in ***Shah Bano*** case was that the husband had not made a "reasonable and fair provision" for his divorced wife even if he had paid the

amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions 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 tobe paid; secondly, Section 4 of the Act, which empowers the Magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to "provision". Obviously, the right to have "a fair and reasonable provision" in her favour is a right enforceable only against the woman's former husband, and in addition to what he is obliged to pay as "maintenance"; thirdly, the words of *The Holy Quran*, as translated by Yusuf Ali of "mata" as "maintenance" though may be incorrect and that other translations employed the word "provision", this Court in ***Shah Bano*** case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether "mata" was rendered "maintenance" or "provision", there could be no pretence that the husband in ***Shah Bano*** 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 onetime transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word "provision" in Section 3(1)(*a*) of the Act incorporates "mata" as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables "a reasonable and fair provision" and "a reasonable and fair provision" as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in ***Shah Bano*** case, actually codifies the very rationale contained therein.

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 theAct 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 compellingthose 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*** case. 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***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 fromreferring 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 241-42 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*** 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*** case. The learned Solicitor-General contended that what has been stated in the objects and reasons in the 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*** 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.

33. In ***Shah Bano*** 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 Muslim 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 of Sections 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 notbe 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 Corpn***.[(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 remarry and such aright, if deprived, would not be reasonable, just and fair. Thus the provisions of the Act depriving the divorced 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 lawand, 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 tobe 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 on another construction which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that the 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 round.

34. The learned counsel appearing for the Muslim organisations contended after referring to various passages from the textbooks which we have adverted to earlier to state that the law is very clear that a divorced Muslim woman is entitled to maintenance only up to the stage of iddat and not thereafter. What is to be provided by way of mata is only a benevolentprovision to be made in case of a 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 onSuras 241 and 242 of Chapter II of ***The Holy Quran*** has been referred to in ***Shah Bano*** case. ***Shah Bano*** 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 up to the stage of iddat and this provision is applicable in case ofnormal 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 havingforgotten the historical background of the enactment. The enactment though purports to overcome the view expressed in ***Shah Bano*** case in relation to a divorced Muslim woman getting something by way of maintenance in the nature of mata is indeed 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 tothese two expressions by this Court in ***Shah Bano*** case. Therefore, we are of the view that thecontentions advanced on behalf of the parties to the contrary cannot be sustained.

35. In (many cases) 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 the 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 a 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*** [(1998) 2 DMC 85 (P&H) (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 the 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 ofiddat and thereafter if she is unable to maintain herself, she has to approach her relatives or the Wakf Board, by majority decisions in ***Usman Khan Bahamani* v. *Fathimunnisa Begum*** [AIR 1990 AP 225 (FB)], ***Abdul Rashid* v. *Sultana Begum*** [1992 Cri LJ 76 (Cal)]**,** ***Abdul Haq* v. *Yasmin Talat*** [1998 Cri LJ 3433 (MP)] and ***Mohd. 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.

36. While upholding the validity of the Act, we may sum up our conclusions:

(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(*a*) of the Act.

(2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(*a*) of the Act to pay maintenance is not confined to the iddat period.

(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct theState 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.

37. In the result, Writ Petitions Nos. 868, 996, 1001, 1055, 1062, 1236, 1259 and 1281 of 1986 challenging the validity of the provisions of the Act are dismissed.

* * * * *

Noor Saba Khatoon v. *Mohd. Quasim*

AIR 1997 SC 3280

DR A.S. ANAND, J. - A short but interesting question involved in this appeal, by special leave, is whether the children of Muslim parents are entitled to grant of maintenance under Section 125 CrPC for the period till they attain majority or are able to maintain themselves whichever date is earlier or in the case of female children till they get married or is their right restricted to the grant of maintenance only for a period of two years prescribed under Section 3(1)(*b*) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 notwithstanding Section 125 CrPC.

2. The appellant married the respondent according to Muslim rites on 27-10-1980. During the wedlock, three children were born - two daughters and a son. On certain disputes arising between the parties, the respondent allegedly turned the appellant out of the matrimonial home along with the three children then aged 6 years, 3 years and 1 ½ years and also refused and neglected to maintain her and the children thereafter. After turning the appellant out ofthe matrimonial home, the respondent took a second wife, Shahnawaz Begum. Claiming that the appellant has no means to maintain herself and the children and that the respondent had both agricultural land and was carrying on business in electrical appliances as well and had sufficient income and means to maintain them, she filed an application under Section 125 CrPC in the Court of Shri A.K. Jha, Judicial Magistrate, First Class, Gopalganj, on 13-2- 1992. She claimed a sum of Rs 400 per month for herself and Rs 300 per month as maintenance for each of the three children. The application was contested, though it was only the appellant, who adduced evidence at the trial and the respondent/husband did not lead any evidence. The trial court found that the respondent had failed and neglected to maintain his wife and children and that they had no source of income or means to maintain themselves andaccordingly held that they were entitled to the grant of maintenance from the respondent. By its order dated 19-1-1993, the trial court directed the respondent to pay maintenance to the appellant at the rate of Rs 200 per month for herself and at the rate of Rs 150 per month for each of the three minor children, till they attain the age of majority. While the matter rested thus, the respondent divorced the appellant and thereafter filed an application in the trial courtseeking modification of the order dated 19-1-1993, in view of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the 1986 Act).By an order dated 27-7-1993, the trial court modified the order dated 19-1-1993, insofar as the grant of maintenance to the appellant is concerned while maintaining the order granting maintenance to each of the three minor children. Insofar as the appellant is concerned, thetrial court held that in view of the provisions of the 1986 Act the appellant-wife after her divorce was entitled to maintenance only for a period of three months i.e. for the period of *iddat*. The trial court further found that the right to maintenance under Section 125 CrPC insofar as the children are concerned was not affected by the 1986 Act in any manner. The order dated 27-7-1993 was challenged by the respondent through a revision petition in the Court of 2nd Additional Judge, Gopalganj. On 16-7-1994, the revisional court dismissed the revision petition holding that the 1986 Act does not override the provisions of Section 125 CrPC for grant of maintenance to the minor children and that Section 3(1)(*b*) of the 1986 Act

also entitles a divorced woman to claim reasonable and fair maintenance from her husband for maintaining the children born to her before or after her divorce from her former husband for a period of two years from the respective dates of birth of the children and that the said provision did not affect the right to maintenance of the minor children granted by Section 125CrPC. The respondent, thereupon, filed a criminal miscellaneous petition under Section 482 CrPC in the High Court challenging the correctness of that part of the order of the revisional court which upheld the right to maintenance of the three minor children under Section 125 CrPC at the rate of Rs 150 per month per child. A learned Single Judge of the High Court accepted the plea of the respondent that vide Section 3(1)(*b*) of the 1986 Act, a divorced Muslim woman is entitled to claim maintenance from her previous husband for her minor children *only* for a period of two years from the date of birth of the child concerned and that the minor children were *not* entitled to claim maintenance under Section 125 CrPC after the coming into force of the 1986 Act. The High Court noticed that the two older children were aged 6 years and 3 years when the application for maintenance was filed on their behalf by their mother, and thus "had completed two years prior to filing of the petition for grant of maintenance" and as such those two children were held not entitled to the grant of any maintenance under Section 125 CrPC and that the third child, who was only 1 ½years of age on 19-1-1993, was entitled to receive maintenance till she attained the age of two years i.e.till 19-7-1993 from the date of filing of the application i.e. 13-2-1992. With the said modification, the miscellaneous application of the respondent-husband was partly allowed.By special leave to appeal the appellant has come up to this Court.

3. The facts are not in dispute. The appellant had filed a petition for grant of maintenance under Section 125 CrPC for herself as well as on behalf of the three children born during the wedlock, who were living with her, since the respondent had refused and neglected tomaintain them. On the date of the application filed under Section 125 CrPC i.e. 13-2-1992,the children were aged 6 years, 3 years and 1 ½ years After the trial court granted the petition under Section 125 CrPC in favour of the appellant and the three minor children, the respondent divorced the appellant and filed an application seeking modification of the orderof maintenance in view of the provisions of the 1986 Act. The trial court modified its order qua the appellant, restricting the grant of maintenance to the period of *iddat* but maintainedits earlier order insofar as the children are concerned. While the revisional court declined to interfere with the order of the trial court, the High Court based itself on Section 3(1)(*b*) of the 1986 Act to hold that the grant of maintenance to the children of divorced Muslim parents, living with their mother, was restricted to the period prescribed under the said sectionnotwithstanding the provisions of Section 125 CrPC.

4. Does Section 3(1)(*b*) of the 1986 Act in any way affect the rights of the minor children of divorced Muslim parents to the grant of maintenance under Section 125 CrPC is thus the moot question.

5. The preamble to the 1986 Act reads:

> 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.

6. The Act, thus, aims to protect the rights of Muslim women who have been divorced. The 1986 Act was enacted as a sequel to the judgment in ***Mohd. Ahmed Khan* v. *Shah Bano Begum*** [AIR 1985 SC 945]. The question of maintenance of children was *not* involved in the controversy arising out of the judgment in the case of ***Shah Bano Begum***. The Act was *not* enacted to regulate the obligations of a Muslim father to maintain his minor children unable to maintain themselves which continued to be governed with Section 125 CrPC. This position clearly emerges from a perusal of the relevant provisions of the 1986 Act.

7. Section 3 of the 1986 Act to the extent relevant for this case reads:

> 3. ***Mahr or other properties of Muslim woman to be given to her at the time of divorce***.- (1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—
>
> (a) a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband;
>
> (b) Where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;
>
> (c) an amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and
>
> (d) All the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

From a plain reading of the above section it is manifest that it deals with "Mahr" or other properties of a *Muslim woman* to be given to her at the time of *divorce*. It lays down that a reasonable and fair provision has to be made for payment of maintenance to her during the period of *iddat* by her former husband. Clause (*b*) of Section 3(1) (*supra*) provides for grant of *additional* maintenance to her for the fosterage period of two years from the date of birth of the child of marriage for maintaining that child during the fosterage. Maintenance for the prescribed period referred to in clause (*b*) of Section 3(1) is granted on the *claim* of the divorced mother *on her own behalf* for maintaining the infant/infants for a period of two years from the date of the birth of the child concerned who is/are living with her and presumably is aimed at providing some extra amount to the mother for *her* nourishment for nursing or taking care of the infant/infants up to a period of two years It has nothing to dowith the right of the child/children to claim maintenance under Section 125 CrPC. So long as the conditions for the grant of maintenance under Section 125 CrPC are satisfied, the rights ofthe minor children, unable to maintain themselves, are not affected by Section 3(1)(*b*) of the 1986 Act. Under Section 125 CrPC the maintenance of the children is obligatory on the father(irrespective of his religion) and as long as he is in a position to do so and the children haveno independent means of their own, it remains his *absolute obligation* to provide for them. Insofar as children born of Muslim parents are concerned there is nothing in Section 125CrPC which exempts a Muslim father from his obligation to maintain the children. These provisions are not affected by clause (*b*) of Section 3(1) of the 1986 Act and indeed it would be unreasonable, unfair, inequitable and even preposterous to deny the benefit of Section 125

CrPC to the children only on the ground that they are born of Muslim parents. The effect of a beneficial legislation like Section 125 CrPC, cannot be allowed to be defeated except through clear provisions of a statute. We do not find manifestation of any such intention in the 1986 Act to take away the independent *rights* of the children to claim maintenance under Section 125 CrPC where they are minor and are unable to maintain themselves. A Muslim father's obligation, like that of a Hindu father, to maintain his minor children as contained in Section 125 CrPC is *absolute* and is not at all affected by Section 3(1)(*b*) of the 1986 Act. Indeed a Muslim father can claim custody of the children born through the divorced wife to fulfil his obligation to maintain them and if he succeeds, he need not suffer an order or direction under Section 125 CrPC but where such custody has not been claimed by him, he cannot refuse and neglect to maintain his minor children on the ground that he has divorced their mother. The right of the children to claim maintenance under Section 125 CrPC is separate, distinct and independent of the right of their divorcee mother to claim maintenance for herself for maintaining the infant children up to the age of 2 years from the date of birth of the child concerned under Section 3(1) of the Act. There is nothing in the 1986 Act which in any manner affects the application of the provisions of Sections 125-128 of the CrPC relating to grant of maintenance insofar as minor children of Muslim parents, unable to maintain themselves, are concerned.

8. Indeed Section 3(1) of 1986 Act begins with a non obstante clause "notwithstanding anything contained in any other law for the time being in force" and clause (*b*) thereof provides that a divorced woman shall be entitled to a reasonable and fair provision for maintenance by her former husband to maintain the children born out of the wedlock for a period of two years from the date of birth of such children, but the non obstante clause in our opinion only restricts and confines the right of a divorcee Muslim woman to claim or receive maintenance for herself and for maintenance of the child/children till they attain the age of two years, notwithstanding anything contained in any other law for the time being in force *in that behalf*. It has nothing to do with the independent right or entitlement of the minorchildren to be maintained by their Muslim father. A careful reading of the provisions of Section 125 CrPC and Section 3(1)(*b*) of the 1986 Act makes it clear that the two provisions apply and cover different situations and there is no conflict, much less a real one, between thetwo. Whereas the 1986 Act deals with the obligation of a Muslim husband vis-à-vis his divorced wife including the payment of maintenance to her for a period of two years of fosterage for maintaining the infant/infants, where they are in the custody of the mother, the obligation of a Muslim father to maintain the minor children is governed by Section 125 CrPC and his obligation to maintain them is absolute till they attain majority or are able to maintain themselves, whichever date is earlier. In the case of female children this obligation extends till their marriage. Apart from the statutory provisions referred to above, even under the Muslim Personal Law, the right of minor children to receive maintenance from their father, till they are able to maintain themselves, is absolute.

9. Prof. Tahir Mahmood, in his book ***Statute Law relating to Muslims in India*** (1995 Edn.), while dealing with the effect of the provisions of Section 125 CrPC on the 1986 Act and the Muslim Personal Law observes at p. 198:

These provisions of the Code remain fully applicable to the Muslims, notwithstanding the controversy resulting from the *Shah Bano case* and the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986. *There is nothing in that Act in any way affecting the application of these provisions to the children and parents governed by Muslim law....*

As regards children, the Code adopts the age of minority from the Majority Act, 1875 by saying: '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.' — [Explanation to Section 125(1), clause (*a*).] *Ordinarily, thus, every Muslim child below 18 can invoke the CrPC law to obtain maintenance from its parents if they 'neglect or refuse' to maintain it despite 'having sufficient means*'.... * * *

By Muslim law, maintenance (nafaqa) is a birthright of children and an absolute liability of the father. Daughters are entitled to maintenance till they get married if they are bakira (maiden), or till they get remarried if they are thayiba (divorcee/widow). Sons are entitled to it till they attain bulugh if they are normal; and as long as necessary if they are handicapped or indigent. Providing maintenance to daughters is a great religious virtue. The Prophet had said:

Whoever has daughters and spends all that he has on their upbringing will, on the Day of Judgment, be as close to me as two fingers of a hand.'

If a father is poverty-stricken and cannot therefore provide maintenance to his children, while their mother is affluent, the mother must provide them maintenance subject to reimbursement by the father when his financial condition improves.

10. Thus, both under the personal law and the statutory law (Section 125 Cr PC) the obligation of a Muslim father, having sufficient means, to maintain his minor children, unable to maintain themselves, till they attain majority and in case of females till they get married, is absolute, notwithstanding the fact that the minor children are living with the divorced wife.

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

THE END