"An order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody."

An extract from the Judgment of Hon'ble Supreme Couret of India in Gaytri Bajaj Versus Jiten Bhalla Civil Appeal Nos. 7232-7233 of 2012 Arising out of SLP (Civil) 35468-69 of 2009)

Hon'ble Mr. Justice Ranjan Gogoi

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

"God always has something for you
A Key for every problem
A Light for every shadow
A Relief for every sorrow and
A Plan for every tomorrow"

An extract from the Judgment of Hon'ble Supreme Court of India in Anu Bhandari Vs. Pradip Bhandari [Civil Appeal No. 2494 of 2018 arising out of S.L.P. (Civil) No. 15537 of 2016] [Civil Appeal No. 2495 of 2018 @ SLP (Civil) No. 2343 of 2017]

Hon'ble Mr. Justice Kurian Joseph

YEAR OF PUBLICATION : 2018

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

Year of Publication : 2018

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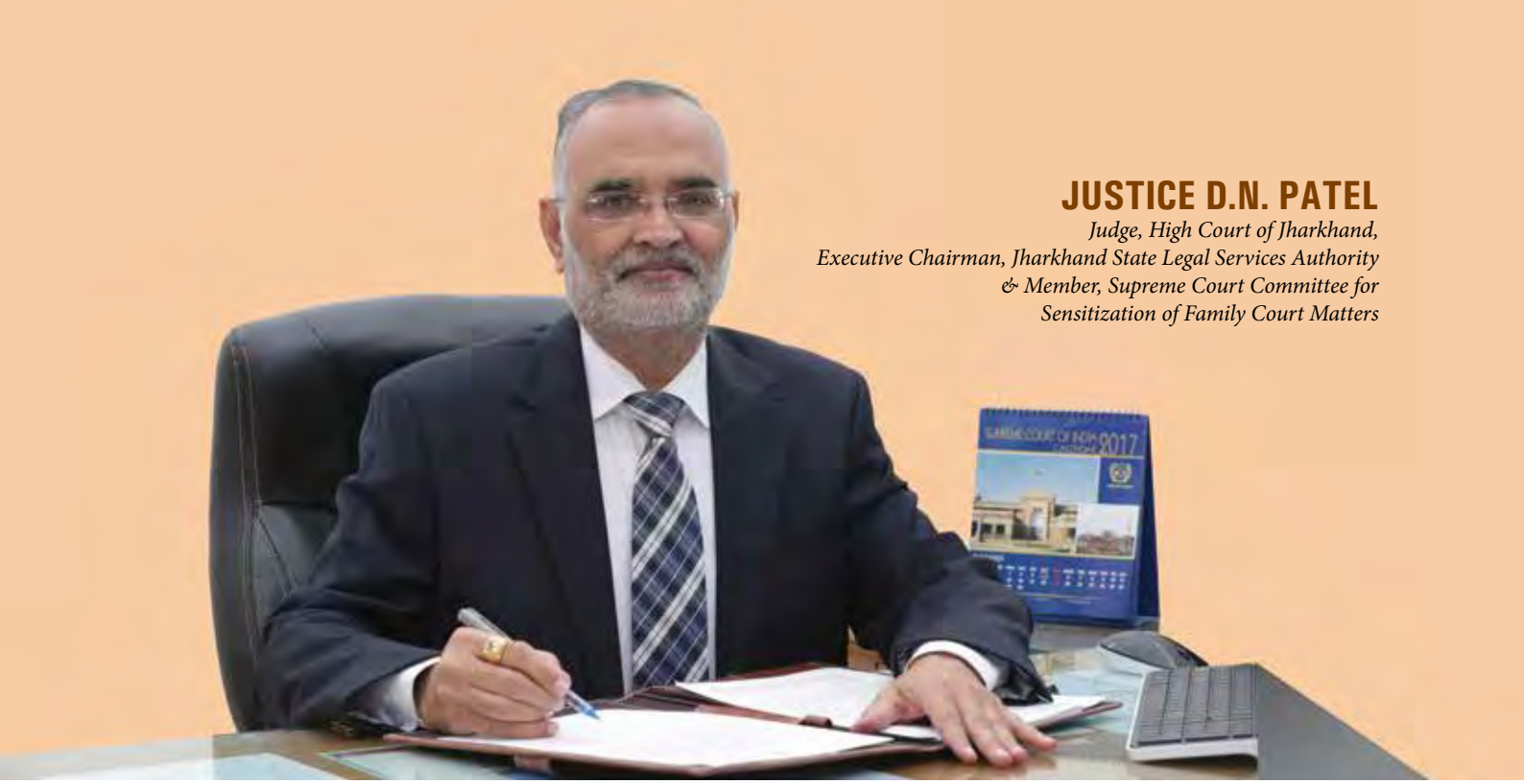

JUSTICE D.N. PATEL
Judge, High Court of Jharkhand,
Executive Chairman, Jharkhand State Legal Services Authority
& Member, Supreme Court Committee for
Sensitization of Family Court Matters

Preface...

The Family Court is a unique jurisdiction. It deals with families in crisis, and emotions run high. Its judges are faced with extremely difficult decisions,which affect litigants in a profoundly personal way. The welfare of children is often at stake. Personal rights compete with protection and security. Fairness competes with the welfare of children. Such principles cannot always be balanced or compromised – one must prevail over the other. People are hurt by these decisions, however "right" they may be.

The Family Court should be the place where family legal disputes are resolved as quickly possible, in a way that meets the needs of families – especially children. To achieve this, the Family Court must:

- *help families reach agreements;*
- *give families information and professional advice to inform their decision making;*
- *provide opportunity for children's views to be heard;*
- *give children representation;*
- *deal in the same place with matters relating to the same family;*
- *recognise differing cultural values;*
- *provide information and professional expertise to inform court decisions, where these are required;*
- *provide help from empathetic, well-qualified, and properly trained staff and professionals;*
- *liaise effectively with individuals and community groups that help families;*
- *keep pace with social change;*
- *provide a fair and just process;*
- *resolve disputes as speedily as possible;*
- *make urgent interim orders where necessary.*

These have been the aims of the Family Court since it was set up in 1984. Over the last 34 years its jurisdiction has burgeoned, putting increasing pressure on resources. There has also been profound social change. Our Family Court model acknowledges these changes, and takes a more focused and targeted response to dispute resolution. We believe it will achieve more enduring outcomes that are better for children.

The Family Court is, however, only a venue for dispute resolution. Overall, outcomes for Indian families depend on many other factors, such as health, poverty, education, and employment, all of which impact on the families who may seek assistance from the Family Court.

The Family Court of India is a specialist court with specialist judges. It has comprehensive jurisdiction over family matters. The legislation provides for pro active approach to bring about reconciliation and settlement.

The ***Supreme Court Committee for Sensitization of Family Court Matters*** *has organized Conferences For Sensitization of Family Court Matters at Regional level for all the four regions of India and 1st National Meet is going to be organized at Ranchi on 17th November, 2018. By this, the first round will be complete. Our aim and objective has been to sensitize all the duty holders. This Compilation of Landmark Judgments of Supreme Court of India on Family Matters is an attempt to place before all the duty holders- such as Family Court Judge, Counsellors, Experts, NGOs etc- those judgments of the Hon'ble Supreme Court of India which are landmark on the topic. These Judgments not only define the law, but also, sensitize us about the innocence of child and esteem of women and elders. We have put this work on our website- www.jhalsa.org- for being used by legal fraternity and common people alike.*

ॐ सर्वे भवन्तु सुखिनः सर्वे सन्तु निरामयाः।
सर्वे भद्राणि पश्यन्तु मा कश्चिद्दुःखभाग्भवेत्।
ॐ शान्तिः शान्तिः शान्तिः ।।

May all be prosperous and happy, May all be free from illness
May all see what is spiritually uplifting, May no one suffer
Om peace, peace, peace.

''सभी सुखी होवें, सभी रोगमुक्त रहें, सभी मंगलमय घटनाओं के साक्षी बनें
और किसी को भी दुःख का भागी न बनना पड़े।''

(Justice D.N. Patel)

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ANU BHANDARI VERSUS PRADIP BHANDARI

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Kurian Joseph and Hon'ble Mr. Justice Mohan M. Shantanagoudar**

Anu Bhandari ...Petitioner
Versus
Pradip Bhandari ...Respondent

[Civil Appeal No. 2495 of 2018 @ SLP (Civil) No. 2343 of 2017]

[Civil Appeal No. 2494 of 2018 arising out of S.L.P. (Civil) No. 15537 of 2016]

Decided on : **5th March, 2018**

The appellant and respondent solemnized marriage on 18-05-1997 and have two children. After seven years of marriage, the differences arose and both started living separately since March 2011. They have altogether 23 pending civil as well as criminal cases. Many fruitless attempts were made to settle the matter. Finally the matter came to the Supreme Court and the Court finally settled all the matters except the matter of S13(b) of Hindu Marriage Act,1955. Seeing the condition of the spouse, the court decided not to delay the matter for another 6 months and granted them divorce by mutual consent. Held Under section 9 of the Family Court Act, 1984 the court has a duty to make an endeavour to assist and persuade the parties to settle the matter. The jurisdiction is not the just to decide the dispute.The court has to involve itself in the process of conciliation/mediation between the parties. Duty of the Court is not only to settle disputes but also to secure speedy settlement of disputes. This will help not only in resolving the dispute but also to prevent multiplicity of litigations between the parties.

JUDGMENT

Hon'ble Mr. Justice Kurian Joseph :—

1. Leave granted.

2. "god always has something for you
A Key for every problem
A Light for every shadow
A Relief for every sorrow and
A Plan for every tomorrow

Very
Obedient
Vibhu"

This is the rich encomium paid to the Court by Master Vibhu, the ten year old son of the appellant and respondent. The little one present in Court today is exuberantly happy and sought

liberty to present a handmade card expressing his joy on the settlement of all the disputes and litigations between his mother and father. Their marriage was solemnized as per Hindu rites on 18.05.1997. They have two children - Bhuvi, the elder daughter born on 19.04.1998 and Vibhu, son born on 31.01.2008. On account of marital discord and temperamental differences, they have been living separately since March, 2011. They are involved in various litigations, civil as well as criminal. As of now, twenty three cases are pending before various courts - Trial Courts, High Court, this Court and one before the Consumer Forum.

3. There have been several efforts for settlement. Notable among them were the intervention of Hon'ble Mrs. Justice Lisa Gill, Judge of the High Court of Punjab and Haryana and Ms. Meenakshi Arora, learned Senior Counsel, appointed by this Court as Mediator. Having noticed that all the efforts hitherto have not been fully fruitful, we directed the parties to be present before this Court. The parties have cooperated with the tireless efforts taken by this Court. It is heartening to note that finally the parties have reached an amicable settlement. The terms of settlement have been stated in detail in Interlocutory Application No. 19210 of 2018, based on which the parties have sought for divorce by mutual consent. The Interlocutory Application No. 19210 of 2018 shall form part of this Judgment.

4. Since the parties have finally resolved their entire disputes, they have prayed for giving a quietus to the entire civil and criminal litigations. Having regard to the nature of the cases and having due regard to the settlement, we are of the view that it is in the interest of justice that the entire litigations between the parties are also put an end to, in terms of the settlement.

5. Accordingly, the following cases are quashed:-

Sl. No.	Case No.	Court/Authority
1.	Crl. Complaint No.162/14	Judicial Magistrate First Class, Chandigarh
2.	Crl. Complaint No.1359/16	Judicial Magistrate First Class, Chandigarh
3.	PHC 1430/14	Judicial Magistrate First Class, Chandigarh
4.	Untraceable Case 156/2016	Judicial Magistrate First Class, Chandigarh
5.	Case No.301/13 dated 14.6.13	Judicial Magistrate First Class, Chandigarh
6.	Case No.464/13	Judicial Magistrate First Class, Chandigarh
7.	FIR No.0167 dated 25.8.2017 P.S. City Phagwara	P.S. City Phagwara

6. The following cases are dismissed:-

Sl. No.	Case No.	Court/Authority
1.	Civil Suit No.12905/13	Judicial Magistrate First Class, Chandigarh
2.	Crl. Misc. Case No.570 of 2016	Judicial Magistrate First Class, Chandigarh
3.	Crl. Misc. Case No.305 of 2015	Judicial Magistrate First Class, Chandigarh
4.	Execution App. No.543/14	ADJ, Chandigarh
5.	Civil Suit No.CS CJ/1072/2016	JMIC, Chandigarh
6.	Contested Mutation No.8303 of Village Maloya, Chandigarh	Sub. Divisional Magistrate (South) U.T. Chandigarh

7. The following cases are disposed of in terms of the Settlement:-

Sl. No.	Case No.	Court/Authority
1.	CRM No.M-1087 of 2017	High Court of Punjab and Haryana at Chandigarh
2.	CRM No.M-10620 of 2017	High Court of Punjab and Haryana at Chandigarh
3.	CRM No.M-14499 of 2017	High Court of Punjab and Haryana at Chandigarh
4.	CRM No.M-7865 of 2017	High Court of Punjab and Haryana at Chandigarh
5.	CRM No.M-7622 of 2017	High Court of Punjab and Haryana at Chandigarh
6.	CRM No.M-31885 of 2017	High Court of Punjab and Haryana at Chandigarh
7.	CRM No.M-22474 of 2014	High Court of Punjab and Haryana at Chandigarh

The Consumer Case No.580 of 2014 filed by Ms. Anu Bhandari pending before the Chandigarh District Consumer Disputes Redressal Forum-I, UT Chandigarh is dismissed.

8. Civil Appeal No. 2494 of 2018 arises out of Special Leave Petition (Civil) No. 15537 of 2016 filed by Ms. Anu Bhandari being aggrieved by Order dated 11.04.2016 passed by the High Court of Punjab and Haryana in Civil Revision No. 3430 of 2014. Civil Appeal No. 2495 of 2018 arises out of Special Leave Petition (Civil) No. 2343 of 2017 is filed by Pradip Bhandari 5 being aggrieved by Order dated 11.04.2016 passed by the High Court of Punjab and Haryana in Civil Revision No. 3430 of 2014.

9. What survives is only the Application filed by the parties under Section 13B of the Hindu Marriage Act, 1955. As we have settled all disputes, we do not think it necessary to relegate them for another litigation before the Family Court. The parties are present before us. Having regard to the background of the litigation and having regard to the long separation between the parties, we are convinced that the parties have taken a conscious decision, uninfluenced by any extraneous factors. Therefore, it is not necessary for them to wait for a further period of six months. Accordingly, the marriage between Anu Bhandari and Pradip Bhandari is dissolved by a decree of divorce by mutual consent.

10. The appellant and respondent are directed to strictly abide by the terms of settlement. They are also restrained from instituting any fresh litigation in respect of the subject matter without leave of this Court.

11. In our Order dated 15.02.2018, the following direction in terms of the statement had been issued:

> "**2.** *Mr. Pradip Bhandari is directed to transfer his share in agricultural land situated in Khewat No.159, Khatauni No.176, Khasra 46/2 (20-0) in Village Golpura, Tehsil and District Panchkula as per Jamabandi for the year 2007-2008 left over land owned as on date by Mr. Pradip Bhandari in favour of Ms. Anu Bhandari/wife, Bhuvi Bhandari and master Vibhu Bhandari.*"

12. The Tehsildar concerned is directed to effect the required transfer and change the mutation in respect of the property referred to in the order in favour of Anu Bhandari, Bhuvi Bhandari and Master Vibhu Bhandari. It is made clear that the share of Mr. Pradip Bhandari will be equally divided among the three. This shall be done immediately.

13. We are informed that an amount of Rs.50,000/- (Rupees Fifty Thousand) is lying in the form of Demand Draft in the name of Ms. Anu Bhandari with Judicial Magistrate First Class, Chandigarh in Case No. 301 of 2013 dated 14.06.2013. We direct the Court concerned to return the Demand

Draft to Mr. Pradip Bhandari forthwith. Mr. Pradip Bhandari is directed to pay an amount of Rs.50,000/- to Ms. Anu Bhandari within a week thereafter.

14. Before parting with the Judgment, we may hasten to observe that what has been closed is not simply twenty three cases; in the background of both the parties, they would have easily gone for many more litigations in the coming years. Under Section 9 of the Family Courts Act, 1984, the Court has a duty to make an endeavour to assist and persuade the parties in arriving at a settlement.

Unlike many other legislations, the Legislature has cast a duty on the Court in that regard. The jurisdiction is not just to decide a dispute, on the contrary, the court also has to involve itself in the process of conciliation/mediation between the parties for assisting them not only to settle the disputes but also to secure speedy settlement of disputes. Such timely intervention of the court will not only resolve the disputes and settle the parties peacefully but also prevent sporadic litigations between the parties.

15. We record our deep appreciation for the strenuous efforts taken by Hon'ble Mrs. Justice Lisa Gill, Judge of the High Court of Punjab and Haryana, Ms. Meenakshi Arora, learned Senior Counsel appointed as Mediator by this Court and for the cooperation extended by the learned Counsel on both sides and the parties themselves.

16. The Civil Appeals are accordingly disposed of.

17. There shall be no order as to costs.

❑❑❑

SANTHINI VERSUS VIJAYA VENKETESH

SUPREME COURT OF INDIA

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

Santhini Petitioner(S)
Versus
Vijaya Venketesh Respondent(S)

Transfer Petition (Civil) No. 1278 Of 2016
With
Transfer Petition (Civil) No. 422 Of 2017

Decided on : **09th August, 2017**

The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation. Reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties. The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework. The child is of both parents and the child has a right to get the love and affection of both the parents and also has a duty to love and respect both the parents.

ORDER

Hon'ble Mr. Justice Kurian Joseph :—

1. The petitioner has approached this Court seeking for transfer of O.P.(HMA) No.580 of 2015 filed for dissolution of marriage of the respondent and petitioner and O.P. No.1282 of 2012 filed for custody of minor child, from the Court of Family Court, Alappuzha, Kerala to Family Court, Chennai, Tamil Nadu.

2. When the matter came up for consideration before this Court, learned counsel appearing for the respondent brought to our notice a decision rendered by a coordinate Bench of this Court in Krishna Veni Nagam v. Harish Nagam[1] and requested that there is no need to transfer the cases; instead parties can be directed to avail the facility of video conferencing, as suggested by this Court in the case referred to above.

3. In Krishna Veni Nagam (supra) a coordinate Bench of this Court went into the issue of preventing the backlog of transfer petitions before the Courts. It appears that the Court also had the assistance of an amicus. Having heard the learned Counsel on both the sides and learned amicus, the Court finally, at paragraph-18, issued the following directions:-

> ***"18.*** *We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court*

1 (2017) 4 SCC 150

where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of defendant/respondent does not result in denial of justice. Order incorporating such safeguards may be sent along with the summons. The safeguards can be:-

i) *Availability of video conferencing facility.*

ii) *Availability of legal aid service.*

iii) *Deposit of cost for travel, lodging and boarding in terms of Order XXV CPC.*

iv) *E-mail address/phone number, if any, at which litigant from out station may communicate."*

4. We are informed that not only this Court but the High Courts and even the District Courts are passing orders in the light of the judgment referred to above, relegating the parties to video conferencing even where such facilities are not available. Thus, it is a situation not only of inter State appeal or intra State appeal but also of intra District appeal.

5. Having due regard to the nature of family disputes sought to be addressed by the Parliament, we are afraid, the Court in Krishna Veni Nagam (supra) has not been furnished with the required information, before passing the order.

6. The Family Courts Act, 1984 was introduced with the following purpose:-

"INTRODUCTION

From time to time, it had been urged by several organisations of women, other organisations and individuals that Family Courts be set-up for the settlement of family disputes. The Law Commission in its 59th Report had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. In 1976 the Code of Civil Procedure was also amended to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family, but not much change in the attitude of the courts was noticed. Therefore, the need was felt to establish Family Courts for speedy settlement of family disputes. Accordingly the Family Courts Bill was introduced in the Parliament.

STATEMENT OF OBJECTS AND REASONS

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

prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

2. *The Bill, inter alia, seeks to-*

(a) *provide for establishment of Family Courts by the State Government;*

(b) *make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million;*

(c) *enable the State Governments to set up, such courts, in areas other than those specified in (b) above;*

(d) *exclusively provide within the jurisdication of the Family Courts the matters relating to-*

(i) *matrimonal relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person;*

(ii) *the property of the spouses or of either of them;*

(iii) *declaration as to the legitimacy of any person;*

(iv) *guardianship of a person or the custody of any minor;*

(v) *maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure;*

(e) *make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply;*

(f) *provide for the association of social welfare agencies, counsellors, etc., during conciliation stage and also to secure the service of medical and welfare experts;*

(g) *provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the court may, in the interest of justice, seek assistance of a legal expert as amicus curiae;*

(h) *simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute;*

(i) *provide for only one right of appeal which shall lie to the High Court.*

3. *The Bill seeks to achieve the above objects." (Emphasis supplied)*

7. Section 9 of the Family Courts Act, 1984 makes it a mandatory duty of the Family Court to make efforts for settlement. The said provision reads as follows:-

"9. *Duty of Family Court to make efforts for settlement. (1) In every suit or proceeding, endeavor shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or*

proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2) *If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.*

(3) *The power conferred by sub-section (2) shall be in addition to, and not in derogation of any other power of the Family Court to adjourn the proceedings." (Emphasis supplied)*

8. In order to assist the Family Court, the Act has provided for association of social welfare agencies. In Section 6 provision regarding counsellors, officers and other employees of Family Courts is mentioned, which reads as follows:-

"6. *Counsellors, officers and other employees of Family Courts. (1)The State Government shall in consultation with the High Court, determine the number and categories of counsellors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counsellors, officers and other employees as it may think fit.*

(2) *The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees, referred to in sub-section (1), shall be such as may be specified by rules made by the State Government."*

9. Section 12 provides for the assistance of medical and welfare experts, which reads as under:-

"12. *Assistance of medical and welfare experts.-In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act."*

10. Section 11 provides that "in every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires".

11. Under the Hindu Marriage Act, 1955 also, in respect of the family matters, the Parliament has made several provisions for reconciliation. Under Section 23(2) "before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties".

12. Sub-section (3) of Section 23 of the Hindu Marriage Act further provides for methods to facilitate the process, which reads as follows:-

"23 (3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has

been effected and the court shall in disposing of the proceeding have due regard to the report." (Emphasis supplied)

13. Section 22 of the Hindu Marriage Act has given a very important safeguard for protecting the privacy of the proceedings or prohibiting the printing and publishing of any proceedings before the Court, except the printed judgment of the High Court or the Supreme Court. The section also provides for the situation where the proceedings are to be held in camera. Section 22 reads as follows:-

"22 Proceedings to be in camera and may not be printed or published.(1) Every proceeding under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) *If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees." (Emphasis supplied)*

14. Section 26 of the Hindu Marriage Act deals with the custody of children, wherein it is mandatory for the Court to ascertain the wish of the children as well before taking a decision on the custody. The said section reads as follows:-

"26 Custody of children.- In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made:

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent." (Emphasis supplied)

15. Order XXXIIA of the Code of Civil Procedure was introduced in the year 1976. The same pertains to "suits relating to matters concerning the family". Rule 3 casts a duty on the Court to make every effort for settlement in family matters, the said provision reads as follows:-

"3. Duty of court to make efforts for settlement.-

(1) *In every suit or proceeding to which this Order applies, an endeavour shall be made by the court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.*

(2) *If, in any such suit or proceeding, at any stage it appears to the court that there is a reasonable possibility of a settlement between the parties, the court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.*

(3) *The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the court to adjourn the proceedings.*"

16. Rule 2 deals with in camera proceedings. Rule 4 provides for the assistance of a welfare expert and Rule 5 casts a duty on the Court to "inquire, so far as it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant".

17. Unfortunately, it seems, none of these mandatory procedures as laid down by the Parliament have been brought to the notice of the Court while considering the case of Krishna Veni Nagam (supra). The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework. Reconciliation is not mediation. Neither is it conciliation. No doubt, there is conciliation in reconciliation. But the concepts are totally different. Similarly, there is mediation in conciliation but there is no conciliation in mediation. In mediation, the role of the mediator is only to evolve solutions whereas in reconciliation, the duty-holders have to take a proactive role to assist the parties to reach an amicable solution. In conciliation, the conciliator persuades the parties to arrive at a solution as suggested by him in the course of the discussions. In reconciliation, as already noted above, the duty-holders remind the parties of the essential family values, the need to maintain a cordial relationship, both in the interest of the husband and wife or the children, as the case may be, and also make a persuasive effort to make the parties reconcile to the reality and restore the relationship, if possible. The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation. However, reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties. In all these matters, the approaches are different.

18. The role of a counsellor in Family Court is basically to find out what is the area of incompatibility between the spouses, whether the parties are under the influence of anybody or for that matter addicted to anything which affects the normal family life, whether they are taking free and independent decisions, whether the incompatibility can be rectified by any psychological or psychiatric assistance etc. The counsellor also assists the parties to resume free communication. In custody matters also the counsellor assists the child, if he/she is of such age, to accept the reality of incompatibility between the parents and yet make the child understand that the child is of both parents and the child has a right to get the love and affection of both the parents and also has a duty to love and respect both the parents etc. Essentially, the counsellor assists the parents to shed their ego and take a decision in the best interest of the child.

19. To what extent the confidence and confidentiality will be safeguarded and protected in video conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered. It is certainly difficult in video conferencing, if not impossible, to maintain confidentiality. It has also to be noted that the footage in video conferencing becomes part of the record whereas the reconciliatory efforts taken by the duty-holders referred to above are not meant to be part of the record. All that apart, in reconciliatory efforts, physical presence of the parties would make a significant difference. Having regard to the very object behind the establishment of Family Courts Act, 1984, to Order XXXIIA of the Code of Civil Procedure and to the special provisions introduced in the Hindu Marriage Act under Sections 22, 23 and 26,

we are of the view that the directions issued by this Court in Krishna Veni Nagam (supra) need reconsideration on the aspect of video conferencing in matrimonial disputes.

20. Therefore, we are of the view that the matter requires consideration by a larger Bench. The Registry is directed to place the papers before Hon'ble the Chief Justice of India. We request Hon'ble the Chief Justice of India to expeditiously constitute a Bench havingregard to the urgency of the matter.

Per **Hon'ble Mr. Justice Dipak Misra, CJI.**

[For himself and Khanwilkar, J.] A two-Judge Bench in Krishna Veni Nagam v. Harish Nagam1, while dealing with transfer petition seeking transfer of a case instituted under Section 13 of the Hindu Marriage Act, 1955 (for brevity, the 1955 Act) pending on the file of IInd Signature Not Verified Presiding Judge, Family Court, Digitally signed by CHETAN KUMAR Jabalpur, Madhya Pradesh to the Family Court, Hyderabad, Andhra Date: 2017.10.09 16:22:15 IST Reason:

Pradesh, took note of the grounds of transfer and keeping in view the 1 (2017) 4 SCC 150 approach of the Court to normally allow the transfer of the proceedings having regard to the convenience of the wife, felt disturbed expressing its concern to the difficulties faced by the litigants travelling to this Court and, accordingly, posed the question whether there was any possibility to avoid the same. It also took note of the fact that in the process of hearing of the transfer petition, the matrimonial matters which are required to be dealt with expeditiously are delayed. That impelled the Court to pass an order on 09.01.2017 which enumerated the facts including the plight asserted by the wife, the concept of territorial jurisdiction under Section 19 of the 1955 Act, and reflected on the issues whether transfer of a case could be avoided and alternative mode could be thought of. Dwelling upon the said aspects, the Court articulated:-

> In these circumstances, we are prima facie of the view that we need to consider whether we could pass a general order to the effect that in case where husband files matrimonial proceedings at place where wife does not reside, the court concerned should entertain such petition only on the condition that the husband makes appropriate deposit to bear the expenses of the wife as may be determined by the Court. The Court may also pass orders from time to time for further deposit to ensure that the wife is not handicapped to defend the proceedings. In other cases, the husband may take proceedings before the Court in whose jurisdiction the wife resides which may lessen inconvenience to the parties and avoid delay. Any other option to remedy the situation can also be considered. As the narration would exposit, the pivotal concern of the Court was whether an order could be passed so as to provide a better alternative to each individual who is compelled to move this Court.

2. The observation made in Anindita Das v. Srijit Das to the effect that on an average at least 10 to 15 transfer petitions are on board of each Court on each admission day was noticed. The learned Judges apprised themselves about the observations made in Mona Aresh Goel v. Aresh Satya Goel, Lalita A. Ranga v. Ajay Champalal Ranga, Deepa v. Anil Panicker, Archana Rastogi v. Rakesh Rastogi, Leena Mukherjee v. Rabi Shankar Mukherjee, Neelam Bhatia v. Satbir Singh Bhatia, Soma Choudhury v. Gourab Choudhaury, Rajesh Rani v. Tej Pal, Vandana Sharma v. Rakesh Kumar Sharma and Anju Ohri v. Varinder Ohri which rest on the principle of expedient

for ends of justice to transfer the proceedings. It also adverted to Premlata Singh v. Rita Singh wherein this Court 2 (2006) 9 SCC 197 3 (2000) 9 SCC 255 4 (2000) 9 SCC 355 5 (2000) 9 SCC 441 6 (2000) 10SCC 350 7 (2002) 10 SCC 480 8 (2004) 13 SCC 436 : (2006) 1 SCC (Cri) 323 9 (2004) 13 SCC 462 : (2006) 1 SCC (Cri) 341 10 (2007) 15 SCC 597 11 (2008) 11 SCC 768 12 (2007) 15 SCC 556 13 (2005) 12 SCC 277 had not transferred the proceedings but directed the husband to pay for travelling, lodging and boarding expenses of the wife and/or person accompanying her for each hearing. The said principle was also followed in Gana Saraswathi v. H. Raghu Prasad.

3. The two-Judge Bench, after hearing the learned counsel for the parties, the learned Additional Solicitor General and the learned Senior Counsel who was requested to assist the Court, made certain references to the doctrine of forum non conveniens and held that it can be applied to matrimonial proceedings for advancing the interest of justice. The learned Additional Solicitor General assisting the Court suggested about conducting the proceedings by videoconferencing. In that context, it has been held:-

> **14.** One cannot ignore the problem faced by a husband if proceedings are transferred on account of genuine difficulties faced by the wife. The husband may find it difficult to contest proceedings at a place which is convenient to the wife. Thus, transfer is not always a solution acceptable to both the parties. It may be appropriate that available technology of videoconferencing is used where both the parties have equal difficulty and there is no place which is convenient to both the parties. We understand that in every district in the country videoconferencing is now available. In any case, wherever such facility is available, it ought to be fully utilised and all the High Courts ought to issue appropriate administrative instructions to regulate the use of videoconferencing for certain category of cases. Matrimonial cases where one of the parties resides outside courts jurisdiction is one of such 14 (2000) 10 SCC 277 categories. Wherever one or both the parties make a request for use of videoconferencing, proceedings may be conducted on videoconferencing, obviating the needs of the party to appear in person. In several cases, this Court has directed recording of evidence by video conferencing.
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> **x x x x**
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> **16.** The advancement of technology ought to be utilised also for service on parties or receiving communication from the parties. Every District Court must have at least one e-mail ID. Administrative instructions for directions can be issued to permit the litigants to access the court, especially when litigant is located outside the local jurisdiction of the Court. A designated officer/manager of a District Court may suitably respond to such e-mail in the manner permitted as per the administrative instructions. Similarly, a manager/information officer in every District Court may be accessible on a notified telephone during notified hours as per the instructions. These steps may, to some extent, take care of the problems of the litigants. These suggestions may need attention of the High Courts. [Emphasis added]

4. After so stating, the two-Judge Bench felt the need to issue directions which may provide alternative to seeking transfer of proceedings on account of inability of a party to contest proceedings at a place away from their ordinary residence which will eventually result in denial of justice. The safeguards laid down in the said judgment are:-

(i) Availability of videoconferencing facility.

(ii) Availability of legal aid service.

State of Maharashtra v. Praful B. Desai, (2003) 4 SCC 601 : 2003 SCC (Cri) 815; Kalyan Chandra Sarkar v. Rajesh Ranjan, (2005) 3 SCC 284 : 2005 SCC (Cri) 705; Budhadev Karmaskar (4) v. State of W.B., (2011) 10 SCC 283 : (2012) 1 SCC (Cri) 285; Malthesh Gudda Pooja v. State of Karnataka, (2011) 15 SCC 330 : (2014) 2 SCC (Civ)

(iii) Deposit of cost for travel, lodging and boarding in terms of Order 25 CPC.

(iv) E-mail address/phone number, if any, at which litigant from outstation may communicate. Be it stated, the Court took note of the spirit behind the orders of this Court allowing the transfer petitions filed by wives and opined that the Court almost mechanically allows the petitions so that they are not denied justice on account of their inability to participate in proceedings instituted at a different place. It laid stress on financial or physical hardship. It referred to the authorities in the constitutional scheme that provide for guaranteeing equal access to justice, power of the State to make special provisions for women and children, duty to uphold the dignity of women and various steps that have been taken in the said direction.

5. In the said case, the Court transferred the case as prayed for and further observed that it will be open to the transferee court to conduct the proceedings or record the evidence of the witnesses who are unable to appear in court by way of videoconferencing. The aforesaid decision was brought to the notice of the two-Judge Bench in the instant case by the learned counsel appearing for the respondent who advanced his submission that there is no need to transfer the case and the parties can be directed to avail the facility of videoconferencing. The two-Judge Bench, after referring to the Statement of Objects and Reasons of the Family Courts Act, 1984 (for brevity, the 1984 Act), various provisions of the said Act, Sections 22, 23 and 26 of the 1955 Act, Rules 2, 3 and 4 of Order XXXIIA which were inserted by the 1976 amendment to the Code of Civil Procedure (for short, the CPC), the concept of reconciliation, the role of the counsellors in the Family Court and the principle of confidence and confidentiality, held:-

19. To what extent the confidence and confidentiality will be safeguarded and protected in video conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered. It is certainly difficult in video conferencing, if not impossible, to maintain confidentiality. It has also to be noted that the footage in video conferencing becomes part of the record whereas the reconciliatory efforts taken by the duty-holders referred to above are not meant to be part of the record. All that apart, in reconciliatory efforts, physical presence of the parties would make a significant difference. Having regard to the very object behind the establishment of Family Courts Act, 1984, to Order XXXIIA of the Code of Civil Procedure and to the special provisions introduced in the Hindu Marriage Act under Sections 22, 23 and 26, we are of the view that the directions issued by this Court in Krishna Veni Nagam (supra) need reconsideration on the aspect of video conferencing in 12 matrimonial disputes. Being of this view, it has referred the matter to be considered by a larger Bench. That is how the matter has been placed before us.

6. We have heard Mr. V.K. Sidharthan, learned counsel for the petitioner and Mr. Rishi Malhotra, learned counsel for the respondent. We have also heard Mr. Ajit Kumar Sinha, learned senior counsel who has been requested to assist the Court.

7. Before we refer to the scheme under the 1984 Act and the 1955 Act, we think it apt to refer to the decisions that have been noted in Krishna Veni Nagam (supra). In Mona Aresh Goel (supra), the three-Judge Bench was dealing with the transfer of the matrimonial proceedings for divorce that was instituted by the husband in Bombay. The prayer of the wife was to transfer the case from Bombay to Delhi. The averment was made that the wife had no independent income and her parents were not in a position to bear the expenses of her travel from Delhi to Bombay to contest the divorce proceedings. That apart, various inconveniences were set forth and the husband chose not to appear in the Transfer Petition. The Court, considering the difficulties of the wife, transferred the case from Bombay to Delhi. In Lalita A. Ranga (supra), the Court, taking note of the fact that the husband had not appeared and further appreciating the facts and circumstances of the case, thought it appropriate to transfer the petition so that the wife could contest the proceedings. Be it noted, the wife had a small child and she was at Jaipur and it was thought that it would be difficult for her to go to Bombay to contest the proceedings from time to time. In Deepas case, the stand of the wife was that she was unemployed and had no source of income and, on that basis, the prayer of transfer was allowed. In Archana Rastogi (supra), the Court entertained the plea of transfer and held that the prayer for transfer of matrimonial proceedings taken by the husband in the Court of District Judge, Chandigarh to the Court of District Judge, Delhi deserved acceptance and, accordingly, transferred the case. Similarly, in Leena Mukherjee (supra), the prayer for transfer was allowed. In Neelam Bhatia (supra), the Court declined to transfer the case and directed the husband to bear the to-and-fro travelling expenses of the wife and one person accompanying her by train whenever she actually appeared before the Court. In Soma Choudhury (supra), taking into consideration the difficulties of the wife, the proceedings for divorce were transferred from the Court of District Judge, South Tripura, Udaipur (Tripura) to the Family Court at Alipore (West Bengal). In Anju Ohri (supra), the Court, on the foundation of the convenience of the parties and the interest of justice, allowed the transfer petition preferred by the wife. In Vandana Sharma (supra), the Court, taking note of the fact that the wife had two minor daughters and appreciating the difficulty on the said bedrock, thought it appropriate to transfer the case and, accordingly, so directed.

8. Presently, we think it condign to advert in detail as to what has been stated in Anindita Das (supra). The stand of the wife in the transfer petition was that she had a small child of six years and had no source of income and it was difficult to attend the court at Delhi where the matrimonial proceedings were pending. The two-Judge Bench referred to some of the decisions which we have already referred to and also adverted to Ram Gulam Pandit v. Umesh J. Prasad and Rajwinder Kaur v. Balwinder Singh and opined that all the authorities are based on the facts of the respective cases and they do not lay down any particular law which operates as a precedent. Thereafter, it noted that taking advantage of the leniency shown to the ladies by this Court, number of transfer petitions are filed by women and, therefore, it is required to consider each petition on merit. Then, the Court dwelled upon the fact situation and directed that the husband shall pay all travel and stay expenses to the wife and her companion for each and every occasion whenever she was required to attend the Court at Delhi. From the aforesaid decision,

it is quite vivid that the Court felt that the transfer petitions are to be considered on their own merits and not to be disposed of in a routine manner.

9. Having noted the authorities relating to transfer of matrimonial disputes, we may refer to Section 25 of the CPC which reads as follows:-

Section 25. Power of Supreme Court to transfer suits, etc.- (1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit, appeal or other proceedings be transferred from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State.

(2) Every application under this section shall be made by motion which shall be supported by an affidavit.

(3) The court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either re-try it or proceed from the stage at which it was transferred to it.

(4) In dismissing any application under this section, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum, not exceeding two thousand rupees, as it considers appropriate in the circumstances of the case.

(5) The law applicable to any suit, appeal or other proceeding transferred under this section shall be the law which the court in which the suit, appeal or other proceeding was originally instituted ought to have applied to such Suit, appeal or proceeding.

10. Order XLI Rule 2 of the Supreme Court Rules, 2013 which deals with the application for transfer under Article 139A(2) of the Constitution and Section 25 of the CPC is as follows:-

1. Every petition under article 139A(2) of the Constitution or Section 25 of the Code of Civil Procedure, 1908, shall be in writing. It shall state succinctly and clearly all relevant facts and particulars of the case, the name of the High Court or other Civil Court in which the case is pending and the grounds on which the transfer is sought. The petition shall be supported by an affidavit.

2. The petition shall be posted before the Court for preliminary hearing and orders as to issue of notice. Upon such hearing the Court, if satisfied that no prima facie case for transfer has been made out, shall dismiss the petition and if upon such hearing the Court is satisfied that a prima facie case for granting the petition is made out, it shall direct that notice be issued to the parties in the case concerned to show cause why the case be not transferred. A copy of the Order shall be transmitted to the High Court concerned.

3. The notice shall be served not less than four weeks before the date fixed for the final hearing of the petition. Affidavits in opposition shall be filed in the Registry not later than one week before the date appointed for hearing and the affidavit in reply shall be filed not later than two days preceding the day of the hearing of the petition. Copies of affidavits in opposition and in reply shall be served on the opposite party or parties and the affidavits shall not be accepted in the Registry unless they contain an endorsement of service signed by such party or parties.

4. The petition shall thereafter be listed for final hearing before the Court.

5. Save as otherwise provided by the rules contained in this Order the provisions of other orders (including Order LI) shall, so far as may be, apply to petition under this Order. The purpose of referring to the same is that this Court has been conferred with the power by the Constitution under Article 139A(2) to transfer the cases and has also been conferred statutory jurisdiction to transfer the cases. The Rules have been framed accordingly. The Court has the power to allow the petition seeking transfer or to decline the prayer and indubitably, it is on consideration of the merits of the case and satisfaction of the Court on that score.

11. Having stated thus, it is necessary to appreciate the legistative purpose behind the 1984 Act. The Family Courts have been established for speedy settlement of family disputes. The Statement of Objects and Reasons reads thus:-

Statement of Objects and Reasons Several associations of women, other organizations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special family.

However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

2. The Bill inter alia, seeks to

(a) provide for establishment of Family Courts by the State Governments;

(b) make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million;

(c) enable the State Governments to set up, such courts, in areas other than those specified in (b) above.

(d) exclusively provide within the jurisdiction of the Family Courts the matters relating to

(i) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person;

(ii) the property of the spouses or of either of them;

(iii) declaration as to the legitimacy of any person;

(iv) guardianship of a person or the custody of any minor;

(v) maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure;

(e) Make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply;

(f) provide for the association of social welfare agencies, counselors, etc., during conciliation stage and also to secure the service of medical and welfare experts;

(g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the court may, in the interest of justice, seek assistance of a legal expert as amicus curiae,

(h) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute;

(i) provide for only one right of appeal which shall lie to the High Court.

3. The Bill seeks to achieve the above objects.

12. The preamble of the 1984 Act provides for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.

13. Presently, we may recapitulate how this Court has dealt with the duty and responsibility of the Family Court or a Family Court Judge. In Bhuwan Mohan Singh v. Meena and others, the three-Judge Bench referred to the decision in K.A. Abdul Jaleel v. T.A. Shahida and laid stress on securing speedy settlement of disputes relating to marriage and family affairs. Emphasizing on the role of the Family Court Judge, the Court in Bhuwan Mohan Singh (supra) expressed its anguish as the proceedings before the family court had continued for a considerable length of time in respect of application filed under Section 125 of the Code of Criminal Procedure (CrPC). The Court observed:-

It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim.

When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto.

When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow.

And again:

We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the Objects and Reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.

14. The said passage makes it quite clear that a Family Court Judge has to be very sensitive to the cause before it and he/she should be conscious about timely delineation and not procrastinate the matter as delay has the potentiality to breed bitterness that eventually corrodes the emotions. The Court has been extremely cautious while stating about patience as a needed quality for arriving at a settlement and the need for speedy settlement and, if not possible, proceeding with meaningful adjudication. There must be efforts for reconciliation, but the time spent in the said process has to have its own limitation.

15. In Shamima Farooqui v. Shahid Khan, after referring to the earlier decisions, especially the above quoted passages, the Court expressed:-

When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the court. As regards the second facet, it is the duty of the court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands still on some unknown bank of the river. It cannot allow it to sing the song of the brook. Men may come and men may go, but I go on forever. This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a proactive approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more. [Underlining is ours]

16. The object of stating this is that the legislative intent, the schematic purpose and the role attributed to the Family Court have to be perceived with a sense of sanctity. The Family Court Judge should neither be a slave to the concept of speedy settlement nor should he be a serf to the proclivity of hurried disposal abandoning the inherent purity of justice dispensation system. The balanced perception is the warrant and that is how the scheme of the 1984 Act has to be understood and appreciated.

17. Let us now proceed to analyse the fundamental intent of the scheme of the 1984 Act. Section 4 of the 1984 Act deals with the appointment of the judges. Section 5 provides for association of social welfare agencies, etc. It engrafts that the State Government may, in consultation with the High Court, provide, by rules, for the association in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of institutions or organisations engaged in social welfare or the representatives thereof; persons professionally engaged in promoting the welfare of the family; persons working in the field of social welfare;

and any other person whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of the 1984 Act. The aforesaid provision, as is evident, conceives involvement of institutions or organizations engaged in social welfare or their representatives and professionals engaged in promoting the welfare of the family for the purpose of effective functioning of the Family Court to sub-serve the purposes of the Act. Thus, the 1984 Act, to achieve its purpose, conceives of involvement of certain categories so that, if required, the Family Court can take their assistance to exercise its jurisdiction in an effective manner.

18. Section 6 provides for counselors, officers and other employees of Family Courts. Section 7 deals with the jurisdiction of the Family Court. The jurisdiction conferred on the Family Court, as we perceive, is quite extensive. It confers power in a Family Court to exercise jurisdiction exercisable by any district court or any subordinate civil court under any law relating to a suit or a proceeding between the parties to a marriage or a decree of a nullity of marriage declaring the marriage to be null and void or annulling the marriage, as the case may be, or restitution of conjugal rights or judicial separation or dissolution of marriage. It has the authority to declare as to the validity of a marriage so as to annul the matrimonial status of any person and also the power to entertain a proceeding with respect to the property of the parties to a marriage or either of them. The Family Court has the jurisdiction to pass an order or injunction in circumstances arising out of a marital relationship, declare legitimacy of any person and deal with proceedings for grant of maintenance, guardianship of the person or the custody of or access to any minor. That apart, it has also been conferred the authority to deal with the applications for grant of maintenance for wife and children and parents as provided under the CrPC.

19. Section 9 prescribes the duty of the Family Court to make efforts for settlement by rendering assistance and persuading the parties for arriving at a settlement in respect of the subject matter of the suit or proceeding. For the said purpose, it may follow the procedure laid down by the High Court. If in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable opportunity of settlement between the parties, it may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

20. Section 11 provides for proceedings to be held in camera. The provision, being significant, is reproduced below:-

Section 11. Proceedings to be held in camera.In every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires. On a plain reading of the aforesaid provision, it is limpid that if the Family Court desires, the proceedings should be held in camera and it shall be so held if either of the parties so desires. A reading of the said provision, as it seems to us, indicates that, once one party makes a prayer for holding the proceedings in camera, it is obligatory on the part of the Family Court to do so.

21. Section 12 stipulates for assistance of medical and welfare experts for assisting the Family Court in discharging the functions imposed by the Act.

22. At this juncture, it is profitable to refer to certain provisions of the 1955 Act. Section 22 of the said Act provides for proceedings to be in camera and stipulates that the proceeding may not be printed or published. Section 23(2) of the 1955 Act enjoins that before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case

where it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. The said provision is not applicable to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of Section 13. Sub-section (3) of Section 23 permits the Court to take aid of a person named by the parties or of any person nominated by the Court to bring out a resolution. It enables the Court, if it so thinks, to adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been effected and the court shall, in disposing of the proceeding, have due regard to the report.

23. It is worthy to note here that the reconciliatory measures are to be taken at the first instance and emphasis is on efforts for reconciliation failing which the court should proceed for adjudication and the command on the Family Court is to hold it in camera if either party so desires.

24. Section 26 of the 1955 Act deals with custody of children. It empowers the court, from time to time, to pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children consistently with their wishes, wherever possible, and the Government may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree were still pending, and the court may also, from time to time, revoke, suspend or vary any such orders and provisions previously made. The proviso appended thereto postulates that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.

25. It is to be borne in mind that in a matter relating to the custody of the child, the welfare of the child is paramount and seminal. It is inconceivable to ignore its importance and treat it as secondary. The interest of the child in all circumstances remains vital and the Court has a very affirmative role in that regard. Having regard to the nature of the interest of the child, the role of the Court is extremely sensitive and it is expected of the Court to be pro-active and sensibly objective.

26. In Mausami Moitra Ganguli v. Jayant Ganguli, it has been held that the principles of law in relation to the custody of a minor child are well settled. While determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. The provisions contained in the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 hold out the welfare of the child as a predominant consideration because no statute on the subject can ignore, eschew or obliterate the vital factor of the welfare of the minor.

27. In the said case, a passage from Halsburys Laws of England (4 th Edn., Vol. 13) was reproduced which reads thus:-

809. Principles as to custody and upbringing of minors. Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other.

28. In Rosy Jacob v. Jacob A. Chakramakkal, the Court ruled that the children are not mere chattels, nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

29. In Vikram Vir Vohra v. Shalini Bhalla, the Court took note of the fact that the learned Judge of the High Court had personally interviewed the child who was seven years old to ascertain his wishes. The two Judges of this Court also interacted with the child in the chambers in the absence of his parents to find out about his wish and took note of the fact that the child was aged about 10 years and was at an informative and impressionable stage and eventually opined that the order passed by the High Court affirming the order of the trial Court pertaining to visitation rights of the father had been so structured that it was compatible with the educational career of the child and the rights of the father and the mother had been well balanced. It is common knowledge that in most of the cases relating to guardianship and custody, the Courts interact with the child to know her/his desire keeping in view the concept that the welfare of the child is paramount.

30. It is essential to reflect on the reasoning ascribed in Krishna Veni Nagam (supra). As we understand, the two-Judge Bench has taken into consideration the number of cases filed before this Court and the different approaches adopted by this Court, the facet of territorial jurisdiction, doctrine of forum non-conveniens which can be applicable to matrimonial proceedings for advancing the interest of justice, the problems faced by the husband, the recourse taken by this Court to videoconferencing in certain cases and on certain occasions, the advancement of technology, the role of the High Courts to issue appropriate administrative instructions to regulate the use of videoconferencing for certain categories of cases and ruled that the matrimonial cases where one of the parties resides outside the courts jurisdiction do fall in one of such categories.

31. Before we proceed to analyse further, we would like to cogitate on the principles applied in the decisions rendered in the context of videoconferencing. In State of Maharashtra v. Dr. Praful B. Desai, the proceedings related to recording of evidence where the witness was in a foreign country. In Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav & Anr., the controversy pertained to a criminal trial under Section 302 IPC wherein the Court, in exercise of power under Article 142 of the Constitution, directed shifting of the accused from a jail in Patna to Tihar Jail at Delhi. In that context, the Court permitted conducting of the trial with the aid of videoconferencing.

In Budhadev Karmaskar (4) v. State of West Bengal, the issue of videoconferencing had arisen as the lis related to rehabilitation of sex workers keeping in view the interpretation of this Court of life to mean life of dignity.

32. In Malthesh Gudda Pooja v. State of Karnataka & Ors., the question that fell for consideration was whether a Division Bench of the High Court, while considering a memo for listing an appeal restored for fresh hearing, on grant of application for review by a co-ordinate Bench, could refuse to act upon the order of review on the ground that the said order made by a Bench different from the Bench which passed the original order granting review is a nullity. We need not dilate upon what ultimately the Court said. What is necessary to observe is what arrangement should be made in case of a High Court where there are Principal Seat and Circuit Benches and Judges move from one Bench to another for some time and decide the matters and review is filed. In that context, the Court opined:-

when two Judges heard the matter at a Circuit Bench, the chances of both Judges sitting again at that place at the same time, may not arise. But the question is in considering the applications for review, whether the wholesome principle behind Order 47 Rule 5 of the Code and Chapter 3 Rule 5 of the High Court Rules providing that the same Judges should hear it, should be dispensed with merely because of the fact that the Judges in question, though continue to be attached to the Court are sitting at the main Bench, or temporarily at another Bench. In the interests of justice, in the interests of consistency in judicial pronouncements and maintaining the good judicial traditions, an effort should always be made for the review application to be heard by the same Judges, if they are in the same Court. Any attempt to too readily provide for review applications to be heard by any available Judge or Judges should be discouraged. And further:-

With the technological innovations available now, we do not see why the review petitions should not be heard by using the medium of video conferencing.

33. The aforesaid pronouncements, as we find, are absolutely different from a controversy which is involved in matrimonial proceedings which relate to various aspects, namely, declaration of marriage as a nullity, dissolution of marriage, restitution of marriage, custody of children, guardianship, maintenance, adjudication of claim of stridhan, etc. The decisions that have been rendered cannot be regarded as precedents for the proposition that videoconferencing can be one of the modes to regulate matrimonial proceedings.

34. The two-Judge Bench has also noted the constitutional scheme that provides for guaranteeing equal access to justice and the power of the State to make special provisions for women and children as enshrined under Article 15(3) of the Constitution and the duty to uphold the dignity of women and the various steps taken in the said direction. The Court has also referred to Articles 243-D and 243-T of the Constitution under which provisions have been made for reservation for women in Panchayats and Municipalities by the 1973 and 1974 amendments. It has also taken note of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that underlines the awareness of the international commitments on the subject. There is also reference to various authorities of the Court that have referred to the international conventions and affirmative facet enshrined under Article 15(3) of the Constitution. We must immediately clarify that these provisions of the Articles of the Constitution and the decisions

find place in the footnote of the judgment to highlight the factum that various steps have been taken to uphold the dignity of women.

35. The two-Judge Bench has referred to certain judgments to highlight the affirmative rights conferred on women under the Constitution. We shall refer to them and explain how they are rendered in a different context and how conducting of matrimonial disputes through videoconferencing would scuttle the rights of women and not expand the rights. In Mackinnon Mackenzie & Co. Ltd v. Audrey Dcosta and another, the Court dealt with the principle of applicability of equal pay for equal work to lady stenographers in the same manner as male stenographers. A contention was advanced by the employer that this discrimination between the two categories had been brought out not merely on the ground of sex but the Court found it difficult to agree with the contention and referred to various aspects and, eventually, did not interfere with the judgment of the High Court that had granted equal remuneration to both male and female stenographers. In Vishaka and others v. State of Rajasthan and others, the three-Judge Bench, taking note of Articles 14, 15, 19(1)(g), 21 and 51-A and further highlighting the concept of gender equality and the recommendations of CEDAW and the absence of domestic law, laid down guidelines and norms for observation at work places and other institutions for the purpose of effective enforcement of the basic human right of gender equality and sexual harassment and abuse, more particularly, sexual harassment at work places.

36. In Arun Kumar Agrawal and another v. National Insurance Company Limited and others, the lis arose pertaining to the criteria for determination of compensation payable to the dependants of a woman who died in a road accident and who did not have regular source of income. Singhvi, J. opined that it is highly unfair, unjust and inappropriate to compute the compensation payable to the dependants of a deceased wife/mother who does not have a regular income by comparing her services with that of a housekeeper or a servant or an employee who works for a fixed period. The gratuitous services rendered by the wife/mother to the husband and children cannot be equated with the services of an employee and no evidence or data can possibly be produced for estimating the value of such services. Ganguly, J., in his concurring opinion, said that women make a significant contribution at various levels. He referred to numerous authorities and ruled:-

63. Household work performed by women throughout India is more than US $612.8 billion per year (Evangelical Social Action Forum and Health Bridge, p. 17). We often forget that the time spent by women in doing household work as homemakers is the time which they can devote to paid work or to their education. This lack of sensitiveness and recognition of their work mainly contributes to womens high rate of poverty and their consequential oppression in society, as well as various physical, social and psychological problems. The courts and tribunals should do well to factor these considerations in assessing compensation for housewives who are victims of road accidents and quantifying the amount in the name of fixing just compensation.

64. In this context the Australian Family Property Law has adopted a very gender sensitive approach. It provides that while distributing properties in matrimonial matters, for instance, one has to factor in the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of a homemaker or parent.

37. In Voluntary Health Association of Punjab v. Union of India and others, the two-Judge Bench which was dealing with the sharp decline in female sex ratio and mushrooming of various

sonography centers, issued certain directions keeping in view the provisions of the Medical Termination of Pregnancy Act, 1971 and the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996. The concurring opinion adverted to the direction contained in point 9.8 of the main judgment which related to the steps taken by the State Government and the Union Territory to educate the people of the necessity of implementing the provisions of the said Act by conducting workshops as well as awareness camps at the State and district levels. In the concurring opinion, reference was made to the authority in State of H.P. v. Nikku Ram and M.C. Mehta v. State of T.N. and it was stated:-

A woman has to be regarded as an equal partner in the life of a man. It has to be borne in mind that she has also the equal role in the society i.e. thinking, participating and leadership. The legislature has brought the present piece of legislation with an intention to provide for prohibition of sex selection before or after conception and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide. The purpose of the enactment can only be actualised and its object fruitfully realised when the authorities under the Act carry out their functions with devotion, dedication and commitment and further there is awakened awareness with regard to the role of women in a society.

38. In Charu Khurana and others v. Union of India and others, the controversy arose about the prevalence of discrimination of gender equality in the film industry where women were not allowed to become make-up artists and only allowed to work as hair-dressers. Referring to various earlier judgments and Article 51-A(e), the Court observed:-

On a condign understanding of clause (e), it is clear as a cloudless sky that all practices derogatory to the dignity of women are to be renounced. Be it stated, dignity is the quintessential quality of a personality and a human frame always desires to live in the mansion of dignity, for it is a highly cherished value. And again: The sustenance of gender justice is the cultivated achievement of intrinsic human rights. Equality cannot be achieved unless there are equal opportunities and if a woman is debarred at the threshold to enter into the sphere of profession for which she is eligible and qualified, it is well-nigh impossible to conceive of equality. It also clips her capacity to earn her livelihood which affects her individual dignity.

39. Eventually, directions were issued that women were eligible to become make-up artists. The aforesaid decisions unequivocally lay stress and emphasis on gender equality and dignity of women.

40. In Voluntary Health Association of Punjab v. Union of India and Ors, while dealing with female foeticide, it has been observed:-

It needs no special emphasis that a female child is entitled to enjoy equal right that a male child is allowed to have. The constitutional identity of a female child cannot be mortgaged to any kind of social or other concept that has developed or is thought of. It does not allow any room for any kind of compromise. It only permits affirmative steps that are constitutionally postulated. Be it clearly stated that when rights are conferred by the Constitution, it has to be understood that such rights are recognised regard being had to their naturalness and universalism. No one, let it be repeated, no one, endows any right to a female child or, for that matter, to a woman. The question of any kind of condescension or patronisation does not arise.

41. Emphasizing on the equality and dignity of women, it has been stated:-

... let it be stated with certitude and without allowing any room for any kind of equivocation or ambiguity, the perception of any individual or group or organisation or system treating a woman with inequity, indignity, inequality or any kind of discrimination is constitutionally impermissible. The historical perception has to be given a prompt burial. Female foeticide is conceived by the society that definitely includes the parents because of unethical perception of life and nonchalant attitude towards law. The society that treats man and woman with equal dignity shows the reflections of a progressive and civilised society. To think that a woman should think what a man or a society wants her to think tantamounts to slaughtering her choice, and definitely a humiliating act. When freedom of free choice is allowed within constitutional and statutory parameters, others cannot determine the norms as that would amount to acting in derogation of law.

42. In Vikas Yadav v. State of Uttar Pradesh and others, condemning honour killing, the Court after referring to Lata Singh v. State of U.P. and Maya Kaur Baldevsingh Sardar v. State of Maharashtra, has opined:-

One may feel My honour is my life but that does not mean sustaining ones honour at the cost of another.

Freedom, independence, constitutional identity, individual choice and thought of a woman, be a wife or sister or daughter or mother, cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl. Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so-called brotherly or fatherly honour or class honour by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise. It is a vice, condemnable and deplorable perception of honour, comparable to medieval obsessive assertions.

43. The aforesaid enunciation of law makes it graphically clear that the constitutional identity, freedom of choice, dignity of a woman and affirmative rights conferred on her by the Constitution cannot be allowed to be abrogated even for a moment. In this context, we have to scan and appreciate the provision contained in Section 11 of the 1984 Act. The provision, as has been stated earlier, mandates the proceedings to be held in camera if one of the parties so desires. Equality of choice has been conferred by the statute. That apart, Section 22 of the 1955 Act lays down the proceedings to be held in camera and any matter in relation to any such proceeding may not be printed or published except a judgment of the High Court or of the Supreme Court with the previous permission of the Court.

44. We, as advised at present, constrict our analysis to the provisions of the 1984 Act. First, as we notice, the expression of desire by the wife or the husband is whittled down and smothered if the Court directs that the proceedings shall be conducted through the use of videoconferencing. As is demonstrable from the analysis of paragraph 14 of the decision, the Court observed that wherever one or both the parties make a request for the use of videoconferencing, the proceedings may be conducted by way of videoconferencing obviating the need of the parties to appear in person. The cases where videoconferencing has been directed by this Court are distinguishable. They are either in criminal cases or where the Court found it necessary that the

witness should be examined through videoconferencing. In a case where the wife does not give consent for videoconferencing, it would be contrary to Section 11 of the 1984 Act. To say that if one party makes the request, the proceedings may be conducted by videoconferencing mode or system would be contrary to the language employed under Section 11 of the 1984 Act. The said provision, as is evincible to us, is in consonance with the constitutional provision which confer affirmative rights on women that cannot be negatived by the Court. The Family Court also has the jurisdiction to direct that the proceedings shall be held in camera if it so desires and, needless to say, the desire has to be expressed keeping in view the provisions of the 1984 Act.

45. The language employed in Section 11 of the 1984 Act is absolutely clear. It provides that if one of the parties desires that the proceedings should be held in camera, the Family Court has no option but to so direct. This Court, in exercise of its jurisdiction, cannot take away such a sanctified right that law recognizes either for the wife or the husband. That apart, the Family Court has the duty to make efforts for settlement. Section 23(2) of the 1955 Act mandates for reconciliation. The language used under Section 23(2) makes it an obligatory duty on the part of the court at the first instance in every case where it is possible, to make every endeavour to bring about reconciliation between the parties where it is possible to do so consistent with the nature and circumstances of the case. There are certain exceptions as has been enumerated in the proviso which pertain to incurably of unsound mind or suffering from a virulent and incurable form of leprosy or suffering from venereal disease in a communicable form or has renounced the world by entering any religious order or has not been heard of as being alive for a period of seven years, etc. These are the exceptions carved out by the legislature. The Court has to play a diligent and effective role in this regard.

46. The reconciliation requires presence of both the parties at the same place and the same time so as to be effectively conducted. The spatial distance will distant the possibility of reconciliation because the Family Court Judge would not be in a position to interact with the parties in the manner as the law commands. By virtue of the nature of the controversy, it has its inherent sensitivity. The Judge is expected to deal with care, caution and with immense sense of worldly experience absolutely being conscious of social sensibility. Needless to emphasise, this commands a sense of trust and maintaining an atmosphere of confidence and also requirement of assurance that the confidentiality is in no way averted or done away with. There can be no denial of this fact. It is sanguinely private. Recently, in Justice K.S. Puttaswamy (Retd) v. Union of India & others, this Court, speaking through one of us (Chandrachud, J.), has ruled thus:-

The intersection between ones mental integrity and privacy entitles the individual freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity.

The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. And again:

Privacy represents the core of the human personality and recognizes the ability of each individual to make choices and to take decisions governing matters intimate and personal.

47. Frankfurter Felix in Schulte Co. v. Gangi, has stated that the policy of a statute should be drawn out of its terms as nourished by their proper environment and not like nitrogen out of the air.

Benjamin N. Cardozo, in Hopkins Savings Assn. v. Cleary, has opined that when a statute is reasonably susceptible of two interpretations, the Court has to prefer the meaning that preserves to the meaning that destroys.

48. The command under Section 11 of the 1984 Act confers a right on both the parties. It is statutory in nature. The Family Court Judge who is expected to be absolutely sensitive has to take stock of the situation and can suo motu hold the proceedings in camera. The Family Court Judge is only meant to deal with the controversies and disputes as provided under the 1984 Act. He is not to be given any other assignment by the High Court. The in camera proceedings stand in contradistinction to a proceeding which is tried in court. When a case is tried or heard in court, there is absolute transparency. Having regard to the nature of the controversy and the sensitivity of the matter, it is desirable to hear in court various types of issues that crop up in these types of litigations. The Act commands that there has to be an effort for settlement. The legislative intendment is for speedy settlement. The counsellors can be assigned the responsibility by the court to counsel the parties. That is the schematic purpose of the law. The confidentiality of the proceedings is imperative for these proceedings.

49. The procedure of videoconferencing which is to be adopted when one party gives consent is contrary to Section 11 of the 1984 Act. There is no provision that the matter can be dealt with by the Family Court Judge by taking recourse to videoconferencing. When a matter is not transferred and settlement proceedings take place which is in the nature of reconciliation, it will be well nigh impossible to bridge the gap. What one party can communicate with other, if they are left alone for sometime, is not possible in videoconferencing and if possible, it is very doubtful whether the emotional bond can be established in a virtual meeting during videoconferencing. Videoconferencing may create a dent in the process of settlement.

50. The two-Judge Bench had referred to the decisions where the affirmative rights meant for women have been highlighted in various judgments. We have adverted to some of them to show the dignity of woman and her rights and the sanctity of her choice. When most of the time, a case is filed for transfer relating to matrimonial disputes governed by the 1984 Act, the statutory right of a woman cannot be nullified by taking route to technological advancement and destroying her right under a law, more so, when it relates to family matters. In our considered opinion, dignity of women is sustained and put on a higher pedestal if her choice is respected. That will be in consonance with Article 15(3) of the Constitution.

51. In this context, we may refer to the fundamental principle of necessity of doing justice and trial in camera. The nine-Judge Bench in Naresh Shridhar Mirajkar and Ors v. State of Maharashtra and Anr.46, after enunciating the universally accepted proposition in favour of open trials, expressed:-

While emphasising the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it. If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze, is it or is it not open to him in exercise of his inherent power to hold the trial in camera either partly or fully? If the primary function of the court is to do justice in causes brought before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as

inflexible and universal and it is held that it admits of no exceptions whatever, cases may arise where by following the principle, justice itself may be defeated. That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course. It is hardly necessary to emphasise that this inherent power must be exercised with great caution and it is only if the court is satisfied beyond a doubt that the ends of justice themselves would be defeated if a case is tried in open court that it can pass an order to hold the trial in camera; but to deny the existence of such inherent power to the court would be to ignore the primary object of adjudication itself. The principle underlying the insistence on hearing causes in open court is to protect and assist fair, impartial and objective administration of justice; but if the requirement of justice itself sometimes dictates the necessity of trying the case in camera, it cannot be said that the said requirement should be sacrificed because of the principle that every trial must be held in open court.

52. The principle of exception that the larger Bench enunciated is founded on the centripodal necessity of doing justice to the cause and not to defeat it. In matrimonial disputes that are covered under Section 7 of the 1984 Act where the Family Court exercises its jurisdiction, there is a statutory protection to both the parties and conferment of power on the court with a duty to persuade the parties to reconcile. If the proceedings are directed to be conducted through videoconferencing, the command of the Section as well as the spirit of the 1984 Act will be in peril and further the cause of justice would be defeated.

53. A cogent reflection is also needed as regards the perception when both the parties concur to have the proceedings to be held through videoconferencing. In this context, the thought and the perception are to be viewed through the lens of the textual context, legislative intent and schematic canvas. The principle may had to be tested on the bedrock that courts must have progressive outlook and broader interpretation with the existing employed language in the statute so as to expand the horizon and the connotative expanse and not adopt a pedantic approach.

54. We have already discussed at length with regard to the complexity and the sensitive nature of the controversies. The statement of law made in Krishna Veni Nagam (supra) that if either of the parties gives consent, the case can be transferred, is absolutely unacceptable. However, an exception can be carved out to the same. We may repeat at the cost of repetition that though the principle does not flow from statutory silence, yet as we find from the scheme of the Act, the Family Court has been given ample power to modulate its procedure. The Evidence Act is not strictly applicable. Affidavits of formal witnesses are acceptable. It will be permissible for the other party to cross-examine the deponent. We are absolutely conscious that the enactment gives emphasis on speedy settlement. As has been held in Bhuwan Mohan Singh (supra), the concept of speedy settlement does not allow room for lingering the proceedings. A genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to bring in a settlement or to arrive at a solution of the lis, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. Therefore, we are disposed to think that once a settlement fails and if both the parties give consent that a witness can be examined in video conferencing, that can be allowed. That apart, when they give consent that it is necessary in a specific factual matrix having regard to the convenience of the parties, the Family Court may allow the prayer for videoconferencing. That much of discretion, we are inclined to think can be conferred on the Family Court. Such a limited discretion will not run counter to the legislative intention that permeates the 1984 Act. However, we would like

to add a safeguard. A joint application should be filed before the Family Court Judge, who shall take a decision. However, we make it clear that in a transfer petition, no direction can be issued for video conferencing. We reiterate that the discretion has to rest with the Family Court to be exercised after the court arrives at a definite conclusion that the settlement is not possible and both parties file a joint application or each party filing his/her consent memorandum seeking hearing by videoconferencing.

55. Be it noted, sometimes, transfer petitions are filed seeking transfer of cases instituted under the Protection of Women from Domestic Violence Act, 2005 and cases registered under the IPC. As the cases under the said Act and the IPC have not been adverted to in Krishna Veni Nagam (supra) or in the order of reference in these cases, we do intend to advert to the same.

56. In view of the aforesaid analysis, we sum up our conclusion as follows :-

(i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.

(ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.

(iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that videoconferencing will sub-serve the cause of justice, it may so direct.

(iv) In a transfer petition, video conferencing cannot be directed.

(v) Our directions shall apply prospectively.

(vi) The decision in Krishna Veni Nagam (supra) is overruled to the aforesaid extent

57. We place on record our appreciation for the assistance rendered by Mr. Ajit Kumar Sinha, learned senior counsel.

58. The matters be placed before the appropriate Bench for consideration of the transfer petitions on their own merits.

Per **Hon'ble Dr. Justice D.Y. Chandrachud :—**

The judgment proposed by the learned Chief Justice has been circulated and deliberated upon. The reasons why I am unable to adopt the view propounded in the judgment of the learned Chief Justice will be delivered separately. I record below my conclusions:

1. The Family Courts Act, 1984 has been enacted at a point in time when modern technology (at least as we know it today) which enables persons separated by spatial distances to communicate with each other face to face was not the order of the day or, in any case, was not as fully developed. That is no reason for any court - especially for this court which sets precedent for the nation - to exclude the application of technology to facilitate the judicial process.

2. Appropriate deployment of technology facilitates access to justice. Litigation under the Family Courts Act 1984 is not an exception to this principle. This court must be averse to judicially

laying down a restraint on such use of technology which facilitates access to justice to persons in conflict, including those involved in conflicts within the family. Modern technology is above all a facilitator, enabler and leveler.

3. Video conferencing is a technology which allows users in different locations to hold face to face meetings. Video conferencing is being used extensively the world over (India being no exception) in on line teaching, administration, meetings, negotiation, mediation and telemedicine among a myriad other uses. Video conferencing reduces cost, time, carbon footprint and the like.

4. An in-camera trial is contemplated under Section 11 in two situations: the first where the Family Court so desires; and the second if either of the parties so desires. There is a fallacy in the hypothesis that an in-camera trial is inconsistent with the usage of video conferencing techniques. A trial in-camera postulates the exclusion of the public from the courtroom and allows for restraints on public reporting. Video conferencing does not have to be recorded nor is it accessible to the press or the public. The proper adoption of video conferencing does not negate the postulates of an in-camera trial even if such a trial is required by the court or by one of the parties under Section 11.

5. The Family Courts Act 1984 envisages an active role for the Family Court to foster settlements. Under the provisions of Section 11, the Family Court has to endeavour to "assist and persuade" parties to arrive at a settlement. Section 9 clearly recognises a discretion in the Family Court to determine how to structure the process. It does so by adopting the words "where it is possible to do so consistent with the nature and circumstances of the case". Moreover, the High Courts can frame rules under Section 9(1) and the Family Court may, subject to those rules, "follow such procedure as it deems fit". In the process of settlement, Section 10(3) enables the Family Court to lay down its own procedure. The Family Court is entitled to take the benefit of counsellors, medical experts and persons professionally engaged in promoting the welfare of the family.

6. The above provisions - far from excluding the use of video conferencing - are sufficiently enabling to allow the Family Court to utilise technological advances to facilitate the purpose of achieving justice in resolving family conflicts. There may arise a variety of situations where in today's age and time parties are unable to come face to face for counselling or can do so only at such expense, delay or hardship which will defeat justice. One or both spouses may face genuine difficulties arising from the compulsions of employment, family circumstances (including the needs of young children), disability and social or economic handicaps in accessing a court situated in a location distant from where either or both parties reside or work. It would be inappropriate to deprive the Family Court which is vested with such wide powers and procedural flexibility to adopt video conferencing as a facilitative tool, where it is convenient and readily available. Whether video conferencing should be allowed must be determined on a case to case analysis to best effectuate the concern of providing just solutions. Far from such a procedure being excluded by the law, it will sub serve the purpose of the law.

7. Conceivably there may be situations where parties (or one of the spouses) do not want to be in the same room as the other. This is especially true when there are serious allegations of marital abuse. Video conferencing allows things to be resolved from the safety of a place which is not accessible to the other spouse against whom there is a serious allegation of misbehaviour of a psychiatric nature or in a case of substance abuse.

8. Video conferencing is gender neutral. In fact it ensures that one of the spouses cannot procrastinate and delay the conclusion of the trial. Delay, it must be remembered, generally defeats the cause of a party which is not the dominant partner in a relationship. Asymmetries of power have a profound consequence in marital ties. Imposing an unwavering requirement of personal and physical presence (and exclusion of facilitative technological tools such as video conferencing) will result in a denial of justice.

9. The High Courts have allowed for video conferencing in resolving family conflicts. A body of precedent has grown around the subject in the Indian context. The judges of the High Court should have a keen sense of awareness of prevailing social reality in their states and of the federal structure. Video conferencing has been adopted internationally in resolving conflicts within the family. There is a robust body of authoritative opinion on the subject which supports video conferencing, of course with adequate safeguards. Whether video conferencing should be allowed in a particular family dispute before the Family Court, the stage at which it should be allowed and the safeguards which should be followed should best be left to the High Courts while framing rules on the subject. Subject to such rules, the use of video conferencing must be left to the careful exercise of discretion of the Family Court in each case.

10. The proposition that video conferencing can be permitted only after the conclusion of settlement proceedings (resultantly excluding it in the settlement process), and thereafter only when both parties agree to it does not accord either with the purpose or the provisions of the Family Courts Act 1984. Exclusion of video conferencing in the settlement process is not mandated either expressly or by necessary implication by the legislation. On the contrary the legislation has enabling provisions which are sufficiently broad to allow video conferencing. Confining it to the stage after the settlement process and in a situation where both parties have agreed will seriously impede access to justice. It will render the Family Court helpless to deal with human situations which merit flexible solutions. Worse still, it will enable one spouse to cause interminable delays thereby defeating the purpose for which a specialised court has been set up.

II The reference should in my opinion be answered in the above terms.

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SMRUTI PAHARIYA VERSUS SANJAY PAHARIYA

SUPREME COURT OF INDIA

Bench: **Hon'ble Mr. Justice K.G. Balakrishnan, CJI, Hon'ble Mr. Justice P. Sathasivam & Hon'ble Mr. Justice Asok Kumar Ganguly**

Smruti Pahariya .....Appellant(S)
Versus
Sanjay Pahariya ....Respondent(S)

Civil Appeal No. 3465 of 2009
(@ Special Leave Petition (Civil) No. 17402 Of 2008)

Decided on : **11th May, 2009**

This Court strongly disapproves the manner in which the proceeding was conducted in this case. A Court's proceeding must have a sanctity and fairness. It cannot be conducted for the convenience of one party alone. In any event, when the Court fixed the matter for 10.12.2007, it could not pre-pone the matter on an ex-parte prayer made by the appellant-wife on 5.12.2007 and grant the decree of divorce on that day itself by treating the matter on the board in the absence of the husband. This, in our opinion, is a flagrant abuse of the judicial process and on this ground alone, the decree dated 5.12.2007 has to be set aside.

On this aspect, this Court endorses the dissatisfaction expressed by the Bombay High Court in its judgment under appeal about the manner in which the date of final hearing was pre-poned and an ex-parte decree was passed.

While dealing with the second question it appears that the Family Court has not acted in a manner which is required of it having regard to the jurisdiction vested on it under the Family Courts Act.

The Family Courts Act, 1984 (hereinafter, Act 66 of 1984) was enacted for adopting a human approach to the settlement of family disputes and achieving socially desirable results. The need for such a law was felt as early as in 1974 and Chief Justice P.B. Gajendragadhkar, as the Chairman of Law Commission, in the 59th report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954, opined:-

"In our Report on the Code of Civil Procedure, we have had occasion to emphasis that in dealing with disputes concerning the family, the court ought to adopt a human approach - an approach radically different from that adopted in ordinary civil proceedings, and that the court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that

such an approach should be adopted in dealing with matrimonial disputes. We would suggest that in due course, States should think of establishing family courts, with presiding officers who will be well qualified in law, no doubt, but who will be trained to deal with such dispute in a human way, and to such courts all disputes concerning the family should be referred."

Almost 10 years thereafter when the said Act 66 of 1984 was enacted, the words of the Chief Justice were virtually quoted in its statement of objects and reasons. Consistent with the said human approach which is expected to be taken by a Family Court Judge, Section 9 of the Act casts a duty upon the Family Court Judge to assist and persuade the parties to come to a settlement.

JUDGMENT

Hon'ble Mr. Justice Ashok Kumar Ganguly :—

1. Leave granted.

2. The wife, who is the appellant before this Court, filed this appeal seeking to impugn the judgment and order dated 5.6.2008 passed by the High Court of judicature at Bombay, which in a detailed judgment, was pleased to set aside the judgment and decree dated 5.12.2007 passed by the Family Court, Mumbai, in which the Family Court, dissolved the marriage between the appellant and the respondent by a decree of divorce on mutual consent under Section 13B of the Hindu Marriage Act, 1955 (hereinafter "the said Act").

3. Admittedly, the parties are Hindu and governed by the provisions of the said Act and they were married on 5.3.1993 at Mumbai following the Hindu Vedic rites. Marriage was also registered. After marriage, the parties resided together in Flat No. 601, 2nd Floor, Dinath Court, Sir Pochkhanwala Road, Worli, Mumbai. Two sons were born to them, one on 1.2.1995 and the other one on 3.4.1997. A few years after that, serious differences and incompatibility surfaced between them and all attempts of settlement failed. The parties stopped living together from January 2005 and decided to file a petition seeking divorce by mutual consent under Section 13B of the said Act. A joint petition to that effect was filed before the Family Court at Bandra, Mumbai and the same was registered on 19.5.2007. It was averred therein that incompatibility with each other made it difficult for them to co-exist and they stopped cohabiting as husband and wife from January 2005 (para 6). In paragraph 13, it was stated that there was no collusion between the parties in filing the petition for divorce by mutual consent and in paragraph 17 it was pointed out that there is no force or coercion between the parties in filing the petition. Along with the said petition, certain consent terms were also filed but with those terms we are not concerned in this proceeding.

4. Under the provisions of Section 13B (2) of the said Act, a minimum period of six month has to elapse before such petition can be taken up for hearing. In the instant case, the said period expired on or about 19.11.2007. In between, two dates were given, namely, 14.6.2007 and 23.8.2007 when the parties were given a chance for counselling but on both the days parties were absent and no counselling took place.

5. On 19.11.2007, after the mandatory period of six months, the matter came up before the Family Court. It appears from the affidavit filed by the wife in this proceeding before the Bombay High

Court that on 3.11.2007, advocate of the parties informed the husband that the matter will be listed on 19.11.2007 and a draft affidavit of deposition was sent to him through E-mail. It is not in dispute that both the parties had the same advocate. It also appears from the affidavit of the wife that on 18.11.2007 the advocate received a text SMS in his mobile from the respondent-husband that he is unable to attend the court on 19.11.2007.

Therefore, on 19.11.2007, when the matter appeared for the first time before the Court, the husband was absent and the Family Court asked the advocate to inform the husband of the next date of hearing of the matter, which was fixed on 1.12.2007.

6. On 19.11.2007 itself, an application was made by the wife to summon the husband directing him to be present in the Family court on the next date. Accordingly, summons were sent by the Court on 23.11.2007 by courier and the courier returned with the remark "not accepting".

In this connection, the order which was passed by the Family Court, on 1.12.2007, on perusal of the service report is of some importance. The following order was passed on the service return:

"Perused the first summons and subsequent orders thereto. I have seen service affidavit also, states that servant was present. Hence I am not able to accept it as a proper one. The courier endorsement is also vague. Considering the contents in affidavit, I allow petitioner No.1 to serve the notice by pasting on the address given in cause title to petitioner No.2. EPSB allowed. It is made returnable on 4.12.2007."

7. The petition was thus made returnable on 4.12.2007. It appears that the bailiff pasted the summons on 3.12.2007 outside the door of the husband's residence and the matter came up before the Family Court on 4.12.2007 and on that day the husband was absent. The Family Court adjourned the matter to 10.12.2007. But on 5.12.2007, the wife, filed a petition before the Family Court with a prayer that the hearing of the matter may be pre-poned and be taken up on the very same day i.e. 5.12.2007. On the aforesaid prayer of the wife, though the matter was not on the board, it was taken on the board by the Family Court on 5.12.2007 and the decree of divorce was passed ex-parte on that date itself.

8. It may be mentioned in this connection that the Family Court pre-poned the hearing on wife's application and in the absence of the husband. Admittedly, the pre-ponement was done ex-parte.

9. In the background of these facts, basically four questions fall for our consideration:

I. Whether impugned decree of divorce passed by the Family Court on 5.12.2007 is vitiated by procedural irregularity?

II. Whether by conducting the proceeding, in the manner it did, the Family Court acted contrary to the avowed object of the Family Courts Act, 1984?

III. Whether from the absence of the husband before the Family Court on 19.11.2007, 1.12.2007 and 4.12.2007 it can be inferred that his consent for grant of divorce on a petition on mutual consent subsists, even though he has not withdrawn the petition for divorce on mutual consent?

IV. Whether on a proper construction of Section 13B (2) of the said Act, which speaks of 'the motion of both the parties', this Court can hold that the Family Court can dissolve a marriage and grant a decree of divorce in the absence of one of the parties and without

actually ascertaining the consent of that party who filed the petition for divorce on mutual consent jointly with the other party?

10. This fourth question assumes general importance since it turns on the interpretation of the section. Apart from that, this question is relevant here in view of various recitals in the judgment and decree of the learned Judge of the Family Court. It appears that the Family Court granted the decree of divorce by proceeding on the presumption of continuing consent of the husband.

11. While dealing with the first question about procedural irregularity in the matter, this Court finds that the Family Court did not act properly even if it is held that it was correct in presuming the continuing consent of the respondent-husband.

12. From the sequence of events, it appears that on 19.11.2007 when the matter came up before the Court, the first day after the mandatory period of six months, the husband was absent. The Court directed service of summons on the husband on the request of the wife. The service return was before the Court on 1.12.2007. Looking at the service return, the Court found that service was not a proper one and the Court was also not satisfied with the endorsement of the courier. Under such circumstances, the Court's direction on the prayer of the appellant-wife, for substituted service under Order 5 Rule 20 of the Civil Procedure Code is not a proper one. Direction for substituted service under Order 5 Rule 20 can be passed only when Court is satisfied "that there is reason to believe that the defendant is keeping out of the way for the purpose of evading service, or that for any other reason the summons cannot be served in the ordinary way".

13. In the facts of this case, the Court did not, and rather could not, have any such satisfaction as the Court found that the service was not proper. If the service is not proper, the Court should have directed another service in the normal manner and should not have accepted the plea of the appellant-wife for effecting substituted service. From wife's affidavit asking for substituted service, it is clear that the servant of the respondent-husband intimated her advocate's clerk that respondent-husband was out of Bombay and will be away for about two weeks. However, the appellant-wife asserted that the respondent-husband was in town and was evading. But the Court on seeing the service return did not come to the conclusion that the husband was evading service. Therefore, the Court cannot, in absence of its own satisfaction that the husband is evading service, direct substituted service under Order 5 Rule 20 of the Code.

14. Apart from the aforesaid irregularity, the Court, after ordering substituted service and perusing service return on 4.12.2007, fixed the matter for 10.12.2007. Then, on the application of the wife on 5.12.2007, pre-poned the proceeding to 5.12.2007 and on that very day granted the decree of divorce even though the matter was not on the list.

15. This Court strongly disapproves of the aforesaid manner in which the proceeding was conducted in this case. A Court's proceeding must have a sanctity and fairness. It cannot be conducted for the convenience of one party alone. In any event, when the Court fixed the matter for 10.12.2007, it could not pre-pone the matter on an ex-parte prayer made by the appellant-wife on 5.12.2007 and grant the decree of divorce on that day itself by treating the matter on the board in the absence of the husband. This, in our opinion, is a flagrant abuse of the judicial process and on this ground alone, the decree dated 5.12.2007 has to be set aside.

16. On this aspect, this Court endorses the dissatisfaction expressed by the Bombay High Court in paragraph 34 of its judgment under appeal about the manner in which the date of final hearing was pre-poned and an ex-parte decree was passed.

17. While dealing with the second question it appears that the Family Court has not acted in a manner which is required of it having regard to the jurisdiction vested on it under the Family Courts Act.

18. The Family Courts Act, 1984 (hereinafter, Act 66 of 1984) was enacted for adopting a human approach to the settlement of family disputes and achieving socially desirable results. The need for such a law was felt as early as in 1974 and Chief Justice P.B. Gajendragadhkar, as the Chairman of Law Commission, in the 59th report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954, opined:-

"In our Report on the Code of Civil Procedure, we have had occasion to emphasis that in dealing with disputes concerning the family, the court ought to adopt a human approach – an approach radically different from that adopted in ordinary civil proceedings, and that the court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that such an approach should be adopted in dealing with matrimonial disputes. We would suggest that in due course, States should think of establishing family courts, with presiding officers who will be well qualified in law, no doubt, but who will be trained to deal with such dispute in a human way, and to such courts all disputes concerning the family should be referred."

19. Almost 10 years thereafter when the said Act 66 of 1984 was enacted, the words of the Chief Justice were virtually quoted in its statement of objects and reasons. Consistent with the said human approach which is expected to be taken by a Family Court Judge, Section 9 of the Act casts a duty upon the Family Court Judge to assist and persuade the parties to come to a settlement.

20. In the instant case by responding to the illegal and unjust demand of the wife of pre-poning the proceeding ex-parte and granting an ex-parte decree of divorce, the Family Court did not discharge its statutory obligation under Section 13B (2) of the said Act of hearing the parties. When a proceeding is pre-poned in the absence of a party and a final order is passed immediately, the statutory duty cast on the Court to hear the party, who is absent, is not discharged. Therefore, the Family Court has not at all shown a human and a radically different approach which it is expected to have while dealing with cases of divorce on mutual consent.

21. Marriage is an institution of great social relevance and with social changes, this institution has also changed correspondingly. However, the institution of marriage is subject to human frailty and error. Marriage is certainly not a mere "reciprocal possession" of the sexual organs as was philosophized by I. Kant [The Philosophy of Law page 110, W. Hastie translation 1887] nor can it be romanticized as a relationship which Tennyson fancied as "made in Heaven" [Alymer's Field, in Complete Works 191, 193 (1878)].

22. In many cases, marriages simply fail for no fault of the parties but as a result of discord and disharmony between them. In such situations, putting an end to this relationship is the only way out of this social bondage. But unfortunately, initially the marriage laws in every country were 'fault oriented'. Under such laws marriage can be dissolved only by a Court's decree within certain limited grounds which are to be proved in an adversarial proceeding. Such 'fault' oriented

divorce laws have been criticized as 'obsolete, unrealistic, discriminatory and sometimes immoral' (Foster, Divorce Law Reform; the choices before State page 112).

23. As early as in 1920 possibly for the first time in New Zealand, Section 4 of the Divorce and Matrimonial Causes Amendment Act, 1920 gave the Court the discretion to grant a decree of divorce to parties when they had separated for three years under a decree of judicial separation or separation order by the Magistrate or under a deed of separation or "even by mutual consent". Till such amendment, divorce after separation by parties on "mutual consent" was unknown.

24. Considering the said amendment of 1920 and exercising the discretion the amended law conferred on the Judge, Justice Salmond in Lodder Vs. Lodder, [1921, New Zealand Law Reports, 876], came to the conclusion that it is not necessary to enquire into the merits of the disputes between the parties since the man and the wife had put an end to their relationship 13 years ago and the learned Judge found that their alienation is "permanent and irredeemable". The learned Judge also felt that in the circumstances of the case "no public or private interest is to be served by the further continuance of the marriage bond" and a decree for its dissolution was passed. (See page 881).

25. This seems to be the first decision of a Court granting divorce on a 'no-fault' basis and because of the fact that a marriage had broken down for all practical purposes as parties were staying separately for a very long time.

26. The British society was very conservative as not to accept divorce on such a ground but in 1943, Viscount Simon, Lord Chancellor, in the case of Blunt Vs. Blunt, [1943, 2 All ER 76], speaking for the House of Lords, while categorizing the heads of discretion which should weigh with the courts in granting the decree of divorce, summed up four categories but at page 78 of the Report, the Lord Chancellor added a fifth one and the views of His Lordship were expressed in such matchless words as they deserve to be extracted herein below:-

"To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce the court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused".

27. In India also, prior to the amendment in our laws by insertion of Section 13B in the said Act, the Courts felt the necessity for an amendment in the divorce law. The Full Bench of the Delhi High Court in the judgment of Ram Kali Vs. Gopal Dass – ILR (1971) 1 Delhi 6, felt the inadequacy of the existing divorce law. Chief Justice Khanna (as His Lordship then was) speaking for the Full Bench came to the following conclusion:-

"...It would not be a practical and realistic approach, indeed it would be unreasonable and inhuman, to compel the parties to keep up the façade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife." [See page 12].

28. In coming to the aforesaid conclusion, the learned Chief Justice relied on the observation of the Viscount Simon, Lord Chancellor, in the case of Blunt Vs. Blunt (Supra).

29. Within a year thereafter, Hon'ble Justice Krishna Iyer, in the case of Aboobacker Haji Vs. Mamu Koya - 1971 K.L.T. 663, while dealing with Mohammedan Law relating to divorce correctly traced the modern trend in legal system on the principle of breakdown of marriage in the following words:-

"When an intolerable situation has been reached, the partners living separate and apart for a substantial time, an inference may be drawn that the marriage has broken down in fact and so should be ended by law. This trend in the field of matrimonial law is manifesting itself in the Commonwealth countries these days."(See page 668)

30. In coming to the said finding the learned Judge relied on the principles laid down by Justice Salmond in Lodder Vs. Lodder (supra).

31. After the said amendment in 1976 by way of insertion of Section 13B in the said Act in the 74th Report of the Law Commission of India (April, 1978), Justice H.R. Khanna, as its Chairman, expressed the following views on the newly amended Section 13B:

"Marriage is viewed in a number of countries as a contractual relationship between freely consenting individuals. A modified version of the basis of consent is to be found in the theory of divorce by mutual consent. The basis in this case is also consent, but the revocation of the relationship itself must be consensual, as was the original formation of the relationship. The Hindu Marriage Act, as amended in 1976, recognizes this theory in section 13B."

32. On the question of how to ascertain continuing consent in a proceeding under Section 13B of the said Act, the decision in the case of Smt. Sureshta Devi Vs. Om Prakash – (1991) 2 SCC 25, gives considerable guidance.

33. In Paragraph 8 of the said judgment, this Court summed up the requirement of Section 13B (1) as follows:

> ***"8.*** *There are three other requirements in sub-section (1). They are:-*
>
> ***(i)*** *They have been living separately for a period of one year.*
>
> ***(ii)*** *They have not been able to live together, and*
>
> ***(iii)*** *They have mutually agreed that marriage should be dissolved."*

34. In paragraph 10, the learned Judges dealt with sub-section (2) of Section 13B. In paragraphs 11 and 12, the learned Judges recorded the divergent views of the Bombay High Court [Jayashree Ramesh Londhe v. Ramesh Bhikaji Londhe – AIR 1982 Bom 302: 86 Bom LR 184], Delhi High Court [Chander Kanta v. Hans Kumar – AIR 1989 Del 73], Madhya Pradesh High Court [Meena Dutta v. Anirudh Dutta – (1984) 2 DMC 388 (MP)], and the views of the Kerala High Court [K.I. Mohanan v. Jeejabai – AIR 1988 Ker 28: (1986) 2 HLR 467: 1986 KLT 990], Punjab and Haryana High Court [Harcharan Kaur v. Nachhattar Singh – AIR 1988 P & H 27: (1987) 2 HLR 184: (1987) 92 Punj LR 321] and Rajasthan High Court [Santosh Kumari v. Virendra Kumar – AIR 1986 Raj 128: (1986) 1 HLR 620: 1986 Raj LR 441] respectively on Section 13B.

35. In paragraphs 13 and 14 of the Sureshta Devi (supra), the learned Judges gave an interpretation to Section 13B (2) and in doing so the learned Judges made it clear that the reasons given by the High Court of Bombay and Delhi are untenable inasmuch as both the High Courts held that

once the consent is given by the parties at the time of filing the petition, it is impossible for them to withdraw the same to nullify the petition.

36. We also find that the interpretation given by Delhi and Bombay High Courts is contrary to the very wording of Section 13B (2) which recognizes the possibility of withdrawing the petition filed on consent during the time when such petition has to be kept pending.

37. In paragraph 13 of Sureshta Devi (supra), the learned Judges made the position clear by holding as follows:

> *"At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-Section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties,…. if the petition is not withdrawn in the meantime, the court shall….pass a decree of divorce…". What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent."*

38. Therefore, it was made clear in Sureshta Devi (supra) that under Section 13B (2), the requirement is the 'motion of both the parties' and interpreting the same, the learned Judges made it clear that there should be mutual consent when they move the Court with a request to pass a decree of divorce and there should be consent also at the time when the Court is called upon to make an enquiry, if the petition is not withdrawn and then pass the final decree.

39. Interpreting the said Section, it was held in Sureshta Devi (supra) that if the petition is not withdrawn in the meantime, the Court, at the time of making the enquiry, does not have any jurisdiction to pass a decree, unless there is mutual consent.

40. Learned Judges made it further clear that if the Court makes an enquiry and passes a divorce decree even at the instance of one of the parties and against the consent of the other, such a decree cannot be regarded as a decree by mutual consent.

41. In paragraph 14 of the said judgment, learned Judges made it further clear as follows:-

> *"If the Court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality and consent for divorce. Mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section 13-B. Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the court to pass a decree of divorce.*
>
> *"The consent must continue to decree nisi and must be valid subsisting consent when the case is heard." {See (i) Halsbury's Laws of England, 4th edn. Vol. 13 para 645; (ii) Rayden on Divorce, 12th edn., Vol. 1, P. 291; and (iii) Beales V. Beales}."*

42. In paragraph 15 of the judgment, this Court held that the decisions of the High Courts of Bombay, Delhi and Madhya Pradesh cannot be said to have laid down the law correctly and those judgments were overruled. We also hold accordingly.

43. The decision in Sureshta Devi (supra) was rendered by a Bench of two learned Judges of this Court. In a subsequent decision of two learned Judges of this Court in the case of Ashok Hurra Vs. Rupa Bipin Zaveri – (1997) 4 SCC 226, the judgment in Sureshta Devi (supra) was doubted as according to the learned Judges some of the observations in Sureshta Devi (supra) appear to be too wide and require reconsideration in an appropriate case.

44. Learned Judges in Ashok Hurra (supra) made it clear that they were passing the order in that case on the peculiar fact situation. This Court also held that in exercise of its jurisdiction under Article 142 of the Constitution, a decree of divorce by mutual consent under Section 13B of the Act was granted between the parties. (See paragraph 16 and 22 of the report).

45. It appears that those observations were made by the learned Judges without considering the provisions of the Family Courts Act. In any event, the decision in Ashok Hurra (supra) was considered by a larger Bench of this Court in Rupa Ashok Hurra Vs. Ashok Hurra and Anr. – (2002) 4 SCC 388. No doubt was expressed by the larger Bench on the principles laid down in Sureshta Devi (supra). It appears that a petition for review was filed against the two judge decision in Ashok Hurra (supra) and the same was dismissed.

Thereafter, the question before the Constitution Bench in Rupa Ashok Hurra (supra) was as follows:-

> *"Whether the judgment of this Court dated 10.3.1997 in Civil Appeal No.1843 of 1997 [1997 (4) SCC 226] can be regarded as a nullity and whether a writ petition under Article 32 of the Constitution can be maintained to question the validity of a judgment of this Court after the petition for review of the said judgment has been dismissed are, in our opinion, questions which need to be considered by a Constitution Bench of this Court."*

46. In the Constitution Bench decision of this Court in Rupa Ashok Hurra (supra), this Court did not express any view contrary to the views of this Court in Sureshta Devi (supra).

47. We endorse the views taken by this Court in Sureshta Devi (supra) as we find that on a proper construction of the provision in Section 13B (1) and 13B (2), there is no scope of doubting the views taken in Shreshta Devi (supra). In fact the decision which was rendered by the two learned Judges of this Court in Ashok Hurra (supra) has to be treated to be one rendered in the facts of that case and it is also clear by the observations of the learned Judges in that case.

48. None of the counsel for the parties argued for reconsideration of the ratio in Sureshta Devi (supra).

49. We are of the view that it is only on the continued mutual consent of the parties that decree for divorce under Section 13B of the said Act can be passed by the Court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the Court grants the decree, the Court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the Court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its facts situation, discussed above.

50. In our view it is only the mutual consent of the parties which gives the Court the jurisdiction to pass a decree for divorce under Section 13B. So in cases under Section 13B, mutual consent of the parties is a jurisdictional fact. The Court while passing its decree under Section 13B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The Court

has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent. In the facts of the case, the impugned decree was passed within about three weeks from the expiry of the mandatory period of six months without actually ascertaining the consent of the husband, the respondent herein.

51. It is nobody's case that a long period has elapsed between the expiry of period of six months and the date of final decree.

52. For the reasons aforesaid, we affirm the view taken by the learned Judges of the Bombay High Court in the order under appeal.

53. The appeal is disposed of as follows:-

(i) On receipt of the copy of this judgment, the Family Court is directed to issue notice to both the parties to appear in the Court on a particular day for taking further steps in the case.

(ii) On that day, the parties are at liberty to engage their own counsel and they may be personally present before the Court and inform the Court as to whether they have consent to the passing of the decree under Section 13B of the Act. If both the parties give their consent for passing of the decree under Section 13B, the Court may pass appropriate orders.

(iii) If any of the parties makes a representation that he/she does not have consent to the passing of the decree, the Court may dispose of the proceedings in the light of the observations made by us. There shall be no order as to costs.

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K.A. ABDUL JALEEL VERSUS T.A. SHAHIDA

SUPREME COURT OF INDIA

Bench: **Hon'ble The Chief Justice of India, Hon'ble Mr. Justice S.B. Sinha & Hon'ble Mr. Justice AR. Lakshmanan**

K.A. Abdul Jaleel
Versus
T.A. Shahida

Appeal (Civil) 3322 of 2003
(2003) 4 SCC 166

Decided on : **10th April, 2003**

The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. From a perusal of the Statement of Objects and Reasons, it appears that the said Act, inter-alia, seeks to exclusively provide within the jurisdiction of the Family Courts the matters relating to the property of the spouses or either of them. Section 7 of the Act provides for the jurisdiction of the Family Court in respect of suits and proceedings as referred to in the Explanation appended thereto. Explanation (c) appended to Section 7 refers to a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them.

JUDGMENT

Hon'ble Mr. Justice S.B. Sinha :—

Leave granted.

Whether the Family Court has jurisdiction to adjudicate upon any question relating to the properties of divorced parties arises for consideration in this appeal. The said question arises out of a judgment and order dated 20.03.2001 passed by a Division Bench of the Kerala High Court dismissing an appeal from an order passed by the Family Court, Ernakulam, dated 22.07.1998 in O.P. No.343 of 1996.

The parties to this appeal were married on 03.01.1988. A female child was born out their wedlock on 11.10.1988. Allegedly, after the birth of the second child, owing to deterioration in the health of the respondent herein, the relationship of the parties became strained. The respondent contended that at the time of marriage, a large amount in cash as also gold ornaments were given. From the cash amount the appellant herein purchased a property described in Schedule 'A' of the petition on 01.02.1988. The balance amount was kept by the appellant. He allegedly further sold the gold ornaments of the respondent and out of the sale proceeds he purchased the property described in Schedule 'B' of the petition.

In respect of properties an agreement marked Exhibit A1 was executed by the parties, in terms whereof it was agreed that the properties purchased from the aforesaid amount will be transferred in the name of the respondent by the appellant. The appellant herein pronounced Talaq on 01.11.1995 after his

relationship with the respondent became strained. In terms of the said agreement dated 17.09.1994, the respondent filed a suit marked O.S. No.85 of 1995 in the Family Court on 08.12.1995. The appellant in his written statement alleged that the said agreement was signed by him under threat and coercion and further contended that several documents purported to have been executed by him in support thereof were also obtained by applying force. Both the parties examined themselves as also proved various documents in the said suit before the Family Court.

The Family Court by a judgment and order dated 22.07.1998 decreed the suit in favour of the respondent herein upon arriving at a finding that she was the absolute owner of the Schedule 'A' property as also 23/100 shares in the Schedule 'B' property.

Aggrieved thereby and dissatisfied therewith, the appellant preferred an appeal before the High Court which was marked as MFA No.196 of 1999. By reason of the impugned judgment dated 20.03.2001, the said appeal has been dismissed.

Mr. Haris Beeran, learned counsel appearing on behalf of the appellant, would submit that having regard to the provisions contained in Section 7 of the Family Courts Act, 1984, the Family Court had no jurisdiction to decide a dispute as regards properties claimed by a divorced wife. The learned counsel would urge that the jurisdiction exercisable by any Family Court being between the parties to a marriage which would mean parties to a subsisting marriage. In support of the said contention strong reliance has been placed on a judgment of a Division Bench of the Allahabad High Court in Amjum Hasan Siddiqui vs. Smt.Salma B. [AIR 1992 (Allahabad) 322] and Ponnavolu Sasidar vs. Sub-Registrar, Hayatnagar and Others [AIR 1992 (A.P.) 198].

Mr. T.L.V. Iyer, learned Senior Counsel appearing on behalf of the respondent, on the other hand, would contend that the matter is covered by an inter-parties judgment passed by a Division Bench of the Kerala High Court which is since reported in [1997 (1) KLT 734]. As the appellant herein did not question the correctness of the said judgment, he cannot be permitted to turn round and now challenge the jurisdiction the Family Court.

The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. From a perusal of the Statement of Objects and Reasons, it appears that the said Act, inter alia, seeks to exclusively provide within the jurisdiction of the Family Courts the matters relating to the property of the spouses or either of them. Section 7 of the Act provides for the jurisdiction of the Family Court in respect of suits and proceedings as referred to in the Explanation appended thereto. Explanation (c) appended toSection 7 refers to a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them.

The fact of the matter, as noticed hereinbefore, clearly shows that the dispute between the parties to the marriage arose out of the properties claimed by one spouse against the other. The respondent herein made a categorical statement to the effect that the properties were purchased out the amount paid in cash or by way of ornaments and the source of consideration for purchasing the properties described in Schedules 'A' and 'B' of the suit having been borne out of the same, the appellant herein was merely a trustee in relation thereto and could not have claimed any independent interest thereupon. It is also apparent that whereas the agreement marked as Exhibit A1 was executed on 17.09.1994, the appellant pronounced Talaq on 01.11.1995. The wordings 'disputes relating to marriage and family affairs and for matters connected therewith' in the view of this Court must be given a broad construction. The Statement of Objects and Reasons, as referred to hereinbefore, would clearly go to show that the jurisdiction of the Family Court extends, inter alia, in relation to properties of spouses or of either of them which would

clearly mean that the properties claimed by the parties thereto as a spouse of other; irrespective of the claim whether property is claimed during the subsistence of a marriage or otherwise.

The submission of the learned counsel to the effect that this Court should read the words "a suit or proceeding between the parties to a marriage" as parties to a subsisting marriage, in our considered view would lead to miscarriage of justice.

The Family Court was set up for settlement of family disputes. The reason for enactment of the said Act was to set up a court which would deal with disputes concerning the family by adopting an approach radically different from that adopted in ordinary civil proceedings. The said Act was enacted despite the fact that Order 32A of the Code of Civil Procedure was inserted by reason of the Code of Civil Procedure (Amendment) Act, 1976, which could not bring about any desired result.

It is now a well-settled principle of law that the jurisdiction of a court created specially for resolution of disputes of certain kinds should be construed liberally. The restricted meaning if ascribed to Explanation (c) appended to Section 7 of the Act, in our opinion, would frustrate the object wherefor the Family Courts were set up.

In Amjum Hasan Siddiqui's case (supra) an application was filed in terms of Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The question before the Allahabad High Court arose as to whether a Family Court could deal with such a dispute. It was held that no application could lie before the Family Court as the claim under Section 3 of the 1986 Act would neither be a suit nor a proceeding within the meaning of Section 7 of the Family Courts Act inasmuch as such an application could only be moved before the First Class Magistrate having requisite jurisdiction as provided for in the Code of Criminal Procedure. The said decision, in our opinion, cannot be said to have any application whatsoever in the instant case.

In Smt. P. Jayalakshmi and Another vs. V. Revichandran and Another [AIR 1992 AP 190], the Andhra Pradesh High Court was dealing with a case under Section 125 of the Code of Criminal Procedure. It was held that although the matrimonial proceeding was moved before the Family Court, the same could not have provided for a legal bar for the wife and the minor child for instituting a proceeding under Section 125 of the Code of Criminal Prcoedure at Tirupathi where they were residing; as both the rights are separate.

As indicated hereinbefore, Balakrishnan, J. (as His Lordship then was) speaking for a Division Bench in a matter arising out of a preliminary issue on the question of jurisdiction held that the dispute over properties between parties to a marriage cannot be confined to the parties to a subsisting marriage. We agree with the said view. The said decision being inter- parties and having attained finality would operate as res judicata.

The further contention of the learned counsel appearing on behalf of the appellant is that as the respondent had already filed an application under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, wherein an amount of Rs.1,33,200/- was awarded in her favour, the impugned proceeding was not maintainable.

The two proceedings are absolutely separate and distinct. The impugned judgment does not show that the said question was even argued before the High Court. As indicated hereinbefore, the factual issue involved in this appeal revolved round as to whether Exhibit A1 was obtained by applying force or undue influence upon the appellant. The said contention has been negatived by both the Family Court as also the High Court.

We, therefore, find no merit in this appeal which is dismissed with costs. Counsel's fee assessed at Rs.5,000/- (Rupees Five thousand only).

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LANDMARK JUDGMENTS ON

CUSTODY OF CHILD, VISITATION RIGHTS & SHARED PARENTING

GAYTRI BAJAJ VERSUS JITEN BHALLA

SUPREME COURT OF INDIA

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

Gaytri Bajaj Appellant
Versus
Jiten Bhalla Respondent

Civil Appeal Nos. 7232-7233 of 2012
(Arising out of SLP (Civil) 35468-69 of 2009)

Decided on 5 October, 2012

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

- ***This Court, therefore, was of the view that taking away the custody of the children from the father will not be desirable. In fact such a step would be adverse to the best interest of the children. However, keeping in mind the position of the appellant as the mother it was decided that the mother should be allowed to make an initial contact with the children and gradually built up a relationship, if possible, so as to arrive at a satisfactory solution to the impasse. Accordingly, the Court made the following interim arrangement:***

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

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

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

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi :—

1. Leave granted.

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

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

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

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

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

not correct, the High Court had left the question of validity of the decree, on ground of alleged fraud, open for adjudication in the suit.

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

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

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

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

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

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

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

10. What happened thereafter has been stated in an application filed by the respondent-husband before this Court (Interlocutory Application No.4/2012) seeking vacation/modification of the interim arrangement made by the order dated 16.12.2011. In the said application, it has been stated that pursuant to the order dated 16.12.2011 the respondent-father along with both the children had come to the Supreme Court Mediation Centre at about 10 a.m. on 17.12.2011.

However, the children refused to go with their mother and the appointed Mediator, inspite of all efforts, did not succeed in persuading the children. At about 1.30 p.m. the respondent, who had left the children in the Mediation Centre, received a call that he should come and take the children back with him. In the aforesaid I.A. it has been further stated that on 30.12.2011 when the children were due to visit the Mediation Centre once again, both the children started behaving abnormally since the morning and had even refused to take any food. After reaching the Mediation Centre, the children once again refused to go with their mother and the mediator had also failed to convince the children.

Eventually, at about 12.00 p.m., the respondent took both the children home. Thereafter, both the children have declined to visit the Mediation Centre any further. Before the next date for appearance in the Mediation Centre, i.e., 14.01.2012 the said fact was informed to the learned counsel for the appellant by the respondent through his counsel by letter dated 13.01.2012.

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

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

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

51. The word welfare used in section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration,

1 2009 (1) SCC 142

2 AIR 1941 (Bom.) 103

3 (1973) 1 SCC 840

4 (1982) 2 SCC 544

there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases.

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

14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.

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

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

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5 (2008) 7 SCC 673

6 (2006) 3 SCC 62

SUDARSANA RAO GADDE VERSUS KARUNA GADDE

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Kurian Joseph and Hon'ble Mr. Justice M. Shantanagoudar**

Sudarsana Rao Gadde
Versus
Karuna Gadde

Civil Appeal No(S). 2287/2018

[arising from SLP (C) Nos.17055 of 2017]

Decided on : **20th February, 2018**

Appellant, father, filed the case for custody of his child. Several attempts were made for peaceful and amicable settlement. The parties marriage is dissolved by a decree of divorce by mutual consent under section 10A of the Indian Divorce Act, 1869. After prolonged litigation for custody of minor child, the parties arrived at a settlement. Both the parties were directed not to institute any case or petition or any complaint against each other or members of the family on both sides with regard to disputes between the parties or on custody of the child or on visitation without the leave of the court. Appellant was directed to hand over the child to Respondent. Visitation and Custody rights as per settlement.

JUDGMENTS

Hon'ble Mr. Justice Kurian Joseph :—

1. Leave granted.

2. The appellant is before this Court, aggrieved by the order dated 16.06.2017 passed in Civil Revision No.1804/2017. The disputes are matrimonial in nature.

3. We had made several attempts for a peaceful and amicable settlement of the disputes, through Mediators and also by the Court itself. In this connection, we may reproduce an order of this Court dated 01.08.2017:-

> *"The parties are before us on account of a prolonged litigation for the custody of their minor child Ayush. The parties along with the grandparents are here for quite a few days. We painfully note that the child has not been attending the school for the last one month. Thanks to the intervention of Mr. P.S. Narasimha, learned Additional Solicitor General, thanks to the strenuous efforts of learned Senior counsel appearing for both sides, thanks to the cooperation extended by the parties and finally due to the steps taken by this Court, the parties have now arrived at a settlement.*
>
> *The agreement dated 01.08.2017, duly signed by both the parties and their respective counsel has been handed over to us in the Court today. The parties are present before us today. The parties are directed to act according to the terms of the settlement which shall also form part of this order. We direct both parties not to institute any case or petition or any complaint against each other or the members of the family on both sides.*

They will not approach any forum with regard to any of the disputes between the parties or on the custody of the child or on visitation without the leave of this Court. All litigations pending between the parties shall remain stayed until further orders. We direct the petitioner Sudarsana Rao Gadde to hand over the child at the residence of Karuna Gadde-respondent before 1 p.m. on 02.08.2017. In case the presence of both the parents is required in the school, they shall communicate with each other and both of them shall be present in the school. Post this matter on 20.02.2018."

4. Today, the parties are personally present before us along with their child-Aayush. In Clause (vi) of the Settlement, the parties have agreed on visitation and custody rights. In view of the long litigations between the parties they have prayed for a decree of divorce by mutual consent. Having interacted with the parties, we find that they have taken a conscious decision without being influenced by any other extraneous factors. Accordingly, the marriage between the appellant/Sudarsana Rao Gadde and respondent/Karuna Gadde is dissolved by a decree of divorce by mutual consent under Section 10A of the Indian Divorce Act, 1869. The Settlement dated 01.08.2017 arrived at between the parties is already on record and the same shall form part of this judgment.

5. We direct the parties to strictly abide by the terms of Settlement.

6. Now that the parties have settled their disputes, we do not think it necessary to relegate them to the respective Courts where other litigations are pending between them as they have agreed to put an end to all the litigations. Accordingly, G.W.O.P. No. 2222 of 2016 on the file of the Family Court at Rangareddy District, Miyapur, Hyderabad will stand disposed of in terms of the Settlement dated 01.08.2017. O.P. No.2223/2016 pending before the Family Court at Rangareddy District, Miyapore Hyderabad is decreed as per the abovementioned Settlement.

7. In terms of the Settlement, we restrain the parties from instituting any fresh case against each other in respect of any dispute arising out of the Settlement dated 01.08.2017, without express permission from this Court.

8. The appeal is, accordingly, disposed of.

9. Pending applications, if any, shall stand disposed of.

10. There shall be no orders as to costs.

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MEENAL BHARGAVA VERSUS NAVEEN SHARMA

SUPREME COURT OF INDIA

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

Meenal Bhargava .....Appellant(S)

Versus

Naveen Sharma.....Respondent(S)

Civil Appeal No. 3629 of 2018

Decided on : **9th May, 2018**

The appellant has challenged the order against the findings of the High Court holding her to be in contempt of its order and awarding the said punishment. The respondent feels aggrieved by that part of the order whereby the High Court has refused to grant him the custody of Pranav and showed him the route of execution. This, in nutshell, is the scope of two appeals before this Court.

Unfortunate part is that instead of acknowledging the truth, parties are grumbling continuously and complaining against each other. This accusation, castigation, chargeability and dilation, depicting deviation from rectitude is a mindless exercise and, in the process, true welfare of Pranav is sought to be sacrificed. We are compelled to express these sentiments because of the reason that things have still not gone beyond repair. Had the parties shown positive and cooperative attitude (which, we are sure, they had demonstrated during mediation talks) they could still achieve an amiable resolution, inasmuch as it is even now possible to work out the terms of the compromise that was entered into between them. In fact, the respondent had expressed his willingness to go an extra-mile to save the settlement and the matrimonial home. However, the appellant stood firm in her attitude as she kept on saying that she could no longer repose confidence and trust in the respondent. She has a grudge that respondent lured her into the settlement with selfish motive to take away the custody of Pranav with no love towards her and his moves lack bona fides. The respondent, on the other hand, maintained the position that appellant was resorting to falsehood because of her selfish motives which were kept higher in priority, even at the cost of family life.

However, we may re-emphasise that all is not lost and situation can still be brought under control if there is a dispassionate and objective thinking by both the parties, keeping aside their ego. Life has problems. Parties have to understand those problems and to reflect on the reasons why these problems have arisen leading to such kind of disputes. Both the parties have also to reflect on the future and to make up their mind on that basis as to whether it would be in their interest, as well as in the interest of Pranav to bury the hatched and have a new beginning.

JUDGMENTS

Hon'ble Mr. Justice A.K.Sikri :—

These are the cross-appeals, filed by both the parties challenging different parts of the orders dated January 9, 2018 passed by the High Court of Judicature at Rajasthan in D.B. Civil Contempt Petition No. 1846 of 2017. The parties are husband and wife. After their marriage in the year 2007, the wife joined her husband in the United States of America (USA). Their child, named Pranav, was born out of this wedlock in August, 2009 at Baltimore, USA. In 2010, they migrated to Canada. For certain reasons, the matrimonial relations became strained and the wife viz. Meenal Bhargava (hereinafter referred to as the appellant), left the company of her husband Naveen Sharma (hereinafter referred to as the respondent) and on July 26, 2013, went away from her husband, taking Pranav with her. Initially, for some time, she stayed in Buffalo, New York and thereafter came to India in August, 2013.

2. The respondent filed a case for custody of Pranav in a Canadian Court. Vide order dated October 29, 2014, the Court granted temporary custody of Pranav to the respondent. By that time, appellant had brought Pranav to India i.e. on August 4, 2013. After order dated October 29, 2014 granting temporary custody of Pranav was passed in favour of the respondent, the mother of the appellant filed a motion in a Court at Canada stating that the said Court at Canada had no jurisdiction in the matter. This contention was, however, rejected by the Court and, thereafter on April 2, 2015, another order was passed directing the appellant to return Pranav to its jurisdiction and appear before the Court on April 16, 2015. The appellant did not comply with this order, which led to issuance of red corner notice by the FBI/Interpol against the appellant.

3. Since the appellant had travelled out of territorial jurisdiction of the Canadian Court and had come to India with Pranav, finding no other alternative, the respondent herein filed a Habeas Corpus Petition in the High Court of Judicature at Rajasthan. In the said petition, notice was issued to the appellant herein. Having regard to the nature of dispute, the High Court deemed it proper to explore the possibility of settlement in the first instance. Thus, by order dated December 17, 2015, the parties were referred to mediation. This effort bore fruits as the respondent and appellant settled the matter.

4. The appellant agreed to come back to USA and join the company of the respondent along with Pranav. Consent terms were recorded and on the basis thereof, the High Court disposed of the Habeas Corpus Petition vide order dated December 17, 2015 incorporating those terms of settlement in its order and directing the parties to abide by the same. These consent terms are as under:

(1) *Both the parties will withdraw their respective cases within 4 months from today.*

(2) *Mr. Naveen Sharma will find out 3-4 flats for choice of Smt. Meenal and Smt. Meenal will then go to U.S.A. to select one of them. This process should complete within 18 months.*

(3) *In the meantime Mr. Naveen Sharma will come to India to meet Mrs. Meenal and Pranav at least for 3 time. Similarly Mrs. Meenal will go to U.S.A. along with her son under the security with condition that Mr. Naveen will arrange all their expenses including travelling expenses and will undertake that if both of them desire to return India then Mr. Naveen will arrange their safe return to India.*

(4) *The flat which is going to purchase by Mr. Naveen Sharma should be in joint name of both party. None of the party will entitle to sale this flat or its any part independently. Mr. Naveen Sharma will arrange collateral security against loan and in no case the flat should be taken from ownership and possession of Mrs. Meenal Sharma. In case any mis-happening the flat will remain in ownership of Mrs. Meenal Sharma.*

(5) *Mr. Naveen, Mrs. Meenal and Pranav will live jointly at U.S.A. after purchase of flat. None of the family member of both parties will disturb and interfere in their lives.*

5. For certain reasons, the laudable settlement, hoping to achieve win-win situation, did not turn into reality. As per the respondent, it is the appellant who committed breach of the said settlement and also violated the directions contained in the order of the High Court to comply with these terms. As she failed to adhere to the settlement and did not comply with the directions of the High Court in this behalf, the respondent herein filed Civil Contempt Petition in the High Court seeking execution of the consent terms and punishment to the appellant under the Contempt of Courts Act, 1971 (hereinafter referred to as the Act). The appellant also, thereafter, filed application in the High Court seeking recall of the consent order dated December 17, 2015. The High Court has, by impugned judgment dated January 9, 2018, found the appellant to be in contempt and award maximum punishment of six months civil imprisonment under Section 12(1) read with Section 12(3) of the Act with direction to the appellant to surrender within four weeks. The High Court has also dismissed the application preferred by the appellant for recall of order dated December 17, 2015. However, it has not accepted the request of the respondent to give him the custody of Pranav pursuant to the Canadian Courts order dated April 16, 2015 and, instead, permitted the respondent to seek execution of the said order.

6. The appellant has challenged the aforesaid order against the findings of the High Court holding her to be in contempt of its order and awarding the said punishment. The respondent feels aggrieved by that part of the order whereby the High Court has refused to grant him the custody of Pranav and showed him the route of execution. This, in nutshell, is the scope of two appeals before this Court.

7. As noted above, Pranav was born in Baltimore, USA on August 22, 2009. He is having US citizenship. Both the parties, after their marriage, have resided in America or Canada. They have also became Permanent Residents of Canada as well as America. From the date of his birth in August, 2009, Pranav remained with their parents, initially in America and thereafter in Canada till July 26, 2013, when the appellant went away with him to Buffalo, New York and thereafter came to India on August 4, 2013. Pranav stayed with his father, along with her mother, for four years and since then he is living with her mother to the exclusion of the respondent. He was 4 years of age when he was brought to India by the appellant and is in India now for more than 4½ years. Another pertinent fact which is to be noted is that the respondent has got orders from the Canadian Court giving custody of Pranav to him and has directed the appellant herein to return the child back to Canada.

8. In the aforesaid background, the respondent had filed petition for Habeas Corpus. However, the said petition was not heard on merits inasmuch as parties were relegated to mediation where they settled the matter leading to disposal of the Habeas Corpus petition vide order dated December 17, 2015 on the consent terms which were made part of the order with specific directions to both the parties to adhere to those conditions. We have already noted the consent

terms as per which the parties had to withdraw their respective cases against each other within 4 months from the date of the order of the High Court. The respondent was obligated to find out 3-4 flats for choice of the appellant. After having chosen these flats, he was to show the same to the appellant. The appellant, at that stage, was supposed to go to USA to select one of the said flats. On this selection, she was to join the respondent with Pranav, thereby achieving again the matrimonial alliance and Pranav having benefit of the company of both his parents. This entire process was to be completed within 18 months. During the aforesaid period of 18 months which was given to the respondent to find out flats in USA, the respondent was permitted to come to India, at least three times, to meet the appellant and Pranav. Likewise, the appellant and Pranav were also supposed to go to USA under security and for such visits, it was the responsibility of the respondent to arrange all their expenses including travelling expenses. During such visits, they were entitled to remain in USA as per their choice and as and when they desired to return to India, the respondent had to arrange their safe return to India.

9. Three main obligations, as per the consent terms, were foisted upon the respondent, viz.:

(i) To find 3-4 flats in USA to enable the appellant to select one of them. The chosen flat was to become abode of the family.

(ii) To withdraw the cases filed against the appellant. This included complaint filed with Police and also take steps to ensure that warrants/red-corner notice issued by the FBI/Interpol also stands withdrawn. This was necessary for smooth entry of the appellant in USA.

(iii) After the selection of the flat by the appellant, the respondent was obligated to purchase the said flat in joint names.

10. Likewise, the appellant was bound to carry out the following tasks as per the aforesaid statements:

(i) To withdraw all the cases filed by her against the respondent.

(ii) After earmarking of 3-4 flats by the respondent, to go to USA to select one of them.

(iii) On selecting the flat and purchase thereof by the respondent in joint names of the appellant and respondent, she was to go to USA along with Pranav and stay there with the respondent.

11. For certain reasons, the parties fell apart and the settlement terms could not be fructified leading to the unfortunate situation. As per the respondent, he had played his part by complying with the said terms inasmuch as he withdrew the illinois police complaint, warrants/red-corner notice issued by FBI/Interpol on February 12, 2016. He also visited India three times i.e. in August, 2016, December, 2016 and August, 2017. During these visits, the respondent had shown to the appellant various flats selected online by him with request to the appellant to make her choice. However, on his third visit in August, 2017, the appellant did not allow Pranav to meet the respondent as a result of which police complaint was filed with the SHO, Ajmer on August 26, 2017. The respondent also sent air tickets to the appellant on August 31, 2017 for travel on September 3, 2017 to enable her and Pranav to visit USA. The respondent further claims that he had also planned a trip to Disney World, Florida for Pranav along with the appellant. According to the respondent, in spite of all the efforts made by the respondent, it is the appellant who backed out and resiled from the settlement as she failed to perform her role.

12. The appellant, on the other hand, blames the respondent which led to the aforesaid failure. Her accusation is that after the Habeas Corpus Petition was disposed of vide order dated December 17, 2015, she filed following three petitions on April 12, 2016 seeking to withdraw the following cases filed by her:

(i) Custody Petition filed by her before the Family Court, Ajmer.

(ii) Maintenance case filed by her before the Family Court, Ajmer.

(iii) Divorce case filed by her before the Family Court, Ajmer.

13. It is further claimed by the appellant that even the criminal proceedings launched by her under Section 498-A IPC etc. were quashed by the High Court on a petition filed by the respondent under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) which happened because of her no objection as per the settlement. Pointing the finger at the respondent, her imputation is that he did not withdraw the custody case filed by him in the Canadian Court and/or sought vacation/rescinding of order dated April 16, 2015 by which custody of Pranav was ordered in favour of the respondent. She also alleges that the respondent failed to send a list of flats to her within the stipulated 18 months time which was mentioned in the consent terms. Thus, according to the appellant, it is the respondent who has not fulfilled his obligations under the settlement. In fact, she even filed miscellaneous application in the petition that was filed by the respondent under Section 482 Cr.P.C. and was allowed by the High Court on April 12, 2017, seeking recall of the said order on the ground that it was the respondent who had committed breach of the settlement. High Court, however, rejected the said application vide order dated May 9, 2017 on the ground that the said order had been passed after issuance of notice to the appellant.

14. With this kind of impasse, the respondent filed a miscellaneous application in the Habeas Corpus Petition seeking revival thereof on the ground that the appellant had breached the consent terms. This application was, however, not accepted by the High Court on the ground that if there was any breach or disobedience on the part of the appellant herein, there was an alternative remedy available to the respondent to file contempt petition. This application was, thus, dismissed as withdrawn by order dated October 5, 2017 with liberty to the respondent to file the contempt petition. Thereafter, the respondent filed the contempt petition on November 7, 2017 which has culminated in the impugned judgment dated January 9, 2018.

15. We may mention at this stage that when the notice of the contempt petition was served upon the appellant, she filed reply thereto stating that she had taken requisite steps under the settlement and it is the respondent who failed to get orders dated April 16, 2015 passed by Canadian Court nullified thereby disabling her to go to America inasmuch as she could be arrested immediately on landing in USA/Canada in view of the aforesaid order. She also alleged that list of flats was not sent to her. Moreover, conduct of the respondent, post-settlement, was not good. She had also filed additional reply dated December 11, 2017 contending (i) pursuant to High Court orders, she had gone to Delhi hotel to meet respondent and his mother but she was publicly humiliated there, (ii) she had found that the respondent had been fired by his employer IBM for taking bribes and he had not been truthful to the Government also and (iii) respondent had not paid a single penny as maintenance. This was followed by application dated December 19, 2017 by the appellant seeking recall of order dated December 17, 2015.

16. The aforesaid stand of the appellant has been taken note of with a specific purpose, namely, it is the contention of Mrs. Anjana Prakash, learned senior counsel appearing for the appellant, that the High Court has, in the impugned judgment, not even discussed and dealt with the submissions of the appellant that she had not committed any breach of the order or consent terms and on the contrary, it is the respondent who failed to fulfil his obligations thereunder. She submitted that from the reading of the impugned order, it can be discerned that the High Court Bench kept on insisting the appellant to join the company of the respondent along with Pranav and on her refusal to do so, the High Court has taken the view that appellant has shown strong defiance to the orders of the Court. In the process, the High Court has not even cared to examine who was at fault insofar as adherence to the consent order is concerned. She also submitted that the High Court took into consideration another extraneous factor. It has noted in the impugned judgment that statement was given in the Court by the father of the appellant that the application for recall of order dated May 9, 2017 passed in petition filed by the respondent under Section 482 Cr.P.C., was moved by the counsel for the appellant without her instructions. That, however, was found to be false assertion inasmuch as the High Court called for the record of that case and found that each page of the application was signed by the appellant and on realising this, it was conceded that lawyer was instructed to make such an application. It was contended by the learned senior counsel that even if this was correct, it has no bearing insofar as the contempt case is concerned.

17. Mr. Jauhar, learned counsel appearing for the respondent, on the other hand, put entire blame upon the appellant who, according to him, took summersault with intention to commit breach of settlement terms as there was change of heart and she decided not to join the company of the husband. He took pains to demonstrate that respondent had took all the necessary steps in terms of the settlement. He still wanted the appellant to resume matrimonial alliance for the sake of saving the family ties and also to enable Pranav be in the company of both the parents.

18. We have duly considered the submissions of counsel for both the parties. As noted in detail above, both the parties are blaming each other for the failure of settlement terms. In this backdrop, we have gone through the impugned order passed by the High Court. In the entire judgment, the High Court has not adverted to the important aspect that needed attention in such a case, namely, whether it was the appellant who was responsible for not adhering to the terms of the consent order and thereby violated the directions issued by the High Court in in its orders dated May 09, 2017. After all, the respondent had filed the contempt petition attributing breach of the directions on the part of the appellant. In reply, the appellant had taken up the stand that she was not responsible for the happenings and squarely blamed the respondent therefor. The High Court has not discussed these aspects. On the contrary, the approach of the High Court was to insist the appellant to adhere to the settlement terms even at that stage and on her refusing to do so it arrived at a finding that she had committed the contempt of the courts order as the aforesaid conduct was found to be abhorrent. It is, thus, the stubborn attitude shown by the appellant during the hearing of the contempt petition which has weighed by the High Court. That, according to us, was not the correct approach for punishing the appellant for contempt of court. The contempt petition was filed by the respondent alleging that the appellant had not fulfilled her obligations under the consent terms and the directions given by the High court in this behalf. It was, thus, necessary for the High Court to discuss and consider, in the first instance, as to whether these allegations of the respondent were correct.

19. There is another way of looking into the matter. The consent terms on which the parties settled the matter contained an important part of agreement, namely, both the parties decided to live together again. This happened in the proceedings which essentially related to the custody of child. No doubt, when the parties agreed to resume the matrimonial relations and decided to live again as husband and wife, the problem of custody of Pranav got automatically solved thereby as it brought about an ideal situation where Pranav could have the company of his both the parents. Unfortunately, this did not materialise. In a case like this whether the High Court could force the appellant to join the company of the respondent and live with him, if he had decided for certain reasons not to do so? Even when a decree of conjugal rights is filed by a competent court of law in favour of one of the spouses, such a decree cannot be executed and the other spouse who is directed to resume the conjugal relations, cannot be forced to do so. It is a different matter that for not obeying such a decree, other consequence follow including right to the decree holder to seek divorce. When that is the position even in respect of a decree passed by competent court of law forcing the appellant to join the company of the respondent and on her failing to do so punishing her in committing contempt of the courts order, that too by awarding maximum civil imprisonment in law cannot be countenanced. In a matter like this, the focus of the High Court should have been on the custody of the child, which was a subject matter of the Habeas Corpus petition. However, as far as that aspect is concerned, the High Court simply stated that it would be open to the respondent to execute the order of the Canadian Court dated April 16, 2015. Here again the High Court has fallen into error. In fact, in a matter like this, the High Court should have restored the Habeas Corpus Petition and decided the same on merits. However, when application for this purpose was filed by the respondent, instead of doing so the High Court passed the orders dated October 05, 2017 giving liberty to the respondent to file the contempt petition.

20. Having regard to our aforesaid discussion, we allow the appeal filed by the appellant and set aside the order of the High court whereby the appellant is punished for contempt. It would be open to the respondent to press the contempt petition before the High Court and if he so choses the High Court shall decide the contempt petition in the light of the aforesaid observations made by this Court, namely, to first find out as to whether the appellant is correct in her submissions that it is the respondent who did not take necessary steps to ensure that the appellant joins the company of the respondents along with Pranav in USA. We also allow the appeal of the respondent partly by setting aside the direction of the High Court permitting the respondent to file the execution petition. Instead with the consent of both the parties, order dated October 05, 2017 passed in Miscellaneous Application filed by respondent in Habeas Corpus petition is set aside and her Habeas Corpus petition is revived which shall be dealt with by the High Court on merits in order to decide as to whether custody of Pranav is to be handed over to the respondent. Before us, both the parties have advanced arguments on this aspect whereas the appellant submitted that the welfare of Pranav lies in continuing his custody with his mother. The respondent had made a fervent plea to claim the custody on the basis of the order of the Canadian Court. However, we are deliberately not dealing with this aspect as this aspect is the subject matter of Habeas Corpus Petition pending in the High Court and it is the High Court which has to deal with and decide this question, in the first instance.

21. Both the aforesaid appeals are allowed on the aforesaid terms, without any orders as to costs.

22. Before we part with, we are constrained to make few comments about the conduct of the parties who are not fully acknowledging the truth and reality of the situation. It is either the appellant or the respondent or may be, to some extent, both of them, who are to be blamed for the egoist approach. No doubt, on an earlier occasion, some differences arose between them which led to strained relations and the appellant even came back to India. Legal battles of all kinds started with both the parties filing multiple proceedings against each other. In these dark clouds enveloping the relationship between the parties, a silver lining emerged in the form of mediation. As both the parties acted with wisdom and maturity, mediation exercise was successful. Both the parties not only buried their acrimony against each other but decided to have a new beginning. The magic of mediation worked at that moment. The consent terms which were recorded in the settlement arrived at during mediation proceedings brought about the resolution which could truly be levelled as win-win situation. The accord was aimed at reuniting the two spouses with the aim of bringing happiness in the matrimonial relationship. More importantly, paramount interest of Pranav as a child was acknowledged by the parties as any child, particularly at this age, needs the company of both the parents for him/her to bloom and for ideal bringing up. In fact, as is clear from the events noted above, both the parties even took initial steps to make this settlement a success. However, before it could be seen as happy ending and parties could reach that end of the road where they could find their final destination as envisaged in the settlement, they encountered a road block. Whether it happened due to the fault of the appellant or that of respondent, we are not commenting about the same. Unfortunate part is that instead of acknowledging the truth, parties are grumbling continuously and complaining against each other. This accusation, castigation, chargeability and dilation, depicting deviation from rectitude is a mindless exercise and, in the process, true welfare of Pranav is sought to be sacrificed. We are compelled to express these sentiments because of the reason that things have still not gone beyond repair. Had the parties shown positive and cooperative attitude (which, we are sure, they had demonstrated during mediation talks) they could still achieve an amiable resolution, inasmuch as it is even now possible to work out the terms of the compromise that was entered into between them. In fact, the respondent had expressed his willingness to go an extra-mile to save the settlement and the matrimonial home. However, the appellant stood firm in her attitude as she kept on saying that she could no longer repose confidence and trust in the respondent. She has a grudge that respondent lured her into the settlement with selfish motive to take away the custody of Pranav with no love towards her and his moves lack bona fides. The respondent, on the other hand, maintained the position that appellant was resorting to falsehood because of her selfish motives which were kept higher in priority, even at the cost of family life. However, we may re-emphasise that all is not lost and situation can still be brought under control if there is a dispassionate and objective thinking by both the parties, keeping aside their ego. Life has problems. Parties have to understand those problems and to reflect on the reasons why these problems have arisen leading to such kind of disputes. Both the parties have also to reflect on the future and to make up their mind on that basis as to whether it would be in their interest, as well as in the interest of Pranav to bury the hatched and have a new beginning. We say no more.

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MRS. KANIKA GOEL VERSUS STATE OF DELHI

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Dipak Misra, CJI, Hon'ble Mr. Justice A.M. Khanwilkar and Hon'ble Mr. Justice D. Y. Chandrachud**

Mrs. Kanika Goel .....Appellant(s)
Versus
State of Delhi ....Respondent(s)

Criminal Appeal Nos. 635-640 of 2018

Decided on : **20th July, 2018**

Writ petition filed by Respondent No. 2 for issuing a writ of habeas corpus for production of his minor daughter M (assumed name), who was about 3 years of age at the time of filing of the writ petition and for a direction for return of M to the jurisdiction of the competent Court in the United States of America in compliance with the order dated 13th January, 2017 passed by the Circuit Court of Cook County, Illinois, USA, came to be allowed.

Appellant filed a petition under section 13(1) of Hindu Marriage Act, 1955 seeking dissolution of marriage on the ground of cruelty along with an application under section 26 of same act.

The child is a habitual resident of US and Illinois is the home state of child pursuant to the Uniform Child Custody Jurisdiction Enforcement Act, the high court committed an error look into the best interest of child on the basis of provisions of the Juvenile Justice Act, 2015. Application filed by the Appellant Under Section 151 of the Code of Civil Procedure, restraining Respondent No. 2 from removing the minor child from the jurisdiction of that Court until further orders.

Appellant, being the mother of the minor child M, has approached this Court by way of Special Leave under Article 136 of the Constitution of India.

Custody of the minor girl child M would remain with the Appellant until she attains the age of majority or the Court of competent jurisdiction, trying the issue of custody of the minor child, orders to the contrary, with visitation and access rights to the biological father whenever he would visit India.

Further directed that the Appellant and Respondent No. 2 must ensure early disposal of the proceedings for grant of custody of the minor girl child to the Appellant, instituted and pending before the Family Court at Patiala House, New Delhi. All contentions available to the parties in that regard will have to be answered by the Family Court on its own merits and in accordance with law. Present court further set aside the impugned judgment and orders of the High Court and dispose of the writ petition with some terms and conditions.

JUDGMENTS

Hon'ble Mr. Justice A.M. Khanwilkar :—

1. These appeals take exception to the judgment and orders passed by the High Court of Delhi at New Delhi dated 16 th November, 2017, 1st December, 2017 and 6th December, 2017, in Writ Petition (Criminal) No.374 of 2017 and Criminal M.A. whereby the writ petition filed by respondent No.2 for issuing a writ of habeas corpus for production of his minor daughter M (assumed name), who was about 3 years of age at the time of filing of the writ petition and for a direction for return of M to the jurisdiction of the competent Court in the United States of America in compliance with the order dated 13th January, 2017 passed by the Circuit Court of Cook County, Illinois, USA, came to be allowed. The Delhi High Court directed the appellant to comply with the directions as M was in her custody, the appellant being M's mother.

2. The respondent No.2 asserted that he was born in India but presently is a citizen of USA since 2005. He is working as the CEO of a Company called 'Get Set Learning'. The appellant is his wife and mother of the minor child M. She is a US Permanent Resident and a "Green Card" holder and has also applied for US citizenship on 2nd December, 2016. At the relevant time, she was a certified teacher in the State of Illinois and was employed as a Special Education Classroom Assistant in Chicago Public Schools. The respondent No.2 and the appellant got married on 31st December, 2010 as per Sikh rites, i.e. Anand Karaj ceremony, and Hindu Vedic rites in NewDelhi. It was clearly understood between both the parties that the appellant, after marriage, would reside with respondent No.2 in the USA. Eventually, the appellant travelled to the USA on a Fiance Visa and got married to respondent No.2 again on 19th March, 2011 at Cook County Court in Chicago, Illinois. Before the marriage, the parties entered into a Pre-Nuptial Agreement dated 20th October, 2010 enforceable in accordance with the laws of the State of Illinois, USA. The appellant then took employment as a teacher in Chicago Public School and also secured a US Permanent Citizen Green Card. The appellant became pregnant and gave birth to M on 15 th February, 2014 in USA. M is thus a natural born US citizen and was domiciled in the State of Illinois, USA from her birth till she was clandestinely removed by the appellant in December 2016 under the guise of undertaking a short trip to New Delhi to meet the appellant's parents.

3. The appellant was scheduled to return to Chicago on 7 th January, 2017 but she went missing and filed a petition under Section 13(1) of the Hindu Marriage Act, 1955 (for short "the 1955 Act") being H.M.A. Case No.27 of 2017 seeking dissolution of marriage on the ground of cruelty, along with an application under Section 26 of the 1955 Act on 7 th January, 2017 seeking a restraint order against respondent No.2 from taking M away from the jurisdiction of Indian Courts. A notice was issued thereon to respondent No.2, made returnable on 11th January, 2017.

4. The respondent No.2, however, filed an emergency petition for temporary sole allocation of parental responsibilities and parenting time in his favour or in the alternative, an emergency order of protection for possession of his minor daughter M, before the Circuit Court of Cook County, Illinois on 9th January, 2017. A notice of emergency motion was served on the appellant by e-mail, informing her of the proposed hearing on 13th January, 2017.

5. In the meantime, on 11th January, 2017 the Family Court at New Delhi issued a fresh notice to respondent No.2 and passed an ex-parte order on the application filed by the appellant under Section 151 of the Code of Civil Procedure, restraining respondent No.2 from removing the minor child from the jurisdiction of that Court until further orders.

6. The respondent No.2 on the other hand, caused to file a missing person complaint on 13 th January, 2017 before the SHO, Vasant Kunj (South), P.S. New Delhi, which was acknowledged by the Police Station on 14 th January, 2017. Besides the said complaint, respondent No.2 moved the Circuit Court of Cook County, Illinois, USA on 13 th January, 2017 when an ex-parte order was passed for interim sole custody of the minor child. The said order reads thus:

> ***"1)*** *The child M born on 15.02.2014, in Chicago, Illinois and having resided in Chicago solely for her entire life (specifically at 360 East Randolph Street, Chicago, IL 60601) is also a US citizen.*
>
> ***2)*** *The child is a habitual resident of the state of Illinois, United States of America having never resided anywhere else. Illinois is the home state of the child pursuant to the Uniform Child Custody Jurisdiction Enforcement Act.*
>
> ***3)*** *Karan Goel is the natural father of the minor child and granted interim sole custody of the minor child. Child is to be immediately returned to the residence located in Cook County, Illinois, USA by Respondent.*
>
> ***4)*** *The Cook County, Illinois Court having personal and subject matter jurisdiction over the parties and matter.*
>
> ***5)*** *All further issues regarding visitation, child support are reserved until further Order of Court."*

7. The appellant did not comply with the order of the Circuit Court of Cook County, Illinois, therefore, respondent No.2 filed a writ petition before the Delhi High Court on 1 st February, 2017, to issue a writ of habeas corpus and direct the appellant to produce the minor child M and cause her return to the jurisdiction of the Court in the United States, in compliance with the order dated 13th January, 2017 passed by the Circuit Court of Cook County, Illinois, to enable the minor child to go back to United States and if the appellant failed to do so within a fixed time period, to direct the appellant to immediately hand over the custody of the minor child to respondent No.2 (writ petitioner) to enable him to take the minor child to the jurisdiction of the US Court.

8. This writ petition was contested by the appellant. The High Court issued interim orders including regarding giving access of the minor child to respondent No.2 in the presence ofthe appellant and her parents. Finally, all the contentious issues between the parties were answered by the High Court by a speaking judgment and order dated 16 th November, 2017, in favour of respondent No.2, after recording a finding that the paramount interest of the minor child was to return to USA, so that she could be in her natural environment. To facilitate the parties to have a working arrangement and to minimize the inconvenience, the Division Bench of the High Court issued directions in the following terms:

> ***"139.*** *In the light of the aforesaid, we are more than convinced that respondent No.2 should, in the best interest of the minor child M, return to USA along with the child, so that she can be in her natural environment; receive the love, care and attention of her father as well – apart from her grandparents, resume her school and be with her teachers and peers. Pertinently, respondent No.2 is able-bodied, educated, accustomed to living in Chicago, USA, was gainfully employed and had an income before she came to India in December 2016 and, thus, she should not have any difficulty in finding her feet in*

USA. She knows the systems prevalent in that country, and adjustment for her in that environment would certainly not be an issue. Accordingly, we direct respondent no.2 to return to USA with the minor child M. However, this direction is conditional on the conditions laid down hereinafter.

140. *Respondent No.2 has raised certain issues which need to be addressed, so that when she returns to USA, she andthe minor child do not find themselves to be in a hostile or disadvantageous environment. There can be no doubt that the return of respondent No.2 with the minor child should be at the expense of the petitioner; their initial stay in Chicago, USA, should also be entirely funded and taken care of by the petitioner by providing a separate furnished accommodation (with all basic amenities & facilities such as water, electricity, internet connection, etc.) for the two of them in the vicinity of the matrimonial home of the parties, wherein they have lived till December 2016. Thus, it should be the obligation of the petitioner to provide reasonable accommodation sufficient to cater to the needs of respondent No.2 and the minor child. Since respondent No.2 came to India in December 2016 and would, therefore, not have retained her job, the petitioner should also meet all the expenses of respondent No.2 and the minor child, including the expenses towards their food, clothing and shelter, at least for the initial period of six months, or till such time as respondent No.2 finds a suitable job for herself. Even after respondent No.2 were to find a job, it should be the responsibility of the petitioner to meet the expenses of the minor daughter M, including the expenses towards her schooling, other extra-curricular activities, transportation, Attendant/ Nanny and the like, which even earlier were being borne by the petitioner. The petitioner should also arrange a vehicle, so that respondent No.2 is able to move around to attend to her chores and responsibilities.*

141. *Considering that the petitioner had initiated proceedings in USA and the respondent No.2 has been asked to appear before the Court to defend those proceedings, the petitioner should also meet the legal expenses that respondent No.2 may incur, till the time she is not able to find a suitable job for herself. However, if respondent no.2 is entitled to legal aid/assurance from the State, to the extent the legal aid is provided to her, the legal expenses may not be borne by the petitioner.*

142. *The petitioner should also undertake that after the return of the minor child M with respondent No.2 to USA, the custody of M shall remain with respondent No.2 and that he shall not take the minor child out of the said custody by use of force. He should also undertake that after respondent No.2 lands in Chicago, USA, the visitation and custody rights qua the parties, as may be determined by the competent Court in USA, shall be honoured.*

143. *Respondent No.2 has also expressed apprehension that the petitioner would seek to enforce the terms of the Pre-Nuptial Agreement entered into between the parties. Since the said agreement has been entered into in India, its validity has to be tested as per the Indian law. Respondent No.2 has already initiated suit for declaration and permanent injunction to challenge the said Pre-Nuptial Agreement dated 22.10.2010. We have perused the said agreement and we are of the view the petitioner should not be permitted to enforce the terms of this agreement in USA, at least till the said suit preferred by the respondent No.2 is decided. The petitioner should, therefore, give an undertaking to*

this Court, not to rely upon or enforce the said Pre-Nuptial Agreement to the detriment of respondent No.2 in any proceedings either in USA, or in India. The undertaking shall remain in force till the decision in the suit for declaration and injunction filed by respondent No.2 challenging validity of the Pre-Nuptial Agreement. This undertaking shall, however, not come in the way of the petitioner while defending the said suit of the respondent No.2.

144. *With the aforesaid arrangements and directions, in our view, respondent No.2 can possibly have no objection to return to USA with M. The comfort that we have sought to provide to respondent No.2, as aforesaid, is to enable her to have a soft landing when she reaches the shores of USA, so that the initial period of at least six months is taken care of for her, during which period she could find her feet and live on her own, or under an arrangement as may be determinedby the competent Courts in USA during this period. At this stage, we are not inclined to direct that the custody of M be given to the petitioner so that he takes her back to USA. M is a small child less than 4 years of age, and that too, is a female child. Though she may be attached to the petitioner – her father, she is bound to need her mother – respondent no.2 more. In our view, once M returns to USA with her mother, i.e. respondent No.2, orders for custody or co- parenting should be obtained by the parties from the competent Courts in USA. Moreover, it would be for the Courts in USA to eventually rule on the aspect concerning the financial obligations and responsibilities of the parties towards each other and towards the minor child M – for upbringing the minor child – M independent of any directions issued by this Court in this regard.*

145. *The petitioner is directed to file his affidavit of undertaking in terms of paras 140 to 144 above within ten days with advance copy of the respondents. The matter be listed on 01.12.2017 for our perusal of the affidavit of undertaking, and for passing of final orders.*"

9. By this judgment and order passed by the High Court and the directions issued, as reproduced hitherto, the substantive issues inter se the parties were answered against the appellant to the extent indicated. In continuation of the aforementioned directions, a further order was passed on 1 st December, 2017 by the High Court which reads thus:

"***1.*** *In terms of the directions contained in our judgment dated 16.11.2017, the petitioner Karan Goel has filed the affidavit dated 20.11.2017. A perusal of the affidavit shows that the petitioner has undertaken and consented to abide by all the conditions imposed upon him, so that respondent no.2 could return to USA with the minor child.*

2. *Respondent no.2 has also filed a counter-affidavit to the said affidavit of the petitioner. Respondent no.2 has raised the issue that the petitioner has not particularized the amounts and facilities that the petitioner would provide in case respondent no.2 were to return to USA with the minor child.*

3. *The petitioner is present in Court with his parents. The petitioner has tendered in Court the details/particulars of the proposed financial aid in terms of our judgment. The said details/ particulars read as follows:*

*'**1.** Upon Respondent No.2 giving a date/this Hon'ble Court fixing a date on which she and minor child M will depart from Delhi for Chicago, Illinois, USA, the Petitioner shall do the following at least 3 [three] days prior to their departure date:-*

(i) Book airline tickets on United Airlines with a non-stop flight from Delhi to USA for minor child M and Respondent No.2;

(ii) Provide a hotel room at The Hyatt Regency (located ~7 minute walk from minor child M's preschool) for the first seven (7) days after landing in Chicago to enable Respondent No.2 to sign leases for (a) accommodation and (b) a car; and

***2.** The Petitioner is/ was already paying [directly out of his salary] the following amounts for minor child M and shall continue to do so in compliance of the directions of this Hon'ble Court (all amounts in US Dollars = USD):-*

(i) ~$2,100/month Preschool tuition at Bright Horizons Lakeshore East where she was enrolled five days a week; and

(ii) ~$232/month for health insurance via Blue Cross Blue Shield of Illinois.

***3.** In addition to point 2 above, the Petitioner shall pay the following amounts (all amounts in US Dollars =USD) for a total of $4,200/month to Respondent No.2 in advance for the first month [by transferring the said amount into a joint account prior to Respondent No.2 and minor child M taking off from Delhi] and thereafter by the 28th of every month for the subsequent month [for the initial period of six months]:-*

(i) $2,600/month as rent for a fully furnished apartment with high-speed internet, air conditioning and heating, water, garbage disposal, and parking for a vehicle;

(ii) $400/month for Respondent No. 2's health insurance;

(iii) $1,000/month in expenses for food, shelter, and clothing for minor child M and Respondent No. 2; and

(iv) $200/month for a car lease and car insurance.

***4.** In case legal aid / assurance is not available / provided to Respondent No.2, the Petitioner shall give an additional amount of $1,500/ month to Respondent No.2 for her legal expenses for the first six months after her and minor child M's return to Chicago, Illinois, USA'.*

***4.** We have also separately recorded the statement of petitioner on oath, wherein he has undertaken to this Court to abide by the offer made by him in terms of our decision. He has also undertaken that in case of any breach of the said stipulation, respondent no.2 may enforce the same before the competent Court in USA.*

***5.** To ensure compliance of the aforesaid obligation, the petitioner has offered that he shall deposit an amount US$ 25,000 in an escrow account, which shall be operated upon orders of the competent Court in Cook County, Illinois, USA. The said account shall be operatable at the instance of respondent no.2 in case of non compliance of any of the condition and to the extent it becomes necessary, under the orders of the said Court.*

6. *The petitioner seeks a short adjournment to produce the relevant documents in that regard before this Court.*

7. *Since the petitioner and his parents are in India, and it is submitted that the petitioner has not met his minor daughter since March 2017, it is agreed that the petitioner and his parents shall be allowed to meet the minor child M today, tomorrow and day after tomorrow at DLF Promenade Mall, Vasant Kunj, New Delhi.*

8. *Today's meeting shall take place between 6:00 p.m. to 8:00 p.m., and on Saturday and Sunday, the meeting shall take place from 11:00 a.m. to 2:00 p.m. The petitioner has desired that the meeting may take place exclusively.*

9. *Since respondent no.2 has apprehensions, the petitioner has offered to and has deposited his American Passport with the Court Master. The Court Master shall seal the same in Court and thereafter the same be handed over to the Deputy Registrar concerned to be kept in safe custody. The same shall not be parted with unless so ordered by this Court.*

10. *The petitioner has assured that the child shall not be taken away unauthorisedly and shall be duly returned to respondent no.2 at the end of the meeting on each date.*

11. *List on 06.12.2017 for further directions. On the next date, the child may be brought to the Court so that the petitioner and his parents are able to meet the child in the Children's Room at the Mediation Centre between 2:30 p.m. to 4:30 p.m.*

12. *Order dasti under the signatures of the Court Master.*"

10. Again, on 6th December, 2017, another order was passed to formally dispose of the writ petition finally in the following terms:

1. *"Mr. Jauhar has tendered in Court the affidavit of undertaking sworn by the petitioner along with three annexures, which are:*

(i) *A statement from Citibank, USA in respect of joint account held by the petitioner and respondent No.2;*

(ii) *An affidavit of Molshree A., Sharma, ESQ., a partner at the law firm of Mandel, Lipton, Roseborough & Sharma Ltd., based in Chicago; and*

(iii) *Documents to show deposit of US$25,000 in an escrow account operated by the aforesaid law firm.*

2. *The petitioner has stated that he has already deposited US$25,000 into his attorney's escrow account. The affidavit of Molshree A., Sharma affirms that the said escrow account may be operated by respondent No.2/ Kanika Goel in the event of failure of the petitioner/ Karan Goel in meeting his obligations as per his undertaking given to this Court.*

3. *We are satisfied with the aforesaid arrangement made by the petitioner to secure the interests of respondent No.2 and the minor child in terms of our decision dated 16.11.2017.*

4. *In these circumstances, we now direct respondent No.2 to return to USA along with the minor child M within two weeks from today, failing which the minor child M shall be handed over to the petitioner, to be taken to USA.*

5. *We may observe that learned counsel for respondent No.2 has sought more time on the ground that respondent No.2 wishes to assail the decision dated 16.11.2017 and that the Supreme Court shall be closed for Winter Vacation in later part of December, 2017 and early part of January, 2018. However, we are not inclined to grant any further time for the reason that it is imperative for respondent No.2 to return to USA on or before 23.12.2017, and if she does not so return, her return may not be permitted by the Immigration Department of USA without further compliance being made by her. We cannot permit a situation to arise where respondent No.2 is able to defeat the direction issued by this Court on account of her own acts & omissions.*

6. *The passport of the petitioner deposited in this Court is directed to be returned forthwith. The said passport be returned to Mr. Prabhjit Jauhar, larned counsel for the petitioner. The said passport shall be retained by Mr. Jauhar so as to enable the petitioner and his parents to meet the child M, while they are in New Delhi, India. Mr. Jauhar shall return the passport to the petitioner only at the time when the petitioner has to return to USA, after ensuring that the custody of the child is with respondent No.2.*

7. *The meeting between the petitioner and his parents, on the one hand, and the child, on the other hand, shall be undertaken as per the arrangement worked out by us earlier, i.e. two hours every working day, and three hours at the weekends, as mutually agreed between the parties.*

8. *The petition stands disposed of in the aforesaid terms.*"

11. Being aggrieved by the aforesaid judgment and orders, the appellant, being the mother of the minor child M, has approached this Court by way of Special Leave under Article 136 of the Constitution of India. This Court issued notice on 15th December, 2017, when it passed the following interim order:

*"**O R D E R***

Issue notice.

As Dr. Abhishek Manu Singhvi and Mr. R.S. Suri, learned senior counsel along with Mr. Prabhjit Jauhar, learned counsel has entered appearance for the respondent No.2, no further notice need be issued.

Counter affidavit be filed within two weeks. Rejoinder affidavit, if any, be filed within a week therefrom.

Let the matter be listed on 24th January, 2018.

As an interim measure, it is directed that the arrangements made by the High Court for the visitation rights shall remain in force. The petitioner-wife shall not create any kind of impediment in the meeting of the father with the child.

In the course of hearing, we have also been apprised by Dr. Singhvi that the Green Card issued in favour of the petitioner-wife is going to expire on 22nd December, 2017.

Be that as it may, If, eventually, the petitioner loses in this proceeding and the respondent No.2 succeeds, the expiration of the Green Card cannot be a ground to deny the custody of the child to the father. Needless to say, if the petitioner wife intends to go to United States of America

and gets the Green Card renewed, it is open for her to do so. We may also record that the husband has acceded to, as stated by the learned counsel for the respondent No.2, that he shall not implicate her in any criminal proceeding."

In continuation of the aforementioned interim arrangement, a further order was passed by this Court on 24th January, 2018, which reads thus:

*"**O R D E R***

***Heard** Mr. Kapil Sibal, learned senior counsel along with Ms. Malavika Rajkotia, learned counsel for the petitioner and Dr. A.M.Singhvi, learned senior counsel along with Mr. Prabhjit Jauhar, learned counsel for the respondents.*

Though, we are not inclined to interfere with the interim arrangement made by the High Court yet, regardbeing had to some grievances of both the parties, we intend to pass an order clarifying the position.

Having heard learned counsel for the parties, it is directed as follows:

(i) *Whenever respondent No.2 is available in India, he shall intimate the petitioner by E-mail and also forward a copy of the said E-mail to the counsel for the petitioner so that she can make the child available for meeting with the father at Promenade Mall, Vasant Kunj between 5.30 P.M. to 7.30 P.M. on weekdays and 11.00 A.M. to 2.00 P.M. on holidays when the school is closed.*

(ii) *When the father will be meeting the child, they shall meet without any supervision.*

(iii) *When the father is not in India, there can be communication/interaction through Skype at about 7.30 P.M.(Indian Standard Time) or any other mode on line.*

(iv) *The passport of the child, which is presently with the father, shall be handed over to the mother for a period of one week so that she can take appropriate steps to complete certain formalities for admission of the child in a school. This direction is without prejudice to the final result in the special leave petition. The passport shall be returned by Ms.Malavika Rajkotia, learned counsel for the petitioner to Mr.Prabhjit Jauhar, learned counsel for the respondents.*

Let the matter be listed on 19.02.2018 at 2.00 P.M. for final disposal."

These are the relevant interim orders, which were to operate until the final disposal of the appeals. On 18th May, 2018, a grievance was made before this Court about non-cooperation by the appellant, which has been recorded as under:

"O R D E R

As mentioned in the first hour, the matter is taken up today. Be it noted, we have listed the matter today as it relates to the conversation right of the father with the child.

In the course of hearing, Mr. Prabhjit Jauhar, learned counsel appearing for the respondent-father submitted that the directions issued by this Court on earlier occasion relating to Skype contact are not being complied with.

Ms. Malavika Rajkotia, learned counsel appearing for the appellant submitted that there has been no deviation and in any case, the mother does not intend to anyway affect, indict or

intervene in the right to converse by Skype. Ms. Rajkotia has assured this Court that her client has not given any occasion to raise any grievance and if any grievance is nurtured by the father, the same shall be duly addressed, so that the order of this Court is duly complied with.

We are sure, the parties shall behave like compliant litigants."

The hearing was concluded and the interim arrangement as directed by this Court was to be observed by the parties until the pronouncement of the final judgment.

12. The appellant, being the mother of the minor child M, has assailed the decision of the High Court for having overlooked the rudimentary principles governing the issue of invoking jurisdiction to issue a writ of habeas corpus in respect of a minor child who was in lawful custody of her mother. According to the appellant, the High Court hascompletely glossed over or to put it differently, misconstrued and misapplied the principles of paramount interest of the minor girl child of tender age of about 4 years. Similarly, the High Court has glossed over the doctrine of choice and dignity of the mother of a minor girl child keeping in mind the exposition in K.S. Puttaswamy & Anr. Vs. Union of India & Ors.1 The High Court has also failed to take into account that the intimate contact of the minor child would be her mother who was her primary care giver and more so, when she was at the relevant time in the company of her mother. The appellant, being the mother, had a fundamental right to look after her minor daughter which cannot be whittled down or trivialized on the considerations which found favour with the High Court. The welfare and paramount interest of the minor girl child would certainly lean towards the mother, all other things being equal. The role of the mother of a minor girl child cannot be reduced to an appendage of the child and the mother cannot be forced to stay in an unfriendly environment 1 (2017) 10 SCC 1 where she had been victim of domestic violence inflicted on her. This would be so when the mother was also a working woman whose career would be at stake in the event the directions given by the High Court were to be complied with in letter and spirit. The High Court ought to have adopted a child rights based approach but the reasons which weighed with the High Court, clearly manifest that it was influenced by the values of pre-constitutional morality standard. The approach of the High Court, of delineating an arrangement, which it noted as the lowest prejudice option to the mother, has no place for deciding the issue of removing the custody of a minor girl child of tender age from her mother and giving it to her father for being taken away to her native country. The High Court has misunderstood and misapplied the principle expounded in Nithya Anand Raghavan Vs. State (NCT of Delhi) & Anr.,2 and Prateek Gupta Vs. Shilpi Gupta & Ors.3 The High Court has completely overlooked the autonomy of the appellant inasmuch as the directions given by the High 2 (2017) 8 SCC 454 3 (2018) 2 SCC 309Court would virtually subjugate all her rights and would compel her to stay in an unfriendly environment at the cost of her career and dignity. The arrangement directed by the High Court can, by no standard, be said to be a just and fair muchless collaborative arrangement to be worked out between the parents, without compromising on the paramount interest and welfare of the minor girl child. The High Court committed a manifest error in answering the issue of best interest of the minor girl child, inter alia on the basis of the provisions of the Juvenile Justice Act and disregarding the crucial fact that the minor girl child was presently staying with her mother along with her extended family, which she would be completely deprived of if taken away to a place within the jurisdiction of the US Court by respondent No.2 her father. It was also contended that in the process of reasoning out the plea taken by the appellant regarding the circumstances in which she fled from USA with the minor girl child due to domestic violence

inflicted on her, the said issue has been trivialized. It is contended that as the marriage between the appellant andrespondent No.2 was solemnized in New Delhi as per Anand Karaj ceremony and Hindu Vedic rites, the fact that the appellant went to the United States to stay with her husband, would make no difference to her status and nationality, much less have any bearing on the issue of best interest of the minor girl child.

13. On the other hand, the respondent No.2 would submit that the High Court analysed all the relevant aspects of the matter keeping in mind the legal principles expounded in the recent decisions of this Court and recorded its satisfaction about the best interest of the minor girl child coupled with the necessity of the minor girl child to be produced before the Circuit Court of Cook County, Illinois, USA, which had intimate contact with the minor girl child, inasmuch as the minor girl child was born and was domiciled within the jurisdiction of that Court before she was clandestinely removed by the appellant to India. It is contended that since both the father as well as the minor girl child are US citizens and the mother is a permanent resident of US and domiciled in that country, only the Courts of that country will have jurisdiction to decide the matrimonial issues between the parties, including custody of the minor girl child and her guardianship. Further, at the tender age of about 3 years, the minor girl child had hardly spent any time in India so as to suggest that she has gained consciousness in India and thus it would be in the best interest of the child to be taken away to the US. It is contended by respondent No.2 that the High Court has analysed all the relevant facts before recording the finding that the welfare and best interest of the minor girl child would be served by returning to United States. As that finding is based on tangible material on record as adverted to by the High Court, this Court should be loath to overturn the same and, more so, when the High Court has issued directions to balance the equities and also facilitate return of the minor child to be produced before the Court of competent jurisdiction. The directions so issued are no different than the directions given by this Court in Nithya Anand Raghavan's case, (supra). It is contended by respondent No.2 that thisCourt may primarily examine the directions issued by the High Court and if necessary, issue further directions to safeguard the interest of the appellant, but in no case should the plea taken by the appellant, that the minor girl child should not return to US, be accepted. It is contended that the sole consideration in a proceeding such as this, must be to ascertain the welfare of the minor girl child and not to adjudicate upon the rights of the father or the mother. While doing so, the Court may take into account all such aspects to ascertain as to whether any harm would be caused to the minor child or for that matter, has been caused in the past during her stay in US. From the order passed by the US Court, it is evident that the custody of the minor girl child with the appellant had become unlawful and for which reason, this Court in exercise of its jurisdiction for issuance of a writ of habeas corpus, must direct the appellant to give the custody of the minor girl child to her father. It is contended that the argument regarding health or personal matters raised by the appellant are only arguments of causing prejudice and should have no bearing for answering the matters in issue, particularly in the context of the equitable directions passed by the High Court. The Court must keep in mind that the minor girl child is presently staying in India without a valid Visa after her Visa obtained for travelling to India expired. The respondent No.2 would submit that no interference with the directions issued by the High Court is warranted in the fact situation of the present case.

14. We have heard Ms. Malavika Rajkotia, learned counsel appearing for the appellant and Ms. Meenakshi Arora, learned senior counsel appearing for the respondent No.2.

15. We shall first advert to the analysis made by the High Court in respect of the contentious issues. That can be discerned from paragraph 102 onwards of the impugned judgment. The High Court was conscious of the fact that it must first examine the issue regarding the welfare and best interest of the minor child. It noted that the minor girl child was about 3 years when the writ petition for habeas corpus was preferred on 1st February, 2017. It then noted that the respondent No.2 – father of the minor girl child had acquired citizenship of the USA in 2005 and holds an American Passport. He is living in the USA since 1994 and is thus domiciled in the USA. He had acquired a Bachelors' degree in Economics and obtained MBA qualification from the University of Chicago. He was an Education Software Entrepreneur. The appellant wife is the biological mother of the minor child M, who has acquired permanent resident status of the USA i.e. Green Card and had also applied for American citizenship on 2nd December, 2016. The respondent No.2 and appellant were classmates during their schooling and revived their contacts in 2000. Eventually, they decided to get married and thereafter reside in USA where the respondent No.2 had his work place and home. The marriage was solemnized in New Delhi in India on 31st October, 2010 as per Anand Karaj ceremony, and Hindu Vedic rites in the presence of the elders of both the families. After the appellant arrived in USA, they performed civil marriage before the competent Court in USA on 19 th March, 2011.

16. The High Court adverted to the accomplishment of the appellant in her education and occupation. The High Court noted that the couple started their matrimonial life in the United States and lived as a couple in that country. They made the United States their home and their entire married life, except the duration during which they were on short visits to India, had been spent in the USA. They gave birth to a girl child M in USA on 15th February, 2014 at North Western Memorial Hospital, Chicago, Illinois, USA. The minor child M is a US citizen by birth and grew up there until she was clandestinely removed by the appellant to India on 25 th December, 2016. The minor child had, in fact, started attending pre-school in Chicago and had a full time schedule at school from August, 2016. Thus, the mental development of M while she was in USA till the end of 2016, had taken place to such an extent that she was very well aware and conscious of her surroundings. She was perceiving and absorbing from her surroundings and communicated not only with her parents, but also with her other relatives, her peers at the pre- school, her instructors, teachers and other care givers. The American way of life and systems were already in the process of being learnt and experienced by M when she came to India in December, 2016. The environment which M was experiencing during her growth was the natural environment of Chicago, USA. Both her parents were looking after her proper upbringing. The Court also noted that the paternal grandparents of the minor child M were visiting and interacting with her. The Court then adverted to the decisions in Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and Anr.4, Aviral Mittal Vs. State5, Shilpa Aggarwal Vs. Aviral Mittal and Anr.6, Dr. V. Ravi Chandran Vs. Union of India & Ors.7, and Nithya Anand Raghavan (supra), to opine that the Court in the US seemed to be the most appropriate Court to decide the issue of custody of M, considering that it had 4 (1984) 3 SCC 698 5 (2009) 112 DRJ 635 6 (2010) 1 SCC 591 7 (2010) 1 SCC 174 intimate contact with the parties and the child. It went on to observe that it was neither inclined nor in a position to undertake a detailed enquiry into aspects of custody, visitation and co-parenting of the minor child in the facts and circumstances of the case, considering all the events unfolded in, circumstances developed in and evidences were located in the USA. After having said this, it examined the compelling reasons disclosed by the appellant to dissuade the Court from issuing directions for return of M to her native country and the environment where

she was born and being brought up. That analysis has been done in paragraph 114 onwards. The High Court considered the grievances of the appellant in paragraphs 114 to 117 in the following words:

> ***"114.*** *The allegations of respondent no.2 against the petitioner and his mother are that the petitioner's mother follows a strict eco-friendly lifestyle and imposes the same on the couple, which even caused chronic backache to the respondent since she was forced to sleep on a hard eco- friendly mattress. She claim that all her day to day affairs were influenced by the lifestyle of her mother in law, such as not using plastic products, non stick cookware, personal care products etc. The respondent had no voice in the matter. The petitioner took minimal interest in household affairs, while his mother interfered in the lives of the partiesby tracking their schedules. The petitioner and his mother did not respect the respondents privacy and the plan of the parties to bear a child were disclosed to the petitioner's mother in advance. She even imposed lifestyle changes upon the respondent. The petitioner's mother also did not permit the respondent to maintain a secular household. She was not permitted to celebrate both Sikh and Hindu festivals and the petitioner insisted that they celebrate only Sikh festivals.*
>
> *Respondent no.2 states that she was diagnosed with a grave's disease in October 2014. The petitioner and his mother insisted that the respondent undergoes surgery rather than taking medication, since medication would have made it difficult for her to conceive in future. She claims that the petitioner even threatened her with divorce in case she prioritised her own health at the cost of expanding their family. The respondent makes several other allegations against the petitioner and his mother complaining of cruelty and indifference on their part towards her.*
>
> ***115.*** *The above allegations per se do not suggest any grave undesirable conduct or deviant behavior on the part of the petitioner, or his mother qua the child M – even if they were to be assumed to be true for the time being. The allegations even remotely, not such as to suggest that the minor child M may be exposed to any adversity, harm, undesirable influence, or danger if she were to be allowed to meet them or spend time with them in USA. There is nothing to suggest that the petitioner – father of M, or her grandmother would leave a bad and undesirable influence on M. These allegations are not such as to persuade this Court not to send the child M back to her country of origin and initial upbringing. On the contrary, the petitioner appears to be an educated person who is gainfully managing his business, and the photographs on record show healthy bonding between M and her father. He also appears to have actively participated in the upbringing of M – if the averments made by him in his petition are to be believed. In fact, respondent no.2 had also expressed her willingness to let M interact with the petitioner and to allow him visitation rights, whichwould not have been the case if she considered him to be a bad influence on, or a potential threat to her daughter. The fact that the petitioner's mother is a pediatrician, in fact, is a reassuring fact that M would be taken good care of medically in her tender years. The photographs filed by the petitioner along with the petition show M to be having a healthy and normal upbringing while she was in USA. She is seen enjoying the love, care and company of her parents and others – including children of her age. There is no reason why she should be allowed to be uprooted from the environment in which she was naturally growing up, and to be*

retained in an environment where she would not have the love, care and attention of her father and paternal grandparents, apart from her peers, teachers, school and other care givers who were, till recently, with her.

116. *From the allegations made by respondent No.2, it appears that she may have had issues of living with and adjusting with the petitioner and his parents – particularly the mother-in-law. However, there is absolutely nothing placed on record to even remotely suggest that so far as the petitioner is concerned, his conduct qua M and his presence with M, or for that matter, even the grandparents, could be said to be detrimental to or harmful for M. It certainly cannot be said that if M were to be returned to her place of origin where she spent the initial three years of her life – considering that those three years constitute more than 3/4th of her entire existence on this planet till date, would be detrimental to her interest in any manner whatsoever.*

117. *The parties started their married life in USA, and as clearly appears from their conduct, their mutual commitment was to spend their married life and to raise their children in USA. There is absolutely nothing to suggest that the parties mutually ever agreed to or intended to shift from their place of residence to a place in India, though respondent no.2 may have unilaterally so desired. In such a situation, in our view, respondent No.2 cannot breach her maternal commitment without any valid justification and remain in return to India with M – who is an American citizen and would, obviously, be attached to her father and grandparents; her home; her Nanny; her teachers & instructors and her peers and friends, all of whom are in USA."*

17. After having said this, the High Court considered the argument of the appellant that she was the primary care giver qua M but disregarded the same by observing that that alone cannot be made the basis to reject the prayer for return of the minor girl child to her native country, and more so, when the minor girl child deserves love, affection and care of her father as well. The Court found that nothing prevents the appellant from returning to the USA if she so desires. Further, the fact that the minor girl child would make new friends and have new care givers and teachers in India at a new school, cannot be the basis to deny her the love and affection of her biological father or parenting of grandparents which was equally important for the grooming and upbringing of the child. The Court then went on to notice that the expression "best interest of child" is wide in its connotation and cannot be limited only to love and care of the primary care giver i.e. the mother. Itthen adverted to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, while making it clear that it was conscious of the fact that the said Act may not strictly apply to the case on hand for examining the issue of best interest of the child. In paragraphs 124 to 126 of the impugned judgment, it went on to observe thus:

"124. *Thus, all decisions regarding the child should be based on primary consideration that they are in the best interest of the child and to help the child to develop to full potential. When involvement of one of the parents is not shown to be detrimental to the interest of the child, it goes without saying that to develop full potential of the child, it is essential that the child should receive the love, care and attention of both his/ her parents, and not just one of them, who may have decided on the basis of his/ her differences with the other parent, to re-locate in a different country. Development of full potential of the child requires participation of both the parents. The child, who does not receive the love, care and attention of both the parents, is bound to suffer from psychological and emotional*

trauma, particularly if the child is small and of tender age. The law also recognizes the fact that the primary responsibility of care, nutrition and protection of the child falls primarily on the biological family. The "biological family" certainly cannot mean only one of the two parents, even if that parent happens to be the primary care giver.

125. *The JJ Act encourages restoration of the child to be re- united with his family at the earliest, and to be restored to the same socio-economic and cultural status that he was in, before being removed from that environment, unless such restoration or repatriation is not in his best interest. The present is not a case where respondent No.2 fled from USA or decided to stay back in India on account of any such conduct of the petitioner which could be said to have been detrimental to her own interest, or the interest of the minor child M. The decision of respondent No.2 to stay back in India is entirely personal to her, and her alone. It is not based on consideration of the best welfare of the minor child M. In fact, the best interest of the child M has been sidelined by respondent no.2 while deciding to stay back in India with M.*

126. *Pertinently, respondent No.2 in her statement in response to the missing person report made by the petitioner on 14.01.2017 vide DD No.20B dated 14.01.2017 at PS – Vasant Kunj (South), New Delhi, inter alia, stated that 'the parties came to New Delhi, India with their daughter M on 20.12.2016. She further stated that during this time, I realized that I do not want to continue with his suppressed marriage and file for divorce and custody petition against K G in the Hon'ble Court Sh. Arun Kumar Arya, Principle Judge, Family Courts, Patiala House, New Delhi via HMA No.27/17……'. Thus, it appears from the statement of respondent No.2 that the realization that she did not want to continue in her marriage dawned upon her only when she came to India, and it is not that when she left the shores of USA in December 2016, she left with a clear decision in her mind that she would not return to USA for any specific and justifiable reason.*"

18. Reference was then made to the provisions of the Convention on the Rights of the Child adopted by the General Assembly of the United Nations dated 20 th November, 1989, which was ratified by the Government of India on 11 thDecember, 1992, and the resolution by the Government of India issued by the Ministry of Human Resource Development vide Resolution No.6-15/98 C.W., dated 9 th February, 2004 framing the "National Charter for Children, 2003" and the Court observed in paragraph 138 as follows:

"138. Thus, best welfare of the child, normally, would lie in living with both his/ her parents in a happy, loving and caring environment, where the parents contribute to the upbringing of the child in all spheres of life, and the child receives emotional, social, physical and material support to name a few. In a vitiated marriage, unfortunately, there is bound to be impairment of some of the inputs which are, ideally, essential for the best interest of the child. Then the challenge posed before the Court would be to determine and arrive at an arrangement, which offers the best possible solution in the facts and circumstances of a given case, to achieve the best interest of the child."

19. On a perusal of the impugned judgment, it is noticed that the High Court has taken note of all the relevant decisions including the latest three-Judge Bench decision of this Court in Nithya Anand Raghavan's case, (supra), which has had occasion to exhaustively analyse the earlier decisions on the subject matter under consideration. The exposition in the earlier decisions has

been again restated and re-affirmed in the subsequent decision of this Court in Prateek Gupta Vs. Shilpi Gupta & Ors., (supra). Let us, therefore, revisit these two decisions. In paragraph 40 of the Nithya Anand Raghavan's case, (supra), this Court observed thus:

> ***"40.*** *The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards the non- Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child.*
>
> *Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation—be it a summary inquiry or an elaborate inquiry—the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition."*
>
> *(emphasis supplied)*

Again in paragraph 42, the Court observed thus:

> ***"42.*** *The consistent view of this Court is that if the child has been brought within India, the courts in India may conduct:*
>
> *(a) summary inquiry; or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign court. In an elaborate inquiry, the court is obliged to examine the merits as to where the paramount interests*

and welfare of the child lay and reckon the fact of a pre-existing order of the foreign court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle of comity of courts cannot be given primacy or more weightagefor deciding the matter of custody or for return of the child to the native State."

(emphasis supplied)

It will be apposite to also advert to paragraphs 46 & 47 of the reported decision, which read thus:

"46. *The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.*

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child." (emphasis supplied)

Again in paragraph 50, the Court expounded as under:

"50. *The High Court in such a situation may then examine whether the return of the minor to his/her native state would be in the interests of the minor or would be harmful.*

While doing so, the High Court would be well within its jurisdiction if satisfied, that having regard to the totality of the facts and circumstances, it would be in the interests and welfare of the minor child to decline return of the child to the country from where he/she had been removed; then such an order must be passed without being fixated with the factum of an order of the foreign court directing return of the child within

the stipulated time, since the order of the foreign court must yield to the welfare of the child. For answering this issue, there can be no straitjacket formulae or mathematical exactitude. Nor can the fact that the other parent had already approached the foreign court or was successful in getting an order from the foreign court for production of the child, be a decisive factor. Similarly, the parent having custody of the minor has not resorted to any substantive proceeding for custody of the child, cannot whittle down the overarching principle of the best interests and welfare of the child to be considered by the Court. That ought to be the paramount consideration."

(emphasis supplied)

In paragraphs 67 and 69, the Court propounded thus:

"67. *The facts in all the four cases primarily relied upon by Respondent 2, in our opinion, necessitated the Court to issue direction to return the child to the native state. That does not mean that in deserving cases the courts in India are denuded from declining the relief to return the child to the native state merely because of a pre-existing order of the foreign court of competent jurisdiction. That, however, will have to be considered on case to case basis — be it in a summary inquiry or an elaborate inquiry. We do not wish to dilate on other reported judgments, as it would result in repetition of similar position and only burden this judgment.*

xxx xxx xxx

69. *…… The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child. Again the summary jurisdiction be exercised only if the court to which the child has been removed is moved promptly and quickly. The overriding consideration must be the interests and welfare of the child."* *(emphasis supplied)*

20. At this stage, we deem it apposite to reproduce paragraphs 70 and 71 of the reported judgment, which may have some bearing on the final order to be passed in this case. The same read thus:

"70. *Needless to observe that after the minor child (Nethra) attains the age of majority, she would be free to exercise herchoice to go to the UK and stay with her father. But until she attains majority, she should remain in the custody of her mother unless the court of competent jurisdiction trying the issue of custody of the child orders to the contrary. However, the father must be given visitation rights, whenever he visits India. He can do so by giving notice of at least two weeks in advance intimating in writing to the appellant and if such request is received, the appellant must positively respond in writing to grant visitation rights to Respondent 2 Mr Anand Raghavan (father) for two hours per day twice a week at the mentioned venue in Delhi or as may be agreed by the appellant, where the appellant or her representatives are necessarily present at or near the venue. Respondent 2 shall not be entitled to, nor make any attempt to take the child (Nethra) out from the said venue. The appellant shall take all such steps to comply with*

the visitation rights of Respondent 2, in its letter and spirit. Besides, the appellant will permit Respondent 2 Mr Anand Raghavan to interact with Nethra on telephone/mobile or video conferencing, on school holidays between 5 p.m. to 7.30 p.m. IST.

71. *As mentioned earlier, the appellant cannot disregard the proceedings instituted before the UK Court. She must participate in those proceedings by engaging solicitors of her choice to espouse her cause before the High Court of Justice. For that, Respondent 2 Anand Raghavan will bear the costs of litigation and expenses to be incurred by the appellant. If the appellant is required to appear in the said proceeding in person and for which she is required to visit the UK, Respondent 2 Anand Raghavan will bear the air fares or purchase the tickets for the travel of appellant and Nethra to the UK and including for their return journey to India as may be required. In addition, Respondent 2 Anand Raghavan will make all arrangements for the comfortable stay of the appellant and her companions at an independent place of her choice at reasonable costs. In the event, the appellant is required to appear in the proceedings before the High Court of Justice in the UK, Respondent 2 shall not initiate any coercive process against her which may result in penal consequences for the appellant and if any such proceeding is already pending, he must take steps to first withdraw the same and/or undertake before the court concerned not to pursue it any further. That will be condition precedent to pave way for the appellant to appear before the court concerned in the UK."*

21. In the subsequent judgment of two Judges of this Court in Prateek Gupta (supra), after analysing all the earlier decisions, in paragraphs 49 to 51 the Court noted thus:

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

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

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

51. *It has been consistently held that there is no forum convenience in wardship jurisdiction and the peremptory mandate that underlines the adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration." (emphasis supplied) Again, in paragraph 53 of the judgment, the Court observed thus:*

"53. *.... The issue with regard to the repatriation of a child, as the precedential explications would authenticate has to be addressed not on a consideration of legal rights of the parties but on the sole and preponderant criterion of the welfare of the minor. As aforementioned, immediate restoration of the child is called for only on an unmistakable discernment of the possibility of immediate and irremediable harm to it and not otherwise. As it is, a child of tender years, with malleable and impressionable mind and delicate and vulnerable physique would suffer serious set-back if subjected to frequent and unnecessary translocation in its formative years. It is thus imperative that unless, the continuance of the child in the country to which it has been removed, is unquestionably harmful, when judged on the touchstone of overall perspectives, perceptions and practicabilities, it ought not to be dislodged and extricated from the environment and setting to which it had got adjusted for its well-being." (emphasis supplied)*

22. After these decisions, it is not open to contend that the custody of the female minor child with her biological mother would be unlawful, for there is presumption to the contrary. In such a case, the High Court whilst exercising jurisdiction under Article 226 for issuance of a writ of habeas corpus need not make any further enquiry but if it is called upon to consider the prayer for return of the minor female child to the native country, it has the option to resort to a summary inquiry or an elaborate inquiry, as may be necessary in the fact situation of the given case. In the present case, the High Court noted that it was not inclined to undertake a detailed inquiry. The question is, having said that whether the High Court took into account irrelevant matters for recording its conclusion that the minor female child, who was in custody of her biological mother, should be returned to her native country. As observed in Nithya Anand Raghavan's case(supra), the Court must take into account the totality of the facts and circumstances whilst ensuring the best interest of the minor child. In Prateek Gupta's case (supra), the Court noted that the adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration. Further, the doctrine of "intimate and closest concern" are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom etc. with the portent of mutilative bearing on the process of its overall growth and grooming. The High Court in the present case focused primarily on the grievances of the appellant and while rejecting those grievances, went on to grant relief to respondent No.2 by directing return of the minor girl child to her native country. On the totality of the facts and circumstances of the present case, in our opinion, there is nothing to indicate that the native language (English) is not spoken or the child has been divorced from the social customs to which she has been accustomed. Similarly, the minor child

had just entered pre-school in the USA before she came to New Delhi along with her mother. In that sense, there was no disruption of her education or being subjected to a foreign system of education likely to psychologically disturb her. On the other hand, the minor child M is under the due care of her mother and maternal grand-parents and other relatives since her arrival in New Delhi. If she returns to US as per the relief claimed by the respondent No.2, she would inevitably be under the care of a Nanny as the respondent No.2 will be away during the day time for work and no one else from the family would be there at home to look after her. Placing her under a trained Nanny may not be harmful as such but it is certainly avoidable. For, there is likelihood of the minor child being psychologically disturbed after her separation from her mother, who is the primary care giver to her. In other words, there is no compelling reason to direct return of the minor child M to the US as prayed by the respondent No.2 nor is her stay in the company of her mother, along with maternal grand-parents and extended family at New Delhi, prejudicial to her in any manner, warranting her return to the US.

23. As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the threshold issues in a habeas corpus petition. For the purpose of habeas corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom etc. interfering with his/her overall growth and grooming and whether continuance there will be harmful. This has been theconsistent view of this Court as restated in the recent three- Judge Bench decision in Nithya Anand Raghavan (supra), and the two-Judge Bench decision in Prateek Gupta (supra). It is unnecessary to multiply other decisions on the same aspect.

24. In the present case, the minor child M is a US citizen by birth. She has grown up in her native country for over three years before she was brought to New Delhi by her biological mother (appellant) in December 2016. She had joined a pre- school in the USA. She had healthy bonding with her father (respondent No.2). Her paternal grand-parents used to visit her in the USA at some intervals. She was under the care of a Nanny during the day time, as her parents were working. Indeed, the work place of her father is near the home. The biological father (respondent No.2) of the minor child M has acquired US citizenship. Both father and mother of the minor child M were of Indian origin but domiciled in the USA after marriage. The mother (appellant) is a permanent resident of the USA-Green Card holder and has also applied for US citizenship. In her affidavit filed before the Delhi High Court dated 30th November, 2017, she admits that her legal status was complicated as she has ceased to be an Indian citizen and her status of citizenship of the USA is in limbo.

25. Be that as it may, the father filed a writ petition before the Delhi High Court for issuance of a writ of Habeas Corpus for production of the minor child and for directions for her return to USA without any loss of time. Given the fact that the parties performed a civil marriage on 19 th March, 2011 in the USA and cohabited in the native country and gave birth to minor child M who grew up in that environment for at least three years, coupled with the fact that the father and minor child M are US citizens and mother is a permanent resident of USA, the closest contact and jurisdiction is possibly that of the Circuit Court of Cook County, Illinois,

USA. However, we may not be understood to have expressed any final opinion in this regard. At the same time, it is indisputable that the appellant and respondent No.2 first got married on 31 st October, 2010 as per Sikh rites, i.e. Anand Karaj ceremony, and Hindu Vedic rites and that marriage was solemnised in New Delhi at which point of time the appellant was admittedly a citizen of India. Presently, she is only a Green Card holder (permanent resident) of the US. It is, therefore, debatable whether the Family Court at New Delhi, where the appellant has already filed a petition for dissolution of marriage, has jurisdiction in that behalf including to decide on the question of custody and guardianship in respect of the minor child M. For that reason, it may be appropriate that the said proceedings are decided with utmost promptitude in the first place before the appellant is called upon to appear before the US Court and including to produce the minor child M before that Court.

26. It is not disputed that the appellant and minor child are presently in New Delhi and the appellant has no intention to return to her matrimonial home in the U.S.A. The appellant has apprehensions and serious reservations on account of her past experience in respect of which we do not think it necessary to dilate in this proceedings. That is a matter to be considered by the Court of Competent Jurisdiction called upon to decide the issue of dissolution of marriage and/or grant of custody of the minor child, as the case may be. For the time being, we may observe that the parties must eschew from pursuing parallel proceedings in two different countries. For, the first marriage between the parties was performed in New Delhi as per Anand Karaj Ceremony and Hindu Vedic rites on 31st October, 2010 and the petition for dissolution of marriage has been filed in New Delhi. Whereas, the civil marriage ceremony on 19th March, 2011 at Circuit Court of Cook County, Illinois, USA, was performed to complete the formalities for facilitating the entry of the appellant into the US and to obtain US Permanent Resident status. It is appropriate that the proceedings pending in the Family Court at New Delhi are decided in the first place including on the question of jurisdiction of that Court. Depending on the outcome of the said proceedings, the parties will be free to pursue such other remedies as may be permissible in law before the Court of Competent Jurisdiction.

27. As aforesaid, it is true that both respondent No.2 and also the minor child M are US citizens. The minor girl child has a US Passport and has travelled to India on a tenure Visa which has expired. That does not mean that she is in unlawful custody of her biological mother. Her custody with the appellant would nevertheless be lawful. The appellant has already instituted divorce proceedings in the Family Court at Patiala House, New Delhi. The respondent No.2 has also filed proceedings before the Court in the US for custody of the minor girl child, directing her return to her natural environment in the US. In such a situation, the arrangement directed by this Court in the case of Nithya Anand Raghavan (supra), as exposited in paragraphs 70-71, may be of some help to pass an appropriate order in the peculiar facts of this case, instead of directing the biological mother to return to the US along with the minor girl child, so as to appear before the competent court in the US. In that, the custody of the minor girl child M would remain with the appellant until she attains the age of majority or the Court of competent jurisdiction, trying the issue of custody of the minor child, orders to the contrary, with visitation and access rights to the biological father whenever he would visit India and in particular as delineated in the interim order passed by us reproduced in paragraph 11 (eleven) above.

28. A fortiori, dependant on the outcome of the proceedings, before the Family Court at New Delhi, the appellant may then be legally obliged to participate in the proceedings before the

US Court and must take all measures to effectively defend herself in the said proceedings by engaging solicitors of her choice in the USA to espouse her cause before the Circuit Court of Cook County, Illinois, USA. In that event, the respondent No.2 shall bear the cost of litigation and expenses to be incurred by the appellant to pursue the proceedings before the Courts in the native country. In addition, the respondent No.2 will bear the air fares or purchase the ticketsfor the travel of the appellant and the minor child M to the USA and including their return journey for India, as may be required. The respondent No.2 shall also make all suitable arrangements for the comfortable stay of the appellant and her companions at an independent place of her choice, at a reasonable cost. Further, the respondent No.2 shall not initiate any coercive/penal action against the appellant and if any such proceeding initiated by him in that regard is pending, the same shall be withdrawn and not pursued before the concerned Court any further. That will be the condition precedent to facilitate the appellant to appear before the Courts in the USA to effectively defend herself on all matters relating to the matrimonial dispute and including custody and guardianship of the minor child.

29. The appellant and respondent No.2 must ensure early disposal of the proceedings for grant of custody of the minor girl child to the appellant, instituted and pending before the Family Court at Patiala House, New Delhi. All contentions available to the parties in that regard will have to be answeredby the Family Court on its own merits and in accordance with law.

30. We, accordingly, set aside the impugned judgment and orders of the High Court and dispose of the writ petition in the aforementioned terms. The appeals are allowed with no order as to costs.

❑❑❑

SONI GERRY VERSUS GERRY DOUGLAS

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Dipak Misra, CJI, Hon'ble Mr. Justice A.M. Khanwilkar and Hon'ble Dr. Justice D.Y. Chandrachud**

Soni Gerry .....Petitioner

Versus

Gerry Douglas.....Respondent

Contempt Petition (Civil) No. 1606/2017

IN
SPECIAL LEAVE PETITION (CIVIL) NO. 18761/2011
WITH
SLP (CRL.) NO. 6237/2017

Decided on : **5th January, 2018**

Lower court granted child's custody to father residing at Kuwait and Visitation rights to mother residing at Thiruvananthapuram. An appeal is filed by aggrieved under Article 136 where parties agreed for said arrangement and court rejected mother's claim for custody under Guardians and Wards Act, 1860, to which mother brought allegations of contempt where court directed personal presence of daughter. The daughter showed her interest in pursuing studies from Kuwait, therefore the contempt was disposed of. Court gave directions to father regarding the visitation rights of minor son where father had to pay Rs. 50,000 to mother for every visit of minor son. Court further clarified that as daughter had attains age of 18 years, she has full freedom to make her choice which she openly declared in the presence of court. The special leave petition and the contempt petition are therefore disposed of.

ORDER

The petitioner had preferred a habeas corpus petition before the High Court of Kerala for issuance of an appropriate direction to produce her daughter in the Court, to which the High Court did not accede. The reason for not acceding to the request by the High Court was that the daughter had completed 18 years of age on 19.9.2016. The contention advanced by the mother that she was in illegal custody of the first respondent, the husband, in Kuwait, was not accepted by the Division Bench of the High Court. It came to a categorical conclusion that there had been no illegal detention of the daughter at Kuwait and, therefore, the prayer for habeas corpus was not sustainable. Signature Not Verified During the pendency of SLP(Crl.) No. 6237/2017 Contempt Petition (Civil) No. 1606/2017 was filed, alleging that the orders passed by this Court in SLP(C) No. 18761/2011 had been blatantly violated by the husband-contemnor. To appreciate the contentions raised in the contempt petition, it is necessary to refer to the order dated 5.8.2011 passed in the said special leave petition, which is to the following effect:-

> *"Parties have agreed that both the children shall be sent to India from 20th August to 11th September this year and from the next year the children shall be sent for the entire period of*

vacation to live with the mother. This shall be arranged in the same manner and mode as envisaged by order dated 11th August, 2010.

The Special Leave Petition stands disposed of in view of the aforesaid settlement between the parties."

It is necessary to note here that Contempt Petition (Civil) No. 223/2012 was filed, wherein on 29.11.2012, the following order came to be passed:-

"Pursuant to the directions issued by us, the respondent herein has produced the children. We had a long discussion with the children and also the parents. The respondent herein, who is the father, makes a statement that he is ready and willing to send the children to India to prosecute their further studies after they finish their school course, namely, 9th standard and 2nd standard in Kuwait for a further period of 4 months. However, the petitioner says that in the interest of the children the custody of the children be handed over to her.

We have not yet made up our mind in this regard. For the present, we direct the respondent to file an appropriate undertaking before this court, firstly stating that he is ready and willing to send the children to India after they finish their school course, namely, 9th standard and 2nd standard some time in March, 2013.

Secondly, he will also indicate whether the children should prosecute their further studies in India. Thirdly, whether he would financially support the children who would be with their mother and would be prosecuting their further studies in India.

List tomorrow (30.11.2012)." Eventually, the contempt petition was disposed of with the following order:-

"Heard learned counsel for the parties to the lis.

Having carefully perused the records of the case, we are of the opinion that nothing survives in this contempt petition for our consideration and decision. Accordingly, the contempt petition is dismissed.

The respondent is directed to strictly comply with the earlier orders and directions issued by this Court without leaving any margin of error which may compel the petitioner to approach this Court once again with yet another contempt petition.

Ordered accordingly."

It is contended by Mr. P.A. Noor Muhamed, learned counsel appearing for the petitioner-mother in Contempt Petition (Civil) No. 1606/2017 that the orders passed in SLP(C) No. 18761/2011 and the earlier contempt petition therein [Contempt Petition (Civil) No. 223/2012] have been seriously violated by the husband and, therefore, the Court should impose an adequate punishment.

When the present special leave petition and the contempt petition were listed, an issue arose, whether this Court could have an interaction or dialogue with the daughter of the petitioner-mother and the respondent. A statement was made on behalf of the mother that the daughter is in custody of the respondent-husband and she should be directed to remain personally present. Regard being had to the aforesaid submission, this Court on 1.9.2017, passed the following order:-

"Mr. K. Rajeev, learned counsel, submits that he has instructions to appear on behalf of the respondent-husband and to file the reply. The reply be filed within three weeks hence. Learned counsel has assured the Court that the husband shall make arrangements for travel of the son from Thiruvananthapuram to Kuwait by direct flight. Let the matter be listed on 22.9.2017."

It was further directed that the daughter shall remain personally present on that day and the father shall make all arrangements for her presence as they were staying together.

Vide order dated 22.9.2017, the matter was adjourned to 5.1.2018 with a further direction that the daughter shall remain personally present and the father shall make all arrangements for her presence, as they were staying together.

Pursuant to our orders dated 1.9.2017 and 22.9.2017, the daughter of the petitioner and the respondent is present in Court today. On a query being made, it is put forth by her that she is pursuing a graduation through correspondence course from the Indira Gandhi National Open University (IGNOU), and presently is doing an internship in Huawei Technologies Kuwait Co. W.L.L. She has categorically stated that her date of birth is 19.9.1998. She has expressly stated that she would like to go to Kuwait and pursue her career.

At this juncture, Mr. P.A. Noor Muhamed, learned counsel appearing for the petitioner-mother would submit that her opinion is not an informed one and she has been pressurized by the respondent-husband. For the aforesaid purpose, he has drawn our attention to certain Emails, which were sent by the daughter to the petitioner-mother in the year 2016. We do not intend to refer to the contents of the said Emails. Suffice it to state that we had directed the daughter of the petitioner to remain personally present in Court and gave the responsibility to the father to see that she is present. She has appeared. She has, without any hesitation, clearly stated that she intends to go back to Kuwait to pursue her career. In such a situation, we are of the considered opinion that as a major, she is entitled to exercise her choice and freedom and the Court cannot get into the aspect whether she has been forced by the father or not. There may be ample reasons on her behalf to go back to her father in Kuwait, but we are not concerned with her reasons. What she has stated before the Court, that alone matters and that is the heart of the reasoning for this Court, which keeps all controversies at bay.

It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/he is entitled to make her/his choice. The Courts cannot, as long as the choice remains, assume the role of parens patriae. The daughter is entitled to enjoy her freedom as the law permits and the Court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father. We say so without any reservation.

As far as the son is concerned, he is still a minor. Mr. P.V. Dinesh, learned counsel for the respondent-husband submits that as per the order dated 1.9.2017 passed in Contempt Petition (Civil) No. 1606/2017 in SLP(C) No. 18761/2011 and SLP(Crl.) No. 6237/2017, the orders passed in the earlier contempt petition [Contempt Petition (Civil) No. 223/2012] and the reasoned order passed by the learned Family Court, Thiruvananthapuram in a petition filed under the provisions of the Guardians and Wards Act, 1890, the petitioner-mother will be entitled to have interim custody during his summer vacation. However, if during the summer vacation, the son is undergoing any essential summer courses, that period will be excluded (not exceeding one month).

As the son is coming to stay with the mother during the summer vacation, it is directed that the respondent-husband shall pay a sum of Rs.50,000/- (Rupees fifty thousand only) to the petitioner-mother on every visit of the child. The respondent-husband shall inform the petitioner-mother about the flight and other relevant details well in advance. Needless to say, the petitioner-mother would be entitled to talk to the son and the respondent-husband shall not create any kind of disturbance in that regard.

The special leave petition and the contempt petition are accordingly disposed of. All pending interlocutory applications also stand disposed of.

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JASMEET KAUR VERSUS NAVTEJ SINGH

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Adarsh Kumar Goel and Hon'ble Mr. Justice Uday U. Lalit**

Jasmeet Kaur ...Appellant(S)
Versus
Navtej Singh ...Respondent(S)

Civil Appeal No.(S). 2291 Of 2018

(Arising out of SLP(C)No(s).3090 of 2018)

Decided on : **20th February, 2018**

Appellant wife and respondent husband are citizens of the USA, appellant filed a case of guardianship in Family Court by applying order 7 R. 11 CPC on ground that the USA courts have intimate contact with matter.

Held that marriage between the parties was performed in the USA where one child was born out of wedlock and another was born in India. High Court upheld this decision.

Held that principle of comity of courts or forum conveniens cannot alone determine threshold bar of jurisdiction. In such matters, paramount consideration is always stressed in best interest of child. This cannot be subject matter of final determination in proceeding under Order 7 R. 11 CPC, hence order passed by High Court set aside and Or. 7 R. 11 CPC application dismissed. Further court directed parties to appear before Jurisdictional Family Court.

ORDER

(1) Leave granted. We have heard learned counsel for the parties and perused the record.

(2) The appellant filed a Guardianship Petition which was rejected by the Family Court under Order VII Rule 11 of the Code of Civil Procedure on the ground that the parties are nationals of the United States of America and the U.S. courts have intimate contact with the matter. It was observed the marriage between the parties took place in U.S.A. Out of the wedlock, one child was born in 2012 in U.S.A. and the second child was born in India. The appellant came to India, just before the delivery of the said child. The High Court has affirmed the said order.

(3) We have gone through the judgments of this Court in Surya Vadanan v. State of Tamil Nadu, (2015) 5 SCC 450, Dr. V. Ravi Chandaran v. Union of India and Others, (2010) 1 SCC 174, Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112, Surinder Signature Not Verified Kaur v. Harbax Singh Sandhu, (1984) 3 SCC 698, Sanjeev Majoo, (2011) 6 SCC 479. These judgments were considered by this Court in a recent Three-Judge Bench Judgment in Nithya Anand Raghavan v. State of NCT, (2017) 8 SCC 454 and it was observed :

> ***"39.*** *We must remind ourselves of the settled legal position that the concept of forum convenience has no place in wardship jurisdiction. Further, the efficacy of the principle*

of comity of courts as applicable to India in respect of child custody matters has been succinctly delineated in several decisions of this Court. …

66. *The invocation of first strike principle as a decisive factor, in our opinion, would undermine and whittle down the wholesome principle of the duty of the Court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the Court is convinced in that regard, the fact that there is already an order passed by a foreign Court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshi case [1998(1) SCC 112], in relation to non-convention countries is that the Court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration. While considering that aspect, the Court may reckon the fact that the child was abducted from his or her country of habitual residence but the Court's overriding consideration must be the child's welfare.*"

(4) In view of above, principle of comity of courts or principle of forum convenience alone cannot determine the threshold bar of jurisdiction. Paramount consideration is the best interest of child. The same cannot be subject-matter of final determination in proceedings under Order VII Rule 11 of the C.P.C.

(5) Accordingly, we set aside the impugned order. The application under Order VII Rule 11 is dismissed.

(6) Since it is pointed out that the proceedings on the same subject-matter are also pending before the High Court, the trial court may wait for the decision of the High Court before proceeding further.

(7) We make it clear that we have not expressed any opinion on the merits of the case and the Family Court may now decide the matter expeditiously and as far as possible within six months from today.

(8) The parties are directed to appear before the Family Court for further proceedings on Saturday, the 24th February, 2018. (9) In view of above, the appeal is disposed of.

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SURYA VADANAN VERSUS STATE OF TAMIL NADU & ORS.

SUPREME COURT OF INDIA

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

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

Criminal Appeal No. 395 of 2015

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

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

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

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

The following principles were accepted and adopted by this court:

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

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

(3) An order of a foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But that will not override the consideration of welfare of the child. Therefore, even where the removal of a child

from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child.

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

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

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

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

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

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

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

JUDGMENT

Hon'ble Mr. Justice Madan B. Lokur :—

1. Leave granted.

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

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

The facts

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

5. Soon after their marriage Mayura joined her husband Surya in U.K. sometime in March 2000. Later she acquired British citizenship and a British passport sometime in February 2004. As such, both Surya and Mayura are British citizens and were ordinarily resident in U.K. Both were also working for gain in the U.K.

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

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

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

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

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

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

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

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

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

Proceedings in the U.K.

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

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

"IT IS ORDERED THAT:

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

2. *The Respondent mother shall :*

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

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

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

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

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

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

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

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

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

a. *The Foreign and Commonwealth Office;*

b. *The British High Commission, New Delhi;*

c. *The Indian High Commission, London*

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

8. *Costs reserved.*

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

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

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

"IT IS ORDERED THAT :

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

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

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

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

A penal notice is attached to this paragraph.

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

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

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

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

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

a. *The Foreign and Commonwealth Office;*

b. *The British High Commission, New Delhi;*

c. *The Indian High Commission, London;*

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

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

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

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

11. *Costs reserved.*

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

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

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

Proceedings in the High Court

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

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

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

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

Important decisions of this court

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

23. As a result of matrimonial differences between Sarita Sharma and her husband Sushil Sharma an order was passed by a District Court in Texas, USA regarding the care and custody of their

3 (2000) 3 SCC 14

4 (2010) 1 SCC 591

5 (2010) 1 SCC 174

6 (2011) 6 SCC 479

7 (2013) 15 SCC 790

children (both American citizens) and their respective visiting rights. A subsequent order placed the children in the care of Sushil Sharma and only visiting rights were given to Sarita Sharma. Without informing the foreign court, Sarita Sharma brought the children to India on or about 7th May, 1997.

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

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

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

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

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

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

On the merits of the case, this Court observed:

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

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

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

9 Surinder Kaur Sandhu v. Harbax Singh Sandhu

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

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

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

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

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

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

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

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

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

32. On these facts and applying the principles mentioned above, this court agreed with the view of the High Court that the order dated 26th November, 2008 passed by the foreign court did not intend to separate the child from Shilpa Aggarwal until a final decision was taken with

11 Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42. Even though this court used the word "sole", it is clear that it did not reject or intend to reject the principle of comity of courts.

12 Sarita Sharma v. Sushil Sharma

regard to the custody of the child. The child was a foreign national; both parents had worked for gain in the U.K. and both had acquired permanent resident status in the U.K. Since the foreign court had the most intimate contact[13] with the child and the parents, the principle of "comity of courts" required that the foreign court would be the most appropriate court to decide which parent would be best suited to have custody of the child.

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

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

34. On 8th August, 2007, Ravi Chandran applied for modification of the custody order and was granted, the same day, temporary sole legal and physical custody of the minor child and Vijayasree Voora was directed to immediately turn over the minor child and his passport to Ravi Chandran and further, her custodial time with the child was suspended. The foreign court also ordered that the issue of custody of the child shall be heard by the jurisdictional Family Court in the USA.

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

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

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

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

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

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

13 Surinder Kaur Sandhu v. Harbax Singh Sandhu

14 B's Settlement, In re. B. v. B.,1940 Ch 54: (1951) 1 All ER 949 and McKee v. McKee

15 McKee v. McKee

16 McKee v. McKee

17 McKee v. McKee

18 B's Settlement, In re

19 Kernot v. Kernot, 1965 Ch 217: (1964) 3 WLR 1210: (1964) 3 All ER 339

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

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

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

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

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

(4) Ruchi Majoo v. Sanjeev Majoo

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

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

20 H. (Infants) , In re, (1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)

21 L. (Minors), In re, (1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)

22 L. (Minors), In re,

23 Surinder Kaur Sandhu v. Harbax Singh Sandhu

protective custody warrant order passed by the foreign court) to the effect that Sanjeev Majoo shall not interfere with the custody of her minor child till the next date of hearing.

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

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

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

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

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

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

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

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

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

(4) Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court where the parties had set up their matrimonial

24 Dhanwanti Joshi v. Madhav Unde

25 Dhanwanti Joshi v. Madhav Unde

26 Sarita Sharma v. Sushil Sharma

home, the domestic court must consider whether to conduct an elaborate or summary inquiry on the question of custody of the child. If an elaborate inquiry is to be held, the domestic court may give due weight to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed.[27]

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

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

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

(5) Arathi Bandi v. Bandi Jagadrakshaka Rao

45. The facts in this case are a little complicated and it is not necessary to advert to them in any detail. The sum and substance was that Arathi Bandi and her husband Bandi Rao were ordinarily residents of USA and they had a minor child. There were some matrimonial differences between the couple and proceedings in that regard were pending in a court in Seattle, USA.

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

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

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

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

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

(2) In a given case relating to the custody of a child, it may be necessary to have an elaborate inquiry with regard to the welfare of the child or a summary inquiry without investigating

27 V. Ravi Chandran and Aviral Mittal

28 Dhanwanti Joshi referring to Elizabeth Dinshaw v. Arvand M. Dinshaw

29 Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw

the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child.[30]

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

Discussion of the law

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

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

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

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

54. Second, there is no reason why the principle of "comity of courts" should be jettisoned, except for special and compelling reasons. This is more so in a case where only an interim or an interlocutory order has been passed by a foreign court (as in the present case). In McKee which has been referred to in several decisions of this court, the Judicial Committee of the Privy Council was not dealing with an interim or an interlocutory order but a final adjudication. The applicable

30 V. Ravi Chandran v. Union of India

31 V. Ravi Chandran v. Union of India

32 Shilpa Aggarwal v. Aviral Mittal

principles are entirely different in such cases. In this appeal, we are not concerned with a final adjudication by a foreign court – the principles for dealing with a foreign judgment are laid down in Section 13 of the Code of Civil Procedure.[33] In passing an interim or an interlocutory order, a foreign court is as capable of making a prima facie fair adjudication as any domestic court and there is no reason to undermine its competence or capability. If the principle of comity of courts is accepted, and it has been so accepted by this court, we must give due respect even to such orders passed by a foreign court. The High Court misdirected itself by looking at the issue as a matter of legal rights of the parties. Actually, the issue is of the legal obligations of the parties, in the context of the order passed by the foreign court.

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

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

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

57. There may be a case, as has happened in the present appeal, where one parent invokes the jurisdiction of a court but does not obtain any substantive order in his or her favour and the other parent invokes the jurisdiction of another court and obtains a substantive order in his

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

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

58. As has been held in Arathi Bandi a violation of an interim or an interlocutory order passed by a court of competent jurisdiction ought to be viewed strictly if the rule of law is to be maintained. No litigant can be permitted to defy or decline adherence to an interim or an interlocutory order of a court merely because he or she is of the opinion that that order is incorrect – that has to be judged by a superior court or by another court having jurisdiction to do so. It is in this context that the observations of this court in Sarita Sharma and Ruchi Majoo have to be appreciated. If as a general principle, the violation of an interim or an interlocutory order is not viewed seriously, it will have widespread deleterious effects on the authority of courts to implement their interim or interlocutory orders or compel their adherence. Extrapolating this to the courts in our country, it is common knowledge that in cases of matrimonial differences in our country, quite often more than one Family Court has jurisdiction over the subject matter in issue. In such a situation, can a litigant say that he or she will obey the interim or interlocutory order of a particular Family Court and not that of another? Similarly, can one Family Court hold that an interim or an interlocutory order of another Family Court on the same subject matter may be ignored in the best interests and welfare of the child? We think not. An interim or an interlocutory is precisely what it is - interim or interlocutory – and is always subject to modification or vacation by the court that passes that interim or interlocutory order. There is no finality attached to an interim or an interlocutory order. We may add a word of caution here – merely because a parent has violated an order of a foreign court does not mean that that parent should be penalized for it. The conduct of the parent may certainly be taken into account for passing a final order, but that ought not to have a penalizing result.

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

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

34 L. (Minors), In re,

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

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

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

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

Discussion on facts

61. The facts in this appeal reveal that Surya and Mayura are citizens of the U.K. and their children are also citizens of the U.K.; they (the parents) have been residents of the U.K. for several years and worked for gain over there; they also own immovable property (jointly) in the U.K.; their children were born and brought up in the U.K. in a social and cultural milieu different from that of India and they have grown up in that different milieu; their elder daughter was studying in a school in the U.K. until she was brought to India and the younger daughter had also joined a school in the U.K. meaning thereby that their exposure to the education system was different from the education system in India.[36] The mere fact that the children were admitted to a school in India, with the consent of Surya is not conclusive of his consent to the permanent or long term residence of the children in India. It is possible, as explained by his learned counsel, that he did not want any disruption in the education of his children and that is why he consented to the admission of the children in a school in India. This is a possible explanation and cannot be rejected outright.

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

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

35 Arathi Bandi

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

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

65. We have gone through the orders and directions passed by the foreign court and find that there is no final determination on the issue of custody and what the foreign court has required is for Mayura to present herself before it along with the two children who are wards of the foreign court and to make her submissions. The foreign court has not taken any final decision on the custody of the children. It is quite possible that the foreign court may come to a conclusion, after hearing both parties that the custody of the children should be with Mayura and that they should be with her in India. The foreign court may also come to the conclusion that the best interests and welfare of the children requires that they may remain in the U.K. either under the custody of Surya or Mayura or their joint custody or as wards of the court during their minority. In other words, there are several options before the foreign court and we cannot jump the gun and conclude that the foreign court will not come to a just and equitable decision which would be in the best interests and welfare of the two children of the couple.

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

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

68. There is no doubt that the foreign court has the most intimate contact with Mayura and her children and also the closest concern with the well being of Mayura, Surya and their children. That being the position even though Mayura did not violate any order of the foreign court when

she brought her children to India, her continued refusal to abide by the interim and interlocutory order of the foreign court is not justified and it would be certainly in the best interests and welfare of the children if the foreign court, in view of the above, takes a final decision on the custody of the children at the earliest. The foreign court undoubtedly has the capacity to do so.

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

70. It must be noted at this stage that efforts were made by this court to have the matter of custody settled in an amicable manner, including through mediation, as recorded in a couple of orders that have been passed by this court. Surya had also agreed to and did temporarily shift his residence to Coimbatore and apparently met the children. However, in spite of all efforts, it was not possible to amicably settle the issue and the mediation centre attached to this court gave a report that mediation between the parties had failed. This left us with no option but to hear the appeal on merits.

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

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

73. Accordingly, we direct as follows:-

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

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

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

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

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

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

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PURVI MUKESH GADA VERSUS MUKESH POPATLAL GADA & ANR.

SUPREME COURT OF INDIA

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

Purvi Mukesh Gada
Versus
Mukesh Popatlal Gada & anr.

Criminal Appeal No.1553 of 2017
arising out of SLP (CRL.) No. 1867 of 2016

Decided on : **4 September, 2017**

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

  Moreover, during Dussehra, Diwali, Christmas or summer vacations etc., the respondent shall be entitled to avail the custody for half of the durations of those vacations. However, while effecting this arrangement, it shall be ensured that studies

of the children are not affected. In case of any difficulty in working out the aforesaid modalities, the parties shall be at liberty to approach the trial court. Since the custody of the children is allowed to be retained by the appellant-mother, domicile certificates of the children as well as their passports which are with the respondent, shall be handed over to the appellant.

Hon'ble Mr. Justice A.K. Sikri :—

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

However, in those cases where their togetherness as spouses had resulted in procreation of children, the war is extended by laying respective claims on the custody of those children as well. These minor children, for their proper upbringing, need the company of both the parents - mother as well as the father, for financial reasons, security reasons, psychological reasons, etc. They need the love of both their parents. Not only separation of their parents from each other deprives these children 24/7 company of both the parents, when it results in legal battle of custody in the courts, the situation becomes more traumatic for these children because of various obvious reasons. That is why such cases which seriously impact these children are the most unfortunate.

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

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

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

On September 18, 2014, the appellant filed a domestic violence case in the 38th Court of Additional ACMM, Ballard Estate, Mumbai on the ground of gross mental and physical cruelty,

including verbal and physical abuse and occult practices. Three months after filing the said case, the appellant (arising out of SLP (Crl.) No. 1867 of 2016) moved an application therein praying for access to her minor children during Christmas vacation, which was allowed to be availed of in the respondent's house in Pune.

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

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

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

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

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

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

7. Vide order dated January 29, 2015, the High Court directed day access on September 21 and 24, 2015. Again vide order dated November 11, 2015, overnight access for the coming weekend was accorded to the respondent. Identical overnight access was given by the High Court vide order dated November 23, 2015. However, the respondent could not avail the benefit of these orders. According to the respondent, the appellant had violated these orders, whereas the appellant has pleaded that on September 24, 2015 the respondent himself did not come to have the access of the children and insofar as order granting overnight access during weekends is concerned, the explanation of the appellant is that it is the children who refused to go to their father as they were petrified and, therefore, themselves took such a decision.

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

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

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

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

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

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

(iii) The High Court wanted to interact with the children in order to ascertain their wishes as well as to determine as to which course of action is appropriate in the welfare of the children. However, before doing so, the High Court deemed it appropriate to grant

weekend access to the respondent. For this, directions were given (which have already been taken note of). As per the High Court, prima facie it appeared that the appellant was responsible for non-compliance of those orders and even if it is to be believed that the children did not show their unwillingness to go to their father, it indicates the extent of influence exerted by the mother upon her minor children.

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

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

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

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

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

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

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

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

At the same time, it is also a fact that Tanay was not in the physical company of his father on day-to-day basis. It is also a harsh reality that he was not doing well in studies during the period his

legal custody was entrusted to the respondent. His overall performance in most of the subjects was dismal and he had even failed in Grade IX.

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

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

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

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

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

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

They never showed any reluctance in this behalf. At the same time, when it came to choosing a particular parent for the purposes of custody, they preferred their mother. In fact, these were the

reasons because of which the Additional ACMM had passed orders dated July 01, 2015 (after interviewing the children and ascertaining their wishes as well as welfare) rejecting the request of the respondent to restore custody to him.

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

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

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

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

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

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

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PRATEEK GUPTA VERSUS SHILPI GUPTA & ORS.

THE SUPREME COURT OF INDIA

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

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

Criminal Appeal No. 968 of 2017

Decided on : **December 6, 2017**

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

Hon'ble Mr. Justice Amitava Roy :—

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

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

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

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

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

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

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

IN re: Aadvik Gupta

D.O.B September 28, 2012

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

ORDER

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

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

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

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

from the Commonwealth of Virginia except at the direction of the petitioner, Shilpi Gupta.

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

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

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

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

to the other party and the court. The proceedings concluded with the observation "This cause is final". For immediate reference the proceedingsof 20.10.2015 is also extracted hereinbelow:

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

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

CUSTODY AND VISITATION ORDER

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

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

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

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

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

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

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

This cause is final

Entered this 20th day of October, 2015."

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

service. That the notice of the proceedings in U.S Court at both the stages had been served on the appellant is a minuted fact. It was in this eventful backdrop, that the respondent invoked the writ jurisdiction of the High Court of Delhi seeking a writ of habeas corpus against the appellant for the custody of the child alleging its illegal and unlawful charge by him.

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

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

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

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

1 (2015) 5 SCC 450

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

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

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

and has accustomed himself to a desired congenial family environment, informed with love and affection, amongst others of his grand-parents for which it would be extremely harsh toextricate him herefrom and lodge him in an alien setting, thus adversely impacting upon the process ofhis overall grooming. That the removal of the child by the appellant to India had not been in defiance of any order of the court in U.S and that the issue, more particularly with regard to his custody as per the Indian law is presently pending in a validly instituted proceeding here has also been highlighted in endorsement of the challenge to the impugned judgment and order. The decisions of this Court in*Dhanwanti Joshi v. Madhav Unde*[2], *Sarita Sharma v.Sushil Sharma*[3] and Surya Vadanan1 have been advertedto in consolidation of the above arguments.

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

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

19. A three Judge Bench of this Court in *Nithya Anand Raghavan v. State (NCT of Delhi)*[4] did have the occasion to exhaustively revisit the legal postulations qua the repatriation of a minor child removed by one of the parents from the custody of the other parent from a foreign country to

2 (1998) 1 SCC 112

3 (2000) 3 SCC 14

4 (2017) 8 SCC 454

India and its retention in the face of an order of a competent foreign court directing its return to the place of abode from which it had been displaced. The appeal before this Court arose from a decision of the High Court in a Writ Petition filed by the father alleging that theminor daughter of the parties had been illegally removed from his custody in United Kingdom (for short, hereafter referred to as "UK"), thus seeking a writ of habeas corpus for her production. By the verdict impugned, the High Court directed the appellant-mother therein to produce the minor childand to comply with an earlier order passed by the High Court of Justice, Family Division, Principal Registry, United Kingdom within three weeks or in the alternativeto handover the custody of the daughter to the respondent-father therein within that time. The proceeding in which the Court in the UK had passed the order dated 08.01.2016 had been initiated by the respondent/father after the appellant/mother had returned to India with the minor.

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

21. Assailing this determination, it was urged on behalf of the appellant inter alia that the High Court had wrongly assigned emphasis on the principle ofcomity of courts in complete disregard

of the paramount interest and welfare of the child, more particularly in view of the vicious environment at her matrimonial home in U.K in which she (appellant) had been subjected to physical and verbal abuse and had even placed the child at risk with his behaviour. The fact that India not being a signatory to the Hague Convention intended to prevent parents from abducting children across the borders, the principle ofcomity of courts did not merit precedence over the welfare of the child, an aspect overlooked by the High Court, was underlined. It was asserted that the impugned order did also disregard the parens patriaejurisdiction of the Indian court within whose jurisdiction the child was located as well as the welfareof the child in question in mechanically applying the principle of comity of courts. That though the welfareof the child in situations of the like as well, is ofparamount consideration, this Court in *Shilpa Aggarwalv. Aviral Mittal*[5] and in Surya Vadanan1 had deviated from this governing precept and had directed the childand mother to return to the jurisdiction of the foreign court by mis-interpreting the concept of'intimate contact' of the child with the place ofrepatriation, was highlighted for reconsideration of the views expressed therein. It was urged that the decision in Surya Vadanan1 had a chilling effect of assigning dominance to the principle of comity of courts over the welfare of a child, which mentionably undermined the perspective of the child, thus encouraging multiplicity of proceedings.

22. It was insistingly canvassed that the view adopted in Surya Vadanan1 was in direct conflict with an earlier binding decision in *V. Ravi Chandran (Dr.) v.Union of India*[6] in which a three-Judge Bench had categorically held that under no circumstance can the principle of welfare of the child be eroded and that achild can seek refuge under the parens patriaejurisdiction of the Court. While dismissing the initiativeof the respondent before the UK Court to be one in retaliation of the appellant's allegation of abuse and violence and noticeably after she had filed a complaint with the Crime Against Women Cell (CAWC), New Delhi, it was also urged that the U.K Court had passed ex parte order without affording any opportunity to her topresent her case. It was canvassed further that the writ petition filed by the respondent seeking a writ ofhabeas corpus which is envisaged for urgent and immediate relief was also a designed stratagem of his bordering on the abuse of the process of the court and thus ought to have been discouraged by the High Court. It was underlined as well that the High Court in passing the impugned direction had also overlooked that the respondent had defaulted in the discharge ofhis parental duty towards the child, who was suffering from serious health problems, thus compromising in all respects the supervening consideration of overall well-being of the child.

23. In refutation, it was maintained on behalf of the respondent that the child was a British citizen and brought up in U.K and as he had acquired its citizenship and the appellant was also a permanent resident ofU.K, they had the abiding intention to permanently settle there along with the child and thus the U.K Court had the closest concern and intimate contact with thechild as regards her welfare and custody and thus indubitably had the jurisdiction in the matter. It was urged on behalf of the respondent by referring amongst others to the rendering in Surya Vadanan1that the child had clearly adapted to the social and cultural milieu of U.K and thus it was in its best interestto be rehabilitated there. That there was no materialto suggest that the return of the child to U.K would result in psychological, physical or cultural harm to her or that the U.K Court was incompetent to take a decision in the interest and welfare of the child, was

5 (2010) 1 SCC 591

6 (2010) 1 SCC 174

underlined. It was insisted as well that there was no compelling reason for the High Court to ignore the principle of comity of courts and that as acknowledged by the High Court, better medical facilities were available in U.K to treat the child. The steps taken by the respondent towards the child's boarding and travelling expenses together with the expenditure incurrable for the school and other incidental aspects and his undertaking not to pursue any criminal proceeding against the appellant for kidnapping the child with the avowed desire ofreinstating his home was highlighted to demonstrate his bona fides. That there was no delay on the part ofthe respondent in filing the writ petition, which he did immediately after coming to learn that the appellant was disinclined to return the child to U.K, was stressed upon as well.

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

25. While recalling that the concept of forum convenience has no place is wardship jurisdiction, this Court at the outset dwelt upon the efficacy of the principle of comity of courts as applicable to India in respect of child custody matters and for that purpose, exhaustively traversed the relevant decisions on the issue. It referred to the verdict in *Dhanwanti Joshi*[2], which recorded the enunciation of the Privy Council in *Mark T. Mckee v. Evelyn Mckee*[7], which in essence underlined the paramountcy of the consideration of welfare and happiness of the infantto be of decisive bearing in the matter of deciding itscustody with the observation that comity of courts demanded not its enforcement but its grave consideration. In that case, a decree of divorce was passed in USA and custody of the child was given tothe father and later varied in favour of the mother. At that stage, the father took away the child to Canada, whereafter in the habeas corpus proceedings by the mother, though initially the decisions of the lower courts went against her, the Supreme Court of Canada gave her custody and the said Court held that thefather could not have the question of custody retried in Canada once the question was adjudicated in favourof the mother in the U.S.A earlier. The above observation was made by the Privy Council on appealto it which held that in the proceedings relating to thecustody before the Canadian Court, the welfare and happiness of the infant was of paramount consideration and the order of a foreign court in USA as to the custody can be given due weight in the circumstances of the case but such an order of a foreign court was only one of the factors which must be taken into consideration. The duty of the Canadian Court to form any independent judgment on the merits of the matter with regard to the welfare ofthe child was emphasized. It recorded as well that this view was sustained in L (minors) (Wardship: Jurisdiction), In. re[8], which reiterated that the limited question which arose in the latter decisions was whether the court in the country in which the child was removed could conduct (a) summary enquiry or (b) an elaborate enquiry in the question of custody. It was explicated that in case of (a) a summary enquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child and in case of (b) an elaborate enquiry, the court could go into the meritsto determine as to where the permanent welfare lay and ignore the order of the Foreign Court or treat the fact of removal of the child from another country as only one of the circumstances and the crucial question as to whether the court (in the country to which thechild is removed) would exercise

7 (1951) AC 352 (PC)

8 (1974) 1 WLR 250 (CA)

the summary or elaborate procedure is to be determined according tothe child's welfare. It was indicated that the summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or its education in his native land is interrupted and the child is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child. It was mentioned as well that the summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may be well persuaded that it will be better for the child that those facets be investigated in the court in his native country on the expectation that an early decision in the native country could be in the interest of the child before it would develop roots in the country to which he had been removed. It was expounded in the alternative, that the Court might as well think of conducting an elaborate enquiry on merits and have regard to the other facts of the case and the time that has elapsed after the removal of thechild and consider, if it would be in the interest of thechild not to have it returned from the country towhich it had been removed, so much so that in such an eventuality, the unauthorized removal of the childfrom the native country would not come in the way ofthe court in the country to which the child has been removed, to ignore the removal and independently consider whether the sending back of the child to its native country would be in the paramount interest ofthe child.

26. This Court recalled its mandate in *Elizabeth Dinshaw v. Arvand M. Dinshaw*[9], directing the fatherof the child therein, who had removed it from USA contrary to the custody orders of U.S Court, torepatriate it to USA to the mother not only becauseof the principle of comity but also because on facts, which on independent consideration merited such restoration of the child to its native State, in its interest. The following observations in Dhanwanti Joshi2qua the state of law vis-a-vis the countries who are not the signatories of the Hague Convention are offormidable significance and as noticed in Nithya Anand Raghavan4, are extracted hereinbelow:

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

9 (1987) 1 SCC 42

27. Here again the court in the country to which thechild is removed was required to consider the question on merits bearing on its welfare as ofparamount significance and take note of the order ofthe foreign court as only a factor to be taken into consideration as propounded in *Mckee*[7], unless the court thought it fit to exercise the summary jurisdiction of the child and its prompt return to its native country for its welfare. In elaboration of the above exposition, this Court in Nithya Anand Raghavan4propounded thus:

> ***"40.*** *The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit toexercise summary jurisdiction in the interests ofthe child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to returnto his native state because of the difference in language spoken or social customs and contacts towhich he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits ofthe paramount welfare of the child but leave that inquiry to the foreign court by directing return ofthe child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing orderof the foreign court if any as only one of the factors and not get fixated therewith. In either situation—be it a summary inquiry or an elaborate inquiry—the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief ofreturn of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child tophysical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition."*

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

placed in an intolerable or unbearable situation or environment or if the child in a given case, if matured, objects to its return.

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

> ***"27.*** *… However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the childto the United States of America on the ground that its removal from USA in 1984 was contrary to the orders of US courts. It was also held that whenever a question arises before a court pertaining to thecustody of a minor child, the matter is to be decided not on considerations of the legal rightsof the parties but on the sole and predominant criterion of what would best serve the interest ofthe minor."*
> *(emphasis supplied)*

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

> ***"29.*** *While dealing with a case of custodyof a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the countryto which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question ofcustody or by dealing with the matter summarily order a parent to return custodyof the child to the country from which thechild was removed and all aspects relating tothe child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects ofwelfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to hiscustody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.*
>
> ***30.*** *However, in a case where the court decides to exercise its jurisdiction summarilyto return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child tobe investigated by the court in his own native country as that could be in the best interests ofthe child. The indication given in McKee v.McKee that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care ofthe child on the ground that such an order is in the best interests of the child has been explained in L. (Minors), In re [L. (Minors) (Wardship : Jurisdiction), (1974) 1 WLR 250 (CA)] and the said view has been approved by this Court in Dhanwanti Joshi [Dhanwanti Joshi. Similar view taken by the Court of Appeal in H. (Infants) (1966) 1 WLR 381 has been approved by this Court in Elizabeth Dinshaw."(emphasis supplied)*

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

> *"**42.** The consistent view of this Court is that if the child has been brought within India, the courts in India may conduct: (a) summary inquiry; or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign court. In an elaborate inquiry, the court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native State."*

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

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

decision of this Court, amongst others in *Syed Saleemuddin v. Dr. Rukhsana*[10], was adverted to, wherein it had been proclaimed that the principal duty of the court moved for the issuance of writ of habeas corpus in relation to the custody of a minor child is to ascertain whether such custody is unlawful or illegal and whether the welfare of the child requires, that his present custody should be changed and the child ought to be handed over to the care and custody of any person. It was once again emphasized that while doing so, the paramount consideration must be, the welfare of the child.

33. The observation in *Elizabeth Dinshaw*[9] that in such matters, the custody must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion as to what would best serve the interest and welfare of the minor and that to that extent, the High Court would exercise its parens patriae jurisdiction, as the minor is within its jurisdiction was reminisced. In the facts of the case also, noting the supervening fact that the appellant was the biological mother and natural guardian of the minor child, the remedy of writ of habeas corpus invoked for enforcement of the directions of the foreign court was declined, however leaving the respondent/father to take recourse to such other remedy as would be available in law for the enforcement of the order passed by the foreign court for securing the custody of the child. It was held that the appellant being the biological mother and natural guardian of the child, it could be presumed that its custody with her was lawful.

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

10 (2001) 5 SCC 247

On an evaluation of the overall facts and circumstances, this Court thus was of the unhesitant opinion that it would be in the interest of the child to remain in the custody of her mother and that her return to UK would prove harmful to her. While concluding thus, it was stated that this arrangement notwithstanding the appellant/mother ought to participate in the proceedings before the UK Court so long as it had the jurisdiction to adjudicate the matter before it. It was observed as well that, as the scrutiny involved with regard to the custody had arisen from a writ petition filed by the respondent/father for issuance of writ of a habeas corpus and not to decide the issue of grant or otherwise of the custody of the minor, all relevant aspects would have to be considered on their own merit in case a substantive proceeding for custody is made before any court of competent jurisdiction, including in India, independent of any observation made in the judgment.

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

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

37. In *Arathi Bandi v. Bandi Jagadrakshaka Rao*[11] the minor involved was a male child who was born in USA and had acquired the citizenship of that country by birth. The child was removed from USA by the mother in spite of a restraint order and a red corner notice operating against her had been issued by a court of competent jurisdiction in USA. This Court therefore held that the facts involved were identical to those in V. Ravi Chandran6 and further noticed that the mother of the child also had expressed her intention to return to USA and live with her husband though the latter was not prepared to cohabit with her.

38. In Surya Vadanan1, the two minor girls aged 10 years 6 years respectively were British citizens by birth. Following intense matrimonial discords, the mother had left UK and had come to India with her two daughters. She also instituted a proceeding in the Family Court at Coimbatore seeking dissolution of marriage. The husband, finding the wife to be unrelenting and disinclined to return to U.K with her daughters, petitioned the High Court of Justice in U.K for making the

11 (2013) 15 SCC 790

children as the wards of the Court, which passed an order granting the prayer and required the mother to return the children to its jurisdiction. This order was passed even before any formal order could be passed on the petition filed by the wife seeking divorce. This order was followed by another order of the U.K Court giving peremptory direction to the wife to produce the two daughters before the U.K Court and was supplemented by a penal notice to her. It was thereafter that the husband moved the Madras High Court for a writ of habeas corpus on the ground that the wife had illegal custody of the two daughters. On the following considerations as extracted hereinbelow, relief as prayed for by the husband was granted:

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

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

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

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

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

towards all relevant aspects related thereto. The impugned judgment of the High Court issuing the writ of habeas corpus in favour of the respondent-husband was thus set aside.

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

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

44. The following observations in *Ruchi Majoo v.Sanjeev Majoo*[12] bearing on the parens patriae jurisdiction of Indian courts in cases involving custody of minor children are apt as well:

"Recognition of decrees and orders passed by foreign courts remains an eternal dilemma inasmuch as whenever called upon to do so, courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Civil Procedure, 1908, as amended by the Amendment Acts of 1999 and 2002. The duty of a court exercising its parens patriae jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factory to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision."

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

12 (2011) 6 SCC 479

if the applicant/parent is slack and there is a considerable time lag between the removal of the child from the native country and the steps taken for its repatriation thereto, the court would prefer an elaborate enquiry into all relevant aspects bearing on the child, as meanwhile with the passage of time, it expectedly had grown roots in the country and its characteristic milieu, thus casting its influence on the process of its grooming in its fold.

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

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

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

overall perspectives, perceptions and practicabilities, it ought not to be dislodged and extricated from the environment and setting to which it had got adjusted for its well-being.

49. Noticeably, a proceeding by the appellant seeking custody of the child under the Guardian and Wards Act, 1890 has been instituted, which is pending in the court of the Principal Judge, Family Court, Rohini, Delhi. This we mention, as the present adjudication pertains to a challenge to the determination made in a writ petition for habeas corpus and not one to decide on the entitlement in law for the custody of the child.

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

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

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

53. The appeal is thus allowed.

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LANDMARK JUDGMENTS ON

MARRIAGE & DIVORCE

HARJINDER SINGH VERSUS RAJPAL

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Kurian Joseph and Hon'ble Mr. Justice Amitava Roy**

Harjinder Singh .. Appellant(S)
Versus
Rajpal .. Respondent(S)

Civil Appeal No. 452 of 2018

(Arising out of S.L.P. (Civil) No.18046 of 2013)

Decided on : **17th January, 2018**

In the present case, an SLP was filed after the High Court confirmed the order passed by the Additional District Judge, Jalandhar and declined to grant decree of divorce on the ground of cruelty and desertion. While the matter was pending before the Supreme Court, with the consent of the parties, they were directed to stay together as a last attempt for reconciliation. However, the parties reported that it was not possible for them to stay together. Therefore, the Supreme Court referred for the parties to mediation . As per the compromise, the appellant-husband has agreed to pay an amount of Rs. 22 lakhs (Rupees Twenty Two Lakhs) to the Respondent-wife. The parties had also filed a petition seeking divorce by mutual consent under Section 13(B) of the Hindu Marriage Act, 1955. With respect to that petition, the Supreme Court held that parties have been litigating and living separately for around two decades, therefore the further waiting period should be dispensed with and hence, the marriage stands dissolved by the decree of mutual consent.

JUDGMENT

Hon'ble Mr. Justice Kurian Joseph :—

Leave granted.

1. Heard learned counsel for the parties.

2. The High Court confirmed the order passed by the Additional District Judge, Jalandhar dated 8th September, 2008 and declined to grant decree of divorce on the ground of cruelty and desertion. When the matter reached before us on 01.12.2017, we had the assistance of Advocate Dr.(Mrs.) Vipin Gupta on whose suggestion and with the consent of the parties, they were directed to stay together for a while to see whether the disputes could be amicably patched up.

3. Today the parties have reported before us that it is not possible for them to live together. However, we may painfully record one fact that their only son in his late teens ended his life around a year back and that was one reason for an afterthought for reunion.

4. Mr. Nidhesh Gupta, learned senior counsel, who graciously accepted our request to mediate, after interacting with the parties and their counsel and the relatives who have come with the parties, reported that the parties have reached a compromise and the same is reduced to writing

and duly signed by the parties and by their counsel. The said compromise is taken on record and the same shall become part of this judgment.

5. As per the compromise, the appellant has agreed to pay an amount of Rs.22 lakhs (Rupees Twenty Two Lakhs) in full and final settlement of the claims of the respondent-wife. We direct the appellant-husband to pay the first instalment of Rs.10 lakhs (Rupees Ten Lakhs) by depositing it in the account of the respondent-wife on or before 20th January, 2018. The name of the Bank and Account number will be furnished by the counsel for the respondent. The remaining amount of Rs.12 lakhs (Rupees Twelve Lakhs) shall be similarly deposited in the account of the respondent-wife on or before 20th April, 2018.

6. The parties have also filed a petition under Section 13(B) of the Hindu Marriage Act, 1955 seeking decree of divorce by mutual consent. The parties are before us and we have interacted with them. Having regard to the fact that the parties have been litigating and living separately for around two decades, we are convinced that the parties have taken a free and conscious decision. In the background of the long separation and the long pending litigation, we are of the view that the further period of waiting should dispensed with. Ordered accordingly.

7. The marriage between the appellant Harjinder Singh and respondent Rajpal is dissolved by the decree of divorce by mutual consent. The case filed by the respondent-wife for maintenance, pending before the J.M.C. Jalandhar, shall stand dismissed as withdrawn.

8. Accordingly, the appeal is disposed of.

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DINESH SINGH THAKUR VERSUS SONAL THAKUR

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice R.K. Agrawal and Hon'ble Mrs. Justice R. Banumathi**

Dinesh Singh Thakur ...Appellant(s)
Versus
Sonal Thakur ..Respondent(s)

Civil Appeal No. 3878 2018

(Arising out of Special Leave Petition (Civil) No. 10078 of 2018)

Decided on : **17th April, 2018**

Section 41(b) of the Specific Performance Act, 1963 deals with anti-suit injunctions which are meant to restrain a party from instituting a case in a another court, including a foreign court. Such cases are governed by the principles of equity. Most of the principles governing grant of injunction are also applicable in the cases of anti-suit injunction. While dealing with cases involving the application of Section 41(b) of the Specific Performance Act, 1963, the courts must be very cautious and careful. Also, it should be borne in mind that it should not become a routine practice and such injunction should only be granted wherein the situation requires so because such orders involves the encroachment of jurisdiction of one court by another. In the present case, the appellant-husband has prayed for grant of injunction of the suit initiated by the respondent-wife for grant of a decree of divorce on the grounds of irretrievable breakdown of marriage at Circuit Court, Florida, USA. However, such a ground for divorce is not stipulated by the Hindu Marriage Act, 1955. The respondent-wife has herself admitted the jurisdiction of Family Court, Gurgaon. But it is undisputed that the Circuit Court, Florida, USA also had the jurisdiction to entertain the present case because the appellant-husband is himself residing in USA since 2007 and the present case in India was initiated through a power of attorney. Hence, the contention of the appellant-husband for seeking anti-suit injunction that, if the proceedings are allowed to continue in the Circuit Court, Florida will cause him grave injustice cannot be accepted and therefore, injunction is not granted. Also, both the parties must produce evidence pertaining to the question whether their marriage is governed by Hindu Marriage Act or any other law.

JUDGMENT

Hon'ble Mr. Justice R.K. Agrawal :—

1) Leave granted.

2) The present appeal has been filed against the impugned judgment and order dated 03.11.2016 passed by the High Court of Punjab & Haryana at Chandigarh in CR No. 7190 of 2016 whereby learned single Judge of the High Court dismissed the revision filed by the appellant-husband against the order dated 18.10.2016 passed by the District Judge, Family Court, Gurgaon in Civil

Suit No. 15 of 2016 whereby ad-interim injunction granted against the respondent-wife, vide order dated 26.09.2016 has been vacated.

Brief facts:-

3) Having regard to the nature and circumstances of the case, we do not intend to discuss all the facts in detail at this stage. Hence, the facts are stated in a summarized way only to appreciate the issue involved in this instant appeal.

(a) The marriage between Dinesh Singh Thakur-the appellant-husband and Sonal Thakur -respondent-wife was solemnized on 20.02.1995 as per Hindu rites and two children were born out of the said wedlock. The appellant-husband was working in United States of America (USA) at the time of marriage and he took the respondent-wife to USA on Dependent Visa. Both the parties got the citizenship of USA in May, 2003. They obtained PIO status (Person of India Origin) in June 2003 and OCI status (Overseas Citizens of India) in July 2006.

(b) The appellant-husband filed a petition being H.M.A. No. 601 of 2016 under Sections 13 and 26 of the Hindu Marriage Act, 1955 (in short the Act) against the respondent-wife at the Family Court, Gurgaon which is pending adjudication before the Court. Subsequently, the respondent-wife filed a petition being Case No. 2016-008918-FD in the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida, USA for divorce on the ground of irretrievable breakdown of marriage and other reliefs. Thereafter, the appellant-husband filed Civil Suit No. 15 of 2016 before the District Judge, Family Court, Gurgaon, under Section 7 of the Act for permanent injunction and declaration inter alia to restrain the respondent-wife from pursuing the petition for divorce before the Court in USA.

(c) Learned District Judge, vide order dated 26.09.2016, granted ex parte ad interim injunction to the appellant-husband. Being aggrieved, the respondent-wife filed an application for vacation and modification of the order dated 26.09.2016. Learned District Judge, vide order dated 18.10.2016, vacated the injunction granted vide order dated 26.09.2016.

(d) Aggrieved by the order vacating injunction, the appellant-husband preferred CR No. 7190 of 2016 before the High Court. Learned single Judge of the High Court, vide order dated 03.11.2016 dismissed the petition filed by the appellant-husband.

(e) Aggrieved by the judgment and order dated 03.11.2016, the appellant-husband has filed this appeal by way of special leave before this Court.

4) Heard Ms. Indu Malhotra, learned senior counsel for the appellant-husband and Mr. V. Giri, learned senior counsel for the respondent-wife and perused the record.

Point(s) for consideration:-

5) The only point for consideration before this Court is whether in the present facts and circumstances of the case, the appellant-husband is entitled to the decree of anti-suit injunction against the respondent-wife?

Rival submissions:-

6) Learned senior counsel for the appellant-husband contended that as the appellant herein had already filed a petition seeking dissolution of marriage of the parties in which the respondent-

wife was served on 04.08.2016 and she had caused appearance on 16.09.2016, the proceedings initiated by the respondent-wife seeking a decree of divorce in a Foreign Court on the ground of irretrievable breakdown of marriage which is not a ground for divorce under the Act are liable to be stayed.

Further, the respondent-wife, along with her minor children is residing in India since 2003 and filing of petition for divorce in the Court at USA, after receipt of notice in the divorce petition filed by the appellant-husband in India, is an abuse of process of law and amounts to multiplicity of proceedings.

7) Learned senior counsel further contended that the respondent-wife is admittedly residing at Gurgaon, therefore, the court at Gurgaon would be the forum convenient to both the parties. She further contended that the trial Court has only considered the provisions of Section 41(b) of the Specific Relief Act, 1963 (in short the SR Act) and the decision in the case of Rakesh Kumar vs. Ms. Ashima Kumar AIR 2007 P&H 63 but did not take into consideration the provisions of Section 41(a) of the SR Act, relevant in the present context. Learned senior counsel for the appellant-husband finally contended that the High Court was not right in upholding the order of the court below on vacating the ad-interim injunction and interference in this regard is sought for by this Court.

8) Learned senior counsel for the respondent-wife while refuting the claims made by learned senior counsel for the appellant-husband submitted that the petition that has been filed before the Court at Florida is not only for dissolution of marriage of the parties but also for claiming various other reliefs such as equitable distribution of marital assets, child support, alimony, partition and other reliefs that are not available under the Indian Law. Learned senior counsel further submitted that the irreparable loss or injury shall be caused to the respondent-wife and to the children in case the petition pending in the Court at Florida is stayed.

Discussion

9) Anti-Suit Injunctions are meant to restrain a party to a suit/proceeding from instituting or prosecuting a case in another court, including a foreign court. Simply put, an anti-suit injunction is a judicial order restraining one party from prosecuting a case in another court outside its jurisdiction. The principles governing grant of injunction are common to that of granting anti-suit injunction. The cases of injunction are basically governed by the doctrine of equity.

10) It is a well-settled law that the courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. However, before passing the order of anti-suit injunction, courts should be very cautious and careful, and it should be granted sparingly and not as a matter of routine as such orders involve a court impinging on the jurisdiction of another court, which is not entertained very easily specially when the it restrains the parties from instituting or continuing a case in a foreign court.

11) In this backdrop, it is worthwhile to quote Section 41 of the SR Act which provides for various instances and circumstances under which injunction cannot be granted.

> **41.** Injunction when refused.An injunction cannot be granted
>
> **(a)** to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;

(c) to restrain any person from applying to any legislative body;

(d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;

(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

(f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(g) to prevent a continuing breach in which the plaintiff has acquiesced;

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;

(j) when the plaintiff has no personal interest in the matter.

12) The appellant husband argued that Section 41(b) is not applicable to the instant case rather it is applicable only to those cases where question is regarding the injunction for proceedings in the Indian court. In support of this argument, learned senior counsel placed reliance on Oil and Natural Gas Commission vs. Western Company of North America (1987) 1 SCC 496, wherein this Court, while interpreting the provision of Section 41(b) of the Specific Relief Act, 1963 has held as follows:-

18. This provision, in our opinion, will be attracted only in a fact-situation where an injunction is sought to restrain a party from instituting or prosecuting any action in a court in India which is either of coordinate jurisdiction or is higher to the court from which the injunction is sought in the hierarchy of Courts in India..

13) Learned senior counsel for the appellant-husband further placed reliance on Modi Entertainment Network and Another vs. WSG Cricket PTE Ltd. 2003 (4) SCC 341, wherein this Court while dealing with the matter laid down certain principles required to be taken into consideration by any court while granting an anti-suit injunction. These principles are as under:-

The defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court. If the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated and; The principle of comity-respect for the court in which the commencement or continuation of action/proceeding is sought to be restrained-must be borne in mind.

14) In Modi Entertainment Networks (supra), this Court has reiterated this position by holding that the courts in India like Court in England are courts of law and equity. The principles governing the grant of anti-suit injunction being essentially an equitable relief; the courts in India have the powers to issue anti-suit injunction to a party over whom it has personal jurisdiction in an appropriate case; this is because the courts of equity exercise jurisdiction in personam; this power has to be exercised sparingly where such an injunction is sought and if not granted, it would amount to the defeat of ends of justice and injustice would be perpetuated.

15) In Vivek Rai Gupta vs. Niyati Gupta, Civil Appeal No. 1123 of 2006, decided on February 10, 2016, this Court has held as under:-

If the execution proceedings are filed by the respondent-wife for executing the aforesaid decree dated 18.09.2012 passed by the Court of Common Pleas, Cuyahoga Country, Ohio, USA against any other movable/immovable property in India it would be open to the appellant-husband to resist the said execution petition on any grounds available to him in law taking the position that such a decree is not executable.

16) Further, in Harmeeta Singh vs. Rajat Taneja 2003 (67) DRJ 58, the Delhi High Court considering the fact that the parties have lived together for a very short time in the United States of America had granted anti suit injunction.

17) Y. Narasimha Rao & Others vs. Y. Venkata Lakshmi and Another (1991) 3 SCC 451, this Court has held as under:-

> **20.** From the aforesaid discussion the following rule can be deduced for recognising a foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

18) Further, during the course of hearing, various documents such as pan card, Aadhar card of the respondent-wife, lease deed which was executed by her in 2015 etc., which are also placed on record, are sufficient to show that respondent-wife is ordinarily living in India. Further, as it appears from the proceedings recorded before the US court that the respondent herself has admitted that the Family Court Gurgaon has jurisdiction in the given case. The evidence placed on record is sufficient enough to show that the respondent is amenable to the personal jurisdiction of Gurugram Family Court. Though the respondent-wife is amenable to the jurisdiction of Family Court, Gurgaon, there is nothing on record to hold that the other party will suffer grave injustice if the injunction is not granted.

There is no dispute to the fact that both the parties are permanent citizens of U.S. Undisputedly, the Circuit Court, Florida, USA is also having the concurrent jurisdiction in the given case. The contention that the appellant-husband will suffer grave injustice if the proceedings are allowed to be continued in the Circuit Court, Florida USA doesnt stand to the ground as the appellant himself has been residing there after 2007 and the proceedings for grant of anti-suit injunction were initiated by him in India through another person by empowering him through a power of attorney to file and pursue the disputed litigation on his behalf. Further, there is nothing brought on record to show how the appellant-husband would suffer grave injustice if the injunction restraining the respondent-wife from pursuing the divorce petition in Florida, is not granted.

Still further, even if the injunction is declined, it cannot be said that the ends of justice will be defeated and injustice will be perpetuated.

19) The contention that the respondent-wife has filed the petition for divorce in the court at USA on the ground of irretrievable breakdown of marriage which is not the ground provided for divorce under the Act requires consideration. The mere fact that the respondent-wife has filed the case on the ground which is not available to her under the Act, doesnt means that there are likelihood of her being succeeding in getting a decree for divorce. Specifically, in view of the fact that the appellant has raised this contention before the Circuit Court, Florida and both the parties will produce evidence with regard to the question whether their marriage is governed by the Act or any other law.

20) Foreign court cannot be presumed to be exercising its jurisdiction wrongly even after the appellant being able to prove that the parties in the present case are continued to be governed by the law governing Hindus in India in the matter of dispute between them.

21) In view of above discussion and after having regard to the nature of case and other peculiar facts, we do not deem it appropriate to interfere with the decision rendered by the High Court. We are of the opinion that the proceedings in the Foreign Court cannot be said to be oppressive or vexatious. The appeal is accordingly dismissed with no order as to costs.

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MR. ANURAG MITTAL VERSUS MRS. SHAILY MISHRA MITTAL

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice S.A. Bobde and Hon'ble Mr. Justice L. Nageswara Rao**

Mr. Anurag Mittal ...Appellant (S)
Versus
Mrs. Shaily Mishra Mittal ...Respondent (S)

Civil Appeal No.18312 of 2017

Decided on : **24th August, 2018**

In the present case, the petitioner-wife filed a petition seeking divorce under Section 13(1)(i)(a) of the Hindu Marriage Act, 1955 which was granted by the Additional District Judge, North, Tis Hazari Court, Delhi. It also dismissed the petition filed under Section 9 of the Act by the husband. Aggrieved by the order of the court, the appellant-husband filed appeals before the High Court and accordingly, the High Court stayed the judgment and the operation of the judgment passed by the Family Court. While the appeal was pending before the High Court, the parties reached a settlement through mediation which stipulated that the Appellant-husband was required to withdraw the appeals before the High Court within 30 days. Subsequently, the High Court dismissed the appeals as withdrawn on 20.12.2011. In the meanwhile, the Appellant-husband married the Respondent on 06.12.2011. Very soon, their relationship got bitter and the respondent-wife filed a petition for declaring the marriage as void under Section 5(i) read with Section 11 of the Act. The family court dismissed the petition. The respondent-wife approached the High Court challenging the judgment of the Family court. The High Court allowed the appeal and declared the marriage between the Appellant-husband and the Respondent-wife as null and void. Aggrieved by this order of the High court, the Appellant-husband approached the Supreme Court. The Supreme Court held that the restriction placed on a second marriage in S.15 of the Act till dismissal of an appeal would not apply to a case where the parties have settled and decided not to pursue further appeal. Also, the court observed that it is not the case of the appellant that marriage was lawful because of the interim order that was passed in appeals filed by him against the decree of divorce and he rested his case on petition filed for withdrawal of appeal. Therefore the judgment of the High Court that the marriage was void is erroneous. [Per L. Nageshwar Rao, J.] If provision of law prescribes incapacity to marry and yet person marries while under that incapacity, marriage would not be void in absence of express provision that declares nullity. [Per S.A. Bobde, J.] Further, the court held that the withdrawal of suit is an absolute right of the plaintiff and Order 13 Rule 1 applies to appeals as well, therefore, if the appellant makes such an application unconditionally to the court, the court has to grant it. Hence, the appeal is deemed to have been withdrawn on the date of filing of application of withdrawal.

JUDGMENT

Hon'ble Mr. Justice L. Nageswara Rao :—

1. By a judgment dated 31.08.2009, the Additional District Judge, North, Tis Hazari Court, Delhi allowed the petition filed by Ms. Rachna Aggarwal under Section 13 (1) (i) (a) of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) and dissolved the marriage between her and the Appellant. By the said judgment the petition filed under Section 9 of the Act by the Appellant for restitution of conjugal rights was dismissed. The Appellant filed appeals against the said judgment Date: 2018.08.24 and the operation of the judgment and decree dated 31.08.2009 was stayed by the High Court on 20.11.2009. During the pendency of the Appeal, the Appellant and Ms. Rachna Aggarwal reached a settlement before the Mediation Centre, Tis Hazari Court, Delhi. According to the terms of the settlement dated 15.10.2011, the Appellant had to move an application for withdrawal of the Appeals within 30 days. The Appellant filed an application to withdraw the appeals before the High Court in terms of the settlement dated 15.10.2011 which was taken up on 28.11.2011 by the Registrar of the High Court of Delhi. He recorded that there was a settlement reached between the parties before the Mediation Centre, Tis Hazari Court, Delhi and listed the matter before the Court on 20.12.2011. The High Court dismissed the appeals filed by the Appellant as withdrawn in terms of the settlement by an order dated 20.12.2011. In the meanwhile, the Appellant married the Respondent on 06.12.2011. Matrimonial discord between the Appellant and the Respondent led to the filing of a petition by the Respondent for declaring the marriage as void under Section 5 (i) read with Section 11 of the Act. The main ground in the petition was that the appeal filed by the Appellant against the decree of divorce dated 31st August, 2009 was pending on the date of their marriage i.e. 06.12.2011. The Family Court dismissed the petition filed by the Respondent. The Respondent challenged the judgment of the Family Court in the High Court. By a judgment dated 10.08.2016, the High Court set aside the judgment of the Family Court and allowed the appeal of the Respondent and declared the marriage between the Appellant and the Respondent held on 06.12.2011 as null and void. Aggrieved by the judgment of the High Court, the Appellant has approached this Court.

2. As a pure question of law arises for our consideration in this case, we make it clear that we are not dealing with the merits of the allegations made by both sides. The points that arises for consideration are:

a) Whether the dismissal of the appeal relates back to the date of filing of the application for withdrawal?

b) Whether the marriage dated 06.12.2011 between the Appellant and the Respondent during the pendency of the appeal against the decree of divorce is void?

3. The Family Court framed only one substantial issue as to whether the marriage between the parties was null and void on account of the contravention of Section 5 (i) of the Act. It was held by the Family Court that the judgment and decree of divorce dated 31.08.2009 is a judgment in rem which was neither reversed nor set aside by a superior court. As the judgment was confirmed by the High Court, the marriage between the parties stood dissolved w.e.f. 31.08.2009 itself. The Family Court also observed that there is no provision in the Act which declares a marriage in contravention of Section 15 to be void. It was further held by the Family Court that the effect of stay of the judgment by a superior court is only that the decree of divorce remained in abeyance but it did not become non-existent. On the other hand, the High Court framed a

question whether the Appellant could have contracted a second marriage after the decree of divorce was passed on 31.08.2009 notwithstanding the operation of the decree being stayed. The High Court was of the opinion that any marriage solemnized by a party during the pendency of the appeal wherein the operation of the decree of divorce was stayed, would be in contravention of Section 5 (i) of the Act.

4. Section 11 of the Act provides that any marriage solemnized after commencement of the Act shall be null and void if it contravenes any of the conditions specified in Clauses (i), (iv) and (v) of Section

5. Clause (i) of Section 5 places a bar on marriage by a person who has a spouse living at the time of the marriage. Section 15 of the Act which is relevant is as follows: 15. Divorced persons. When may marry again.- When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

5. There is no dispute that the marriage between the Appellant and the Respondent was held on 06.12.2011 during the pendency of the appeals filed by the Appellant against the decree of divorce in favour of Ms. Rachna Aggarwal. It is also clear from the record that the appeals were dismissed as withdrawn on 20.12.2011 pursuant to an application for withdrawal that was placed before the Registrar on 28.11.2011. The Family Court has rightly held that the decree of divorce is a judgment in rem.1

6. It is pertinent to take note of the Proviso to Section 15 of the Act according to which it shall not be lawful for the respective parties to marry again unless at the time of such marriage at least one year has elapsed from the date of the decree in the Court of first instance. This Proviso was repealed w.e.f. 27.05.1976. 2 In Lila Gupta v. Laxmi Narain3, Rajender Kumar contracted second marriage with Lila Gupta before the expiry of one year from the date of decree of divorce. This Court was concerned with a point relating to the marriage between Rajender Kumar and Lila Gupta being void having been contracted in violation of the Proviso to Section 15 of the Act. In the said context this Court observed as follows:

> **8.** Did the framers of law intend that a marriage contracted in violation of the provision contained in 1 Marsh v. Marsh 1945 AC 271 2 Hindu Marriage (Amendment) Act, 1976, Act 68 of 1976 3 (1978) 3 SCC 258 the proviso to Section 15 to be void? While enacting the legislation, the framers had in mind the question of treating certain marriages void and provided for the same. It would, therefore, be fair to infer as legislative exposition that a marriage in breach of other conditions the legislature did not intend to treat as void. While prescribing conditions for valid marriage in Section 5 each of the six conditions was not considered so sacrosanct as to render marriage in breach of each of it void. This becomes manifest from a combined reading of Sections 5 and 11 of the Act. If the provision in the proviso is interpreted to mean personal incapacity for marriage for a certain period and, therefore, the marriage during that period was by a person who had not the requisite capacity to contract the marriage and hence void, the same consequence must follow where there is breach of condition (iii) of Section 5 which also provides for personal incapacity to contract marriage for a certain period. When minimum age of the bride and the bridegroom for a valid marriage is prescribed in condition (iii) of Section 5 it would

only mean personal incapacity for a period because every day the person grows and would acquire the necessary capacity on reaching the minimum age. Now, before attaining the minimum age if a marriage is contracted Section 11 does not render it void even though Section 18 makes it punishable. Therefore, even where a marriage in breach of a certain condition is made punishable yet the law does not treat it as void. The marriage in breach of the proviso is neither punishable nor does Section 11 treat it void. Would it then be fair to attribute an intention to the legislature that by necessary implication in casting the proviso in the negative expression, the prohibition was absolute and the breach of it would render the marriage void? If void marriages were specifically provided for it is not proper to infer that in some cases express provision is made and in some other cases voidness had to be inferred by necessary implication. It would be all the more hazardous in the case of marriage laws to treat a marriage in breach of a certain condition void even though the law does not expressly provide for it. Craies on Statute Law, 7th Edn., P. 263 and 264 may be referred to with advantage:

The words in this section are negative words, and are clearly prohibitory of the marriage being had without the prescribed requisites, but whether the marriage itself is void ... is a question of very great difficulty. It is to be recollected that there are no words in the Act rendering the marriage void, and I have sought in vain or any case in which a marriage has been declared null and void unless there were words in the statute expressly so declaring it (emphasis supplied). . . . From this examination of these Acts I draw two conclusions. First, that there never appears to have been a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity unless such nullity was declared in the Act. Secondly, that, viewing the successive marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the legislature to create a nullity [Ed. Quoting Catterall v. Sweetman, (1845) 9 Jur 951, 954]
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9. In the Act under discussion there is a specific provision for treating certain marriages contracted in breach of certain conditions prescribed for valid marriage in the same Act as void and simultaneously no specific provision having been made for treating certain other marriages in breach of certain conditions as void. In this background even though the proviso is couched in prohibitory and negative language, in the absence of an express provision it is not possible to infer nullity in respect of a marriage contracted by a person under incapacity prescribed by the proviso.

10. Undoubtedly the proviso opens with a prohibition that: It shall not be lawful etc. Is it an absolute prohibition violation of which would render the act a nullity? A person whose marriage is dissolved by a decree of divorce suffers an incapacity for a period of one year for contracting second marriage. For such a person it shall not be lawful to contract a second marriage within a period of one year from the date of the decree of the Court of first instance. While granting a decree for divorce, the law interdicts and prohibits a marriage for a period of one year from the date of the decree of divorce. Does the inhibition for a period indicate that such marriage would be void? While there is a disability for a time suffered by a party from contracting marriage, every such disability does not render the marriage void. A submission that the proviso is directory or at any rate not mandatory and decision bearing on the point need not detain us because the interdict of law is that it

shall not be lawful for a certain party to do a certain thing which would mean that if that act is done it would be unlawful. But whenever a statute prohibits a certain thing being done thereby making it unlawful without providing for consequence of the breach, it is not legitimate to say that such a thing when done is void because that would tantamount to saying that every unlawful act is void. As pointed out earlier, it would be all the more inadvisable in the field of marriage laws. Consequences of treating a marriage void are so serious and far reaching and are likely to affect innocent persons such as children born during the period anterior to the date of the decree annulling the marriage that it has always been considered not safe to treat a marriage void unless the law so enacts or the inference of the marriage being treated void is either inescapable or irresistible. Therefore, even though the proviso is couched in a language prohibiting a certain thing being done, that by itself is not sufficient to treat the marriage contracted in contravention of it as void.

7. In the said judgment, this Court also had occasion to deal with the continuance of the marital tie even after the decree of divorce for the period of incapacity as provided in the Proviso to Section 15 of the Act. In the said context, this Court held as follows:

13. To say that such provision continues the marriage tie even after the decree of divorce for the period of incapacity is to attribute a certain status to the parties whose marriage is already dissolved by divorce and for which there is no legal sanction. A decree of divorce breaks the marital tie and the parties forfeit the status of husband and wife in relation to each other. Each one becomes competent to contract another marriage as provided by Section

15. Merely because each one of them is prohibited from contracting a second marriage for a certain period it could not be said that despite there being a decree of divorce for certain purposes the first marriage subsists or is presumed to subsist. Some incident of marriage does survive the decree of divorce; say, liability to pay permanent alimony but on that account it cannot be said that the marriage subsists beyond the date of decree of divorce. Section 13 which provides for divorce in terms says that a marriage solemnised may on a petition presented by the husband or the wife be dissolved by a decree of divorce on one or more of the grounds mentioned in that section. The dissolution is complete once the decree is made, subject of course, to appeal. But a final decree of divorce in terms dissolves the marriage. No incident of such dissolved marriage can bridge and bind the parties whose marriage is dissolved by divorce at a time posterior to the date of decree. An incapacity for second marriage for a certain period does not have effect of treating the former marriage as subsisting. During the period of incapacity the parties cannot be said to be the spouses within the meaning of clause (i), sub-section (1) of Section 5. The word spouse has been understood to connote a husband or a wife which term itself postulates a subsisting marriage. The word spouse in sub-section (1) of Section 5 cannot be interpreted to mean a former spouse because even after the divorce when a second marriage is contracted if the former spouse is living that would not prohibit the parties from contracting the marriage within the meaning of clause (i) of sub-section (1) of Section 5. The expression spouse in clause (i), sub- section (1) of Section 5 by its very context would not include within its meaning the expression former spouse. (underlining ours)

8. After a comprehensive review of the scheme of the Act and the legislative intent, this Court in Lila Gupta (supra) held that a marriage in contravention of the proviso to Section 15 is not void. Referring to Sections 5 and 11 of the Act, this Court found that a marriage contracted in breach of only some of the conditions renders the marriage void. This Court was also conscious of the absence of any penalty prescribed for contravention of the proviso to Section 15 of the Act. This Court referred to the negative expression it shall not be lawful used in proviso to Section 15 which indicates that the prohibition was absolute. In spite of the absolute prohibition, this Court was of the view that a marriage contracted in violation of the proviso to Section 15 was not void. There was a further declaration that the dissolution of a marriage is in rem and unless and until a Court of appeal reversed it, marriage for all purposes was not subsisting. The dissolution of the marriage is complete once the decree is made, subject of course to appeal. This Court also decided that incapacity for second marriage for a certain period of time does not have the effect of treating the former marriage as subsisting and the expression spouse would not include within its meaning the expression former spouse.

9. The majority judgment was concerned only with the interpretation of proviso to Section 15 of the Act. Justice Pathak in his concurring judgment referred to Section 15, but refrained from expressing any opinion on its interpretation.

Effective date of the Dismissal of Appeal

10. In case of a dissolution of marriage, a second marriage shall be lawful only after dismissal of the appeal. Admittedly, the marriage between the Appellant and the Respondent was on 06.12.2011 i.e. before the order of withdrawal was passed by the Court on 20.12.2011. There is no dispute that the application for withdrawal of the appeal was filed on 28.11.2011 i.e. prior to the date of the marriage on 06.12.2011. We proceed to consider the point that whether the date of dismissal of the appeal relates back to the date of filing of the application for withdrawal of the appeal. Order XXI Rule 89 (2) of the Code of Civil Procedure, 1908 (hereinafter referred to as the CPC) provides that unless an application filed under Order XXI Rule 90 of the CPC is withdrawn, a person shall not be entitled to make or prosecute an application under Order XXI Rule 89 of the CPC. In Shiv Prasad v. Durga Prasad,4 the contention of the Appellant therein that an application filed under the aforesaid Rule 90 does not stand withdrawn until an order to the effect is recorded by the Court, was not accepted. It was held that every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting the withdrawal of the application. This Court concluded that the act of withdrawal is complete as soon as the applicant intimates the Court that he intends to withdraw the application. The High Court of Bombay in Anil Dinmani Shankar Joshi v. Chief Officer, Panvel Municipal Council, Panvel5 followed the judgment of this Court in Shiv Prasad (supra) and held that the said judgment is applicable to suits also. The High Court recognized the unconditional right of the plaintiff to withdraw his suit and held that the withdrawal would be 4 (1975) 1 SCC 405 5 AIR 2003 Bom. 238, 239 complete as soon as the plaintiff files his purshis of withdrawal.

11. Order XXIII Rule 1 (1) of the CPC enables the plaintiff to abandon his suit or abandon a part of his claim against all or any of the defendants. Order XXIII Rule 1 (3) of the CPC requires the satisfaction of the Court for withdrawal of the suit by the plaintiff in case he is seeking liberty to institute a fresh suit. While observing that the word abandonment in Order XXIII Rule 1 (1) of the CPC is absolute withdrawal which is different from the withdrawal after taking permission

of the court, this Court held as follows6: 12. The law as to withdrawal of suits as enacted in the present Rule may be generally stated in two parts:

(a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the court; in that case he will be precluded from suing again on the same cause of action. Neither can the plaintiff abandon a suit or a part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and

(b) a plaintiff may, in the circumstances mentioned in sub-rule (3), be permitted by the court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty being granted 6 K.S. Bhoopathy v. Kokila (2000) 5 SCC 458 by the Court enables the plaintiff to avoid the bar in Order II Rule 2 and Section 11 CPC.

12. Order XXIII Rule 1 (1) of the CPC gives an absolute right to the plaintiff to withdraw his suit or abandon any part of his claim. There is no doubt that Order XXIII Rule 1 of the CPC is applicable to appeals as well and the Appellant has the right to withdraw his appeal unconditionally and if he makes such an application to the Court, it has to grant it. 7 Therefore, the appeal is deemed to have been withdrawn on 28.11.2011 i.e. the date of the filing of the application for withdrawal. On 06.12.2011 which is the date of the marriage between the Appellant and the Respondent, Ms. Rachna Aggarwal cannot be considered as a living spouse. Hence, Section 5 (i) is not attracted and the marriage between the Appellant and the Respondent cannot be declared as void.

13. Sh. Sakha Ram Singh, learned Senior Counsel appearing for the Respondent placed reliance on a judgment of this Court in Lila Gupta (supra) to submit that the marriage between the Appellant and the 7 Bijayananda Patnaik v. Satrughna Sahu (1962) 2 SCR 538, 550 Respondent held on 06.12.2011 is void as it was in violation of Section 15 of the Act. He relied upon the concurring judgment of Justice Pathak in support of his submission that the findings pertaining to Proviso to Section 15 cannot be made applicable to Section 15. He submitted that there is a qualitative difference between the period of incapacity set out in the Proviso during which a second marriage cannot be contracted and the bar for another marriage during the pendency of an appeal. We have already noted that Justice Pathak refrained from expressing any view on the expression of Section 15 of the Act.

However, the scope and purport of Section 15 of the Act arise for consideration in the present case.

Interpretation of Section 15 Interpretation has been explained by Cross in Statutory Interpretation8 as:

"The meaning that the Court ultimately attaches to the statutory words will frequently be that which it believes members of the legislature attached to them, or the meaning which they would have attached to the words had the situation before the Court been present to their minds. Interpretation is the process by which the Court determines the meaning of a statutory 8 Cross Statutory Interpretation, Ed. Dr. John Bell & Sir George Ingale, Second Edition (1987) provision for the purpose of applying it to the situation before it.

14. The Hindu Marriage Act is a social welfare legislation and a beneficent legislation and it has to be interpreted in a manner which advances the object of the legislation. The Act intends to bring

about social reforms.9 It is well known that this Court cannot interpret a socially beneficial legislation on the basis as if the words therein are cast in stone.10

15. The predominant nature of the purposive interpretation was recognized by this Court in Shailesh Dhairyawan v. Mohan Balkrishna Lulla11 which is as follows:

> **33.** We may also emphasise that the statutory interpretation of a provision is never static but is always dynamic. Though the literal rule of interpretation, till some time ago, was treated as the golden rule, it is now the doctrine of purposive interpretation which is predominant, particularly in those cases where literal interpretation may not serve the purpose or may lead to absurdity. If it brings about an end which is at variance with the purpose of statute, that cannot be countenanced.

Not only legal process thinkers such as Hart and Sacks rejected intentionalism as a grand strategy for statutory interpretation, and in its place they offered purposivism, this principle is now widely applied by 9 Parayankandiyal Eravath Kanapravan Kalliani Amma v. K. Devi (1996) 4 SCC 76, para 68 10 Revanasiddappa v. Mallikarjun, (2011) 11 SCC 1, para 40 11 (2016) 3 SCC 619 the courts not only in this country but in many other legal systems as well.

16. In Salomon v. Salomon & Co Ltd.12, Lord Watson observed that :

In a Court of Law or Equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. In Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg AG13, Lord Reid held that:

We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.

17. It is also relevant to take note of Dy. Custodian v. Official Receiver14 in which it was declared that if it appears that the obvious aim and object of the statutory provisions would be frustrated by accepting the literal construction suggested by the Respondent, then it may be open to the Court to inquire whether an alternative construction which would serve the purpose of achieving the aim and object of the Act, is reasonably possible .

12 [1897] AC 22 at 38 13 [1975] AC 591, p. 613 14 (1965) 1 SCR 220 at 225 F - G

18. Section 15 of the Act provides that it shall be lawful for either party to marry again after dissolution of a marriage if there is no right of appeal against the decree. A second marriage by either party shall be lawful only after dismissal of an appeal against the decree of divorce, if filed. If there is no right of appeal, the decree of divorce remains final and that either party to the marriage is free to marry again. In case an appeal is presented, any marriage before dismissal of the appeal shall not be lawful. The object of the provision is to provide protection to the person who has filed an appeal against the decree of dissolution of marriage and to ensure that the said appeal is not frustrated. The purpose of Section 15 of the Act is to avert complications that would arise due to a second marriage during the pendency of the appeal, in case the decree of dissolution of marriage is reversed. The protection that is afforded by Section 15 is primarily to a person who is contesting the decree of divorce.

19. Aggrieved by the decree of divorce, the Appellant filed an appeal and obtained a stay of the decree. During the pendency of the appeal, there was a settlement between him and his former spouse. After entering into a settlement, he did not intend to contest the decree of divorce. His intention was made clear by filing of the application for withdrawal. It cannot be said that he has to wait till a formal order is passed in the appeal, or otherwise his marriage dated 06.12.2011 shall be unlawful. Following the principles of purposive construction, we are of the opinion that the restriction placed on a second marriage in Section 15 of the Act till the dismissal of an appeal would not apply to a case where parties have settled and decided not to pursue the appeal.

20. It is not the case of the Appellant that the marriage dated 06.12.2011 is lawful because of the interim order that was passed in the appeals filed by him against the decree of divorce. He rested his case on the petition filed for withdrawal of the appeal. The upshot of the above discussion would be that the denouement of the Family Court is correct and upheld, albeit for different reasons. The conclusion of the High Court that the marriage dated 06.12.2011 is void is erroneous. Hence, the judgment of the High Court is set aside.

21. Accordingly, the Appeal is allowed.

Per **Hon'ble Mr. Justice S.A. Bobde :—**

1. I am in agreement with the view taken by Nageswara Rao J. but it is necessary to state how the question before us has already been settled by the decision in Lila Gupta v. Laxmi Narain and Ors.1. Even when the words of the proviso were found to be prohibitory in clear negative terms it shall not be lawful etc., this Court held that the incapacity to marry imposed by the proviso did not lead to an inference of nullity, vide para 9 of Lila Gupta (supra). It is all the more difficult to infer nullity when there is no prohibition; where there are no negative words but on the other hand positive words like it shall be lawful. Assuming that a marriage contracted before it became lawful to do so was unlawful and the words create a disability, it is not possible to infer a nullity or voidness vide paras 9 (1978) 3 SCC 258 and 10 of Lila Gupta case. The Court must have regard to the consequences of such an interpretation on children who might have been conceived or born during the period of disability.

2. The observations in Lila Guptas case are wide. They are undoubtedly made in the context of the proviso to sec 15 of the Hindu Marriage (Amendment) Act, 1976 2, since deleted. The proviso opened with the prohibition that it shall not be lawful. This Court considered the question whether a marriage contracted in violation of the proviso would be a nullity or void and came to the conclusion that though the proviso is couched in prohibitory and negative language, in the absence of an express provision it was not possible to infer nullity in respect of a marriage contracted by a person under incapacity prescribed by the proviso.

What is held in essence is that if a provision of law prescribes an incapacity to marry and yet the person marries while under that incapacity, the marriage would not be void in the absence of an express provision that declares nullity. Quae incapacity imposed by statute, there is no difference between an incapacity imposed by negative language such as it shall not be lawful or an incapacity imposed by positive language like it shall be lawful (in certain conditions, in the

absence of which it is impliedly unlawful). It would thus appear that the law is already settled by this Court that a marriage contracted during a prescribed period will not be void because it was contracted under an incapacity. Obviously, this would Act 68 of 1976 have no bearing on the other conditions of a valid marriage. The decision in Lila Gupta case thus covers the present case on law.

3. In any event, in the present case we are satisfied that the appellants marriage was not subsisting when he married again. He had filed an application for withdrawal of his appeal against the decree for dissolution and had done nothing to contradict his intention to accept the decree of dissolution.

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NARAYAN GANESH DASTANE VERSUS SUCHETA NARAYAN DASTANE

SUPREME COURT OF INDIA

Bench: **Hon'ble Mr. Justice Y.V. Chandrachud, Hon'ble Mr. Justice P.K. Goswami & Hon'ble Mr. Justice N.L. Untwalia**

Petitioner: Narayan Ganesh Dastane
Versus
Respondent: Sucheta Narayan Dastane

1975 SCC (2) 326

1975 AIR 1534, 1975 SCR (3) 967

Decided on : **19th March, 1975**

Hindu Marriage Act--Section 10(1)(b) and 23(1)(a)(b)--Meaning of cruelty--Burden of proof in matrimonial matters--Whether beyond reasonable doubt--Condonation--of cruelty--Whether sexual intercourse amounts to condonation--Whether condonation is conditional--Revival of cruelty.

Code of Civil Procedure--Section 100 and 103--Powers of High Court in second appeal.

The appellant husband filed a petition for annulment of marriage on the ground of fraud, for divorce on the ground of unsoundness of mind and for judicial separation on the ground of cruelty. The appellant and respondent possess high educational qualifications and they were married in 1956. Two children were born of the marriage one in 1957 and the other in 1959.

The Trial Court rejected the contention of fraud and unsoundness of mind. It, however, held the wife guilty of cruelty and on that ground passed a decree for judicial separation. Both sides went in appeal to the District Court which dismissed the husband's appeal and allowed the wife's. The husband then filed a Second Appeal in the High Court.

The High Court dismissed that appeal.

On appeal to this Court,

Neither s.10 nor s. 23 of the Hindu Marriage Act requires that the petitioner must prove his case beyond reasonable doubt S. 23 confers on the court the power to pass a decree if it is satisfied on the matters mentioned in Clauses (a) to (e) of that Section. Considering that proceedings under the Act are essentially of a civil nature the word 'satisfied' must mean satisfied on a preponderance of probabilities and not satisfied beyond a reasonable doubt. The society has a stake in the institution of marriage and, therefore, the erring spouse is treated not as a mere defaulter but as an offender. But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is

accepted as a ground for- the dissolution of marriage, it has no bearing on the standard of proof in matrimonial cases. In England, a view was at one time taken that a petitioner in a matrimonial petition must establish his or her case beyond a reasonable doubt but the House of Lords in Blyth v. Blyth has held that the grounds of divorce or the bars to the divorce May be proved by a preponderance of probability

On the question of condonation of cruelty, a specific provision of a specific enactment has to be interpreted, namely s. 10(1) (b). The enquiry, therefore, has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English Law, that the cruelty must be of such a character as to cause danger to life, limb or health or as to give rise to a reasonable apprehension of such a danger.

Acts like the tearing of the Mangal Sutra, locking out the husband when he is due to arrive from the office, rubbing of chilly powder on the tongue of an infant child, beating a child mercilessly while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him are acts which tend to destroy the legitimate ends and objects of matrimony. The conduct of wile amounts to cruelty within the meaning of s. 10(1) (b) of the Act. The threat that she would put an end to her own life or that she will set the house on fire, the threat that she will make the husband lose his job and have the matter published in newspapers and the persistent abuses and insults hurled at the husband and his parents are all of so grave an order as to 'imperil the appellant's sense of personal safety, mental happiness, job satisfaction and reputation.

JUDGMENT

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2224 of 1970.

From the judgment and order dated the 19th February, 1969 of the Bombay High Court in Second Appeal No. 480 of 1968.

V. M. Tarkunde, S. Bhandare, P. H. Parekh and Manju Jaitely, for the appellant.

V. S. Desai, S. B. Wad and Jayashree Wad, for the respondents.

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Y.V. Chandrachud :—

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

The spouses possess high academic qualifications and each one claims a measure. of social respectability and cultural sophistry. The evidence shows some traces of these. But of this there need be no doubt,: the voluminous record which they have collectively built up in the case contains a fair reflection of their rancour and acrimony, The appellant, Dr. Narayan Ganesh Dastane, passed his M.Sc. in Agriculture

from the Poona University. He was sent by the Government of India to Australia in the Colombo Plan Scheme. He obtained his Doctorate in Irrigation Research from an Australian University and returned to India in April, 1955. He worked for about 3 years as an Agricultural Research Officer and in October, 1958 he left Poona to take charge of a new post as an Assistant Professor of Agronomy in the 'Post-Graduate School, Pusa Institute, Delhi. At present be is said to be working on a foreign assignment.

His father was a solicitor-cum lawyer practising in Poona.

The respondent, Sucheta, comes from Nagpur but she spent her formative years mostly in Delhi. Her father was transferred to Delhi in 1949 as an Under Secretary in the Commerce Ministry of the Government of India and she came to Delhi along with the rest of the family. She passed her B.Sc. from the Delhi University in 1954 and spent a year in Japan where her father was attached to the Indian Embassy. After the rift in her marital relations, she obtained a Master's Degree in Social Work. She has done field work in Marriage Conciliation and Juvenile Delinquency. She is at present working in the Commerce and Industry Ministry, Delhi.

In April, 1956 her parents arranged her marriage with the appellant. But before finalising the proposal, her father- B. R. Abhyankarwrote two letters to the appellant's father saying in the first of these that the respondent "had a little misfortune before going to Japan in that she had a bad attack of sunstroke which affected her mental condition for sometime". In the second letter which followed at an interval of two days, "cerebral malaria" was mentioned as an additional reason of the mental affectation. The letters stated that after a course of treatment at the Yeravada Mental Hospital, she was cured : "you find her as she is today". The respondent's father asked her appellant's father to discuss the matter, if necessary, with the doctors of the Mental Hospital or with one Dr. P. L. Deshmukh, a relative of the respondent's mother. The letter was written avowdely'in order that the appellant and his people "should not be in the dark about an important episode" in the life of the respondent, which "fortunately, had ended happily".

Dr. Deshmukh confirmed what was stated in the letters and being content with his assurance, the appellant and his father made no enquiries with the Yeravada Mental Hospital. The marriage was performed at Poona on May 13, 1956. The appellant was then 27 and the respondent 21 years of age.

They lived at Arbhavi in District Belgaum from June to October, 1956. On November 1, 1956 the appellant was transferred to Poona where the two lived together till 1958.

During this period a girl named Shubha was born to them on March 11, 1957. The respondent delivered in Delhi where ,her parents lived and returned to Poona in June, 1957 after an absence, normal on such occasions, of about 5 months. In October, 1958 the appellant took a job in the Pusa Institute of Delhi, On March 21, 1959 the second daughter, Vibha, was born. The respondent delivered at Poona where the appellant's parents lived and returned to Delhi in August, 1959. Her parents were living at this time in Djakarta, Indonesia.

In January, 1961, the respondent went to Poona to attend the marriage of the appellant's brother, a doctor-by profession, who has been given an adoption in the Lohokare family. A fortnight after the marriage, on February 27, 1961 the appellant who had also gone to Poona for the marriage got the respondent examined by Dr. seth, a Psychiatrist in charge of the Yeravada Mental Hospital. Dr. Seth probably wanted adequate data to make his diagnosis and suggested that he would like to have a few sittings exclusively with the respondent. For reasons good or bad, the respondent was averse to submit

herself to any such scrutiny. Either she herself or both she and the appellant decided that she should stay for some time with a relative of bers, Mrs-Gokhale. On the evening of the 27th, she packed her titbits and the appellant reached her to Mrs. Gokhale's house.

There was no consultation thereafter with Dr. Seth.

According to the appellant, she had promised to see Dr, Seth but she denies that she made any such promise. She believed that the appellant was building up a case that she was of unsound mind and she was being lured to walk into that trap.

February 1961 was the last that they lived together-. But on the day of parting she was three months in the family way. The third child, again a girl, named Pratibha was born on August 19, 1961 when her parents were in the midst of a marital crisis.

Things had by then come to an impossible pass. And close relatives instead of offering wise counsel were fanning the fire of discord that was devouring the marriage. A gentleman called Gadre whose letter-head shows an "M.A. (Phil.) M.A. (Eco.) LL.B.", is a maternal uncle of the respondent. On-March 2, 1961 he had written to tile appellant's father a pseudonymous letter now proved to be his, full of malice and sadism. He wrote :

> *"I on my part consider myself to be the father of 'Brahmadev ..... This is only the beginning. From the spark of your foolish and half-baked egoism, a big conflagration of family quarrels will break out and all will perish therein This image of the mental agony suffered by all your kith and' kin gives me extreme happiness..... You worthless person, who cherishes a desire to spit on my face, now behold that all the world is going to spit on your old cheeks.*
>
> *So why should I loose the opportunity of giving you a few severe slaps on your cheeks and of fisting your ear. It is my earnest desire that the father-in-law should beat your son with foot-ware in a public place."*

On March 11, 1961 the appellant returned to Delhi all alone. Two days later the respondent followed him but she went straight to her parents' house in)Delhi. On the 15th, the appellant wrote a letter to the police asking for protection as he feared danger to his life from the respondent's parents and relatives. On the 19th, the respondent saw the appellant but that only gave to the parties one more chance to give vent to mutual dislike and distrust. After a brief meeting, she left the broken home for good. On the 20th, the appellant once again wrote to the police renewing his request for protection.

On March 23, 1961 the respondent wrote to the appellant complaining against his conduct and asking for money for the maintenance of herself and the daughters. On May 19, 1961 the respondent wrote a letter to the Secretary, Ministry of Food and Agriculture, saying that the appellant had deserted her, that he had treated her with extreme cruelty and asking that the Government should make separate provision for her maintenance. On March 25, her statement was recorded by an Assistant Superintendent of Police, in which she alleged desertion and ill-treatment by the appellant. Further statements were recorded by the police and the Food Ministry also followed up respondent's letter of May 19 but ultimately nothing came out of these complaints and cross complaints. As stated earlier, the third daughter, Pratibha, was born on August 19, 1961. On November 3, 1961 the appellant wrote to respondent's father complaining of respondent's conduct and expressing regret that not even a proper invitation was issued to him when the naming ceremony of the child was performed. On December 15, 1961 the appellant wrote to respondent's father stating that he had decided to go to the

court for seeking separation from the respondent. The proceedings out of which this appeal arises were instituted on February 19, 1962.

The parties are Hindus but we do not propose, as is commonly done and as has been done in this case, to describe the respondent as a "Hindu wife in contrast to non-Hindu wives as if wotmen professing this or that particular religion are exclusively privileged in the matter of good sense, loyalty and conjugal kindness. Nor shall we refer to the appellant as a "Hindu husband" as if that species unfailingly projects the image of tyrant husbands. We propose to consider the evidence on its merits, remembering of course the peculiar habits, ideas, susceptibilities and expectations of persons belonging to the strata of society to which these two belong. All circumstances which constitute the, occasion or setting for the conduct complained of have relevance but we think that no assumption can be made that respondent is the oppressed and appellant the oppressor. The evidence in any case ought to bear a secular examination.

The appellant asked for annulment of his marriage by a decree of nullity under section 12(1) (c) of 'The Hindu Marirage Act', 25 of 1955, ("The Act") on the ground that his consent to the marriage was obtained by fraud. Alternatively, he asked for divorce under section 13 (1) (iii) on the ground that the respondent was incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition. Alternatively, the appellant asked for Judicial separation under section 10(1) (b) on the ground that the respondent had treated him with such cruelty as to cause a reasonable apprehension in his mind that. it would be harmful or injurious for him to live with her.

The appellant alleged that prior to the marriage, the respondent was treated in the Yeravada Menfal Hospital for Schizophrenia but her father fraudulently represented that she was treated for sun-stroke and cerebral malaria. The trial court rejected this contention. It also rejected the contention that the respondent was of unsound mind.It,however, held that the respondent was guilty of cruelty and on that ground it passed a decree for judicial separation.

Both sides went in appeal to the District Court which dismissed the appellant's appeal and allowed the respondent's, with the result that the petition filed by the appellant stood wholly dismissed.

The appellant then filed Second Appeal No. 480 of 1968 in the Bombay High Court. A learned single Judge of that court dismissed that appeal by a judgment dated February 24, 1969.

This Court granted to the appellant special leave to appeal, limited to the question of judicial separation on the ground of cruelty.

We are thus not concerned with the question whether the appellant's consent to the marriage was obtainede by fraud or whether the respondent bad been of unsound mind for the requisite period preceding the presentation of the petition.

The decision-of the-High Court on those questions must be treated as final and can not be reopened. In this appeal by special leave, against the judgment rendered by the High Court in Second Appeal, we would not have normally permitted the parties to take us through the evidence in the case. Sitting in Second Appeal, it was not open to the High Court itself to reappreciate evidence. Section 100 of the Code of Civil Procedure restricts the jurisdiction of the High Court in Second appeal to questions of law or to substantial errors or defects in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. But the High Court came to the conclusion that both the courts below had "failed to apply the correct principles of law in determining the issue of

cruelty". Accordingly, the High Court proceeded to consider the evidence for itself and came to the conclusion independently that the appellant had failed to establish that the respondent had treat him with cruelty. A careful consideration of the evidence by the High Court ought to be enough assurance that the finding of fact is correct and it is not customary for this Court in appeals under Article 136 of the Constitution to go into minute details of evidence and weigh them one against the other, as if for the first time. Disconcertingly, this normal process is beset with practical difficulties.

In judging of the conduct of the respondent, the High Court assumed that the words of abuse or insult used by the respondent "could not have been addressed in vacuum. Every abuse, insult, remark or retort must have been probably in exchange for remarks and rebukes from the husband..... a court is bound to consider the probabilities and infer, as I have done, that they must have been in the context of the abuses, insults, rebukes and remarks made by the husband and without evidence on the record with respect to the conduct of the husband in response to which the wife behaved in a particular way on each occasion, it is difficult, if not impossible to draw inferences against the wife."

We find this approach difficult to accept. Under section 103 of the Code of Civil Procedure, the High Court may, if the evidence on the record is sufficient, determine any issue of 'fact necessary for the disposal of the appeal which has not been determined by the lower appellate court or which has been wrongly determined by such court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100. But, if the High Court takes upon itself the duty to determine an issue of fact its power to appreciate evidence would be subject to the same restraining conditions to which the power of any court of facts is ordinarily subject. The limits of that power are not wider for the reason that the evidence is being appreciated by the High Court and not by the District Court. While appreciating ,evidence, inferences may and have to be drawn but courts of facts have to remind themselves of the line that divides an inference from guesswork.

If it is proved, as the High Court thought it was, that the respondent had uttered words of abuse and insult, the High Court was entitled to infer that she had acted in retaliation, provided of course there was evidence, direct or circumstantial, to justify such an inference. But the High Court itself felt that there was no evidence on the record with regard to the conduct of the husband in response to which the wife could be said to have behaved in the particular manner. The High Court reacted to this situation by saying that since there was no evidence regarding the conduct of the husband, "it is difficult, if not impossible, to draw inferences against the wife". If there was no evidence that the husband had provoked the wife's utterances, no inference could be drawn against the husband.

There was no question of drawing any inferences against the wife because, according to the High Court, it was established on the evidence that she had uttered the particular words of abuse and insult. The approach of the High Court is thus erroneous and its findings are vitiated. We would have normally remanded the matter to the High Court for a fresh consideration of the evidence but this proceeding has been pending for 13 years and we thought that rather than delay the decision any further, we should undertake for ourselves the task which the High Court thought it should undertake under section 103 of the Code. That makes it necessary to consider the evidence in the case.

But before doing so, it is necessary to clear the ground of certain misconceptions, especially as they would appear to have influenced the judgment of the High Court. First, as to the nature of burden of Proof which rests on a petitioner in a matrimonial petition under the Act. Doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it., This principle accords with commonsense as

it is so much earlier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of section 10 (1) (b) of the Act.

But does the law require, as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt ? In other words, though the burden lies on the petitioner to establish the charge of cruelty, what is the standard of proof to be applied in order Lo judge whether the burden has been discharged ?

The normal rule which governs civil proceedings is that a fact can be said to be estabilshed if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, section 3, a fact issaid to be proved when the court either believes it to exist or considersits existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where. the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue"(1) ; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear" (2).

But whether the issue is one of cruelty or of a loan on a promote, the test to apply is whether on a preponderance of robabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged. Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so' nicely balanced that a reasonable, (1) Per Dixon,J.in Wright v.Wright (1948)77 C.L.R.191at p. 210. (2) Blyth v. Blyth, [1966] 1 A.E.R. 524 at 536. not a vascillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature.

Neither section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor section 23 which governs the jurisdiction of the court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the court the power to pass a decree if it is "satisfied" on matters mentioned in clauses (a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases.

The misconception regarding the standard of proof in matrimonial cases arises perhaps from a loose description of the respondent's conduct in such cases as constituting a "matrimonial offence". Acts of a spouse which are calculated to impair the integrity of a marital union have a social significance.

To mar' or not to marry and if so whom, may well be a private affair but the freedom to break a matrimonial tie is not. The society has a stake in the institution of marriage and therefore the erring spouse is treated not as a mere defaulter but as an offender.]But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for the dissolution of a marriage, has no bearing on the standard of proof in matrimonial cases.

In England, a view was at one time taken that the petitioner in a matrimonial petition must establish his case beyond a reasonable doubt but in Blyth v. Blyth(P), the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case; like any civil case, may be proved by a preponderance of probability". The High Court of Austraila in Wright v. Wright (2) , has also taken the view that "the civil and not the criminal standard of persuasion applies to matrimonial causes, including issues of adultery". The High Court was therefore in error in holding that the petitioner must establish the charge of cruelty "beyond reasonable doubt". The High Court adds that "This must be in accordance with the law of evidence", but we are not clear as to the implications of this observation.

Then, as regards the meaning of "Cruelty". The High Court on this question begins with the decision in Moonshee Bazloor Rubeem v. Shamsoonnissa Begum(3), where the Privy Council observed:

> *"The Mohomedan law, on a question of what is legal cruelty between Man and Wife, would probably not differ materially from our own of which one of the most recent exposition is the following :- 'There must be actual violence (1) [1966] A.E.R. 524 at 536. (2) 1948, 77 C.L.R. 191 at 210. (3) 11 Moore's Indian Appeals 551. of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it'."*

The High Court then refers to the decisions of some of the Indian Courts to illustrate "The march of the Indian Courts with the Englishs Courts" and cites the following passage from D. Tolstoy's "The Law and Practice of Divorce and Matrimonial Causes" (Sixth Ed., p. 61):

> *"Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger."*

The High Court concludes that "Having regard to these principles and the entire evidence in the case, in my judgment, I find that none of the acts complained of against the respondent can he considered to be so sufficiently grave and weighty as to be described as cruel according to the matrimonial law."

An awareness of foreign decisions could be a useful asset in interpreting our own laws. But it has to be remembered that we have to interpret in this case a specific provision of a specific enactment, namely, section 10(1) (b) of the Act. What constitutes cruelty must depend upon the terms of this statute which provides :

> *"10(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-(b) has treated the petitioner with such cruelty as to cause areasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;"*

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

It is not necessary, as under the English law, that the cruelty must be of such a character as to cause "danger" to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other. The risk of relying on English decisions in this field may be shown by the learned Judge's reference to a passage from Tolstoy (p. 63) in which the learned author, citing Horton v. Horton(1), says :

> *"Spouses take each other for better or worse, and it is not enough to show that they find life together impossible, even if there results injury to health." (1) [1940] P. 187.*

If the danger to health arises merely from the fact that the spouses find it impossible to live together as where one of the parties shows an attitude of indifference to the other, the charge of cruelty may perhaps fail. But under section 10(1) (b), harm or injury to health, reputation, the working career or the like, would be an important consideration in determining whether the conduct of the respondent amounts to cruelty. Plainly, what we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent.

One other matter which needs to be clarified is that though under section 10(1) (b), the apprehension of the petitioner that it will be harmful or injurious to live with the other party has to be reasonable, it is wrong, except in the context of such apprehension, to import the concept of a reasonable man as known to the law of negligence for judging of matrimonial relations. Spouses are undoubtedly supposed and expected to conduct their joint venture as best as they might but it is no function of a court inquiring into a charge of cruelty to philosophise on the modalities of married life. Some one may want to keep late hours to finish the day's work and some one may want to get up early for a morning round of golf. The court cannot apply to the habits or hobbies of these the test whether a reasonable man situated similarly will behave in a similar fashion. "The question whether the misconduct complained of constitutes cruelty and the like for divorce purposes is determined primarily by its effect upon the particular person complaining of the acts. The question is not whether the conduct would be cruel to a reasonable person or a person of average or normal sensibilities, but whether it would have that effect upon the aggrieved spouse,. That which may be cruel to one person may be laughed off by another, and what may not be cruel to an individual under one set of circumstances may be extreme cruelty under another set of circumstances."[1] The Court has to deal, not with an ideal husband and ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures. As said by Lord Reid in his speech in Gollins v. Gollins[2].

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

1 American Jurisprudence, 2nd Ed., Vol. 24, p. 206.

2 [1963] 2 A.E.R. 966,970.

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 (1) (a) of the Act that the relief prayed for can be decreed only if the court is satisfied that the petitioner is not in any way taking advantage of his own wrong. Not otherwise. We do not propose to spend time on the trifles of their married life. Numerous incidents have been cited by the appellant as constituting cruelty but the simple trivialities which can truly be described as the reasonable, wear and tear of married life have to be ignored. It is in the context of such trivialities that one says that spouses take each other for better or worse. In many marriages each party can, if it so wills, discover many a cause for complaint but such grievances arise mostly from temperamental disharmony. Such disharmony or incompatibility is not cruelty and will not furnish a cause for the dissolution of marriage. We will therefore have regard only to grave and weighty incidents and consider these to find what place they occupy on the marriage canvas.

The spouses parted company on February 27, 1961, the appellant filed his petition on February 19, 1962 and the trial began in September, 1964. The 3-1/2 years' separation must naturally have created many more misunderstandings and further embitterment. In such an atmosphere, truth is a common casualty and therefore we consider it safer not to accept the bare word of the appellant either as to what the respondent said or did or as to the genesis of some of the more serious incidents. The evidence of the respondent too would be open to the same criticism but the explanation of her words and deeds, particularly of what she put in cold print, must come from her oral word and that has to be examined with care.

The married life of these spouses is well-documented, almost incredibly documented. They have reduced to writing what crossed their minds and the letters which they have written to each other bear evidence of the pass to which the marriage had come. Some of these were habitually written as the first thing in the morning like a morning cup (if tea while some were written in the silence of mid-night soon after the echo of harsh words had died down. To think that this young couple could indulge in such an orgy of furious letter-writing is to have to deal with a problem out of the ordinary for it is seldom that a husband and wife, while sharing a common home, adopt the written word as a means of expression or communication.

The bulk of the correspondence is by the wife who seems to have a flair for letter-writing. She writes in some style and as true as "The style is the man", her letters furnish a clue to her personality. They are a queer mixture of confessions and opprobrious accusations. It is strange that almost every one connected with this couple his a penchant for writing. The wife, apart from her voluminous letters, has written an autobiographical account of her unfortunate experiences in the Yeravada Hospital, calling it "Mee Antaralat Tarangat Asta" ("while I was floating in space").

The husband's father idealised the Shiva-Parvati relationship in a book called : "Gauriharachai Goad Kahani" ("The sweet story of Gaurihar"). Quite a few of the wifes relatives including a. younger sister of hers and of course her maternal uncle have set their pen to paper touching some aspect or the other of her married life. Perhaps, it was unfortunate that the promised millennium that did not come began with a letter. That was the letter of April 25, 1956 which the wife's lather wrote to the husband's father while the marriage negotiations were in progress. The marriage took place on May 13, 1956.

Nothing deserving any serious notice happened till August, 1959 except that the letters Exs. 556, 238, 243 and 244 show that quite frequently the respondent used to get into fits of temper and say things for which She would express regret later. In the letter Ex. 556 dated November 23, 1956 she admits to

having behaved "very badly"; in Ek. 238 dated March 26, 1959 she admits that she was behaving like an "evil star" and had harassed the appellant; in Ex. 243 dated May 5, 1959 she says that she was aware of her "lack of sense" and asks for forgiveness for having insulted the appellant, his parents, his sister and her husband; and in Ex. 244 dated May 22, 1959 she entreats the appellant that he should not feel guilty for the insults hurled by her at his parents.

The period from August 1959 to March 1960 was quite critical and the correspondence covering that period shows that an innate lack of self-control had driven the respondent to inexorable conduct. By the letter. Ex. 256 dated February 16, 1960 the appellant complained to the respondent's father who was then in Indonesia that the respondent kept on abusing him, his parent and sister and that he was extremely unhappy. The appellant says in the letter that differences between a husband and wife were understandable but that it was impossible to tolerate the respondent constantly accusing him and his relatives of wickedness. The appellant complains that the respondent used to say that the book written by his father should be burnt to ashes, that the appellant should apply the ashes to his forehead, that the whole Dastane family was utterly mean and that she wished that his family may be utterly ruined. The appellant was gravely hurt at the respondent's allegation that his father's 'Sanad' bad been once forfeited. The appellant tells the respondent's father that if he so desired he could ask her whether anything stated in the letter was untrue and that he had conveyed to her what be was stating in the letter. It may be stated that the respondent admits that the appellant had shown her this letter before it was posted to her father. On March 21. 1960 the respondent wrote a letter (Ex. 519) to the appellant's parents admitting the truth of the allegations made by the appellant in Ex. 256.

On June 23, 1960 the respondent made a noting in her own hand stating that she had accused the appellant of being a person with a beggarly luck, that she had said that the food eaten at his house, instead of being digested would cause worms in the stomach and that she had given a threat :

"murder shall be avenged with murder".

During June 1, 1960 to December 15, 1960 the marital relations were subjected to a stress and strain which ultimately wrecked the marriage. In about September, 1960 the appellants father probably offered to mediate and asked the appellant and the respondent to submit to him their respective complaints in writing. The appellant's bill of complaints is at Ex. 426 dated October 23, 1960. The letter much too long to be reproduced, contains a sorry tale. The gist of the more important of the appellant's grievances in regard to the period prior to June, 1960 is this : (1)' The respondent used to describe the appellant's mother as a boorish woman; (2) On the day of 'Paksha' (the day oil which oblations are offered to ancestors) she used to abuse the ancestors of the appellant; (3) She tore off the 'Mangal- Sutra'; (4) She beat the daughter Shubha while she was running a high temperature of 104'; (5) One night she started behaving as if she was 'possessed'. She tore off the Mangal-Sutra once again and said that she will not put it on again; and (6) She used to switch on the light at midnight and sit by the husband's bedside nagging him through the night, as a result he literally prostrated himself before her on several occasions.

The gist of the incidents from May to October, 1960 which the appellant describes as 'a period of utmost misery' is this. (1) The respondent would indulge in every sort of harassment and would blurt out anything that came to her mind; (2) One day while a student of the appellant called Godse was sitting in the outer room she shouted :

"You are not a man at all"; (3) In the heat of anger she used to say that she would pour kerosene on her body and would set fire to herself and the house; (4) She used to lock out the appellant when he

was due to return from the office. On four or five occasions he had to go back to the office without taking any food; (5) For the sheer sake of harassing him she would hide his shoes, watch, keys and other things.

The letter Ex. 426 concludes by saying : , "She is a hard headed, arrogant, merciless, thoughtless, unbalanced girl devoid of sense of duty. Her ideas about a husband are : He is a dog tied at doorstep who is supposed to come and go at her beck and call whenever ordered. She behaves with the relatives of her husband as if they were her servants. When I see her besides herself with fury, I feel afraid that she may kill me at any moment. I have become weary of her nature of beating the daughters, scolding and managing me every night uttering abuses and insults."

Most of these incidents are otherwise, supported, some by the admissions of the respondent herself, and for their proof we do not have to accept the bare word of the appellant.

On July 18, 1960 the respondent wrote a letter (Ex. 274) to the appellant admitting that within the bearing of a visitor she had beaten the daughter Shubha severely. When the appellant protested she retorted that if it was a matter of his prestige, be should not have procreated the children.

She has also admitted in this letter that in relation to her daughters she bad said that there will be world deluge because of the birth of those "ghosts". On or about July 20. 1960 she wrote another letter (Ex. 275) to the appellant admitting that she had described him as "a monster in a human body", that she had and that be'should not have procreated children. that he should "Pickle them and preserve them in a jar" and that she had given a threat that she would see to it that he loses his job and then she would publish the news in the Poona newspapers. On December 15, 1960 the appellant wrote a letter (Ex. 285) to the respondent's father complaining of the strange and cruel behaviour not only of the respondent but of her mother. He says that the respondent's mother used to threaten him that since she was the wife of an Under Secretary she knew many important persons and could get him dismissed from service, that she used to pry into his correspondence in his absence and that she even went to the length of saying that the respondent ought to care more for her parents because she could easily get another husband but not another pair of parents.

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

The correspondence subsequent to February 27, 1961 shall have to be considered later in a different,, though a highly important, context. Some of those letters clearly bear the stamp of being written under legal advice. The parties had fallen out for good and the domestic war having ended inconclusively they were evidently preparing ground for a legal battle.

In regard to the conduct of the respondent as reflected in her admissions, two contentions raised on her behalf must be considered. It is urged in the first place that the various letters containing admissions were written by her under coercion. There is no substance in this contention. In her written statement, the respondent alleged that the appellant's parents had coerced her into writing the letters. At the trial she shifted her ground and said that the coercion proceeded from the appellant himself. That apart, at a time when the marriage had gone asunder and the respondent sent to the appellant formal letters resembling a lawyer's notice, some of them by registered post, no allegation was made that the appellant or his parents had obtained written admissions from her. Attention may be drawn in this behalf to the letters Exs. 299 and 314 dated March 23 and May 6, 1961 or to the elaborate complaint

Ex. 318 dated May 19, 1961 which she made to the Secretary to Government of India, Ministry of Food and Agriculture.

Prior to that on September 23, 1960 she had drawn up a list of her complaints (Ex. 424) which begins by saying : "He has oppressed me in numerous ways like the following." But she does not speak therein of any admission or writing having been obtained from her. Further, letters like Exs. 271 and 272 dated respectively June 23 and July 10, 1960 which besides containing admissions on her part also contain allegations against the appellant could certainly not have been obtained by coercion. Finally, considering that the respondent was always surrounded by a group of relatives who had assumed the role of marriage-counsellors, it is unlikely that any attempt to coerce her into making admissions would have been allowed to escape unrecorded. After all, the group here consists of greedy letter-writers.

The second contention regarding the admissions of the respondent is founded on the provisions of section 23(1)(a) of the Act under which the court cannot decree relief unless it is satisfied that "the petitioner is not in any way taking advantage of his own wrong'. The fulfilment of the conditions mentioned in, section 23(1) is so imperative that the legislature has taken the care to provide that "then, and in such a case, but not otherwise, the court shall decree such relief accordingly". It is urged that the appellant is a bigoted and egocentric person who demanded of his wife an impossibly rigid standard of behaviour and the wife's conduct must be excused as being in selfdefence. In other words, the husband is said to have provoked the wife to say and act the way she did and he cannot be permitted to take advantage of his own wrong. The appellant, it is true, seems a stickler for domestic discipline and these so-called perfectionists can be quite difficult to live with. On September 22, 1957 the respondent made a memorandum (Ex. 379) of the instructions given by the appellant, which makes interesting reading:

> *"Special instructions given by my husband.*
>
> ***(1)*** *On rising up in the morning, to look in the minor.*
>
> ***(2)*** *Not to fill milk vessel or tea cup to the brim.*
>
> ***(3)*** *Not to serve meals in brass plates cups and vessels.*
>
> ***(4)*** *To preserve carefully the letters received and if addresses of anybody are given therein to note down the same in the note book of addresses.*
>
> ***(5)*** *After serving the first course during meals, not to repeatedly ask 'what do you want?' but to inform at the beginning of the meals how much and which are the courses.*
>
> ***(6)*** *As far as possible not to dip the fingers in any utensils.*
>
> ***(7)*** *Not to do any work with one hand.*
>
> ***(8)*** *To keep Chi. Shuba six feet away from the primus stove and Shegari.*
>
> ***(9)*** *To regularly apply to her 'Kajal' and give her tomato juice, Dodascloin etc. To make her do physical exercise, to take her for a walk and not to lose temper with her for a year.*
>
> ***(10)*** *To give him his musts and the things he requires when he starts to go outside.*
>
> ***(11)*** *Not to talk much.*
>
> ***(12)*** *Not to finish work somehow or the other; for example to write letters in good hand writing, to take a good paper, to write straight and legibly in a line.*

(13) *Not to make exaggerations in letters.*

(14) *To show imagination in every work. Not to note down the milk purchased on the calendar."*

Now, this was utterly tactless but one cannot say that it called for any attack in self-defence. The appellant was then 28 and the respondent 22 years of age. In that early morning flush of the marriage' young men and women do entertain lavish expectations of each other do not and as years roll by they see the folly of. their ways. But we think that the wife was really offended by the instructions given by the appellant. The plea of self-defence seems a clear after-thought which took birth when there was a fundamental failure of faith and understanding.

Reliance was then placed on certain letters to show that the husband wanted to assert his will at any cost, leaving the wife no option but to retaliate. We see no substance in this grievance either. The, plea in the written statement is one of the denial of conduct alleged and not of provocation. Secondly, there are letters on the record by which the wife and her relatives had from time to time complimented the husband and his parents for their warmth, patience and understanding.

Counsel for the respondent laid great emphasis on the letter, Ex. 244 dated May 22, 1959 written by her to the appellant in which she refers to some "unutterable question" put by him to her. It is urged that the appellant was pestering her with a demand for divorce and the "unutterable question" was the one by which he asked for divorce. No such inference can in our opinion be raised. The respondent has not produced the letter to which Ex. 244 is reply; in the written statement there is hardly a suggestion that the appellant was asking her for a divorce; and the appellant was not asked in his evidence any explanation in regard to the "unutterable question".

These defences to the charge of cruelty must accordingly be rejected. However, learned counsel for the respondent is right in stressing the warning given by Denning L.J., in Kaslefsky v. Kaslefsky that : "If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread especially in undefended cases. The temptation must be resisted test we slip into a state of affairs where the institution of marriage itself is imperilled." But we think that 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 the mercy of her inflexible temper. She delights in causing misery to her husband and his relation-, and she willingly suffers the calculated insults which her relatives hurled at him and his parents : the false accusation that, "the pleader's Sanad of that old bag of your father was forfeited"; "I want to see the ruination of the whole Dastane dynasty", "burn (1)[1950] 2 A.E.R. 398,403.

the book written by your father and apply the ashes to your forehead"; "you are not a man" conveying that the children were not his; "you are a monster in a human body. "I will make you lose your job and publish it in the Poona newspapers"-these and similar outbursts are not the ordinary wear and tear of married life but they became, by their regularity a menace to the peace and well-being of the household. Acts like the tearing of the Mangal-Sutra, locking out the husband when he is due to return from the office, rubbing chillie powder on the tongue of an infant child, beating a child mercilessly while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him are acts which tend to destroy the legitimate ends and objects of matrimony. Assuming that

there was some justification for occasional sallies or show of temper, the pattern of behaviour which the respondent generally adopted was grossly excessive.

The conduct of the respondent clearly amounts to cruelty within the meaning of section 10(1) (b) of the Act. Under that provision, the relevant consideration is to see whether the conduct is such as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for him to live with the respondent. The threat that she will put an end of her own life or that she will set the house on fire, the threat that she will make him lose his job and have the matter published in newspapers and the, persistent abuses and insults hurled at the appellant and his parents are all of so grave an order as to imperil the appellant's sense of personal safety. mental, happiness, job satisfaction and reputation. Her once-too-frequent.

apologies do not reflect genuine contrition but were merely impromptu device to tide over a crisis temporarily. The next question for consideration is whether the appellant had at any time condoned the respondent's cruelty. Under section 23(1) (b) of the Act, in any proceeding under the Act whether defended or not, the relief prayed for can be decreed only and only if "where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty".

The respondent did not take up the plea in her written statement that the appellant bad condoned her cruelty. Probably influenced by that omission, the trial court did not frame any issue on condonation. While granting a decree of judicial separation on the ground of cruelty, the learned Joint Civil Judge, Junior Division, Poona, did not address himself to the question of condonation. In appeal, the learned Extra Assistant Judge, Poona, having found that the conduct of the respondent did not amount to cruelty, the question of condonation did not arise. The High Court in Second Appeal confirmed the finding of the 1st Appellate Court on the issue of cruelty and it further held that in any case the alleged cruelty was condoned by the appellant.

The condonation, according to the High Court, consisted in the circumstance that the spouses co-habited till February 27, 1961 and a child was born to them in August, 1961.

Before us, the question of condonation was argued by both the sides. It is urged on behalf of the appellant that there is no evidence of condonation while the argument of the respondent is that condonation is implicit in the act of co-habitation and is proved by the fact that on February 27, 1961 when the spouses parted, the respondent was about 3 months pregnant. Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of section 23(1) (b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if we are satisfied "but not otherwise", that the petitioner has not in any manner condoned the cruelty. It is, of course, necessary that there should be evidence on the record of the case to show that the appellant had condoned the cruelty.

Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things : forgiveness and restoration(1). The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty. But that evidence does not consist in the mere fact that the spouses continued to share a common home during or for some time after the spell of cruelty. Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued co-

habitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws.

The evidence of condonation consists here in the fact that the spouses led a normal sexual life despite the respondent's Acts of cruelty. This is not a case where the spouses, after separation, indulged in a stray act of sexual intercourse, in which case the necessary intent to forgive and restore may be said to be lacking. Such stray acts may bear more than one explanation. But if during co-habitation the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which characterises normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status may reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied by the nobler graces of marital life. One might then as well magine that the sexual act was undertaken just in order to kill boredom or even in a spirit of revenge. Such speculation is impermissible. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. Therefore, evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. Intercourse, of course, is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But intercourse in circumstances as obtain here would raise a strong inference of condonation with its dual requirement, forgiveness and restoration. That inference stands uncontradicted, the appellant not having explained the circumstances in which he came to lead and live a normal sexual life with the respondent, even after a series of acts of cruelty on her part.

But condonation of a matrimonial offence is not to be likened to a full Presidential Pardon under Article 72 of the Constitution which, once granted, wipes out the guilt beyond the possibility of revival. Condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety.

> *"No matrimonial offence is erased by condonation. It is obscured but not obliterated" (1). Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence(2). Condoned cruelty can therefore be revived, say, by desertion or adultery."*

Section 23 (1) (b) of the Act, it may be urged, speaks of condonation but not of its revival and therefore the English doctrine of revival should not be imported into matters arising under the Act. Apparently, this argument may seem to receive some support from the circumstances that under the English law, until the passing of the Divorce Reform Act, 1969 which while abolishing the traditional bars to relief introduces defences in the nature of bars, at least one matrimonial offence, namely, adultery could not be revived if once condoned (3). But a closer examination of such an argument would reveal its weakness. The doctrine of condonation was established by the old ecclesiastical courts in Great Britain and was adopted by the English Courts from the canon law. 'Condonation' is a technical word which means and implies a conditional waiver of the right of the injured spouse to take matrimonial proceedings. It is not 'forgiveness' as commonly understood (4). In England condoned adultery could not be received because of the express provision contained in section 3 of the Matrimonial Causes Act, 1963 which was later incorporated into section 42(3) of the Matrimonial Causes Act, 1965. In the absence of any such provision in the Act governing the charge of cruelty, the word 'condonation' must receive the meaning which it has borne for centuries in the world of law(").

'Condonation' under section 23 (1) (b) therefore means conditional forgiveness, the implied condition being that no further matrimonial offence shall be committed.

(1) See Words and Phrases Legally Defined (Butterworths) 1969 Ed., Vol I, p. 305, ("Condonation").

(2) See Halsbury's Laws of England, 3rd Ed., Vol. 12, p. 3061.

(3) See Rayden on Divorce, 11th Ed. (1971) pp. 11, 12, 23, 68, 2403.

(4) See Words and Phrases Legally Defined (Butterworths) 1969 Ed., p. 306 and the Cases cited therein.

(5) See Ferrers vs Ferrers (1791) 1 Hag. Con 130 at pp. 130, 131.

It therefore becomes necessary to consider the appellant's argument that even on the assumption that the appellant had condoned the cruelty, the respondent by her subsequent conduct forfeited the conditional forgiveness, thereby reviving the original cause of action for judicial separation on the ground of cruelty. It is alleged that the respondent treated the appellant with cruelty during their brief meeting on March 19, 1961, that she refused to allow to the appellant any access to the children, that on May 19, 1961 she wrote a letter (Ex. 318) to the Secretary to the Government of India, Ministry of Food and Agriculture, New Delhi, containing false and malicious accusations against the appellant and his parents and that she deserted the appellant and asked the Government to provide her with separate maintenance.

These facts, if proved, shall have to be approached and evaluated differently from the facts which were alleged to constitute cruelty prior to its condonation. The incidents on which the appellant relied to establish the charge of cruelty had to be grave and weighty. And we found them to be so. In regard to the respondent's conduct subsequent to condonation, it is necessary to bear in mind that such conduct may not be enough by itself to found a decree for judicial separation and yet it may be enough to revive the condoned offence. For example, gross familiarities short of adultery[3] or desertion for less than the statutory period[4] may be enough to revive a condoned offence. The incident of March 19, 1961 is too trifling to deserve any notice. That incident is described by the appellant himself in the complaint (Ex. 295) which he made to the police on March 20, 1961. He says therein that on the 19th morning, the respondent went to his house with some relatives, that those relatives-instigated her against him, that they entered his house though he asked them not to do so and that she took away certain household articles with her. As shown by her letter (Ex. 294) dated the 19th itself, the articles which she took away were some petty odds and ends like a do]], a slate, a baby hold-all, two pillows, a bundle of clothes and a baby-cart. The police complaint made by the appellant betrays some hypersensitivity.

As regards the children, it does seem that ever since February 27, the appellant was denied a chance to meet them. His letters Exs. 307. 309 and 342 dated April 20, April 21 and November 23, 1961 respectively contain the grievance that the children were deliberately not allowed to see him., From his point of view the grievance could be real but then the children, Shubha and Vibha, were just 4 and 2 years of age in February, 1961 when their parents parted company.

Children of such tender age need a great amount of looking after and they could not have been sent to meet their father unescorted. The one person who could so escort them was the mother who bad left or bad to leave the matrimonial home for good. The appellant's going to the house of the respondent's

3 Halsbury's Law-, of England, 3rd Ed., Vol. 12, p. 306, para 609.

4 Beard vs. Beard [1945] 2 A.E.R. 306.

parents where he was living was in the circumstances an impracticable proposition. Thus, the wall that divided the parents denied to the appellant access to his children.

The allegations made by the respondent in her letter to the Government, Ex. 318 dated May 19, 1961 require a close consideration. It is a long letter, quite an epistle, in tune with the, respondent's proclivity as a letter-writer. By that letter, she asked the Government to provide separate maintenance for herself and the children. The allegations contained in the letter to which the appellant's counsel has taken strong exception are these : (1) During the period that she lived with the appellant, she was subjected to great harassment as well as mental and physical torture; (2) The appellant had driven her out of the house on February 27, 1961; (3) The appellant had deserted her and had declared that he will not have any connection with her and that he will not render any financial help for the maintenance of herself and the children. He also refused to give medical help to her in her advanced stage of pregnancy; (4) The appellant had denied to her even the barest necessities of life like food and clothing; (5) The parents of (he appellant were wicked persons and much of her suffering was due to the influence which they had on the appellant; (6) The appellant used to threaten her that he would divorce her, drive her out of the house and even do away with her life, (7) The plan to get her examined by Dr. Seth of the Peravada Mental Hospital was an insincere wicked and evil move engineered by the appellant, his brother and his father, (8) On her refusal to submit to the medical examination any further, she was driven out of the house with the children after being deprived of the valuables on her person and in her possession; and (9) The appellant had subjected her to such cruelty as to cause a reasonable apprehension in her mind that it would be harmful or injurious for her to live with him.

Viewed in isolation, these allegations present a different and a somewhat distorted picture. For their proper assessment and understanding, it is necessary to consider the context in which those allegations came to be made. We will, for that purpose, refer to a few letters.

On March 7, 1961 the respondent's mother's aunt, Mrs. Gokhale wrote a letter (Ex. 644) to the respondent's mother. The letter has some bearing on the events which happened in the wake of the separation which took place on February 27, 1961. It shows that the grievance of the respondent and her relatives was not so much that a psychiatrist was consulted as that the consultation was arranged without any prior intimation to the respondent. The letter shows that the appellant's brother Dr. Lohokare, and his brother-in-law Deolalkar, expressed regret that the respondent should have been got examined by a psychiatrist without previous intimation to any of her relatives. The letter speaks of a possible compromise between the husband and wife and it sets out the terms which the respondent's relatives wanted to place before the appellant. The terms were that the respondent would stay at her parents' place until her delivery but she would visit the appellant off and on; that the children would be free to visit the appellant; and that in case the appellant desired that the respondent should live with him, he should arrange that Dr. Lohokare's mother should stay with them in Delhi for a few days. The last term of the proposed compromise Was that instead of digging the past the husband and wife should live in peace and happiness. The letter bears mostly the handwritting of the respondent herself and the significance of that circumstance is that it was evidently written with her knowledge and consent. Two things are clear from the letter : one, that the respondent did not want to leave the appellant and two, that she did not either want to prevent the children from seeing the appellant. The letter was written by one close relative of the respondent to another in the ordinary course of events and was not, so to say, prepared in order to create evidence or to supply a possible defence. It reflects

a genuine attitude, not a make believe pose and the feelings expressed therein were shared by the, respondent whose handwriting the letter bears.

This letter must be read along with the letter Ex. 304 which the respondent sent to the appellant on April 18, 1961. She writes :

> *"I was sorry to hear that you are unwell and need treatment. I would always like never to fail in my wifely duty of looking after you, particularly when you are ailing, but you will, no doubt, agree that even for this, it will not be possible for me to join you in the house out of which you have turned me at your father's instance. 'This is, therefore, just to keep you informed that if you come to 7/6 East Patel Nagar, I shall be able to nurse you properly and my parents will ever be most willing to afford the necessary facilities under their care to let me carry out this proposal of mine."*

There is no question that the respondent had no animus to desert the appellant and as stated by her or on her behalf more than once, the appellant had on February 27, 1961 reached her to Mrs. Gokhale's house in Poona, may be in the hope that she will cooperate with Dr. Seth in the psychiatric exploration. She did not leave the house of her own volition.

But the appellant had worked himself up to believe that the respondent had gone off her mind. On March 15, 1961 he made a complaint (Ex. 292) to the Delhi Police which begins with the recital that the respondent was in the Mental Hospital before marriage and that she needed treatment from a psychiatrist. He did say that the respondent was "a very loving and affectionate person" but he qualified it by saying : "when excited, she appears to be a very dangerous woman, with confused thinking".

On April 20, 1961 the appellant wrote a letter (Ex. 305) to the respondent charging her once again of being in an "unsound state of mind". The appellant declared by that letter that he will not be liable for any expenses incurred by her during her stay in her parents' house. On the same date he wrote a letter (Ex. 307) to the respondent's father reminding him that he, the appellant, had accepted a girl "who had returned from the Mental Hospital". On April 21, 1961 he wrote it letter (Ex. 309) to the Director of Social Welfare, Delhi Administration, in which he took especial care to declare that the respondent "was in the Poona Mental Hospital as a lunatic before the marriage". The relevance of these reiterations regarding the so-called insanity of the respondent, particularly in the last letter, seems only this, that the appellant was preparing ground for a decree of divorce or of annulment of marriage. He was surely not so naive as to believe that the Director of Social Welfare could arrange to "give complete physical and mental rest" to the respondent. Obviously, the appellant was anxious to disseminate the information as widely as possible that the respondent was of unsound mind.

On May 6, 1961 the respondent sent a reply (Ex. 314) to the appellant's letter, Ex. 305, dated April 20, 1961. She expressed her willingness to go back to Poona as desired by him, if he could make satisfactory arrangements for her stay there. But she asserted that as a wife she was entitled to live with him and there was no purpose in her living at Poona "so many miles away from Delhi, without your shelter". In regard to the appellant's resolve that he will not bear the expenses incurred by her, she stated that not a pie remitted by him will be illspent and that, whatever amount he would send her will be, accounted for fully. It is in this background that on May 19, 1961 the respondent wrote the letter Ex. 318 to the Government. When asked by the Government to offer his explanation, the appellant by his reply Ex. 323 dated July 19, 1961 stated that the respondent needed mental treatment, that she may have written the letter Ex. 318 in a "madman's frenzy" and that her father had "demoralised" her. In

his letter Ex. 342 dated November 23 , 1961 to the respondent's father, he described the respondent as "'your schizophrenic daughter".

Considered in this context, the allegations made by the respondent in her letter Ex. 318 cannot revive the original cause of action. These allegations were provoked by the appellant by his persistent and purposeful accusation, repeated times without number, that the respondent was of unsound mind. He snatched every chance and wasted no opportunity to describe her as a mad woman which, for the purposes of this appeal, we must assume to be wrong and unfounded. He has been denied leave to appeal to this Court from the finding of the High Court that his allegation that the respondent was of unsound mind is baseless. He also protested that he was not liable to maintain the respondent.

It is difficult in these circumstances to accept the appellant's argument either that the respondent deserted him or that she treated him with cruelty after her earlier conduct was condoned by him. It is true that the more serious the original offence, the less grave need be the subsequent acts to constitute a revival[5] and in cases of cruelty, "very slight fresh evidence is needed to show a resumption of the cruelty. for cruelty of character is bound to show itself in conduct and behaviour, day in and day out, night in and night out". But the conduct of the respondent after condonation cannot be viewed apart from the conduct of the appellant after condonation. Condonation is conditional forgiveness but the grant of such forgiveness does not give to the condoning spouse a charter to malign the other spouse. If this were so, the condoned spouse would be required mutely to submit to the cruelty of the other spouse without relief or remedy. The respondent ought not to have described the appellant's parents as "wicked" but that perhaps is the only allegation in the letter Ex. 318 to which exception may be taken. We find ourselves unable to rely on that solitary circumstance to allow the revival of condoned cruelty.

We therefore hold that the respondent was guilty of cruelty but the appellant condoned it and the subsequent conduct of the respondent is not such as to amount to a revival of the original cause of action. Accordingly, we dismiss the appeal and direct the appellant to pay the costs of the respondent.

Appeal dismissed.

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5 Cooper vs. Cooper (1950) W.N. 200 (H.L.)

SHAFIN JAHAN VERSUS ASOKAN K.M. & ORS.

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Dipak Misra, CJI, Hon'ble Mr. Justice A.M. Khanwilkar and Hon'ble Mr. Justice D. Y. Chandrachud**

Shafin Jahan …Appellant(s)
Versus
Asokan K.M. & Ors. …Respondent(s)

Criminal Appeal No. 366 of 2018

(Arising out of S.L.P. (Crl.) No. 5777 of 2017)

Decided on : **9th April, 2018**

Respondent filed a writ of habeas corpus before High Court claiming that his daughter was likely to be transported outside the country where High Court allowed the petition and declared marriage as null and void. To which appeal was preferred by aggrieved party. Hon'ble Supreme Court noted that view point of father cannot be allowed to curtail the fundamental rights under Article 21 of Constitution of India, of his daughter who out of her own volition married the appellant. Further the exercise of jurisdiction by High Court to declare the marriage null and void while entertaining a petition for habeas corpus was plainly in excess of judicial power leading to transgression of constitutional rights.

JUDGMENT

Dipak Misra, CJI [for himself and A.M. Khanwilkar, J.]:-

Rainbow is described by some as the autograph of the Almighty and lightning, albeit metaphorically, to be the expression of cruelty of otherwise equanimous "Nature". Elaborating the comparison in conceptual essentiality, it can be said that when the liberty of a person is illegally smothered and strangulated and his/her choice is throttled by the State or a private person, the signature of life melts and living becomes a bare subsistence. That is fundamentally an expression of acrimony which gives indecent burial to the individuality of a person and refuses to recognize the other's identity. That is reflection of cruelty which the law does not countenance. The exposé of facts in the present case depicts that story giving it a colour of different narrative. It is different since the State that is expected to facilitate the enjoyment of legal rights of a citizen has also supported the cause of a father, an obstinate one, who has endeavoured immensely in not allowing his daughter to make her own choice in adhering to a faith and further making Everestine effort to garrotte her desire to live with the man with whom she has entered into wedlock. The thought itself is a manifestation of the idea of patriarchal autocracy and possibly selfobsession with the feeling that a female is a chattel. It is also necessary to add here that the High Court on some kind of assumption, as the impugned judgment and order would reflect, has not been appositely guided by the basic rule of the highly valued writ of habeas corpus and has annulled the marriage. And that is why the order becomes a sanctuary of errors.

2. On 08.03.2018, this Court had allowed the appeal passing the following order:"

Leave granted.

Heard Mr. Kapil Sibal and Ms. Indira Jaising, learned senior counsel along with Mr. Haris Beeran, learned counsel for the appellant, Mr. Maninder Singh, learned Additional Solicitor General for the National Investigation Agency (NIA) and Mr. Shyam Divan, learned senior counsel along with Ms. Madhavi Divan, learned counsel for respondent No.1.

The reasoned judgment will follow. The operative part of the order reads as follows:

Considering the arguments advanced on both sides, in the facts of the present case, we hold that the High Court should not have annulled the marriage between appellant No.1, Shafin Jahan and respondent No.9, Hadiya alias Akhila Asokan, in a Habeas Corpus petition under Article 226 of the Constitution of India. We say so because in the present appeal, by special leave, we had directed the personal presence of Hadiya alias Akhila Asokan; she appeared before this Court on 27th November, 2017, and admitted her marriage with appellant No.1. In view of the aforesaid, the appeal stands allowed. The judgment and order passed by the High Court is set aside. Respondent No.9, Hadiya alias Akhila Asokan is at liberty to pursue her future endeavours according to law. We clarify that the investigations by the NIA in respect of any matter of criminality may continue in accordance with law."

3. Presently, we proceed to state the reasons.

4. The facts which are necessary to be stated are that Ms. Akhila alias Hadiya, respondent No.9 herein, aged about 26 years at present, the only child of Sh. Asokan K.M., respondent No.1 herein, and Smt. Ponnamma, had completed a degree in Homeopathic Medicine, BHMS (Bachelor of Homeopathic Medicine and Surgery) from Shivaraj Homeopathic Medical College, Salem in Tamil Nadu. While pursuing the said course, she was initially residing in the college hostel and later she started staying in a rented house near her college together with five other students among whom were Jaseena and Faseena, daughters of one Aboobacker. During the college holidays, Hadiya used to visit the house of Aboobacker and there was also an occasion when both Jaseena and Faseena came to reside with Hadiya at the house of Asokan, respondent No.1 herein. On 6th December, 2015, Hadiya's paternal grandfather breathed his last. Hadiya on that day came back to her house and it is alleged that at that time, the family members and relatives of Asokan noticed some changes in her behaviour as she was showing reluctance to participate in the rituals performed in connection with the funeral of her grandfather. Thereafter, she went to Salem for her internship along with Jaseena and Faseena. Till 5th January, 2016, she was in constant touch with her family. Thereafter, on the next day, i.e., 6th January, 2016, Asokan received a telephone call from one of the friends of Hadiya informing that Hadiya had gone to the college on that day wearing a 'Pardah'. The respondent No.1 was further informed that Hadiya was inspired by someone to change her faith.

5. Upon receiving the information, Asokan fell ill. Smt. Ponnamma, wife of Asokan, called Hadiya and informed her about the illness of her father. Jaseena and Hadiya left for Salem about 8 p.m. on 6th January, 2016 but Hadiya did not reach her father's house. Later Asokan went in search of Hadiya and came to know from one Ms. Archana that Hadiya was living at the house of Aboobacker. Thereupon, Asokan contacted Aboobacker for meeting his daughter Hadiya. Aboobacker promised Asokan that he would bring Hadiya to the house of Ms. Archana, a friend of Hadiya, but this never happened and later Asokan was informed that Hadiya had escaped from the house of Aboobacker and had run away somewhere. Disgusted and disgruntled, as he was, Asokan filed a complaint before S.P. Malapuram District, but as there was no progress made

by the police in the investigation of the matter, Asokan filed a Writ Petition of Habeas Corpus before the Division Bench of the High Court of Kerala being W.P. (Criminal) No. 25 of 2016.

6. On 14.01.2016, when the case came up for admission, the Division Bench directed the Government pleader to get instructions regarding the action, if any, taken on the aforesaid complaint of Asokan. Thereafter, on 19.01.2016, when the case was taken up for further consideration, Hadiya appeared through a lawyer and filed an application for impleadment being I.A. No. 792 of 2016. The said application for impleadment was allowed and Hadiya was impleaded as a respondent. An affidavit dated 26.11.2016 was filed on her behalf stating, inter alia, the facts and circumstances under which she had left her house. The aforesaid affidavit mentioned that she had communicated to her father as well as Director General of Police by registered letter regarding the actual state of affairs. Further, she along with one Sainaba filed Writ Petition being W.P. (C) No. 1965 of 2016 seeking protection from police harassment.

7. The Division Bench in W.P. (Criminal) No. 25 of 2016 persuaded Hadiya to go along with her father, Asokan, to her parental house but the said persuasions were all in vain as Hadiya was not willing to go with her father. The Division Bench, thereafter, interacted with Sainaba who expressed her unequivocal willingness to the Division Bench to accommodate Hadiya in "Satyasarani" institution and that Sainaba would render all necessary help to Hadiya to pursue her internship in BHMS degree course. As Hadiya had taken a stand that she wanted to join Satyasarani and she was not, in any case, willing to go back to her parental home along with Asokan, the Division Bench permitted Hadiya to stay with Sainaba at her house till she joined Satyasarani. The Division Bench thereafter adjourned the case for further hearing directing to produce proof regarding admission of Hadiya in Satyasarani.

8. The case was taken up for consideration by the Division Bench where the counsel appearing on behalf of Hadiya produced documents to show that Hadiya had got admission on 20.01.2016 in an institution, namely, 'Markazul Hidaya Sathyasarani Educational & Charitable Trust' at Karuvambram, Manjeri in Malappuram District. The counsel for Hadiya also submitted before the writ court that Hadiya was staying in the hostel of the said institution.

9. The Division Bench, vide judgment dated 25.01.2016, directed as follows:

> *"8. Under the above mentioned circumstances, we are convinced that the alleged detenue is not under any illegal confinement. She is at present staying in the above said institution on her own wish and will. She is not under illegal confinement. Therefore, there exists no circumstances warranting interference for issuance of any writ of Habeas Corpus. Hence the original petition is hereby disposed of by recording the fact that the alleged detenue is staying in the above said institution on her own free will. It will be left open to the petitioner and her family members to make visit to her at the above institution, subject to regulations if any regarding visiting time."*

10. In view of the aforesaid order, the writ petition filed by Hadiya was withdrawn.

11. When the matter stood thus, the 1st respondent filed a second Writ Petition (Criminal) No. 297 of 2016 alleging that his daughter was likely to be transported out of the country and the High Court, vide interim order, directed the respondent to keep her under surveillance and to ensure that she was not taken out of the country without further orders of the Court. The averments made by the father in the writ petition need not be stated in detail. Suffice it to say that Hadiya

alias Akhila categorically declined to go with her parents and stated in the affidavit filed by her that she was not being permitted to interact with anyone. Hadiya further stated that she wanted to reside at a place of her choice and that she had not been issued a passport and, therefore, there was no likelihood of her being taken to Syria. The High Court, considering the affidavit, passed the following order:

"After hearing learned counsel on both sides, we are of the opinion that in the light of the finding entered by this court in the earlier round of litigation that this Court cannot compel the petitioner's daughter to go and reside with her parents and that she is not in the illegal custody of anyone, this court cannot any longer direct that the petitioner's daughter should continue to reside at Santhinikethan Hostel, Pachalam. When we asked the petitioner's daughter as to whether she is willing to appear on another day, she submitted that she will appear on the next hearing date. Learned counsel for the detenue also submitted that the detenue will be present in person on the next hearing date. We accordingly permit the detenue to reside at a place of her choice. We also record the statement of Ms. Akhila that she proposes to reside with the seventh respondent, Smt. A.S.Sainaba, whose address is mentioned in the instant writ petition. Sri. P.K.Ibrahim, learned counsel appearing for the seventh respondent submitted that the seventh respondent will cause production of the petitioner's daughter on the next hearing date, if she proposes to reside with her. If the petitioner's daughter proposes to shift her residence and to reside elsewhere, we shall inform that fact to the Deputy Superintendent of Police, Perinthalmanna in writing and furnish her full residential address and the telephone number if any over which she can be contacted. Call on 24.10.2016. The Deputy Superintendent of Police, Perinthalmanna shall cause production of the petitioner's daughter on that day. It will be open to the parents of Ms. Akhila to meet and interact with her."

12. On the basis of the aforesaid order passed by the High Court, Hadiya was permitted to reside with the 7th respondent. On 14.11.2016, the counsel for the writ petitioner before the High Court expressed serious apprehension regarding the continued residence of his daughter in the house of the 7th respondent therein. On 19.12.2016, the High Court noted that she had not completed her course and acquired competence to practise homeopathy and, accordingly, expressed the opinion that she should complete her House Surgeoncy without delay and obtain eligibility to practice. A statement was made on her behalf that she has to complete her House Surgeoncy at the Shivaraj Homeopathic Medical College, Salem which has a hostel for women where she was willing to reside for the purpose of completing her House Surgeoncy. On the basis of the aforesaid, the High Court passed the following order:

"We have heard the learned Senior counsel Sri. S.Sreekumar, who appears for the detenue. We have perused the affidavit dated 26.11.2016 filed by the detenue producing documents, Exts. R8(d) and R8(e). We are not prepared to rely on Ext.R8(d) which purports to make it clear as though a registered Homeopathic Medical Practitioner has permitted the detenue to work as a trainee in Homeopathic Medicine on a remuneration of Rs.2000/per month for her day today expenses. We fail to understand how the detenue, who has not obtained a degree in Homeopathy can be permitted to train under him. The detenue has admittedly not completed her House Surgeoncy or obtained eligibility to practice. Therefore, it is only appropriate that she completes her House Surgeoncy without further delay and obtains eligibility to practice Homeopathic Medicine. Her Senior counsel Sri. S.Sreekumar informs us that, the detenue is desirous of completing her House Surgeoncy. However, we place on record our dissatisfaction

at the continued residence of the detenue with the 7th respondent, who is a stranger. The counsel for the petitioner also expresses anxiety and concern at her continued residence with the 7th respondent. He is anxious about the safety and well being of the detenue. His anxiety and concern as the parent of an only daughter is understandable. Therefore, it is necessary that the detenue shifts her residence to a more acceptable place, without further delay. According to the learned Senior counsel Sri.S.Sreekumar, she has to complete her House Surgeoncy at the Shivaraj Homeopathic Medical College, Salem. The college has a hostel for girl students where she is willing to reside and complete her House Surgeoncy. The petitioner offers to bear the expenses for her education and stay at the Medical College Hostel. He offers to escort her to the Medical College and to admit her into the Hostel there. The detenue is also, according to the learned Senior counsel, willing to accompany her.

2. *In view of the above, there shall be a direction to the detenue to appear before this Court at 10.15 a.m. on 21.12.2016. The petitioner shall also be present in person in Court on the said date. The petitioner who is stated to be in possession of the certificates of the detenue shall bring such certificates also to Court. We shall pass further orders in the matter, regarding the manner in which the detenue is to be taken to the Medical College and admitted to the ladies hostel, on 21.12.2016. Post on 21.12.2016."*

13. On 21.12.2016, Hadiya appeared before the High Court and a statement was made that she had entered into marriage with Shafin Jahan, the appellant herein. The High Court, at that juncture, as the order would reflect, noted that her marriage was totally an unexpected event and proceeded to ascertain the veracity of the statement made. It has recorded its displeasure as to the manner in which the entire exercise was accomplished. It passed a detailed order on 21.12.2016. The relevant part of the order reads thus:

"This court exercising its Parens Patriae jurisdiction is anxious and concerned about the safety of the detenue and her well being, viewed especially in the light of the allegations made in the Writ Petition and the continued obstinance of the detenue to return to her parents. The person who is stated to have got married to the detenue has appeared before us today, for the first time. He claims to be a graduate and a person who is employed in the Gulf. It is stated that, he is desirous of taking the detenue out of the country. It was precisely the said apprehension that was expressed by her father in the proceedings before this Court on the earlier occasion. This Court has on the said occasion recorded the fact that since she was not possessed of a Passport, there was no likelihood of her being taken to Syria. The question that crops up now is whether the marriage that has been allegedly performed is not a device to transport her out of this country. We are not aware of the identity of the person who is alleged to have got married to the detenue. We are not aware of the antecedents of the said person or his family background. The address mentioned in the marriage certificate produced shows that he is from Kollam. In what manner he has come into contact with detenue and under what circumstances, the detenue has agreed to get married to a stranger like him are matters that require to be probed thoroughly. The marriage certificate shows that the marriage was performed by the Khazi at the house of the 7th respondent, Srambikal House, Puthur. Why the marriage was conducted at her house is not clear. Unless the above questions are answered, it cannot be accepted that the detenue is in safe hands. This Court exercising Parens Patriae jurisdiction has a duty to ensure that young girls like the detenue are not exploited or transported out of the country. Though the learned Senior Counsel has vociferously contended that the detenue is a person

who has attained majority, it is necessary to bear in mind the fact that the detenue who is a female in her twenties is at a vulnerable age. As per Indian tradition, the custody of an unmarried daughter is with the parents, until she is properly married. We consider it the duty of this Court to ensure that a person under such a vulnerable state is not exposed to further danger, especially in the circumstances noticed above where even her marriage is stated to have been performed with another person, in accordance with Islamic religious rites. That too, with the connivance of the 7th respondent with whom she was permitted to reside, by this Court. 8. We place on record our absolute dissatisfaction at the manner in which the marriage if at all one has been performed, has been conducted. The 7th respondent having been a party to these proceedings had a duty to at least inform this Court of the same, in advance. This Court had relying on her credentials and assurance, permitted the detenue to accompany her and to live with her. We would have expected a reasonable litigant, which includes the detenue also who as we have noticed earlier, is represented through an eminent Senior Counsel of this Court, to have informed this Court and obtained permission from this Court before such a drastic course was undertaken. Considering the manner in which the marriage has been conducted, the secrecy surrounding the said transaction and also the hurried manner in which the whole exercise was completed, the entire episode is shrouded in suspicion. Unless the suspicion is cleared the detenue cannot be permitted to go with the person who is seen to be accompanying her now. In view of the above, the following directions are issued.

1) *The first respondent is directed to escort the detenue and to have her accommodated at the S.N.V.Sadanam Hostel, Chittoor Road, Ernakulam, until further orders. The first respondent shall ensure that she is not provided the facility of possessing or using a mobile phone. The petitioner and the mother shall be at liberty to meet her according to the rules and regulations of the hostel. No other person is permitted to meet her.*

2) *The first respondent shall cause an investigation to be conducted into the education, family background, antecedents and other relevant details of Sri. Shafin Jahan who is stated to be the bridegroom of the alleged marriage that is stated to have been conducted on 19.12.2016 as evidenced by the certificate dated 20.12.2016 produced before us. The first respondent shall also enquire into the circumstances surrounding the conduct of such marriage, the persons who were involved in the conduct of the same the organization that has issued the marriage certificate, as well as their antecedents. A report of such investigation shall be placed before us before the next posting date of this case. The 4th respondent shall oversee the investigation and see that all relevant details are unearthed and placed before us including any links with extremist organizations, of which allegations are made in the Writ Petition.*

3) *The Secretary, Othukkungal Grama Panchayat is directed not to issue the marriage certificate sought for by the applicants Shafine Jahan and Hadiya as per receipt dated 20.12.2016, without further orders from this Court. The petitioner shall bear the expenses for the accommodation of the detenue at the hostel.*

4) *Post on 6.1.2017."*

14. Thereafter, the matter was taken up on various dates by the High Court and eventually, by the impugned judgment and order, it opined that a girl aged 24 years is weak and vulnerable and capable of being exploited in many ways and thereafter, the Court, exercising the parens patriae

jurisdiction, observed that it was concerned with the welfare of the girl of her age. It has been further observed by the High Court that the duty is cast on it to ensure the safety of at least the girls who are brought before it and the said duty can only be discharged by ensuring that the custody of Akhila alias Hadiya should be given to her parents. The High Court further directed to the following effect:

"She shall be cared for, permitted to complete her House Surgeoncy Course and made professionally qualified so that she would be in a position to stand independently on her own two legs. Her marriage being the most important decision in her life, can also be taken only with the active involvement of her parents. The marriage which is alleged to have been performed is a sham and is of no consequence in the eye of law. The 7th respondent and her husband had no authority or competence to act as the guardian of Ms. Akhila and to give her in marriage. Therefore, the alleged marriage is null and void. It is declared to be so."

15. The High Court also directed that a police officer of the rank of SubInspector should escort Akhila alias Hadiya from the hostel to her father's house and the Superintendent of Police, Respondent No.2 therein, should maintain surveillance over them to ensure their continued safety. That apart, the High Court issued the following directions:

" iii) *The 4th respondent shall take over the investigation of Crime No. 21 of 2016 of Perinthalmanna Police Station and shall have a comprehensive investigation conducted coordinating the investigation in Crime No.510 of 2016 of Cherpulassery Police Station which has been registered into the forcible conversion of Ms.Athira which is the subject matter of W.P.(Crl.) No. 235 of 2016 of this Court. The 4th respondent shall also investigate the activities of the organizations that are involved in this case of which reference has been made by us above. Such investigation shall be completed as expeditiously as possible and the persons who are found to be guilty shall be brought to the book.*

iv) *The 4th respondent shall conduct a fullfledged enquiry into the lapses on the part of the Investigating Officer in this case and shall, if necessary, pursue departmental proceedings against the Officer concerned."*

16. Against the aforesaid order, the present appeal, by special leave, was filed by Shafin Jahan seeking permission to file the special leave which is granted by this Court. 17. This Court, vide order dated 4.8.2017, asked Mr. Maninder Singh, learned Additional Solicitor General, to accept notice on behalf of the Respondent No.6, the National Investigating Agency (NIA). Thereafter, various orders were passed by this Court with regard to investigation which are not necessary to narrate. It is worthy to mention that on 30.10.2017, this Court directed the 1st respondent to produce his daughter before this Court on 27.11.2017. On the date fixed, Hadiya was produced before this Court and a prayer was made to interact with Hadiya in camera and not in open Court but repelling the said submission, the following order was passed:

"After due deliberation, we thought it appropriate to interact with Akhila @ Hadiya and we have accordingly interacted with her in Court. We were told that though she can communicate in English, she may not be able to effectively articulate in that language. Hence, we requested Mr. V. Giri, learned senior counsel, who also represents the State of Kerala to assist in translating the questions posed to her in Court and the answers given by her.

The range of questions that we posed basically pertained to her qualifications, interest in studies, perception of life and what she intends to do in future. In response to our queries, she responded by stating that she has passed Class X from Higher Secondary School in K.V. Puram, Vaikom in Kottayam District and thereafter she was prosecuting her BHMS course in Shivaraj Homeopathy Medical College in Salem in the State of Tamil Nadu. She has also stated that she intends to continue her internship/ housemanship which she had left because of certain reasons and her ambition is to become a fullfledged homeopathic doctor. She has expressed her desire to stay in the hostel and complete the course in the said college, if a seat is made available.

In the above view, we direct, as desired by her, that she be taken to Salem so as to enable her to pursue her internship/housemanship. We also direct the college to admit her and to allow the facility of a room or a shared room in the hostel as per practice to enable her to continue her internship/housemanship afresh. Be it stated, she herself has stated that the duration of the internship/housemanship is likely to be for 11 months. If any formality is to be complied with, the college shall communicate with the university and the university shall accede to the same. Our directions are to be followed in letter and spirit by all concerned. Needless to say, when she stays in the hostel, she will be treated like any other student and will be guided by the hostel rules. If necessary, the expenses for pursuing the course and for the hostel shall be borne by the State of Kerala. The Dean of the College shall approach this Court if there is any problem with regard to any aspect. 'Any problem' does not mean, admission in the hostel or continuance in the course.

We direct the State of Kerala to make all necessary arrangements so that she can travel to Salem at the earliest. She has made a request that she should be accompanied by policewomen in plainclothes. The State shall attend to the prayer appropriately. If any security problem arises, the State of Tamil Nadu shall make local arrangements for the same. We have been told that she is presently staying in Kerala Bhawan at New Delhi. Mr. V. Giri, learned senior counsel assures this Court that she shall be permitted to stay in Kerala Bhawan till she moves to Salem. We make it clear that the NIA investigation shall continue in accordance with law."

18. The aforesaid adumbration calls for restatement of the law pertaining to writ of habeas corpus which has always been considered as 'a great constitutional privilege' or 'the first security of civil liberty'. The writ is meant to provide an expeditious and effective remedy against illegal detention, for such detention affects the liberty and freedom of the person who is in confinement.

19. In *P. Ramanatha Aiyar's Law Lexicon (1997 Edn.)*, while defining "habeas corpus", apart from other aspects, the following has been stated:"

The ancient prerogative writ of habeas corpus takes its name from the two mandatory words habeas corpus, which it contained at the time when it, in common with all forms of legal process, was framed in Latin. The general purpose of these writs, as their name indicates, was to obtain the production of an individual."

20. In *Cox v. Hakes*[1], Lord Halsbury observed as under:

" *For a period extending as far back as our legal* history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the

1 (1890) 15 AC 506

return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed."

21. In S*ecretary of State for Home Affairs v. O'Brien*[2], it has been observed that:

"… It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirtythird year of Edward I. It has through the ages been jealously maintained by the courts of law as a check upon the illegal usurpation of power by the executive at the cost of the liege."

22. In *Ranjit Singh v. State of Pepsu (now Punjab)*[3], after referring to *Greene v. Secy. of States for Home Affairs*[4], this Court ruled:"

4.… the whole object of proceedings for a writ of habeas corpus is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible."

The Bench quoted Lord Wright who, in Greene's case, had stated:

"… The incalculable value of habeas corpus is that it enables the immediate determination of the right to the applicant's freedom."

23. In *Kanu Sanyal v. District Magistrate, Darjeeling and Others*[5], a Constitution Bench, after adverting to the brief history of the writ of habeas corpus, opined that it is essentially a procedural writ that deals with the machinery of justice and not a substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The Court furtherelaborated:

"… The writ of habeas corpus is one of the most ancient writs known to the common law of England. It is a writ of immemorial antiquity and the first threads of its origin are woven deeply within the "seamless web of history" and they are concealed and perhaps untraceable among countless incidents that constituted the total historical pattern."

24. Tracing the history, the Court proceeded to explicate:

"The writ of habeas corpus cum causa made its appearance in the early years of the fourteenth century. It not merely commanded the Sheriff to "have the body" of the person therein mentioned like its predecessor but added the words "with the cause of the arrest and detention". The person who had the custody of a prisoner was required by this writ to produce him before the Court together with the ground for the detention. The writ thus became a means of testing the legality of the detention and in this form it may be regarded as the immediate ancestor of the modern writ of habeas corpus. The writ of habeas corpus cum causa was utilised by

2 [1923] AC 603 : [1923] ALL E.R. Rep. 442 (HL)

3 AIR 1959 SC 843

4 [1942] AC 284 : [1941] 3 All ER 388 (HL)

5 (1973) 2 SCC 674

the common law courts during the fifteenth century as an accompaniment of the writs of certiorari and privilege to assert their jurisdiction against the local and franchise courts."

25. In *Ware v. Sanders*[6], a reference was made to the Law of Habeas Corpus by James A Scott and Charles C. Roe of the Chicago Bar (T.H. Flood & Company, Publishers, Chicago, Illinois, 1923) where the authors have dealt with the aspect of Habeas Corpus. It reads as under:

" A writ of habeas corpus is a writ of right of very ancient origin, and the preservation of its benefit is a matter of the highest importance to the people, and the regulations provided for its employment against an alleged unlawful restraint are not to be construed or applied with over technical nicety, and when ambiguous or doubtful, should be interpreted liberally to promote the effectiveness of the proceeding."

(See Ummu Sabeena v. State of Kerala and Others[7]*)*

26. In *Ummu Sabeena,* the Court further ruled that the principle of habeas corpus has been incorporated in our constitutional law and in a democratic republic like India where judges function under a written Constitution and which has a chapter of fundamental rights to protect individual liberty, the judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India; and the same exercise of power can be done in the most effective manner by issuing a writ of habeas corpus.

27. Thus, the pivotal purpose of the said writ is to see that no one is deprived of his/her liberty without sanction of law. It is the primary duty of the State to see that the said right is not sullied in any manner whatsoever and its sanctity is not affected by any kind of subterfuge. The role of the Court is to see that the detenue is produced before it, find out about his/her independent choice and see to it that the person is released from illegal restraint. The issue will be a different one when the detention is not illegal. What is seminal is to remember that the song of liberty is sung with sincerity and the choice of an individual is appositely respected and conferred its esteemed status as the Constitution guarantees. It is so as the expression of choice is a fundamental right under Articles 19 and 21 of the Constitution, if the said choice does not transgress any valid legal framework. Once that aspect is clear, the enquiry and determination have to come to an end.

28. In the instant case, the High Court, as is noticeable from the impugned verdict, has been erroneously guided by some kind of social phenomenon that was frescoed before it. The writ court has taken exception to the marriage of the respondent No. 9 herein with the appellant. It felt perturbed. As we see, there was nothing to be taken exception to. Initially, Hadiya had declined to go with her father and expressed her desire to stay with the respondent No.7 before the High Court and in the first writ it had so directed. The adamantine attitude of the father, possibly impelled by obsessive parental love, compelled him to knock at the doors of the High Court in another Habeas Corpus petition whereupon the High Court directed the production of Hadiya who appeared on the given date along with the appellant herein whom the High Court calls a stranger. But Hadiya would insist that she had entered into marriage with him. True it is, she had gone with the respondent No.7 before the High Court but that does not mean and can never mean that she, as a major, could not enter into a marital relationship. But, the High Court unwarrantably took exception to the same forgetting that parental love or concern cannot be

6 146 Iowa 233 : 124 NW 1081 (1910)

7 (2011) 10 SCC 781

allowed to fluster the right of choice of an adult in choosing a man to whom she gets married. And, that is where the error has crept in. The High Court should have, after an interaction as regards her choice, directed that she was free to go where she wished to.

29. The High Court further erred by reflecting upon the social radicalization and certain other aspects. In a writ of habeas corpus, especially in the instant case, it was absolutely unnecessary. If there was any criminality in any sphere, it is for the law enforcing agency to do the needful but as long as the detenue has not been booked under law to justify the detention which is under challenge, the obligation of the Court is to exercise the celebrated writ that breathes life into our constitutional guarantee of freedom. The approach of the High Court on the said score is wholly fallacious.

30. The High Court has been swayed away by the strategy, as it thought, adopted by the respondent No.7 before it in connivance with the present appellant and others to move Hadiya out of the country. That is not within the ambit of the writ of Habeas Corpus. The future activity, if any, is required to be governed and controlled by the State in accordance with law. The apprehension was not within the arena of jurisdiction regard being had to the lis before it.

31. Another aspect which calls for invalidating the order of the High Court is the situation in which it has invoked the parens patriae doctrine. Parens Patriae in Latin means "parent of the nation". In law, it refers to the power of the State to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection. "*The parens patriae jurisdiction is sometimes spoken of as 'supervisory'*"[8] .

32. The doctrine of Parens Patriae has its origin in the United Kingdom in the 13th century. It implies that the King as the guardian of the nation is under obligation to look after the interest of those who are unable to look after themselves. *Lindley L.J. in Thomasset v. Thomasset*[9] pointed out that in the exercise of the Parens Patriae jurisdiction, "the rights of fathers and legal guardians were always respected, but controlled to an extent unknown at common law by considering the real welfare." The duty of the King in feudal times to act as Parens Patriae has been taken over in modern times by the State.

33. Black's Law Dictionary defines 'Parens Patriae' as:

> ***"1.*** *The State regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.*
>
> ***2.*** *A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, especially on behalf of someone who is under a legal disability to prosecute the suit. The State ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit."*

34. In Charan Lal Sahu v. Union of India[10], the Constitution Bench, while delving upon the concept of parens patriae, stated:

> ***"35.*** *…In the "Words and Phrases" Permanent Edition,Vol. 33 at page 99, it is stated that parens patriae is the inherent power and authority of a legislature to provide protection to the person and property of persons non sui juris, such as minor, insane,*

8 P.W. Yong, C Croft and ML Smit, On Equity

9 1894] P 295

10 (1990) 1 SCC 613

and incompetent persons, but the words parens patriae meaning thereby 'the father of the country', were applied originally to the King and are used to designate the State referring to its sovereign power of guardinaship over persons under disability. (emphasis supplied)

Parens patriae jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term parens patriae differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability. Conceptually, the parens patriae theory is the obligation of the State to protect and takes into custody the rights and the privileges of its citizens for dischargings its obligations. Our Constitution makes it imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and where the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the rights of the citizens. …"

35. In Anuj Garg and Others v. Hotel Association of India and others[11], a twoJudge Bench, while dealing with the constitutional validity of Section 30 of the Punjab Excise Act, 1914 prohibiting employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or intoxicating drug is consumed by the public, opined thus in the context of the parens patriae power of the State:

"29. *One important justification to Section 30 of the Act is parens patriae power of State. It is a considered fact that use of parens patriae power is not entirely beyond the pale of judicial scrutiny. 30. Parens patriae power has only been able to gain definitive legalist orientation as it shifted its underpinning from being merely moralist to a more objective grounding i.e. utility. The subjectmatter of the parens patriae power can be adjudged on two counts:*

(i) in terms of its necessity, and

(ii) assessment of any tradeoff or adverse impact, if any.

This inquiry gives the doctrine an objective orientation and therefore prevents it from falling foul of due process challenge. (See City of Cleburne v. Cleburne Living Center[12])"

36. Analysing further, the Court ruled that the parens patriae power is subject to constitutional challenge on the ground of right to privacy also. It took note of the fact that young men and women know what would be the best offer for them in the service sector and in the age of internet, they would know all pros and cons of a profession. The Court proceeded to state:

"31. *… It is their life; subject to constitutional, statutory and social interdicts—a citizen of India should be allowed to live her life on her own terms."*

37. Emphasizing on the right of selfdetermination, the Court held:

"34. *The fundamental tension between autonomy and security is difficult to resolve. It is also a tricky jurisprudential issue. Right to selfdetermination is an important offshoot*

11 (2008) 3 SCC 1

12 473 US 432, 439-41: 105 S Ct 3249 : 87 L Ed 2d 313 (1985)

of gender justice discourse. At the same time, security and protection to carry out such choice or option specifically, and state of violencefree being generally is another tenet of the same movement. In fact, the latter is apparently a more basic value in comparison to right to options in the feminist matrix."

38. In *Aruna Ramachandra Shanbaug v. Union of India*[13], the Court, after dealing with the decision in State of Kerala v. N.M. Thomas[14] wherein it has been stated by Mathew, J. that

"the Court also is 'State' within the meaning of Article 12 (of the Constitution) ...", opined:

"130. *In our opinion, in the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as parens patriae, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight."*

39. Constitutional Courts in this country exercise parens patriae jurisdiction in matters of child custody treating the welfare of the child as the paramount concern. There are situations when the Court can invoke the parens patriae principle and the same is required to be invoked only in exceptional situations. We may like to give some examples. For example, where a person is mentally ill and is produced before the court in a writ of habeas corpus, the court may invoke the aforesaid doctrine. On certain other occasions, when a girl who is not a major has eloped with a person and she is produced at the behest of habeas corpus filed by her parents and she expresses fear of life in the custody of her parents, the court may exercise the jurisdiction to send her to an appropriate home meant to give shelter to women where her interest can be best taken care of till she becomes a major.

40. In *Heller v. Doe*[15], Justice Kennedy, speaking for the U.S. Supreme Court, observed:

"The State has a legitimate interest under its Parens Patriae powers in providing care to its citizens who are unable to care for themselves."

41. The Supreme Court of Canada in *E. (Mrs.) v. Eve*[16] observed thus with regard to the doctrine of Parens Patriae:

"The Parens Patriae jurisdiction for the care of the mentally incompetent is vested in the provincial superior courts. Its exercise is founded on necessity. The need to act for the protection of those who cannot care for themselves. The jurisdiction is broad. Its scope cannot be defined. It applies to many and varied situations, and a court can act not only if injury has occurred but also if it is apprehended. The jurisdiction is carefully guarded and the courts will not assume that it has been removed by legislation.

While the scope of the parens partiae jurisdiction is unlimited, the jurisdiction must nonetheless be exercised in accordance with its underlying principle. The discretion given under this jurisdiction is to be exercised for the benefit of the person in need of protection and not for the benefit of others. It must at all times be exercised with great caution, a caution that must increase with the seriousness of the matter. This is particularly so in cases where a court might

13 (2011) 4 SCC 454

14 (1976) 2 SCC 310

15 509 US 312 (1993)

16 [1986] 2 SCR 388

be tempted to act because failure to act would risk imposing an obviously heavy burden on another person."

42. The High Court of Australia in *Secretary, Department of Health and Community Service v. J.W.B. and S.M.B.*[17], speaking through Mason C.J., Dawson, Toohey and Gaudron JJ., has made the following observations with regard to the doctrine:

"71. No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care and control of infants by parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control. As already explained, the Parens Patriae jurisdiction springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind."

43. Deane J. in the same case stated the following:

"4… Indeed, in a modern context, it is preferable to refer to the traditional Parens Patriae jurisdiction as "the welfare jurisdiction" and to the "first and paramount consideration" which underlies its exercise as "the welfare principle"."

44. Recently, the Supreme Court of New South Wales, in the case of *AC v. OC (a minor)*[18], has observed:

"36. *That jurisdiction, protective of those who are not able to take care of themselves, embraces (via different historical routes) minors, the mentally ill and those who, though not mentally ill, are unable to manage their own affairs: Re Eve [1986] 2 SCR 388 at 407417; Court of Australia in Secretary, Department of Health and Community Services v. JWB and SMB (Marion's Case (1992) 175 CLR 218 at 258; PB v. BB [2013] NSWSC 1223 at [7][8], [40][42], [57][58] and [64][65].*

37. *A key concept in the exercise of that jurisdiction is that it must be exercised, both in what is done and what is left undone, for the benefit, and in the best interest, of the person (such as a minor) in need of protection."*

45. Thus, the Constitutional Courts may also act as Parens Patriae so as to meet the ends of justice. But the said exercise of power is not without limitation. The courts cannot in every and any case invoke the Parens Patriae doctrine. The said doctrine has to be invoked only in exceptional cases where the parties before it are either mentally incompetent or have not come of age and it is proved to the satisfaction of the court that the said parties have either no parent/legal guardian or have an abusive or negligent parent/legal guardian.

46. Mr. Shyam Divan, learned senior counsel for the first respondent, has submitted that the said doctrine has been expanded by the England and Wales Court of Appeal in a case *DL v. A Local Authority and others*[19]. The case was in the context of "elder abuse" wherein a man in his 50s behaved aggressively towards his parents, physically and verbally, controlling access to visitors and seeking to coerce his father into moving into a care home against his wishes. While it was assumed that the elderly parents did have capacity within the meaning of the Mental Capacity

17 [1992] HCA 15 (MARION'S Case) : (1992) 175 CLR 218

18 [2014] NSWSC 53

19 [2012] 3 All ER 1064

Act, 2005 in that neither was subject to "an impairment of, or a disturbance in the functioning of the mind or brain", it was found that the interference with the process of their decision making arose from undue influence and duress inflicted by their son. The Court of Appeal referred to the judgment in *Re: SA (Vulnerable Adult with Capacity : Marriage)*[20] to find that the parens patriae jurisdiction of the High Court existed in relation to "vulnerable if 'capacitous' adults". The cited decision of the England and Wales High Court (Family Division) affirmed the existence of a "great safety net" of the inherent jurisdiction in relation to all vulnerable adults. The term "great safety net" was coined by Lord Donaldson in the Court of Appeal judgment which was later quoted with approval by the House of Lords in In *Re F (Mental Patient: Sterilisation*[21]. In paragraph 79 of *Re: SA (Vulnerable Adult with Capacity : Marriage)*, Justice Munby observes:

> "The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors."

47. In relation to Article 8 of the European Convention on Human Rights (ECHR), Justice Munby observes in paragraph 66:

> *"In terms of the ECHR, the use of the inherent jurisdiction in this context is compatible with Article 8 in just the same manner as the MCA 2005 is compatible. Any interference with the right to respect for an individual's private or family life is justified to protect his health and or to protect his right to enjoy his Article 8 rights as he may choose without the undue influence (or other adverse intervention) of a third party. Any orders made by the court in a particular case must be only those which are necessary and proportionate to the facts of that case, again in like manner to the approach under the MCA 2005."*

48. However, in paragraph 76, he qualifies the above principle with the following comment:

> *"It is, of course, of the essence of humanity that adults are entitled to be eccentric, entitled to be unorthodox, entitled to be obstinate, entitled to be irrational. Many are."*

49. The judgment of *Re: SA (Vulnerable Adult with Capacity : Marriage) (supra)* authored by Justice Munby and cited in the above Court of Appeal case was in the context of the exercise of parens patriae to protect an eighteen year old girl from the risk of an unsuitable arranged marriage on the ground that although the girl did not lack capacity, yet she was undoubtedly a "vulnerable adult".

50. Interestingly, in another case, namely, *A Local Authority v. HB, MB, ML and BL (By their Children's Guardian)*[22], the High Court's inherent jurisdiction was invoked to protect children who were allegedly going to be taken by their mother to Syria where they were at a risk of radicalization.

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20 2005] EWHC 2942 (FAM)

21 [1990] 2 AC 1

22 [2017] EWHC 1437 (Fam)

Although the High Court dismissed the applications on facts for want of evidence, yet it made certain observations regarding extremism and radicalization.

51. Mr. Divan has drawn our attention to the authority in *A Local Authority v. Y*[23] wherein the High Court (Family Division) invoked its inherent jurisdiction to protect a young person, the defendant Y, from radicalization.

52. Relying upon the aforesaid decisions, he emphasized on the concept that when the major is a vulnerable adult, the High Court under Article 226 of the Constitution of India can exercise the parens patriae doctrine which has been exercised in this case. The aforesaid judgments, in our considered opinion, are not applicable to the facts of the present case. We say so without any hesitation as we have interacted with the respondent No. 9 and there is nothing to suggest that she suffers from any kind of mental incapacity or vulnerability. She was absolutely categorical in her submissions and unequivocal in the expression of her choice.

53. It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. It has to be remembered that the realization of a right is more important than the conferment of the right. Such actualization indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition.

54. Nonacceptance of her choice would simply mean creating discomfort to the constitutional right by a Constitutional Court which is meant to be the protector of fundamental rights. Such a situation cannot remotely be conceived. The duty of the Court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centripodal value of liberty should allow an individual to write his/her script. The individual signature is the insignia of the concept.

55. In the case at hand, the father in his own stand and perception may feel that there has been enormous transgression of his right to protect the interest of his daughter but his view point or position cannot be allowed to curtail the fundamental rights of his daughter who, out of her own volition, married the appellant. Therefore, the High Court has completely erred by taking upon itself the burden of annulling the marriage between the appellant and the respondent no.9 when both stood embedded to their vow of matrimony.

56. Resultantly, we allow the appeal and set aside the impugned order. However, as stated in the order dated 08.03.2018, the investigation by the NIA in respect of any matter of criminality may continue in accordance with law. The investigation should not encroach upon their marital status.

23 [2017] EWHC 968 (Fam)

Per **Hon'ble Dr. Justice D Y Chandrachud :—**

1 While re-affirming the conclusions set out in the operative order, I agree with the erudite judgment of the learned Chief Justice. I have added my own thoughts on the judicial parchment to express my anguish with the grievous miscarriage of justice which took place in the present case and to formulate principles in the expectation that such an injustice shall not again be visited either on Hadiya or any other citizen. The High Court of Kerala has committed an error of jurisdiction. But what to my mind, is disconcerting, is the manner in which the liberty and dignity of a citizen have been subjected to judicial affront. The months which Hadiya lost, placed in the custody of her father and against her will cannot be brought back. The reason for this concurring judgment is that it is the duty of this Court, in the exercise of its constitutional functions to formulate principles in order to ensure that the valued rights of citizens are not subjugated at the altar of a paternalistic social structure.

2 Asokan, the father of Akhila alias Hadiya moved a habeas corpus petition before the High Court of Kerala. His apprehension was that his daughter was likely to be transported out of the country. The Kerala High Court was informed during the course of the hearing that she had married Shafin Jahan. The High Court allowed the petition for habeas corpus and directed that Hadiya shall be escorted from a hostel in which she resided in Ernakulam to the house of her father holding that:

> *"A girl aged 24 years is weak and vulnerable, capable of being exploited in many ways. This Court exercising parens patriae jurisdiction is concerned with the welfare of a girl of her age. The duty cast on this Court to ensure the safety of at least the girls who are brought before it can be discharged only by ensuring that Ms. Akhila is in safe hands."*

3 With these directions, the Division Bench of the Kerala High Court declared that the marriage between Hadiya and Shafin Jahan is null and void and ordered "a comprehensive investigation" by the police. Hadiya continued to remain, against her will, in compulsive confinement at the home of her father in pursuance of the directions of the Kerala High Court. On 27 November 2017, this Court interacted with Hadiya and noted that she desires to pursue and complete her studies as a student of Homeopathy at a college where she was a student, in Salem. Accepting her request, this Court directed the authorities of the State to permit her to travel to Salem in order to enable her to pursue her studies.

4 The appeal filed by Shafin Jahan has been heard finally. Hadiya is a party to these proceedings.

5 This Bench of three judges pronounced the operative part of its order on 8 March 2018 and allowed the appeal by setting aside the judgment of the High Court annulling the marriage between Shafin Jahan and Hadiya. The Court has underscored that Hadiya is at liberty to pursue her endeavours in accordance with her desires.

6 Hadiya is a major. Twenty four years old, she is pursuing a course of studies leading up to a degree in Homoeopathic medicine and surgery at a college in Salem in Tamil Nadu. She was born to parents from the Ezhava Community. In January 2016, Asokan instituted a habeas corpus petition, stating that Hadiya was missing. During the course of the proceedings, Hadiya appeared before the Kerala High Court and asserted that she had accepted Islam as a faith of choice. From 7 January 2016, she resided at the establishment of Sathyasarani Education Charitable Trust at Malappuram. On 19 January 2016, the Kerala High Court categorically observed that Hadiya

was not under illegal confinement after interacting with her and permitted her to reside at the Sathyasarani Trust premises. Nearly seven months later, Asokan filed another petition in the nature of habeas corpus alleging that Hadiya had been subjected to forced conversion and was likely to be transported out of India.

7 During the course of the proceedings, the High Court interacted with Hadiya. She appeared in the proceedings represented by an advocate. Hadiya, as the High Court records, declined to accompany her parents and expressed a desire to continue to reside at Sathyasarani. The High Court initially issued a direction that she should be "accommodated in a ladies' hostel at the expense of her father". On 27 September 2016, Hadiya made a serious grievance of being in the custody of the court for thirty five days without being able to interact with anyone. She stated that she had no passport and the allegation that she was likely to go to Syria was incorrect. Based on her request, the High Court directed her to reside at the Sathyasarani establishment. The High Court heard the case on 24 October 2016, 14 November 2016 and 19 December 2016. On 21 December 2016, the High Court was informed that Hadiya had entered into a marriage on 19 December 2016. The High Court recorded its "absolute dissatisfaction at the manner in which the marriage if at all one has been performed has been conducted". Confronted with the undisputed fact that Hadiya is a major, the High Court still observed:

> *"This Court exercising Parens Patriae jurisdiction has a duty to ensure that young girls like the detenue are not exploited or transported out of the country. Though the learned Senior Counsel has vociferously contended that the detenue is a person who has attained majority, it is necessary to bear in mind the fact that the detenue who is a female in her twenties is at a vulnerable age. As per Indian tradition, the custody of an unmarried daughter is with the parents, until she is properly married. We consider it the duty of this Court to ensure that a person under such a vulnerable state is not exposed to further danger, especially in the circumstances noticed above where even her marriage is stated to have been performed with another person, in accordance with Islamic religious rites. That too, with the connivance of the 7th respondent with whom she was permitted to reside, by this Court."*

Hadiya was under judicial order transported to a hostel at Ernakulam, with a direction that: "she is not provided the facility of possessing or using a mobile phone." Save and except for her parents no one was allowed to meet her. An investigation was ordered into the "education, family background, antecedents and other relevant details" of Shafin Jahan together with others involved in the 'conduct' of the marriage. The High Court continued to monitor the case on 6 January 2017, 31 January 2017, 7 February 2017 and 22 February 2017. Eventually, by its judgment and order dated 24 May 2017, the High Court allowed the petition for habeas corpus and issued the directions noted above.

8 The principal findings which have been recorded by the High Court need to be visited and are summarised below:

(i) This was "not a case of a girl falling in love with a boy of a different religion and wanting to get married to him" but an "arranged marriage" where Hadiya had no previous acquaintance with Shafin Jahan;

(ii) Hadiya met Shafin Jahan on an online portal called "Way to Nikah";

(iii) During the course of the proceedings, Hadiya had stated before the court that she desired to complete her studies as a student of Homeopathy and "nobody had a case at that time that she wanted to get married";

(iv) Though on 19 December 2016, the High Court adjourned the hearing to 21 December 2016 to enable her to proceed to her college, the marriage took place on the same day;

(v) The marriage was "only a make-believe intended to take the detenue out of reach of the hands of this court";

(vi) The conduct of the parties in conducting the marriage without informing the court was unacceptable;

(vii) There is no document evidencing the conversion of Hadiya to Islam; the antecedents of Shafin Jahan and his Facebook posts show a radical inclination; and

(viii) No prudent parent would decide to get his daughter married to a person accused in a criminal case. The High Court concluded that the marriage "is only a sham and is of no consequence", a charade to force the hands of the court.

9 During the course of the present proceedings, this Court by its order dated 30 October 2017 directed the First respondent to ensure the presence of his daughter on 27 November 2017. On 27 November 2017, Hadiya stated before this Court, in the course of the hearing, that she intends to pursue further studies towards the BHMS degree course at Salem, where she was admitted. Directions were issued by the Court to ensure that Hadiya can pursue her course of studies without obstruction. We clarified that while she could stay in the hostel of the college as she desired, she would be "treated like any other student".

10 Hadiya has filed an affidavit expressly affirming her conversion to Islam and her marriage to Shafin Jahan.

11 There are two serious concerns which emerge from the judgment of the Kerala High Court. The first is that the High Court transgressed the limits of its jurisdiction in issuing a declaration annulling the marriage of Shafin Jahan and Hadiya in the course of the hearing of a habeas corpus petition.

12 Undoubtedly, the powers of a constitutional court are wide, to enable it to reach out to injustice. Mr Shyam Divan, learned senior counsel appearing on behalf of First respondent emphasised the plenitude of the inherent powers of the High Court. The width of the domain which is entrusted to the High Court as a constitutional court cannot be disputed. Halsbury's Laws of England postulates:

> *"In the ordinary way the Supreme Court, as a superior court of record, exercise the full plenitude of judicial power in all matters concerning the general administration of justice within its territorial limits, and enjoys unrestricted and unlimited powers in all matters of substantive law, both civil and criminal, except insofar as that has been taken away inunequivocal terms by statutory enactment. The term "inherent jurisdiction" is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rule of court. The jurisdiction of the court which is comprised within*

the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law."

Dealing with the ambit of the powers under Article 226, Gajendragadkar, CJ in *State of Orissa v Ram Chandra Dev and Mohan Prasad Singh Deo*[24] observed thus:

"Under Article 226 of the Constitution, the jurisdiction of the High Court is undoubtedly very wide. Appropriate writs can be issued by the High Court under the said Article even for purposes other than the enforcement of the fundamental rights and in that sense, a party who invokes the special jurisdiction of the High Court under Article 226 is not confined to case of illegal invasion of this fundamental right alone. But though the jurisdiction of the High Court under Article 226 is wide in that sense, the concluding words of that Article clearly indicate that before a writ or an appropriate order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or threatened. The existence of a right is thus the foundation of a petition under Article 226."

While dealing with the powers and privileges of the state legislatures, in *Keshav Singh*[25], a Bench of seven learned judges held thus:

"136…in the case of a superior Court of Record, it is for the court to consider whether any matter falls within its jurisdiction or not. Unlike a Court of limited jurisdiction, the superior Court is entitled to determine for itself questions about its own jurisdiction. "Prima facie", says Halsbury, "no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court [Halsbury's Law of England, Vol. 9, p. 349] ".

The High Court is vested with an extra-ordinary jurisdiction in order to meet unprecedented situations (*T K Rangarajan v Government of T.N.*[26]). Several decisions have noted the inherent and plenary powers of the High Court. Their purpose is to advance substantial justice. (i) *Roshan Deen v Preeti Lal*[27]; (ii) *Dwarka Nath v ITO, Special Circle D-ward, Kanpur*[28]; (iii) *Naresh Shridhar Nirajkar v State of Maharashtra*[29]; and (iv) *M V Elisabeth v Harwan Investment and Trading (P) Ltd.*[30]

13 These principles which emerge from the precedent are well-settled. Equally the exercise of all powers by a constitutional court must ensure justice under and in accordance with law.

14 The principles which underlie the exercise of the jurisdiction of a court in a habeas corpus petition have been reiterated in several decisions of the Court. In *Gian Devi v Superintendent, Nari Niketan, Delhi*[31], a three-judge Bench observed that where an individual is over eighteen years of age, no fetters could be placed on her choice on where to reside or about the person with whom she could stay:

24 AIR (1964) SC 685

25 (1965) 1 SCR 413

26 (2003) 6 SCC 581

27 (2002) 1 SCC 100

28 (1965) 3 SCR 536

29 (1966) 3 SCR 744

30 1993 Suppl. (2) SCC 433

31 (1976) 3 SCC 234

"…Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age. As the petitioner is sui juris no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter."

The ambit of a habeas corpus petition is to trace an individual who is stated to be missing. Once the individual appears before the court and asserts that as a major, she or he is not under illegal confinement, which the court finds to be a free expression of will, that would conclude the exercise of the jurisdiction. In *Girish v Radhamony K*[32] a two judge Bench of this Court observed thus:

"3…In a habeas corpus petition, all that is required is to find out and produce in court the person who is stated to be missing. Once the person appeared and she stated that she had gone of her own free will, the High Court had no further jurisdiction to pass the impugned order in exercise of its writ jurisdiction under Article 226 of the Constitution."

In *Lata Singh v State of U P*[33], Bench of two judges took judicial notice of the harassment, threat and violence meted out to young women and men who marry outside their caste or faith. The court observed that our society is emerging through a crucial transformational period and the court cannot remain silent upon such matters of grave concern. In the view of the court:

"17…This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken againstsuch persons as provided by law."

Reiterating these principles in *Bhagwan Dass v State (NCT OF DELHI)*[34], this Court adverted to the social evil of honour killings as being but a reflection of a feudal mindset which is a slur on the nation.

In a more recent decision of a three judge Bench in *Soni Gerry v Gerry Douglas*[35], this Court dealt with a case where the daughter of the appellant and respondent, who was a major had expressed a desire to reside in Kuwait, where she was pursuing her education, with her father. This Court observed thus:

"9 *…She has, without any hesitation, clearly stated that she intends to go back to Kuwait to pursue her career. In such a situation, we are of the considered opinion that as a major, she is entitled to exercise her choice and freedom and the Court cannot get into the*

32 (2009) 16 SCC 360

33 (2006) 5 SCC 475

34 (2011) 6 SCC 396

35 (2018) 2 SCC 197

aspect whether she has been forced by the father or not. There may be ample reasons on her behalf to go back to her father in Kuwait, but we are not concerned with her reasons. What she has stated before the Court, that alone matters and that is the heart of the reasoning for this Court, which keeps all controversies at bay.

10. *It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/He is entitled to make her/his choice. The courts cannot, as long as the choice remains, assume the role of parens patriae. The daughter is entitled to enjoy her freedom as the law permits and the court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father. We say so without anyreservation.*"

These principles emerge from a succession of judicial decisions. Fundamental to them is the judgment of a Constitution bench of this Court in *Kanu Sanyal v District Magistrate, Darjeeling*[36].

15 The High Court was seized of the grievance of Asokan that his daughter was under illegal confinement and was likely to be transported out of the country. In the course of the hearing of an earlier petition for habeas corpus, the High Court by its order dated 19 January 2016 expressly noticed that Hadiya was not willing to return to her parental home. Taking note of the desire of Hadiya to reside at Sathyasarani, the High Court observed that "the alleged detenue needs to be given liberty to take her own decision with respect to her future life."

With the passing of that order the writ petition was withdrawn on 25 January 2016. Yet, again, when a second petition was filed, it was evident before the High Court that Hadiya had no desire to stay with her parents. She is a major. The Division Bench on this occasion paid scant regard to the earlier outcome and to the decision of a coordinate Bench. The High Court inexplicably sought to deviate from the course adopted in the earlier proceeding.

16 The schism between Hadiya and her father may be unfortunate. But it was no part of the jurisdiction of the High Court to decide what it considered to be a 'just' way of life or 'correct' course of living for Hadiya. She has absolute autonomy over her person. Hadiya appeared before the High Court and stated that she was not under illegal confinement. There was no warrant for the High Court to proceed further in the exercise of its jurisdiction under Article 226. The purpose of the habeas corpus petition ended. It had to be closed as the earlier Bench had done. The High Court has entered into a domain which is alien to its jurisdiction in a habeas corpus petition. The High Court did not take kindly to the conduct of Hadiya, noting that when it had adjourned the proceedings to issue directions to enable her to pursue her studies, it was at that stage that she appeared with Shafin Jahan only to inform the court of their marriage. How Hadiya chooses to lead her life is entirely a matter of her choice. The High Court's view of her lack of candour with the court has no bearing on the legality of her marriage or her right to decide for herself, whom she desires to live with or marry.

17 The exercise of the jurisdiction to declare the marriage null and void, while entertaining a petition for habeas corpus, is plainly in excess of judicial power. The High Court has transgressed the limits on its jurisdiction in a habeas corpus petition. In the process, there has been a serious transgression of constitutional rights. That is the second facet to which we now turn.

36 (1973) 2 SCC 674

18 Hadiya and Shafin Jahan are adults. Under Muslim law, marriage or Nikah is a contract. Muslim law recognises the right of adults to marry by their own free will. The conditions for a valid Muslim marriage are:

(i) Both the individuals must profess Islam;
(ii) Both should be of the age of puberty;
(iii) There has to be an offer and acceptance and two witnesses must be present;
(iv) Dower and Mehar; and
(v) Absence of a prohibited degree of relationship.

19 A marriage can be dissolved at the behest of parties to it, by a competent court of law. Marital status is conferred through legislation or, as the case may be, custom. Deprivation of marital status is a matter of serious import and must be strictly in accordance with law. The High Court in the exercise of its jurisdiction under Article 226 ought not to have embarked on the course of annulling the marriage. The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one's personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith. The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme. The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground. Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution. In deciding whether Shafin Jahan is a fit person for Hadiya to marry, the High Court has entered into prohibited terrain. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognising them. Indeed, the Constitution protects personal liberty from disapproving audiences.

20 Article 16 of the Universal Declaration of Human Rights underscores the fundamental importance of marriage as an incident of human liberty:

"Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

21 The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guaranteesas a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as

for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners.

22 In Justice *K S Puttaswamy v Union of India*[37], this Court in a decision of nine judges held that the ability to make decisions on matters close to one's life is an inviolable aspect of the human personality:

> *"The autonomy of the individual is the ability to make decisions on vital matters of concern to life… The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination… The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual."*

A Constitution Bench of this Court, in Common Cause (A Regd. Society) v Union of India[38], held:

> *"Our autonomy as persons is founded on the ability to decide: on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to believe or not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives."*

The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage.

23 The High Court, in the present case, has treaded on an area which must be out of bounds for a constitutional court. The views of the High Court have encroached into a private space reserved for women and men in which neither law nor the judges can intrude. The High Court was of the view that at twenty four, Hadiya "is weak and vulnerable, capable of being exploited in many ways". The High Court has lost sight of the fact that she is a major, capable of taking her own decisions and is entitled to the right recognised by the Constitution to lead her life exactly as she pleases. The concern of this Court in intervening in this matter is as much about the miscarriage of justice that has resulted in the High Court as much as about the paternalism which underlies the approach to constitutional interpretation reflected in the judgment in appeal. The superior courts, when they exercise their jurisdiction parens patriae do so in the case of persons who are incapable of asserting a free will such as minors or persons of unsound mind. The exercise of that jurisdiction should not transgress into the area of determining the suitability of partners to a marital tie. That decision rests exclusively with the individuals themselves. Neither the state nor society can intrude into that domain. The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intimacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of

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38 Writ Petition(Civil) No. 215 of 2005

the state. Courts as upholders of constitutional freedoms must safeguard these freedoms. The cohesion and stability of our society depend on our syncretic culture. The Constitution protects it. Courts are duty bound not to swerve from the path of upholding our pluralism and diversity as a nation.

24 Interference by the State in such matters has a seriously chilling effect on the exercise of freedoms. Others are dissuaded to exercise their liberties for fear of the reprisals which may result upon the free exercise of choice. The chilling effect on others has a pernicious tendency to prevent them from asserting their liberty. Public spectacles involving a harsh exercise of State power prevent the exercise of freedom, by others in the same milieu. Nothing can be as destructive of freedom and liberty. Fear silences freedom.

25 We have not been impressed with the submission of Mr Shyam Divan, learned senior counsel that it was necessary for the High Court to nullify, what he describes as a fraud on the Court, as an incident of dealing with conduct obstructing the administration of the justice. Whether or not Hadiya chose to marry Shafin Jahan was irrelevant to the outcome of the habeas corpus petition. Even if she were not to be married to him, all that she was required to clarify was whether she was in illegal confinement. If she was not, and desired to pursue her own endeavours, that was the end of the matter in a habeas corpus petition. The fact that she decided to get married during the pendency of the proceedings had no bearing on the outcome of the habeas corpus petition. Constitutionally it could have no bearing on the outcome.

26 During the course of the proceedings, this Court by its interim order had allowed the National Investigation Agency to assist the Court. Subsequently, NIA was permitted to carry out an investigation. We clarify that NIA may exercise its authority in accordance with the law within the bounds of the authority conferred upon it by statute. However, the validity of the marriage between Shafin Jahan and Hadiya shall not form the subject matter of the investigation. Moreover, nothing contained in the interim order of this Court will be construed as empowering the investigating agency to interfere in the lives which the young couple seeks to lead as law abiding citizens.

27 The appeal stands allowed in terms of our order dated 8 March 2018.

The judgment of the High Court is set aside.

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SNEHA PARIKH VERSUS MANIT KUMAR

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Dipak Misra, CJI, Hon'ble Mr. Justice A.M. Khanwilkar and Hon'ble Dr. Justice D.Y. Chandrachud**

Sneha Parikh ...Petitioner
Versus
Manit Kumar ...Respondent

Transfer Petition (Civil) No. 373/2017

Decided on : **16th January, 2018**

In the present case, the Supreme Court directed the parties to appear before the Supreme Court Mediation Centre. The parties arrived at a settlement. In the course of hearing, the counsel for both the parties submitted that the parties have been living separately for more than two years and there exists no situation for reconciliation, hence, the Court may grant divorce and quash the FIR lodged by the petitioner-wife at Police Station Samta Nagar, Mumbai, for the offences punishable under Section 498-A, 406 and 506 Part II read with Section 34 of the Indian Penal Code, 1860.

As per the settlement, the amount of Rs. 18,00,000 (Eighteen Lakhs) was agreed as permanent alimony out of which Rs. 6,00,000 (Six Lakhs) was already paid to the petitioner-wife and the rest of the 12,00,000 (Twelve Lakhs) was paid to the wife on the date of hearing.

Therefore, the court invoking its power under Article 142 of the Constitution, with regard to the facts of the case and fulfillment of the terms of the settlement, the Court dissolved the marriage by mutual consent of the parties and also quashed the above-mentioned FIR lodged by the petitioner-wife.

ORDER

This Court vide order dated 9.11.2017 had directed the parties to appear before the Supreme Court Mediation Centre on 16.11.2017. Thereafter, they appeared and the mediation proceedings continued. The learned Mediator has recorded the settlement, which has been arrived at between the parties. The settlement agreement reads as follows:-

SETTLEMENT AGREEMENT This Settlement Agreement is entered into between petitioner-wife Sneha Parikh, w/o Mr. Manit Kumar D/o Shri Mayur Parikh, R/o Flat No. 8-103, Swapna Puri, CHS, Jivala Pada, Thakur Village, Kandivali (E), Mumbai-400101, Maharashtra and Mr. Manit Kumar S/o Shri Mahinder Kumar Kathuria, R/o D/874, New Friends Colony, New Delhi-110025.

The marriage between the petitioner-wife and the respondent-husband was solemnized as per Hindu rites and customs on 10.2.2015 at Delhi. Because of disputes temperamental differences both the parties started residing separately since October, 2015.

The petitioner-Sneha Parikh lodge the TP(C) 373/2017 complaint against the respondent and his family members, where upon a case crime registration no. 386/2016 was registered at P.S. Samta Nagar, Mumbai under Sections 498A, 406, 506(2), 34 IPC.

There is no issue out of this wedlock and the parties are living separately since October, 2015. The respondent-husband has filed a petition H.M.A. No. 1002 of 2016 under Section 13 of the H.M.A. The same is pending before the Principal Judge, Family Courts, Saket District Court, New Delhi and thereafter the petitioner-wife has filed the present Transfer Petition for the transfer of the above divorce petition filed by the respondent-husband.

The Hon'ble Supreme Court vide its order dated 9.11.2017 was pleased to refer the matter to the Supreme Court Mediation centre.

Comprehensive mediation sessions were held with the parties separately and jointly in presence of their respective counsels on today i.e. on 16.11.2017.

Both the parties hereto have arrived at an amicable mutual settlement on the following terms and conditions for dissolution of marriage by mutual consent and for quashing of the Crime Registration No. 386 of 2016 at P.S. Samta Nagar, Mumbai against the respondent and his other family members:

1. That is is agreed between the parties that they shall jointly pray for dissolution of marriage and quashing of Crime Registration No. 386 of 2016 at P.S. Samta Nagar, Mumbai against the respondent and his other family members as well as disposing of all the matter between the parties before the Hon'ble Supreme Court at the time of next date of hearing invoking the inherent power under Article 142 of the Constitution for grant of divorce by mutual consent as both the parties are staying separately for the last more than 2 years and there is no hope for reunion/reconciliation.

2. The respondent-husband has agreed to pay a total sum of Rs.18,00,000/- (Rupees Eighteen Lacs Only) to the petitioner-wife towards full and final settlement of all her claims towards alimony, maintenance (past, present and future), Stridhan, belongings and any other claim TP(C) 373/2017 whatsoever. That out of this an amount of Rs.6,00,000/- (Rupees Six Lakh Only) has already been paid/deposited by the respondent in the Court of Hon'ble Session Judge Dhindoshi District Court, Mumbai in Crime Registration No. 386 of 2016 while hearing on the anticipatory bail application No. 1077 of 2016 titled as Manit Kumar & Ors. vs. State of Maharashtra and the petitioner has already received/withdrawn the said amount of Rs.6,00,000/- (Rupees Six Lakh Only). Hence, the respondent has to pay only the balance amount of Rs.12,00,000/- (Rupees Twelve Lakh Only) to the petitioner. It is agreed that the said amount shall be paid in the following manner:-

(a) That out of the aforesaid amount Rs.6,00,000/- (Rupees Six Lacs Only) will be paid by demand draft/bankers cheque in the name of Sneha Mayur Parikh at the time of recording the statement of the parties in the divorce petition under Section 13(B)(2) of H.M.A.

(b) That balance/final amount of Rs.6,00,000/- (Rupees six lacs only) will be paid by demand draft/bankers cheque in the name of Sneha Mayur Parikh at the time of quashing of FIR/ Crime Registration No. 386 of 2016 at P.S. Samta Nagar, Mumbai against the respondent and his other family members.

3. That it is agreed between the parties that the partnership firm with the name and style of M/s. Visual Echoes in which both the petitioner and respondent (petitioner and respondent 10% share

of petitioner and 90% share of respondent) are partners is non functional since approximately last 2 years. However, the parties have agreed to sign a dissolution deed on or before next date of hearing before this Hon'ble Court. In the event if any liability arises with regard to the aforesaid partnership firm the respondent has agreed to be liable for the same and the petitioner will not be accountable for any such liability.

4. That the parties have further agreed in case where the application, under Article 142 of Constitution of India mentioned above is not accepted by this Hon'ble Court, the parties shall file a joint petition for divorce within two weeks under Section 13(B)(i) and (B)(ii) for grant of decree of divorce by mutual consent before the TP(C) 373/2017 competent Court at Saket, Delhi, as the marriage of the parties was solemnized at Delhi. That the respondent and his other family members will file the quashing petition before the Hon'ble High Court at Mumbai for quashing of Crime Registration No. 386 of 2016 at P.S. Samta Nagar, Mumbai against the respondent and his other family members within 4 weeks from the date of divorce. The petitioner has agreed to cooperate in quashing of the aforesaid FIR/Crime Registration No. 386 of 2016.

5. That in case the Hon'ble Supreme Court is pleased to allow the application filed under Article 142 of Constitution of India and grant divorce and quash the FIR, then the respondent-husband shall pay the entire balance amount of Rs.12,00,000/- (Rupees Twelve Lakh Only) to the petitioner-wife before this Hon'ble Court during the course of hearing.

6. That in case there is any other case/complaint pending before any Court/Authority filed by any of the parties involved in any of the case filed against each other or their family members apart from cases detailed in the present agreement with regard to this matrimonial dispute, shall be withdrawn by the respective parties within one month from the signing of this agreement.

7. That the petitioner and the respondent have agreed that none of them would initiate any other legal action or complaint against each other or against the family members of each other with regard to this matrimonial alliance.

8. Subject to the aforesaid terms, the parties have resolved all the dispute amicably in relation to the marriage and have been left with no claims against each other and/or their respective family members.

9. By signing this Agreement the parties hereto solemnly state and affirm that they have no further claims or demands against each other and all the disputes and differences have been amicably settled by the parties hereto through the process of mediation.

10. The parties undertake to abide by the terms and conditions set out in the above mentioned Agreement, which have been arrived without any coercion, duress or collusion and undertake not to TP(C) 373/2017 raise any dispute whatsoever henceforth.

11. The contents of this settlement-agreement have been explained to all the parties through their respective counsels and the parties have understood the terms of the settlement agreement. We have perused the settlement agreement. In the course of hearing, learned counsel for the parties submitted that this Court may grant divorce and quash the First Information Report (FIR) lodged by the petitioner-wife, forming the subject matter of Crime Registration/FIR No. 386 of 2016 registered at Police Station Samta Nagar, Mumbai, for offences punishable under Section 498A, 406 and 506(2) read with Section 34 of the Indian Penal Code (IPC).

We have also been apprised that the amount of Rs.12,00,000/- (Rupees twelve lacs only) has been paid to the petitioner-wife today.

In view of the aforesaid, we think it appropriate to direct that the marriage between the parties stands dissolved on consent. It is ordered accordingly.

As all other disputes have been put to rest, we think it appropriate to quash the Crime Registration/FIR No. 386 of 2016 registered at Police Station Samta Nagar, Mumbai, for the offences punishable under Section 498A, 406 and 506(2) read with Section 34 of the IPC. We appreciate the efforts made by the learned Mediator to convince the parties and make them arrive at the settlement. TP(C) 373/2017 The transfer petition is accordingly disposed of.

Pending interlocutory applications, if any, also stand disposed of.

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SHAKTI VAHINI VERSUS UNION OF INDIA

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Dipak Misra, CJ, Hon'ble Mr. Justice A.M. Khanwilkar and Hon'ble Dr. Justice D.Y. Chandrachud**

Shakti Vahini ...Petitioner(s)
Versus
Union of India and others ...Respondent(s)

Writ Petition (Civil) No. 231 of 2010

Decided on : **27th March, 2018**

In the present case, a writ petition was filed under Article 32 of the Constitution of India seeking directions to the State Governments and the Central Government to take preventive steps to combat honor crimes.

The Court held that the consent of family or community or clan is not necessary when two consenting adults enter into wedlock. It is right engrafted under Articles 21, 19(1)(a) and 14 of the Constitution to marry a person of one's own choice. Hence, honour killings and like activities performed by Khap Panchayats are illegal and it is the duty of the courts and other authorities to protect the young couples /families from such illegality.

Further, the court distinguished between Honour Crime and Honour Killing. Whereas Honour Crime is genus, Honour killing is species. However, the court emphasized that whatever be the nomenclature of the act, it cannot be allowed because it hits the liberty of choice of an individual relating to love and marriage. Therefore, such acts are illegal. Moreover Preventive, Remedial and Punitive Directions have been issued to the State Governments until a law prohibiting honour killing is passed.

JUDGMENT

Dipak Misra, CJI Assertion of choice is an insegregable facet of liberty and dignity. That is why the French philosopher and thinker, Simone Weil, has said:-

Liberty, taking the word in its concrete sense consists in the ability to choose. When the ability to choose is crushed in the name of class honour and the persons physical frame is treated with absolute indignity, a chilling effect dominates over the brains and bones of the society at large. The question that poignantly emanates for consideration is whether the elders of the family or clan can ever be allowed to proclaim a verdict guided by some notion of passion and eliminate the life of the young who have exercised their choice to get married against the wishes of their elders or contrary to the customary practice of the clan. The answer has to be an emphatic No. It is because the sea of liberty and the ingrained sense of dignity do not countenance such treatment inasmuch as the pattern of behaviour is based on some extra-constitutional perception. Class honour, howsoever perceived, cannot smother the choice of an individual which he or she is entitled to enjoy under our compassionate Constitution. And this right of enjoyment of liberty deserves to be continually and zealously guarded so that it can

thrive with strength and flourish with resplendence. It is also necessary to state here that the old order has to give way to the new. Feudal perception has to melt into oblivion paving the smooth path for liberty. That is how the statement of Joseph J. Ellis becomes relevant.

He has propounded:-

We dont live in a world in which there exists a single definition of honour anymore, and its a fool that hangs on to the traditional standards and hopes that the world will come around him.

2. Presently, to the factual score. The instant Writ Petition has been preferred under Article 32 of the Constitution of India seeking directions to the respondents- State Governments and the Central Government to take preventive steps to combat honour crimes, to submit a National Plan of Action and State Plan of Action to curb crimes of the said nature and further to direct the State Governments to constitute special cells in each district which can be approached by the couples for their safety and well being. That apart, prayers have been made to issue a writ of mandamus to the State Governments to launch prosecutions in each case of honour killing and take appropriate measures so that such honour crimes and embedded evil in the mindset of certain members of the society are dealt with iron hands.

3. The petitioner-organization was authorized for conducting Research Study on Honour Killings in Haryana and Western Uttar Pradesh by order dated 22.12.2009 passed by the National Commission for Women. It is averred that there has been a spate of such honour killings in Haryana, Punjab and Western Uttar Pradesh and the said trend is on the increase and such killings have sent a chilling sense of fear amongst young people who intend to get married but do not enter into wedlock out of fear. The social pressure and the consequent inhuman treatment by the core groups who arrogate to themselves the position of law makers and impose punishments which are extremely cruel instill immense fear that compels the victims to commit suicide or to suffer irreparably at the hands of these groups. The egoism in such groups getting support from similarly driven forces results in their becoming law unto themselves. The violation of human rights and destruction of fundamental rights take place in the name of class honour or group right or perverse individual perception of honour. Such individual or individuals consider their behaviour as justified leaning on the theory of socially sanctioned norms and the legitimacy of their functioning in the guise of ethicality of the community which results in vigilantism. The assembly or the collective defines honour from its own perception and describes the same in such astute cleverness so that its actions, as it asserts, have the normative justification.

4. It is contended that the existence of a woman in such an atmosphere is entirely dependent on the male view of the reputation of the family, the community and the milieu. Sometimes, it is centered on inherited local ethos which is rationally not discernible. The action of a woman or a man in choosing a life partner according to her or his own choice beyond the community norms is regarded as dishonour which, in the ultimate eventuate, innocently invites death at the cruel hands of the community prescription. The reputation of a woman is weighed according to the manner in which she conducts herself, and the family to which the girl or the woman belongs is put to pressure as a consequence of which the members of the family, on certain occasions, become silent spectators to the treatment meted out or sometimes become active participants forming a part of the group either due to determined behaviour or unwanted sense of redemption of family pride.

5. The concept of honour with which we are concerned has many facets. Sometimes, a young man can become the victim of honour killing or receive violent treatment at the hands of the family members of the girl when he has fallen in love or has entered into marriage. The collective behaves like a patriarchal monarch which treats the wives, sisters and daughters subordinate, even servile or self-sacrificing, persons moving in physical frame having no individual autonomy, desire and identity. The concept of status is accentuated by the male members of the community and a sense of masculine dominance becomes the sole governing factor of perceptive honour.

6. It is set forth in the petition that the actions which are found to be linked with honour based crimes are- (i) loss of virginity outside marriage; (ii) pre-marital pregnancy; (iii) infidelity; (iv) having unapproved relationships; (v) refusing an arranged marriage; (vi) asking for divorce; (vii) demanding custody of children after divorce; (viii) leaving the family or marital home without permission; (ix) causing scandal or gossip in the community, and (x) falling victim to rape. Expanding the aforesaid aspect, it is stated that some of the facets relate to inappropriate relationship by a woman some of which lead to refusal of arranged marriages. Certain instances have been cited with regard to honour crimes and how the said crimes reflect the gruesome phenomena of such incidents. Murder in day light and brutal treatment in full public gaze of the members of the society reflect that the victims are treated as inanimate objects totally oblivious of the law of the land and absolutely unconcerned with the feelings of the victims who face such cruelty and eventually succumb to them. The expression of intention by the couples to get married even if they are adults is sans sense to the members who constitute the assembly, for according to them, it is the projected honour that rules supreme and the lives of others become subservient to their desires and decisions. Instances that have been depicted in the Writ Petition pertain to beating of people, shaving of heads and sometimes putting the victims on fire as if they are flies to the wanton boys. Various news items have been referred to express anguish with regard to the abominable and horrifying incidents that the human eyes cannot see and sensitive minds can never countenance.

7. It is contended in the petition that the parallel law enforcement agency consists of leading men of a group having the same lineage or caste which quite often meets to deal with the problems that affect the group. They call themselves Panchayats which have the power to punish for the crimes and direct for social boycott or killing by a mob. Sometimes these Panchayats have the nomenclature of Khap Panchayats which have cultivated and nurtured the feeling amongst themselves that their duty is sanctified and their action of punishing the hapless victims is inviolable. The meetings of the collective and the discussions in the congregation reflect the level of passion at the highest. It is set forth that the extra-constitutional bodies which engage in feudalistic activities have no compunction to commit such crimes which are offences under the Indian Penal Code. It is because their violent acts have not been taken cognizance of by the police and their functioning is not seriously questioned by the administration. The constitutional provisions are shown scant regard and human dignity is treated at the lowest melting point by this collective. Article 21 which provides for protection of life and liberty and guards basic human rights and equality of status has been unceremoniously shown the exit by the actions of these Panchayats or the groups who, without the slightest pangs of conscience, subscribe to honour killing. In this backdrop, prayers have been made as has been stated hereinbefore.

8. A counter affidavit has been filed on the behalf of the Union of India, Ministry of Home Affairs and Ministry of Women and Child Development, respondent Nos. 1, 2 and 3 respectively. It

has been contended that honour killings are treated as murder as defined under Section 300 of the IPC and punishable under Section 302 of the IPC. As the police and public order are State subjects under the Constitution, it is primarily the responsibility of the States to deal with honour killings. It is put forth that the Central Government is engaging various States and Union Territories for considering a proposal to either amend the IPC or enact a separate legislation to address the menace of honour killing and related issues.

9. Pursuant to the order of this Court dated 9th September, 2013, the Union of India has filed another affidavit stating, inter alia, that in order to tackle the issue of 'honour killings', a Bill titled The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill has been recommended by the Law Commission of India vide the 242nd Law Commission Report. The Union of India has further contended that since the matter of the 242nd Law Commission Report falls under List III, i.e., Concurrent list of the Seventh Schedule to the Constitution of India, consultation with the Governments of the States and Union Territories is a sine qua non for taking a policy decision in this regard.

10. In a further affidavit dated 16th January, 2014, the Union of India has contended that as on the said date, 15 States/UTs have sent their positive responses, while responses from other remaining States/UTs were awaited. The Union of India filed an additional affidavit on 25th September, 2014 wherein vide paragraph 4 it is averred that six more States/UTs have sent positive responses in favour of The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill and that reminders have been sent to the remaining States/UTs whose responses are awaited. Further, it has been submitted that after receiving comments from the remaining States/UTs, necessary action shall be taken by the Union of India in the matter. It is the stand of the Union of India that a draft Bill in consultation with all stakeholders will be prepared for the avowed purpose as soon as the comments are received. It has also been set forth that several advisories have been issued to the State Governments from time to time regarding the steps needed to prevent crimes against women including special steps to be taken to curb the menace of honour killing.

11. An affidavit has been filed by the State of Punjab stating, inter alia, that it is not taking adversarial position and it does not intend to be a silent spectator to any form of honour killing and for the said reason, it has issued Memo NX5/151/10-5H4/2732-80 in the Department of Home Affairs and Justice laying down and bringing into force the revised guidelines/policies in order to remove any doubt and to clear any uncertainty and/or threat prevalent amongst the public at large. The policy, as put forth, envisages dealing with protection to newly wedded couples who apprehend danger to life and liberty for at least six weeks after marriage. It also asserted that the State is determined to take pre-emptive, protective and corrective measures and whenever any individual case comes to notice or is highlighted, appropriate action has been taken and shall also be taken by the Government. That apart, the reply affidavit reflects that all the culprits of the crime have been booked under the law and proceeded against.

12. The State of Haryana has filed an affidavit denying the allegations made against the State and further stating that adequate protection has been given to couples by virtue of the order of the High Court and District Courts and sometimes by the police directly coming to know of the situation. It is contended that FIRs have been lodged against persons accused of the crime and the cases are progressing as per law. The stand of the State of Haryana is that an action plan has already been prepared and the Crime Against Women Cells are functioning at every district

headquarter in the State and necessary publicity has already been given and the citizens are aware of those cells.

13. The State of Jharkhand has filed its response stating, inter alia, the measures taken against persons involved in such crimes. Apart from asseverating that honour killing is not common in the State of Jharkhand, it is stated that it shall take appropriate steps to combat such crimes.

14. A counter affidavit has been filed on behalf of NCT of Delhi. The affidavit states that Delhi Police does not maintain separate record for cases under the category of Honour Killing. However, it has been mentioned that by the time the affidavit was filed, 11 cases were registered. It is urged that such cases are handled by the District Police and there is a special cell functioning within Delhi Police meant for serious crimes relating to internal security and such cases can be referred to the said cell and there is no necessity for constitution of a special cell in each police district. Emphasis has been laid that Delhi Police has sensitized the field officers in this regard so that the issues can be handled with necessary sensitivity and sensibility. The Department of Women and Child Development has also made arrangements for rehabilitation of female victims facing threat of honour killing and efforts have been made to sensitize the society against commission of such crimes. A circular dealing with the subject Action to be taken to prevent cases of Honour Killing has been brought on record.

15. The State of Rajasthan, in its reply, had strongly deplored the exercise of unwarranted activities under the garb of khap panchayats. The State of Rajasthan contends that it has issued circulars to the police personnel to keep a check on the activities of the panchayats and further expressed its willingness to abide by any guidelines that may be issued by this Court to ameliorate and curb the evil of honour killing that subsists in our society.

16. The State of Uttar Pradesh has filed two counter affidavits wherein it is stated that it is the primary duty of the States to protect the Fundamental Rights enshrined and guaranteed under the Constitution of India. It is further contended that although there is no specific legislation to regulate and prevent "honour killing", yet effective measures under the present law are being taken by the State to control the same. The said measures are in the nature of directions and guidelines to the law enforcement agencies. Further, the State of Uttar Pradesh has brought on record that there have been no reported cases of "honour killing" or "social ostracizing" in the State for the period from 01.01.2010 till 31.12.2012. Yet, time and again, directions are being given to the police stations to keep a close watch on the activities and functioning of the Khaps. The State of Uttar Pradesh has acceded to comply with any directions which this Court may issue.

17. The State of Bihar has, in its affidavit, acknowledged that honour killing is a heinous crime which violates the fundamental rights of the citizens. Although the State of Bihar has taken the stance that cases of honour killing in the State are almost nil, yet a list of five cases which may assume the character of honour killing have been mentioned in the affidavit. The State has further averred that several reformative steps have been taken for the upliftment and empowerment of women and constant efforts are being made to sensitize people. It has been asserted that the State of Bihar has initiated a scheme to provide National Saving Certificate amounting to Rs. 25,000/- as incentive to any woman performing inter-caste marriage in order to ensure their economic stability.

18. It has been contended by the State of Madhya Pradesh that the State Government and the police are alive to the problem of honour killings and they have created a "Crime Against Women Cell" at the State level headed by the Inspector General of Police to ensure safety of couples and active prosecution in each case of honour killing. The M.P. Government, vide order no. F/21-261/10 dated 27.01.2011, has issued specific instructions to the District Magistrates/Superintendent of Police for taking strict action in cases of honour killing.

19. It is the contention of the State of Himachal Pradesh that there are no Panchayats of the nature of Khap Panchayats operating in the State of Himachal Pradesh and that there have been no cases of honour killing reported in the past 10 years. The State avers that several measures are being taken to combat the social evils prevailing in the society.

20. An application for intervention, on behalf of several Khap Panchayats, filed by Manushi Sanghatan has been allowed. It has been averred by Manushi Sanghatan that, on being requested by the media to voice their concern on the activities of Khap panchayats, the Sanghatan has conducted a survey into the functioning of the Khap Panchayats, but they were unable to find any evidence to hold the Khap Panchayats responsible for honour killings occurring in the country. In this factual background, the Sanghatan contends that the proposed bill, The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill', is a futile exercise in view of the ample existing penal provisions and it is stated that the powers that the said bill aims to stipulate may have the result of giving power to vested interests to harass well meant gatherings of local communities. The intervenor has also challenged the findings of the report of the petitioner on various grounds.

21. The petitioner has filed a rejoinder affidavit wherein it has been highlighted that this Court has taken cognizance of the brutal killings that take place in the name of honour and it is urged that although some States have formed an Action Plan in pursuance of the directions issued by this Court, yet they have failed to effectively implement the same in letter and spirit. In view of this fact, effective guidelines to the police and law enforcement agencies to curb the menace of honour killing need to be formulated and implemented.

22. From the stand taken by the concerned States, it is perceivable that the authorities, while denying the incidences being visible, do not dispute the sporadic happenstance of such occurrences and speak in a singular voice by decrying such acts. It is also clear that some such Panchayats take the positive stance demonstrating their collective effort as to how they cultivate in people the idea of inter-caste marriage and community acceptance. The duty of this Court, in view of the authorities in the field that deal with specific circumstances, is to view the scenario from the prism of pragmatic ground reality as has been projected and to act within the constitutional parameters to protect the liberty and life of citizens. Commitment to the constitutional values requires this Court to be sensitive and act in such a matter and we shall do so within the permissible boundaries and framework because as the guardian of the rights of the citizens, this Court cannot choose the path of silence.

23. Before we engage ourselves in the process what we have stated hereinabove and refer to the earlier decisions of this Court, we think it apt to refer to the 242nd Report submitted by the Law Commission of India, namely, Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework. The relevant extracts of the Report read as follows:-

1.2 At the outset, it may be stated that the words honour killings and honour crimes are being used loosely as convenient expressions to describe the incidents of violence and harassment caused to the young couple intending to marry or having married against the wishes of the community or family members. They are used more as catch phrases and not as apt and accurate expressions.

1.3 The so-called honour killings or honour crimes are not peculiar to our country. It is an evil which haunts many other societies also. The belief that the victim has brought dishonour upon the family or the community is the root cause of such violent crimes. Such violent crimes are directed especially against women. Men also become targets of attack by members of family of a woman with whom they are perceived to have an inappropriate relationship. Changing cultural and economic status of women and the women going against their male dominated culture has been one of the causes of honour crimes. In some western cultures, honour killings often arise from women seeking greater independence and choosing their own way of life. In some cultures, honour killings are considered less serious than other murders because they arise from long standing cultural traditions and are thus deemed appropriate or justifiable. An adulterous behaviour of woman or pre-marital relationship or assertion of right to marry according to their choice, are widely known causes for honour killings in most of the countries. The report of the Special Rapporteur to U.N. 1 of the year 2002 concerning cultural practices in the family that are violent towards women indicated that honour killings had been reported in Jordon, Lebanon, Morocco, Pakistan, United Arab Republic, Turkey, Yemen and other Persian Gulf countries and that they had also taken place in western countries such as France, Germany and U.K. mostly within migrant communities. The report Working towards the elimination of crimes against women committed in the name of honour 2 submitted to the United Nations High Commissioner for Human Rights is quite revealing. Apart from the other countries named above, according to the UN Commission on Human Rights, there are honour killings in the nations of Bangladesh, Brazil, Ecuador, India, Israel, Italy, Morocco, Sweden, Turkey and Uganda. According to Mr. Widney Brown, Advocacy Director for Human Rights Watch, the practice of honour killing goes across cultures and across religions. There are reports that in some communities, many are prepared to condone the killing of someone who have dishonoured their family. The 2009 European Parliamentary Assembly noted the rising incidents of honour crimes with concern. In 2010, Britain saw a 47% rise of honour-related crimes. Data from police agencies in the UK report 2283 cases in 2010 and most of the attacks were conducted in cities that had high immigrant populations. The national legal Courts in some countries viz., Haiti, Jordon, Syria, Morocco and two Latin American countries do not penalize men killing female relatives found committing adultery or the husbands wives in flagrante delicto. A survey by Elen R. Sheelay 3 revealed that 20% of Jordanites interviewed simply believe that Islam condones or even supports killing in the name of family honour which is a myth.

1.4 As far as India is concerned, honour killings are mostly reported from the States of Haryana, Punjab, Rajasthan and U.P. Bhagalpur in Bihar is also one of the known places for honour killings. Even some incidents are reported from Delhi and Tamil Nadu. Marriages with members of other castes or the couple leaving the parental home to live together and marry provoke the harmful acts against the couple and immediate family

members. 1.5 The Commission tried to ascertain the number of such incidents, the accused involved, the specific reasons, etc., so as to have an idea of the general crime scenario in such cases. The Government authorities of the States where incidents often occur have been addressed to furnish the information. The Director (SR) in the Ministry of Home Affairs, by her letter dated 26 May 2010, also requested the State Governments concerned to furnish the necessary information to the Commission. However, there has been no response despite reminder. But, from the newspaper reports, and reports from various other sources, it is clear that the honour crimes occur in those States as a result of people marrying without their familys acceptance and for marrying outside their caste or religion. Marriages between the couple belonging to same Gotra (family name) have also often led to violent reaction from the family members or the community members. The Caste councils or Panchayats popularly known as Khap Panchayats try to adopt the chosen course of moral vigilantism and enforce their diktats by Quoted in Anver Emons Article on Honour Killings assuming to themselves the role of social or community guardians. [underlining is ours]

24. Adverting to the dimensions of the problem and the need for a separate law, the Report states:-

2.3 The pernicious practice of Khap Panchayats and the like taking law into their own hands and pronouncing on the invalidity and impropriety of Sagotra and inter-caste marriages and handing over punishment to the couple and pressurizing the family members to execute their verdict by any means amounts to flagrant violation of rule of law and invasion of personal liberty of the persons affected.

2.4 Sagotra marriages are not prohibited by law, whatever may be the view in olden times. The Hindu Marriage Disabilities Removal Act, 1946 was enacted with a view to dispel any doubts in this regard. The Act expressly declared the validity of marriages between the Hindus belonging to the same gotra or pravara or different sub-divisions of same caste. The Hindu Marriage Act does not prohibit sagotra or inter- caste marriages. And further:-

2.5 The views of village elders or family elders cannot be forced on the willing couple and no one has a right to use force or impose far-reaching sanctions in the name of vindicating community honour or family honour. There are reports that drastic action including wrongful confinement, persistent harassment, mental torture, infliction of or threats of severe bodily harm is resorted to either by close relations or some third parties against the so-called erring couple either on the exhortations of some or all the Panchayatdars or with their connivance. Several instances of murder of one or the other couple have been in the news. Social boycotts and other illegal sanctions affecting the young couple, the families and even a section of local inhabitants are quite often resorted to. All this is done in the name of tradition and honour. The cumulative effect of all such acts have public order dimensions also.

25. The Law Commission had prepared a draft Bill and while adverting to the underlying idea of the provisions of the draft Bill, it has stated:-

2.8 The idea underlying the provisions in the draft Bill is that there must be a threshold bar against congregation or assembly for the purpose of objecting to and condemning the conduct of young persons of marriageable age marrying according to their choice, the ground of objection being that they belong to the same gotra or to different castes or

communities. The Panchayatdars or caste elders have no right to interfere with the life and liberty of such young couples whose marriages are permitted by law and they cannot create a situation whereby such couples are placed in a hostile environment in the village/ locality concerned and exposed to the risk of safety. Such highhanded acts have a tendency to create social tensions and disharmony too. No frame of mind or belief based on social hierarchy can claim immunity from social control and regulation, in so far as such beliefs manifest themselves as agents of enforcement of right and wrong. The very assembly for an unlawful purpose viz. disapproving the marriage which is otherwise within the bounds of law and taking consequential action should be treated as an offence as it has the potential to endanger the lives and liberties of individuals concerned. The object of such an assembly is grounded on disregard for the life and liberty of others and such conduct shall be adequately tackled by penal law. This is without prejudice to the prosecution to be launched under the general penal law for the commission of offences including abetment and conspiracy. 2.9 Given the social milieu and powerful background of caste combines which bring to bear intense pressure on parents and relatives to go to any extent to punish the sinning couples so as to restore the community honour, it has become necessary to deal with this fundamental problem. Any attempt to effectively tackle this socio-cultural phenomenon, rooted in superstition and authoritarianism, must therefore address itself to various factors and dimensions, viz, the nature and magnitude of the problem, the adequacy of existing law, and the wisdom in using penal and other measures of sanction to curb the power and conduct of caste combines. The law as it stands does not act either as a deterrence or as a sobering influence on the caste combinations and assemblies who regard themselves as being outside the pale of law. The socio-cultural outlook of the members of caste councils or Panchayats is such that they have minimal or scant regard for individual liberty and autonomy. [Emphasis added]

26. Highlighting the aspect of autonomy of choices and liberty, the underlying object of the proposed Bill as has been stated by the Law Commission reads as under :-

4.1 The autonomy of every person in matters concerning oneself a free and willing creator of ones own choices and decisions, is now central to all thinking on community order and organization. Needless to emphasize that such autonomy with its manifold dimensions is a constitutionally protected value and is central to an open society and civilized order. Duly secured individual autonomy, exercised on informed understanding of the values integral to ones well being is deeply connected to a free social order. Coercion against individual autonomy will then become least necessary.

4.2 In moments and periods of social transition, the tensions between individual freedom and past social practices become focal points of the communitys ability to contemplate and provide for least hurting or painful solutions. The wisdom or wrongness of certain community perspectives and practices, their intrinsic impact on liberty, autonomy and self-worth, as well as the parents concern over impulsive and unreflective choices all these factors come to the fore-front of consideration.

4.3 The problem, however, is the menacing phenomena of repressive social practices in the name of honor triggering violent reaction from the influential members of community who are blind to individual autonomy.

27. Thus, the Report shows the devastating effect of the crime and the destructive impact on the right of choice of an individual and the control of the collective over the said freedom. The Commission has emphasized on the intense pressure of the powerful community and how they punish the sinning couples according to their socio-cultural perception and community honour and the action taken by them that results in extinction of the rights of individuals which are guaranteed under the Constitution. It has eloquently canvassed about the autonomy of every person in matters concerning oneself and the expression of the right which is integral to the said individual.

28. Be it noted, the draft Bill refers to "Khap Panchayat" to mean any person or group of persons who have gathered, assembled or congregated at any time with the view or intention of condemning any marriage, including a proposed marriage, not prohibited by law, on the basis that such marriage has dishonoured the caste or community tradition or brought disrepute to all or any of the persons forming part of the assembly or the family or the people of the locality concerned.

29. Presently, we shall advert to certain pronouncements of this Court where the Court, while adjudicating the lis of the said nature, has expressed its concern with regard to such social evil which is the manifestation of perverse thought, egotism at its worst and inhuman brutality.

30. In Lata Singh v. State of U.P. and another 4, a two- Judge Bench, while dealing with a writ petition under Article 32 of the Constitution which was filed for issuing a writ of certiorari and/or mandamus for quashing of a trial, (2006) 5 SCC 475 allowed the writ petition preferred by the petitioner whose life along with her husbands life was in constant danger as her brothers were threatening them. The Court observed that there is no bar for inter-caste marriage under the Hindu Marriage Act or any other law and, hence, no offence was committed by the petitioner, her husband or husbands relatives. The Court also expressed dismay that instead of taking action against the petitioners brothers for unlawful and high handed acts, the police proceeded against the petitioners husband and her sisters-in-law. Being aware of the harassment faced and violence against women who marry outside their caste, the Court observed:-

> **17.** This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage.

31. After so stating, the two-Judge Bench directed the administration/police authorities throughout the country to ensure that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is neither harassed by anyone nor subjected to threats or acts of violence, and that anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law. Deliberating further, the Court painfully stated:-

> **18.** We sometimes hear of honour killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal,

feudal-minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.

32. In Arumugam Servai v. State of Tamil Nadu5, the Court referred to the observations made in Lata Singhs case and opined:-

> **12.** We have in recent years heard of Khap Panchayats (known as Katta Panchayats in Tamil Nadu) which often decree or encourage honour killings or other atrocities in an institutionalised way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with (2011) 6 SCC 405 the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. As already stated in Lata Singh case, there is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal-minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal.

33. After so stating, the Court directed the administrative and police officials to take strong measures to prevent such atrocious acts. If such incidents happen, apart from instituting criminal proceedings against those responsible for the atrocities, the State Government was directed to immediately suspend the District Magistrate/Collector and SSP/SPs of the district as well as other officials concerned and charge-sheet them and proceed against them departmentally if they do not

(1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or

(2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them. Be it noted, in the said case, the Court commented on the appellants that they had behaved like uncivilized savages and deserved no mercy.

34. The aforesaid view of the Court was further emphasized in Bhagwan Dass v. State (NCT of Delhi) 6 wherein it has been stated that many people feel that they are dishonoured by the behaviour of the young man/woman who is related to them or belongs to their caste simply because he/she is marrying against their wish or having an affair with someone, and hence they take the law into their own hands and kill or physically assault such person or commit some other atrocities which is wholly illegal. Regard being had to the expression of unhappiness with the behaviour of a daughter or other person, the Court observed that the maximum a person can do is to cut off social relations with her/him, but he cannot take the law into his own hands by committing violence or giving threats of violence.

35. In Re: India Woman says Gang-raped on Orders of Village Court published in Business & Financial News dated 23-1-20147, the Court, after referring to Lata Singh (2011) 6 SCC 396 (2014) 4 SCC 786 (supra), Arumugam Servai (supra) and adverting to the 242nd Report of the Law Commission, opined:-

> **16.** Ultimately, the question which ought to consider and assess by this Court is whether the State police machinery could have possibly prevented the said occurrence. The response

is certainly a yes. The State is duty-bound to protect the fundamental rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage. Such offences are resultant of the States incapacity or inability to protect the fundamental rights of its citizens. And again:-

18. As a long-term measure to curb such crimes, a larger societal change is required via education and awareness. The Government will have to formulate and implement policies in order to uplift the socio-economic condition of women, sensitisation of the police and other parties concerned towards the need for gender equality and it must be done with focus in areas where statistically there is higher percentage of crimes against women.

36. In Vikas Yadav v. State of Uttar Pradesh and others 8 , the two-Judge Bench, while dwelling upon the quantum of sentence in the case where the young man chosen by the sister was murdered by the brother who had received education in good educational institutions, observed that the accused persons had not cultivated the (2016) 9 SCC 541 ability to abandon the deprecable feelings and attitude for centuries. Perhaps, they had harboured the fancy that it is an idea of which time had arrived from time immemorial and ought to stay till eternity. Proceeding further, the Court held:-

75. One may feel My honour is my life but that does not mean sustaining ones honour at the cost of another. Freedom, independence, constitutional identity, individual choice and thought of a woman, be a wife or sister or daughter or mother, cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl. Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so-called brotherly or fatherly honour or class honour by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise. It is a vice, condemnable and deplorable perception of honour, comparable to medieval obsessive assertions.

37. In Asha Ranjan v. State of Bihar and others9, the Court, in a different context, noted:-

61. choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognised in the Constitution under Article 19, and such a right is not expected to succumb to the concept of class honour or group thinking. It is (2017) 4 SCC 397 because the sense of class honour has no legitimacy even if it is practised by the collective under some kind of a notion.

38. In State of U.P. v. Krishna Master and others10, the Court, while setting aside the judgment of acquittal of the High Court, convicted the accused persons with rigorous imprisonment for life and fine of Rs. 25,000/-. It observed that killing of six persons and wiping out of almost the whole family on the flimsy ground of saving of honour of the family would fall within the rarest of rare case evolved by this Court and, therefore, the trial court was perfectly justified in imposing capital punishment on the respondents. However, taking into consideration the fact that the incident had taken place before twenty years, it did not pass the death sentence but imposed the sentence of rigorous imprisonment for life. The said decision reflects the gravity of the crime that occurs due to honour killing.

39. The aforesaid authorities show the distress with which the Court has perceived the honour crimes and also reflects the uneasiness and anxiety to curb such social symptoms. The observations were made and the directions were issued in cases where a crime based on honour was required to be AIR 2010 SC 3071 dealt with. But, the present case, in contradistinction, centres around honour killing and its brutality and the substantive measures to be taken to destroy the said menace. The violation of the constitutional rights is the fulcrum of the issue. The protection of rights is pivotal. Though there has been constant social advancement, yet the problem of honour killing persists in the same way as history had seen in 1750 BC under the Code of Hammurabi. The people involved in such crimes become totally oblivious of the fact that they cannot tread an illegal path, break the law and offer justification with some kind of moral philosophy of their own. They forget that the law of the land requires that the same should be shown implicit obedience and profound obeisance. The human rights of a daughter, brother, sister or son are not mortgaged to the so-called or so-understood honour of the family or clan or the collective. The act of honour killing puts the rule of law in a catastrophic crisis.

40. It is necessary to mention here that honour killing is not the singular type of offence associated with the action taken and verdict pronounced by the Khap Panchayats. It is a grave one but not the lone one. It is a part of honour crime. It has to be clearly understood that honour crime is the genus and honour killing is the species, although a dangerous facet of it. However, it can be stated without any fear of contradiction that any kind of torture or torment or ill-treatment in the name of honour that tantamounts to atrophy of choice of an individual relating to love and marriage by any assembly, whatsoever nomenclature it assumes, is illegal and cannot be allowed a moment of existence.

41. What we have stated hereinabove, to explicate, is that the consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock. Their consent has to be piously given primacy. If there is offence committed by one because of some penal law, that has to be decided as per law which is called determination of criminality. It does not recognize any space for informal institutions for delivery of justice. It is so since a polity governed by Rule of Law only accepts determination of rights and violation thereof by the formal institutions set up for dealing with such situations. It has to be constantly borne in mind that rule of law as a concept is meant to have order in a society. It respects human rights. Therefore, the Khap Panchayat or any Panchayat of any nomenclature cannot create a dent in exercise of the said right.

42. In this regard, we may fruitfully reproduce a passage from Kartar Singh v. State of Punjab 11 wherein C.G. Weeramantry in The Law in Crisis Bridges of Understanding emphasizing the importance of rule of law in achieving social interest has stated:-

The protections the citizens enjoy under the Rule of Law are the quintessence of twenty centuries of human struggle. It is not commonly realised how easily these may be lost. There is no known method of retaining them but eternal vigilance.

There is no known authority to which this duty can be delegated but the community itself. There is no known means of stimulating this vigilance but education of the community towards an enlightened interest in its legal system, its achievements and its problems. Honour killing guillotines individual liberty, freedom of choice and ones own perception of choice. It has to be sublimely borne in mind that when two adults consensually choose each other as life

partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right (1994) 3 SCC 569 needs to be protected and it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy.

43. The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the Constitutional Courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid provisions of law, the life of a person is comparable to the living dead having to endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement. The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realization of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. We may clearly and emphatically state that life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person.

44. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the notion that they are a law unto themselves or they are the ancestors of Caesar or, for that matter, Louis the XIV. The Constitution and the laws of this country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law.

45. It has been argued on behalf of the "Khap Panchayats" that it is a misnomer to call them by such a name. The nomenclature is absolutely irrelevant. What is really significant is that the assembly of certain core groups meet, summon and forcefully ensure the presence of the couple and the family members and then adjudicate and impose punishment. Their further submission is that these panchayats are committed to the spreading of awareness of permissibility of inter-community and inter-caste marriages and they also tell the people at large how "Sapinda" and "Sagotra marriages have no sanction of law. The propositions have been structured with immense craft and advanced with enormous zeal and enthusiasm but the fallacy behind the said proponements is easily decipherable. The argument is founded on the premise that there are certain statutory provisions and certain judgments of this Court which prescribe the prohibitory degrees for marriages and provide certain guidelines for maintaining the sex ratio and not

giving any allowance for female foeticide that is a resultant effect of sex determination which is prohibited under the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex Selection) Act, 1994 (for short PCPNDT Act) (See : Voluntary Health Association of Punjab v. Union of India and others12 and Voluntary Health Association of Punjab v. Union of India and others13).

46. The first argument deserves to be rejected without much discussion. Suffice it to say, the same relates to the recognition of matrimonial status. If it is prohibited in law, law shall take note of it when the courts are approached. Similarly, PCPNDT Act is a complete code. That apart, the concern of this Court in spreading awareness to sustain sex ratio is not to go for sex determination and resultantly female foeticide. It has nothing to do with the institution of marriage.

47. The 'Khap Panchayats' or such assembly should not take the law into their hands and further cannot assume the character of the law implementing agency, for that authority has not been conferred upon them under any law. Law has to be allowed to sustain by the law enforcement agencies. For example, when a crime under IPC is committed, an assembly of people cannot impose the punishment. They have no authority. They are entitled to lodge an FIR or inform the police. They may also facilitate so that the accused is dealt with in accordance with law. But, by putting forth a stand that they are spreading awareness, they really can neither affect others' fundamental rights nor cover up their own illegal acts. It is simply not permissible. In fact, it has to be condemned as an act abhorrent to law and, therefore, it has to stop. Their activities are to be stopped in entirety. There is no other alternative. What is illegal cannot commend recognition or acceptance.

48. Having noted the viciousness of honour crimes and considering the catastrophic effect of such kind of crimes on the society, it is desirable to issue directives to be followed by the law enforcement agencies and also to the various administrative authorities. We are disposed to think so as it is the obligation of the State to have an atmosphere where the citizens are in a position to enjoy their fundamental rights. In this context, a passage from S. Rangarajan v. P. Jagjivan Ram and others14 is worth reproducing:-

> **51.** We are amused yet troubled by the stand taken by the State Government with regard to the film which has received the National Award. We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it? If the film, is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression.
>
> We are absolutely conscious that the aforesaid passage has been stated in respect of a different fundamental right but the said principle applies with more vigour when the life and liberty of individuals is involved. We say so reminding the States of their constitutional obligation to comfort and (1989) 2 SCC 574 nurture the sustenance of fundamental rights of the citizens and not to allow any hostile group to create any kind of trench in them.

49. We may also hold here that an assembly or Panchayat committed to engage in any constructive work that does not offend the fundamental rights of an individual will not stand on the same footing of Khap Phanchayat. Before we proceed to issue directions to meet the challenges of honour crime which includes honour killing, it is necessary to note that as many as 288 cases of honour killing were reported between 2014 and 2016. According to the data of National Crime Records Bureau (NCRB), 28 honour killing cases were reported in 2014, 192 in 2015 and 68 in the year 2016.

50. We may note with profit that honour killings are condemned as a serious human rights violation and are addressed by certain international instruments. The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence addresses this issue. Article 42 reads thus:-

Article 42 Unacceptable justifications for crimes, including crimes committed in the name of so-called honour

1. Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called honour shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.

2. Parties shall take the necessary legislative or other measures to ensure that incitement by any person of a child to commit any of the acts referred to in paragraph 1 shall not diminish the criminal liability of that person for the acts committed.

51. Once the fundamental right is inherent in a person, the intolerant groups who subscribe to the view of superiority class complex or higher clan cannot scuttle the right of a person by leaning on any kind of philosophy, moral or social, or self-proclaimed elevation. Therefore, for the sustenance of the legitimate rights of young couples or anyone associated with them and keeping in view the role of this Court as the guardian and protector of the constitutional rights of the citizens and further to usher in an atmosphere where the fear to get into wedlock because of the threat of the collective is dispelled, it is necessary to issue directives and we do so on the foundation of the principle stated in Lakshmi Kant Pandey v. Union of India15, Vishaka and others v. State of Rajasthan and others 16 and Prakash Singh and others v. Union of India and others17.

52. It is worthy to note that certain legislations have come into existence to do away with social menaces like Sati and Dowry. It is because such legislations are in accord with our Constitution. Similarly, protection of human rights is the elan vital of our Constitution that epitomizes humanness and the said conceptual epitome of humanity completely ostracizes any idea or prohibition or edict that creates a hollowness in the inalienable rights of the citizens who enjoy their rights on the foundation of freedom and on the fulcrum of justice that is fair, equitable and proportionate. There cannot be any assault on human dignity as it has the potentiality to choke the majesty of law. Therefore, we would recommend to the legislature to bring law appositely covering the field of honour killing. In this regard, we may usefully refer to the authority wherein this (1984) 2 SCC 244 (1997) 6 SCC 241 (2006) 8 SCC 1 Court has made such recommendation. In Samrendra Beura v. Union of India and others18, this Court held:-

16. Though such amendments have been made by Parliament under the 1950 Act and the 1957 Act, yet no such amendment has been incorporated in the Air Force Act, 1950. The aforesaid provisions, as we perceive, have been incorporated in both the statutes to avoid hardship to persons convicted by the Court Martial. Similar hardship is suffered by the persons who are sentenced to imprisonment under various provisions of the Act. Keeping in view the aforesaid amendment in the other two enactments and regard being had to the purpose of the amendment and the totality of the circumstances, we think it apt to recommend the Union of India to seriously consider to bring an amendment in the Act so that the hardships faced by the persons convicted by the Court Martial are avoided.

53. Mr. Raju Ramachandran, learned senior counsel being assisted by Mr. Gaurav Agarwal, has filed certain suggestions for issuing guidelines. The Union of India has also given certain suggestions to be taken into account till the legislation is made. To meet the challenges of the agonising effect of honour crime, we think that there has to be preventive, remedial and punitive measures and, accordingly, we state the broad contours and the modalities with liberty to the executive and the police administration of (2013) 14 SCC 672 the concerned States to add further measures to evolve a robust mechanism for the stated purposes. I. Preventive Steps:-

(a) The State Governments should forthwith identify Districts, Sub-Divisions and/or Villages where instances of honour killing or assembly of Khap Panchayats have been reported in the recent past, e.g., in the last five years.

(b) The Secretary, Home Department of the concerned States shall issue directives/advisories to the Superintendent of Police of the concerned Districts for ensuring that the Officer Incharge of the Police Stations of the identified areas are extra cautious if any instance of inter-caste or inter-religious marriage within their jurisdiction comes to their notice.

(c) If information about any proposed gathering of a Khap Panchayat comes to the knowledge of any police officer or any officer of the District Administration, he shall forthwith inform his immediate superior officer and also simultaneously intimate the jurisdictional Deputy Superintendent of Police and Superintendent of Police.

(d) On receiving such information, the Deputy Superintendent of Police (or such senior police officer as identified by the State Governments with respect to the area/district) shall immediately interact with the members of the Khap Panchayat and impress upon them that convening of such meeting/gathering is not permissible in law and to eschew from going ahead with such a meeting. Additionally, he should issue appropriate directions to the Officer Incharge of the jurisdictional Police Station to be vigilant and, if necessary, to deploy adequate police force for prevention of assembly of the proposed gathering.

(e) Despite taking such measures, if the meeting is conducted, the Deputy Superintendent of Police shall personally remain present during the meeting and impress upon the assembly that no decision can be taken to cause any harm to the couple or the family members of the couple, failing which each one participating in the meeting besides the organisers would be personally liable for criminal prosecution. He shall also ensure that video recording of the discussion and participation of the members of the assembly is done on the basis of which the law enforcing machinery can resort to suitable action.

(f) If the Deputy Superintendent of Police, after interaction with the members of the Khap Panchayat, has reason to believe that the gathering cannot be prevented and/or is likely to cause harm to the couple or members of their family, he shall forthwith submit a proposal to the District Magistrate/Sub-Divisional Magistrate of the District/ Competent Authority of the concerned area for issuing orders to take preventive steps under the Cr.P.C., including by invoking prohibitory orders under Section 144 Cr.P.C. and also by causing arrest of the participants in the assembly under Section 151 Cr.P.C.

(g) The Home Department of the Government of India must take initiative and work in coordination with the State Governments for sensitising the law enforcement agencies and by involving all the stake holders to identify the measures for prevention of such violence and to implement the constitutional goal of social justice and the rule of law.

(h) There should be an institutional machinery with the necessary coordination of all the stakeholders. The different State Governments and the Centre ought to work on sensitization of the law enforcement agencies to mandate social initiatives and awareness to curb such violence. II.

Remedial Measures:-

(a) Despite the preventive measures taken by the State Police, if it comes to the notice of the local police that the Khap Panchayat has taken place and it has passed any diktat to take action against a couple/family of an inter-caste or inter-religious marriage (or any other marriage which does not meet their acceptance), the jurisdictional police official shall cause to immediately lodge an F.I.R. under the appropriate provisions of the Indian Penal Code including Sections 141, 143, 503 read with 506 of IPC.

(b) Upon registration of F.I.R., intimation shall be simultaneously given to the Superintendent of Police/ Deputy Superintendent of Police who, in turn, shall ensure that effective investigation of the crime is done and taken to its logical end with promptitude.

(c) Additionally, immediate steps should be taken to provide security to the couple/family and, if necessary, to remove them to a safe house within the same district or elsewhere keeping in mind their safety and threat perception. The State Government may consider of establishing a safe house at each District Headquarter for that purpose. Such safe houses can cater to accommodate

(i) young bachelor-bachelorette couples whose relationship is being opposed by their families /local community/Khaps and

(ii) young married couples (of an inter-caste or inter-religious or any other marriage being opposed by their families/local community/Khaps). Such safe houses may be placed under the supervision of the jurisdictional District Magistrate and Superintendent of Police.

(d) The District Magistrate/Superintendent of Police must deal with the complaint regarding threat administered to such couple/family with utmost sensitivity. It should be first ascertained whether the bachelor-bachelorette are capable adults. Thereafter, if necessary, they may be provided logistical support for solemnising their marriage and/or for being duly registered under police protection, if they so desire. After the marriage, if the couple so desire, they can be provided accommodation on payment of nominal charges in the

safe house initially for a period of one month to be extended on monthly basis but not exceeding one year in aggregate, depending on their threat assessment on case to case basis.

(e) The initial inquiry regarding the complaint received from the couple (bachelor-bachelorette or a young married couple) or upon receiving information from an independent source that the relationship/marriage of such couple is opposed by their family members/local community/Khaps shall be entrusted by the District Magistrate/ Superintendent of Police to an officer of the rank of Additional Superintendent of Police. He shall conduct a preliminary inquiry and ascertain the authenticity, nature and gravity of threat perception. On being satisfied as to the authenticity of such threats, he shall immediately submit a report to the Superintendent of Police in not later than one week.

(f) The District Superintendent of Police, upon receipt of such report, shall direct the Deputy Superintendent of Police incharge of the concerned sub-division to cause to register an F.I.R. against the persons threatening the couple(s) and, if necessary, invoke Section 151 of Cr.P.C. Additionally, the Deputy Superintendent of Police shall personally supervise the progress of investigation and ensure that the same is completed and taken to its logical end with promptitude. In the course of investigation, the concerned persons shall be booked without any exception including the members who have participated in the assembly. If the involvement of the members of Khap Panchayat comes to the fore, they shall also be charged for the offence of conspiracy or abetment, as the case may be. III. Punitive Measures:-

(a) Any failure by either the police or district officer/officials to comply with the aforesaid directions shall be considered as an act of deliberate negligence and/or misconduct for which departmental action must be taken under the service rules. The departmental action shall be initiated and taken to its logical end, preferably not exceeding six months, by the authority of the first instance.

(b) In terms of the ruling of this Court in Arumugam Servai (supra), the States are directed to take disciplinary action against the concerned officials if it is found that (i) such official(s) did not prevent the incident, despite having prior knowledge of it, or (ii) where the incident had already occurred, such official(s) did not promptly apprehend and institute criminal proceedings against the culprits.

(c) The State Governments shall create Special Cells in every District comprising of the Superintendent of Police, the District Social Welfare Officer and District Adi-Dravidar Welfare Officer to receive petitions/complaints of harassment of and threat to couples of inter-caste marriage.

(d) These Special Cells shall create a 24 hour helpline to receive and register such complaints and to provide necessary assistance/advice and protection to the couple.

(e) The criminal cases pertaining to honour killing or violence to the couple(s) shall be tried before the designated Court/Fast Track Court earmarked for that purpose. The trial must proceed on day to day basis to be concluded preferably within six months from the date of taking cognizance of the offence. We may hasten to add that this direction shall apply even to pending cases. The concerned District Judge

shall assign those cases, as far as possible, to one jurisdictional court so as to ensure expeditious disposal thereof.

54. The measures we have directed to be taken have to be carried out within six weeks hence by the respondent- States. Reports of compliance be filed within the said period before the Registry of this Court.

55. The Writ Petition is, accordingly, disposed of. There shall be no order as to costs.

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SUKHENDU DAS VERSUS RITA MUKHERJEE

SUPREME COURT OF INDIA

Bench: **Hon'ble Mr. Justice S.A. Bobde and Hon'ble Mr. Justice L. Nageswara Rao**

Sukhendu Das .... Appellant
Versus
Rita Mukherjee .... Respondent

Civil Appeal No. 7186 of 2016

Decided on : **25th July, 2018**

- ***The Appellant and the Respondent are District Judges working in the State of West Bengal. Their marriage was performed on 19th June, 1992 as per the Special Marriage Act, 1954 (hereinafter referred to as "the Act"). A girl child was born out of the wedlock on 14th April, 1993. There was matrimonial discord between the Appellant and the Respondent and they were living separately since the year 2000. The Appellant filed an application under Section 27 of the Act seeking a divorce.***
- ***This court in a series of judgments has exercised its inherent powers under Article 142 of the Constitution for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if thefacts of the case do not provide a ground in law on which the divorce could be granted [Manish Goel v. Rohini Goel Admittedly, the Appellant and the Respondent have been living separately for more than 17 yearsand it will not be possible for the parties to live together and there is no purpose in compellingthe parties to live together in matrimony [Rishikesh Sharma v. Saroj Sharma47]. The daughter ofthe Appellant and the Respondent is aged about 24 years and her custody is not in issue before us. In the peculiar facts of this case and in order to do complete justice between the parties, we allow the Appeal in exercise of our power under Article 142 of the Constitution of India, For the aforementioned reasons, the Appeal is allowed and the application for divorce filed bythe Appellant under Section 27 of the Act is allowed.***

JUDGMENT

Hon'ble Mr. Justice L. Nageswara Rao :—

1. The Appellant and the Respondent are District Judges working in the State of West Bengal. Their marriage was performed on 19th June, 1992 as per the Special Marriage Act, 1954 (hereinafter referred to as "the Act"). A girl child was born out of the wedlock on 14th April, 1993. There was matrimonial discord between the Appellant and the Respondent and they were living separately since the year 2000. The Appellant filed an application under Section 27 of the Act seeking a divorce.

2. The Appellant alleged that the differences arose because of the improper behavior of the Respondent in not showing due respect to his ailing father. It was further alleged that the Respondent deserted him and refused to give the custody of the child to him. The Appellant further averred in the application that the Respondent did not visit him even when he was seriously ill. The Respondent is accused of using intemperate language and threatening the Appellant with filing of criminal cases if he perused the petition for divorce which he proposed in the year 2005.

3. The Respondent filed a written statement denying the allegations made in the application filed by the applicant for divorce. She refuted all the averments in the application and sought for dismissal of the application for divorce. The Respondent did not participate in the proceedings before the trial court after filing the written statement. The Chief Judge, City Civil Court, Calcutta by the judgment dated 6th August, 2009 dismissed the application for divorce. The Appeal filed against the said judgment was dismissed by the High Court of Calcutta on 4th April, 2012. The Respondent did not seek to appear before the High Court also. The correctness of the judgment of the High Court is assailed in the above Appeal.

4. After referring to the pleadings in the case, the trial court found that the Appellant failed to prove cruelty on the part of the Respondent. The evidence adduced by the Appellant was scrutinized by the trial court to come to a conclusion that the Appellant did not make out a case for divorce. The High Court, taking note of the fact that the Appellant and the Respondent are judicial officers, made an attempt for conciliation between the parties. However, in spite of the effort of the High Court, both the Appellant and the Respondent did not appear personally before the High Court. Despite taking note of the fact that the Appellant and the Respondent were living separately since the year 2000, the High Court dismissed the Appeal by holding that irretrievable breakdown of marriage cannot be a ground for divorce. The High Court held that the Appellant failed to prove mental cruelty on the part of the Respondent.

5. Notice was issued to the Respondent on 8th October, 2012 to explore the possibility of an amicable resolution to the matrimonial dispute. The parties were directed to appear before the Mediation Centre of the Supreme Court on 21st November, 2012. The Respondent did not appear before the Mediation Centre in spite of service of the Notice. She chose not to appear before this Court. Fresh Notice was ordered on 17th August, 2015 but the Respondent did not appear in spite of receipt of Notice again.

6. Mr. Raja Chatterjee, learned counsel appearing for the Appellant submitted that the Respondent deserted the Appellant about 17 years back and she refused to come back and live with him. Apart from the allegation of desertion, the learned counsel also alleged mental cruelty on the part of the Respondent who threatened the Appellant in the year 2005 that she would get a criminal case filed against him if he did not stop attempts to get the divorce. The learned counsel further submitted that the Appellant and the Respondent have been living apart due to matrimonial discord since 17 years and for all practical purposes the marriage has broken down.

7. The Respondent, who did not appear before the trial court after filing of written statement, did not respond to the request made by the High Court for personal appearance. In spite of service of Notice, the Respondent did not show any interest to appear in this Court also. This conduct of the Respondent by itself would indicate that she is not interested in living with the Appellant. Refusal to participate in proceeding for divorce and forcing the appellant to stay

in a dead marriage would itself constitute mental cruelty [Samar Ghosh v. Jaya Ghosh1]. The High Court observed that no attempt was made by either of the parties to be posted at the same place. Without entering into the disputed facts of the case, we are of the opinion that there is no likelihood of the Appellant and the Respondent living together and for all practical purposes there is an irretrievable breakdown of the marriage.

8. This court in a series of judgments has exercised its inherent powers under Article 142 of the Constitution for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted [Manish Goel v. Rohini Goel2].

Admittedly, the Appellant and the Respondent have been living separately for more than 17 years and it will not be possible for the parties to live together and there is no purpose in compelling the parties to live together in matrimony [Rishikesh Sharma v. Saroj Sharma3]. The daughter of the Appellant and the Respondent is aged about 24 years and her custody is not in issue before us. In the peculiar facts of this case and in order to do complete justice between the parties, we allow the Appeal in exercise of our power under Article 142 of the Constitution of India, 1950.

9. For the aforementioned reasons, the Appeal is allowed and the application for divorce filed by the Appellant under Section 27 of the Act is allowed.

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1 (2007) 4 SCC 511 [para101 (xiv)]

2 (2010) 4 SCC 393 [para 11]

3 (2007) 2 SCC 263 [para 4 and 5]

BIPIN CHANDER JAISINGHBHAI SHAH VERSUS PRABHAWATI

SUPREME COURT OF INDIA

Bench: **Hon'ble Mr. Justice Bhuvneshwar P. Sinha, Hon'ble Mr. Justice B. Jagannadhadas & Hon'ble Mr. Justice T.L. Venkatarama Aiyyar**

Bipin Chander Jaisinghbhai Shah
Versus
Prabhawati.

1957 AIR 176
Equivalent Citations: 1956 Scr 838

Decided on : **19th October, 1956**

HMA-section 13- divorce- ground of desertion - For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely

(1) the factum of separation, and

(2) the intention to bring cohabitation permanently to an end (animus deserendi).

Similarly two elements are essential so far as the deserted spouse is concerned:

(1) the absence of consent, and

(2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively....

Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus deserendi coincide in point of time.

JUDGMENT

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 247 of 1953. Appeal by special leave from the judgment and decree dated August 22, 1952 of the Bombay High Court in Appeal No. 66 of 1952 arising out of the decree dated March 7, 1952 of Bombay High Court in its Ordinary Original Civil Jurisdiction in Suit No. 1177 of 1951.

Hon'ble Mr. Justice Bhuvneshwar P. Sinha :—

This is an appeal by special leave against the judgment and decree of the High Court of Judicature at Bombay dated August 22,1952, reversing those of a single Judge of that Court on the Original Side, dated March 7,1952, by which he had granted a decree for dissolution of marriage between the appellant and the respondent.

The facts and circumstances of this case may be stated as follows: The appellant, who was the plaintiff, and the respondent were married at Patan on April 20, 1942, according to Hindu rites of the Jain Community. The families of both the parties belong to Patan, which is a town in Gujarat, about a night's rail journey from Bombay. They lived in Bombay in a two-room flat which was in occupation of the appellant's family consisting of his parents and his two sisters, who occupied the larger room called the hall, and the plaintiff and the defendant who occupied the smaller room called the kitchen. The appellant's mother who is a patient of asthma lived mostly at Patan. There is an issue of the marriage, a son named Kirit, born on September 10, 1945. The defendant's parents lived mostly at Jaigaon in the East Khandesh district in Bombay. The parties appear to have lived happily in Bombay until a third party named Mahendra, a friend of the family came upon the scene and began to live with the family in their Bombay flat some time in 1946, after his discharge from the army. On January 8, 1947, the appellant left for England on business. It was the plaintiff's case that during his absence from Bombay the defendant became intimate with the said Mahendra and when she went to Patan after the plaintiff's departure for England she carried on "amorous correspondence" with Mahendra who continued to stay with the plaintiff's family in Bombay. One of the letters written by the defendant to Mahendra while staying at the plaintiff's flat in Bombay, is Ex. E as officially translated in English, the original being in Gujerati except a few words written in faulty English. This letter is dated April,1947, written from the plaintiff's house at Patan, where the defendant bad been staying with her mother-in-law. This letter had been annexed to the plaint with the official translation. It was denied by the defendant in her written statement. But at the trial her counsel admitted it to have been written by her to Mahendra. As this letter started all the trouble between the parties to this litigation, it will have to be set out in extenso hereinafter. Continuing the plaintiff's narrative of the events as alleged in the plaint and in his evidence, the plaintiff returned to Bombay from abroadon May 20, 1947. To receive him back from his foreign journey the whole family' including the defendant was there in Bombay. According to the plaintiff, he found that on the first night after his return his bed had been made in the hall occupied by his father and that night he slept away from his wife. As this incident is said to have some significance in the narrative of events leading up to the separation between the husband and the wife and about the reason for which the parties differ, it will have to be examined in detail later. Next morning, that is to say, on May 21, 1947, the plaintiff's father handed over the letter aforesaid to the plaintiff, who recognised it as being in the familiar handwriting of his wife. He decided to tackle his wife with reference to the letter. He handed it to a photographer to have photo copies made of the same. That very day in the evening he asked his wife as to why she had addressed the letter to Mahendra. She at first denied having written any letter and asked to see the letter upon which the plaintiff informed her that it was with the photographer with a view to photo copies being made. After receiving the letter and the photo copies from the photographer on May 23, the plaintiff showed the defendant the photo copy of the letter in controversy between them at that stage and then the defendant is alleged to have admitted having written the letter to Mahendra and to have further told the plaintiff that Mahendra was a better man than him and that Mahendra loved her and she loved him. The next important event in the narrative is what happened on May 24, 1947. On the morning of that day, while the plaintiff

was getting ready to go to his business office his wife is alleged to have told him that she had packed her luggage and was ready to go to Jalgaon on the ostensible ground that there was a marriage in her father's family. The plaintiff told her that if she had made up her mind to go, he would send the car to take her to the station and offered to pay her Rs. 100 for her expenses. But she refused the offer. She left Bombay apparently in the plaintiff's absence for Jalgaon by the afternoon train. when the plaintiff came back home from his office, he "discovered that she had taken away everything with her and had left nothing behind". It may be added here that the plaintiff's mother had left for Patan with his son some days previously. Plaintiff 's case further is that the defendant never came back to Bombay to live with him, nor did she write any letters from Jalgaon, where she stayed most of the time. It appears further that the plaintiff took a very hasty, 'if not also a foolish, step of having a letter addressed to the defendant by his solicitor on July 15, 1947, charging her with intimacy between herself and Mahendra and asking her to send back the little boy. ,The parties violently differ on the intent and effect of this letter which will have to be set out in extenso at the appropriate place. No answer to this letter was received by the plaintiff. In November, 1947, the plaintiff's mother came from Patan to Bombay and informed the plaintiff that the defendant might be expected in Bombay a few days later. Thereupon the plaintiff sent a telegram to his father-in-law at Patan. The telegram is worded as follows:-

"Must not send Prabha. Letter posted.

Wishing happy new year".

The telegram stated that a letter bad been posted. The defendant denied that any such letter bad been received by her or by her father. Hence the original, if any, is not on the record. But the plaintiff produced what he alleged to be a carbon copy of that letter which purports to have been written on November 13, 1947, the date on which the telegram was despatched. An English translation of that letter is Ex. C and is to the following effect:-

Bombay 13-11-47 To Rajmanya Rajeshri Seth Popatlal & others. There is no letter from you recently. You must have received the telegram sent by me today.

Further, this is to inform you that I have received information from my Mami (mother) thatPrabha is going to come to Bombay in 3 or 4 days. I am surprised to hear this news; Ever since she has gone to Jalgaon, there has been not a single letter from her to this day. Not only that, but, although you know everything, neither you nor any one on your behalf has come to see me in this connection. What has made Prabha thus inclined to come all of a sudden! After her behaviour while going to Jalgaon for: the marriage, (and after), her letter to Mahendra and her words. 'He is better than you-Has feeling for' me and I love him' and all this, I was afraid that she would not set up a house with me. Hence when my mother gave me the news of her return, I was surprised.

I have not the slightest objection to the return of Prabha, but if she gives such shameless replies to me and shows such improper behaviour, I shall not be able to tolerate the same. If she now really realises her mistake and if she is really repenting and wants sincerely to come, please make her write a reply to this letter. On getting a letter from her, I shall personally come to Patan to fetch her. Kirit is young. For his sake also, it is necessary to persuade Prabha.

Further, I have to state that I have so far kept peace. I have made efforts to call back Prabha. Please understand this to her my final effort. If even now Prabha does not give up her obstinacy, I am not responsible and (then) do not blame me.

Well, that is all for the present. Kirit must be bale and hearty. My new year's greetings to you all. Please do assign to me such work-as I can manage.

Written by Bipinchandra"

The plaintiff stated that be received no answer either to the telegram or to the letter. Two days later, on, November 15, the plaintiff's father addressed a letter to the defendant's father, which is Ex. D. This letter makes reference. to the defendant's mother having, talked to the plaintiffs mother about sending the defendant I to Bombay and to the fact that the plaintiff bad sent a telegram on November 13, and ends with the expression of opinion by the plaintiff's father that it was "absolutely necessary" that the plaintiff's consent should be obtained before sending the defendant to Bombay. This letter also remained unanswered. According to the plaintiff, nothing happened until May, 1948, when he went to Patan and there met the defendant and told her "that if she repented for her relations with Mahendra in the interests of the child as well as our own interests she could come back and live with me". To that the defendant is said to have replied that in November, 1947, as a result of pressure from her father and the community, she had-been thinking of coming to live with the plaintiff) but that she had then decided not to do so. The defendant has given quite a different version of this interview. The second interview between the plaintiff and the defendant again took place at Patan some time later in 1948 when the plaintiff went there to see her on coming to know that she had been suffering from typhoid,. At that time also she evinced no desire to come back to the plaintiff. The third and the last interview between the plaintiff and the defendant took place at Jalgaon in April-May, 1949. At that interview also the defendant turned down the plaintiff's request that at least in the interests of the child she should come back to him. According to the plaintiff, since May 24, 1947, when the defendant left his home in Bombay of her own accord, she bad not come back to her marital home. The suit was commenced by the plaintiff by filing the plaint dated July 4, 1951, substantially on the ground that the defendant bad been in desertion ever since May 24, 1947, without reasonable cause and without his consent and against his will for a period of over four years. He therefore prayed for a decree for a dissolution of his marriage with the defendant and for the custody of the minor child.

The suit was contested by the defendant by a written statement filed on February 4, 1952, substantially on the ground that it was the plaintiff who by his treatment of her after his return from England had made her life unbearable and compelled her to leave her marital home against her wishes on or about May 24, 1.947. She denied any intimacy between herself and Mahendra or that she was confronted by the plaintiff with a photostat copy of the letter., Ex. E, or that she had confessed any such intimacy to the plaintiff. She admitted having received the Attorney's letter, Ex. A, and also that she did not reply to that letter. She adduced her father's advice as the reason for not sending any answer to that letter. She added that her paternal uncle Bhogilal (since deceased) and his son Babubhai saw the plaintiff in Bombay at the instance of the defendant and her father and that the plaintiff turned down their request for taking her back. She also made reference to the negotiations between the defendant's mother and the plaintiff's mother to take the defendant back to Bombay and that the defendant could not go to Bombay as a result of the telegram of November 13, 1947, and the plaintiff's father's letter of November 15, 1947, aforesaid. She also stated that the defendant and her son, Kirit, both lived with,the plaintiff's family at Patan for over four months and off and on on several occasions. The defendant's definite case is that she had always been ready and willing to go back to the plaintiff and that it was the plaintiff who all along had been wailfully refusing to keep her and to cohabit with her. On those allegations she resisted the plaintiff's claim for a decree for a dissolution of the marriage. On those pleadings a single issue was joined between the parties, namely,-

"Whether the defendant deserted the plaintiff for a continuous period of over four years prior to the filing of the suit".

At the trial held by Tendolkar, J. of the Bombay High Court on the Original Side, the plaintiff examined only himself in support of his case. The defendant examined herself, her father, Popatlal, and her cousin, Bhogilal, in support of her case that she had been all along ready and willing to go back to her marital home and that in spite of repeated efforts on her part through her relations the plaintiff had been persistently refusing to take her back.

The learned trial Judge answered the only issue in the case in the affirmative and granted a decree for divorce in favour of the plaintiff, but made DO order as to the costs of the suit. He held that the letter, Ex. E "reads like a love letter written by a girl to her paramour. The reference to both of them having been anxious about something and there being now no need to be anxious any more can only be to a possible fear that she might miss her monthly periods and her having got her monthly period thereafter, because, if it were not so and the reference was to anything innocent, there was nothing that she should have repented later on in her mind as she says she did, nor should there have been occasion for saying 'after all love is such an affair'." With reference to that letter he further held that it was capable of the interpretation that she had misbehaved with Mahendra and that she was conscious of her guilt. With reference to the incident of May 24, the learned Judge observed that having regard to the demeanour of the plaintiff and of the defendant in the witness box, he was inclined to prefer the husband's testimony to that of the wife in all matters in which there was a conflict. He held therefore that there was desertion with the necessary animus deserendi and that the defendant had failed to prove that she entertained a bonafide intention to come back to the marital home, that is to say, there was no animus revertendi. With reference to the contention that the solicitor's letter of July 15,1947, had terminated the desertion, if any, he held that it was not well founded inasmuch as the defendant had at no time a genuine desire to return to her husband. He made no reference to the prayer in the plaint that the custody of the child should be given to the father, perhaps because that prayer was not pressed. The defendant preferred an appeal under the Letters Patent which was heard by a. Division Bench consisting of Chagla C.J. and Bhagwati J. The Appellate Bench, allowed the appeal, set aside the decision of the trial Judge and dismissed the suit with costs. It held that the defendant was not guilty of desertion, that the letter of July 15, 1947, clearly established that it was the 'plaintiff who had deserted the defendant. Alternatively, the Appellate Court held that even assuming that the defendant was in desertion as a result of what had happened on May 24, and subsequently, the letter aforesaid bad the effect of putting an end to that desertion. In its judgment the letter, Ex. E, did not justify the plaintiff having any reasonable suspicions about his wife's guilt and that the oral evidence of the defendant and her relations proved the wife's anxiety to return back to her husband and of the obduracy of the husband in refusing to take the wife back. The plaintiff made an application to the High Court for leave to appeal to this Court. The leave asked for was refused by another Division Bench consisting of the Chief Justice and Dixit J. Thereafter the plaintiff moved this Court and obtained special leave to appeal from the judgment of the Appellate Bench of the High Court.

In this appeal the learned Attorney-General appearing on behalf of the appellant and the learned Solicitor-General appearing on behalf of the respondent have placed all relevant considerations of fact and law before us, and we are beholden to them for the great assistance they rendered to us in deciding this difficult case. The difficulty is enhanced by the fact that the two courts below have taken diametrically opposite views of the facts of the case which depend mostly upon oral testimony of the plaintiff-husband and the defendant-wife and not corroborated in many respects on either

side. It is a case of the husband's testimony alone on his side and the wife's testimony aided by that of her father and her cousin. As already indicated, the learned trial Judge was strongly in favour of preferring the husband's testimony to that of the wife whenever there was any conflict. But he made no reference to the testimony of the defendant's father and cousin which, if believed, would give an entirely different colour to the case. Before we deal with the points in controversy, it is convenient here to make certain general of observations on the history of the law on the subject and the well established general principles on which such cases are determined. The suit giving rise to this appeal is based on section 3(1) (d) of the Bombay Hindu Divorce Act', XXII of 1947, (which hereinafter will be referred to as "The Act") which came into force on May 12, 1947, the date the Governor's assent was published in the Bombay Government Gazette. This Act, so far as the Bombay Province, as it then was, was concerned, was the first step in revolutionizing the law of matrimonial relationship, and, as the Preamble shows, was meant "to provide for a right of divorce among all communities of Hindus in certain circumstances". Before the enactment, dissolution of a Hindu marriage particularly amongst what were called the regenerate classes was unknown to general Hindu law and was wholly inconsistent with the basic conception of a Hindu marriage as a sacrament, that is to say, a holy alliance for the performance of religious duties. According to the Shastras, marriage amongst the Hindus was the last of the ten sacraments enjoined by the Hindu religion for purification. Hence according to strict Hindu law as given by the Samhitas and as developed by the commentators, a Hindu marriage could not be dissolved on any-ground whatsoever, even on account of degradation in the hierarchy of castes or apostacy. But custom', particularly amongst the tribal and what used to be called the lower castes recognised divorce on rather easy terms. Such customs of divorce on easy terms have been in some instances held by the courts to be against public policy. The Act in section 3 sets out the grounds of divorce. It is noticeable that the Act does not recognise adultery simpliciter as one of the grounds of divorce, though cl. (f) renders the fact that a husband "has any other woman as a concubine" and that a wife "is a concubine of any other man or leads the life of a prostitute" a ground of divorce. In the present case we are immediately concerned with the provisions of s. 3(1)(d), which are in these terms:-

3. (1) A husband or wife may sue for divorce on any of the following grounds, namely:-

.....

(d) that the defendant has deserted the plaintiff for a continuous period of four years".

"Desertion" has been defined in section 2(b) in these terms:-

'Desert' means to desert without reasonable cause and without the consent or against the will of the spouse". It will be seen that the definition is tautological and not very helpful and leads us to the Common Law of England where in spite of repeated legislation on the subject of matrimonial law, no attempt has been made to define "desertion". Hence a large body of case law has developed round the legal significance of "desertion". "Marriage" under the Act means "a marriage between Hindus whether contracted before or after the coming into operation of this Act". "Husband" means a Hindu husband and "wife" means a Hindu wife.

In England until 1858 the only remedy for desertion was a suit for restitution of conjugal rights. But by the Matrimonial Causes Act of 1857, desertion without cause for two years and upwards was made a ground for a suit for judicial separation. It was not till 1937 that by the Matrimonial Causes Act, 1937, desertion without cause for a period of three years immediately preceding the institution of proceedings was made a ground for divorce. The law has now been consolidated in the Matrimonial Causes Act, 1950 (14 Geo. VI, c. 25). It would thus appear that desertion as affording a cause of action

for a suit for dissolution of marriage is a recent growth even in England. What is desertion? "Rayden on Divorce" which is a standard Work on the subject at p. 128 (6th Edn.) has summarised the case-law on the subject in these terms:-

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to on end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

The legal position has been admirably summarised in paras. 453 and 454 at pp. 241 to 243 of Halsbury's Laws of England (3rd Edn.) Vol. 12, in the following words:- "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. , The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or, where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion.' For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there., namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce; under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed

as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or-implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three year period and the Bombay Act prescribes a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bonafide offer of resuming the matrimonial some with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced,, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce' the plaintiff must prove the offence of desertion, like any other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard, C.J. in the case of Lawson v. Lawson[1] may be referred to:-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution.....

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

In this connection the plaintiff in the witness box deposed to the incident of the night of May 20, 1947. He stated that at night he found that his bed had been made in the hall in which his father used to sleep, and on being questioned by him, the defendant told him that it was so done with a view to giving him the opportunity after a long absence in England to talk to his father. The plaintiff expressed his wish to the defendant that they should sleep in the same room as they used to before his departure for England, to which the wife replied that as the bed had already been made, "it would look indecent if they were removed". The plaintiff therefore slept in the hall that night. This incident was relied upon by the plaintiff with a view to showing that the wife had already made up her mind to stop cohabitation. This incident has not been admitted by the defendant in her cross-examination. On the other hand she would make it out that it was at the instance of the plaintiff that the bed had been made in the hall occu- pied by his father and that it was the plaintiff and not she who was responsible for their sleeping apart that night. As the learned trial Judge has preferred the plaintiff's testimony to that of the defendant on all matters on which there was simply oath against oath, we would not go behind that finding. This incident by itself is capable of an innocent explanation and therefore has to be viewed along with the other incidents deposed to by the plaintiff in order to prove his case of desertion by

1 [1955] 1 All E.R. 341, 342.

the defendant. There was no reason why the husband should have thought of sleeping apart from the wife because there was no suggestion in the record that the husband was aware till then of the alleged relationship between the defendant and Mahendra. But the wife may have been apprehensive that the plaintiff had known of her relations with Mahendra. That apprehension may have induced her to keep out of the plaintiff's way. The most important event which led to the ultimate rupture between the parties took place on May 21, 1947, when in the morning the plaintiff's father placed Mahendra's letter aforesaid in the plaintiff's hands. The letter which has rightly been pointed out in the courts below as the root case of the trouble is in its relevant parts in these terms:-

"Mahendrababu, Your letter has been received. I have read the same and have noted the contents. In the same way, I hope, you will take the trouble of writing me a letter now and then. I am writing, this letter with fear in my mind, because if this reaches anybody's hands, that cannot be said to be decent. What the mind feels has got to be constrained in the mind only. On the pretext of lulling (my) son to sleep, I have been sitting here in this attic, writing this letter to you. All others are chitchatting below. I am thinking now and then that I shall write this and shall write that. Just now my brain cannot go in any way. I do not feel like writing on the main point. The matters on which we were to remain anxious and you particularly were anxious, well we need not now be. I very much repented later on in my mind. But after all love is such an affair. (Love begets love).

..... "While yet busy doing services to my mother-in-law, the clock strikes twelve. At this time, I think of you and you only, and your portrait shoots up before my eyes. I am reminded of you every time. You write of coming, but just now there is nothing like a necessity, why unnecessarily waste money? And again nobody gets salvation at my bands and really nobody will. You know the natures of all. Many a time I get tired and keep on being uneasy in my mind, and in the end I weep and pray God and say, 0 Lord, kindly take me away soon: I am not obsessed by any kind of anxiety and so relieve me from this mundane existence. I do not know how many times I must be thinking of you every day....."

This letter is not signed by the defendant and in place of the signature the word "namaste" findsplace. The contents of the letter were put to the defendant in cross-examination. At that time it was no more a contested document, the defendant's counsel having admitted it during the cross-examination" of the plaintiff. She stated that she had feelings for Mahendra as a brother and not as a lover' When the mysterious parts of the letter beginning with the words "The matters on which" and ending with the words "such an affair" were put to her, she could not give any explanation as to what she meant. She denied the suggestion made on behalf of the plaintiff in these words:-

"It is not true that the reference here is to our having had sexual intercourse and being afraid that I might remain pregnant".

The sentence "I very much repented later on in my mind" was also put to her specifically and her answer was "I do not know what I repented for. I wrote some thing foolishly". Pressed further about the meaning of the next sentence after that, her answer was "I cannot now understand how I came to write such a letter. I admit that this reads like a letter written by a girl to her lover. Besides the fact that my brain was not working properly I bad no explanation to give as to how I wrote such a letter". She also admitted that she took good care to see that the. other members of the family, meaning the mother-in-law and the sisters-in-law, did not see her writing that letter and that she wanted that the letter should remain a secret to them. Being further pressed to explain the sentence "We need not be anxious now", her answer was " I did not intend to convey that I had got my monthly period about

which we were anxious. I cannot say what the normal natural meaning of this letter would be". She bad admitted having received at least one letter from Mahendra. Though it would appear from the trend of her cross-examination that she received more letters than one, she stated that she did not preserve any of his letters. She has further admitted in cross-examination "I have not signed this letter. It must have remained to be signed by mistake. I admit that under the letter where the signature should be I have put the word 'Namaste' only. It is not true that I did not sign this letter because I was afraid, that if it got into the hands of any one, it might compromise me and Mahendra. Mahendra would have known from my handwriting that this was my letter. I had previously written one letter to him. That letter also I had not signed. I had only said 'Namaste'". The tenor of the letter and the defendant's explanation or want of explanation in the witness box of those portions of the letter which very much need explanation would leave no manner of doubt in any person who read that letter that there was something between her and Mahendra which she was interested to keep a secret from everybody. Even when given the opportunity to explain, if she could, those portions of the letter, she was not able to put any innocent meaning to her words except saying in a bland way that it was a letter from a sister to a brother. The trial court rightly discredited her testimony relating to her answers with respect to the contents of the letter. The letter shows a correspondence between her and Mahendra which was clearly unworthy of a faithful wife and her pose of innocence by characterising it as between a sister and a brother is manifestly disingenuous. Her explanation, if any, is wholly unacceptable. The plaintiff naturally got suspicious of his wife and naturally taxed her with reference to the contents of the letter. That she had a guilty mind in respect of the letter is shown by the fact that she at first denied having written any such letter to Mahendra, a denial in which she persisted even in her answer to the plaint. The plaintiff's evidence that he showed her a photostatic copy of that letter on May 23, 1947, and that she then admitted having written that letter and that she bad tender feelings for Mahendra can easily be believed. The learned trial Judge was therefore justified in coming to the conclusion that the letter betrayed on the part of the writer "a consciousness of guilt". But it is questionable how far the learned Judge was justified in observing further that' the contents of the letter "are only capable of the interpretation that she had misbehaved with Mahendra during the absence of the plaintiff". If he meant by the word "misbehaved" that the defendant had sexual intercourse with Mahendra, he may be said to have jumped to the conclusion which did not necessarily follow as the only conclusion from them. The very fact that a married girl was writing amorous letters to a man other than her husband was reprehensible and easily capable of furnishing good grounds to the husband for suspecting the wife's fidelity. So far there can be no difficulty in assuming that the husband was fully justified in losing temper with his wife and in insisting upon her repentance and assurance of good conduct in future. But we are not prepared to say that the contents of the letter are capable of only that interpretation and no other. On the other hand, the learned Judges of the Appeal Court were inclined to view this letter as an evidence merely of what is sometimes characterised as "platonic love" between two persons who by reasons of bond of matrimony are compelled to restrain themselves and not to go further than merely showing love and devotion for each other. We are not prepared to take such a lenient, almost indulgent, view of the wife's conduct as betrayed in the letter in question. We cannot but sympathise with the husband in taking a very serious view of the lapse on the wife's part. The learned Judges of the Appeal Court have castigated the counsel for the plaintiff for putting those questions to the defendant in cross-examination. They observe in their judgment (speaking through the Chief Justice) that there was no justification for the counsel for the plaintiff to put to the defendant those questions in cross-examination suggesting that she had intercourse with Mahendra as a result of which they were apprehending future trouble in the shape of pregnancy and illegitimate child birth. It is true that it was

not in terms the plaintiff's case that there had been an adulterous intercourse between the defendant and Mahendra. That need not have been so, because the Act does not recognise adultery as one of the grounds for divorce. But we do not agree with the appellate Court that those questions to the defendant in cross-examination were not justified. The plaintiff proposed to prove that the discovery of the incriminating letter containing those mysterious sentences was the occasion for the defendant to make up her mind to desert,the plaintiff. We do not therefore agree with the observations of the appellate Court in all that they have said in respect of the letter in question.

There can be no doubt that the letter in question made the plaintiff strongly suspicious of his wife's conduct (to put it rather mildly), and naturally he taxed his wife to know from her as to what she bad to say about her relations with Mahendra. She is said to have confessed to him that Mahendra was a better man than the plaintiff and that he loved her and she loved him. When matters had come to such a head, the natural reaction of the parties would be that the husband would get not only depressed, as the plaintiff admitted in the witness box, but would in the first blush think of getting rid of such an unloving, if not a faithless, wife. The natural reaction of the defendant would be not to face the husband in that frame of mind. She would naturally wish to be out of the sight of her husband at least for some time, to gain time for trying, if she was so minded, to reestablish herself in her husband's estimation and affection, if not love. The event of the afternoon of May 24, 1947, must therefore be viewed in that light. There was going to be performed the marriage of the defendant's cousin at her father's place of business in Jalgaon, though it was about five to six weeks from then. The plaintiff would make it out in his evidence that she left rather in a recalcitrant mood in the afternoon during his absence in office with all her belongings and that she had refused his offer of being sent in his car to station and Rs. 100 for' expenses. This conduct on the part of the wife can easily be explained as that of a person who had found that her love letter had been discovered by the husband. She would-naturally try to flee away from the husband for the time being at least because she had not the moral courage to face him. The question is whether her leaving her marital home on the afternoon of May 24, 1947, is only consistent with her having deserted, her husband, in the sense that she had deliberately' decided permanently to forsake all relationship with her husband with the intention of not returning to consortium, without the consent of the husband and against his wishes. That is the plaintiff's case. May that conduct be not consistent with the defendant's case that she had not any such intention, i.e., being in desertion? The following observations of Pollock, M. R. in Thomas v. Thomas[2] may usefully be quoted in this connection:-

"Desertion is not a single act complete in itself and revocable by a single act of repentance.

The act of departure from the other spouse draws its significance from the purpose with which it is done, as revealed by conduct or other expressions of intention: see Charter v. Charter[3]. 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] that desertion is not a specific act, but a course of conduct. As Corell Barnes J. said in Sickert v. Sickert[5]: '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".

2 [1924] P. 194.

3 84 L T. 272.

4 58 J. P. 415.

5 [1899] P. 278, 282

The defendant's further case that she bad been turned out of the house by the husband under duress cannot be accepted because it is not corroborated either by circumstances or by direct testimony. Neither her father nor her cousin say a word about her speaking to them on her arrival at Jalgaon that she had been turned out of her husband's home. If her case that she bad been forcibly turned out of her marital home by the husband had been made out, certainly the husband would have been guilty of "constructive desertion", because the test is riot who left the matrimonial home first. (See Lang v. Lang[6]). If one spouse by his words and conduct compel the other spouse to leave the marital home. the former would be guilty of desertion, though it is the latter who has physically separated from the other and has been made to leave the marital home. It should be noted that the wife did not cross-petition for divorce or for any other relief. Hence it is no more necessary for us to go into that question. It is enough to point out that we are not prepared to rely upon the uncorroborated testimony 'of the defendant Chat she had been compelled to leave her marital home by the threats of the plaintiff.

The happenings of May 24, 1947, as pointed out above, are consistent with the plaintiff's case of desertion by the wife. But they are also consistent not with the defendant's case as actually Pleaded in her written statement, but with the fact; and circumstances disclosed in the evidence, namely, that the defendant having been discovered in her clandestine amorous correspondence with her supposed paramour Mahendra, she could not face her husband or her husband's people living in the same flat in Bombay and therefore shamefacedly withdrew herself and went to her parent's place of business in Jalgaon on the pretext of the marriage of her cousin which was yet far off. That she was not expected at Jalgaon on that day in connection with the marriage is proved by her own admission in the witness box that "when I went to Jalgaon everyone was surprised". As pointed out above, the burden is on the plaintiff to prove desertion without cause for the statutory period of four years, that is. to say, that the deserting spouse must be in desertion throughout the whole period. In this connection the following observations of Lord Macmillan in his speech in the House of Lords in the case of Pratt v. Pratt[7] are apposite:-

"In my opinion what is required of a petitioner for divorce on the ground of desertion is proof that throughout the whole course of the three years the respondent has without cause been in desertion. The 861, deserting spouse must be shown to have persisted in the intention to desert throughout the whole period. In fulfilling its duty of determining whether on the evidence a case of desertion without cause has been proved the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If on the facts it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion". It is true that the defendant did not plead that she had left her husband's home in Bombay in the circumstances indicated above. She, on the other hand, pleaded constructive desertion by the husband. That case, as already observed, she has failed to substantiate by reliable evidence. But the fact that the defendant has so failed does not necessarily lead to the conclusion that the plaintiff has succeeded in proving his case. The plaintiff must satisfy the court that the defendant had been in desertion for the continuous period of four years as required by the Act. If we come to the conclusion that the happenings of May 24, 1947, are consistent with both the conflicting theories, it is plain that the plaintiff has not succeeded in bringing the offence of desertion home to the defendant beyond all

6 [1955] A.C. 402. 417.

7 [1939] A C. 417, 420.

reasonable doubt. We must therefore examine what other evidence there is in support of the plaintiff's case and in corroboration of his evidence in court.

The next event of importance in this narrative is the plaintiff's solicitor's letter of July 15, 1947, addressed to the defendant, care of her father at Jalgaon. The defendant's cousin's marriage was performed towards the end of June and she could have come back to her husband's place, soon thereafter' Her evidence is that after the marriage had been performed she was making preparations to go back to Bombay but her father detained her and asked her to await a letter from the plaintiff. The defendant instead of getting an invitation from the plaintiff to come back to the marital home received the solicitor's letter aforesaid, which, to say the least, was not calculated to bring the parties nearer. The letter is in these terms:-

"Madam, Under instructions from our client Bipin Chandra J. Shah we have to address you as under:-

That you were married to our client in or about April 1942 at Patan. Since the marriage you and our client lived together mostly in Bombay and son by name Kirit was born on or about the 10th day of September 1944.

Our client. states that he left for Europe in January last and returned by the end of May last. After our client's return, our client learnt that during our client's absence from India you developed intimacy with one Mahendra and you failed to give any satisfactory reply when questioned about the same and left for your parents under the pretext of attending to the marriage ceremony of your cousin. You have also taken the minor with you and since then you are residing with your father to evade any satisfactory explanation.

Our client states that under the events that have happened, our client has become entitled to obtain a divorce and our client does not desire to keep you any longer under his care and protection. Our client desires the minor to be kept by him and we are instructed to request you to send back the minor to our client or if necessary our client will send his agent to bring the minor to him. Our client further states that in any event it will be in the interest of the minor that he should stay with our client. Our client has made this inquiry about the minor to avoid any unpleasantness when our client's agent comes to receive the minor". The letter is remarkable in some respects,apart from antedating the birth of the son Kirit by a year. The letter does not in terms allege that the defendant was in desertion, apart from mentioning the fact that she had left against the plaintiff's wishes or that she had done so with the intention of permanently abandoning her marital duties. On the other hand, it alleges that "You are residing with your father to avoid any satisfactory explanation". The most important part of the letter is to the effect that the plaintiff had "become entitled to obtain a divorce" and that he "does not desire to keep you any longer under his care and protection". Thus if the solicitor's letter is any indication of the working of the mind of the plaintiff, it makes it clear that at that time the plaintiff did not believe that the defendant had been in desertion and that the plaintiff had positively come to the determination that he was no longer prepared to affirm the marriage relationship. As already indicated, one of the essential conditions for success in a suit for divorce grounded upon desertion is that the deserted spouse should have been willing to fulfill his or her part of the marital duties. The statement of the law in para 457 at p. 244 of Halsbury's Laws of England (3rd Edn. Vol 12) may be usefully quoted:

"The burden is on the petitioner to show that desertion without cause subsisted, throughout the statutory period. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole of the three year period. It has been said that a petitioner should be able honestly to say that he or she was all along willing to fulfill the duties of the marriage, and that the desertion was

against his or her will, and continued throughout the statutory period without his or her consent; but in practice it is accepted that once desertion has been started by the fault of the deserting spouse, it is no longer necessary for the deserted spouse to show that during the three years preceding the petition be or she actually wanted the other spouse to come back, for the intention to desert is presumed to continue. That presumption may, however, be rebutted". Applying those observations to the facts of the present case, can the plaintiff honestly say that be was all along willing to fulfill the duties of the marriage and that the defendant's desertion, if any, continued throughout the statutory period without his consent. The letter, Ex. A) is an emphatic no. In the first place, even the plaintiff in that letter did not allege any desertion and, secondly, he was not prepared to receive her back to the matrimonial home. Realising his difficulty when cross-examined as to the contents of that letter, he wished the court to believe that at the time the letter was written in his presence he was "in a confused state of mind" and did not remember exactly whether he noticed the sentence -that he did not desire to keep his wife any longer. Pressed 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 the confused state of mind that despite my repeated attempts my wife puts me off".

In our opinion, the contents of the letter could not thus be explained away by the plaintiff in the witness box. On the other hand, it shows that about seven weeks after the wife's departure for her father's place the plaintiff had at least for the time being convinced himself that the defendant was no more a suitable person to live with. That, as found by us, be was justified in this attitude by the reprehensible conduct of his wife during his absence is beside the point. This letter has an importance of its own only in so far as it does not corroborate the plaintiff's version that the defendant was in desertion and that the plaintiff was all along anxious to induce her to come back to him. This letter is more consistent with the supposition that the husband was very angry with her on account of her conduct as betrayed by the letter, Ex. E and that the wife left her husband's place in shame not having the courage to face him after that discovery. But that will not render her in the eye of the law a deserter, as observed by Pollock, M. R. in Bowron v. Bowron[8] partly quoting from Lord Gorell as follows:-

"In most cases of desertion the guilty party actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion: See also Graves v. Graves[9]; Pulford v. Pulford[10]; Jackson v. Jackson[11]; where Sir Henry Duke P. explains the same doctrine. You must look at the conduct of the spouses and ascertain their real intention".

It is true that once it is found that one of the spouses has been in desertion, the presumption is that the desertion has continued and that it is not necessary for the deserted spouse actually to take steps to bring the deserting spouse back to the matrimonial home. So far we do not find any convincing evidence in proof of the alleged desertion by the wife and naturally therefore the presumption of continued desertion cannot arise.

But it is not necessary that at the time the wife left her husband's home, she should have at the same time the animus deserendi. Let us therefore examine the question whether the defendant in this case,

8 [1925] P. 187, 192.

9 3 Sw. & Tr. 350.

10 [1923] P. 18.

11 [1924] P. 19.

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[12] in an appeal from the decision of the High Court of Australia, to the following effect:-

"Both in England and in Australia, to establish desertion two things must be proved: first, certain outward and visible conduct the 'factum' of desertion; secondly, the 'animus deserendi' the intention underlying this conduct to bring the matrimonial union to an end.

In ordinary desertion the factum is simple: it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will be almost entirely as to the 'animus'. Was the intention of the party leaving the home to break it up for good, or something short of, or different from that?" In this connection the episode of November, 1947, when the plaintiff's mother came from Patan to Bombay is relevant. It appears to be common ground now that the defendant had agreed to come back to Bombay along with the plaintiff's mother or after a few days. But on this information being given to the plaintiff he countermanded any such steps on the wife's part by sending the telegram, Ex. B,aforesaid and the plaintiff's father's letter dated November 15, 1947. 'We are keeping out of consideration for the present the letter, Ex. C, dated November 13, 1947, which is not admitted to have been received either by the defendant or her father. The telegram is in peremptory terms: "Must not send Prabha". The letter of November 15, 1947, by the plaintiff's father to the defendant's father is equally peremptory. It says "It is absolutely necessary that you should obtain the consent of Chi. Bipinchandra before sending Chi. Prabhavati". The telegram and the letter which is a supplement to the telegram, as found by the courts below, completely negative the plaintiff's statement in court that he was all along ready and willing to receive the defendant back to his home. The letter of November 13, 1947, Ex. C, which the plaintiff claims to have written to his father-in-law in explanation of the telegram and is a prelude to it is altogether out of tune with the tenor of the letter and the telegram referred to above. The receipt of this letter has been denied by the defendant and her father. In court this letter has been described as a fake in the sense that it was an afterthought and was written with a. view to the legal position and particularly with a view to getting rid of the effect of the solicitor's letter of July 15, which the plaintiff found it hard to explain away in the witness box. Neither the trial court, which was entirely in favour of the plaintiff and which had accepted the letter as genuine, nor the appellate Court, which was entirely in favour of the defendant has placed implicit faith in the bona fides of this letter. The lower appellate Court is rather ironical about it, observing "This letter as it were stands in isolated glory. There is no other letter. There is no other conduct of the plaintiff which is consistent with this letter". Without going into the controversy as to the genuineness or bona flde‍s of this letter, it can be said that the plaintiff's attitude, as disclosed therein, was that he was prepared to take her back into the matrimonial home provided she wrote a letter to him expressing real repentance and confession of mistake. This attitude of the plaintiff cannot be said to be unreasonable in the circumstances of the case. He was more sinned against than sinning at the beginning of the controversy between the husband and the wife.

This brings us to a consideration of the three attempts alleged by the plaintiff to have been made by him to induce his wife to return to the matrimonial home when he made two journeys to Patan in 1948 and the third journey in April- May, 1949, to Jalgaon. These three visits are not denied by the defendant. The only difference between the parties is as to the purpose of the visit and the substance 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

12 [1955] A.G. 402, 417.

to Patan to see her. On this occasion which was the second visit the plaintiff does not say that he proposed to her to come back and that she refused to do so. He only says that she did not express any desire to come back. That may be explained as being due to diffidence on her part. But in respect of the first and the third visits the plaintiff states that on both those occasions he wanted her to come back but she refused. On the other hand, the defendant's version is that the purpose of his visit was only to take away the child and not to take her back to his home. It is also the plaintiff's complaint that the defendant never wrote any letter to him offering to come back. The wife's answer is that she did write a few letters before the solicitor's letter was received by the father and that thereafter under her father's advice she did not writeany more to the plaintiff. In this connection it becomes necessary to examine the evidence of her cousin Babulal and her father Popatlal. Her cousin, Babulal, who was a member of her father's joint family, deposes that on receipt of the letter, Ex. A, a fortnight later he and his father, since deceased, came to Bombay and saw the plaintiff. They expostulated with him and pleaded the defendant's cause and asked the plaintiff to forgive and forget and to take her back. The plaintiff's answer was that he did not wish to keep his wife. The defendant's father's evidence is to the effect that after receipt of the letter, Ex. A, he came to Bombay and saw the plaintiff's father at his residence and protested to him that "a false notice had been given to us". The plaintiff's father is said to have replied that they "would settle the matters amicably" He also deposes as to his brother and his brother's son having gone to the plaintiff. He further states that he with his wife and the defendant went to Patan and saw the plaintiff's mother and in consultation with her made arrangements to send her back to 'Bombay. But before that could be done the telegram, Ex. B, and the letter, Ex. D, were received and consequently he gave up the idea of sending the defendant to Bombay without straightening matters. Both these witnesses on behalf of the defendant further deposed to the defendant having done several times and stayed with the plaintiff's family, particularly his mother at Patan along with the boy. The evidence of these two witnesses on behalf of the defendant is ample corroboration of the defendant's ,case and the evidence in court that she has all along been ready and willing to go back to the matrimonial home. The learned trial Judge has not noticed this evidence and we have not the advantage of his comment on this corroborative evidence. This body of evidence is in consonance with the natural course of events. The plaintiff himself stated in the witness box that he had sent the solicitor's' letter by way of a shock treatment to the defendant's family so that they might persuade his wife to come back to his matrimonial home. The subsequent telegram and letters (assuming that both the letters of the 13th and 15th November had been posted in the usual course and received by the addressees) would give a shock to the family. Naturally thereafter the members of the family would be up and doing to see that a reconciliation is brought about between the husband and the wife. Hence the visits of the defendant's uncle and the father would be a natural conduct after they had been apprised of the rupture between them. We therefore do not see any sufficient reasons for brushing aside all that oral evidence which has been believed by the Lower Appellate Court and had not in terms been disbelieved by the trial court. This part of the case on behalf of the defendant and her evidence is corroborated by the evidence of the defendant's relatives aforesaid. It cannot be seriously argued that evidence should be disbelieved, because the witnesses happened to be the defendant's relatives. They were naturally the parties most interested in bringing about a reconciliation They were anxious not only for the welfare of the defendant but were also interested in the good name of the family and the community as is only natural in families like these which have not been so urbanised as to completely ignore the feelings of the community. They would therefore be the persons most anxious in the interests of all the parties concerned to make efforts to bring the husband and the wife together and to put an end to a controversy which they con- sidered to be derogatory to the good

name and, prestige of the families concerned. The plaintiff's evidence, on the other hand, on this part of the case is uncorroborated. Indeed his evidence stands uncorroborated in many parts of his case and the letters already discussed run counter to the tenor of his evidence in court. We therefore feel inclined to accept the defendant's case that after her leaving her husband's home and after the performance of her cousin's marriage she was ready and willing to go back to her husband. It, follows from what we have said so far that the wife was not in desertion though she left her husband's home without any fault on the part of the plaintiff which could justify her action in leaving him, and that after the lapse of a few months' stay at her father's place she was willing to go back to her matrimonial home. This conclusion is further supported by the fact that between 1948 and 1951 the defendant stayed with her mother- in-law at Patan whenever she was there, sometimes for months, at other times for weeks. This conduct is wholly inconsistent with the plaintiff's case that the defendant was in desertion during the four years that she was out of her matrimonial home. It is more consistent with the defen- dant's attempts to. get herself re-established in her husband's home after the rupture in May 1947 as aforesaid. It is also in evidence that at the suggestion of her mother- in-law the defendant sent her three year old son to Bombay so that be might induce his' ,father to send for the mother, The boy stayed in Bombay for about twenty days and then was brought. back to Patan by his father as he (the boy) was unwilling to stay there without the mother., This was in August_September 1948 when the defendant deposes to having questioned her husband why she bad not been called back and the husband's answer was evasive. Whether or not this statement of the defendant is true, there can be no doubt that the defendant would not have allowed her little boy of about three years of age to be sent alone to Bombay except in the hope that he might be instrumental in bringing about a reconciliation between the father and the mother. The defendant has deposed to the several efforts made by her mother-in-law and her father-in-law to intercede on her behalf with the plaintiff but without any result. There is no explanation why the plaintiff could not examine his father and mother in corroboration of his case of continuous desertion for the statutory period by the defendant. Their evidence would have been as valuable, if not more, as that of the defendant's father and cousin as discussed above. Thus it is not a case where evidence was not available in corroboration of the plaintiff's case. As the plaintiff's evidence on many important aspects of the case has remained uncorroborated by evidence which could be available to him, we must hold that the evidence given by the plaintiff falls short of proving his case of desertion by his wife. Though we do not find that the essential ingredients of desertion have been proved by the plaintiff, there cannot be the least doubt that it was the defendant who had by her objectionable conduct brought about a rupture in the matrimonial home and caused the plaintiff to become so cold to her after she left him.

In view of our finding that the plaintiff has failed to prove his case of desertion by the defendant, it is not necessary to go into the question of animus revertendi on which considerable argument with reference to case-law was addressed to us on both sides. For the aforesaid reasons we agree with the Appellate Bench of the High Court in the conclusion at which they had arrived, though not exactly for the same reasons. The appeal is accordingly dismissed. But as the trouble started on account of the defendant's con- duct, though she is successful in this Court, we direct that each party must bear its own costs throughout. Appeal dismissed.

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MANJU KUMARI SINGH @ SMT. MANJU SINGH VERSUS AVINASH KUMAR SINGH

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Abhay Manohar Sapre and Hon'ble Mr. Justice Uday Umesh Lalit**

Manju Kumari Singh @ Smt. Manju Singh ...Appellant(s)
Versus
Avinash Kumar Singh ...Respondent(s)

Civil Appeal No. 6988 of 2018
(Arising out of S.L.P.(C) No.19420 of 2017)

Decided on : **25th July, 2018**

In the present case, the petitioner-husband has filed a petition seeking divorce on the grounds of cruelty and desertion by the wife. After hearing both the sides, the Family Court at Jamshedpur passed a decree for dissolution of marriage. On appeal, the High Court of Jharkhand at Ranchi affirmed the judgment of the Family Court.

Aggrieved by the said order, the appellant-wife filed an appeal in the Supreme Court. The matter was remanded to the High Court of Jharkhand for fresh hearing. However, the High Court reaffirmed its earlier order and the order passed by the Family Court at Jamshedpur.

The appellant-wife again approached the Supreme Court through a SLP against this order of the High Court. The Supreme Court observed that the parties are living separately for more than a decade and that there exists no situation for reconciliation between the parties. It also came to the knowledge of the court that a daughter was born out of the wedlock and now she is of a marriageable age.

Therefore, the Court held that the respondent-husband will pay a total sum of Rs. 10,00,000/- (Ten Lakhs) in two installments towards permanent alimony and maintenance to appellant-wife and daughter and thereby exercising its power under Article 142 of the Constitution declared the dissolution of the marriage subject to the fulfillment of the aforesaid conditions.

JUDGMENT

Hon'ble Mr. Justice Abhay Manohar Sapre :—

1. Leave granted.

2. This appeal is filed by the wife against the final judgment and order dated 28.02.2017 passed by the High Court of Jharkhand at Ranchi in F.A. No. Signature Not Verified 51 of 2004 whereby the High Court dismissed the appeal and affirmed the judgment dated 23.12.2002 passed by the Principal Judge, Family Court, Singhbhum East at Jamshedpur in Matrimonial Suit No.40

of 2001 by which the marriage between the appellantCkife and the respondentChusband was dissolved.

3. Few facts need to be mentioned infra to appreciate the short issue involved in the appeal.

4. The appellant is the wife whereas the respondent is the husband. The appellant and the respondent were married on 16.02.1997. The appellant is serving as a Teacher whereas the respondent is a practicing advocate. The couple was blessed with a daughter in 1998 and she has been living with the appellant since birth. As on this date, the daughter is studying and is of marriageable age. Unfortunately, due to various reasons, their married life was not cordial soon after the marriage, which eventually led to filing of divorce petition (Matrimonial Suit No.40/358 of 2001) by the respondent (husband) in the year 2001 against the appellant (wife) in the Family Court, Singhbhum East, Jamshedpur.

5. The respondent sought divorce inter alia on the ground of cruelty and desertion against the appellant. The appellant denied the allegations of cruelty/desertion and contested the suit by joining issues.

6. By order dated 23.12.2002, the Family Judge dissolved the marriage between the appellant-wife and the respondent-Jhusband on the ground that the allegation of cruelty and desertion against the appellant was proved and the suit filed by the respondent-husband for the dissolution of marriage was decreed.

7. The appellant felt aggrieved, filed First Appeal (51 of 2004) before the High Court of Jharkhand at Ranchi. By order dated 24.09.2008, the High Court affirmed the order passed by the Family Judge.

8. Challenging the said order, the appellantQvife filed an appeal before this Court. Vide order dated 09.01.2015, this Court remanded the matter to the High Court for fresh hearing. Against the said order, the respondent-husband filed a review petition, which was dismissed vide this Courts order dated 14.07.2015.

9. After remanding, the High Court again heard the matter. By impugned order, the High Court dismissed the appellants appeal and affirmed the order of the Family Judge and, in consequence, allowed the respondent's divorce petition by granting a decree of divorce in his favour on the ground of desertion. It is against this order of the High Court, the wife (appellant herein) felt aggrieved and filed the present appeal by way of special leave in this Court.

10. We have heard the learned counsel for the parties, respondentEinEperson and perused the record of the case.

11. It is not in dispute that the parties have been living separately for the last more than a decade. All attempts of reconciliation through mediation have failed. It is, therefore, clear that there is absolutely no chance of both living together to continue their marital life.

12. In Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558, the husband had filed petition seeking divorce on the ground of cruelty on the part of wife. While the matter was pending in the Trial Court, efforts were made for amicable settlement but without any success. Finding that there was no cordiality left between the parties to live together, the Trial Court ordered dissolution of marriage and directed the husband to deposit Rs.5 lakhs towards permanent maintenance of the wife. The appeal at the instance of the wife having been allowed, the husband approached this

Court by filing an appeal. The observations of this Court in paragraphs 86 and 90 are relevant for our purposes and the same are quoted hereunder:

86. In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

90. Consequently, we set aside the impugned judgment of the High Court and direct that the marriage between the parties should be dissolved according to the provisions of the Hindu Marriage Act, 1955. In the extraordinary facts and circumstances of the case, to resolve the problem in the interest of all concerned, while dissolving the marriage between the parties, we direct the appellant to pay Rs 25,00,000 (Rupees twentyCfive lakhs) to the respondent towards permanent maintenance to be paid within eight weeks. This amount would include Rs 5,00,000 (Rupees five lakhs with interest) deposited by the appellant on the direction of the trial court. The respondent would be at liberty to withdraw this amount with interest. Therefore, now the appellant would pay only Rs 20,00,000 (Rupees twenty lakhs) to the respondent within the stipulated period. In case the appellant fails to pay the amount as indicated above within the stipulated period, the direction given by us would be of no avail and the appeal shall stand dismissed. In awarding permanent maintenance we have taken into consideration the financial standing of the appellant.

13. In Sanghamitra Ghosh v. Kajal Kumar Ghosh, (2007) 2 SCC 220, it was observed in paragraphs 18, 19, 20 and 21 as under:

18. In the instant case, we are fully convinced that the marriage between the parties has irretrievably broken down because of incompatibility of temperament. In fact there has been total disappearance of emotional substratum in the marriage. The matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, therefore, the public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto as observed in Naveen Kohli case(2006) 4 SCC 558.

19. In view of peculiar facts and circumstances of this case, we consider it appropriate to exercise the jurisdiction of this Court under Article 142 of the Constitution.

20. In order to ensure that the parties may live peacefully in future, it has become imperative that all the cases pending between the parties are directed to be disposed of.

According to our considered view, unless all the pending cases are disposed of and we put a quietus to litigation between the parties, it is unlikely that they would live happily and peacefully in future.

In our view, this will not only help the parties, but it would be conducive in the interest of the minor son of the parties.

21. On consideration of the totality of the facts and circumstances of the case, we deem it appropriate to pass the order in the following terms:

(a) the parties are directed to strictly adhere to the terms of compromise filed before this Court and also the orders and directions passed by this Court;

(b) we direct that the cases pending between the parties, as enumerated in the preceding paragraphs, are disposed of in view of the settlement between the parties; and

(c) all pending cases arising out of the matrimonial proceedings including the case of restitution of conjugal rights and guardianship case between the parties shall stand disposed of and consigned to the records in the respective courts on being moved by either of the parties by providing a copy of this order, which has settled all those disputes in terms of the settlement.

14. In our considered view, in order to ensure that the parties may live peacefully in future and their daughter would be settled properly in her life, a quietus must be given to all litigations between the parties. Indeed both the learned counsel appearing for the parties too agreed for this. Such an approach, in our view, would be consistent with the approach adopted by this Court in the aforesaid matters. Consistent with the broad consensus arrived at between the parties, we consider it just and proper to dispose of the appeal with the following directions:^

(i) The respondent-Jhusband will pay a total sum of Rs. 10,00,000/P[ten lakhs) in two instalments towards permanent alimony and maintenance to the appellant and daughter.

(ii) First instalment of Rs. 5,00,000/Qvould be paid by the respondent—husband to the daughter by way of a Demand Draft drawn in favour of his daughter within three months from the date of this order.

(iii) Second instalment of Rs.5,00,000/D would be paid by the respondent-husband to the daughter by way of a Demand Draft drawn in favour of his daughter within four months from the date of payment of first instalment.

(iv) All allegations made in pending cases arising out of the matrimonial proceedings including the one out of which this appeal arises are expunged. All proceedings pending in various Courts, if any, shall stand disposed of accordingly.

15. In view of the peculiar facts and circumstances of this case, we also consider it appropriate to exercise our power under Article 142 of the Constitution in order to do substantial justice to the parties to this appeal and accordingly declare dissolution of their marriage subject to fulfillment of the aforesaid conditions.

16. With the aforesaid directions, the appeal stands accordingly disposed of. No costs.

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DR. AMIT KUMAR VERSUS DR. SONILA

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Kurian Joseph and Hon'ble Mr. Justice Sanjay Kishan Kaul**

Dr. Amit Kumar ....Appellant
Versus
Dr. Sonila & Ors. ...Respondents

Civil Appeal No. 10771 of 2018
[Arising out of SLP(C) No.21786/2018]

Decided on : **26th October, 2018**

In the present case, the Appellant and Respondent were married and from the wedlock were born a son and a daughter (aged 11 and 8 years respectively). Both the parties are doctors deployed with the CRPF.

Due to the relationship becoming sore between them, the parties agreed for a decree of divorce by mutual consent and henceforth filed a petition under Section 13B of the Hindu Marriage Act, 1955. According to the decree of divorce, both the parties were at liberty to marry any other person and agreed to the custody of both the children with the husband with a stipulation that financial obligations of the son would be borne by the husband and those of the daughter to be borne by the wife.

After a while, the husband re-married and also got transferred to Jammu. Consequently, he admitted the children at a boarding school in Pune. Till then, the wife had not made any payment with regard to her financial obligation. Therefore, the husband sent a legal notice demanding the payment. In reply, the wife stated that the consent decree was not accepted to her and thereupon she also filed an application under Section 6 of the Hindu Minority and Guardianship Act, 1956 seeking custody of her minor children.

After two rounds of litigation, the matter reached the Supreme Court .

held that the decision to give custody to the husband was a conscious decision taken by the parties and can hardly be categorized as a decision under force, pressure or fraud. Also, there was six months hiatus period for the parties to think over the terms of the settlement. Further, the proceedings initially initiated for the custody and thereafter for seeking cancellation of the decree of divorce were clearly an endeavor to pressurize the appellant not to claim any amounts.

Therefore, having regard to the facts of the case, the court held that the custody should remain with the father.

JUDGMENT

Hon'ble Mr. Justice Sanjay Kishan Kaul :—

1. Leave granted.

2. The appellant and respondent No.1 were married according to Hindu rites on 7.5.2004 and, from the wedlock were born a son (respondent No.2) and a daughter (respondent No.3), who are now about 11 years and 8 years respectively. It appears that the marriage ran into problem at some stage and all endeavours for reconciliation failed. The appellant and respondent No.1, both, are qualified doctors, who were deployed with the CRPF throughout, which position exists even today.

3. The appellant and respondent No.1 ultimately agreed for a decree of divorce by mutual consent and filed a petition under Section 13B of the Hindu Marriage Act, 1955. The first motion was filed in June, 2016 and after the expiry of the statutory period of six (6) months, the second motion was passed and a decree of divorce was granted on 9.12.2016.

4. The two relevant terms of the decree of divorce for the purposes of this present appeal are extracted as under:

> **5)** That, petitioner No.1 and 2 are at liberty to marry with any other person of their choice. In future petitioner No.1 has no any right of husband over petitioner No.2, so also petitioner No.2 has lost right as wife over petitioner No.1 today.
>
> **6)** That, petitioner No.1 and 2 both are agree to custody of both the childrens residing with petitioner No.1. Petitioner No.1 will provide education, medicines, and marriage of Aarokya Kumar s/o Amit Kumar. Petitioner No.2 will provide education, medicines and marriage of Riya Kumar d/o Amit Kumar.

5. A perusal of the aforesaid shows that para 5 was a natural corollary to the decree of divorce, i.e., that either parties could re-marry. Clause 6 provides for an agreement inter se the appellant and respondent No.1 qua the issue of custody of both the children, which was agreed to be with the appellant. However, possibly in view of their similar financial strength, it was agreed that the appellant would provide for education, medicines and marriage of the son while respondent No.1 would do the likewise for the daughter.

6. The parties at the relevant time were posted in Nanded and, thus, initially the arrangement for custody worked out fine. The issue, however, arose once the appellant was transferred out of Nanded. The appellant was transferred to Jammu, which apparently necessitated him to make arrangements for admission of respondent Nos.2 & 3 to a boarding school in Pune, while he assessed the possibility of bringing the children to live with him in Jammu. The undisputed fact is that at no point of time did respondent No.1 make any financial contributions towards her obligations, in terms of the decree of divorce by mutual consent. The appellant sent a legal notice dated 28.3.2017 to respondent No.1 pointing out this fact and demanding the payment of unpaid amounts, apart from the amount required for securing admission and meeting the living expenses of the daughter in the boarding school at Pune. It is this demand which seems to have triggered off the present dispute.

7. Respondent No.1 sent a reply to the aforesaid notice through her counsel on 15.4.2017. The said reply raised the issue that the consent decree was not acceptable to her, and hence her counsel had advised her to seek a modification of the terms & conditions of the decree regarding the custody of the children. It was also alleged that the transfer of respondent Nos.2 & 3 to

the boarding school was a unilateral act of the appellant and that the expenses quoted were exorbitant.

8. Respondent No.1 filed an application dated 31.5.2017 under Section 6 of the Hindu Minority and Guardianship Act, 1956, seeking custody of her minor children. In the application, it is alleged that respondent No.1 was mentally disturbed regarding the future of respondent Nos.2 & 3, who are of a tender age, and that at the time of the divorce, the appellant forced and coerced the applicant to dance on his tunes though not acceptable to the applicant. It is further pleaded that respondent No.1 had not asked for absolute custody of the children only so that they do not get disturbed in their education. This application also admits that the trigger has been the notice dated 28.3.2017, sent by the appellant through his counsel, whereby respondent No.1 was for the first time informed that the children were being put in a boarding school. A reference has also been made to the communication, where it was alleged by the appellant that the respondent No.1 wanted to get rid of the custody and responsibility of the children and that is the reason why she had given their custody to the appellant as respondent No.1 had decided to get re-married. There are certain other allegations made qua the problem of the visiting rights of respondent No.1 vis-a-vis the appellant but they are not germane to the controversy in question.

9. The aforesaid application was resisted by the appellant by filing a reply where it was sought to be emphasised that the terms of the decree had been agreed upon, six months time period had been granted to the parties to have a thought over the same, and only thereafter had they been incorporated in the decree of divorce. In the reply it has also been pointed out that though the marriage between the appellant and respondent No.1 was a love marriage, issues arose on account of an alleged affair between respondent No.1 and her school boyfriend, as named in the reply. It was also alleged that she was caught red-handed, but on her begging forgiveness, the appellant decided to maintain the relationship. This, however, it is alleged, did not bring the liaison to an end. Not only this, in March 2016, she is alleged to have started an affair with a person working in the same organisation, who has been named in the application, and that on being found out, respondent No.1 even attempted to commit suicide on that account, for which medical records are available. The divorce is stated to have been agreed upon without making these allegations against respondent No.1, in order to maintain the dignity of the parties in the society at large. The District Judge disposed of the application on 04.09.2017. The court noticed that the paramount consideration was the interest of the children. The court took into consideration that both the parties were well qualified and enjoyed an equal occupation and status, and had mutually agreed to the terms and conditions of the decree for divorce after the completion of the statutory period of six months. There was, thus, no reason to deprive the appellant of the custody of the children, but visiting right arrangements were made in view of the fact that the two parties were based in different stations.

10. This order was assailed by respondent No.1 before the High Court in WP No.12432/2017 in September, 2017. While the writ petition was still pending, respondent No.1 filed a civil suit for declaration that the decree of divorce by mutual consent passed by the Family Court had been obtained by coercion, fraud and misrepresentation and was, thus, null and void, and hence did not affect the marriage between the parties. This suit is stated to be still pending.

11. During the proceedings, mediation was also endeavoured, but it failed. The learned Single Judge of the Bombay High Court passed an order on 12.6.2018, after having interacted with the children. The learned Judge took note of the subsequent development that the appellant had

married recently, prior to the order, and that there was a biological son of his second wife, borne out of her first wedlock, who is residing with them, currently. The appellant had also got the children admitted to a school in Jammu, by that point in time. The interaction with the children is stated to have led the Judge to the conclusion that the son and daughter desire to live with respondent No.1, but that they also love their father equally. The learned Judge gave preference to the desire of respondent No.1, as a mother, and directed that the children would remain in the custody of the mother for a period of one year to take education at a school in which they would acquire admission, at the place where their mother lives and that the father would have visiting rights. A number of directions were passed qua the implementation of the visiting rights.

12. The appellant, aggrieved by this order, preferred SLP (Civil) No.16667/2018. Leave was granted and this appeal No.6500/2018 was disposed of on 11.7.2018, by making a reference to the clauses in the consent decree, which had not been noticed by the High Court, while passing the order. The matter was then remitted to the High Court for fresh consideration.

13. Based on the interaction with the children, the learned Single Judge of the Bombay High Court by the impugned order dated 25.7.2018, once again, directed the custody of the children to be with the mother, with visiting rights given to the father. The High Court after noticing the submission made on behalf of the appellant that the condition in the divorce decree had not been varied till date, posted the matter on 19.3.2019, to be reviewed after a year.

14. We had directed the personal presence of the appellant and the respondents with whom we interacted. Learned counsel for the appellant drew our attention to certain pleadings which would show that proceedings had been initiated against the officer with whom the liaison of respondent No.1 was alleged. The Memorandum dated 14.3.2017 issued by the Directorate General, CRPF referred to the imputations of misconduct in support of the article of charges and it is specifically alleged that the said officer had used immoral texts during office hours while communicating with respondent No.1. The details of the same have also been set out. The inquiry is stated to be still pending. In the course of the Courts interaction, it came to light that as per the appellant and his second wife, the matrimonial arrangement was with the understanding that Respondent Nos.2 and 3 would stay with the appellant, and the second wife of the appellant would take care of them. The second wife of the appellant is an MBA graduate and was previously working with a bank, but resigned to take care of domestic responsibilities. The appellant also stated that while on the one hand no financial aid had been given by respondent No.1 to the appellant for the daughter, as per the obligations in the consent decree on other hand she had been transferring substantive amounts to the person with whom she allegedly had a liaison. On the Courts query, respondent No.1 initially took offence to the fact that the appellant had access to her bank details, but on a pointed query admitted that she did transfer the funds to her colleague, but stated that the same was her own business. She sought to plead that it was immaterial whether she was or was not a good wife, but that she was indeed a good mother, as had become apparent in the interaction of the children with the learned Single Judge.

15. We have given deep thought to the matter. The issue is not so simple as it involves the interests of these young children, respondent Nos.2 & 3, which is of paramount concern. While saying so, it has been kept in mind that these children are still young and are of an impressionable age and the interaction can only be one of the factors to be taken into account.

16. In our view, it clearly emerges that the decision to give custody to the appellant, of the two children, was a conscious decision taken by the parties at the relevant stage and can hardly be categorised as a decision under force, pressure or fraud. Respondent No.1 is well-educated and is a medical practitioner. There was a six (6) months hiatus period for the parties to think over the terms of the settlement before the grant of the decree of divorce, which is the statutory period available for the parties to have a re-think, if they so deem it appropriate. The parties had clearly agreed as per clause 5 that they were free to re-marry. As per the terms of the custody, the said marriage does not have any effect on the custody rights, at least in the terms between the parties. The appellant has also borne all the expenses for both the children, as respondent No.1 even initially failed to contribute anything towards the expenses for the daughter, contrary to the agreement inter se the parties.

17. The trigger for respondent No.1 claiming custody of the children only arose when the appellant asked her to contribute financially. It was not a case of financial difficulty, but the unwillingness of respondent No.1 to contribute for her own daughter, while simultaneously transferring amounts to a colleague of hers. It does appear that the proceedings initiated initially for the custody and thereafter for seeking cancellation of the decree of divorce were clearly an endeavour to pressurise the appellant to not claim any amounts. We may also invite attention to Order II Rule 2 of the Code of Civil Procedure, 1908 specifying that where a plaintiff intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so relinquished. Respondent No.1 had relinquished her rights to claim custody and the suit filed by her, thus, is also highly doubtful.

18. We may hasten to add that it is not as if there can be no eventuality where such terms may require modification, but that would arise if the interests of the children so desire, and more specifically if the appellant had failed to honour his commitments, or look after the children. The second marriage of the appellant cannot be put against him, nor can the factum of the child of his second wife residing with him deprive him of the custody rights of his two children, which has been specifically conferred on him with the consent of respondent No.1.

19. A perusal of the impugned order shows that it is not as if the appellant was not looking after the children. The children showed affection for their father. It was due to the exigencies of the appellants service condition that the children had to be put in a boarding school for some time, which exigency also does not remain at present. It was known to the parties that they were in a transferable job. A conscious decision was taken by the parties to give the sole custody to the appellant, in the interest of the children. The second wife of the appellant is an educated lady. Merely because the appellant has decided to go ahead in life, and has had a second marriage, it provides no ground whatsoever to deprive him of the custody of the children as agreed upon between the appellant and respondent No.1, especially when he has been looking after the children and has not gone back on any of his commitments. Respondent No.1, in order to avoid the financial liability started these proceedings, resulting in the impugned order, as also a separate suit proceeding. One fails to appreciate what is it that respondent No.1 wants by filing the suit now, by claiming that the decree of divorce is null and void, when there is admission of a mutual consent for divorce and the appellant has already re-married. We are not going into the details of the allegations against respondent No.1s liaison with another man in the same service, as the inquiry is still pending and, it may not be appropriate also, to do so in the present proceedings. We, however, see no reason why the appellant has been compelled to go through

this unnecessary litigation when the parties, at the threshold, after deep deliberation, and for the interest of the children, have given the custody to the appellant.

20. We are of the view that the learned Single Judge has given undue importance to the conversation with the children at a time when naturally they would prefer to stay with a parent rather than a boarding school. Respondent No.1 cannot be permitted to take advantage of the visiting rights granted for the vacation period to now claim that the children should continue to stay with her.

21. We are, thus, of the unequivocal view that the interference by the learned Single Judge, vide impugned order dated 25.7.2018, was unjustified, and the order of the Family Court dated 9.12.2016 was in order.

22. Insofar as any further facilitative directions, for the purpose of visiting rights of respondent No.1 are concerned, it would be open for the Family Court or High Court to make necessary arrangements. Respondent Nos.2 & 3 should be returned to the appellant by respondent No.1, along with all relevant documents of the children, within thirty (30) days from today, before the Family Court. In case the appellant is unable to make arrangement for a mid-term admission for the children, he may inform respondent No.1 and in that eventuality the children will continue to study in the same school at present and continue to stay with respondent No.1 till the end of the session. This is in order to ensure that the study of the children are not disturbed. We also make it clear that the rights and obligations as envisaged in the decree of divorce by mutual consent will bind both the appellant and respondent No.1. Needless to say that after the children attain the age of majority, they would have their own choice.

23. The appeal is accordingly allowed, leaving the parties to bear their own costs.

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NANDAKUMAR & ANR. VERSUS STATE OF KERALA & ORS.

SUPREME COURT OF INDIA

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

Nandakumar & Anr. ...Petitioner(s)
Versus
The State of Kerala & Ors. ...Respondent(s)

Criminal Appeal No. 597 of 2018
[Arising out of SLP (CRL.) No. 4488 of 2017]

Decided on : **20th April, 2018**

The marriage between the Appellant and his wife was annulled by the High Court on the ground that the boy was less than the age of 21 at the time of wedlock, as mandated by The Hindu Marriage Act, 1955 even though the girl was of 19 years (age of girls to marry as per the Hindu Marriage Act is 18).

Held that the marriage between the Appellant and his wife, both being Hindus and major (the only fact being that the boy has yet not attained the marriageable age) is not a void marriage under the Hindu Marriage Act, 1955, and as per the provisions of Section 12, which can be attracted in the present case, the marriage would be a voidable marriage at the most.

Both the Appellant and his wife being major, even though not competent to enter into a wedlock, they had the right to live together even outside the wedlock, when 'live-in-relationship' is now recognised by the Legislature itself. The court emphasised on due importance of the "right to choice" of an adult person accorded by the Constitution.

As the wife of the Appellant expressed her desire to be with the Appellant, the Hon'ble Supreme Court set aside the High Court's direction of giving the custody of the Appellant's wife to her parents.

JUDGMENT

Hon'ble Dr. Justice A.K. Sikri :—

Leave granted.

The brief facts leading to the present appeal are that appellant No. 1 has married Ms.Thushara. According to the appellant, this marriage was solemnised on 12.04.2017 at the Chakkulathukavu Bagavathi Temple situated in the Trivandrum District, Kerala. Insofar as Thushara is concerned, as on the date of marriage, she was admittedly 19 years of age and was, therefore, competent to enter into wedlock. It appears that after that marriage, she started living with appellant No. 1 as his wife. Respondent No. 4 is the father of Thushara. He filed Habeas Corpus petition being W.P.(Crl.) No. 149/2017(S) in the High Court of Kerala alleging therein that ever since 10.04.2017, his daughter Thushara was missing. He also stated in the said petition that Thushara was in the illegal custody of appellant No. 1.

In fact, respondent No. 4 had lodged FIR regarding missing of his daughter on 10.04.2017. Stating this fact in the writ petition, he averred that though the said FIR was registered, but no effective investigation had been conducted in the matter. On that basis, prayer made in the petition was to issue writ of Habeas Corpus commanding the appellants to produce his daughter in the High Court. This writ petition was admitted on 25.04.2017 and notice was ordered to the appellants herein by special messenger. On that day, the High Court also directed respondent Nos. 1 to 3 to trace out and produce the respondent No. 4's daughter in the Court. On 28.04.2017, when the writ petition was taken up, respondent No. 4 and his wife were present. Appellants were also present.

The Sub Inspector of Police, Vatgtiyoorkavu Police Station produced the detenue in the Court. The High Court interacted with the parties, including Thushara. As pointed out above, insofar as Thushara is concerned, she was 19 years of age and, therefore, competent to marry, as the marriageable age for females is 18 years. However, dispute arose about the age of appellant No. 1 herein. It was the contention of respondent No. 4 that appellant No. 1 was less than 21 years of age and, therefore, he was not of marriageable age. To ascertain this fact, the High Court asked appellant No. 1 to inform his date of birth. He stated his date of birth to be 30.05.1997, and in support thereof, produced driving licence issued by the licensing authorities. Treating it to be the date of birth of appellant No. 1, the High Court found that he would be attaining the age of 21 years only on 30.05.2018.

Therefore, on 12.04.2017, when the marriage was solemnised between appellant No. 1 and Thushara, appellant No. 1 was not of marriageable age. On that basis, the High Court concluded that the daughter of respondent No. 4 is not the lawfully wedded wife of appellant No. 1. The High Court also remarked that apart from the photographs of marriage which were produced in the High Court, there was no evidence to show that a valid marriage was solemnised between the parties and that a certificate issued by the local authority under the Kerala Registration of Marriages (Common) Rules, 2008, was also not produced.

On these facts, the High Court allowed the writ petition by entrusting the custody of Thushara to her father i.e., respondent No. 4 herein, as is clear from the following directions contained in the impugned order: "We accordingly dispose of the writ petition by entrusting custody of Ms. Thushara, the daughter of the petitioner with the petitioner. The Sub Inspector of Police, Vattiyoorkavu shall, to ensure their safety accompany them to their residence at Thirvananthapuram." Assailing the aforesaid order, the present appeal is preferred.

Notice was issued to the respondents. Respondent No. 1/State of Kerala as well as official respondent Nos. 2 and 3, viz., the Superintendent of Police and Sub-inspector of Police, have put in their appearance through the State counsel. Nobody has appeared on behalf of respondent No. 4 in spite of service of notice. In the aforesaid circumstances, we have heard learned counsel for the appellants as well as learned counsel for the State. A neat submission which is made by the learned counsel for the appellants is that the High Court has adopted an approach which is not permissible in law by going into the validity of marriage. It is submitted that when Thushara is admittedly a major i.e., more than 18 years of age, she has right to live wherever she wants to or move as per her choice. As she is not a minor daughter of respondent No. 4, "custody" of Thushara could not be entrusted to him.

Learned counsel for the appellants is right in his submission. Even the counsel for the State did not dispute the aforesaid position in law and, in fact, supported this submission of the learned counsel for the appellants. Insofar as marriage of appellant No. 1 (who was less than 21 years of age on the date of marriage and was not of marriageable age) with Thushara is concerned, it cannot be said that

merely because appellant No. 1 was less than 21 years of age, marriage between the parties is null and void. Appellant No. 1 as well as Thushara are Hindus. Such a marriage is not a void marriage under the Hindu Marriage Act, 1955, and as per the provisions of section 12, which can be attracted in such a case, at the most, the marriage would be a voidable marriage. Section 5 and Section 12 of the Hindu Marriage Act make this position clear which are reproduced below:

> ***"5.*** *Conditions for a Hindu marriage. - A Marriage may be solemnised between any two Hindus, if the following conditions are fulfilled, namelyxxxx xxxx xxxx xxxx*
>
> ***(iii)*** *the bridegroom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage;"*
>
> ***12.*** *Voidable marriages.-*

(1) Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-

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

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

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, the 1978 (2 of 1978), the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or

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

We need not go into this aspect in detail. For our purposes, it is sufficient to note that both appellant No. 1 and Thushara are major. Even if they were not competent to enter into wedlock (which position itself is disputed), they have right to live together even outside wedlock. It would not be out of place to mention that 'live-in relationship' is now recognized by the Legislature itself which has found its place under the provisions of the Protection of Women from Domestic Violence Act, 2005. In a recent judgment rendered by this Court in the case of 'Shafin Jahan v. Asokan K.M. & Ors.' [2018 SCC Online SC 343], after stating the law pertaining to writ of Habeas Corpus, this writ has been considered as "a great constitutional privilege" or "the first security of civil liberty". The Court made the following pertinent observations: -

> ***"28.*** *Thus, the pivotal purpose of the said writ is to see that no one is deprived of his/her liberty without sanction of law. It is the primary duty of the State to see that the said right is not sullied in any manner whatsoever and its sanctity is not affected by any kind of subgterfuge. The role of the Court is to see that the detenue is produced before it, find out about his/her indpendent choice and see to it that the person is released form illegal restraint. The issue will be a different one when the detention is not illegal. What is seminal is to remember that the song of liberty is sung with sincerity and the choice of an individual is appositely respected and conferred its esteemed status as the Constitution guarantees.*

It is so as the expression of choice is a fundamental right under Articles 19 and 21 of the Constitution, if the said choice does not transgress any valid legal framework. Once that aspect is clear, the enquiry and determination have to come to an end.

29. In the instant case, the High Court, as is noticeable from the impugned verdict, has been erroneously guided by some kind of social phenomenon that was frescoed before it. The writ court has taken exception to the marriage of the respondent No. 9 herein with the appellant. It felt perturbed. As we see, there was nothing to be taken exception to. Initially, Hadiya had declined to go with her father and expressed her desire to stay with the respondent No. 7 before the High Court and in the first writ it had so directed.

The adamantine attitude of the father, possibly impelled by obsessive parental love, compelled him to knock at the doors of the High Court in another Habeas Corpus petition whereupon the High Court directed the production of Hadiya who appeared on the given date along with the appellant herein whom the High Court calls a stranger. But Hadiya would insist that she had entered into marriage with him.

True it is, she had gone with the respondent No. 7 before the High Court but that does not mean and can never mean that she, as a major, could not enter into a marital relationship. But, the High Court unwarrantably took exception to the same forgetting that parental love or concern cannot be allowed to fluster the right of choice of an adult in choosing a man to whom she gets married. And, that is where the error has crept in. The High Court should have, after an interaction as regards her choice, directed that she was free to go where she wished to." The Court also emphasised due importance to the right of choice of an adult person which the Constitution accords to an adult person as under:

> ***"54.*** *It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her automony; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow.*

It has to be remembered that the realization of a right is more important than the conferment of the right. Such actualization indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition.

55. Non-acceptance of her choice would simply mean creating discomfort to the constitutional right by a Constitutional Court which is meant to be the protector of fundamental rights. Such a situation cannot remotely be conceived. The duty of the Court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centripodal value of liberty should allow an individual to write his/her script. The individual signature is the insignia of the concept. We also reproduce the following discussion from the concurring judgment rendered by Dr. Justice D.Y. Chandrachud in the said case:

> ***"81.*** *In a more recent decision of a three Judge Bench in Soni Gerry v. Gerry Douglas', this Court dealt with a case where the daughter of the appellant and respondent, who was a major had expressed a desire to reside in Kuwait, where she was pursuing her education, with her father. This Court observed thus: "9.....She has, without any hesitation, clearly stated that she intends to go back to Kuwait to pursue her career. In such a situation, we are of the considered opinion that as a major, she is entitled to exercise her choice and freedom and the Court cannot get into the aspect whether she has been forced by the father or not. There may be ample reasons on her behalf to go back to her father in Kuwait, but we are not concerned with her reasons. What she has stated before the Court, that alone matters and that is the heart of the reasoning for this Court, which keeps all controversies at bay.*

10. It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/He is entitled to make her/his choice. The courts cannot, as long as the choice remains, assume the role of parens patriae. The daughter is entitled to enjoy her freedom as the law permits and the court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father. We say so without any reservation."

It may be significant to note that insofar as Thushara is concerned, she has expressed her desire to be with appellant No. 1. Accordingly, we allow this appeal and set aside the impugned judgment of the High Court. However, since Thushara has not appeared as she was not made party in these proceedings, while setting aside the directions of the High Court entrusting the custody of Thushara to respondent No. 4, we make it clear that the freedom of choice would be of Thushara as to with whom she wants to live.

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LANDMARK JUDGMENTS ON

MAINTENANCE & ALIMONY

JAIMINIBEN HIRENBHAI VYAS & ANR VERSUS HIRENBHAI RAMESHCHANDRA VYAS & ANR.

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice J. Chelameswar & Hon'ble Mr. Justice S.A. Bobde**

Jaiminiben Hirenbhai Vyas & Anr
Versus
Hirenbhai Rameshchandra Vyas & Anr.

Criminal Appeal No. 2435 of 2014
(Arising out of SLP (Crl.) No. 3345 of 2013)

Decided on : **19th November, 2014**

- ***On the Appellants application for maintenance made for herself and her children, the Family Court granted maintenance in the sum of Rs 5,000/- only to her daughter under Section 125 Cr.P.C. The son was living with the father who was maintaining him and was therefore not granted maintenance. The main ground for denying maintenance to the Appellant was that she was found to have been working before her marriage and the Family Court was of the view that she could earn her living even now after the separation and therefore she was denied maintenance. This view did not find favour with the High Court, which noted that the Appellant had stopped working after her marriage and had given birth to two children. She had been only looking after the family and had therefore stopped working. The High Court thus reversed the Order of the Family Court and granted maintenance in the sum of Rs. 5,000/-. This was however granted from the date of the order.***
- ***The High Court has not given any reason why it has not directed maintenance from the date of the application for maintenance . Section 125 of the Cr.P.C., therefore, impliedly requires the Court to consider making the order for maintenance effective from either of the two dates, having regard to the relevant facts. For good reason, evident from its order, the Court may choose either date. It is neither appropriate nor desirable that a Court simply states that maintenance should be paid from either the date of the order or the date of the application in matters of maintenance.***
- ***The High Court has not given any reason for not granting maintenance from the date of the application. We are of the view that the circumstances eminently justified grant of maintenance with effect from the date of the application in view of the finding that the Appellant had worked before marriage and had not done so during her marriage. There was no evidence of her income during the period the parties lived as man and wife.***

JUDGMENTS

Hon'ble Mr. Justice S.A. Bobde :—

1. Leave granted.

2. This appeal has been preferred by a wife and a minor daughter. The Family Court directed payment of interim maintenance to wife and minor daughter @ Rs. 6,000/- per month under Section 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Cr.P.C.). Interim maintenance was also ordered under Section 24 of the Hindu Marriage Act, 1955 (hereinafter referred to as the H.M. Act) @ 3,000/- per month payable to both. Eventually, the Family Court disposed the maintenance proceedings finally by the Order dated 31.01.2009. By this Order the Family Court granted maintenance in favour of daughter @ Rs. 5,000/- per month from the date of judgment. The Family Court, however, took the view that the appellant wife would not be entitled to receive any amount more than the interim maintenance which she is receiving under the H.M. Act.

3. On the Appellants application for maintenance made for herself and her children, the Family Court granted maintenance in the sum of Rs 5,000/- only to her daughter under Section 125 Cr.P.C. The son was living with the father who was maintaining him and was therefore not granted maintenance. The main ground for denying maintenance to the Appellant was that she was found to have been working before her marriage and the Family Court was of the view that she could earn her living even now after the separation and therefore she was denied maintenance. This view did not find favour with the High Court, which noted that the Appellant had stopped working after her marriage and had given birth to two children. She had been only looking after the family and had therefore stopped working. The High Court thus reversed the Order of the Family Court and granted maintenance in the sum of Rs. 5,000/-. This was however granted from the date of the order.

4. We have given our anxious consideration to the Order of the High Court but find it difficult to uphold the direction that the maintenance should be paid only from the date of the Order. The High Court has not given any reason why it has not directed maintenance from the date of the application for maintenance.

5. The relevant part of Section 125 reads as follows:

> **125.** Order for maintenance of wives, children and parents.
>
> > **(1)** If any person having sufficient means neglects or refuses to maintain-
> >
> > > **(a)** his wife, unable to maintain herself, or
> >
> > > **(b)** his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
> >
> > > **(c)** his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
> >
> > > **(d)** his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child,

father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

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

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

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

Explanation.- For the purposes of this Chapter,-

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

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

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

6. The provision expressly enables the Court to grant maintenance from the date of the order or from the date of the application. However, Section 125 of the Cr.P.C. must be construed with sub-section (6) of Section 354 of the Cr.P.C. which reads thus:

354 (6) Language and contents of judgment - Every order under Section 117 or sub-section (2) of Section 138 and every final order made under Section 125, Section 145 or Section 147 shall contain the point or points for determination, the decision thereon and the reasons for the decision.

Therefore, every final order under Section 125 of the Cr.P.C. [and other sections referred to in sub-section (c) of Section 354] must contain points for determination, the decision thereon and the reasons for such decision. In other words, Section 125 and Section 354 (6) must be read together.

7. Section 125 of the Cr.P.C., therefore, impliedly requires the Court to consider making the order for maintenance effective from either of the two dates, having regard to the relevant facts. For good reason, evident from its order, the Court may choose either date. It is neither appropriate nor desirable that a Court simply states that maintenance should be paid from either the date of the order or the date of the application in matters of maintenance. Thus, as per Section 354

(6) of the Cr.P.C., the Court should record reasons in support of the order passed by it, in both eventualities.

The purpose of the provision is to prevent vagrancy and destitution in society and the Court must apply its mind to the options having regard to the facts of the particular case.

8. In Shail Kumari Devi v. Krishan Bhagwan Pathak[1] this Court dealt with the question as to from which date a Magistrate may order payment of maintenance to wife, children or parents. In Shail Kumar Devi, this Court considered a catena of decisions by the various High Courts, before arriving at the conclusion that it was incorrect to hold that, as a normal rule, the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance. It is, therefore, open to the Magistrate to award maintenance from the date of application. The Court held, and we agree, that if the Magistrate intends to pass such an order, he is required to record reasons in support of such Order. Thus, such maintenance can be awarded from the date of the Order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary.

9. In the case before us, the High Court has not given any reason for not granting maintenance from the date of the application. We are of the view that the circumstances eminently justified grant of maintenance with effect from the date of the application in view of the finding that the Appellant had worked before marriage and had not done so during her marriage. There was no evidence of her income during the period the parties lived as man and wife. We, therefore reverse the Order of the High Court in this regard and direct that the respondent shall pay the amount of maintenance found payable from the date of the application for maintenance. As far as maintenance granted under Section 24 of the H.M. Act by the Courts below is concerned, it shall remain unaltered.

10. Accordingly, the appeal is allowed.

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1 (2008) 9 SCC 632; Paras 39 - 41.

MANISH JAIN VERSUS AKANKSHA JAIN

SUPREME COURT OF INDIA

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

Manish Jain
Versus
Akanksha Jain

Civil Appeal No. 4615 OF 2017
(Arising out of SLP (C) No.7670 OF 2014)

Decided on : **30th March, 2017**

- ***An order for maintenance pendente lite or for costs of the proceedings is conditional on the circumstance that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding. It is no answer to a claim of maintenance that the wife is educated and could support herself. Likewise, the financial position of the wife's parents is also immaterial. The Court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance and whether the applicant has any independent income sufficient for her or his support. Maintenance is always dependent upon factual situation; the Court should, therefore, mould the claim for maintenance determining the quantum based on various factors brought before the Court.***
- ***In the present case, at the time of claiming maintenance pendente lite when the respondent-wife had no sufficient income capable of supporting herself, the High Court was justified in ordering maintenance. However, in our view, the maintenance amount of Rs.60,000/- ordered by the High Court (in addition to Rs.10,000/- paid under the proceedings of the D.V. Act) appears to be on the higher side and in the interest of justice, the same is reduced to Rs.25,000/- per month. The maintenance pendente lite of Rs.25,000/- is to be paid to the respondent-wife by the appellant-husband (in addition to Rs.10,000/- paid under the proceedings of the D.V. Act).***

ORDER

Hon'ble Mrs. Justice R. Banumathi :—

Leave granted.

2. The present appeal has been filed by the appellant-husband against the order dated 21.02.2014 passed by the High Court of Delhi at New Delhi in C.M.(M) No.910 of 2010. In the said judgment, the High Court while setting aside the order dated 15.03.2010 passed by the Additional District Judge-II (West), Tis Hazari, Delhi who declined to award maintenance pendente lite to the respondent-wife under Section 24 of the Hindu Marriage Act, 1955 has granted interim maintenance to the respondent-wife at the rate of Rs.60,000/- per month to be paid by the

appellant-husband Manish Jain with effect from 1st February, 2012 till the disposal of divorce petition. The said amount was fixed in addition to Rs.10,000/- which the appellant-husband has already been paying by way of interim maintenance as per the order passed in Criminal Appeal No.65 of 2008 under Section 23(2) of the Protection of Women from Domestic Violence Act, 2005 [for short the D.V. Act].

3. This is a case of marital discord which has a chequered history. Brief facts leading to this appeal by way of special leave are as under:- Both the appellant and the respondent got married on 16.02.2005 and they were living at V-38, Green Park, New Delhi. The couple shifted to an accommodation at 303, SFS Apartment, Hauz Khas, New Delhi on 15.04.2007. In or about July, 2007 relationship between the parties got strained. In September, 2007 the appellant-husband filed a divorce petition HMA No.553/2007 under the Hindu Marriage Act, 1955 [for short the HM Act] seeking divorce on the grounds of cruelty.

4. In November, 2007 the respondent-wife filed a petition under the D.V. Act along with interim relief i.e., maintenance. She also filed a complaint on 23.11.2007 under Section 498-A and Section 406 IPC with CAW Cell, Amar Colony, Nanakpura, New Delhi against the appellant-husband and his family members which was later on registered as FIR bearing No.190 of 2008, Police Station, Friends Colony, New Delhi on 04.03.2008. In December, 2007, respondent filed yet another Complaint Case No.381 of 2008 under Section 125 Cr.P.C. before the Mahila Court, Patiala House, New Delhi. Her interim application seeking maintenance amongst other reliefs under Section 23(2) of the D.V. Act was dismissed by the Metropolitan Magistrate, Patiala House, New Delhi by order dated 23.04.2008 on the ground that the respondent was employed and was getting a stable income and that no document was placed on record by the respondent to show that respondent had again become jobless as the publication of the Magazine FNL had been stopped. Against the dismissal of application for maintenance, the respondent had filed appeal before Additional Sessions Judge, Patiala House in Criminal Appeal No.65 of 2008. In the said appeal and in Criminal Revision No.66 of 2008, Additional Sessions Judge, Patiala House by an order dated 01.09.2009 granted maintenance of Rs.10,000/- per month to the respondent-wife.

5. The appellant-husband filed an application under Section 438 Cr.P.C. on 22.04.2008 for grant of bail in anticipation of his likely arrest. The High Court granted anticipatory bail to the appellant-husband subject to return of Toyota Corolla and dowry/jewellery articles to the respondent-wife within a week from the date of order till the next date of hearing which is said to have been complied with. Order was also passed directing the respondent to deposit Rs.12,00,000/- towards alleged return of dowry articles.

6. The respondent-wife filed application under Section 24 of the HM Act claiming interim maintenance pendente lite of Rs.4,00,000/- per month and also a sum of Rs.80,000/- to meet litigation expenses during the pendency of the divorce petition. In the said application, the respondent- wife pleaded that she was having no source of income to maintain herself and that she is dependent upon others for her day to day needs and requirements. The said application was resisted by the appellant-husband contending that the respondent-wife is an educated lady and that she had completed her one year course of Fashion Designing from J.D. Institute, Hauz Khas, New Delhi and that she is capable of earning monthly salary of Rs.50,000/. The application filed under Section 24 of the HM Act was dismissed by Additional District Judge-II, Tis Hazari, Delhi by order dated 15.03.2010. Being aggrieved, the respondent-wife filed Crl. M.A. No.17724 of 2012 before the High Court, Delhi. The High Court in its order dated 08.11.2011 in C.M.(M)

No.910 of 2010 filed by the wife against the order dated 15.03.2010 directed both the parties to file an affidavit truthfully disclosing their correct income. Both the husband and the wife filed an affidavit as to their income in compliance of the aforesaid order. After so directing the parties to file affidavit regarding their income and after referring to the income of appellant-husband and the properties which the appellant and his family are owning and also the standard of living of the respondent-wife which she is required to maintain, the High Court by the impugned order directed the appellant-husband to pay interim maintenance of Rs.60,000/- per month in addition to Rs.10,000/- which was directed to be paid to the respondent-wife in the proceedings under the D.V. Act.

7. Aggrieved by the order of the High Court, the appellant-husband came in appeal before this Court by way of special leave. After giving opportunity to the parties to work out a settlement which ultimately failed, the same was dismissed on 15.04.2014. Being aggrieved by the dismissal of the above petition, a review petition was filed on 13.05.2014 in which notice was issued by this Court on 06.08.2014 and on 03.02.2016 the same was allowed and the Special Leave Petition was restored to its original number which is the subject matter before us.

8. Learned counsel for the appellant-husband submitted that the respondent-wife has concealed her employment and independent source of income on several occasions throughout the matrimonial proceedings before the courts below and also that the High Court has committed a grave error in interfering with the well-reasoned order of the trial Court under Section 24 of the HM Act. The learned counsel for the appellant-husband submitted that the trial court after analyzing the evidence that the wife was educated, professionally qualified in the Fashion industry and had sufficient independent income rejected the application of the wife seeking maintenance under Section 24 of the HM Act. It was submitted that the High Court without proper appreciation of the income of the parties had wrongly set aside the order of the trial Court and fixed an abnormal amount of Rs.60,000/- as maintenance to the respondent-wife under Section 24 of the Hindu Marriage Act.

Learned counsel further submitted that in Criminal Appeal No.65 of 2008 under Section 23(2) of the D.V. Act, the appellant- husband is paying an interim maintenance of Rs.10,000/- per month to the respondent-wife and the appellant-husband has so far made a total payment of Rs.7,50,000/- in the proceedings under D.V. Act, apart from returning a Toyota Corolla car worth Rs.13,00,000/- besides depositing a sum of Rs.12,00,000/- and a sum of Rs.2,75,000/- towards untraced admitted dowry articles in compliance with the order passed by the Court. It was further submitted that the appellant-husbands firms/companies have been either shut down due to heavy loss and/or under the stage of winding up and the appellant-husband is not in a position to pay the exorbitant amount of Rs.60,000/- per month as maintenance pendente lite to the respondent-wife.

9. Learned counsel for the respondent-wife at the outset submitted that the principle of providing maintenance is to ensure the living conditions of respondent-wife similar to that of appellant-husband whereas in the present case the respondent-wife is yet to receive any money.

10. We have heard the matter at considerable length. Parties are entangled in several rounds of litigation making allegations and counter allegations against each other. Since various proceedings are pending between the parties, we are not inclined to go into the merits of the rival contentions advanced by the parties. The only question falling for consideration is whether the respondent-

wife is entitled to maintenance pendente lite and whether the amount of Rs.60,000/- awarded by the High Court is on the higher side.

11. The Court exercises a wide discretion in the matter of granting alimony pendente lite but the discretion is judicial and neither arbitrary nor capricious. It is to be guided, on sound principles of matrimonial law and to be exercised within the ambit of the provisions of the Act and having regard to the object of the Act. The Court would not be in a position to judge the merits of the rival contentions of the parties when deciding an application for interim alimony and would not allow its discretion to be fettered by the nature of the allegations made by them and would not examine the merits of the case. Section 24 of the HM Act lays down that in arriving at the quantum of interim maintenance to be paid by one spouse to another, the Court must have regard to the appellants own income and the income of the respondent.

12. At the time of filing application under Section 24 of the HM Act in December, 2007, the respondent-wife was doing her internship in fashion designing in J.D. Institute of Fashion Technology and just completed the course and was not employed at that time. Only in the month of May, 2008, she became a trainee and joined FNL Magazine of Images Group as Junior Fashion Stylist and was earning an approximate/stipend income of Rs.21,315/- per month and due to recession, the same is said to have been reduced to Rs.16,315/- for three months that is July, August and September in the year 2009. It is stated that thereafter the respondent-wife has become jobless and associated with Cosmopolitan Magazine and according to the respondent-wife, she was working as a Stylist and is paid nominal amount of Rs.4,500/- per shoot and the said amount is inclusive of expenses like travelling etc. On a perusal of the judgment of the High Court and also the affidavit of the respondent-wife, it is clear that the respondent-wife has no permanent source of employment and no permanent source of income.

13. Appellant-husband is stated to be a partner in the firms of his family business. It is also stated that the appellant-husband and his family own several valuable properties and has flourishing business. Insofar as the properties/income of appellant-husband, the High Court has made the following observations:-

> **38.** From the pleading of the respondent before other Courts, it has come on record that the respondents family is having successful and flourishing business of electrical and non-ferrous metals for the last 22 years. They are successful in their business. His mother belongs to a family of journalists and lawyers.
>
> **39.** From the material placed on record by the petitioner, prima facie it appears to the Court that even the respondent has not made full disclosure about his income and correct status of the family in the affidavits filed by him. The statements made by him are contrary to the statement made in the bail application. Prima facie, it appears to the Court that the respondent is hiding his income by trying to show himself as a pauper, however, the documents placed on record speak differently. At the same time the family members have a reasonably flourishing business and many properties as admitted by him. It has now become a matter of routine that as and when an application for maintenance is filed, the non-applicant becomes poor displaying that he is not residing with the family members if they have a good business and movable and immovable properties in order to avoid payment of maintenance. Courts cannot under these circumstances close their eyes when tricks are being played in a clever manner.

14. Section 24 of the HM Act empowers the Court in any proceeding under the Act, if it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of any one of them order the other party to pay to the petitioner the expenses of the proceeding and monthly maintenance as may seem to be reasonable during the proceeding, having regard to also the income of both the applicant and the respondent. Heading of Section 24 of the Act is Maintenance pendente lite and expenses of proceedings. The Section, however, does not use the word maintenance; but the word support can be interpreted to mean as Section 24 is intended to provide for maintenance pendente lite.

15. An order for maintenance pendente lite or for costs of the proceedings is conditional on the circumstance that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding. It is no answer to a claim of maintenance that the wife is educated and could support herself. Likewise, the financial position of the wifes parents is also immaterial. The Court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance and whether the applicant has any independent income sufficient for her or his support. Maintenance is always dependent upon factual situation; the Court should, therefore, mould the claim for maintenance determining the quantum based on various factors brought before the Court.

16. In the present case, at the time of claiming maintenance pendente lite when the respondent-wife had no sufficient income capable of supporting herself, the High Court was justified in ordering maintenance. However, in our view, the maintenance amount of Rs.60,000/- ordered by the High Court (in addition to Rs.10,000/- paid under the proceedings of the D.V. Act) appears to be on the higher side and in the interest of justice, the same is reduced to Rs.25,000/- per month. The maintenance pendente lite of Rs.25,000/- is to be paid to the respondent-wife by the appellanthusband (in addition to Rs.10,000/- paid under the proceedings of the D.V. Act).

17. The order impugned herein is set aside and the appeal is allowed. The amount of Rs.60,000/- awarded as maintenance pendente lite is reduced to Rs.25,000/- per month which is in addition to Rs.10,000/- paid under the proceedings of the D.V. Act. The appellant-husband is directed to pay the arrears w.e.f. 01.02.2012 till the disposal of the divorce petition, within four weeks from today. The appellant-husband shall continue to pay Rs.25,000/- per month in addition to Rs.10,000/- paid under the proceedings of the D.V. Act on or before 10th of every English calendar month till the disposal of the divorce petition. If the appellant-husband has paid or deposited any amount of maintenance pursuant to the order of the High Court dated 21.02.2014, the same shall be set-off against the arrears to be paid by the appellant-husband. The respondent-wife is at liberty to withdraw the amount, if any, deposited by the appellant-husband pursuant to the order dated 21.02.2014. We make it clear that we have not expressed any opinion on the merits of the matter. In case the appellant-husband does not comply with the order, as above, including for payment of arrears, he would be visited with all consequences including action for contempt of Court.

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UDITA NABHA VERSUS RANJEET NABHA

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice N. V. Ramana and Hon'ble Mr. Justice Abdul Nazeer**

Udita Nabha .....Appellant(S)
Versus
Ranjeet Nabha .....Respondent(S)

Civil Appeal Nos. 6695-6697 of 2018

[Arising out of the SLP (C) Nos. 22343-22345 of 2017]

Decided on : **16th July, 2018**

The Appellant-wife and Respondent-husband were married under the provisions of the Special Marriage Act, 1954 and had a minor daughter. Due to matrimonial discord the Appellant-wife filed a divorce petition under Section 27(1)(d) of the Special Marriage Act, 1954. The Appellant-wife in her petition was seeking permanent alimony of Rs. 30,00,00,000/- and interim maintenance of Rs. 6,00,000/- (Rs. 3,50,000/- for herself and Rs. 2,50,000/- for her minor daughter). The Family Court allowed the Appellant application partially for interim maintenance. Both the parties preferred appeals before the High Court. Further, the aggrieved Appellant moved to the Supreme Court seeking relief against the order of the High Court. The court held that no interference was required ,but ,modified the lower court's order by allowing the withdrawal of Rs. 2,00,00,000/- by the Appellant-wife as an interim measure.

JUDGMENTS

Hon'ble Mr. Justice N. V. Ramana :—

1. Leave granted.

2. These appeals are filed against the interim order dated 25.04.2017 in Civil Application No. 78 of 2017 in FCA No. 216 of 215 along with Civil Application No. 178 of 2016 in FCA No. 232 of 2015 and order dated 06.07.2017 in Review Petition No. 5 of 2017 in Civil Application 78 of 2017 passed by the High Court of Judicature at Bombay.

3. It would be necessary to observe the litigation history of this case, in order to appreciate the case at hand. Appellant (wife) 1 NON-REPORTABLE and respondent (husband) were married under the provisions of the Special Marriage Act, 1954 way back in the year 1995. The couple was blessed with a girl child in the year 2003. As there was matrimonial discord between appellant (wife) and respondent (husband), appellant (wife) filed a petition under Section 27(1)(d) of the Special Marriage Act, 1954, being M.J. Petition No. A-2400 of 2011 before the Family Court in Mumbai.

4. In the aforesaid divorce petition, the Appellant, inter alia, sought permanent alimony of Rs. 30,00,00,000/- and interim maintenance of Rs. 3,50,000/- for herself and Rs. 2,50,000/- for her minor daughter. It is to be noted that the Family Court, by order dated 21.10.2013, partly

allowed the appellant's application for interim maintenance and directed the respondent to pay Rs. 2,00,000/- per month for the appellant (wife) and Rs. 1,00,000/- per month for the minor daughter. The order of trial court granting interim maintenance was sustained by the appellate courts thereafter.

5. Thereafter, the Family Court by a final order and judgment, dated 14.09.2015, in M.J. Petition No. A-2400 of 2011, inter alia, while granting the divorce to the petitioner, provided for the permanent alimony, in the following manner -

> **4.** The respondent shall pay lumpsum permanent alimony of Rs. 6 Crores for the petitioner and Rs. 5 crores for their daughter Naia, within three months from the date of decree.
>
> **5.** Out of the above mentioned Rs. 5 Crores, the petitioner shall keep the amount of Rs. 3.5 Crores in fixed Deposit with any nationalized bank in the name of minor child Naia for a period of 5 years.
>
> **6.** The petitioner is not entitled to withdraw above amount of Fixed deposit of Rs. 3.5 Crores in the name of minor daughter without the permission of the Court during the minority of child.

6. It may be relevant to note that both parties preferred appeals, before the High Court, against the aforesaid order of the Family Court, being FCA No. 216 of 2015 and 232 of 2015. The High Court, by order dated 09.03.2016, has issued notice in both appeals filed by parties herein and the same is pending.

7. In the meanwhile, respondent filed a Civil Application No. 385 of 2015 in FCA No. 216 of 2015, seeking, inter alia, stay of the implementation of the final order, so far as it relates to the permanent alimony, granted by the Family Court. On 04.05.2016, the High Court, while considering the interim stay sought by the respondent, tentatively allowed his counsel to seek instruction on the deposit, in the following manner- Clause 4 of the impugned decree is a money decree. If Applicant wants his prayer for stay and grant of monthly payment to be considered, the Applicant must deposit a reasonable amount out of the amount payable in terms of Clause 4. Learned Senior Advocate for the Applicant seeks time to take instructions whether the respondent can pay a reasonable amount.

We however, make it clear that unless the Applicant deposits a reasonable amount, his prayer for a grant of facility to pay monthly amount will not be considered on merits. Further, by order dated 12.08.2016, The High Court while granting a conditional stay, ordered as under- Pending the hearing and final disposal of Family Court Appeal No. 216 of 2015, execution of judgment and order in Clauses (iv) and (v), passed by the learned Family Court No.6 at Bandra, Mumbai on 14th September, 2015 stands stayed subject to applicant Ranjeet Nabha depositing 75% of the amount as directed by the Family Court in clauses (iv) and (v) towards lumpsum permanent alimony in favour of respondent Udita Nabha and daughter Naia Nabha within three months from today, with the Registry of this Court. On an appeal before this Court, by the respondent, in SLP (C) No. 32082 of 2016, this Court, by Order dated 28.11.2016, while dismissing the special leave petition, extended the time period for respondent to deposit the money by further two months.

8. In view of the aforesaid order of this Court, the respondent, accordingly, deposited the requisite money and complied with the order.

9. Thereafter, the appellant (wife) filed an Application before the High Court, being Civil Application No. 78 of 2017 in 4 FCA No. 216 of 2015, seeking, inter alia, permission to unconditionally withdraw a sum of Rs. 8.25 Crores deposited by the respondent.

10. The High Court, by the final impugned order, dated 25.04.2017, while partly allowing the application, inter alia, passed the following order-

(I) We direct the registry to invest a sum of Rs. 1.125 crores in separate fixed deposit with any nationalized bank. While opening the fixed deposit account, instructions shall be given to the Bank directing the Bank to transfer the quarterly interest accrued thereon directly to the bank account of the applicant-wife. We direct the applicant-wife to furnish necessary account particulars of her Bank account to the Registrar (Judicial-I) within a period of three weeks from the date on which order is uploaded;

(II) The amount equivalent to 75% of the sum of Rs. 3.5 Crores shall be separately invested in fixed deposit with any nationalized Bank. In the event of any major change in circumstances, it will be open for the applicant-wife to apply to this Court for seeking permission to withdraw a part of the said amount or interest accrued thereon;

(III) Rest of the amount deposited by the respondent-husband in terms of the order dated 12th August 2016 shall be invested in fixed deposit in any nationalized bank;

(IV) All fixed deposits shall be renewed from time to time till further orders are passed by the Court in Family Court Appeal;

11. Further, the appellant (wife) filed a Review Petition No. 5 of 2017 in Civil Application No. 78 of 2017, seeking review of the aforesaid order. The High Court, vide order dated 06.07.2017, dismissed the Review Petition filed by the appellant (wife).

12. Aggrieved by the impugned order, the appellant (wife) approached this Court through these appeals.

13. Heard the learned senior counsels appearing on behalf of both parties and perused the material available on record.

14. Our attention was drawn to the fact that appellant (wife) and the minor daughter were provided with Rs. 2,00,000/- per month and Rs. 1,00,000/- per month as interim maintenance, but the aforesaid amount has been substantially reduced and presently, the minor daughter is only entitled for approximately Rs. 29,000/- per month, even after being granted the permanent alimony by the Family Court through the final order. Further, we are aware of the fact that the appeals filed by both the parties are pending in the High Court.

15. Although the learned senior counsel, appearing on behalf of the respondent, has vehemently contended that there was no requirement to grant any amount to the petitioner (wife), as she was alleged to have sufficient means 6 to maintain herself and her daughter, but we are not impressed by such submissions on merits, as we are only concerned with reasonability of conditions imposed for granting stay. In this case at hand, we have to delicately balance the interests of parties concerned, so that a party is not unjustly denied of his rights on the one hand, at the same time, interest of judgment-debtor during intra-appeal is also not unjustly denied.

16. Learned senior counsel appearing on behalf of the petitioner, has limited the submissions to only a part of the entire amount granted by the trial court, so as to maintain herself and her

child. Although we acknowledge the respondent's promise to provide for the child's education in the concerned institution, but we cannot lose track of the fact that the appellant (wife) may require certain amount to lead a comparable life and also provide for her child's comfort at the same time. Therefore, it is imperative on us to protect her interests in this case at hand.

17. In view of pendency of appeals before the High Court, any further indulgence at this stage is not required, except, we deem it appropriate to modify the order of the High Court to the extent that the appellant (wife) be allowed to withdraw Rs. 2 Crores during intra-appeal as an interim measure.

18. Further, we request the High Court to expeditiously dispose of the appeals. It is also made clear that we have not expressed any views on the merits of this case and the High Court is further requested to consider the case, uninfluenced by any observations made herein.

19. Accordingly, these appeals are disposed of.

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USHA UDAY KHIWANSARA VERSUS UDAY KUMAR JETHMAL KHIWANSARA

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Abhay Manohar Sapre and Hon'ble Mr. Justice Uday Umesh Lalit**

Usha Uday Khiwansara .....Appellant(S)
Versus
Uday Kumar Jethmal Khiwansara .....Respondent(S)

Civil Appeal No. 6861 OF 2018
[Arising out of S.L.P.(C) No.31332 of 2017]

Decided on : **17th July, 2018**

Parties living separately for last more than a decade – There is no issue born out of wedlock – It has also come on record that appellant wife ailing for long time and living with her relatives – She has no independent income of her own and she is wholly dependent upon her family members – On other hand, respondent husband is quite resourceful person having his own or his family bungalow in a posh colony – Held, in order to ensure that parties live peacefully in future, a quietus must be given to all litigations between parties – Consistent with broad consensus arrived at between parties, divorce decree confirmed with direction to respondent husband to make payment of Rs. 30,00,000/- towards permanent alimony to petitioner-wife and also further payment of Rs. 5 lakhs by way of gesture of goodwill and as his contribution toward medical expenses.

JUDGMENTS

Hon'ble Mr. Justice N. V. Ramana :—

1. Delay condoned.

2. Leave granted.

3. This appeal is filed by the appellant-wife against the final judgment and order dated 14.08.2014 passed by the High Court of Signature Not Verified Judicature at Bombay in Family Court Appeal No.155/2007 whereby the High Court allowed the Family Court Appeal filed by the Respondent-husband.

4. Few facts need to be mentioned to appreciate the short issue involved in the appeal.

5. The appellant is the wife whereas the respondent is the husband. The appellant and the respondent married on 07.02.1992. Unfortunately, due to various reasons, their married life was not cordial which eventually led to filing of divorce petition (486 of 2004) by the respondent (husband) in the year 2004 against the appellant (wife) in Pune Family Court.

6. The respondent sought divorce inter alia on the ground of cruelty and desertion against the appellant. The appellant denied the allegations of cruelty/desertion and contested the petition by joining issues.

7. By order dated 19.06.2007, the learned Family Judge dismissed the respondent's divorce petition. He held that respondent failed to make out any case of cruelty and desertion on the part of the appellant so as to entitle him to claim a decree of divorce.

8. The respondent felt aggrieved, filed first appeal (155/2007) before the High Court at Mumbai. By impugned order, the High Court allowed the respondent's appeal and set aside the order of the Family Judge and in consequence allowed the respondent's divorce petition by granting a decree of divorce in his favour on the ground of desertion. It is against this order of the High Court; the wife (appellant herein) felt aggrieved and filed the present special leave to appeal in this Court.

9. We have heard the learned counsel for the parties and perused the record of the case.

10. It is not in dispute that the High Court had allowed respondent's (husband's) appeal and passed the impugned order granting a decree of divorce without hearing the appellant (wife). In other words, none appeared for the wife before the High Court in the appeal, which was, heard ex-parte. Such hearing of the appeal, which eventually resulted in passing an adverse order against the wife and dissolving the marriage undoubtedly caused prejudice to the rights of the appellant-wife.

11. Since the appellant wife thus stood denied of a chance to represent her case before the High Court, the logical consequence would normally have been to set aside the judgment and order under appeal and remit the matter for fresh consideration. At this juncture the learned counsel appearing for both parties submitted that they were willing to part company on a note which would be mutually acceptable to either party. We see force in the submission made by both the learned counsel and rather than relegating them to fight another round of battle, we consider the matter in that perspective.

12. It is not in dispute that the parties have been living separately for last more than a decade. It is also clear that there is absolutely no chance of both coming together to continue their marital life. It has also come on record that there is no issue born out of wedlock. It has also come on record that appellant (wife) has been ailing for long time and living with her relatives in Wardha. It has also come on record that the appellant (wife) has no independent income of her own and she is wholly dependent upon her family members. It has also come on record that the respondent (husband) is quite resourceful person having his own or his family bungalow in a posh colony (Lakaki Road) in Pune where he is living.

13. In *Naveen Kohli v. Neelu Kohli*[1] the husband had filed petition seeking divorce on the ground of cruelty on part of wife. While the matter was pending in the trial court, efforts were made for amicable settlement, without any success. Finding that there was no cordiality left between the parties to live together the trial court ordered dissolution of marriage and directed the husband to deposit Rs.5 lakhs towards permanent maintenance of the wife. The appeal at the instance of the wife having been allowed, the husband approached this Court by filing an appeal. The observations of this Court in paragraphs 86 and 90 are relevant for our purposes and the same are quoted hereunder:

> ***"86.*** *In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been*

1 (2006) 4 SCC 558

initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

90. *Consequently, we set aside the impugned judgment of the High Court and direct that the marriage between the parties should be dissolved according to the provisions of the Hindu Marriage Act, 1955. In the extraordinary facts and circumstances of the case, to resolve the problem in the interest of all concerned, while dissolving the marriage between the parties, we direct the appellant to pay Rs 25,00,000 (Rupees twenty-five lakhs) to the respondent towards permanent maintenance to be paid within eight weeks. This amount would include Rs 5,00,000 (Rupees five lakhs with interest) deposited by the appellant on the direction of the trial court. The respondent would be at liberty to withdraw this amount with interest. Therefore, now the appellant would pay only Rs 20,00,000 (Rupees twenty lakhs) to the respondent within the stipulated period. In case the appellant fails to pay the amount as indicated above within the stipulated period, the direction given by us would be of no avail and the appeal shall stand dismissed. In awarding permanent maintenance we have taken into consideration the financial standing of the appellant.*"

14. In *Sanghamitra Ghosh v. Kajal Kumar Ghosh*[2] it was observed in paragraphs 18, 19, 20 and 21 as under:

"*18. In the instant case, we are fully convinced that the marriage between the parties has irretrievably broken down because of incompatibility of temperament. In fact there has been total disappearance of emotional substratum in the marriage. The matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, therefore, the public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure (2007) 2 SCC 220 what is already defunct de facto as observed in Naveen Kohli case7.*

19. In view of peculiar facts and circumstances of this case, we consider it appropriate to exercise the jurisdiction of this Court under Article 142 of the Constitution.

20. In order to ensure that the parties may live peacefully in future, it has become imperative that all the cases pending between the parties are directed to be disposed of. According to our considered view, unless all the pending cases are disposed of and we put a quietus to litigation between the parties, it is unlikely that they would live happily and peacefully in future. In our view, this will not only help the parties, but it would be conducive in the interest of the minor son of the parties.

21. On consideration of the totality of the facts and circumstances of the case, we deem it appropriate to pass the order in the following terms:

(a) the parties are directed to strictly adhere to the terms of compromise filed before this Court and also the orders and directions passed by this Court;

2 (2007) 2 SCC 220

(b) we direct that the cases pending between the parties, as enumerated in the preceding paragraphs, are disposed of in view of the settlement between the parties; and

(c) all pending cases arising out of the matrimonial proceedings including the case of restitution of conjugal rights and guardianship case between the parties shall stand disposed of and consigned to the records in the respective courts on being moved by either of the parties by providing a copy of this order, which has settled all those disputes in terms of the settlement."

15. In our considered view, in order to ensure that the parties live peacefully in future a quietus must be given to all litigations between the parties. Such an approach would be consistent with that adopted by this Court in the aforesaid matters. Consistent with the broad consensus arrived at between the parties, we direct:-

*"**(i)** On making a payment of Rs.30,00,000/- (Rupees thirty lakhs) by the respondent-husband towards permanent alimony to the petitioner-wife, by way of a demaqnd draft drawn in favour of the petitioner –wife, the marriage between the parties shall stand dissolved. The demand draft shall be handed over to Ms. Anagaha Desai, learned counsel for the petitioner who shall transmit the same to the petitioner.*

***(ii)** The respondent shall make the aforesaid payment within one month from today.*

***(iii)** All the allegations/findings recorded by the High Court against both the parties including the Writ Petition (Crl) No.631 of 2012 pending in the High Court of Bombay, Nagpur Bench are hereby quashed."*

16. We, thus, accept the terms of settlement suggested by learned counsel appearing for both parties. In view of the peculiar facts and circumstances of this case, we also consider it appropriate to exercise our power under Article 142 of the Constitution and declare dissolution of marriage subject to the fulfillment of the aforesaid conditions. We also deem it appropriate to direct the respondent husband to make a further payment of Rs.5 lakhs (Rupees five lakhs) by way of gesture of goodwill and as his contribution towards the medical expenses which the wife has incurred uptill now. This amount shall be paid by way of Demand Draft along with the above-mentioned sum of Rs.30 lakhs.

17. The appeal stands disposed of in aforesaid terms. No Costs.

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REEMA SALKAN VERSUS SUMER SINGH SALKAN

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Dipak Misra, CJI, Hon'ble Mr. Justice A.M. Khanwilkar and Hon'ble Dr. Justice D.Y. Chandrachud**

Usha Uday Khiwansara .....Appellant(S)
Versus
Uday Kumar Jethmal Khiwansara .....Respondent(S)

Criminal Appeal No.1220 of 2018
(Arising Out Of Slp(Crl.) No.5495 of 2018)

Decided on : **25th September, 2018**

The High Court instead directed the respondent/husband to pay the maintenance amount at the rate of Rs.9,000/- per month from 9 th December, 2010 onwards to the appellant/ wife. The application for maintenance, filed in 2003, was finally disposed of on 28 th January, 2015 in the following terms:

"Relief:

In view of my finding on issue no.1 above the petition u/s 125 Cr.P.C. is partly allowed and the respondent is directed to pay maintenance to the petitioner as under:-

1. ***From the date of filing of the petition i.e. 17.07.2003 till 08.12.2010, @ of Rs.10,000/¬ per month.***
2. ***With effect from 08.12.2010 onwards the petitioner is not entitled to any maintenance and her claim in this respect stands dismissed.***

The respondent shall clear off the arrears of maintenance if any, within three months from the date of order. Any payment made towards interim maintenance during the pendency of the present petition and any maintenance paid for the concurrent period, as per the order passed by any other competent court in any other proceeding/litigation between the parties, the money already deposited by the orders of the Superior Courts or by the order of the predecessor of this court, by the respondent shall be adjusted, if required. No orders as to costs. File be consigned to record¬room."

The sole question is about the quantum of monthly maintenance amount payable by the respondent to the appellant. In that, the Family Court has unambiguously held that the respondent neglected to maintain the appellant, for the elaborate reasons recorded in its judgment dated 28th January, 2015. That finding of fact has been upheld by the High Court vide the impugned judgment. The Family Court has also found as a fact that the appellant was unemployed, though she is an MA in English and holds a Post¬graduate Diploma in Journalism and Mass Communication and is also a Law Graduate enrolled with the Bar

Council of Delhi. The High Court has not disturbed that finding recorded by the Family Court. Resultantly, both the Courts have concurrently found that, in law, the respondent was obliged to maintain the appellant.

The High Court took into account all the relevant aspects and justly rejected the plea of the respondent about inability to pay maintenance amount to the appellant on the finding that he was well educated and an able¬bodied person. Therefore, it was not open to the respondent to extricate from his liability to maintain his wife.

JUDGMENTS

Hon'ble Mr. Justice A.M. Khanwilkar :—

1. Leave granted.

2. This appeal takes exception to the judgment and order passed by the High Court of Delhi at New Delhi dated May 31, 2018 in Revision Petition (Criminal) No.204 of 2015, whereby the High Court partly allowed the revision petition preferred by the appellant and was pleased to set aside the judgment and order dated 28th January, 2015 in Petition No. 363 of 2014, passed by the Judge, Family Courts, North Rohini, Delhi, to the limited extent of not granting maintenance amount to the appellant/wife from 10th December, 2010 onwards. The High Court instead directed the respondent/husband to pay the maintenance amount at the rate of Rs.9,000/ per month from 9th December, 2010 onwards to the appellant/wife.

3. There is a chequered history of litigation between the parties. Shorn of unnecessary details, the relevant facts for determination of the present appeal are that the appellant and the respondent got married on 24th March, 2002, according to Hindu rites and ceremonies at Infantry Hostel, Delhi Cantonment, Delhi. The respondent, being a permanent resident of Canada, had assured the appellant that he would take her with him to Canada on 28 th March, 2002 on a Tourist Visa. However, soon after the marriage, relations between the appellant and the respondent became strained. The respondent, being a permanent resident of Canada, returned to Canada without making any arrangements to take the appellant to Canada even on a Tourist Visa, as assured. Rather, he caused impediments in issuance of the Tourist Visa to the appellant, by giving an application in writing in that behalf to the Canadian Immigration Department. As relations between the appellant and the respondent became strained, the appellant filed a complaint before the Women Cell against the respondent and her inlaws. On 16 th July, 2003, she also filed an application under Section 125 of the Code of Criminal Procedure for grant of maintenance of Rs.2 lakh per month from the respondent before the Chief Metropolitan Magistrate, Delhi. Be it noted that during the pendency of the said application, interim maintenance amount was fixed, which issue travelled upto this Court by way of Criminal Appeal Nos.23472349/2014, which was disposed of by this Court on 28th October, 2014 on the finding that the cause of justice would be subserved if the appellant was granted a sum of Rs.20,000/ per month as interim maintenance commencing from November 1, 2014. However, for the reasons stated by the Family Court in its judgment dated 28 th January, 2015, the final maintenance amount was fixed at Rs.10,000/ per month starting from 17th July, 2003 till 8th December, 2010 and no maintenance was granted with effect from 8 th December, 2010. The application

for maintenance, filed in 2003, was finally disposed of on 28 th January, 2015 in the following terms:

"***Relief:***

In view of my finding on issue no.1 above the petition u/s 125 Cr.P.C. is partly allowed and the respondent is directed to pay maintenance to the petitioner as under:

1. *From the date of filing of the petition i.e. 17.07.2003 till 08.12.2010, @ of Rs.10,000/ per month.*

2. *With effect from 08.12.2010 onwards the petitioner is not entitled to any maintenance and her claim in this respect stands dismissed.*

The respondent shall clear off the arrears of maintenance if any, within three months from the date of order. Any payment made towards interim maintenance during the pendency of the present petition and any maintenance paid for the concurrent period, as per the order passed by any other competent court in any other proceeding/litigation between the parties, the money already deposited by the orders of the Superior Courts or by the order of the predecessor of this court, by the respondent shall be adjusted, if required. No orders as to costs. File be consigned to recordroom."

4. Against this decision, the appellant filed a revision petition before the High Court being Revision Petition (Criminal) No.204 of 2015, which has been partly allowed on the following terms:

"85. *Consequently, the impugned order dated 28.01.2015 is setaside to the extent of non granting the maintenance in favour of the petitioner /wife from 09.12.2010 onwards. However, the impugned maintenance in favour of the petitioner/wife till 08.12.2010 at the rate of Rs. 10,000/ per month is upheld. The respondent is directed to pay maintenance amount of Rs.9,000/ per month from 09.12.2010 onwards. Hence, the present revision petition is allowed. The arguments of the learned counsel for the respondent and the judgments relied upon by the respondent are of no help.*

86. *The present petition is allowed and disposed of in the above terms."*

5. The respondent has not filed any independent petition to assail the judgment of the High Court rather, it is the appellant who has questioned the correctness of the quantum of maintenance amount as determined by the Family Court and the High Court, by filing the present appeal. As a result, the sole question to be decided in the present appeal is regarding the quantum of monthly maintenance amount payable by the respondent to the appellant.

6. According to the appellant, the High Court in the impugned judgment has inter alia overlooked the following points while determining the monthly maintenance amount payable by the respondent to the appellant:

(i) Order dt. 28.10.2014 passed by this Court in Criminal Appeal no.234749 of 2014 filed by Appellant against reduction & nonpayment of interim maintenance, whereby this Court granted Rs.20,000/ interim maintenance, cannot be reduced as there has been no change in circumstances of parties since then.

Rather, it can only be increased in final maintenance;

(ii) Appellant's Evidence, Affidavit of Financial Status Exhibited proves that Respondent owns vast capital assets including 26.50 bigha (6.625 hectare) agricultural land in Meerut, UP;

(iii) Respondent [B.Com, MA (Economics) & MBA from USA] has worked in USA, Dubai, Canada for nearly 20 years and hence can be presumed to be gainfully occupied, a fact which he is concealing, besides having savings, investments, social & medical security and insurance of Canada Govt.; and

(iv) Respondent's last disclosed salary for the year 2010, on the basis whereof quantum could have been calculated. As per the last disclosed salary of Cad $48,372.34 p.a. (equal to Rs.21,28,368/ @Rs.44 per Cad.$), monthly salary comes to Rs.1,77,364/. Even if minimum increase @ 5% per annum is added to salary of base year i.e. 2010, Respondent's monthly salary would be Rs.2,51,800/. In absence of disclosure, this is a reasonable presumption for increase in salary. On adding Rs.50,000/ per month agricultural income, Respondent's monthly income can be presumed to be Rs.3 Lakh.

7. The respondent, on the other hand, has supported the decision of the High Court but at the same time, by way of counter affidavit filed to oppose this appeal, has urged that the impugned judgment suffers from flawed reasoning on the following counts:

(a) The High Court does not deal with the reasoning of appreciation of evidence.

(b) The High Court does not notice that the Family Court, after a trial, has had an opportunity to observe the demeanour of the parties and has commented on it.

(c) In Paragraph 38 of the judgment, the High Court doesn't overturn the reasoning of the reduction of the interim maintenance from Rs.25,000/ (Rupees Twenty Five Thousand Only).

(d) The High Court does not overturn the reasoning that she has not established anywhere that she, as a lawyer and an admittedly well educated and competent professional, is unable to maintain herself.

(e) The High Court also noted the scandalous allegations made by the Petitioner, against the Respondent's family which would reinforce his allegation of the Petitioner's vindictiveness.

(f) The High Court has noted judgments of various High Courts wherein the principle laid down is that the laws of maintenance are supposed to support but not enrich; payments cannot continue adinfinitum.

(g) The wife, too, is expected to mitigate her own losses by showing at least some semblance of effort at work and earning.

(h) The maintenance should be in accordance with tenure of marriage, meaning thereby that long tenure marriages with children or even with just a long term investment of time, loss of earnings and so on can be computed monetarily,

but not so a 4 day marriage resulting in a 15 year litigation, driven by a desire for vengeance with a motive to harass.

8. We have heard the appellant appearing inperson and Ms. Malavika Rajkotia, learned counsel appearing for the respondent.

9. As aforesaid, the sole question is about the quantum of monthly maintenance amount payable by the respondent to the appellant. In that, the Family Court has unambiguously held that the respondent neglected to maintain the appellant, for the elaborate reasons recorded in its judgment dated 28 th January, 2015. That finding of fact has been upheld by the High Court vide the impugned judgment. The Family Court has also found as a fact that the appellant was unemployed, though she is an MA in English and holds a Postgraduate Diploma in Journalism and Mass Communication and is also a Law Graduate enrolled with the Bar Council of Delhi. The High Court has not disturbed that finding recorded by the Family Court. Resultantly, both the Courts have concurrently found that, in law, the respondent was obliged to maintain the appellant.

10. The Family Court, however, restricted the liability of the respondent to pay maintenance amount only between 17 th July, 2003 and 8th December, 2010, which view did not commend to the High Court. The High Court, instead directed the respondent to pay a monthly maintenance amount to the appellant even after 9th December, 2010, but limited the quantum to Rs.9,000/ per month.

11. The High Court has recognized the fact that the appellant was not in a position to maintain herself but it restricted the maintenance amount to Rs.9,000/ per month on the finding that the respondent was unemployed and had no source of income. However, having found that the respondent was well educated and an ablebodied person, the High Court went on to hold that he was liable to maintain his wife. The High Court further noted that the respondent had failed to produce any evidence regarding his unemployment or that he had no source of income. Resultantly, the High Court posed a question as to how the respondent was able to manage his affairs after his return from Canada, since 2010. Therefore, the High Court applied notional income basis to arrive at his (respondent's) minimum income of Rs.18,332/ as per the current minimum wages in Delhi, as a person possessing qualifications of B.Com., MA (Eco.) and MBA from Kentucky University, USA, and on that basis, directed the respondent to pay Rs.9,000/per month to the appellant from 9 th December, 2010 onwards until further orders.

12. The manner in which the proceedings, instituted by the appellant under Section 125 Cr.P.C., have progressed from 2003 leaves much to be desired. During the pendency of the maintenance application filed by the appellant on 16 th July, 2003, the respondent's father filed a civil suit which, according to the appellant, was intended to prevent attachment of the family property of the respondent from execution of the order in her favour passed in the maintenance proceedings. The suit for declaration filed by the respondent's father was dismissed on 30th August, 2003, after a fullfledged trial but to prevent attachment of land/family property in interim maintenance case, he moved an application for restoration of the suit. Further, despite the injunction order passed by the Delhi High Court dated 28th October, 2004, which was operating against the respondent, he approached the courts in Canada and obtained an exparte divorce allegedly to escape the liability to pay the maintenance amount and

also adopted delaying tactics in the progress of the subject maintenance proceedings. Furthermore, the Magistrate granted interim maintenance of Rs.25, 000/ per month from the date of filing of the maintenance petition on the prima facie finding that the respondent's monthly salary, earned in Canada, was over Rs.1 lakh in the year 2003. That issue was finally resolved by this Court vide order dated 20 th October, 2014 by observing that the cause of justice would be subserved if the appellant was granted a sum of Rs.20,000/ per month as an interim maintenance, commencing from November, 2014. That interim arrangement was continued till the final disposal of the maintenance petition by the Family Court.

13. Be that as it may, the High Court took into account all the relevant aspects and justly rejected the plea of the respondent about inability to pay maintenance amount to the appellant on the finding that he was well educated and an ablebodied person. Therefore, it was not open to the respondent to extricate from his liability to maintain his wife. It would be apposite to advert to the relevant portion of the impugned judgment which reads thus:

> *"**79.** The respondent during the cross examination has admitted that he too is B.Com, M.A.(Eco.) and MBA from Kentucky University, USA; the respondent is a Canadian citizen working with Sprint Canada and is earning Canadian $(CAD) 29,306.59 as net Annual Salary. However, he has claimed that he has resigned from Sprint Canada on 23.11.2010 and the same has been accepted on 27.11.2010 and the respondent since then is unemployed and has got no source of income to maintain himself and his family.*
>
> ***80.** In the instant case, the petitioner has filed the case under Section 125 Cr.P.C., 1973 for grant of maintenance as she does not know any skill and specialised work to earn her livelihood i.e. in paragraph 26 of maintenance petition against her husband. However, the respondent husband who is well educated and comes from extremely respectable family simply denies the same. The respondent husband in his written statement does not plead that he is not an able bodied person nor he is able to prove sufficient earning or income of the petitioner.*
>
> ***81.** It is an admitted fact emerging on record that both the parties got married as per Hindu Rights and Customs on 24.03.2002 and since then the petitioner was living with her parents from 10.08.2002 onwards, and the parents are under no legal obligation to maintain a married daughter whose husband is living in Canada and having Canadian citizenship. The plea of the respondent that he does not have any source of income and he could not maintain the wife is no answer as he is mature and an able bodied person having good health and physique and he can earn enough on the basis of him being able bodied to meet the expenses of his wife. In this context, the observation made in Chander Prakash v. Shrimati Shila Rani, AIR 1968 Del 174 by this Court is relevant and reproduced as under:*
>
> *"7.....an able bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in position to earn enough to be able to maintain them according to the family standard. It is for such ablebodied person to show to the Court cogent grounds for holding that he is unable, for reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child."*

> ***82.*** *The husband being an ablebodied person is duty bound to maintain his wife who is unable to maintain herself under the personal law arising out of the marital status and is not under contractual obligation. The following observation of the Apex Court in Bhuwan Mohan Singh v. Meena, AIR 2014 SC 2875, is relevant: "3.….Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short "the Code") was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created where under she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is ablebodied. There is no escape route unless there is an order from the court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds.*
>
> ***(emphasis applied)***
>
> ***83.*** *The respondent's mere plea that he does not possess any source of income ipso facto does not absolve himself of his moral duty to maintain his wife in presence of good physique along with educational qualification."*

The view so taken by the High Court is unassailable. Indeed, the respondent has raised a plea to question the correctness of the said view, in the reply affidavit filed in this appeal, but in our opinion, the finding recorded by the High Court is un exceptionable.

14. The only question is: whether the quantum of maintenance amount determined by the High Court is just and proper. The discussion in respect of this question can be traced only to paragraph 84 of the impugned judgment which reads thus:

> *"84. So far, the quantum of maintenance is concerned nothing consistent is emerging on record to show the specific amount which is being earned by the respondent after 2010, however the husband is legally bound to maintain his wife as per the status of a respectable family to which he belongs. The husband being ablebodied along with high qualification B.Com, M.A.(Eco) and MBA from Kentucky University, USA could earn at least minimum of Rs. 18,332/ as per the current minimum wage in Delhi. Therefore, the petitioner being wife is entitled to Rs. 9,000/ per month from 09.12.2010 onwards till further orders."*

15. The principle invoked by the High Court for determination of monthly maintenance amount payable to the appellant on the basis of notional minimum income of the respondent as per the current minimum wages in Delhi, in our opinion, is untenable. We are of the considered opinion that regard must be had to the living standard of the respondent and his family, his past conduct in successfully protracting the disposal of the maintenance petition filed in the year 2003, until 2015; coupled with the fact that a specious and unsubstantiated plea has been taken by him that he is unemployed from 2010, despite the fact that he is highly qualified and an ablebodied person; his monthly income while working in Canada in the year 2010 was over Rs.1,77,364/; and that this Court in Criminal Appeal Nos.23472349/2014 has prima facie found that the cause of justice would be subserved if the appellant is granted an interim maintenance of Rs.20,000/ per month commencing from November 1, 2014. At this distance of time, keeping in mind the spiraling inflation rate and high cost of living index today, to do complete justice between the parties, we are inclined to direct that the respondent shall pay a sum of Rs.20,000/ per month to the appellant towards the maintenance amount with effect from January 2010 and at the rate of Rs.25,000/ per month with effect from 1st June, 2018 until further orders. We order accordingly.

16. We, therefore, direct the respondent to pay the enhanced maintenance amount, as determined in terms of this order, to the appellant within a period of eight weeks from today after duly adjusting the amount already deposited in Court/paid to the appellant till date. The appellant will be entitled to forthwith withdraw the maintenance amount deposited by the respondent in Court, if any. The impugned judgment of the High Court is accordingly modified in the aforementioned terms.

17. The appeal is allowed in the aforementioned terms.

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SANJAY KUMAR SINHA VERSUS ASHA KUMARI

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice R. K. Agrawal, Hon'ble Mr. Justice Abhay Manohar Sapre**

Sanjay Kumar Sinha .....Appellant(S)

Versus

Asha Kumari & Anr. .....Respondent(S)

Civil Appeal No. 3658 of 2018

(Arising out of S.L.P.(c) No. 6301 of 2017)

Decided on : **8th April, 2018**

The dispute is between the husband and wife. Appellant-husband has filed the divorce petition under Section 13 of the Hindu Marriage Act, 1955 against the respondent wife. The Respondent-wife filed an application under Section 24 of the Hindu Marriage Act, 1955 in the aforesaid divorce petition and claimed for interim maintenance. The Family Judge awarded the maintenance (dated 15-7-2016). It is to be noted that the Respondent-wife had also filed an application under Section 125 of the Criminal Procedure Code, 1973 seeking maintenance before the Principal Judge, Family Court.(maintenance awarded, dated 3-1-2011). The Appellant-husband aggrieved by the order dated 15-7-2016, filed civil miscellaneous application in the High Court, which was dismissed. The Supreme Court heard the present appeal by way of special leave by the Appellant-husband and held that the Maintenance awarded under Section 24 of Hindu Marriage Act, 1955 supersedes the Maintenance awarded under Section 125 of Criminal Procedure Code, 1973.

JUDGMENTS

Hon'ble Mr. Justice A.M. Khanwilkar :—

1. Leave granted.

2. This appeal is filed by the husband against the final judgment and order dated 27.10.2016 passed by the High Court of Judicature at Patna in CMJC No.965/2016 whereby the High Court dismissed the application filed by the appellant herein and upheld by the order dated 15.07.2016 passed by the Principal Judge, Family Court, Begusarai in Divorce Case No.42 of 2010.

3. Few facts need to be mentioned to appreciate the short issue involved in the appeal.

4. The dispute is between the husband and wife. The appellant is the husband whereas the respondent is the wife.

5. The appellant (husband) has filed the divorce petition under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act") against the respondent (wife) being Divorce Case No. 42/2010 before the Principal Judge, Family Court, Bagusarai. It is pending for its final disposal.

6. The respondent (wife) filed an application under Section 24 of the Act in the aforesaid Divorce petition and claimed from the appellant (husband) pendente lite monthly maintenance for herself and her daughter. The appellant contested it.

7. By order dated 15.07.2016, the Family Judge awarded Rs.8000/- per month to the wife and Rs.4000/- per month to her minor daughter towards the maintenance and Rs.2500/- per month towards the litigation expenses.

8. It may be mentioned here that the respondent (wife) had also filed one application under Section 125 of the Criminal Procedure Code, 1973 (hereinafter referred to as "Cr.P.C") seeking maintenance before the Principal Judge, Family Court, Samastipur. By order dated 03.01.2011, the Family Judge allowed the application and awarded Rs.4000/- per month to the wife (petitioner therein) and Rs.2000/- per month to the daughter towards the maintenance and Rs.5000/- towards the litigation expenses.

9. The appellant (husband) felt aggrieved by the order dated 15.07.2016 by the Family Judge and filed civil miscellaneous application in the High Court at Patna. By impugned order, the Single Judge upheld the order dated 15.07.2016 of the Family Judge, Begusarai and dismissed the application filed by the appellant herein, which has given rise to filing of the present appeal by way of special leave before this Court by the husband.

10. Heard Mr. Abhishek Vikas, learned counsel for the appellant and Mr. Ranjit Kumar Sharma, learned counsel for the respondents.

11. Having heard learned counsel for the parties and on perusal of the record of the case, we are inclined to dispose of the appeal finally as under:

12. First, the Family Court shall decide the main Divorce Case No. 42/2010 preferably within 6 months on merits.

13. Second, consequent upon passing of the maintenance order dated 15.07.2016 under Section 24 of the Act by the Family Court, the order passed by the Family Court, Samastipur under Section 125 of Cr.P.C. stands superseded and now no longer holds the field. Indeed, this fact was conceded by the learned counsel appearing for the respondent (wife).

14. Third, the appellant (husband) shall, during pendency of main divorce case, continue to pay in cash a sum of Rs.8000/- p.m. (Rs.6000/- to the wife and Rs.2000/- to the daughter) and for the balanced sum, i.e., Rs.4000/- p.m., the appellant would furnish security.

15. Fourth, depending upon the outcome of the main case, appropriate orders towards permanent maintenance and its arrears be also passed.

16. Fifth, the arrears towards monthly maintenance be paid by the appellant to the respondent (wife) within one month from the date of this order, if any, at the rate fixed by this Court above.

17. Sixth, payment of monthly maintenance amount, as fixed by this Court, be paid on 1 st of every month by the appellant to the respondent.

18. Seventh, security for the balance amount (at the rate of Rs.4000/- per month) be furnished within one month to the satisfaction of the Family Judge after calculating the monthly maintenance and arrears liability.

19. Parties are at liberty to adduce evidence on the issue of grant of permanent maintenance in the main case.

20. Parties are also granted liberty to mediate and settle the issue amicably by appearing before the Family Court and if the issue is not settled amicably, the Family Court would decide it on merits, as directed above.

21. We have not expressed any opinion on the merits of the issue and, therefore, the Family Court will decide the case, without being influenced by our order, only on the basis of pleadings and evidence adduced by the parties in the main case.

22. With these directions, the appeal stands disposed of.

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PADMJA SHARMA VERSUS RATAN LAL SHARMA

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice D.P. Wadhwa and Hon'ble Mr. Justice M.B. Shah**

Padmja Sharma .....Appellant(S)
Versus
Ratan Lal Sharma .....Respondent(S)

Civil Appeal No. 2462 of 1999

Decided on : **28th March, 2000**

Suit deals with section 26 of the Hindu Marriage Act, 1955(herein Act), S.18 and S.20 of the Hindu Adoption and Maintenance Act, 1956, S. 125 of CrPC. The appellant-wife filed divorce petition claiming maintenance for her and her children. In order dated 07-04-1992 the Family Court under S.125 of CrPC granted maintenance @ Rs.250 per month per child and under S.26 of the Act @ Rs 250 per month per child. The family court granted divorce under section 13 of the Act. To enhance the amount for maintenance, the appellant wife appealed to High Court. The High Court enhanced the maintenance of the children and observed that,"it is the incumbent liability on the part of the father to bear the cost of education and maintenance of the children". The court held that when both the parents are earning then it is both parents' duty to share burden of education and maintenance.

JUDGMENTS

Hon'ble Mr. Justice D.P. Wadhwa :—

1. Appellant, the wife, whose marriage with the respondent has since been dissolved by decree of divorce on the ground of cruelty on the petition filed by her, has filed this appeal not only seeking enhanced maintenance for two minor children of the marriage but also for claiming the same from the date of application filed under Section 26[1] of the Hindu Marriage Act, 1955 (for short the 'Act) in the Family Court, Jaipur. Appellant is also aggrieved by the order of the courts below not granting her full claim of 'streedhan', litigation expenses, etc.

2. Both the parties are Hindu. Their marriage was solemnized in accordance with Hindu rites on May 2, 1983. First child, a son, was born on January 27, 1984 and the second child, also a son, was born on June 28, 1985. Wife field petition for dissolution of marriage on May 21, 1990. She also prayed therein for return of her 'streedhan', custody and guardi-anship of the children and also for their maintenance. At the same time she also filed an application under Section 125 of Code of Criminal Procedure (Code).

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1 26. Custody of children - In any proceeding under this Act, the court may, from time to time, pass such interim orders and, make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, alter the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may, also from time to time revoke suspend or vary any such orders and provisions previously made.

3. On August 2, 1991, wife filed a petition under Section 26 of the Act in the Family Court claiming maintenance @ Rs. 2575 per month for both the children. In the affidavit supporting the application, however, maintenance was claimed @ Rs. 2,500 per month for both the children. It was pointed out that husband was getting a salary of Rs. 6233.40 per month. Wife also claimed a sum of Rs. 1,585 as admission fee in schools for the children and Rs. 5,000 as litigation expenses.

4. Family Court by the order dated April 7, 1992 granted maintenance under Section 125 of the Code @ Rs. 250 per month for each child. On April 30, 1992 Family Court awarded a further sum of Rs. 250 per month for each child as interim maintenance under Section 26 of the Act. Family Court also framed issues relating to the custody, guardianship and maintenance of the minor children and also regarding 'streedhan'.

5. On October 27, 1995 wife filed another application under Section 26 of the Act wherein she drew the attention of the court to her earlier application filed on August 2, 1991. Now she claimed Rs. 2000 per month for each child. She said salary of the husband had since been increased to Rs. 12,225 in August, 1995. On August 26, 1997 yet another application was filed by wife under Section of the Act. Now she wanted maintenance for the elder child @ Rs. 3,500 per month and for the younger child @ Rs. 3,000 per month, it was pointed out that the salary of the husband was Rs. 13,683 per month and thereafter from August, 1997 it was going to be increased to Rs. 14,550 per month.

6. Family Court by order dated September 13, 1997 consolidated both the proceedings - one under Section 13 of the Act for dissolution of the marriage and the other under Section 26 of the Act. On October 4, 1997 Family Court granted decree of divorce in favour of the wife dissblving the marriage between her and the respondent. Against claim of Rs, 1,80,000 towards 'streedhan' Family Court granted a decree of Rs. 1,00,000 as cost of the articles which prayer was granted in the alternative if the respondent did not return the articles mentioned by wife in her petition. It was also ordered that both the children, till they attain majority, should be in the custody of the mother, the appellant, and maintenance for each of the child was awarded @ Rs. 500 per month from October 4, 1997. A sum of Rs. 1,000 was awarded as cost of the litigation to the wife.

7. Wife took the matter to the High Court seeking enhanced amount of maintenance of the children and decree for the full amount of Rs. 1,80,000. High Court, by its impugned judgment, enhanced maintenance of the children from Rs. 500 per month to Rs. 1,000 per month effective from the date of the order of the Family Court dated October 4, 1997 and awarded Rs. 500 per month for each child from the date of the application. High Court observed, though in our view not correctly, that "it is an incumbent liability on the part of the father to bear the cost of education and the maintenance express for the two children....." High Court also observed that the respondent was "admittedly employed in a responsible position in the Reserved Bank of India where his gross pay packet amounts to Rs. 13,000 per month". During the course of hearing we have been told that the husband is employed as a clerk in the Reserve Bank of India while the appellant-wife is a lecturer in a Government college in Rajasthan. High Court rejected the prayer of the wife for enhancement of any amount from Rs. 1,00,000. High Court made certain directions for the husband to meet the children and with that we are not concerned. High Court disposed of the appeal without any order as to costs. Still the wife felt aggrieved and sought leave to appeal to this Court under Article 136 of the Constitution, which we granted. By an interim order passed on February 22, 1999 it was directed by this Court that by way of interim relief maintenance for each of the child be paid @ Rs. 1,500 per month by the respondent-husband.

8. This Court in an appeal under Article 136 of the Constitution is not going to re-appreciate the evidence led before the Family Court. There is a concurrent finding of award of Rs. 1,00,000 to the wife though in the alternative being the cost of the articles presented at the time of the marriage which we are not going to disturb. As far as costs and special costs are concerned that again is within the discretion of the court and unless some weighty reason is shown to us we again to not think that we should unsettle the payment of award of costs by the Family Court and nor payment of costs by the High Court. Appellant says she has been harassed persistently by the husband in delaying the trial before the Family Court. But then husband also has a grievance that in the Family Court he could not get the services of a lawyer though the wife was represented by her father, who himself is a lawyer and while her father would argue in the court she would remain mute.

9. Respondent before us has not appeared instead of notice to him. We have heard the agreements of the wife ex-parte. On February 28, 2000 an application was filed by the appellant for placing on record additional documents which are all of the period after filing of this appeal. No notice has been given to the respondent of this application. The purpose of the applica-tion appears to be to further enhance the amount of maintenance taking into account the changed circumstances as the salary of the respondent-husband is stated to have increased by passage of time. Various documents like receipts for payment of school fees, buying of books, school bags, etc. have been filed. We are not inclined to permit this application at this stage. If circumstances have changed for enhancement of maintenance appellant can approach the Family Court again as an order under Section 26 of the Act is never final and decree passed thereunder is always subject to modification.

10. Maintenance has not been defined in the Act or between the parents whose duty it is to maintain the children. Hindu Marriage Act, 1955, Hindu Minority and Guardianship Act, 1956, Hindu Adoptions and Maintenance Act, 1956 and Hindu Succession Act, 1956 constitute a law in a coded form for the Hindus. Unless there is anything repugnant to the context definition of a particular word could be lifted from any of the four Acts constituting the law to interpret a certain provision. All these Act are to be read in conjunction with one another and interpreted accordingly. We can, therefore, go to Hindu Adoption and Maintenance Act, 1956 (for short the 'Maintenance Act') to understand the meaning of the 'maintenance'. In clause (b) of Section 3 of this Act

> *"maintenance includes (i) in all cases, provisions for food, clothing, residence, education and medical attendance and treatment; (ii) in the case of an unmarried daughter also the reasonable expenses of and incident to her marriage" and under clause (c) "minor means a person who has not completed his or her age of eighteen years".*

Under Section 18 of the Maintenance Act a Hindu wife shall be entitled to be maintained by her husband during her life time. This is of course subject to certain conditions with which we are not concerned. Section 20* provides for maintenance of children and aged parents. Under this Section a Hindu is bound, during his or her life time, to maintain his or her children. A minor child so long as he is minor can claim maintenance from his or her father or mother. Section 20 is, therefore to be contrasted with Section 18. Under this Section it is as much the obligation of the father to maintain a minor child as that of the mother. It is not the law that how affluent mother may be it is the obligation only of the father to maintain the minor.

11. In the present case both the parents are employed. If we refer to the first application filed under Section 26 of the Act by the wife she mentions that she is getting a salary of Rs. 3,100 per month and husband is getting a salary of Rs. 5,850 per month. She is, therefore, also obliged to contribute in the maintenance of the children. Salaries of both the parents have since increased with the course of time. We believe that in the same proportion, may be perhaps in the case of an employee of Reserve Bank of India at somewhat higher rate. If we take approximate salary of husband is twice as much as that of the wife, they are bound to contribute for maintenance of their children in that proportion. Family Court has already fixed a sum of Rs.. 250 per month for each of the child under Section 125 of the Code. That amount we need not touch.

12. Considering the overall picture in the present case we are of the view that a sum of Rs. 3,000 per month for each of the child would be sufficient to maintain him, which shall be borne by both the parents in the proportion of 2:1. We, therefore, direct that respondent shall pay a sum of Rs. 2,000 per month for each of the two children aforementioned from October 4, 1997, the date of the order of the Family Court. For the earlier period[2] the respondent shall pay Rs. 500 per month for each of the child from the date of the application, i.e., August 2, 1991 and @ Rs. 1,000 per month from the date of the second application, which is October 27, 1995 and @ Rs. 1,500 per month form the date of the third application, which is August 26, 1997. These amounts shall be apart from the amount which the respondent has already been paying to the children @ Rs. 250 per month under Section 125 of the Code. Respondent shall be entitled to makes adjustment of the amounts which he has already paid under orders of the Family Court, High Court or the interim order of this Court.

13. The appeal is thus partly allowed. There shall be no order as to costs as respondent has chosen not to appear.

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2 20. Maintenance of children and aged parents. -

(I) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parents or daughter who is unmarried extends in sofar as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Explanation. - In this section "parent" includes a childless stepmother

JALENDRA PADHIARY VERSUS PRAGATI CHHOTRAY

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice R. K. Agrawal and Hon'ble Mr. Justice Abhay Manohar Sapre**

Jalendra Padhiary .....Appellant(S)
Versus
Pragati Chhotray .....Respondent(S)

Civil Appeal No. 3876 of 2018
[Arising out of SLP (C) No.9691 of 2015]

Decided on : **17th April, 2018**

In the present case, the Supreme Court took a strong note of permanent alimony of Rs. 15,00,000/- awarded to the Respondent-wife by the Family Court which was subsequently upheld by the Division Bench of the High Court. The primary issue that fell for consideration was whether the permanent alimony of Rs. 15,00,000/- awarded by the Family Court was legally and factually sustainable?

The Court in the present case observed that the Lower Courts failed to apply their judicial mind to the factual terms and legal controversy insofar in respect to award of permanent alimony to the Respondent-wife concerned.

The permanent alimony was given to the Respondent-wife without any discussion, appreciation reasoning and categorical findings on the key issues such as financial capacity of the Appellant-husband to pay and the financial earning capacity of the Respondent-wife.

The Bench stated that Courts need to give reasoned orders in every case which must contain-

A) The narration of the bare facts of the case of the parties to the lis.

B) The issues arising in the case.

C) The submissions urged by the parties.

D) The legal principles applicable to the issues involved and

E) The reasons in support of the findings recorded based on appreciation of evidence on all the material issues arising in the case.

While the court set aside the impugned order, it noted that such orders undoubtedly cause prejudice to the parties. In this case, it caused prejudice to the appellant-husband because the orders of the High Court and Family Court deprived him to know the reasons for fixing the permanent alimony amount of Rs.15, 00,000/- payable to his Appellant-wife.

JUDGMENTS

Hon'ble Mr. Justice Abhay Manohar Sapre :—

1) Leave granted.

2) This appeal arises from the final judgment and order dated 03.11.2014 passed by the High Court of Orissa at Cuttack in M.A.T.A. No.113 of 2014 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein in limine at the stage of admission, in consequence, upheld the order dated 17.09.2014 passed by the Family Court, Bhubaneswar in Civil Proceeding No.24 of 2011.

3. The facts of the case lie in a narrow compass and it would be clear from the facts stated hereinbelow.

4. The appellant is the plaintiff whereas the respondent is the defendant in the civil suit out of which this appeal arises. The dispute is between the husband and wife and it relates to award of permanent alimony payable to wife.

5. The appellant-husband filed a petition against the respondent-wife under Section 13 of the Hindu Marriage Act, 1954 (hereinafter referred to as "the Act") before the Judge, Family Court, Bhubaneswar seeking decree for dissolution of marriage on the grounds of desertion and cruelty. The respondent filed her written statement and denied the material averments of the appellant's claim. On the basis of the pleadings and the evidence adduced by the parties, the Family Judge, by order dated 17.09.2014, allowed the petition and passed a decree of divorce by dissolving the marriage. The Family Judge also directed the appellant(husband) to pay permanent alimony of Rs.15,00,000/- and litigation expenses of Rs.10,000/- to the respondent(wife).

6. The appellant(husband), felt aggrieved by that part of the order of the Family Court by which the appellant was directed to pay permanent alimony of Rs.15,00,000/- to the respondent(wife), filed appeal before the Division Bench of the High Court. By judgment/decree dated 03.11.2014, the Division Bench of the High Court dismissed the appellant's appeal and affirmed the order of the Family Court.

7. Against the order of the Division Bench of the High Court, the appellant(husband) has filed this appeal by way of special leave in this Court.

8. The short question, which arises for consideration in this appeal, is whether the Division Bench of the High Court was justified in dismissing the appellant's appeal in limine and thereby upholding the order of the Family Judge insofar as it related to awarding permanent alimony of Rs.15,00,000/- to the wife(respondent).

9. Heard Mr. Kumar Gaurav, learned counsel for the appellant and Mr. Radha Shyam Jena, learned counsel for the respondent.

10. Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow the appeal, set aside the impugned order as also the order of the Family Court to the extent it fixes the award of permanent alimony and remand the case to the Family Court for deciding the question of grant of permanent alimony payable to wife afresh on merits in accordance with law.

11. The operative portion of the order of the Family Court reads as under:

> *"The petition of the petitioner is allowed on contest in favour of the petitioner. A decree of divorce is passed and the marriage between the petitioner and the respondent is hereby declared dissolved with effect from the date of decree. The petitioner is directed to pay permanent*

alimony of Rs.15,00,000/- and litigation expenses of Rs.10,000/- to the respondent." (emphasis supplied)

12. The order of the Division Bench of the High Court reads as under:

"After looking into the allegations made and pleadings taken by the parties, as recorded in the impugned judgment, which during the course of argument could not be snipped, we do not find any reason to interfere with the amount of Rs.15,00,000/- awarded as permanent alimony to the wife by the learned Judge, Family Court. In the present time, the said amount is wholly insufficient for the wife to maintain her entire life.

Since we do not find any merit in the appeal, we dismiss the same in limine at the very stage of admission."

13. The only question involved in the appeal before the High Court, which was carried to this Court in this appeal by the appellant (husband), was whether the award of permanent alimony of Rs.15,00,000/- by the Family Court to the respondent(wife) was legally and factually sustainable.

14. Insofar as the grant of decree of divorce in favour of the husband is concerned, it was not challenged by the respondent (wife) in appeal before the High Court and hence it attained finality.

16. In our view, mere perusal of the order of the Family Court and the High Court quoted supra, would go to show that both the Courts failed to apply their judicial mind to the factual and legal controversy insofar as award of permanent alimony to the respondent(wife) is concerned. Both the Courts did not even mention the factual narration of the case set up by the parties on the question of award of permanent alimony and without there being any discussion, appreciation, reasoning and categorical findings on the material issues such as, financial earning capacity of husband to pay the alimony and also the financial earning capacity of wife, a direction to pay Rs.15,00,000/- by way of permanent alimony to the wife was given. In our opinion, such direction is wholly unsustainable in law.

16. Time and again, this Court has emphasized on the Courts the need to pass reasoned order in every case, which must contain the narration of the bare facts of the case of the parties to the lis, the issues arising in the case, the submissions urged by the parties, the legal principles applicable to the issues involved and the reasons in support of the findings recorded based on appreciation of evidence on all the material issues arising in the case.

17. It is really unfortunate that neither the Family Court nor the High Court kept in mind these legal principles and passed cryptic and unreasoned orders. Such orders undoubtedly cause prejudice to the parties and in this case, it caused prejudice to the appellant(husband) because the orders of the High Court and Family Court deprived him to know the reasons for fixing the permanent alimony amount of Rs.15,00,000/- payable to his wife.

18. We cannot countenance the manner in which both the Courts passed the order which has compelled us to remand the matter to the Family Court for deciding the issue afresh on merits.

19. In the light of the foregoing discussion, we allow the appeal, set aside the impugned order of the High Court and the order of the Family Court insofar as it relates to fixing of Rs.15,00,000/- towards payment of permanent alimony to the respondent(wife) by the appellant(husband) and

remand the case to the Family Court to decide the quantum of payment of permanent alimony afresh in accordance with law keeping in view our observations made supra.

20. We, however, make it clear that we have refrained ourselves from making any observation on merits of the controversy while forming an opinion to remand the case to the Family Court for the reasons mentioned above. The Family Court would, therefore, decide the issue, uninfluenced by any of our observations, strictly in accordance with law. If necessary, the Family Court would also grant liberty to the parties to amend the pleadings and adduce evidence on the question of quantum of payment of permanent alimony.

21. The appeal is accordingly allowed. Impugned order of the High Court and the order of the Family Court insofar as it relates to fixation of permanent alimony of Rs.15,00,000/- are set aside with the aforesaid directions for compliance.

22. We direct the Family Court to decide the case within six months as an outer limit.

23. Till the disposal of the case, the appellant(husband) will continue to pay monthly maintenance amount, which was fixed by the Family Court, to the respondent regularly. Needless to say, the payment of monthly maintenance will be subject to the final determination made by the Family Court.

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DANIAL LATIFI & ANR VERSUS UNION OF INDIA

SUPREME COURT OF INDIA

Bench: **Hon'ble Mr. Justice G.B. Pattanaik, Hon'ble Mr. Justice S. Rajendra Babu, Hon'ble Mr. Justice D.P. Mohapatra, Hon'ble Mr. Justice Doraiswamy Raju & Hon'ble Mr. Justice Shivaraj V. Patil**

Danial Latifi & Anr.
Versus
Union of India

Writ Petition (Civil) 868 of 1986

(2001) 7 SCC 740

Decided on : **28th September, 2001**

The Supreme Court in the case of Daniel Latifi v. Union of India a held that reasonable and fair provisions include provision for the future of the divorced wife (including maintenance) and it does not confine itself to the iddat period only. The Constitutional validity of the Act was also upheld.

JUDGMENTS

Hon'ble Mr. Justice S. Rajendra Babu :—

The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 [hereinafter referred to as the Act] is in challenge before us in these cases.

The facts in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. (1985) 2 SCC 556, are as follows.

The husband appealed against the judgment of the Madhya Pradesh High Court directing him to pay to his divorced wife Rs.179/- per month, enhancing the paltry sum of Rs.25 per month originally granted by the Magistrate. The parties had been married for 43 years before the ill and elderly wife had been thrown out of her husbands residence. For about two years the husband paid maintenance to his wife at the rate of Rs.200/- per month. When these payments ceased she petitioned under Section 125 CrPC. The husband immediately dissolved the marriage by pronouncing a triple talaq. He paid Rs.3000/- as deferred mahr and a further sum to cover arrears of maintenance and maintenance for the iddat period and he sought thereafter to have the petition dismissed on the ground that she had received the amount due to her on divorce under the Muslim law applicable to the parties. The important feature of the case was that the wife had managed the matrimonial home for more than 40 years and had borne and reared five children and was incapable of taking up any career or independently supporting herself at that late stage of her life - remarriage was an impossibility in that case. The husband, a successful Advocate with an approximate income of Rs.5,000/- per month provided Rs.200/- per month to the divorced wife, who had shared his life for half a century and mothered his five children and was in desperate need of money to survive.

Thus, the principle question for consideration before this Court was the interpretation of Section 127(3)(b) CrPC that where a Muslim woman had been divorced by her husband and paid her mahr, would it indemnify the husband from his obligation under the provisions of Section 125CrPC. A Five-

Judge Bench of this Court reiterated that the Code of Criminal Procedure controls the proceedings in such matters and overrides the personal law of the parties. If there was a conflict between the terms of the Code and the rights and obligations of the individuals, the former would prevail. This Court pointed out that mahr is more closely connected with marriage than with divorce though mahr or a significant portion of it, is usually payable at the time the marriage is dissolved, whether by death or divorce. This fact is relevant in the context of Section 125 CrPC even if it is not relevant in the context of Section 127(3)(b) CrPC. Therefore, this Court held that it is a sum payable on divorce within the meaning of Section 127(3)(b) CrPC and held that mahr is such a sum which cannot ipso facto absolve the husbands liability under the Act.

It was next considered whether the amount of mahr constitutes a reasonable alternative to the maintenance order. If mahr is not such a sum, it cannot absolve the husband from the rigour ofSection 127(3)(b) CrPC but even in that case, mahr is part of the resources available to the woman and will be taken into account in considering her eligibility for a maintenance order and the quantum of maintenance. Thus this Court concluded that the divorced women were entitled to apply for maintenance orders against their former husbands under Section 125 CrPC and such applications were not barred under Section 127(3)(b) CrPC. The husband had based his entire case on the claim to be excluded from the operation of Section 125 CrPC on the ground that Muslim law exempted from any responsibility for his divorced wife beyond payment of any mahr due to her and an amount to cover maintenance during the iddat period and Section 127(3)(b)CrPC conferred statutory recognition on this principle. Several Muslim organisations, which intervened in the matter, also addressed arguments. Some of the Muslim social workers who appeared as interveners in the case supported the wife brought in question the issue of mata contending that Muslim law entitled a Muslim divorced woman to claim provision for maintenance from her husband after the iddat period. Thus, the issue before this Court was: the husband was claiming exemption on the basis of Section 127(3)(b) CrPC on the ground that he had given to his wife the whole of the sum which, under the Muslim law applicable to the parties, was payable on such divorce while the woman contended that he had not paid the whole of the sum, he had paid only the mahr and iddat maintenance and had not provided the mata i.e. provision or maintenance referred to in the Holy Quran, Chapter II, Sura

241. This Court, after referring to the various text books on Muslim law, held that the divorced wifes right to maintenance ceased on expiration of iddat period but this Court proceeded to observe that the general propositions reflected in those statements did not deal with the special situation where the divorced wife was unable to maintain herself. In such cases, it was stated that it would be not only incorrect but unjust to extend the scope of the statements referred to in those text books in which a divorced wife is unable to maintain herself and opined that the application of those statements of law must be restricted to that class of cases in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. This Court concluded that these Aiyats [the Holy Quran, Chapter II, Suras 241-242] leave no doubt that the Holy Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Holy Quran. On this note, this Court concluded its judgment.

There was a big uproar thereafter and Parliament enacted the Act perhaps, with the intention of making the decision in Shah Banos case ineffective.

The Statement of Objects & Reasons to the bill, which resulted in the Act, reads as follows :

The Supreme Court, in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. [AIR 1985 SC 945), has held that although the Muslim Law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim Law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husbands liability ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 of the Code of Criminal Procedure.

2. This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill accordingly provides for the following among other things, namely:-

(a) a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to mahr or dower and all the properties given to her by her relatives, friends, husband and the husbands relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the deliver of the properties;

(b) where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where, a divorced woman has no relatives or such relatives or any one of them has not enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

The object of enacting the Act, as stated in the Statement of Objects & Reasons to the Act, is that this Court, in Shah Banos case held that Muslim Law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, but it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973 and, therefore, it cannot be said that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance beyond the period of iddat to his divorced wife, who is unable to maintain herself.

As held in Shah Banos case, the true position is that if the divorced wife is able to maintain herself, the husbands liability to provide maintenance for her ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section

125 CrPC. Thus it was held that there is no conflict between the provisions of Section 125 CrPC and those of the Muslim Personal Law on the question of the Muslim husbands obligation to provide maintenance to his divorced wife, who is unable to maintain herself. This view is a reiteration of what is stated in two other decisions earlier rendered by this Court in Bai Tahira vs. Ali Hussain Fidaalli Chothia, (1979) 2 SCC 316, andFuzlunbi vs. K.Khader Vali & Anr., (1980) 4 SCC 125.

Smt. Kapila Hingorani and Smt. Indira Jaisingh raised the following contentions in support of the petitioners and they are summarised as follows :

1. Muslim marriage is a contract and an element of consideration is necessary by way of mahr or dower and absence of consideration will discharge the marriage. On the other hand, Section 125CrPC has been enacted as a matter of public policy.

2. To enable a divorced wife, who is unable to maintain herself, to seek from her husband, who is having sufficient means and neglects or refuses to maintain her, payment of maintenance at a monthly rate not exceeding Rs.500/-. The expression wife includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. The religion professed by a spouse or the spouses has no relevance in the scheme of these provisions whether they are Hindus, Muslims, Christians or the Parsis, pagans or heathens. It is submitted thatSection 125 CrPC is part of the Code of Criminal Procedure and not a civil law, which defines and governs rights and obligations of the parties belonging to a particular religion like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 CrPC, it is submitted, was enacted in order to provide a quick and summary remedy. The basis there being, neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves, these provisions have been made and the moral edict of the law and morality cannot be clubbed with religion.

3. The argument is that the rationale of Section 125 CrPC is to off- set or to meet a situation where a divorced wife is likely to be led into destitution or vagrancy. Section 125 CrPC is enacted to prevent the same in furtherance of the concept of social justice embodied in Article 21 of the Constitution.

4. It is, therefore, submitted that this Court will have to examine the questions raised before us not on the basis of Personal Law but on the basis that Section 125 CrPC is a provision made in respect of women belonging to all religions and exclusion of Muslim women from the same results in discrimination between women and women. Apart from the gender injustice caused in the country, this discrimination further leads to a monstrous proposition of nullifying a law declared by this Court in Shah Banos case. Thus there is a violation of not only equality before law but also equal protection of laws and inherent infringement of Article 21 as well as basic human values. If the object of Section 125 CrPC is to avoid vagrancy, the remedy thereunder cannot be denied to Muslim women.

5. The Act is an un-islamic, unconstitutional and it has the potential of suffocating the muslim women and it undermines the secular character, which is the basic feature of the Constitution; that there is no rhyme or reason to deprive the muslim women from the applicability of the provisions of Section 125 CrPC and consequently, the present Act must be held to be discriminatory and violative of Article 14 of the Constitution; that excluding the application ofSection 125 CrPC is violative of Articles 14 and 21 of the Constitution; that the conferment of power on the Magistrate under sub-section (2) of Section 3 and Section 4 of the Act is different

from the right of a muslim woman like any other woman in the country to avail of the remedies under Section 125 CrPC and such deprivement would make the Act unconstitutional, as there is no nexus to deprive a muslim woman from availing of the remedies available under Section 125CrPC, notwithstanding the fact that the conditions precedent for availing of the said remedies are satisfied.

The learned Solicitor General, who appeared for the Union of India, submitted that when a question of maintenance arises which forms part of the personal law of a community, what is fair and reasonable is a question of fact in that context. Under Section 3 of the Act, it is provided that a reasonable and fair provision and maintenance to be made and paid by her former husband within the iddat period would make it clear that it cannot be for life but would only be for a period of iddat and when that fact has clearly been stated in the provision, the question of interpretation as to whether it is for life or for the period of iddat would not arise. Challenge raised in this petition is dehors the personal law. Personal law is a legitimate basis for discrimination, if at all, and, therefore, does not offend Article 14 of the Constitution. If the legislature, as a matter of policy, wants to apply Section 125 CrPC to Muslims, it could also be stated that the same legislature can, by implication, withdraw such application and make some other provision in that regard. Parliament can amend Section 125 CrPC so as to exclude them and apply personal law and the policy of Section 125 CrPC is not to create a right of maintenance dehors the personal law. He further submitted that in Shah Banos case, it has been held that a divorced woman is entitled to maintenance even after the iddat period from the husband and that is how Parliament also understood the ratio of that decision. To overcome the ratio of the said decision, the present Act has been enacted and Section 3(1)(a) is not in discord with the personal law.

Shri Y.H.Muchhala, learned Senior Advocate appearing for the All India Muslim Personal Law Board, submitted that the main object of the Act is to undo the Shah Banos case. He submitted that this Court has harzarded interpretation of an unfamiliar language in relation to religious tenets and such a course is not safe as has been made clear by Aga Mahomed Jaffer Bindaneem vs. Koolsom Bee Bee & Ors., 24 IA 196, particularly in relation to Suras 241 and 242 Chapter II, the Holy Quran.. He submitted that in interpreting Section 3(1)(a) of the Act, the expressions provision and maintenance are clearly the same and not different as has been held by some of the High Courts. He contended that the aim of the Act is not to penalise the husband but to avoid vagrancy and in this context Section 4 of the Act is good enough to take care of such a situation and he, after making reference to several works on interpretation and religious thoughts as applicable to Muslims, submitted that social ethos of Muslim society spreads a wider net to take care of a Muslim divorced wife and not at all dependent on the husband. He adverted to the works of religious thoughts by Sir Syed Ahmad Khan and Bashir Ahmad, published from Lahore in 1957 at p. 735. He also referred to the English translation of the Holy Quran to explain the meaning of gift in Sura 241. In conclusion, he submitted that the interpretation to be placed on the enactment should be in consonance with the Muslim personal law and also meet a situation of vagrancy of a Muslim divorced wife even when there is a denial of the remedy provided underSection 125 CrPC and such a course would not lead to vagrancy since provisions have been made in the Act. This Court will have to bear in mind the social ethos of Muslims, which are different and the enactment is consistent with law and justice.

It was further contended on behalf of the respondents that the Parliament enacted the impugned Act, respecting the personal law of muslims and that itself is a legitimate basis for making a differentiation; that a separate law for a community on the basis of personal law applicable to such community, cannot be held to be discriminatory; that the personal law is now being continued by a legislative enactment

and the entire policy behind the Act is not to confer a right of maintenance, unrelated to the personal law; that the object of the Act itself was to preserve the personal law and prevent inroad into the same; that the Act aims to prevent the vagaries and not to make a muslim woman, destitute and at the same time, not to penalise the husband; that the impugned Act resolves all issues, bearing in mind the personal law of muslim community and the fact that the benefits of Section 125 CrPC have not been extended to muslim women, would not necessarily lead to a conclusion that there is no provision to protect the muslim women from vagaries and from being a destitute; that therefore, the Act is not invalid or unconstitutional.

On behalf of the All India Muslim Personal Law Board, certain other contentions have also been advanced identical to those advanced by the other authorities and their submission is that the interpretation placed on the Arabic word mata by this Court in Shah Banos case is incorrect and submitted that the maintenance which includes the provision for residence during the iddat period is the obligation of the husband but such provision should be construed synonymously with the religious tenets and, so construed, the expression would only include the right of residence of a Muslim divorced wife during iddat period and also during the extended period under Section 3(1)(a) of the Act and thus reiterated various other contentions advanced on behalf of others and they have also referred to several opinions expressed in various text books, such as, -

1. The Turjuman al-Quran by Maulana Abul Kalam Azad, translated into English by Dr. Syed Abdul Latif;
2. Persian Translation of the Quran by Shah Waliullah Dahlavi
3. Al-Manar Commentary on the Quran (Arabic);
4. Al-Isaba by Ibne Hajar Asqualani [Part-2]; Siyar Alam-in-Nubla by Shamsuddin Mohd. Bin Ahmed BinUsman Az-Zahbi;
5. Al-Maratu Bayn Al-Fiqha Wa Al Qanun by Dr. Mustafa As- Sabai;
6. Al-Jamil ahkam-il Al-Quran by Abu Abdullah Mohammad Bin Ahmed Al Ansari Al-Qurtubi;
7. Commentary on the Quran by Baidavi (Arabic);
8. Rooh-ul-Bayan (Arabic) by Ismail Haqqi Affendi;
9. Al Muhalla by Ibne Hazm (Arabic);
10. Al-Ahwalus Shakhsiah (the Personal Law) by Mohammad abu Zuhra Darul Fikrul Arabi.

On the basis of the aforementioned text books, it is contended that the view taken in Shah Banos case on the expression mata is not correct and the whole object of the enactment has been to nullify the effect of the Shah Banos case so as to exclude the application of the provision ofSection 125 CrPC, however, giving recognition to the personal law as stated in Sections 3 and 4 of the Act. As stated earlier, the interpretation of the provisions will have to be made bearing in mind the social ethos of the Muslim and there should not be erosion of the personal law.

[On behalf of the Islamic Shariat Board, it is submitted that except for Mr. M. Asad and Dr. Mustafa-as-Sabayi no author subscribed to the view that the Verse 241 of Chapter II of the Holy Quran casts an obligation on a former husband to pay maintenance to the Muslim divorced wife beyond the iddat period. It is submitted that Mr. M. Asads translation and commentary has been held to be unauthentic and unreliable and has been subscribed by the Islamic World League only. It is submitted that Dr. Mustafa-as-Sabayi is a well-known author in Arabic but his field was history and literature and not the Muslim law. It was submitted that neither are they the theologists nor jurists in terms of Muslim law. It is contended that this Court wrongly relied upon Verse 241 of Chapter II of the Holy Quran and the

decree in this regard is to be referred to Verse 236 of Chapter II which makes paying mata as obligatory for such divorcees who were not touched before divorce and whose Mahr was not stipulated. It is submitted that such divorcees do not have to observe iddat period and hence not entitled to any maintenance. Thus the obligation for mata has been imposed which is a one time transaction related to the capacity of the former husband. The impugned Act has no application to this type of case. On the basis of certain texts, it is contended that the expression mata which according to different schools of Muslim law, is obligatory only in typical case of a divorce before consummation to the woman whose mahr was not stipulated and deals with obligatory rights of maintenance for observing iddat period or for breast-feeding the child. Thereafter, various other contentions were raised on behalf of the Islamic Shariat Board as to why the views expressed by different authors should not be accepted.

Dr. A.M.Singhvi, learned Senior Advocate who appeared for the National Commission for Women, submitted that the interpretation placed by the decisions of the Gujarat, Bombay, Kerala and the minority view of the Andhra Pradesh High Courts should be accepted by us. As regards the constitutional validity of the Act, he submitted that if the interpretation of Section 3 of the Act as stated later in the course of this judgment is not acceptable then the consequence would be that a Muslim divorced wife is permanently rendered without remedy insofar as her former husband is concerned for the purpose of her survival after the iddat period. Such relief is neither available under Section 125 CrPC nor is it properly compensated by the provision made in Section 4 of the Act. He contended that the remedy provided under Section 4 of the Act is illusory inasmuch as firstly, she cannot get sustenance from the parties who were not only strangers to the marital relationship which led to divorce; secondly, wakf boards would usually not have the means to support such destitute women since they are themselves perennially starved of funds and thirdly, the potential legatees of a destitute woman would either be too young or too old so as to be able to extend requisite support. Therefore, realistic appreciation of the matter will have to be taken and this provision will have to be decided on the touch stone of Articles 14, 15 and alsoArticle 21 of the Constitution and thus the denial of right to life and liberty is exasperated by the fact that it operates oppressively, unequally and unreasonably only against one class of women. While Section 5 of the Act makes the availability and applicability of the remedy as provided bySection 125 CrPC dependent upon the whim, caprice, choice and option of the husband of the Muslim divorcee who in the first place is sought to be excluded from the ambit of Section 3 of the post-iddat period and, therefore, submitted that this provision will have to be held unconstitutional.

This Court in Shah Banos case held that although Muslim personal law limits the husbands liability to provide maintenance for his divorced wife to the period of iddat, it does not contemplate a situation envisaged by Section 125 CrPC of 1973. The Court held that it would not be incorrect or unjustified to extend the above principle of Muslim Law to cases in which a divorced wife is unable to maintain herself and, therefore, the Court came to the conclusion that if the divorced wife is able to maintain herself the husbands liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to recourse to Section 125 CrPC. This decision having imposed obligations as to the liability of Muslim husband to pay maintenance to his divorced wife, Parliament endorsed by the Act the right of a Muslim woman to be paid maintenance at the time of divorce and to protect her rights.

The learned counsel have also raised certain incidental questions arising in these matters to the following effect-

1) Whether the husband who had not complied with the orders passed prior to the enactments and were in arrears of payments could escape from their obligation on the basis of the Act, or in other words, whether the Act is retrospective in effect?

2) Whether Family Courts have jurisdiction to decide the issues under the Act?

3) What is the extent to which the Wakf Board is liable under the Act?

The learned counsel for the parties have elaborately argued on a very wide canvass. Since we are only concerned in this Bench with the constitutional validity of the provisions of the Act, we will consider only such questions as are germane to this aspect. We will decide only the question of constitutional validity of the Act and relegate the matters when other issues arise to be dealt with by respective Benches of this Court either in appeal or special leave petitions or writ petitions.

In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and women are assigned, invariably, a dependant role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question.

Now it is necessary to analyse the provisions of the Act to understand the scope of the same. The Preamble to the Act sets out that it is an Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto. A divorced woman is defined under Section 2(a) of the Act to mean a divorced woman who was married according to Muslim Law, and has been divorced by, or has obtained divorce from her husband in accordance with Muslim Law; iddat period is defined under Section 2(b) of the Act to mean, in the case of a divorced woman,-

(i) three menstrual courses after the date of divorce, if she is subject to menstruation;

(ii) three lunar months after her divorce, if she is not subject to menstruation; and

(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy whichever is earlier. Sections 3 and 4 of the Act are the principal sections, which are under attack before us. Section 3 opens up with a non-obstante clause overriding all other laws and provides that a divorced woman shall be entitled to -

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

(b) where she maintains the children born to her before or after her divorce, a reasonable provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim Law; and

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

Where such reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made and paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be. Rest of the provisions of Section 3 of the Act may not be of much relevance, which are procedural in nature.

Section 4 of the Act provides that, with an overriding clause as to what is stated earlier in the Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim Law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order. If any of the relatives do not have the necessary means to pay the same, the Magistrate may order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order. Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them has not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board, functioning in the area in which the divorced woman resides, to pay such maintenance as determined by him as the case may be. It is, however, significant to note thatSection 4 of the Act refers only to payment of maintenance and does not touch upon the provision to be made by the husband referred to in Section 3(1)(a) of the Act.

Section 5 of the Act provides for option to be governed by the provisions of Sections 125 to 128CrPC. It lays down that if, on the date of the first hearing of the application under Section 3(2), a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions

of Sections 125 to 128 CrPC, and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

A reading of the Act will indicate that it codifies and regulates the obligations due to a Muslim woman divorcee by putting them outside the scope of Section 125 CrPC as the divorced woman has been defined as Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law. But the Act does not apply to a Muslim woman whose marriage is solemnized either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either underIndian Divorce Act, 1969 or the Indian Special Marriage Act, 1954. The Act does not apply to the deserted and separated Muslim wives. The maintenance under the Act is to be paid by the husband for the duration of the iddat period and this obligation does not extend beyond the period of iddat. Once the relationship with the husband has come to an end with the expiry of the iddat period, the responsibility devolves upon the relatives of the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives, or no relatives are able to support the divorcee, then the Court can order the State Wakf Boards to pay the maintenance.

Section 3(1) of the Act provides that a divorced woman shall be entitled to have from her husband, a reasonable and fair maintenance which is to be made and paid to her within the iddat period. Under Section 3(2) the Muslim divorcee can file an application before a Magistrate if the former husband has not paid to her a reasonable and fair provision and maintenance or mahr due to her or has not delivered the properties given to her before or at the time of marriage by her relatives, or friends, or the husband or any of his relatives or friends. Section 3(3) provides for procedure wherein the Magistrate can pass an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may think fit and proper having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of her former husband. The judicial enforceability of the Muslim divorced womans right to provision and maintenance under Section (3)(1)(a) of the Act has been subjected to the condition of husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat.

A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorce and, therefore, the word provision indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles. The expression within should be read as during or for and this cannot be done because words cannot be construed contrary to their meaning as the word within would mean on or before, not beyond and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided inSection 3(3) but no where the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period

and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

The important section in the Act is Section 3 which provides that divorced woman is entitled to obtain from her former husband maintenance, provision and mahr, and to recover from his possession her wedding presents and dowry and authorizes the magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a reasonable and fair provision for his divorced wife; and (2) to provide maintenance for her. The emphasis of this section is not on the nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, within the iddat period. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both reasonable and fair provision and maintenance by paying these amounts in a lump sum to his wife, in addition to having paid his wifes mahr and restored her dowry as per Section 3(1)(c) and3(1)(d) of the Act. Precisely, the point that arose for consideration in Shah Banos case was that the husband has not made a reasonable and fair provision for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are a reasonable and fair provision and maintenance to be made and paid as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs to be made and paid to her within the iddat period, it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4of the Act, which empowers the magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to provision. Obviously, the right to have a fair and reasonable provision in her favour is a right enforceable only against the womans former husband, and in addition to what he is obliged to pay as maintenance; thirdly, the words of the Holy Quran, as translated by Yusuf Ali of mata as maintenance though may be incorrect and that other translations employed the word provision, this Court in Shah Banos case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether mata was rendered maintenance or provision, there could be no pretence that the husband in Shah Banos case had provided anything at all by way of mata to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to mata is only a single or one time transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word provision inSection 3(1)(a) of the Act incorporates mata as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables a reasonable and fair provision and a reasonable and fair provision as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Banos case, actually codifies the very rationale contained therein.

A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling

those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support is satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right loses its significance. The object and scope of Section 125CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Banos case. In this case to find out the personal law of Muslims with regard to divorced womens rights, the starting point should be Shah Banos case and not the original texts or any other material all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Banos case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Banos case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Banos case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality.

In Shah Banos case this Court has clearly explained as to the rationale behind Section 125 CrPC to make provision for maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or destitution on the part of a Muslim woman. The contention put forth on behalf of the Muslims organisations who are interveners before us is that under the Act vagrancy or destitution is sought to be avoided but not by punishing the erring husband, if at all, but by providing for maintenance through others. If for any reason the interpretation placed by us on the language ofSections 3(1)(a) and 4 of the Act is not acceptable, we will have to examine the effect of the provisions as they stand, that is, a Muslim woman will not be entitled to maintenance from her husband after the period of iddat once the Talaq is pronounced and, if at all, thereafter maintenance could only be recovered from the various persons mentioned in Section 4 or from the Wakf Board. This Court in Olga Tellis v. Bombay Municipal Corporation, 1985(3) SCC 545, and Maneka Gandhi v. Union of India, 1978 (1) SCC 248, held that the concept of right to life and personal liberty guaranteed under Article 21 of the Constitution would include the right to live with dignity. Before the Act, a Muslim woman who was divorced by her husband was granted a right to maintenance from her husband under the provisions of Section 125 CrPC until she may re-marry and such a right, if deprived, would not be

reasonable, just and fair. Thus the provisions of the Act depriving the divoced Muslim women of such a right to maintenance from her husband and providing for her maintenance to be paid by the former husband only for the period of iddat and thereafter to make her run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Section 125 CrPC. Such deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or Christian women or women belonging to any other community. The provisions prima facie, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion. It is well settled that on a rule of construction a given statute will become ultra vires or unconstitutional and, therefore, void, whereas another construction which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that Legislature does not intend to enact unconstitutional laws. We think, the latter interpretation should be accepted and, therefore, the interpretation placed by us results in upholding the validity of the Act. It is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way.

The learned counsel appearing for the Muslim organisations contended after referring to various passages from the text books to which we have adverted to earlier to state that the law is very clear that a divorced Muslim woman is entitled to maintenance only upto the stage of iddat and not thereafter. What is to be provided by way of Mata is only a benevolent provision to be made in case of divorced Muslim woman who is unable to maintain herself and that too by way of charity or kindness on the part of her former husband and not as a result of her right flowing to the divorced wife. The effect of various interpretations placed on Suras 241 and 242 of Chapter 2 of Holy Quran has been referred to in Shah Banos case. Shah Banos case clearly enunciated what the present law would be. It made a distinction between the provisions to be made and the maintenance to be paid. It was noticed that the maintenance is payable only upto the stage of iddat and this provision is applicable in case of a normal circumstances, while in case of a divorced Muslim woman who is unable to maintain herself, she is entitled to get Mata. That is the basis on which the Bench of Five Judges of this Court interpreted the various texts and held so. If that is the legal position, we do not think, we can state that any other position is possible nor are we to start on a clean slate after having forgotten the historical background of the enactment. The enactment though purports to overcome the view expressed in Shah Banos case in relation to a divorced Muslim woman getting something by way of maintenance in the nature of Mata is indeed the statutorily recognised by making provision under the Act for the purpose of the maintenance but also for provision. When these two expressions have been used by the enactment, which obviously means that the Legislature did not intend to obliterate the meaning attributed to these two expressions by this Court in Shah Banos case. Therefore, we are of the view that the contentions advanced on behalf of the parties to the contrary cannot be sustained.

In Arab Ahemadhia Abdulla and etc vs. Arab Bail Mohmuna Saiyadbhai & Ors. etc., AIR 1988 (Guj.) 141; Ali vs. Sufaira, (1988) 3 Crimes 147; K. Kunhashed Hazi v. Amena, 1995 Crl.L.J. 3371;K. Zunaideen v. Ameena Begum, (1998] II DMC 468; Karim Abdul Shaik v. Shenaz Karim Shaik, 2000 Cr.L.J. 3560 and Jaitunbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh & Anr., 1999 (3) Mh.L.J. 694, while interpreting the provision of Sections 3(1)(a) and 4 of the Act, it is held that a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband which must include maintenance for future extending beyond the iddat period. It was held that the liability of the former husband to make a reasonable and fair provision under Section 3(1)(a) of the Act is not restricted only for the period of iddat but that divorced Muslim woman is entitled to a reasonable and fair provision for her future being made by her former husband and also to maintenance being paid to her for the iddat period. A lot of emphasis was laid on the words made and paid and were construed to mean not only to make provision for the iddat period but also to make a reasonable and fair provision for her future. A Full Bench of the Punjab and Haryana High Court in Kaka v. Hassan Bano & Anr., II (1998) DMC 85 (FB), has taken the view that under Section 3(1)(a) of the Act a divorced Muslim woman can claim maintenance which is not restricted to iddat period. To the contrary it has been held that it is not open to the wife to claim fair and reasonable provision for the future in addition to what she had already received at the time of her divorce; that the liability of the husband is limited for the period of iddat and thereafter if she is unable to maintain herself, she has to approach her relative or Wakf Board, by majority decision in Umar Khan Bahamami v. Fathimnurisa, 1990 Cr.L.J. 1364; Abdul Rashid v. Sultana Begum, 1992 Cr.L.J. 76; Abdul Haq v. Yasima Talat; 1998 Cr.L.J. 3433; Md. Marahim v. Raiza Begum, 1993 (1) DMC 60. Thus preponderance of judicial opinion is in favour of what we have concluded in the interpretation of Section 3 of the Act. The decisions of the High Courts referred to herein that are contrary to our decision stand overruled.

While upholding the validity of the Act, we may sum up our conclusions:

1) a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

In the result, the writ petition Nos. 868/86, 996/86, 1001/86, 1055/86, 1062/86, 1236/86, 1259/86 and 1281/86 challenging the validity of the provisions of the Act are dismissed.

All other matters where there are other questions raised, the same shall stand relegated for consideration by appropriate Benches of this Court.

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RAMESH CHANDER KAUSHAL VERSUS VEENA KAUSHAL & ORS

SUPREME COURT OF INDIA

Bench: **Hon'ble Mr. Justice V.R. Krishnaiyer & Hon'ble Mr. Justice D.A. Desai**

Ramesh Chander Kaushal
Versus
Veena Kaushal & Ors.

(1978) 4 SCC 70

Equivalent citations: 1978 AIR 1807, 1978 SCR (3) 782

Decided on : **27th April, 1978**

We cannot help but observe that the current Indian ethos rightly regards the family and its stability as basic to the strength of the social fabric and the erotic doctrine of 'sip every flower and change every hour' and the philosophy of philandering self-fulfilment, unless combated on the militant basis of gender justice and conditions of service, are fraught with catastrophic possibilities. All public sector (why, private sector too) institutions, including the Airlines, must manifest, in their codes of discipline, this consciousness of social justice and inner morality as essential to its life style. Lascivious looseness of man or wife is an infectious disease and marks the beginning of the end of the material and spiritual meaning of collective life. The roots of the rule of law lie deep in the collective consciousness of a community and this sociological factor has a role to play in understanding provisions like Section 125 Criminal Procedure Code which seek to inhibit neglect of women and children, the old and the Infirm. A facet of this benignancy of Section 125 falls for study in the present proceeding.

A final determination of a civil right by a civil court must prevail against a like decision by a criminal court. But here two factors make the principle inapplicable.

Firstly, the direction by the civil court is not a final determination under the Hindu Adoptions and Maintenance Act but an order pendente lite, Under Section 24 of the Hindu Marriage Act to pay the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

Secondly, this amount does not include the claim for maintenance of the children although the order does advert to the fact that the respondent has their custody. This incidental direction is no comprehensive adjudication.

The relevant portion of the section reads :

125. (i) If any person having sufficient means neglects or refuses to maintain

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct."

This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by Courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the causethe cause of the derelicts.

The judgment would seem to indicate that once divorce is decreed the wife ceases to have any right to claim maintenance and that such an impact can be brought about by an application Under Section 127 of the Code. It is clear that this conclusion contradicts the express statutory provision. The advocates on both sides agree that this is a patent error and further agree that the law may be correctly stated and the contradiction with the statute eliminated.

JUDGMENT

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Criminal) No. 1268 of 1977.

From the Judgment and Order dated 5-9-1977 of the Delhi High Court in Criminal Revision No. 224 of 1977. S. T. Desai and R. Bana for the Petitioner. Y. M. Isser, S. Balakrishnan and M. K. D. Namboodri for the Respondent.

The Order of the Court was delivered by KRISHNA IYER, J.-Social justice is not constitutional claptrap but fighting faith which enlivens legislative texts with militant meaning. The points pressed in the Special Leave Petition, which we negative, illustrate the functional relevance of social justice as an aid to statutory interpretation.

The conjugal tribulations of Mrs. Veena, the respondent, who hopefully married Capt. Kaushal, the petitioner, and bore two young children by him, form the tragic backdrop to this case. The wife claimed that although her husband was affluent and once affectionate, his romantic tenderness turned into flagellant tantrums after he took to the skies as pilot in the Indian Airlines Corporation. Desertion, cruelty and break-up of family followed, that sombre scenario which, in its traumatic frequency, flaring up even into macabre episodes consternates our urban societies. The offspring of the young wedlock were not only two vernal innocents but two dismal litigations one for divorce, by the husband, hurling charges of adultery, and the other for maintenance, by the wife, flinging charges of affluent cruelty and diversion of affection after the Airlines assignment. These are versions, not findings. We do not enter the distressing vicissitudes of this marital imbroglio since proceedings are pending and incidental moralizing, unwittingly injuring one or the other party, are far from our intent

and outside the orbit of the present petition. Even so, we cannot help but observe that the current Indian ethos rightly regards the family and its stability as basic to the strength of the social fabric and the erotic doctrine of 'sip every flower and change every hour' and the philosophy of philandering self-fulfilment, unless combated on the militant basis of gender justice and conditions of service, are fraught with catastrophic possibilities. AR public sector (why, private sector too) institutions, including the Airlines, must manifest, in their codes of discipline, this consciousness of social justice and inner morality as essential to its life style. Lascivious looseness of man or wife is an infectious disease and marks the beginning of the end of the material and spiritual meaning of collective life. The roots of the rule of law lie deep in the collective consciousness of a community and this sociological factor has a role to play in understanding provisions like Section 125 Criminal Procedure Code which seek to inhibit neglect of women and children, the old and the infirm. A facet of this benignancy ofSection 125 falls for study in the present proceeding.

The husband sought divorce through the civil court and the wife claimed maintenance through the criminal Court. As an interim measure, the District Court awarded maintenance and the High Court fixed the rate at 400/- per mensem for the spouse as a provisional figure. Meanwhile, the magistrate, on the evidence before him, ordered ex-parte, monthly maintenance at Rs. 1000/- for the mother and two children together.

Sri S. T. Desai urged two points which merit reflection but meet with rejection. They are that : (i) a civil court's determination of the quantum is entitled to serious weight and the criminal court, in its summary decision, fell into an error in ignoring the former; (ii) the awardable maximum for mother and children, as a whole under Section 125 of the Code was Rs. 500/- having regard to the text of the section. Broadly stated and as an abstract proposition, it is valid to assert, as Sri Desai did, that a final determination of a civil right by a civil court must prevail against a like decision by a criminal court. But here two factors make the principle inapplicable. Firstly, the direction by the civil court is not a final determination under the Hindu Adoptions and Maintenance Act but an order pendente lite, under section 24 of the Hindu Marriage Act to pay the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable. Secondly, this amount does not include the claim for maintenance of the children although the order does advert to the fact that the respondent has their custody. This incidental direction is no comprehensive adjudication.

Therefore, barring marginal relevance for the Magistrate it does not bar his jurisdiction to award a higher maintenance. We cannot, therefore, fault the Magistrate for giving Rs. 1000/- on this score.

The more important point turns on the construction of section 125, Crl. Procedure Code which is a reincarnation of section 488 of the old Code except for the fact that parents also are brought into the category of persons eligible for maintenance and legislative cognizance is taken of the devaluation of the rupee and the escalation of living costs by raising the maximum allowance for maintenance from Rs. 100/- to Rs. 500/-. The relevant portion of the section reads "125. (i) if any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly

rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct."

This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article

39. We have no doubt that sections of statutes calling for construction by Courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sec- tions like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the cause he cause of the derelicts.

Sri Desai contends that section 125 of the Code has clearly fixed the ceiling of the monthly allowance "for the maintenance of.... wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole". Assuming the Parliament not to be guilty of redundancy it is argued that the words "in the whole" mean that the total award- for wife, child, father or mother together cannot exceed Rs. 500/-. We do not agree. Both precedentially and interpretatively the argument is specious.

The words which connote that the total, all together, cannot exceed Rs. 500/- namely "in the whole' have been inherited from the previous Code although some ambiguity in the sense of the clause is injected by these words. Clarity, unfortunately, has not been a strong point of our draftsmanship, at least on occasions, and litigation has been engendered by such deficiency. Luckily, these words have been subject to decisions which we are inclined to adopt as correct. A Full Bench of the Bombay High Court in Prabhavati v. Sumatilal(1) has held that the sum specified is not compendious but separate. Chagla C.J. explained the position correctly, if we may say so with respect :

"The suggestion that the jurisdiction of the Magistrate is limited to allowing one hundred rupees in respect of maintenance of the wife and the children jointly is, in our opinion, an impossible construction once it is accepted that the right of the wife and of each child is an independent right. Such a construction would lead to extremely anomalous results.

If, for instance, a wife applies for maintenance for herself and for her children and the Magistrate allows a maintenance of one hundred rupees, and if thereafter an (1) A.I.R. 1954 Bom. 546illegitimate child were to come forward and to make an application for maintenance, the Magistrate having allowed an allowance to her up to the maximum of his jurisdiction would be prevented from making any order in favour of the illegitimate child. Or, a man may have more than one wife and he may have children by each one of the wives. If the suggestion is that maintenance can be, allowed in a compendious application to be made and such maintenance cannot exceed one hundred rupees for all the persons applying for maintenance, then in a conceivable case a wife or a child may be deprived of maintenance altogether under the section.

The intention of the Legislature was clear, and the intention was to cast an obligation upon a person who neglects or refuses to maintain his wife or children to carry out his obligation towards his wife or children. The obligation is separate and independent in relation to each one of the persons whom he is bound in law to maintain. it is futile to suggest that in using the expression "in the whole" the Legislature was limiting the jurisdiction of the Magistrate to passing an order in respect--Of all the persons whom he is bound to maintain allowing them maintenance not exceeding a sum of one hundred rupees." Meeting the rival point of view Chief Justice Chagla held :

". . . . we are unable to accept the view taken by the Division Bench that the jurisdiction of the Magistrate is confined to making a compendious order allowing one hundred rupees in respect of all the persons liable to be maintained."

A recent ruling of the Calcutta High Court in Md. Bashir v. Noon Jahan Begum(1) has taken a similar view reviewing the case law in India on the subject. We agree with Talukdar, J. who quotes Mr. Justice Macardie:

"All law must progress or it must perish in the esteem of man."

In short the decided cases have made a sociological approach to, conclude that each claimant for maintenance, be he or she wife, child, father or mother, is independently entitled to maintenance up to a maximum of Rs. 500/-. Indeed, an opposite conclusion may lead to absurdity. If a woman has a dozen children and if the man neglects the whole lot and, in his addiction to a fresh mistress, neglects even his parents and all these members of the family seek maintenance in one petition against the delinquent respondent, can it be, that the Court cannot- (1) 1971 Crl.L.J. 547@553.

award more than Rs. 500/- for all of them together ? On the other hand if each filed a separate petition there would be a maximum of Rs. 500/- each awarded by the Court. We cannot, therefore, agree to this obvious jurisdictional inequity by reading a limitation of Rs. 500/- although what the section plainly means is that the Court cannot grant more than Rs. 500/- for each one of the claimants. "In the whole" in the context means taking all the items of maintenance together, not all the members of the family put together. To our mind, this interpretation accords with social justice and semantics and, more than all, is obvious :

"It is sometimes more important to emphasize the obvious than to elucidate the obscure."

-Attributed to Oliver Wendell Holmes.

We admit the marginal obscurity in the diction, of the section but mind creativity in interpreting the provision dispels all doubts. We own that Judges perform a creative function even in interpretation.

"All the cases in this book are examples, greater or smaller, of this function".

writes Prof. Griffith in the Politics of the Judiciary.(1) The conclusion is inevitable, although the argument to the contrary is ingenious, that the Magistrate did not exceed his powers while awarding Rs. 1000/- for mother and children all together.

We have been told by Shri S. T. Desai that the divorce pro- ceeding terminated adversely to his client but an appeal is pending. If the appeal ends in divorce being decreed, the wife's claim for maintenance qua wife comes to an end and under section 127 of the Code the Magistrate has the power to make alterations in the allowance order and cipherise it. We make the position clear lest confusion should breed fresh litigation.

The special leave petition is dismissed.

ORDER (22-8-78) Noticing a patent error which has unfortunately crept in the above judgment in the last paragraph thereof, counsel on both sides were given notice to appear and they were heard. Section 125(1), Explanation (b) of the Cr. P.C. reads "Wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried." The last paragraph in the judgment concludes with the statement "If the appeal ends in divorce being decreed, the wife's claim for (1) J.A.G. Griffith 'The Politics of the Judiciary' p. 175.

maintenance qua wife comes to an end and under section 127 of the Code, the Magistrate has the power to make alterations in the allowance order and cipherise it." The judgment would seem to indicate that once divorce is decreed the wife ceases to have any right to, claim maintenance and that such an impact can be brought about by an application u/S. 127 of the Code. It is clear that this conclusion contradicts the express statutory provision. The advocates on both sides agree that this is a patent error and further agree that the law may be correctly stated and the contradiction with the statute eliminated. Therefore, we direct that in substitution of the last paragraph, the following paragraph will be introduced. "We have been told by Shri S. T. Desai that the divorce proceeding has terminated adversely to his client but that an appeal is pending: Whether the appeal ends in divorce or no, the wife's claim for maintenance qua wife under the definition contained in the Explanation (b) to sec. 125 of the Code continues unless parties make adjustments and come to terms regarding the quantum or the right to maintenance. We make the position clear that mere divorce does not end the right to maintenance."

We regret the error and pass this order under Art. 137 of the Constitution with the consent of both sides so that the ends of justice and the law that this Court lays down may be vindicated.

S. R. Petition dismissed.

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LANDMARK JUDGMENTS ON

ADOPTION

SHABNAM HASHMI VERSUS UNION OF INDIA & ORS.

SUPREME COURT OF INDIA

Bench: **Hon'ble Mr. Justice P. Sathasivam, Hon'ble Mr. Justice Ranjan Gogoi & Hon'ble Mr. Justice Shiva Kirti Singh**

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

Writ Petition (Civil) No. 470 of 2005

[Arising out of Special Leave Petition
(Civil) No.12985 of 2016]

Decided on : **19th February, 2014**

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

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

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

The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. Conflicting view points prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard

to the necessity to maintain restraint. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi :—

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

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

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

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

1 (1984) 2 SCC 244

contemplates adoption though it makes it clear that the primary responsibility for providing care and protection to a child is his immediate family. Sections 42, 43 and 44 of the JJ Act, 2000 deals with alternative methods of rehabilitation namely, foster care, sponsorship and being looked after by an after-care organisation.

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

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

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

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

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

attention of the Court that notwithstanding the time schedule specified in the guidelines of 2011 as well as in the JJ Rules, 2007 there is undue delay in processing of adoption cases at the level of Child Welfare Committees (CWS), the Adoption Recommendation Committees (ARCs) as well as the concerned courts.

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

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

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

by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date.

12. The writ petitioner has also prayed for a declaration that the right of a child to be adopted and that of the prospective parents to adopt be declared a fundamental right under Article 21 of the Constitution. Reliance is placed in this regard on the views of the Bombay and Kerala High Courts in In re: Manuel Theodore D'souza[2] and Philips Alfred Malvin Vs. Y.J.Gonsalvis & Ors.[3] respectively. The Board objects to such a declaration on the grounds already been noticed, namely, that Muslim Personal Law does not recognize adoption though it does not prohibit a childless couple from taking care and protecting a child with material and emotional support.

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

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

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2 (2000) 3 BomCR 244

3 AIR 1999 Kerala 187

STEPHANIE JOAN BECKER VERSUS STATE AND ORS.

SUPREME COURT OF INDIA

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

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

Civil Appeal No. 1053 of 2013
(Arising out of SLP (Civil) No. 29505 of 2012)

Decided on : **8th February, 2013**

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

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

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

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi :—

Leave granted.

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

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

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

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

1 (1984) 2 SCC 244

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

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

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

(1) Enlisted Foreign Adoption Agency (EFAA)

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

in any language other than English, then the originals must be accompanied by attested translations

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

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

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

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

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

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

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

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

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

(6) Filing of Petition in the Court

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

(7) Passport and Visa

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

(8) Child travels to adoptive country

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

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

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

is made, the various steps in the process of adoption spelt out by the Guidelines of 2006, details of which have been extracted hereinabove, would apply finally leading to departure of the child from the country to his/her new home for completion of the process of adoption in accordance with the laws of the country to which the child had been taken. In this regard the order of the courts in the country under Section 41(3) of the JJ Act would be a step in facilitating the adoption of the child in the foreign country.

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

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

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

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

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

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

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

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

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LAKSHMI KANT PANDEY VERSUS UNION OF INDIA

SUPREME COURT OF INDIA

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

Lakshmi Kant Pandey
Versus
Union Of India

1984 SCR (2) 795
1984 AIR 469

Decided on : **6th February, 1984**

CITATION:

1984 AIR 469 1984 SCR (2) 795

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

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

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

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

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

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

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

The petitioner, an advocate of the Supreme Court addressed a letter in public interest to

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

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

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

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

2:1. The primary object of giving the child in adoption should be the welfare of the child. Great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life

or moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medial or other research and may be placed in a worse situation than that in his own country.

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

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

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

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

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

Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child

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

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

or Consulate in that country. The social or child welfare agency sponsoring the application of the forefingers must also undertake while forwarding the application to the social or child welfare agency in India, that it will ensure adoption of the child by the foreigner according to the law of his country within a period not exceeding two years and as soon as the adoption is affected, it will send two certified copies of the adoption order to the social or child welfare agency in India through which the application for guardianship is processed, so that one copy can be filed in court and the other can remain with the social or child welfare agency in India. The social or child welfare agency sponsoring the application must also agree to send to the concerned social or child welfare agency in India progress reports in regard to the child, quarterly during the first year and half yearly for the subsequent year or years until the adoption is effected, and it must also undertake that in case of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the concerned social or child welfare agency in India and report such alternative placement to the court handling the guardianship proceedings and such information shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secretary, Ministry of Social Welfare, Government of India.

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

3:3. If the biological parents are known, they should be helped to understand all the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filling an application for appointment of the foreigner as guardian of the child. Thereafter there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back. But in order to eliminate any possibility of mischief and to make sure

that the child has in fact surrendered by its biological parents, it is necessary that the Institution or Centre or home for Child Care or social or Child Welfare Agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background, health and development. If the biological parents state a preference for the religious upbringing of the child, their wish should as far as possible be respected, but ultimately the interest of the child alone should be the sole guiding factor and the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents. The biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of a child or within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

3:4. It should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India or the Government of the State in which it is operating. Since an application for appointment as guardian can be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter country adoption, and in that event it must send without any undue delay the name and must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in intercountry adoption. The Indian Council of Social Welfare and the Indian Council for Child Welfare are clearly two social or child welfare agencies operating at the national level and recognised by the Government of India. But apart from these two recognised social or child welfare agencies functioning at the national level, there are other social or child welfare agencies engaged in child care and welfare and if they have good standing and reputation and are doing commendable work in the are of child care and welfare they should also be recognised by the Government of India or the Government of the State for the purpose of inter-country adoptions. But before taking a decision to recognise any particular social or child welfare agency for the purpose of inter country adoptions the Government of India or the Government

of a State would do well to examine whether the social or child welfare agency has proper staff with professional social work experience, because otherwise it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family. The Government of India or the Government of a State recognising any social or child welfare agency for inter-country adoptions must insist as a condition of recognition that the social or child welfare agency shall maintain proper accounts which shall be audited by a chartered accountant at the end of every year and it shall not charge to the foreigner wishing to adopt a child any amount in excess of that actually in cured by way of legal or other expenses in connection with the application for appointment of guardian including such reasonable remuneration or honorarium for the work done and trouble taken in processing, filing and pursuing the application as may be fixed by the Court.

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

- ***(1) Identifying information, supported where possible by documents.***
- ***(2) Information about original parents, including their health and details of the mother's pregnancy and birth.***
- ***(3) Physical, intellectual and emotional development.***
- ***(4) Health report prepared by a registered medical practitioner preferably by a paediatrician.***
- ***(5) Recent photograph.***
- ***(6) Present environment-category of care (Own home, foster home, institution etc.) relationships routines and habits.***
- ***(7) Social worker's assessment and reasons for suggesting inter-country adoption. [838G-H; 839AE]***

3:6. The recognised social or child welfare agency must insist upon approval of a specific known child and once that approval is obtained the recognised social or child welfare agency should immediately without any undue delay proceed to make an application

for appointment of the foreigner as guardian of the child. Such application would have to be made in the court within whose jurisdiction the child ordinarily resides and it must be accompanied by copies of the home study report, the child study report and other certificates and documents forwarded by the social or child welfare agency sponsoring the application of the foreigner for taking the child in adoption. It is also necessary that the recognised social or child welfare agency through which an application of a foreigner for taking a child in adoption is routed must before offering a child in adoption, make sure that the child is free to be adopted. The recognised social or child welfare agency must place sufficient material before the court to satisfy it that the child is legally available for adoption. It is also necessary that the recognised social or child welfare agency must satisfy itself, firstly, that there is no impediment in the way of the child entering the country of the prospective adoptive parent; secondly, that the travel documents for the child can be obtained at the appropriate time and lastly, that the law of the country of the prospective adoptive parent permits legal adoption of the child and that on such legal adoption being concluded, the child would acquire the same legal status and rights of inheritance as a natural born child and would be granted citizenship in the country of adoption and it should file alongwith the application for guardianship, a certificate reciting such satisfaction.

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

Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hardship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. For the same reasons, notice of the application for guardianship should also not be published in any newspaper. If the court is satisfied, after giving notice of the application to the Indian Council of Child Welfare or the Indian Council for Social

Welfare or any of its branches for scrutiny of the application, that it will be for the welfare of the child to be give in adoption to the foreigner making the application for guardianship, it will only then make an order appointing the foreigner as guardian of the child and permitting him to remove the child to his own country with a view to eventual adoption. The Court will introduce the following conditions in the order, namely:

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

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

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

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

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

charges, any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent.

3:9. If a child is to be given in inter-country adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Children above the age of 3 years may also be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 to 7 years may be able to assimilate themselves in the new surroundings without any difficulty. Even children above the age of seven years may be given in inter-country adoption but their wishes may be ascertained if they are in a position to indicate any preference.

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

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

JUDGMENT

Hon'ble Mr. Justice P.N. Bhagwati :—

This writ petition has been initiated on the basis of a letter addressed by one Laxmi Kant Pandey, an advocate practising in this Court, complaining of malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The letter referred to a press report based on "empirical investigation carried out by the staff of a reputed foreign magazine" called "The Mail" and alleged that not only Indian children of tender age are under

the guise of adoption "exposed to the long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the Shelter and Relief Homes, they in course of time become beggars or prostitutes for want of proper care from their alleged foreign foster parents." The petitioner accordingly sought relief restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian children by foreign parents. This letter was treated as a writ petition and by an Order dated 1st September, 1982 the Court issued notice to the Union of India the Indian Council of Child Welfare and the Indian Council of Social Welfare to appear in answer to the writ petition and assist the Court in laying down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents and if so, the procedure to be followed for that purpose, with the object of ensuring the welfare of the child.

The Indian Council of Social Welfare was the first to file its written submissions in response to the notice issued by the Court and its written submission filed on 30th September, 1982 not only carried considerable useful material bearing on the question of adoption of Indian children by foreign parents but also contained various suggestions and recommendations for consideration by the Court in formulating principles and norms for permitting such adoptions and laying down the procedure for that purpose. We shall have occasion to refer to this large material placed before us as also to discuss the various suggestions and recommendations made in the written submission by the Indian Council of Social Welfare when we take up for consideration the various issues arising in the writ petition. Suffice it to state for the present that the written submission of the Indian Council of Social Welfare is a well thought out document dealing comprehensively with various aspects of the problem in its manifold dimensions. When the writ petition reached hearing before the Court on 12th October, 1982 the only written submission filed was that the Indian Council of Social Welfare and neither the Union of India nor the Indian Council of Child Welfare had made any response to the notice issued by the Court. But there was a telegram received from a Swedish Organisation called `Barnen Framfoer Allt Adoptioner" intimating to the Court that this Organisation desired to participate in the hearing of the writ petition and to present proper material before the Court. S.O.S, Children's Villages of India also appeared through their counsel Mrs. Urmila Kapoor and applied for being allowed to intervene at the hearing of the writ petition so that they could made their submissions on the question of adoption of Indian Children by foreign parents. Since S.O.S, Children's Villages of India is admittedly an organisation concerned with welfare of children, the Court, by an Order dated 12th October, 1982, allowed them to intervene and to make their submissions before the Court. The Court also by the same Order directed that the Registry may address a communication to Barnen Framfoer Allt Adoptioner informing them about the adjourned date of hearing of the writ petition and stating that if they wished to present any material and make their submissions, they could do so by filing an affidavit before the adjourned date of hearing. The Court also directed the Union of India to furnish before the next hearing of the writ petition the names of "any Indian Institutions or Organisations other than the Indian Council of Social Welfare and the Indian Council of Child Welfare, which are engaged or involved in offering Indian children for adoption by foreign parents" and observed that if the Union of India does not have this information, they should gather the requisite information so far as it is possible for them to do so and to make it available to the Court. The Court also issued a similar direction to the Indian Council of Child Welfare, Indian Council of Social Welfare and S.O.S. Children's Villages of India. There was also a further direction given in the same Order to the Union of India, the Indian Council of Child

Welfare, the Indian Council of Social Welfare and the S.O.S. Children's Villages of India "to supply to the Court information in regard to the names and particulars of any foreign agencies which are engaged in the work of finding Indian children for adoption for foreign parents". The writ petition was adjourned to 9th November, 1982 for enabling the parties to carry out these directions.

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

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

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

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

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

The Writ Petition thereafter came up for hearing on 9th November, 1982 when several applications were made by various institutions and organisations for intervention at the hearing of the writ petition. Since the questions arising in the writ petition were of national importance, the Court thought that it would be desirable to have assistance from whatever legitimate source it might come and accordingly, by an order dated 9th November, 1982, the Court granted permission to eight specified institutions or organisations to file affidavits or statements placing relevant material before the Court in regard to the question of adoption of Indian children by foreign parents and directed that such affidavits or statements should be filed on or before 27th November, 1982. The Court also issued notice of the writ petition to the State of West Bengal directing it to file its affidavit or statement on or before the same date. The Court also directed the Superintendent of Tees Hazari courts to produce at the next hearing of the writ petition quarterly reports in regard to the orders made under the Guardian and Wards Act, 1890 entrusting care and custody of Indian children to foreign parents during the period of five years immediately prior to 1st October, 1982. Since the Union of India had not yet filed its affidavit or statement setting out what was the attitude adopted by it in regard to this question, the Court directed the Union of India to file its affidavit or statement within the same time as the others. The Court then adjourned the hearing of the writ petition to 1st December 1982 in order that the record may be completed by that time. Pursuant to these directions given by the Court, various

affidavits and statements were filed on behalf of the Indian Council of Social Welfare, Enfants Du Monde, Missionaries of Charity, Enfants De L's Espoir, Indian Association for promotion of Adoption Kuan-yin Charitable Trust, Terre Des Homes (India) Society, Maharashtra State Women's Council, Legal Aid Services West Bengal, SOS Children's Villages of India, Bhavishya International Union for Child Welfare and the Union of India. These affidavits and statements placed before the Court a wealth of material bearing upon the question of adoption of Indian children by foreign parents and made valuable suggestions and recommendations for the consideration of the Court. These affidavits and statements were supplemented by elaborate oral arguments which explored every facet of the question, involving not only legal but also sociological considerations. We are indeed grateful to the various participants in this inquiry and to their counsel for the very able assistance rendered by them in helping us to formulate principles and norms which should be observed in giving Indian children in adoption to foreign parents and the procedure that should be followed for the purpose of ensuring that such inter-country adoptions do not lead to abuse maltreatment or exploitation of children and secure to them a healthy, decent family life.

It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a "supremely important national asset" and the future well being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fulness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique mental immaturity and incapacity to look-after themselves. That is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they ave to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution. Clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goal-oriented perambulatory introduction:

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

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

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

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

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

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

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

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

Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents. The practice of adoption has been prevalent in Hindu Society for centuries and it is recognised by Hindu Law, but in a large number of other countries it is of comparatively recent origin while in the muslim countries it is totally unknown. Amongst Hindus, it is not merely ancient Hindu Law which recognises the practice of adoption but it has also been legislatively recognised in the Hindu Adoption and Maintenance Act, 1956. The Adoption of Children Bill 1972 sought to provide for a uniform law of adoption applicable to all communities including the muslims but, as pointed out above, it was dropped owing to the strong opposition of the muslim community. The Adoption of Children Bill, 1980 is now pending in Parliament and if enacted, it will provide a uniform law of adoption applicable to all communities in India excluding the muslim community. Now when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country, because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socioeconomic conditions prevailing in the country, it might have to lead the life of a destitute, half clad, half-hungry and suffering from malnutrition and illness. Paul Harrison a free-lance journalist working for several U.N. Agencies including the International Year of the Child Secretariat points out that most third world children suffer "because of their country's lack of resources for development as well as pronounced inequalities in the way available resources are distributed" and they face a situation of absolute material deprivation. He proceeds to say that for quite a large number of children in the rural areas, "poverty and lack of education of their parents, combined with little or no access to essential services of health, sanitation and education, prevent the realisation of their full human potential making them more likely to grow up uneducated, unskilled and unproductive" and their life is blighted by malnutrition, lack of health care and disease and illness caused by starvation, impure water and poor sanitation. What Paul Harrison has said about children of the third world applies to children in India and if it is not possible to provide to them in India decent family life where they can grow up under the loving care and attention of parents and enjoy the basic necessities of life such as nutritive food, health care and education and lead a life of basic human dignity with stability and security, moral as well as material, there is no reason why such children should not be allowed to be given in adoption to foreign parents. Such adoption would be quite consistent with our National Policy on Children because it would provide an opportunity to children, otherwise destitute,

neglected or abandoned, to lead a healthy decent life, without privation and suffering arising from poverty, ignorance, malnutrition and lack of sanitation and free from neglect and exploitation, where they would be able to realise "full potential of growth". But of course as we said above, every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is some time called 'inter country adoption' should be acceptable. This principle stems from the fact that inter country adoption may involve trans-racial, trans-cultural and trans-national aspects which would not arise in case of adoption' within the country and the first alternative should therefore always be to find adoptive parents for the child within the country. In fact, the Draft Guidelines of Procedures Concerning Inter-Country Adoption formulated at the International Council of Social Welfare Regional Conference of Asia and Western Pacific held in Bombay in 1981 and approved at the Workshop on Inter Country Adoption held in Brighten, U.K. on 4th September, 1982, recognise the validity of this principle in clause 3.1 which provides: "Before any plans are considered for a child to be adopted by a foreigner, the appropriate authority or agency shall consider all alternatives for permanent family care within the child's own country". Where, however, it is not possible to find placement for the child in an adoptive family within the country, we do not see anything wrong if: a home is provided to the child with an adoptive family in a foreign country. The Government of India also in the affidavit filed on its behalf by Miss B. Sennapati Programme Officer in the Ministry of Social Welfare seems to approve of inter-country adoption for Indian children and the proceedings of the Workshop on Inter Country Adoption held in Brighten, U.K. on 4th September, 1982 clearly show that the Joint Secretary, Ministry of Social Welfare who represented the Government of India at the Workshop "affirmed support of the Indian Government to the efforts of the international organisations in promoting measures to protect welfare and interests of children who are adopted aboard."

But while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country. The Economic and Social Council as also the Commission for Social Development have therefore tried to evolve social and legal principles for the protection and welfare of children given in inter-country adoption. The Economic and Social Council by its Resolution 1925 LVIII requested the Secretary General of the United Nations to convene a group of Experts with relevant experts with relevant experience of family and child welfare with the following mandate:

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

Pursuant to this mandate an expert Group meeting was convened in Geneva in December, 1978 and this Expert Group adopted a "Draft declaration on social and legal principles relating to the protection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.9. If the parents state a preference for the religious up-bringing of the child, these wishes shall be respected as far as possible, but the best interest of the child will be the paramount consideration. 2.10. If the parents are not known, the appropriate authority or agency, in whose care the child has been placed, shall endeavour to trace the parents and ensure that the above services are provided, before taking any action in relation to adoption of the child.

The Child:

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

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

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

3.3.1. Identifying information, supported where possible by documents.

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

3.3.3. Physical, intellectual and emotional development.

3.3.4. Health report.

3.3.5. Recent photograph.

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

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

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

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

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

Adoptive Parents:

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

4.4. A family study report shall be prepared by professional worker (or experienced personnel who are supervised by such qualified workers) to indicate the basis on which the applicants were accepted as prospective adopters. It should include an assessment of the parents' capacity to parent a particular type of child and provide relevant in formation for other authorities such as Courts.

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

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

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

4.5.4. Health.

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

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

4.5.9. Support available from relatives, friends, community.

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

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

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

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

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

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

5.6. XX XX XX XX

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

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

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

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

Adoption Services and Communities:

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

6.2. XX XX XX XX

6.3. The appropriate authorities and agencies in both sending and receiving countries have a responsibility for public education in relation to inter-country adoption, to ensure that when

such adoption is appropriate for children, public attitudes support this. Where public attitude is known to be discriminatory or likely to be hostile on grounds of race or colour, the appropriate authority or agency in the sending country should not consider placement of the child.

Status of the Child:

7.1. Family:

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

7.2. Name:

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

7.3. Nationality:

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

7.4. XX XX XX XX

7.5. Immigration:

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

Now it would be convenient at this stage to set out the procedure which is at present being followed for giving a child in adoption to foreign parents. Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, resort is had to the provisions of the Guardians & Wards Act 1890 for the purpose of facilitating such adoption. This Act is an old statute enacted for the purpose of providing for appointment of guardian of the person or property of a minor. Section 4 sub-section (5) clause (a) defines the "court" to mean the district court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be a guardian and the expression "district court" is defined in sub-section (4) of section 4 to have the same meaning as assigned to it in the Code of Civil Procedure and includes a High Court in the exercise of its ordinary original civil jurisdiction. Section 7 sub-section (1) provides that where the court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both or declaring a person to be such a guardian, the court may make an order accordingly and, according to section 8, such an order shall not be made except on the application of one of four categories of persons specified in clauses (a) to (d), one of them being "the person desirous of being the guardian of the minor" and the other being "any relative or friend of the minor". Sub section (1) of section 9 declares that if the 'application' is with respect to the guardianship of the person of the minor-and that is the kind of application which is availed of for the purpose of intercountry adoption-it shall be made to the district court having jurisdiction in the place where the minor ordinarily resides. Then follows section 11, sub- section (1) which prescribes that if the court is satisfied that there is ground for proceeding

on the application, it shall fix a date for the hearing thereof and cause notice of the application and of the date fixed for the hearing to be served on the parents of the minor if they are residing in any State to which the Act extends, the person if any named in the petition as having the custody or possession of the person of the minor, the person proposed in the application to be appointed guardian and any other person to whom, in the opinion of the court, special notice of the application should be given. Section 17 provides that in appointing guardian of a minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor and in considering what will be for the welfare of the minor, the court shall have regard to the age sex, and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. The last material section is section 26 which provides that a guardian of the person of a minor appointed by the court shall not, without the leave of the court by which he was appointed, remove the ward from the limits of its jurisdiction, except for such purposes as may be prescribed and the leave to be granted by the court may be special or general.

These are the relevant provisions of the Guardians and Wards Act 1890 which have a bearing on the procedure which is at present being followed for the purpose of carrying through inter-country adoption. The foreign parent makes an application to the court for being appointed guardian of the person of the child whom he wishes to take in adoption and for leave of the court to take the child with him to his country on being appointed such guardian. The procedure to be followed by the court in disposing of such application is laid down by three High Courts in the country with a view to protecting the interest and safeguarding the welfare of the child, but so far as the rest of the High Courts are concerned, they do not seem to have taken any steps so far in that direction. Since most of the applications by foreign parents wishing to take a child in adoption in the State of Maharashtra are made on the original side of the High Court of Bombay that High Court has issued a notification dated 10th May 1972 incorporating Rule 361-B in Chapter XX of the Rules of the High Court of Bombay (Original Side) 1957 an this newly added Rule provides inter alia as follows:

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

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

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

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

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

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

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

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

The object of giving notice to the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other independent, reputed and publicly or officially recognised social welfare agency is obviously to ensure that the application of foreign parents for guardianship of the child with a view to its eventual adoption is properly and carefully scrutinised and evaluated by an expert body having experience in the area of child welfare with a view to assisting the Court in coming to the conclusion whether it will be in the interest of the child, promotive of its welfare, to be adopted by the foreign parents making the application or in other words, whether such adoption will provide moral and material security to the child with an opportunity to grow into the full stature of its personality in an atmosphere of love and affection and warmth of a family hearth and home. This procedure which has been evolved by the High Courts of Bombay, Delhi and Gujarat is, in our opinion, eminently desirable and it can help considerably to reduce, if not eliminate, the possibility of the child being adopted by unsuitable or undesirable parents or being placed in a family where it may be neglected, maltreated or exploited by the adoptive parents. We would strongly commend this procedure for acceptance by every court in the country which has to deal with an application by a foreign parent for appointment of himself as guardian of a child with a view to its eventual adoption We shall discuss this matter a little more in detail when we proceed to consider what principles and norms should be laid down for inter-country adoption, but, in the meanwhile, proceeding further with the narration of the procedure

followed by the courts in Bombay, Delhi and Gujarat, we may point out that when notice is issued by the court, the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other recognised social welfare agency to which notice is issued, prepares what may conveniently be described as a child study report and submits it to the Court for its consideration. What are the different aspects relating to the child in respect of which the child study report should give information is a matter which we shall presently discuss, but suffice it to state for the time being that the child study report should contain legal and social data in regard to the child as also an assessment of its behavioural pattern and its intellectual, emotional and physical development. The Indian Council of Social Welfare has evolved a standardised form of the child study report and it has been annexed as Ex. 'C' to the reply filed in answer to the notice issued by the Court. Ordinarily an adoption proposal from a foreign parent is sponsored by a social or child welfare agency recognised or licensed by the Government of the country in which the foreign parents resides and the application of the foreign parent for appointment as guardian of the child is accompanied by a home study report prepared by such social or child welfare agency. The home study report contains an assessment of the fitness and suitability of the foreign parent for taking the child in adoption based on his antecedents, family background, financial condition, psychological and emotional adaptability and the capacity to look after the child after adoption despite racial, national and cultural differences. The Indian Council of Social Welfare has set out in annexure 'B' to the reply filed by it, guidelines for the preparation of the home study report in regard to the foreign parent wishing to take a child in adoption, and it is obvious from these guidlines which we shall discuss a little later, that the home study report is intended to provide social and legal facts in regard to the foreign parent with a view to assisting the court in arriving at a proper determination of the question whether it will be in the interest of the child to be given in adoption to such foreign parent. The court thus has in most cases where an application is made by a foreign parent for being appointed guardian of a child in the courts in Bombay, Delhi and Gujarat, the child study report as well as the home study report together with other relevant material in order to enable it to decide whether it will be for the welfare of the child to be allowed to be adopted by the foreign parents and if on a consideration of these reports and material, the court comes to the conclusion that it will be for the welfare of the child, the court makes an order appointing the foreign parent as guardian of the child with liberty to him to take the child to his own country with a view to its eventual adoption. Since adoption in a foreign country is bound to take some time and till then the child would continue to be under the guardianship of the foreign parent by virtue of the order made by the court, the foreign parent as guardian would continue to be accountable to the court for the welfare of the child and the court therefore takes a bond from him with or without surety or sureties in such sum as may be thought for ensuring its production if and when required by the court. The foreign parent then takes the child to his own country either personally or through an escort and the child is then adopted by the foreign parent according to the law of his country and on such adoption, the child acquires the same status as a natural born child with the same rights of inheritance and succession as also the same nationality as the foreign parent adopting it. This is broadly the procedure which is followed in the courts in Bombay, Delhi and Gujarat and there can be no doubt that, by and large, this procedure tends to ensure the welfare of the child, but even so, there are several aspects of procedure and detail which need to be considered in order to make sure that the child is placed in the right family where it will be able to grow into full maturity of its personality with moral and material security and in an atmosphere of love and warmth and

it would not be subjected to neglect, maltreatment or exploitation. Now one thing is certain that in the absence of a law providing for adoption of an Indian child by a foreign parent, the only way in which such adoption can be effectuated is by making it in accordance with the law of the country in which the foreign parent resides. But in order to enable such adoption to be made in the country of the foreign parent, it would be necessary for the foreign parent to take the child to his own country where the procedure for making the adoption in accordance with the law of that country can be followed. However, the child which is an Indian national cannot be allowed to be removed out of India by the foreign parent unless the foreign parent is appointed guardian of the person of the child by the Court and is permitted by the Court to take the child to his own country under the provisions of the Guardians and Wards Act 1890. Today, therefore, as the law stands, the only way in which a foreign parents can take an Indian child in adoption is by making an application to the Court in which the child ordinarily resides for being appointed guardian of the person of the child with leave to remove the child out of India and take it to his own country for the purpose of adopting it in accordance with the law of his country. We are definitely of the view that such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents. It has been the experience of a large number of social welfare agencies working in the area of adoption that, by and large, Indian parents are not enthusiastic about taking a stranger child in adoption and even if they decide to take such child in adoption, they prefer to adopt a boy rather than a girl and they are wholly averse to adopting a handicapped child, with the result that the majority of abandoned, destitute or orphan girls and handicapped children have very little possibility of finding adoptive parents within the country and their future lies only in adoption by foreign parents. But at the same time it is necessary to bear in mind that by reason of the unavailability of children in the developed countries for adoption, there is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organisations or individuals activising themselves in the field of inter- country adoption with a view to trafficking in children and sometimes it may also happen that the immediate prospect of transporting the child from neglect and abandonment to material comfort and security by placing it with a foreigner may lead to other relevant factors such as the intangible needs of the child, its emotional and psychological requirements and possible difficulty of its assimilation and integration in a foreign family with a different racial and cultural background, being under-emphasized, if not ignored. It is therefore necessary to evolve normative and procedural safeguards for ensuring that the child goes into the right family which would provide it warmth and affection of family life and help it to grow and develop physically, emotionally, intellectually and spiritually. These safeguards we now proceed to examine.

We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare. Let us first consider what are the requirements which should be insisted upon so far ar a foreigner whishing to take a child in adoption is concerned In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident.

No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.

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

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

Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it. The record shows that in every foreign country where children from India are taken in adoption, there are social and child welfare agencies licensed or recognised by the government and it would not therefore cause any difficulty hardship or inconvenience if it is insisted that every application from a foreigner for taking a child in adoption must be sponsored by a social or child welfare agency licensed or recognised or recognised by the government of the country in which the foreigner resides. It is not necessary that there should be only one social or child welfare agency in the foreign country through which an application for adoption of a child may be routed; there may be more than one such social or child welfare agencies, but every such social or child welfare agency must be licensed or recognised by the government of the foreign country and the court should not make an order for appointment of a foreigner as guardian unless it is satisfied that the application of the foreigner for adopting a child has been sponsored by such social or child welfare agency. The social or child welfare agency which sponsors the application for taking a child in adoption must get a home study report prepared by a professional worker indicating the basis on which the application of the foreigner for adopting a child has been sponsored by it. The home study report should broadly include information in regard to the various matters set out in Annexure 'A' to this judgment though it need not strictly adhere to the requirements of that Annexure and it should also contain an assessment by the social or child welfare agency as to whether the foreigner wishing to take a child in adoption is fit and suitable and has the capacity to parent a child coming from a different racial and cultural milieu and whether the child will be able to fit into the environment of the adoptive family and the community in which it lives. Every application of a foreigner for taking a child in adoption must be accompanied by a home study report and the social or child welfare agency sponsoring such application should also send along with it a recent photograph of the

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

organisations or agencies which are authorised by the National Board for Inter-Country Adoption functioning under the Swedish Ministry of Social Affairs to "mediate" applications for adoption by Swedish nationals and the Indian Council of Social Welfare has also in the reply filed by it in answer to the writ petition given a list of government recognised organisations or agencies dealing in inter-country adoption in foreign countries. It should not therefore be difficult for the Government of India to prepare a list of social or child welfare agencies licensed or recognised for intercountry adoption by the Government in various foreign countries. We direct the Government of India to prepare such list within six months from today and copies of such list shall be supplied by the Government of India to the various High Courts in India as also to the social or child welfare agencies operating in India in the area of inter-country adoption under licence or recognition from the Government of India. We may of course make it clear that application of foreigners for appointment of themselves as guardians of children in India with a view to their eventual adoption shall not be held up until such list is prepared by the Government of India but they shall be processed and disposed of in the light of the principles and norms laid down in this judgment.

We then proceed to consider the position in regard to biological parents of the child proposed to be taken in adoption. What are the safeguards which are required to be provided in so far as biological parents are concerned ? We may make it clear at the outset that when we talk about biological parents, we mean both parents if they are together of the mother or the father if either is alone. Now it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the Institution or centre or Home for Child Care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoptions including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back. It would be most unfair if after a child is approved by a foreigner and expenses are incurred by him for the purpose of maintenance of the child and some times on medical assistance and even hospitalisation for the child, the biological parents were once again to be consulted for giving them a locus penitential to reconsider their decision. But in order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the Institution or Centre or Home for Child Care or social or child welfare agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background,

health and development. If the biological parents state a preference for the religious upbringing of the child, their wish should as far as possible be respected, but ultimately the interest of the child alone should be the sole guiding factor and the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents. This procedure can and must be followed where the biological parents are known and they relinquish the child for adoption to an Institution or Centre or Home for Child Care or hospital or social or child welfare agency. But where the child is an orphan, destitute or abandoned child and its parents are not known, the Institution or Centre or Home for Child Care or hospital or social or child welfare agency in whose care the child has come, must try to trace the biological parents of the child and if the biological parents can be traced and it is found that they do not want to take back the child, then the same procedure as outlined above should as far as possible be followed. But if for any reason the biological parents cannot be traced, then there can be no question of taking their consent or consulting them. It may also be pointed out that the biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of the child of within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

We may now turn to consider the safeguards which should be observed in so far as the child proposed to be taken in adoption is concerned. It was generally agreed by all parties appearing before the Court, whether as interveners or otherwise, that it should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India or the Government of the State in which it is operating, or to put it differently in the language used by the Indian Council of Social Welfare in the reply filed by it in answer to the writ petition, "all private adoptions conducted by unauthorised individuals or agencies should be stopped". The Indian Council of Social Welfare and the Indian Council for Child Welfare are clearly two social or child welfare agencies operating at the national level and recognised by the Government of India, as appears clearly from the letter dated 23rd August, 1980 addressed by the Deputy Secretary to the Government of India to the Secretary, Government of Kerela, Law Department, Annexure 'F' to the submissions filed by the Indian Council for Child Welfare in response to the writ petition. But apart from these two recognised social or child welfare agencies functioning at the national level, there are other social or child welfare agencies engaged in child care and welfare and if they have good standing and reputation and are doing commendable work in the area of child care and welfare, there is no reason why they should not be recognised by the Government of India or the Government of a State for the purpose of inter-country adoptions. We would direct the Government of India to consider and decide within a period of three months from today whether any of the institutions or agencies which have appeared as interveners in the present writ petition are engaged in child care and welfare and if so, whether they deserve to be recognised for inter- country adoptions. Of course it would be open to the Government of India or the Government of a State suo motu or on an application made to it to recognise any other social or child welfare agency for the purpose of inter-country adoptions, provided such social or child welfare agency enjoys good

reputation and is known for its work in the field of child care and welfare. We would suggest that before taking a decision to recognise any particular social or child welfare agency for the purpose of intercountry adoptions, the Government of India or the Government of a State would do well to examine whether the social or child welfare agency has proper staff with professional social work experience, because otherwise it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family. It would also be desirable not to recognise an organisation or agency which has been set up only for the purpose of placing children in adoption: it is only an organisation or agency which is engaged in the work of child care and welfare which should be regarded as eligible for recognition, since inter-country adoption must be looked upon not as an independent activity by itself, but as part of child welfare programme so that it may not tend to degenerate into trading. The Government of India or the Government of a State recognising any social or child welfare agency for inter-country adoptions must insist as a condition of recognition that the social or child welfare agency shall maintain proper accounts which shall be audited by a chartered accountant at the end of every year and it shall not charge to the foreigner wishing to adopt a child any amount in excess of that actually incurred by way of legal or other expenses in connection with the application for appointment of guardian including such reasonable remuneration or honorarium for the work done and trouble taken in processing, filing and pursuing the application as may be fixed by the Court.

Situations may frequently arise where a child may be in the care of a child welfare institution or centre or social or child welfare agency which has not been recognised by the Government. Since an application for appointment as guardian can, according to the principles and norms laid down by us, be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter-country adoption, and in that event it must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in inter-country adoption. Every recognised social or child welfare agency must maintain a register in which the names and particulars of all children proposed to be given in inter-country adoption through it must be entered and in regard to each such child, the recognised social or child welfare agency must prepare a child study report through a professional social worker giving all relevant information in regard to the child so as to help the foreigner to come to a decision whether or not to adopt the child and to understand the child, if he decides to adopt it as also to assist the court in coming to a decision whether it will be for the welfare of the child to be given in adoption to the foreigner wishing to adopt it. The child study report should contain as far as possible information in regard to the following matters:

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

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

(3) *Physical, intellectual and emotional development.*

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

(5) *Recent photograph.*

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

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

The government of India should, with the assistance of the Government of the States, prepare a list of recognised social or child welfare agencies with their names, addresses and other particulars and send such list to the appropriate department of the Government of each foreign country where Indian children are ordinarily taken in adoption so that the social or child welfare agencies licensed or recognised by the Government of such foreign country for intercountry adoptions, would know which social or child welfare agency in India they should approach for processing an application of its national for taking an Indian child in adoption. Such list shall also be sent by the Government of India to each High Court with a request to forward it to the district courts within its jurisdiction so that the High Courts and the district courts in the country would know which are the recognised social or child welfare agencies entitled to process an application for appointment of a foreigner as guardian. Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centres which are active in inter-country adoptions. Such Central Adoption Resource Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward them to one or the other of the recognised social or child welfare agencies in the country. Every social or child welfare agency taking children under its care can then be required to send to such Central Adoption Resource Agency the names and particulars of children under its care who are available for adoption and the names and particulars of such children can be entered in a register to be maintained by such Central Adoption Resource Agency. But until such Central Adoption Resource Agency is set up, an application of a foreigner for taking an Indian child in adoption must be routed through a recognised social or child welfare agency. Now before any such application from a foreigner is considered, every effort must be made by the recognised social or child welfare agency to find placement for the child by adoption in an Indian family. Whenever any Indian family approaches a recognised social or child welfare agency for taking a child in adoption, all facilities must be provided by such social or child welfare agency to the Indian family to have a look at the children available with it for adopt on and if the Indian family wants to see the child study report in respect of any particular child, child study report must also be made available to the Indian family in order to enable the Indian family to decide whether they would take the child in adoption. It is only if no Indian family comes forward to take a child in adoption within a maximum period of two months that the child may be regarded as available for inter-country adoption, subject only to one exception, namely, that if the child is handicapped or is in bad state of health needing urgent medical attention, which is not possible for the social or child welfare agency looking after the child to provide, the recognised social or child welfare agency need not wait for a period of two months and it can and must take immediate steps for the purpose of giving such child in inter-country adoption. The recognised social or child welfare agency should, on receiving an application of a foreigner for adoption through a licensed or recognised social or child welfare agency in a foreign country, consider which child would be suitable for being given in adoption to the foreigner and would fit into the environment of his family and

community and send the photograph and child study report of such child to the foreigner for the purpose of obtaining his approval to the adoption of such child. The practice of accepting a general approval of the foreigner to adopt any child should not be allowed, because it is possible that if the foreigner has not seen the photograph of the child and has not studied the child study report and a child is selected for him by the recognised social or child welfare agency in India on the basis of his general approval, he may on the arrival of the child in his country find that he does not like the child or that the child is not suitable in which event the interest of the child would be seriously prejudiced. The recognised social or child welfare agency must therefore insist upon approval of a specific known child and once that approval is obtained, the recognised social or child welfare agency should immediately without any undue delay proceed to make an application for appointment of the foreigner as guardian of the child. Such application would have to be made in the court within whose jurisdiction the child ordinarily resides and it must be accompanied by copies of the home study report, the child study report and other certificates and documents forwarded by the social or child welfare agency sponsoring the application of the foreigner for taking the child in adoption.

Before we proceed to consider what procedure should be followed by the court in dealing with an application for appointment of a foreigner as guardian of a child, we may deal with a point of doubt which was raised before us, namely, whether the social or child welfare agency which is looking after the child should be entitled to receive from the foreigner wishing to take the child in adoption any amount in respect of maintenance of the child or its medical expenses. We were told that there are instances where large amounts are demanded by so called social or child welfare agencies or individuals in consideration of giving a child in adoption and often this is done under the label of maintenance charges and medical expenses supposed to have been incurred for the child. This is a pernicious practice which is really nothing short of trafficking in children and it is absolutely necessary to put an end to it by introducing adequate safeguards. There can be no doubt that if an application of a foreigner for taking a child in adoption is required to be routed through a recognised social or child welfare agency and the necessary steps for the purpose of securing appointment of the foreigner as guardian of the child have also to be taken only through a recognised social or child welfare agency, the possibility of any so called social or child welfare agency or individual trafficking in children by demanding exorbitant amounts from prospective adoptive parents under the guise of maintenance charges and medical expenses or otherwise, would be almost eliminated. But, at the same time, it would not be fair to suggest that the social or child welfare agency which is looking after the child should not be entitled to receive any amount from the prospective adoptive parent, when maintenance and medical expenses in connection with the child are actually incurred by such social or child welfare agency. Many of the social or child welfare agencies running homes for children have little financial resources of their own and have to depend largely on voluntary donations and therefore if any maintenance or medical expenses are incurred by them on a child, there is no reason why they should not be entitled to receive reimbursement of such maintenance and medical expenses from the foreigner taking the child in adoption. We would therefore direct that the social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate not exceeding Rs. 60 per day (this outer limit being subject to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to its new home as also medical expenses

including hospitalisation charges, if any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent through the recognised social or child welfare agency which has processed the application for guardianship and payment in respect of such claim shall not be received directly by the social or child welfare agency making the claim but shall be paid only through the recognised social or child welfare agency. This procedure will to a large extent eliminate trafficking in children for money or benefits in kind and we would therefore direct that this procedure shall be followed in the future. But while giving this direction, we may make it clear that what we have said should not be interpreted as in any way preventing a foreigner from making voluntary donation to any social or child welfare agency but no such donation from a prospective adoptive parent shall be received until after the child has reached the country of its prospective adoptive parent.

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

We may also at this stage refer to one other question that was raised before us, namely, whether a child under the care of a social or child welfare agency or hospital or orphanage in one State can be brought to another State by a social or child welfare agency for the purpose of being given in adoption and an application for appointment of a guardian of such child can be made in the court of the latter State. This question was debated before us in view of the judgment given by Justice Lentin of the Bombay High Court of 22nd July, 1982 in Miscellaneous Petition No. 178 of 1982 and other allied petitions. We agree with Justice Lentin that the practice of social or child welfare agencies or individuals going to different States for the purpose of collecting children for being given in inter-country adoption is likely to lead to considerable abuse, because it is possible that such social or child welfare agencies or individuals may, by offering monetary inducement, persuade indigent parents to part with their children and then give the children to foreigners in adoption by demanding a higher price, which the foreigners in their anxiety to secure a child for adoption may be willing to pay. But we do not think that if a child is relinquished by its biological parents or is an orphan or destitute or abandoned child in its

parent State, there should be any objection to a social or child welfare agency taking the child to another State, even if the object be to give it in adoption, provided there are sufficient safeguards to ensure that such social or child welfare agency does not indulge in any malpractice. Since we are directing that every application of a foreigner for taking a child in adoption shall be routed only through a recognised social or child welfare agency and an application for appointment of the foreigner as guardian of the child shall be made to the court only through such recognised social or child welfare agency, there would hardly be any scope for a social or child welfare agency or individual who brings a child from another State for the purpose of being given in adoption to indulge in trafficking and such a possibility would be reduced to almost nil.

Moreover before proposing a child for adoption, the recognised social or child welfare agency must satisfy itself that the child has either been voluntarily relinquished by its biological parents without monetary inducement or is an orphan or destitute or abandoned child and for this purpose, the recognised social or child welfare agency may require the agency or individual who has the care and custody of the child to state on oath as to how he came by the child and may also, if it thinks fit, verify such statement, by directly enquiring from the biological parents or from the child care centre or hospital or orphanage from which the child is taken. This will considerably reduce the possibility of abuse while at the same time facilitating placement of children deprived of family love and care in smaller towns and rural areas. We do not see any reason why in cases of this kind where a child relinquished by its biological parents or an orphan or destitute or abandoned child is brought by an agency or individual from one State to another, it should not be possible to apply for guardianship of the child in the court of the latter State, because the child not having any permanent place of residence, would then be ordinarily resident in the place where it is in the care and custody of such agency or individual. But quite apart from such cases, we are of the view that in all cases where a child is proposed to be given in adoption, enquiries regarding biological parents, whether they are traceable or not and if traceable, whether they have voluntarily relinquished the child and if not, whether they wish to take the child back, should be completed before the child is offered for adoption and thereafter no attempt should be made to trace or contact the biological parents. This would obviate the possibility of an ugly and unpleasant situation of biological parents coming forward to claim the child after it has been given to a foreigner in adoption. It is also necessary while considering placement of a child in adoption to bear in mind that brothers and sisters or children who have been brought up as siblings should not be separated except for special reasons and as soon as a decision to give a child in adoption to a foreigner is finalised, the recognised social or child welfare agency must if the child has reached the age of understanding, take steps to ensure that the child is given proper orientation and is prepared for going to its new home in a new country so that the assimilation of the child to the new environment is facilitated.

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

We may also point out that if a child is to be given in intercountry adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The

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

Lastly, we come to the procedure to be followed by the court when an application for guardianship of a child is made to it. Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, we are definitely of the view that no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hard ship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. The possibility also cannot be ruled out that if the biological parents know who are the adoptive parents they may try to extort money from the adoptive parents. It is therefore absolutely essential that the biological parents should not have any opportunity of knowing who are the adoptive parents taking the child in adoption and therefore notice of the application for guardianship should not be given to the biological parents. We would direct that for the same reasons notice of the application for guardianship should also not be published in any newspaper. Section 11 of the Act empowers the court to serve notice of the application for guardianship on any other person to whom, in the opinion of the court, special notice of the application should be given and in exercise of this power the court should, before entertaining an application for guardianship, give notice to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of its branches for scrutiny of the application with a view to ensuring that it will be for the welfare of the child to be given in adoption to the foreigner making the application for guardianship. The Indian Council of Social Welfare of the Indian Council of Child Welfare to which notice is issued by the court would have to scrutinise the application for guardianship made on behalf of the foreigner wishing to take the child in adoption and after examining the home study report, the child study report as also documents and certificates forwarded by the sponsoring social or child welfare agency and making necessary enquiries, it must make its representation to the court so that the court may be able to satisfy itself whether the principles and norms as also the procedure laid down by us in this judgment have been observed and followed, whether the

foreigner will be a suitable adoptive parent for the child and the child will be able to integrate and assimilate itself in the family and community of the foreigner and will be able to get warmth and affection of family life as also moral and material stability and security and whether it will be in the interest of the child to be taken in adoption by the foreigner. If the court is satisfied, then and then only it will make an order appointing the foreigner as guardian of the child and permitting him to remove the child to his own country with a view to eventual adoption. The court will also introduce a condition in the order that the foreigner who is appointed guardian shall make proper provision by way of deposit or bond or otherwise to enable the child to be repatriated to India should it become necessary for and reason. We may point out that such a provision is to be found in clause 24 of the Adoption of Children Bill No. 208 of 1980 and in fact the practice of taking a bond from the foreigner who is appointed guardian of the child is being followed by the courts in Delhi as a result of practice instructions issued by the High Court of Delhi. The order will also include a condition that the foreigner who is appointed guardian shall submit to the Court as also to the Social or Child Welfare Agency processing the application for guardianship, progress reports of the child along with a recent photograph quarterly during the first two years and half yearly for the next three years. The court may also while making the order permit the social or child welfare agency which has taken care of the child pending its selection for adoption to receive such amount as the Court thinks fit from the foreigner who is appointed guardian of such child. The order appointing guardian shall carry, attached to it, a photograph of the child duly counter- signed by an officer of the court. This entire procedure shall be completed by the court expeditiously and as far as possible within a period of two months from the date of filing of the application for guardianship of the child. The proceedings on the application for guardianship should be held by the Court in camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship the entire proceedings including the papers and documents should be sealed. When an order appointing guardian of a child is made by the court, immediate intimation of the same shall be given to the Ministry of Social Welfare, Government of India as also to the Ministry of Social Welfare of the Government of the State in which the court is situate and copies of such order shall also be forwarded to the two respective ministries of Social Welfare. The Ministry of Social Welfare, Government of India shall maintain a register containing names and other particulars of the children in respect of whom orders for appointment of guardian have been made as also names, addresses and other particulars of the prospective adoptive parents who have been appointed such guardians and who have been permitted to take away the children for the purpose of adoption. The Government of India will also send to the Indian Embassy or High Commission in the country of the prospective adoptive parents from time to time the names, addresses and other particulars of such prospective adoptive parents together with particulars of the children taken by them and requesting the Embassy or High Commission to maintain an unobtrusive watch over the welfare and progress of such children in order to safeguard against any possible maltreatment, exploitation or use for ulterior purposes and to immediately report any instance of maltreatment, negligence or exploitation to the Government of India for suitable action.

We may add even at the cost of repetition that the biological parents of a child taken in adoption should not under any circumstances be able to know who are the adoptive parents of the child nor should they have any access to the home study report or the child study report or the other papers and proceedings in the application for guardianship of the child. The foreign parents who

have taken a child in adoption would normally have the child study report with them before they select the child for adoption and in case they do not have the child study report, the same should be supplied to them by the recognised social or child welfare agency processing the application for guardianship and from the child study report, they would be able to gather information as to who are the biological parents of the child, if the biological parents are known. There can be no objection in furnishing to the foreign adoptive parents particulars in regard to the biological parents of the child taken in adoption, but it should be made clear that it would be entirely at the discretion of the foreign adoptive parents whether and if so when, to inform the child about its biological parents.

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

These are the principles and norms which must be observed and the procedure which must be followed in giving a child in adoption to foreign parents. If these principles and norms are observed and this procedure is followed, we have no doubt that the abuses to which inter-country adoptions, if allowed without any safeguards, may lend themselves would be considerably reduced, if not eliminated and the welfare of the child would be protected and it would be able to find a new home where it can grow in an atmosphere of warmth and affection of family life with full opportunities for physical intellectual and spiritual development. We may point out that the adoption of children by foreign parents need not wait until social or child welfare agencies are recognised by the Government as directed in this order, but pending recognition of social or child welfare agencies for the purpose of inter-country adoptions, which interregnum, we hope, will not last for a period of more than two months, any social or child welfare agency having the care and custody of a child may be permitted to process an application of a foreigner, but barring this departure the rest of the procedure laid down by us shall be followed wholly and the principles and norms enunciated by us in this Judgment shall be observed in giving a child in inter-country adoption.

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

ANNEXURE-'A'

1. Source of Referral.

2. Number of single and joint interviews.

3. Personality of husband and wife.

4. Health details such as clinical tests, heart condition, past illnesses etc. (medical certificates required, sterility certificate required, if applicable),

5. Social status and family background.

6. Nature and Adjustment with occupation.

7. Relationship with community.

8. Description of home.

9. Accommodation for the child.

10. Schooling facilities.

11. Amenities in the home.

12. Standard of living as it appears in the home.

13. Type of neighbourhood.

14. Current relationship between husband and wife.

15. (a) Current relationship between parents and children (if any children).

(b) Development of already adopted children (if any) and their acceptance of the child to be adopted.

16. Current relationship between the couple and the members of each other's families.

17. If the wife is working, will she be able to give up the job ?

18. If she cannot leave the job, what arrangements will she make to look after the child ?

19. Is adoption considered because of sterility of one of the maritial partners ?

20. If not, can they eventually have children of their own ?

21. If a child is born to them, how will they treat the adopted child ?

22. If the couple already has children how will these children react to an adopted child ?

23. Important social and psychological experiences which have had a bearing on their desire to adopt a child.

24. Reasons for wanting to adopt an Indian child.

25. Attitude of grand-parents and relatives towards the adoption.

26. Attitude of relatives, friends, community and neighbourhood towards adoption of an Indian child.

27. Anticipated plans for the adopted child.

28. Can the child be adopted according to the adoption law in the adoptive parents country ? Have they obtained the necessary permission to adopt ? (Statement of permission required.)

29. Do the adoptive parents know any one who adopted a child from their own country or another country ? Who are they ? From where did they fail to get a child from that source ?

30. Did the couple apply for a child from any other source ? If yes, which source ?

31. What type of child is the couple interested in ? (sex, age, and for what reasons.)

32. Worker's recommendation concerning the family and the type of child which would best fit into this home.

33. Name and address of the agency conducting the home study. Name of social worker, qualification of social worker.

34. Name of agency responsible for post placement, supervision and follow up.

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

SUPREME COURT OF INDIA

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

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

Appeal (Civil) 6492 of 2005

(Arising out of S.L.P (C) No.9412 of 2003)

Decided on : **24th October, 2005**

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

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

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

the dark and the daylight, when the night is beginning to lower, comes a pause in the day's occupations, that is known as the Children's Hours"

JUDGMENT

Hon'ble Mr. Justice Arijit Pasayat :—

Leave granted.

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

ground that she was suffered from skin disease. The Family Court was of the view that the so called reasons did not merit acceptance. The child was also referred to child study report which indicated that the child did not suffer from any ailment. It was noted that letters of rejection by Indian parents were not filed and the efforts of VCA for in county adoption were not established. It was noted that the effort was to be made in the light of decision of this Court in Lakshmi Kant Pandey v. Union of India (1984 (2) SCC 244).

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

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

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

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

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

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

nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution of India, 1950 (in short the 'Constitution'). Clause (3) of Article 15 enables the State to make special provision, inter-alia, for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) The position in regard to biological parents of the child proposed to be taken in adoption has to be noted. What are the safeguards which are required to be provided insofar as biological parents are concerned? We may make it clear at the outset that when we talk about biological parents, we mean both parents if they are together or the mother or the father if either is alone. Now it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the institution or center or home for child care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should to be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision.

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

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

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

and particulars of such children can be entered in a register to be maintained by such Central Adoption Resource Agency."

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

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

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

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

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

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LANDMARK JUDGMENTS ON

DOMESTIC VIOLENCE

SHALU OJHA VERSUS PRASHANT OJHA

SUPREME COURT OF INDIA

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

Shalu Ojha .....Petitioner(S)
Versus
Prashant Ojha .....Respondent(S)

Special Leave Petition (Criminal) No. 3935 Of 2016

Decided on : **23rd July, 2018**

Matrimonial relationship strained between petitioner wife and respondent husband resulting in multiplicity of legal proceedings. Petitioner filed a case claiming remedies under Protection of Women from Domestic Violence Act, 2005, trial court awarded an interim maintenance of Rs 2,50,000 and compensation of Rs. 1,00,000. In appeal filed against the award , the Session Court reduced maintenance to Rs. 50,000. Appeal preferred by respondent husband was dismissed and SLP was also dismissed. While appeal was still pending before High Court, petitioner wife preferred appeal before Supreme Court challenging order passed by Sessions court. The court held that proceedings under Protection of Women from Domestic Violence Act, 2005, are summary proceedings in nature, petitioner wife was allowed to file suit under provisions of Hindu Adoptions and Maintenance Act, 1956 or section 125 of CrPC, 1973 where both parties can present their evidences before competent court. Respondent husband was directed to continue paying maintenance of Rs. 50,000 per month.

On the question of grant of special leave under Art. 136 of Constitution of India court held that when order passed by lower court is challenged before High court and is pending, special leave cannot be granted normally to challenge order passed by lower court. But on the fact being matrimonial dispute, for amicable, suitable, and appropriate resolution of dispute Supreme Court entertained this petition.

JUDGMENTS

Hon'ble Dr. Justice A.K. Sikri :—

On an earlier occasion, after hearing the petitioner who appeared in person, and the learned counsel for the respondent, we had passed order dated September 4, 2017, thereby disposing of this petition with the following directions:

(a) insofar as domestic violence proceedings before the Family Court are concerned, necessary documents shall be filed by both the parties within four weeks from today and evidence led pursuant thereto. The trial court shall endeavour to decide the case finally, within a period of eight months from maintenance finally; and

(b) Crl.MC. No. 850 of 2015, pending before the High Court, shall be taken up for hearing immediately and the High Court shall endeavour to dispose of the same as expeditiously

as possible and determine at what rate interim maintenance is to be given, i.e. whether order dated February 13, 2015 passed by the learned ASJ need any modification or not.

2) Thereafter, review petition was filed by the petitioner pointing out that there was apparent error in passing the aforesaid directions inasmuch as matter was remitted to the High Court for presumption that proceedings were pending but the fact is that no such proceedings are pending under the Protection of Women from Domestic Violence Act, 2005 (for short the 'DV Act'). Realising this error, the review petition was allowed and the Special Leave Petition was restored which has been heard afresh.

3) Notwithstanding the aforesaid factual error which had crept in the order dated September 4, 2017, the other factual details recorded in the said order are a matter of record. Therefore, it would be in the fitness of things to reproduce the same:

Though this case has a chequered history, only those facts which are very material are taken note of, eschewing other unnecessary details, in order to avoid burdening this judgment with the facts which may not be relevant.

The petitioner is the respondent's wife. It is unfortunate that after their marriage on April 20, 2007 in Delhi, they stayed together hardly for four months. Thus, for almost ten years they have parted company and are living separately. It is not necessary to go into the reasons which led to the matrimonial discord as in the present petition this Court is concerned only with the dispute regarding the rate of maintenance.

The petitioner had filed an application sometime in June 2009 claiming maintenance under the provisions of Section 12 of the DV Act. In that application, apart from other reliefs, she has claimed maintenance as well. Order dated July 05, 2012 was passed by the learned Metropolitan Magistrate granting interim maintenance @ Rs.2,50,000/- per month with effect from the date of filing of the complaint as well as compensation of Rs.1,00,000/-. Since the respondent did not honour the said order, the petitioner filed the execution petition for recovery of the arrears of maintenance. In the meantime, the respondent challenged the order of the Metropolitan Magistrate granting maintenance, by filing appeal under Section 29 of the DV Act, in the Court of Additional Sessions Judge, Delhi (for short, the 'ASJ'). In the said appeal, the learned ASJ issued interim directions dated January 10, 2013 for depositing of the entire arrears of maintenance within two months. As this order was not complied with, the appeal filed by the respondent was dismissed on May 07, 2013. This order of dismissal was challenged by the respondent before the High Court. In those proceedings, order dated July 23, 2013 was passed allowing the appellant herein to file the reply, etc. As no stay was granted, order dated July 23, 2013 was challenged by the respondent in this Court by filing a special leave petition. This Court, however, did not entertain the same. At the same time, while disposing of the special leave petition, observations were made to the effect that if the parties apply for mediation, the matter shall be referred to the Delhi High Court Mediation and Conciliation Centre at the earliest. Keeping in view these observations, the High Court referred the dispute to the Mediation Centre at the Delhi High Court and also stayed the execution proceedings in the meantime. Mediation proceedings failed. As a result, the High Court took up the matter on merits and passed orders dated September 10, 2013 directing the respondent to pay Rs.5,00,000/- on or before September 30, 2013 and another sum of Rs.5,00,000/- on or before October 31, 2013. The petitioner filed an application seeking modification of these orders and prayed for the directions to the respondent to pay entire arrears

of maintenance as per the order of the Family Court in domestic violence proceedings. In the said application only notice was issued and since interim stay on the execution proceedings continued, the petitioner filed special leave petition in this Court for vacation of the interim order passed by the High Court in the execution proceedings. This special leave petition was converted into appeal on grant of leave, in which judgment was delivered on September 18, 2014 allowing the said appeal. Operative portion of the said judgment reads as under:

*"**31.** The issue before the High Court in Crl.MC. No. 1975 of 2013 is limited i.e. whether the sessions court could have dismissed the respondent's appeal only on the ground that respondent did not discharge the obligation arising out of the conditional interim order passed by the sessions court. Necessarily the High Court will have to go into the question whether the sessions court has the power to grant interim stay of the execution of the order under appeal before it.*

***32.** In a matter arising under a legislation meant for protecting the rights of the women, the High Court should have been slow in granting interim orders, interfering with the orders by which maintenance is granted to the appellant. No doubt, such interim orders are now vacated. In the process the appellant is still awaiting the fruits of maintenance order even after 2 years of the order.*

***33.** We find it difficult to accept that in a highly contested matter like this the appellant would have instructed her counsel not to press her claim for maintenance. In our view, the High Court ought not to have accepted the statement of the counsel without verification. The impugned order is set aside.*

***34.** We are of the opinion that the conduct of the respondent is a gross abuse of the judicial process. We do not see any reason why the respondent's petition Crl.MC No. 1975 of 2013 should be kept pending. Whatever be the decision of the High Court, one of the parties will (we are sure) approach this Court again thereby delaying the conclusion of the litigation. The interests of justice would be better served if the respondent's appeal before the Sessions Court is heard and disposed of on merits instead of going into the residuary questions of the authority of the appellate Court to grant interim orders or the legality of the decision of the Sessions Court to dismiss the appeal only on the ground of the non- compliance by the respondent with the conditions of the interim order. The Criminal Appeal No. 23/2012 stands restored to the file of the Sessions Court.*

***35.** We also direct that the maintenance order passed by the magistrate be executed forthwith in accordance with law. The executing court should complete the process within 8 weeks and report compliance in the High Court. We make it clear that such hearing of the Sessions Court should only be after the execution of the order of maintenance passed by the Magistrate.*

***36.** In the event of the respondent's success in the appeal, either in full or part, the Sessions Court can make appropriate orders regarding the payments due to be made by the respondent in the execution proceedings." Notwithstanding the aforesaid judgment, as the respondent did not clear the entire arrears of maintenance, he was sent to judicial custody, where he remained till December 22, 2014. A miscellaneous application was filed by the respondent in this Court in the afore-mentioned disposed of appeal stating that he was in judicial custody due to his inability to pay the entire maintenance and*

requested that his matter be heard by the Sessions Court on merits. In this application this Court passed orders dated December 18, 2014 directing the Sessions Court to decide the appeal of the respondent within six weeks. He remained in judicial custody till December 22, 2014, on which date he was released. During this period, though the respondent had paid certain amounts towards maintenance, but he did not clear the entire outstanding dues.

Thereafter, on February 13, 2015, the learned ASJ decided the appeal of the respondent reducing the maintenance from Rs.2,50,000/-, as fixed by the Family Court, to Rs.50,000/- per month, from the date of filing of the petition under Section 12 of the DV Act. This order was challenged by the appellant by filing a petition (Crl.MC. No. 850 of 2015) before the High Court under Section 482 read with Section 482 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.').

It will also be of interest to note that the maintenance of Rs.50,000/-, as fixed by the learned ASJ, even when reduced significantly from Rs.2,50,000/-, was still not acceptable to the respondent either. Seeking further reduction in the maintenance, the respondent also challenged this order before the High Court by filing petition under Section 482 Cr.P.C. However, his petition was dismissed by the High Court vide order dated April 06, 2015.

The special leave petition filed by the respondent there against was also dismissed by this Court on May 11, 2015. In this manner, insofar as maintenance granted by the learned ASJ @ Rs.50,000/- per month is concerned, this order has attained finality qua the respondent. The question, therefore, is as to whether the petitioner is entitled to enhancement and whether the learned ASJ rightly reduced the amount of maintenance.

Though, the petitioner has filed a petition under Section 482 Cr.P.C., which is registered as Crl. MC. No. 850 of 2015, as pointed out above, and the same is still pending. Notwithstanding, the petitioner has chosen to file the instant special leave petition challenging the order dated February 13, 2015 passed by the ASJ.

Normally, when the proceedings are still pending before the High Court, where same order dated February 13, 2015 passed by the ASJ is challenged, this Court should not have entertained the instant petition from the very beginning. However, notice was issued in this petition, keeping in mind the consideration as to whether the dispute can be resolved amicably, suitably and appropriately by this Court. For this purpose, matter was taken up from time to time. Attempts were even made that the parties settle all their disputes amicably. We even called the parties to the Chambers and had discussions with them. However, amicable solution to the problem, acceptable to both the parties, could not be achieved.

The petitioner, who appears in person, has submitted that there were no valid reasons for the learned ASJ to reduce the maintenance. In order to prove that the respondent is a man of means who is running number of businesses either as the proprietor or partner of firm(s) or shareholder/director in certain companies and possesses various assets and is also enjoying the life of affluence, she has produced plethora of documents in support. The respondent has refuted the authenticity or the relevance of those documents and his submission is that his stakes in all these businesses are no longer there. According to him, some of the companies/firms mentioned by the petitioner never took off and started any business and in some other companies he no longer enjoys any stakes. Picture painted by the respondent is that he is undergoing very hard

times and his financial condition is pathetic. It is also stated that he had to even go behind bars and remain in custody for more than fifty days because of his inability to pay the arrears.

4) We may point out that during arguments, it was contended by learned counsel for the respondent that apart from the monthly maintenance amount which the respondent was giving to the petitioner every month, the petitioner had some other source of income as well. This submission was based on the premise that the amount of maintenance so far received by the petitioner, which was to the tune of Rs.49 lakhs, was kept by the petitioner in the fixed deposits accounts in the banks. According to him, it proves that the petitioner had other source of income and she was employed/self-employed and from that income, she was meeting her day to day needs. We accordingly passed order dated January 29, 2018 directing the petitioner to file an affidavit of her income which would be in the fomat as prescribed in the judgment of Delhi High Court in the case of Kusum Sharma v. Mahinder Kumar Sharma decided on January 14, 2015 (FAO No. 309/1996). Respondent was also given opportunity to file additional documents along with affidavit. Such an affidavit of income was, therefore, filed by the petitioner. Respondent also filed reply to the said income affidavit to which petitioner filed her rejoinder.

5) In the income affidavit filed by the petitioner in the prescribed format, she has, inter alia, mentioned that she is staying with her parents in their house in Mansarovar Garden. The petitioner has also mentioned about monthly expenditure. Col. 11 and Col. 16 of Part I being relevant are reproduced below:

Sl. No.	Description	Particulars
11.	Monthly expenditure mentioned in S. No. 60)	Rs. 1.5 lac approx. spent jointly by parents and self. My share in the above expenditure is around Rs. 1 lac per month.
16.	If not staying at Matrimonial	Staying with my parents in House home, relationship and in which my brother has a sizable income of the person with share. Income Rs. 1.5 lac p.m. whom you are staying?

6) It is not understood as to how petitioner's share of expenditure is Rs. 1 lakh per month out of Rs.1.5 lakhs monthly expenditure. Likewise, it is not explained in Col. 16 as to in what form, income of Rs. 1.5 lakhs per month is generated and who is earning that income. Of course, the petitioner has otherwise maintained that she is not having any other source of income except the amount of maintenance given to her by the respondent. The petitioner has also stated that she is compelled to live in her parents house as the maintenance amount is not sufficient even to pay monthly rent of an aparment.

7) In Part II of the affidavit, the petitioner has made averments relating to respondent. The petitioner says that respondent is earning about Rs.20 lakhs per month. She has given the details of certain business ventures/restaurants owned by the respondent in which he is having his share. The petitioner has also given particulars of assets allegedly owned by the respondent. The petitioner has annexed photocopies of various documents in support of her assertions.

8) In the reply affidavit filed by the respondent, it is averred that the petitioner is maintaining four bank accounts and the total amount lying in these accounts is Rs.8,36,610/-. It is also

stated that the petitioner is having fixed deposits in the banks for a total sum of Rs. 35,75,000/-. In this manner, the total bank balance of the petitioner is Rs.44,11,610/-. As against this, the respondent has paid to the petitioner a sum of Rs.49 lakhs from June 4, 2009 to July, 2017. Thus, in the last eight years, against a sum of Rs.49 lakhs paid by the respondent to the petitioner, the petitioner is still having bank balance of Rs.44 lakhs. According to the respondent, it would be inconceivable that petitioner has spent only Rs.5 lakhs of rupees (or little more if interest earned by the petitioner on the aforesaid Rs.49 lakhs is added) in eight years and that shows that she has other sources of income as well. Other averments in the petitioner's affidavit was also denied including her share of expenditure in the neighbourhood of Rs.1 lakh per month or that respondent is earning Rs.20 lakhs per month. In respect of the particulars given by the petitioner about the businesses of the respondent, the respondent has denied the same and submits that, at present, there is no Restaurant or Bar anywhere in India in which respondent has any share or interest. He has his own explanation and has given alleged circumstances in which he had to give up his share in certain businesses. The petitioner has controverted his averments in her rejoinder affidavit. During arguments, the petitioner also tried to demonstrate, by referring to certain documents filed by her, that the respondent was indulging in falsehood.

9) We have given a glimpse of the respective cases set up by both the parties, without giving details thereof, as asserted by the petitioner and the manner in which the respondent has refuted the same.

10) After giving conscious and objective consideration to the documents placed on record by both the sides, we are of the view that it is only after the evidence is led by both the parties, the veracity and evidential value of such material can be finally adjudged, more particularly, when the said material and assertions of the parties would be tested with their cross-examination.

11) The present proceedings arise out of the petition which was filed by the petitioner under Section 12 of the DV Act. The trial court had arrived at a figure of maintenance on the basis of affidavits filed by both the parties along with their respective documents. Same exercise is undertaken by the learned ASJ in the impugned order while adjudging the correctness of the order passed by the trial court and, in the process, reducing the maintenance from Rs.2.50 lakhs to Rs.50,000/- per month. This obviously happened as the proceedings under the DV Act are of summary nature.

12) In these circumstances, the appropriate course of action would be to allow the petitioner to file an application for maintenance under the Hindu Adoptions and Maintenance Act, 1956 or under Section 125 of the Code of Criminal Procedure, 1973 so that in these proceedings, both the parties lead their documentary and oral evidence and on the basis of such material, appropriate view is taken by the said Court.

13) We accordingly dispose of this petition by granting liberty to the petitioner to move appropriate application for maintenance, as indicated above. Once such application is moved, same shall be decided by the concerned Court most expeditiously having regard to the fact that the petitioner is fighting for her maintenance for last number of years and these proceedings should attain finality at the earliest. We also make it clear that any maintenance fixed shall not, in any case, be less than Rs.50,000/- per month which figure of maintenance has already attained finality.

14) As a sequel, the respondent shall continue to pay Rs.50,000/- per month to the petitioner in the meanwhile. The present petition stands disposed of accordingly.

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DEOKI PANJHIYARA VERSUS SHAHSHI BHUSHAN NARAYAN AZAD & ANR

SUPREME COURT OF INDIA

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

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

CRIMINAL APPEAL Nos.2032-2033 of 2012
(Arising out of SLP (Criminal) Nos. 8076-8077 of 2010

Decided on : **12th December, 2012**

- ***The Respondent before us had claimed (before the trial court as well as the High Court) that the marriage between him and the appellant solemnised on 4.12.2006, by performance of rituals in accordance with Hindu Law, was void on account of the previous marriage between the appellant with one Rohit Kumar Mishra. In support thereof, the respondent relied on a marriage certificate dated 18.4.2003 issued under Section 13 of the Special Marriage Act, 1954. Acting solely on the basis of the aforesaid marriage certificate the learned trial court as well as the High Court had proceeded to determine the validity of the marriage between the parties though both the courts were exercising jurisdiction in a proceeding for maintenance. However, till date, the marriage between the parties is yet to be annulled by a competent court. What would be the effect of the above has to be determined first inasmuch as if, under the law, the marriage between the parties still subsists the appellant would continue to be the legally married wife of the respondent so as to be entitled to claim maintenance and other benefits under the DV Act, 2005. Infact, in such a situation there will be no occasion for the Court to consider whether the relationship between the parties is in the nature of a marriage.***
- ***Admittedly, both the appellant and the respondent are governed by the provisions of the Hindu Marriage Act, 1955. Section 11 of the Hindu Marriage Act makes it clear that a marriage solemnised after the commencement of the Act "shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions so specified in clauses (i), (iv) and (v) of Section 5."***
- ***While considering the provisions of Section 11 of the Hindu Marriage Act, 1955 this Court inYamunabai v. Anantrao[3] has taken the view that a marriage covered by Section 11 is void-ipso-jure, that is, void from the very inception. Such a marriage has to be ignored as not existing in law at all. It was further held by this Court that a formal***

declaration of the nullity of such a marriage is not a mandatory requirement though such an option is available to either of the parties to a marriage.It must, however, be noticed that in Yamunabai (supra) there was no dispute between the parties either as regards the existence or the validity of the first marriage on the basis of which the second marriage was held to be ipso jure void.

- ***In the present case, however, the appellant in her pleadings had clearly, categorically and consistently denied that she was married to any person known as Rohit Kumar Mishra. The legitimacy, authenticity and genuineness of the marriage certificate dated 18.4.2003 has also been questioned by the appellant. Though Section 11 of the aforesaid Act gives an option to either of the parties to a void marriage to seek a declaration of invalidity/nullity of such marriage,***
- ***In the present case, if according to the respondent, the marriage between him and the appellant was void on account of the previous marriage between the appellant and Rohit Kumar Mishra the respondent ought to have obtained the necessary declaration from the competent court in view of the highly contentious questions raised by the appellant on the aforesaid score. It is only upon a declaration of nullity or annulment of the marriage between the parties by a competent court that any consideration of the question whether the parties had lived in a "relationship in the nature of marriage" would be justified. In the absence of any valid decree of nullity or the necessary declaration the court will have to proceed on the footing that the relationship between the parties is one of marriage and not in the nature of marriage.***

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi :—

1. Leave granted.

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

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

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

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

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

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

Section 2

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

(b) (c)

(d).

(e).

(f)

(g)

(h).

(i) relative includes any person related by blood, marriage or adoption and living with the respondent. Thereafter, the different clauses of the Bill were considered by a Parliamentary Standing Committee and recommendations were made that having regard to the object sought to be achieved by the proposed legislation, namely, to protect women from domestic violence and exploitation, clause (2)(i) defining relative may be suitably amended to include women who have been living in relationship akin to marriages as well as in marriages considered invalid by law.

Pursuant to the aforesaid recommendation made by the Standing Committee, in place of the expression relative appearing in clause 2(i) of the Bill, the expression domestic relationship came be included in clause (f) of Section 2 of the Act. Learned counsel by referring to the definition of aggrieved person and domestic relationship as appearing in the DV Act, 2005 has urged that the legislative intent to include women, living in marriages subsequently found to be illegal or even in relationships resembling a marriage, within the protective umbrella of the DV Act is absolutely clear and the same must be given its full effect. It is submitted that having regard to the above even if the marriage of the appellant and the respondent was void on account of the previous marriage of the appellant, the said fact, by itself, will not disentitle the appellant to seek maintenance and other reliefs under the DV Act, 2005.

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

Section 2..

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

(b)

(c)

d)

(e)

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

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

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

b) They must be of legal age to marry.

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

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

10. Learned counsel has, however, pointed out that in Velusamy (supra) the issue was with regard to the meaning of expression wife as appearing in Section 125 Cr.P.C. and therefore reference to the

provisions of Section 2(f) of the DV Act, 2005 and the conclusions recorded were not required for a decision of the issues arising in the case. Additionally, it has been pointed out that while rendering its opinion in the aforesaid case this Court had no occasion to take into account the deliberations of the Parliamentary Standing Committee on the different clauses of Protection of Women from Domestic Violence Bill, 2002. It is also urged that the equation of the expression relationship in the nature of marriage with a common law marriage and the stipulation of the four requirements noticed above is not based on any known or acceptable authority or source of law. Accordingly, it is submitted that the scope and expanse of the expression relationship in the nature of marriage is open for consideration by us and, at any rate, a reference of the said question to a larger bench would be justified.

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

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

13. The Respondent before us had claimed (before the trial court as well as the High Court) that the marriage between him and the appellant solemnised on 4.12.2006, by performance of rituals in accordance with Hindu Law, was void on account of the previous marriage between the appellant with one Rohit Kumar Mishra. In support thereof, the respondent relied on a marriage certificate dated 18.4.2003 issued under Section 13 of the Special Marriage Act, 1954. Acting solely on the basis of the aforesaid marriage certificate the learned trial court as well as the High Court had proceeded to determine the validity of the marriage between the parties though both the courts were exercising jurisdiction in a proceeding for maintenance. However, till date, the marriage

between the parties is yet to be annulled by a competent court. What would be the effect of the above has to be determined first inasmuch as if, under the law, the marriage between the parties still subsists the appellant would continue to be the legally married wife of the respondent so as to be entitled to claim maintenance and other benefits under the DV Act, 2005. Infact, in such a situation there will be no occasion for the Court to consider whether the relationship between the parties is in the nature of a marriage.

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

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

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

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

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

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

18. In the present case, however, the appellant in her pleadings had clearly, categorically and consistently denied that she was married to any person known as Rohit Kumar Mishra. The legitimacy, authenticity and genuineness of the marriage certificate dated 18.4.2003 has also been questioned by the appellant. Though Section 11 of the aforesaid Act gives an option to either of the parties to a void marriage to seek a declaration of invalidity/nullity of such marriage, the exercise of such option cannot be understood to be in all situations voluntarily. Situations may arise when recourse to a court for a declaration regarding the nullity of a marriage claimed by one of the spouses to be a void marriage, will have to be insisted upon in departure to the normal rule. This, in our view, is the correct ratio of the decision of this Court in Yamunabai (supra) and M.M. Malhotra (supra). In this regard, we may take note of a recent decision rendered by this

Court in A. Subash Babu v. State of Andhra Pradesh & Anr.[5] while dealing with the question whether the wife of a second marriage contracted during the validity of the first marriage of the husband would be a person aggrieved under Section 198 (1)(c) of the Code of Criminal Procedure to maintain a complaint alleging commission of offences under section 494 and 495 IPC by the husband. The passage extracted below effectively illuminates the issue:

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

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

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

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

[1] (2010) 10 SCC 469
[2] AIR 1994 SC 853
[3] AIR 1988 SC 645
[4] 2005 (8) SCC 351
[5] 2011 (7) SCC 616

❑❑❑

KUNAPAREDDY VERSUS KUNAPAREDDY SWARNA KUMARI

SUPREME COURT OF INDIA

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

Kunapareddy @ Nookala Shanka Balaji ...Appellant
Versus
Kunapareddy Swarna Kumari & ANR ...Respondents

Criminal Appeal Nos. 516/2016
Arising out of SLP (CRL.) No. 1537/2016

Decided on : **18th April, 2016**

The present Respondent No.1, the wife of the Appellant filed a petition against the appellant under Protection for Women from Domestic Violence Act, 2005(here referred as DV Act) under Ss.9(1)(b) and 37(2)(c), DV Act. The present matter was raised when the petitioner sough amendment in original prayer clause. The Prayer A which was the original prayer relates to Section 9, DV Act and Prayer B included the relief of grant of monthly maintenance to her and her children. The same was allowed by the Trial Court and was also upheld by the High Court. And therefore the appellant approached the apex court. The major issue that arises for consideration in the instant case is whether a court dealing with the petition/complaint filed under the provisions of the Protection of Women from Domestic Violence Act, 2005 can allow amendments. The dispute was also in nature of proceeding i.e. whether it was of civil or criminal nature. The main contention of the herein appellant was that Section 28 of DV Act says proceedings under this act should be governed by CrPC and because CrPC does not allow amendments and allowing amendments under CPC is violation of the provision, therefore the Trial Court and High Court was mistaken in allowing the amendments. It was held by the Supreme Court that the order passed for amendments by the Trial Court was rightly upheld by the High Court. The court said that it cannot be said that the court dealing with the application under the DV Act has no power and/or no jurisdiction to allow the amendment of the said application. If the amendment becomes necessary in view of subsequent events(escalation of prices in the instant case) or to avoid multiplicity of litigation, court will have the power to permit such an amendment. Even in the criminal cases governed by the CrPC, the court is not powerless and may allow amendment in appropriate cases. One of the circumstances where such an amendments is to be allowed is to avoid the multiplicity of the proceedings.

JUDGMENT

Hon'ble Dr. Justice A.K. Sikri :—

1. Leave granted.

2. Learned counsel for both the parties have been finally heard at this stage.

3. The issue that arises for consideration in the instant case is whether a court dealing with the petition/complaint filed under the provisions of the Domestic Violence Act, 2005 (hereinafter referred to as 'the DV Act') has power to allow amendment to the petition/complaint originally filed. This issue has arisen in the petition/complaint filed by respondent no. 1/wife. Respondent No. 1 herein, who is the wife of the appellant, has filed a case against the appellant and his family members before the Court of IInd Additional Judicial First Class Magistrate, West Godavari, Eluru under Sections 9B & 37(2)(C) of the DV Act which is registered as Domestic Violence Case No. 20/2008.

It may be mentioned here that the said petition now stands transferred to the Court of Judicial First Class Magistrate (Mobile Court), Eluru and has been renumbered as DV Case No. 29/2012. In this case, respondent no. 1 has leveled various allegations against the appellant and his family members inter alia alleging that the appellant and his family members used to harass her physically as well as mentally and by also demanding dowry. It is further alleged that she was driven out from her matrimonial home in the month of March, 2015 and initially she took shelter at her brother's house along with the children in Eluru.

Thereafter, on the appellant tendering an apology to respondent no. 1 by coming to Eluru they put up their family together in Gadam Ramakrishna's House at Ashok Nagar, Eluru,but the things did not change. The following prayers are made in the said petition:

> ***"a)*** *to provide protection to the life and limb of the complainant in the hands of the respondents;*
>
> ***b)*** *to grant monthly maintenance of Rs. 5,000/- to the complainant and her children each towards her maintenance, medicines etc. and her children education and maintenance;*
>
> ***c)*** *to grant such other relief or reliefs if the Hon'ble Court deems fit and proper in the circumstances of the case."*

4. Respondent no.1 has also filed a divorce petition before the Court of Senior Civil Judge, West Godavari, Eluru wherein she has made an application for interim maintenance as well. Thereafter, she also filed a maintenance petition under Sections 23(2) and 24 of the Hindu Marriage Act, 1955 before the Court of Family Judge, Eluru.

5. On receiving notice in DV Petition, family members of the appellant filed a petition under Section 482 Cr.P.C. in the High Court of Judicature at Hyderabad for the States of Telengana and Andhra Pradesh for quashing the proceedings in the said DV Petition. This petition was allowed by the High Court vide order dated 17.04.2009 thereby quashing the domestic violence proceedings against the family members of the appellant on the ground that there was no specific allegations against them.

After the DV Petition was transferred to the Court of Judicial First Class Magistrate, Eluru, respondent no. 1 filed an application seeking amendment of the petition. By way of the said amendment petition, respondent no. 1 wanted to amend the prayer clause by incorporating some more prayers, as is clear from the following amendment in this behalf which was sought by respondent no. 1:

a) To provide protection to life and limb of the complainant in the hands of the respondent.

b) To grant monthly maintenance of Rs. 15,000/- to the complainant and her 2nd child to their maintenance instead of Rs.5000/-

c) Direct the respondent to return the Sridhana amount of Rs.3,00,000/- and 15 sovereigns of gold ornaments and other sari samanas and marriage batuvu presented to the respondent worth about 2 sovereigns wrist watch, 7 sovereign gold chain presented by the complainant and her parents.

d) Direct the respondent to pay the compensation of Rs.15 lakhs to the complaint for subjecting the compliant to physical and mental harassments besides including acts of Domestic Violence.

e) Direct the respondent to return the sari samans and other goods like worth more than Rs.10,00,000/- as per the list annexed herewith.

f) Direct the respondent to pay the cost of, litigation to the tune of Rs.25,000/- so far spent by the complainant persuing her litigation.

g) Direct the 1st respondent to provide separate residence by taking rent portion with monthly rent of Rs.10,000/-

h) Directing the respondent to return the original study certificates, medical certificates, deposits certificates and receipts etc. in the prayer portion paragraphs the following amendment by deleting the prayer original para b) to grant monthly maintenance of Rs.5,000/- to the complainant and her children each towards her maintenance, medicines etc. and her children education and maintenance."

6. The appellant herein opposed the said application. However, the learned Trail Court after hearing both the parties allowed the amendment. The appellant raised an objection that there was no power with the court to allow amendment of such a petition/complaint in the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'). This contention was rejected by the trial court on the premise that section 26 of the DV Act, which entitles a civil court, a family court or a criminal court as well to grant any relief which is available to the complainant under Sections 18, 19, 20, 21 & 22 of the said Act, gives an indication that the provisions of the Code of Civil Procedure would squarely apply and, therefore, the court had the power to allow amendment of the petition/complaint, more so, when it was necessary for the purpose of determining the real matter in controversy and to prevent multiplicity of the litigation.

7. This order was challenged by the appellant by filing an appeal before the Court of District and Sessions Judge, Eluru. The District and Sessions Judge, Eluru set aside the order of the Trial Court holding that there was no specific provision for amendment of the complaint and allowed the appeal of the appellant. Aggrieved by that order, respondent no. 1 filed a revision petition in the High Court which has been allowed by the High Court vide impugned judgment permitting respondent no. 1 to amend the petition/complaint, thereby setting aside the order of the District and Sessions Judge and restoring the order of the Trial Court.

8. As mentioned above, in the present appeal preferred by the appellant questioning the validity of the order of the High Court, the contention of the appellant is that there is no such an provision under the DV Act which permits the Trial Court to allow such amendment. On this issue, we have heard the learned counsel for the parties at length.

9. The contention of Mr. G.V.Rao, learned counsel appearing for the appellant was that the proceedings under the DV Act are governed by the provisions of the Code of Criminal Procedure as prescribed under Section 28 of the DV Act and there is no provision for amendment in the Code. He further submitted that the court below was wrong in treating the application for amendment under Order VI Rule 17 of the Code of Civil Procedure which has no application to the proceedings under the DV Act.

10. In order to decide the aforesaid issue, we may take note of some of the salient provisions of the DV Act as well as relevant Rules framed under the said Act. We have gone through the concerned provisions of the Code. We may start our discussion with Section 28 of the DV Act which reads as under:

> ***"28.*** *Procedure.-*
>
> ***(1)*** *Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).*
>
> ***(2)*** *Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub- section (2) of section 23."*

11. No doubt this provision provides that all proceedings under Sections 12, 19 to 23 as well as offences under Section 31 are to be governed by the provisions of the Code. The instant petition, as noted above, is filed under Section 9B and 37(2)(C) of the DV Act. Section 9 enumerates duties and functions of Protection Officer and Clause (b) of sub-Section (1) thereof reads as under:

> ***"(b)*** *to make a domestic incident report to the Magistrate, in such form and in such manner as may be prescribed, upon receipt of a complaint of domestic violence and forward copies thereof to the police officer in charge of the police station within the local limits of whose jurisdiction domestic violence is alleged to have been committed and to the service providers in that area;"*

12. We have already mentioned the prayers which were made by respondent no.1 in the original petition and prayer 'A' thereof relates to Section 9. However, in prayer 'B', the respondent no.1 also sought relief of grant of monthly maintenance to her as well as her children. This prayer falls within the ambit of Section 20 of the DV Act. In fact, prayer 'A" is covered by Section 18 which empowers the Magistrate to grant such a protection which is claimed by the respondent no.1.

Therefore, the petition is essentially under Sections 18 and 20 of the DV Act, though in the heading these provisions are not mentioned. However, that may not make any difference and, therefore, no issue was raised by the appellant on this count. In respect of the petition filed under Sections 18 and 20 of the DV Act, the proceedings are to be governed by the Code, as provided under Section 28 of the DV Act. At the same time, it cannot be disputed that these proceedings are predominantly of civil nature.

13. In fact, the very purpose of enacting the DV Act was to provide for a remedy which is an amalgamation of civil rights of the complainant i.e aggrieved person. Intention was to protect women against violence of any kind, especially that occurring within the family as the civil law

does not address this phenomenon in its entirety. It is treated as an offence under Section 498A of the Indian Penal Code.

The purpose of enacting the law was to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. It is for this reason, that the Scheme of the Act provides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes the character of criminality. In order to demonstrate it, we may reproduce the introduction as well as relevant portions of the Statement of Objects and Reasons of the said Act, as follows:

"INTRODUCTION.

The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged that domestic violence is undoubtedly a human rights issue. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women in its General Recommendations has recommended that State parties should act to protect women against violence of any kind, especially that occurring within the family. The phenomenon of domestic violence in India is widely prevalent but has remained invisible in the public domain.

The civil law does not address this phenomenon in its entirety. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498A of the Indian Penal Code. In order to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society the protection of Women from Domestic Violence Bill was introduced in the Parliament.

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

xxx xxx xxx

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

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

xxx xxx xxx

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

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

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

14. Procedure for obtaining order of reliefs is stipulated in Chapter IV of the DV Act which comprises Sections 12 to 29. Under Section 12 an application can be made to the Magistrate by the aggrieved person or Protection Officer or any other person on behalf of the aggrieved person.

The Magistrate is empowered, under Section 18, to pass protection order. Section 19 of the DV Act authorizes the Magistrate to pass residence order which may include restraining the respondent from dispossessing or disturbing the possession of the aggrieved person or directing the respondent to remove himself from the shared household or even restraining the respondent or his relatives from entering the portion of the shared household in which the aggrieved person resides etc.

Monetary reliefs which can be granted by the Magistrate under Section 20 of the DV Act include giving of the relief in respect of the loss of earnings, the medical expenses, the loss caused due to destruction, damage or removal of any property from the control of the aggrieved person and the maintenance for the aggrieved person as well as her children, if any.

Custody can be decided by the Magistrate which was granted under Section 21 of the DV Act. Section 22 empowers the Magistrate to grant compensation and damages for the injuries, including mental torture and emotional distress, caused by the domestic violence committed by the appellant. All the aforesaid reliefs that can be granted by the Magistrate are of civil nature. Section 23 vests the Magistrate with the power to grant interim ex-parte orders.

It is, thus, clear that various kinds of reliefs which can be obtained by the aggrieved person are of civil nature. At the same time, when there is a breach of such orders passed by the Magistrate, Section 31 terms such a breach to be a punishable offence.

15. In the aforesaid scenario, merely because Section 28 of the DV Act provides for that the proceedings under some of the provisions including Sections 18 and 20 are essentially of civil nature. We may take some aid and assistance from the nature of the proceedings filed under Section 125 of the Code. Under the said provision as well, a woman and children can claim maintenance. At the same time these proceedings are treated essentially as of civil nature.

16. In Ramesh Chander Kaushal vs. Venna Kaushal (1978) 4 SCC 70, Justice Krishna Iyer, dealing with the interpretation of Section 125 of the Code, observed as follows:

"9. *This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article*

39. We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfill.

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

17. We understood in this backdrop, it cannot be said that the Court dealing with the application under DV Act has no power and/or jurisdiction to allow the amendment of the said application. If the amendment becomes necessary in view of subsequent events [escalation of prices in the instant case] or to avoid multiplicity of litigation, Court will the have power to permit such an amendment. It is said that procedure is the handmaid of justice and is to come to the aid of the justice rather than defeating it. It is nobody's case that respondent no. 1 was not entitled to file another application claiming the reliefs which she sought to include in the pending application by way of amendment.

If that be so, we see no reason, why the applicant be not allowed to incorporate this amendment in the pending application rather than filing a separate application. It is not that there is a complete ban/bar of amendment in the complaints in criminal Courts which are governed by the Code, though undoubtedly such power to allow the amendment has to be exercised sparingly and with caution under limited circumstances. The pronouncement on this is contained in the recent judgment of this Court in S.R.Sukumar vs. S. Sunaad Raghuram (2015) 9 SCC 609 in the following paras:

*"**17.** Insofar as merits of the contention regarding allowing of amendment application, it is true that there is no specific provision in the Code to amend either a complaint or a petition filed under the provisions of the Code, but the Courts have held that the petitions seeking such amendment to correct curable infirmities can be allowed even in respect of complaints. In U.P. Pollution Control Board vs. Modi Distillery And Ors., (1987) 3 SCC 684, wherein the name of the company was wrongly mentioned in the complaint that is, instead of Modi Industries Ltd. The name of the company was mentioned as Modi Distillery and the name was sought to be amended. In such factual background, this Court has held as follows:-*

"...The learned Single Judge has focused his attention only on the [pic]technical flaw in the complaint and has failed to comprehend that the flaw had occurred due to the recalcitrant attitude of Modi Distillery and furthermore the infirmity is one which could be easily removed by having the matter remitted to the Chief Judicial Magistrate with a direction to call upon the appellant to make the formal amendments to the averments contained in para 2 of the complaint so as to make the controlling company of the industrial unit figure as the concerned accused in the complaint.

All that has to be done is the making of a formal application for amendment by the appellant for leave to amend by substituting the name of Modi Industries Limited, the company owning the industrial unit, in place of Modi Distillery.... Furthermore, the legal infirmity is of such a nature which could be easily cured..."

18. What is discernible from the U.P. Pollution Control Board's case is that easily curable legal infirmity could be cured by means of a formal application for amendment.

If the amendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact that there is no enabling provision in the Code for entertaining such amendment, the Court may permit such an amendment to be made. On the contrary, if the amendment sought to be made in the complaint does not relate either to a curable infirmity or the same cannot be corrected by a formal amendment or if there is likelihood of prejudice to the other side, then the Court shall not allow such amendment in the complaint.

19. In the instant case, the amendment application was filed on 24.05.2007 to carry out the amendment by adding paras 11(a) and 11 (b). Though, the proposed amendment was not a formal amendment, but a substantial one, the Magistrate allowed the amendment application mainly on the ground that no cognizance was taken of the complaint before the disposal of amendment application.

Firstly, Magistrate was yet to apply the judicial mind to the contents of the complaint and had not taken cognizance of the matter.

Secondly, since summons was yet to be ordered to be issued to the accused, no prejudice would be caused to the accused.

Thirdly, the amendment did not change the original nature of the complaint being one for defamation.

Fourthly, the publication of poem 'Khalnayakaru' being in the nature of subsequent event created a new cause of action in favour of the respondent which could have been prosecuted by the respondent by filing a separate complaint and therefore to avoid multiplicity of proceedings, the trial court allowed the amendment application.

Considering these factors which weighed in the mind of the courts below, in our view, the High Court rightly declined to interfere with the order passed by the Magistrate allowing the amendment application and the impugned order does not suffer from any serious infirmity warranting interference in exercise of jurisdiction under Article 136 of the Constitution of India."

18. What we are emphasis1 ing is that even in criminal cases governed by the Code, the Court is not powerless and may allow amendment in appropriate cases. One of the circumstances where such an amendment is to be allowed is to avoid the multiplicity of the proceedings. The argument of the learned counsel for the appellant, therefore, that there is no power of amendment has to be negated.

19. In this context, provisions of Sub-Section(2) of Section 28 of the DV Act gain significance. Whereas proceedings under certain sections of the DV Act as specified in sub-Section (1) of Section 28 are to be governed by the Code, the Legislature at the same time incorporated the provisions like sub - Section (2) as well which empowers the Court to lay down its own procedure for disposal of the application under Section 12 or Section 23(2) of the DV Act.

This provision has been incorporated by the Legislature keeping a definite purpose in mind. Under Section 12, an application can be made to a Magistrate by an aggrieved person or a

Protection Officer or any other person on behalf of the aggrieved person to claim one or more reliefs under the said Act. Section 23 deals with the power of the Magistrate to grant interim and ex-parte orders and sub-Section (2) of Section 23 is a special provision carved out in this behalf which is as follows:

> ***"(2).*** *If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.*

20. The reliefs that can be granted by the final order or an by interim order, have already been pointed out above wherein it is noticed that most of these reliefs are of civil nature. If the power to amend the complaint/application etc. is not read into the aforesaid provision, the very purpose which the Act attempts to sub-serve itself may be defeated in many cases.

21. We, thus, are of the opinion that the amendment was rightly allowed by the Trial Court and there is no blemish in the impugned judgment of the High Court affirming the order of the Trial Court. This appeal is, thus, devoid of any merits and is, accordingly, dismissed with costs.

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SAMIR VIDYASAGAR BHARDWAJ VERSUS NANDITA SAMIR BHARDWAJ

SUPREME COURT OF INDIA

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

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

Criminal Appeal No. 6450 of 2017
(Arising out of SLP(C) No.4385 of 2017)

Decided on : **09th May, 2017**

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

JUDGMENT

Hon'ble Mrs. Justice R. Banumathi :—

Leave granted.

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

3. This case presents a very unpleasant tale of a couple having daughters who are in their early twenties witnessing a bitter matrimonial battle between their parents. The appellant and the respondent herein tied nuptial knot on 05.05.1992. The couple resided in two flats being Flat No. 102 and Flat No. 103 situated in the building known as "Hi Ville" 29th Road, Bandra(West),

Mumbai. The said two flats were sold by the couple and they purchased a flat bearing No. 201 situated in "Aashna" Building, 8, St. Martin Road, Bandra (West) Mumbai by way of Agreement for Sale dated 22.11.2010. The said flat was purchased in the joint names of the appellant and the respondent herein where they have been residing with their two daughters till date.

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

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

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

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

8. Heard learned counsel for the parties.

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

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

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

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

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

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LALITA TOPPO VERSUS THE STATE OF JHARKHAND & ANR.

SUPREME COURT OF INDIA

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

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

Criminal Appeal No(S). 1656/2015

Decided on : **30th October, 2018**

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

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

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

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

ORDER

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

> *"**3.** Definition of domestic violence.- For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it-*
>
> ***(a)** harms or injures or endangers the health, safety, life, limp or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or ......"*

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

> *"**(iv)** "economic abuse" includes-*
>
> ***(a)** deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a Court or*

otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

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

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

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

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

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

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1 (1988) 1 SCC 530

2 (2005) 3 SCC 636

MANMOHAN ATTAVAR VERSUS NEELAM MANMOHAN ATTAVAR

SUPREME COURT OF INDIA

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

Manmohan Attavar ...Appellants
Versus
Neelam Manmohan Attavar …Respondents

CIVIL APPEAL NO.2500 OF 2017

WITH
CIVIL APPEAL NO.2502 OF 2017

Decided on : **14th July, 2017**

The respondent was married to another guy but got divorced on 10-10-1996. Her relationship with the appellant was developed in 1987. But gradually their relationship get soured and reconciliation did not take place. The respondent initiated proceeding against the appellant under section 12 of the Protection of women from Domestic Violence Act, 2005. On the request of the respondent, the case was transferred from Metropolitan Magistrate VI to the court of Metropolitan Magistrate II. The application was dismissed there. Then she went for Criminal appeal and prayed for interim relief and the same was rejected. The respondent again sought for transfer from one court and for this the respondent prayed in the writ petition in High Court of Karnataka under articles 226 and 227 of the Constitution of India. The learned single judge of the High Court by an ex-parte order permitted the respondent to occupy Premises belonging to the appellant. And this interim order is challenged in the Supreme Court under present case through SLP. The controversy before the Supreme Court was set forth as-

Whether an interim order could have been passed on 19-9-2016 permitting the respondent to occupy the premises of the appellant ?

Whether the learned Single Judge was right in withdrawing the proceedings pending before the learned Additional Sessions Judge to the High Court vide the impugned order dated 24-10-2016?

The Supreme Court was of the view that the nature of the ex-parte order permitting the respondent to occupy the premises of the appellant cannot be sustained and has to be set aside because in order for the respondent to succeed, it was necessary that the two parties had lived in a domestic relationship in the household. However, they never lived together in the property on question. In the second issue, the Court concluded that a perusal of the impugned order shows that the learned Single Judge found the remedy sought for by the respondent to be "misconceived". Thus the order dated 24-10-2016 was set aside.

JUDGMENT

Hon'ble Mr. Justice Sanjay Kishan Kaul :—

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

2. The admitted facts are that the respondent was married to one Shri Harish Chander Chhabra. That marriage did not work out and ultimately a consent decree for divorce was obtained on 10.10.1996. Even in the interregnum period, the respondent claims to have developed a relationship with the appellant starting from their introduction in 1987. It is her case that there was continuous interaction between the two and the appellant even proposed to her in December 1993. The appellant earned a National Award on 16.10.1996. The respondent also claims to have been requested to travel with the appellant to Bangalore on 30.10.1996. The appellant's wife was alive when the respondent claims that the appellant took her to No.38/1, Jayanagar, Bengaluru and that the appellant's wife was apparently also aware of the relationship between the two parties. The respondent claims that she resigned from the job with ICAR at the behest of the appellant. On 10.1.1998, the respondent claims that the appellant applied "kumkum" to her forehead and soon thereafter he was conferred with the Padma Shri Award and the respondent accompanied the appellant for the felicitation ceremony on 21.3.1998.

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

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

5. The respondent initiated proceedings under Section 12 of The Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the D.V. Act') on 16.9.2013 being Criminal Misc. Petition No.179 of 2013. This case is stated to have been re-numbered as Crl. Misc. Application No.139 of 2015. The endeavor of the appellant seeking quashing of these proceedings before the High Court vide Criminal Writ Petition No.6126/2013 under Section 482 of the Criminal Procedure Code, 1973 (hereinafter referred to as the Cr.P.C.) did not succeed and petition was dismissed on 2.1.2015. The trial went on and at the request of the respondent made under Section 410 of the Cr.P.C., the application was transferred from the Court of the Metropolitan Magistrate–VI to the Court of Metropolitan Magistrate-II at Bangalore. This application was finally dismissed by the learned Metropolitan Magistrate on 30.7.2015.

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

7. The respondent again sought a transfer from that court and the appeal was transferred to the Court of the learned Additional Sessions Judge presiding over Court No.53 vide order dated

16.2.2016. A second application was filed by the respondent for stay of the impugned order for interim maintenance. The respondent was once again aggrieved by the conduct of the proceedings during the hearing of the interim application and submitted a complaint to the High Court of Karnataka. In terms of an administrative order of the Registrar General of the High Court, the application was called upon to be decided on or before 30.4.2016. The application was rejected on 21.4.2016 as being not maintainable. The applications filed for additional evidence by the respondent also met an adverse fate.

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

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

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

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

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

13. We may note at this stage itself that it would neither be advisable nor proper to dwell into the controversy on merits because the appeal filed by the respondent is yet to be decided. Any observations by us at this stage could affect either of the parties in the appeal proceedings. The controversy before us is in a very narrow compass. We thus set forth the controversy -

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

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

14. Insofar as the first question is concerned, reliance has been placed by the respondent on the provisions of the D.V. Act and the desirability to construe the provisions liberally in favour of

women seeking relief, as it is in the nature of a social legislation meant for protection of women's rights. In order to appreciate the controversy, we reproduce the relevant provisions as under:-

> ***"17.*** *Right to reside in a shared household.- (1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same. (2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.*
>
> .....
>
> ***19.*** *Residence orders.-(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order -*
>
> ***(a)*** *restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;*
>
> ***(b)*** *directing the respondent to remove himself from the shared household;*
>
> ***(c)*** *restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;*
>
> ***(d)*** *restraining the respondent from alienating or disposing off the shared household or encumbering the same;*
>
> ***(e)*** *restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or*
>
> ***(f)*** *directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require: Provided that no order under clause (b) shall be passed against any person who is a woman. ....."*

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

16. The factual matrix of the present case is such that one would have to look to the definition clauses relevant for the determination of the controversy contained in Section 2 as under:

> *"2(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;*
>
> .....
>
> *2(s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes*

such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household. …….."

17. The facts of the present case are that the respondent has never stayed with the appellant in the premises in which she has been directed to be inducted. This is an admitted position even in answer to a court query by the respondent during the course of hearing. The "domestic relationship" as defined under Section 2 (f) of the D.V. Act refers to two persons who have lived together in a "shared household". A "shared household" has been defined under Section 2(s) of the D.V. Act. In order for the respondent to succeed, it was necessary that the two parties had lived in a domestic relationship in the household. However, the parties have never lived together in the property in question. It is not as if the respondent has been subsequently excluded from the enjoyment of the property or thrown out by the appellant in an alleged relationship which goes back 20 years. They fell apart even as per the respondent more than 7 years ago. We may also note that till 22.2.2010 even the wife of the appellant was alive. We may note for the purpose of record that as per the appellant, he is a Christian and thus there could be no question of visiting any temple and marrying the respondent by applying "kumkum", and that too when the wife of the appellant was alive.

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

19. Now turning to the second controversy, a perusal of the impugned order shows that the learned Single Judge found the remedy sought for by the respondent to be "misconceived". However, the learned Judge found it appropriate to treat the petition as one under Section 407 of the Cr.P.C. The learned Single Judge has expressed the view that the appellate court ought to have called upon the respondent to argue the appeal rather than spend time on interim reliefs, which was not maintainable in the face of the earlier order resulting in a predictable order.

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

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

22. It is also the contention of the appellant that such transfer cannot take place at the whims and fancy of the respondent. The respondent, whenever she fails to obtain a favourable order,

chooses to file proceedings for transfer whether it be before the (1988) 2 SCC 602 MM or before the appellate court. It is submitted that this approach ought not to be encouraged.

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

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

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

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

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

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INDRA SARMA VERSUS V.K.V. SARMA

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice K.S. Radhakrishnan and Hon'ble Mr. Justice Pinaki Chandra Ghose**

Indra Sarma … Appellant

Versus

V.K.V. Sarma … Respondent

Criminal Appeal No. 2009 of 2013

(@ Special Leave Petition (Crl.) No.4895 of 2012)

Decided on : **26th November, 2013**

"Relationship in the nature of marriage" – Live in relationship – Status – Live-in relationship simpliciter distinguished from one that could qualify as a "relationship in the nature of marriage" – Live-in relationship involving a married person – Relevance of opposition to live-in relationship by family of the married person – Held, all live-in relationships are not relationships in the nature of marriage – Relationship to qualify as "relationship in the nature of marriage" should have some inherent or essential characteristics of a marriage though not a marriage legally recognised – After noticing relevant provisions under foreign statutes, guidelines laid down by Supreme Court for testing under what circumstances live-in relationship would fall within expression "relationship in the nature of marriage" under S. 2 (f) (see Shortnotes C and D for the guidelines) – On facts, held, alleged live-in relationship between appellant (unmarried woman) and respondent (married male) was not a relationship in the nature of marriage under S.2(f) – Hence, non-maintenance of appellant by respondent after he left her, would not amount to "domestic violence" under S. 3 of DV Act – Further, if any direction is given to respondent to pay maintenance or monetary consideration to appellant, that would be at the cost of the legally wedded that relationship and have a cause of action against appellant for alienating the companionship and affection of the husband/parent, which is an intentional tort.

JUDGMENT

Hon'ble Mr. Justice K.S. Radhakrishnan:—

Leave granted.

2. Live-in or marriage like relationship is neither a crime nor a sin though socially unacceptable in this country. The decision to marry or not to marry or to have a heterosexual relationship is intensely personal.

3. We are, in this case, concerned with the question whether a "live-in relationship" would amount to a "relationship in the nature of marriage" falling within the definition of "domestic relationship" under Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 (for short "the DV Act") and the disruption of such a relationship by failure to maintain a women involved

in such a relationship amounts to "domestic violence" within the meaning of Section 3 of the DV Act.

FACTS:

4. Appellant and respondent were working together in a private company. The Respondent, who was working as a Personal Officer of the Company, was a married person having two children and the appellant, aged 33 years, was unmarried. Constant contacts between them developed intimacy and in the year 1992, appellant left the job from the above-mentioned Company and started living with the respondent in a shared household. Appellant's family members, including her father, brother and sister, and also the wife of the respondent, opposed that live-in-relationship. She has also maintained the stand that the respondent, in fact, started a business in her name and that they were earning from that business. After some time, the respondent shifted the business to his residence and continued the business with the help of his son, thereby depriving her right of working and earning. Appellant has also stated that both of them lived together in a shared household and, due to their relationship, appellant became pregnant on three occasions, though all resulted in abortion. Respondent, it was alleged, used to force the appellant to take contraceptive methods to avoid pregnancy. Further, it was also stated that the respondent took a sum of Rs.1,00,000/- from the appellant stating that he would buy a land in her name, but the same was not done. Respondent also took money from the appellant to start a beauty parlour for his wife. Appellant also alleged that, during the year 2006, respondent took a loan of Rs.2,50,000/- from her and had not returned. Further, it was also stated that the respondent, all along, was harassing the appellant by not exposing her as his wife publicly, or permitting to suffix his name after the name of the appellant. Appellant also alleged that the respondent never used to take her anywhere, either to the houses of relatives or friends or functions. Appellant also alleged that the respondent never used to accompany her to the hospital or make joint Bank account, execute documents, etc. Respondent's family constantly opposed their live-in relationship and ultimately forced him to leave the company of the appellant and it was alleged that he left the company of the appellant without maintaining her.

5. Appellant then preferred Criminal Misc. No. 692 of 2007 under Section 12 of the DV Act before the III Additional Chief Metropolitan Magistrate, Bangalore, seeking the following reliefs:

1) Pass a Protection Order under Section 18 of the DV Act prohibiting the respondent from committing any act of domestic violence against the appellant and her relatives, and further prohibiting the respondent from alienating the assets both moveable and immoveable properties owned by the respondent;

2) Pass a residence order under Section 19 of the DV Act and direct the respondent to provide for an independent residence as being provided by the respondent or in the alternative a joint residence along with the respondent where he is residing presently and for the maintenance of Rs.25,000/- per month regularly as being provided earlier or in the alternative to pay the permanent maintenance charges at the rate of Rs.25,000/- per month for the rest of the life;

3) Pass a monetary order under Section 20 of the DV Act directing the respondent to pay a sum of Rs.75,000/- towards the operation, pre and post operative medication, tests etc and follow up treatments;

4) Pass a compensation order under Section 22 of the DV Act to a sum of Rs.3,50,000/- towards damages for misusing the funds of the sister of the appellant, mental torture and emotional feelings; and

5) Pass an ex-parte interim order under Section 23 of the DV Act directing the respondent to pay Rs.75,000/- towards the medical expenses and pay the maintenance charges @ Rs.25,000/- per month as being paid by the respondent earlier.

6. Respondent filed detailed objections to the application stating that it was on sympathetical grounds that he gave shelter to her in a separate house after noticing the fact that she was abandoned by her parents and relatives, especially after the demise of her father. She had also few litigations against her sister for her father's property and she had approached the respondent for moral as well as monetary support since they were working together in a Company. The respondent has admitted that he had cohabited with the appellant since 1993. The fact that he was married and had two children was known to the appellant. Pregnancy of the appellant was terminated with her as well as her brother's consent since she was not maintaining good health. The respondent had also spent large amounts for her medical treatment and the allegation that he had taken money from the appellant was denied. During the month of April, 2007, the respondent had sent a cheque for Rs.2,50,000/- towards her medical expenses, drawn in the name of her sister which was encashed. Further, it was stated, it was for getting further amounts and to tarnish the image of the respondent, the application was preferred under the DV Act. Before the learned Magistrate, appellant examined herself as P.W.1 and gave evidence according to the averments made in the petition. Respondent examined himself as R.W.1. Child Development Project Officer was examined as R.W.2. The learned Magistrate found proof that the parties had lived together for a considerable period of time, for about 18 years, and then the respondent left the company of the appellant without maintaining her. Learned Magistrate took the view that the plea of "domestic violence" had been established, due to the non-maintenance of the appellant and passed the order dated 21.7.2009 directing the respondent to pay an amount of Rs.18,000/- per month towards maintenance from the date of the petition.

7. Respondent, aggrieved by the said order of the learned Magistrate, filed an appeal before the Sessions Court under Section 29 of the DV Act. The Appellate Court, after having noticed that the respondent had admitted the relationship with appellant for over a period of 14 years, took the view that, due to their live-in relationship for a considerable long period, non-maintenance of the appellant would amount to domestic violence within the meaning of Section 3 of the DV Act. The appellate Court also concluded that the appellant has no source of income and that the respondent is legally obliged to maintain her and confirmed the order passed by the learned Magistrate.

8. The respondent took up the matter in appeal before the High Court. It was contended before the High Court that the appellant was aware of the fact that the respondent was a married person having two children, yet she developed a relationship, in spite of the opposition raised by the wife of the respondent and also by the appellant's parents. Reliance was also placed on the judgment of this Court in *D. Velusamy v. D. Patchaiammal (2010) 10 SCC 469* and submitted that the tests laid down in *Velusamy case (supra)* had not been satisfied. The High Court held that the relationship between the parties would not fall within the ambit of "relationship in the nature of marriage" and the tests laid down in Velusamy case (supra) have not been satisfied.

Consequently, the High Court allowed the appeal and set aside the order passed by the Courts below. Aggrieved by the same, this appeal has been preferred.

9. Shri Anish Kumar Gupta, learned counsel appearing for the appellant, submitted that the relationship between the parties continued from 1992 to 2006 and since then, the respondent started avoiding the appellant without maintaining her. Learned counsel submitted that the relationship between them constituted a "relationship in the nature of marriage" within the meaning of Section 2(f) of the DV Act, which takes in every relationship by a man with a woman, sharing household, irrespective of the fact whether the respondent is a married person or not. Learned counsel also submitted that the tests laid down in *Velusamy case (supra)* have also been satisfied.

10. Ms. Jyotika Kalra, learned amicus curiae, took us elaborately through the provisions of the DV Act as well as the objects and reasons for enacting such a legislation. Learned amicus curiae submitted that the Act is intended to provide for protection of rights of women who are victims of violence of any type occurring in the family. Learned amicus curiae also submitted that the various provisions of the DV Act are intended to achieve the constitutional principles laid down in Article 15(3), reinforced vide Article 39 of the Constitution of India. Learned amicus curiae also made reference to the Malimath Committee report and submitted that a man who marries a second wife, during the subsistence of the first wife, should not escape his liability to maintain his second wife, even under Section 125 CrPC. Learned amicus curiae also referred to a recent judgment of this Court in *Deoki Panjhiyara v. Shashi Bhushan Narayan Azad and Another (2013) 2 SCC 137* in support of her contention.

11. Mr. Nikhil Majithia, learned counsel appearing for the respondent, made extensive research on the subject and made available valuable materials. Learned counsel referred to several judgments of the Constitutional Courts of South Africa, Australia, New Zealand, Canada, etc. and also referred to parallel legislations on the subject in other countries. Learned counsel submitted that the principle laid down in Velusamy case (supra) has been correctly applied by the High Court and, on facts, appellant could not establish that their relationship is a "relationship in the nature of marriage" so as to fall within Section 2(f) of the DV Act. Learned counsel also submitted that the parties were not qualified to enter into a legal marriage and the appellant knew that the respondent was a married person. Further, the appellant was not a victim of any fraudulent or bigamous marriage and it was a live-in relationship for mutual benefits, consequently, the High Court was right in holding that there has not been any domestic violence, within the scope of Section 3 of the DV Act entitling the appellant to claim maintenance.

12. We have to examine whether the non maintenance of the appellant in a broken live-in-relationship, which is stated to be a relationship not in the nature of a marriage, will amount to "domestic violence" within the definition of Section 3 of the DV Act, enabling the appellant to seek one or more reliefs provided under Section 12 of the DV Act.

13. Before examining the various issues raised in this appeal, which have far reaching consequences with regard to the rights and liabilities of parties indulging in live-in relationship, let us examine the relevant provisions of the DV Act and the impact of those provisions on such relationships.

D.V. ACT

14. The D.V. Act has been enacted to provide a remedy in Civil Law for protection of women from being victims of domestic violence and to prevent occurrence of domestic violence in the society. The DV Act has been enacted also to provide an effective protection of the rights of women guaranteed under the Constitution, who are victims of violence of any kind occurring within the family.

15. "Domestic Violence" is undoubtedly a human rights issue, which was not properly taken care of in this country even though the Vienna Accord 1994 and the Beijing Declaration and Platform for Action (1995) had acknowledged that domestic violence was undoubtedly a human rights issue. UN Committee on Convention on Elimination of All Forms of Discrimination Against Women in its general recommendations had also exhorted the member countries to take steps to protect women against violence of any kind, especially that occurring within the family, a phenomenon widely prevalent in India. Presently, when a woman is subjected to cruelty by husband or his relatives, it is an offence punishable under Section 498A IPC. The Civil Law, it was noticed, did not address this phenomenon in its entirety. Consequently, the Parliament, to provide more effective protection of rights of women guaranteed under the Constitution under Articles 14, 15 and 21, who are victims of violence of any kind occurring in the family, enacted the DV Act.

16. Chapter IV is the heart and soul of the DV Act, which provides various reliefs to a woman who has or has been in domestic relationship with any adult male person and seeks one or more reliefs provided under the Act. The Magistrate, while entertaining an application from an aggrieved person under Section 12 of the DV Act, can grant the following reliefs:

1) Payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for injuries caused by the acts of domestic violence committed by the adult male member, with a prayer for set off against the amount payable under a decree obtained in Court;

2) The Magistrate, under Section 18 of the DV Act, can pass a "protection order" in favour of the aggrieved person and prohibit the respondent from:

a) committing any act of domestic violence;

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

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

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

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

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

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

3) The Magistrate, while disposing of an application under Section 12(1) of the DV Act, can pass a "residence order" under Section 19 of the DV Act, in the following manner:

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

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

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

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

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

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

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

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

xxx xxx xxx

xxx xxx xxx"

(4) An aggrieved person, while filing an application under Section 12(1) of the DV Act, is also entitled, under Section 20 of the DV Act, to get "monetary reliefs" to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but is not limited to,-

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

(a) *the loss of earnings;*

(b) *the medical expenses;*

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

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

xxx xxx xxx

xxx xxx xxx"

The monetary reliefs granted under the above mentioned section shall be adequate, fair, reasonable and consistent with the standard of living to which an aggrieved person is accustomed and the Magistrate has the power to order an appropriate lump sum payment or monthly payments of maintenance.

(5) The Magistrate, under Section 21 of the DV Act, has the power to grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent.

(6) The Magistrate, in addition to other reliefs, under Section 22 of the DV Act, can pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by the respondent.

17. Section 26 of the DV Act provides that any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a Civil Court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act. Further, any relief referred to above may be sought for in addition to and along with any other reliefs that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court. Further, if any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

18. Section 3 of the DV Act deals with "domestic violence" and reads as under:

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

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

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

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

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

Explanation I.*- For the purposes of this section,-*

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

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

(iii) *"verbal and emotional abuse" includes-*

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

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

(iv) *"economic abuse" includes-*

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

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

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

Explanation II.- *For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes" domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration."*

19. In order to examine as to whether there has been any act, omission, or commission or conduct so as to constitute domestic violence, it is necessary to examine some of the definition clauses under Section 2 of the DV Act. Section 2(a) of the DV Act defines the expression "aggrieved person" as follows:

"2(a) *"Aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent." Section 2(f) defines the expression "domestic relationship" as follows:*

"2(f) *"Domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family." Section 2(q) defines the expression "respondent" as follows:*

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

Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner."
Section 2(s) defines the expression "shared household" and reads as follows:

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

20. We are, in this case, concerned with a "live-in relationship" which, according to the aggrieved person, is a "relationship in the nature of marriage" and it is that relationship which has been disrupted in the sense that the respondent failed to maintain the aggrieved person, which, according to the appellant, amounts to "domestic violence". The respondent maintained the stand that the relationship between the appellant and the respondent was not a relationship in the nature of marriage but a live-in-relationship simplicitor and the alleged act, omission, commission or conduct of the respondent would not constitute "domestic violence" so as to claim any protection orders under Section 18, 19 or 20 of the DV Act.

21. We have to first examine whether the appellant was involved in a domestic relationship with the respondent. Section 2(f) refers to five categories of relationship, such as, related by consanguinity, marriage, relationship in the nature of marriage, adoption, family members living together as a joint family, of which we are, in this case, concerned with an alleged relationship in the nature of marriage.

22. Before we examine whether the respondent has committed any act of domestic violence, we have to first examine whether the relationship between them was a "relationship in the nature of marriage" within the definition of Section 3 read with Section 2(f) of the DV Act. Before examining the term "relationship in the nature of marriage", we have to first examine what is "marriage", as understood in law.

MARRIAGE AND MARITAL RELATIONSHIP:

23. Marriage is often described as one of the basic civil rights of man/woman, which is voluntarily undertaken by the parties in public in a formal way, and once concluded, recognizes the parties as husband and wife. Three elements of common law marriage are (1) agreement to be married (2) living together as husband and wife, (3) holding out to the public that they are married. Sharing a common household and duty to live together form part of the 'Consortium Omnis Vitae" which obliges spouses to live together, afford each other reasonable marital privileges and rights and be honest and faithful to each other. One of the most important invariable consequences of marriage is the reciprocal support and the responsibility of maintenance of the common household, jointly and severally. Marriage as an institution has great legal significance

and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, successionship, etc. Marriage, therefore, involves legal requirements of formality, publicity, exclusivity and all the legal consequences flow out of that relationship.

24. Marriages in India take place either following the personal Law of the Religion to which a party is belonged or following the provisions of the Special Marriage Act. Marriage, as per the Common Law, constitutes a contract between a man and a woman, in which the parties undertake to live together and support each other. Marriage, as a concept, is also nationally and internationally recognized. O'Regan, J., in *Dawood and Another v. Minister of Home Affairs and Others 2000 (3) SA 936 (CC)* noted as follows:

> *"Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.*
>
> *The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends...."*

25. South African Constitutional Court in various judgments recognized the above mentioned principle. In *Satchwell v. President of the Republic of South Africa and Another 2002 (6) SA 1 (CC*), *Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC*), the Constitutional Court of South Africa recognized the right "free to marry and to raise family". Section 15(3)(a)(i) of the Constitution of South Africa, in substance makes provision for the recognition of "marriages concluded under the tradition, or a system of religious, personal or family law." Section 9(3) of the Constitution of South Africa reads as follows:

> *"The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."*

26. Article 23 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that:

> ***"1.*** *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

27. Article 16 of the Universal Declaration of Human Rights, 1948 provides that:

"1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at it dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

28. Parties in the present case are Hindus by religion and are governed by the Hindu Marriage Act, 1955. The expression "marriage", as stated, is not defined under the Hindu Marriage Act, but the "conditions for a Hindu marriage" are dealt with in Section 5 of the Hindu Marriage Act and which reads as under:

"5. Conditions for a Hindu marriage - A marriage may be solemnized between any two hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of the marriage

(ii) at the time of the marriage, neither party-

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity;

(iii) the bridegroom has completed the age of twenty- one years and the bride the age of eighteen 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."

29. Section 7 of the Hindu Marriage Act deals with the "Ceremonies for a Hindu marriage" and reads as follows:

"7. Ceremonies for a Hindu marriage. -

(1) *A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.*

(2) *Where such rites and ceremonies include the saptapadi (that is, 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."*

30. Entering into a marriage, therefore, either through the Hindu Marriage Act or the Special Marriage Act or any other Personal Law, applicable to the parties, is entering into a relationship of "public significance", since marriage being a social institution, many rights and liabilities flow out of that legal relationship. The concept of marriage as a "civil right" has been recognised by various courts all over the world, for example, *Skinner v. Oklahoma 316 US 535 (1942), Perez v. Lippold 198 P.2d 17, 20.1 (1948), Loving v. Virginia 388 US 1 (1967)*.

31. We have referred to, in extenso, about the concept of "marriage and marital relationship" to indicate that the law has distinguished between married and unmarried people, which cannot be said to be unfair when we look at the rights and obligations which flow out of the legally wedded marriage. A married couple has to discharge legally various rights and obligations, unlike the case of persons having live-in relationship or, marriage-like relationship or defacto relationship.

32. Married couples who choose to marry are fully cognizant of the legal obligation which arises by the operation of law on solemnization of the marriage and the rights and duties they owe to their children and the family as a whole, unlike the case of persons entering into live-in relationship. This Court in *Pinakin Mahipatray Rawal v. State of Gujarat (2013) 2 SCALE 198* held that marital relationship means the legally protected marital interest of one spouse to another which include marital obligation to another like companionship, living under the same roof, sexual relation and the exclusive enjoyment of them, to have children, their up-bringing, services in the home, support, affection, love, liking and so on.

RELATIONSHIP IN THE NATURE OF MARRIAGE:

33 Modern Indian society through the DV Act recognizes in reality, various other forms of familial relations, shedding the idea that such relationship can only be through some acceptable modes hitherto understood. Section 2(f), as already indicated, deals with a relationship between two persons (of the opposite sex) who live or have lived together in a shared household when they are related by:

a) Consanguinity

b) Marriage

c) Through a relationship in the nature of marriage

d) Adoption

e) Family members living together as joint family.

34. The definition clause mentions only five categories of relationships which exhausts itself since the expression "means", has been used. When a definition clause is defined to "mean" such and such, the definition is prima facie restrictive and exhaustive. Section 2(f) has not used the expression

"include" so as to make the definition exhaustive. It is in that context we have to examine the meaning of the expression "relationship in the nature of marriage".

35. We have already dealt with what is "marriage", "marital relationship" and "marital obligations". Let us now examine the meaning and scope of the expression "relationship in the nature of marriage" which falls within the definition of Section 2(f) of the DV Act. Our concern in this case is of the third enumerated category that is "relationship in the nature of marriage" which means a relationship which has some inherent or essential characteristics of a marriage though not a marriage legally recognized, and, hence, a comparison of both will have to be resorted, to determine whether the relationship in a given case constitutes the characteristics of a regular marriage.

36. Distinction between the relationship in the nature of marriage and marital relationship has to be noted first. Relationship of marriage continues, notwithstanding the fact that there are differences of opinions, marital unrest etc., even if they are not sharing a shared household, being based on law. But live-in-relationship is purely an arrangement between the parties unlike, a legal marriage. Once a party to a live-in- relationship determines that he/she does not wish to live in such a relationship, that relationship comes to an end. Further, in a relationship in the nature of marriage, the party asserting the existence of the relationship, at any stage or at any point of time, must positively prove the existence of the identifying characteristics of that relationship, since the legislature has used the expression "in the nature of".

37. Reference to certain situations, in which the relationship between an aggrieved person referred to in Section 2(a) and the respondent referred to in Section 2(q) of the DV Act, would or would not amount to a relationship in the nature of marriage, would be apposite. Following are some of the categories of cases which are only illustrative:

a) Domestic relationship between an unmarried adult woman and an unmarried adult male: Relationship between an unmarried adult woman and an unmarried adult male who lived or, at any point of time lived together in a shared household, will fall under the definition of Section 2(f) of the DV Act and in case, there is any domestic violence, the same will fall under Section 3 of the DV Act and the aggrieved person can always seek reliefs provided under Chapter IV of the DV Act.

b) Domestic relationship between an unmarried woman and a married adult male: Situations may arise when an unmarried adult women knowingly enters into a relationship with a married adult male. The question is whether such a relationship is a relationship "in the nature of marriage" so as to fall within the definition of Section 2(f) of the DV Act.

c) Domestic relationship between a married adult woman and an unmarried adult male: Situations may also arise where an adult married woman, knowingly enters into a relationship with an unmarried adult male, the question is whether such a relationship would fall within the expression relationship "in the nature of marriage".

d) Domestic relationship between an unmarried woman unknowingly enters into a relationship with a married adult male: An unmarried woman unknowingly enters into a relationship with a married adult male, may, in a given situation, fall within the definition of Section 2(f) of the DV Act and such a relationship may be a relationship in the "nature of marriage", so far as the aggrieved person is concerned.

e) Domestic relationship between same sex partners (Gay and Lesbians): DV Act does not recognize such a relationship and that relationship cannot be termed as a relationship in the nature of marriage under the Act. Legislatures in some countries, like the Interpretation Act, 1984 (Western Australia), the Interpretation Act, 1999 (New Zealand), the Domestic Violence Act, 1998 (South Africa), the Domestic Violence, Crime and Victims Act, 2004 (U.K.), have recognized the relationship between the same sex couples and have brought these relationships into the definition of Domestic relationship.

38. Section 2(f) of the DV Act though uses the expression "two persons", the expression "aggrieved person" under Section 2(a) takes in only "woman", hence, the Act does not recognize the relationship of same sex (gay or lesbian) and, hence, any act, omission, commission or conduct of any of the parties, would not lead to domestic violence, entitling any relief under the DV Act.

39. We should, therefore, while determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence", have a common sense/balanced approach, after weighing up the various factors which exist in a particular relationship and then reach a conclusion as to whether a particular relationship is a relationship in the "nature of marriage". Many a times, it is the common intention of the parties to that relationship as to what their relationship is to be, and to involve and as to their respective roles and responsibilities, that primarily governs that relationship. Intention may be expressed or implied and what is relevant is their intention as to matters that are characteristic of a marriage. The expression "relationship in the nature of marriage", of course, cannot be construed in the abstract, we must take it in the context in which it appears and apply the same bearing in mind the purpose and object of the Act as well as the meaning of the expression "in the nature of marriage". Plight of a vulnerable section of women in that relationship needs attention. Many a times, the women are taken advantage of and essential contribution of women in a joint household through labour and emotional support have been lost sight of especially by the women who fall in the categories mentioned in (a) and (d) supra. Women, who fall under categories (b) and (c), stand on a different footing, which we will deal with later. In the present case, the appellant falls under category (b), referred to in paragraph 37(b) of the Judgment.

40. We have, therefore, come across various permutations and combinations, in such relationships, and to test whether a particular relationship would fall within the expression "relationship in the nature of marriage", certain guiding principles have to be evolved since the expression has not been defined in the Act.

41. Section 2(f) of the DV Act defines "domestic relationship" to mean, inter alia, a relationship between two persons who live or have lived together at such point of time in a shared household, through a relationship in the nature of marriage. The expression "relationship in the nature of marriage" is also described as defacto relationship, marriage – like relationship, cohabitation, couple relationship, meretricious relationship (now known as committed intimate relationship) etc.

42. Courts and legislatures of various countries now began to think that denying certain benefits to a certain class of persons on the basis of their marital status is unjust where the need of those benefits is felt by both unmarried and married cohabitants. Courts in various countries have extended certain benefits to heterosexual unmarried cohabitants. Legislatures too, of late, through legislations started giving benefits to heterosexual cohabitants.

43. In U.K. through the Civil Partnership Act, 2004, the rights of even the same-sex couple have been recognized. Family Law Act, 1996, through the Chapter IV, titled 'Family Homes and Domestic Violence', cohabitants can seek reliefs if there is domestic violence. Canada has also enacted the Domestic Violence Intervention Act, 2001. In USA, the violence against woman is a crime with far-reaching consequences under the Violence Against Women Act, 1994 (now Violence Against Women Reauthorization Act, 2013).

44. The Interpretation Act, 1984 (Australia) has laid down certain indicators to determine the meaning of "de facto relationship", which are as follows:

"13A . De facto relationship and de facto partner, references to

(1) *A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.*

(2) *The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential —*

(a) *the length of the relationship between them;*

(b) *whether the 2 persons have resided together;*

(c) *the nature and extent of common residence;*

(d) *whether there is, or has been, a sexual relationship between them;*

(e) *the degree of financial dependence or interdependence, and any arrangements for financial support, between them;*

(f) *the ownership, use and acquisition of their property (including property they own individually);*

(g) *the degree of mutual commitment by them to a shared life;*

(h) *whether they care for and support children;*

(i) *the reputation, and public aspects, of the relationship between them.*

xxx xxx xxx

xxx xxx xxx"

45. The Domestic and Family Violence Protection Act, 2012 (Queensland) has defined the expression "couple relationship" to mean as follows":

"18. Meaning of couple relationship

1) *xxx xxx xxx*

2) *In deciding whether a couple relationship exists, a court may have regard to the following –*

a) *the circumstances of the relationship between the persons, including, for example–*

(i) the degree of trust between the persons; and

(ii) the level of each person's dependence on, and commitment to, the other person;

b) *the length of time for which the relationship has existed or did exist;*

c) *the frequency of contact between the persons;*

d) *the degree of intimacy between the persons.*

3) *Without limiting sub-section (2), the court may consider the following factors in deciding whether a couple relationship exists-*

a) *Whether the trust, dependence or commitment is or was of the same level;*

b) *Whether one of the persons is or was financially dependent on the other;*

c) *Whether the persons jointly own or owned any property;*

d) *Whether the persons have or had joint bank accounts;*

e) *Whether the relationship involves or involved a relationship of a sexual nature;*

f) *Whether the relationship is or was exclusive.*

4) *A couple relationship may exist even if the court makes a negative finding in relation to any or all of the factors mentioned in subsection (3).*

5) *A couple relationship may exist between two persons whether the persons are of the same or a different gender.*

6) *A couple relationship does not exist merely because two persons date or dated each other on a number of occasions."*

46. The Property (Relationships) Act, 1984 of North South Wales, Australia also provides for some guidelines with regard to the meaning and content of the expression "de facto relationship", which reads as follows:

1 ***"4 De facto relationships***

(1) *For the purposes of this Act, a de facto relationship is a relationship between two adult persons:*

(a) *who live together as a couple, and*

(b) *who are not married to one another or related by family.*

(2) *In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:*

(a) *the duration of the relationship,*

(b) *the nature and extent of common residence,*

(c) *whether or not a sexual relationship exists,*

(d) *the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,*

(e) *the ownership, use and acquisition of property,*

(f) *the degree of mutual commitment to a shared life,*

(g) *the care and support of children,*

(h) *the performance of household duties,*

(i) *the reputation and public aspects of the relationship.*

(3) *No finding in respect of any of the matters mentioned in subsection (2) (a)-(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.*

(4) *Except as provided by section 6, a reference in this Act to a party to a de facto relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship.*"

47. "In *Re Marriage of Lindsay, 101 Wn.2d 299 (1984), Litham v. Hennessey 87 Wn.2d 550 (1976), Pennington 93 Wash.App. at 917*, the Courts in United States took the view that the relevant factors establishing a meretricious relationship include continuous cohabitation, duration of the relationship, purpose of the relationship, and the pooling of resources and services for joint projects. The Courts also ruled that a relationship need not be "long term" to be characterized as meretricious relationship. While a long term relationship is not a threshold requirement, duration is a significant factor. Further, the Court also noticed that a short term relationship may be characterized as a meretricious, but a number of other important factors must be present.

48. In *Stack v. Dowden [2007] 2 AC 432*, Baroness Hale of Richmond said:

"Cohabitation comes in many different shapes and sizes. People embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short-lived and childless. But most people these days cohabit before marriage….. So many couples are cohabiting with a view to marriage at some later date – as long ago as 1998 the British Household Panel Survey found that 75% of current cohabitants expected to marry, although only a third had firm plans: John Ermisch, Personal Relationships and Marriage Expectations (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000-27. Cohabitation is much more likely to end in separation than is marriage, and cohabitations which end in separation tend to last for a shorter time than marriages which end in divorce. But increasing numbers of couples cohabit for long periods without marrying and their reasons for doing so vary from conscious rejection of marriage as a legal institution to regarding themselves 'as good as married' anyway: Law Commission, Consultation Paper No 179, Part 2, para 2.45."

49. In MW v. The Department of Community Services [2008] HCA 12, Gleeson, CJ, made the following observations:

"Finn J was correct to stress the difference between living together and living together 'as a couple in a relationship in the nature of marriage or civil union'. The relationship between two people who live together, even though it is a sexual relationship, may, or may not, be a relationship in the nature of marriage or civil union. One consequence of relationships of the former kind becoming commonplace is that it may now be more difficult, rather than easier, to infer that they have the nature of marriage or civil union, at least where the care and upbringing of children are not involved."

50. In *Lynam v. The Director-General of Social Security (1983) 52 ALR 128*, the Court considered whether a man and a woman living together 'as husband and wife on a bona fide domestic basis' and Fitzgerald, J. said:

> *"Each element of a relationship draws its colour and its significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. In any particular case, it will be a question of fact and degree, a jury question, whether a relationship between two unrelated persons of the opposite sex meets the statutory test."*

51. Tipping, J. in *Thompson v. Department of Social Welfare (1994) 2 SZLR 369 (HC)*, listed few characteristics which are relevant to determine relationship in the nature of marriage as follows:

> ***"(1)*** *Whether and how frequently the parties live in the same house.*
>
> ***(2)*** *Whether the parties have a sexual relationship.*
>
> ***(3)*** *Whether the parties give each other emotional support and companionship.*
>
> ***(4)*** *Whether the parties socialize together or attend activities together as a couple.*
>
> ***(5)*** *Whether and to what extent the parties share the responsibility for bringing up and supporting any relevant children.*
>
> ***(6)*** *Whether the parties share household and other domestic tasks.*
>
> ***(7)*** *Whether the parties share costs and other financial responsibilities by the pooling of resources or otherwise. (8) Whether the parties run a common household, even if one or other partner is absent for periods of time.*
>
> ***(9)*** *Whether the parties go on holiday together. (10) Whether the parties conduct themselves towards, and are treated by friends, relations and others as if they were a married couple."*

52. Live-in relationship, as such, as already indicated, is a relationship which has not been socially accepted in India, unlike many other countries. In *Lata Singh v. State of U.P. [AIR 2006 SC 2522]* it was observed that a live-in relationship between two consenting adults of heterosexual sex does not amount to any offence even though it may be perceived as immoral. However, in order to provide a remedy in Civil Law for protection of women, from being victims of such relationship, and to prevent the occurrence of domestic violence in the society, first time in India, the DV Act has been enacted to cover the couple having relationship in the nature of marriage, persons related by consanguinity, marriages etc. We have few other legislations also where reliefs have been provided to woman placed in certain vulnerable situations.

53. Section 125 Cr.P.C., of course, provides for maintenance of a destitute wife and Section 498A IPC is related to mental cruelty inflicted on women by her husband and in-laws. Section 304-B IPC deals with the cases relating to dowry death. The Dowry Prohibition Act, 1961 was enacted to deal with the cases of dowry demands by the husband and family members. The Hindu

Adoptions and Maintenance Act, 1956 provides for grant of maintenance to a legally wedded Hindu wife, and also deals with rules for adoption. The Hindu Marriage Act, 1955 refers to the provisions dealing with solemnization of marriage also deals with the provisions for divorce. For the first time, through, the DV Act, the Parliament has recognized a "relationship in the nature of marriage" and not a live-in relationship simplicitor.

54. We have already stated, when we examine whether a relationship will fall within the expression "relationship in the nature of marriage" within the meaning of Section 2(f) of the DV Act, we should have a close analysis of the entire relationship, in other words, all facets of the interpersonal relationship need to be taken into account. We cannot isolate individual factors, because there may be endless scope for differences in human attitudes and activities and a variety of combinations of circumstances which may fall for consideration. Invariably, it may be a question of fact and degree, whether a relationship between two unrelated persons of the opposite sex meets the tests judicially evolved.

55. We may, on the basis of above discussion cull out some guidelines for testing under what circumstances, a live-in relationship will fall within the expression "relationship in the nature of marriage" under Section 2(f) of the DV Act. The guidelines, of course, are not exhaustive, but will definitely give some insight to such relationships.

1) Duration of period of relationship Section 2(f) of the DV Act has used the expression "at any point of time", which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.

(2) Shared household The expression has been defined under Section 2(s) of the DV Act and, hence, need no further elaboration.

(3) Pooling of Resources and Financial Arrangements Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.

(4) Domestic Arrangements Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or upkeeping the house, etc. is an indication of a relationship in the nature of marriage.

(5) Sexual Relationship Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc. (6) Children Having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.

(7) Socialization in Public Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.

(8) Intention and conduct of the parties Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship.

STATUS OF THE APPELLANT

56. Appellant, admittedly, entered into a live-in-relationship with the respondent knowing that he was married person, with wife and two children, hence, the generic proposition laid down by the Privy Council in Andrahennedige Dinohamy v. Wiketunge Liyanapatabendage Balshamy, AIR 1927 PC 185, that where a man and a woman are proved to have lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage will not apply and, hence, the relationship between the appellant and the respondent was not a relationship in the nature of a marriage, and the status of the appellant was that of a concubine. A concubine cannot maintain a relationship in the nature of marriage because such a relationship will not have exclusivity and will not be monogamous in character. Reference may also be made to the judgments of this Court in Badri Prasad v. Director of Consolidation 1978 (3) SCC 527 and Tulsa v. Durghatiya 2008 (4) SCC 520. In Gokal Chand v. Parvin Kumari AIR 1952 SC 231 this Court held that the continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long cohabition is a rebuttable one and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them. Polygamy, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage.

57. We may note, in the instant case, there is no necessity to rebut the presumption, since the appellant was aware that the respondent was a married person even before the commencement of their relationship, hence the status of the appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage. Long standing relationship as a concubine, though not a relationship in the nature of a marriage, of course, may at times, deserves protection because that woman might not be financially independent, but we are afraid that DV Act does not take care of such relationships which may perhaps call for an amendment of the definition of Section 2(f) of the DV Act, which is restrictive and exhaustive.

58. Velusamy case (supra) stated that instances are many where married person maintain and support such types of women, either for sexual pleasure or sometimes for emotional support. Woman, a party to that relationship does suffer social disadvantages and prejudices, and historically, such a person has been regarded as less worthy than the married woman. Concubine suffers social ostracism through the denial of status and benefits, who cannot, of course, enter into a relationship in the nature of marriage.

59. We cannot, however, lose sight of the fact that inequities do exist in such relationships and on breaking down such relationship, the woman invariably is the sufferer. Law of Constructive Trust developed as a means of recognizing the contributions, both pecuniary and non-pecuniary, perhaps comes to their aid in such situations, which may remain as a recourse for such a woman who find herself unfairly disadvantaged. Unfortunately, there is no express statutory provision to regulate such types of live-in relationships upon termination or disruption since those relationships are not in the nature of marriage. We can also come across situations where the parties entering into live-in-relationship and due to their joint efforts or otherwise acquiring properties, rearing children, etc. and disputes may also arise when one of the parties dies intestate.

60. American Jurisprudence, Second Edition, Vol. 24 (2008) speaks of Rights and Remedies of property accumulated by man and woman living together in illicit relations or under void marriage, which reads as under:

> *"Although the courts have recognized the property rights of persons cohabiting without benefit of marriage, these rights are not based on the equitable distribution provisions of the marriage and divorce laws because the judicial recognition of mutual property rights between unmarried cohabitants would violate the policy of the state to strengthen and preserve the integrity of marriage, as demonstrated by its abolition of common-law marriage."*

61. Such relationship, it may be noted, may endure for a long time and can result pattern of dependency and vulnerability, and increasing number of such relationships, calls for adequate and effective protection, especially to the woman and children born out of that live-in-relationship. Legislature, of course, cannot promote pre-marital sex, though, at times, such relationships are intensively personal and people may express their opinion, for and against. See S. Khushboo v. Kanniammal and another (2010) 5 SCC 600.

62. Parliament has to ponder over these issues, bring in proper legislation or make a proper amendment of the Act, so that women and the children, born out of such kinds of relationships be protected, though those types of relationship might not be a relationship in the nature of a marriage.

63. We may now consider whether the tests, we have laid down, have been satisfied in the instant case. We have found that the appellant was not ignorant of the fact that the respondent was a married person with wife and two children, hence, was party to an adulterous and bigamous relationship. Admittedly, the relationship between the appellant and respondent was opposed by the wife of the respondent, so also by the parents of the appellant and her brother and sister and they knew that they could not have entered into a legal marriage or maintained a relationship in the nature of marriage. Parties never entertained any intention to rear children and on three occasions the pregnancy was terminated. Having children is a strong circumstance to indicate a relationship in the nature of marriage. No evidence has been adduced to show that the parties gave each other mutual support and companionship. No material has been produced to show that the parties have ever projected or conducted themselves as husband and wife and treated by friends, relatives and others, as if they are a married couple. On the other hand, it is the specific case of the appellant that the respondent had never held out to the public that she was his wife. No evidence of socialization in public has been produced. There is nothing to show that there was pooling of resources or financial arrangements between them. On the other hand, it is the specific case of the appellant that the respondent had never opened any joint account or executed any document in the joint name. Further, it was also submitted that the respondent never permitted to suffix his name after the name of the appellant. No evidence is forthcoming, in this case, to show that the respondent had caused any harm or injuries or endangered the health, safely, life, limb or well- being, or caused any physical or sexual abuse on the appellant, except that he did not maintain her or continued with the relationship.

ALIENATION OF AFFECTION

64. Appellant had entered into this relationship knowing well that the respondent was a married person and encouraged bigamous relationship. By entering into such a relationship, the appellant has committed an intentional tort, i.e. interference in the marital relationship with

intentionally alienating respondent from his family, i.e. his wife and children. If the case set up by the appellant is accepted, we have to conclude that there has been an attempt on the part of the appellant to alienate respondent from his family, resulting in loss of marital relationship, companionship, assistance, loss of consortium etc., so far as the legally wedded wife and children of the respondent are concerned, who resisted the relationship from the very inception. Marriage and family are social institutions of vital importance. Alienation of affection, in that context, is an intentional tort, as held by this Court in Pinakin Mahipatray Rawal case (supra), which gives a cause of action to the wife and children of the respondent to sue the appellant for alienating the husband/father from the company of his wife/children, knowing fully well they are legally wedded wife/children of the respondent..

65. We are, therefore, of the view that the appellant, having been fully aware of the fact that the respondent was a married person, could not have entered into a live-in relationship in the nature of marriage. All live-in- relationships are not relationships in the nature of marriage. Appellant's and the respondent's relationship is, therefore, not a "relationship in the nature of marriage" because it has no inherent or essential characteristic of a marriage, but a relationship other than "in the nature of marriage" and the appellant's status is lower than the status of a wife and that relationship would not fall within the definition of "domestic relationship" under Section 2(f) of the DV Act. If we hold that the relationship between the appellant and the respondent is a relationship in the nature of a marriage, we will be doing an injustice to the legally wedded wife and children who opposed that relationship. Consequently, any act, omission or commission or conduct of the respondent in connection with that type of relationship, would not amount to "domestic violence" under Section 3 of the DV Act.

66. We have, on facts, found that the appellant's status was that of a mistress, who is in distress, a survivor of a live-in relationship which is of serious concern, especially when such persons are poor and illiterate, in the event of which vulnerability is more pronounced, which is a societal reality. Children born out of such relationship also suffer most which calls for bringing in remedial measures by the Parliament, through proper legislation.

67. We are conscious of the fact that if any direction is given to the respondent to pay maintenance or monetary consideration to the appellant, that would be at the cost of the legally wedded wife and children of the respondent, especially when they had opposed that relationship and have a cause of action against the appellant for alienating the companionship and affection of the husband/parent which is an intentional tort.

68. We, therefore, find no reason to interfere with the judgment of the High Court and the appeal is accordingly dismissed.

❑❑❑

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

SUPREME COURT OF INDIA

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

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

Civil Appeal No. 10084 of 2016
(Arising out of SLP (Civil) No. 9132 of 2015)

Decided on : **6th October, 2016**

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

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

STATEMENT OF OBJECTS AND REASONS

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

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

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

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

  Preamble An Act to provide for more effective protection of the rights of women guaranteed under the constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.
- ***What is of great significance is that the 2005 Act is to provide for effective protection of the rights of women who are victims of violence of any kind occurring within the family. The preamble also makes it clear that the reach of the Act is that violence, whether physical, sexual, verbal, emotional or economic, are all to be redressed by the statute. That the perpetrators and abettors of such violence can, in given situations, be women themselves, is obvious***
- ***It will be noticed that the definition of domestic relationship contained in Section 2(f) is a very wide one. It is a relationship between persons who live or have lived together in a shared household and are related in any one of four ways - blood, marriage or a relationship in the nature of marriage, adoption, or family members of a joint family. A reading of these definitions makes it clear that domestic relationships involve persons belonging to both sexes and includes persons related by blood or marriage. This necessarily brings within such domestic relationships male as well as female in-laws, quite apart from male and female members of a family related by blood. Equally, a shared household includes a household which belongs to a joint family of which the respondent is a member.***
- ***When Section 3 of the Act defines domestic violence, it is clear that such violence is gender neutral. It is also clear that physical abuse, verbal abuse, emotional abuse and economic abuse can all be by women against other women. Even sexual abuse may, in a given fact circumstance, be by one woman on another. Section 3, therefore, in tune with the general object of the Act, seeks to outlaw domestic violence of any kind***

against a woman, and is gender neutral.

- ***Section 19(1)(c) makes it clear that the Magistrate may pass a residence order, on being satisfied that domestic violence has taken place, and may restrain the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides. This again is a pointer to the fact that a residence order will be toothless unless the relatives, which include female relatives of the respondent, are also bound by it. And we have seen from the definition of respondent that this can only be the case when a wife or a common law wife is an aggrieved person, and not if any other woman belonging to a family is an aggrieved person. Therefore, in the case of a wife or a common law wife complaining of domestic violence, the husbands relatives including mother-in-law and sister-in-law can be arrayed as respondents and effective orders passed against them. But in the case of a mother-in-law or sister-in-law who is an aggrieved person, the respondent can only be an adult male person and since his relatives are not within the main part of the definition of respondent in Section 2(q), residence orders passed by the Magistrate under Section 19(1)(c) against female relatives of such person would be unenforceable as they cannot be made parties to petitions under the Act.***
- ***We were given to understand that the aforesaid Bill lapsed, after which the present Bill was introduced in the Lok Sabha on 22.8.2005, and was then passed by both Houses. It is interesting to note that the earlier 2002 Bill defined respondent as meaning any person who is.. without the addition of the words adult male, being in consonance with the object sought to be achieved by the Bill, which was pari materia with the object sought to be achieved by the present Act. We also find that, in another Act which seeks to protect women in another sphere, namely, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, respondent is defined in Section 2(m) thereof as meaning a person against whom the aggrieved woman has made a complaint under Section 9. Here again it will be noticed that the prefix adult male is conspicuous by its absence. The 2002 Bill and the 2013 Act are in tune with the object sought to be achieved by statutes which are meant to protect women in various spheres of life.We have adverted to the aforesaid legislation only to show that Parliament itself has thought it reasonable to widen the scope of the expression respondent in the Act of 2013 so as to be in tune with the object sought to be achieved by such legislations.***
- ***We, therefore, set aside the impugned judgment of the Bombay High Court and declare that the words adult male in Section 2(q) of the 2005 Act will stand deleted since these words do not square with Article 14 of the Constitution of India. Consequently, the proviso to Section 2(q),being rendered otiose, also stands deleted. We may only add that the impugned judgment has ultimately held, in paragraph 27, that the two complaints of 2010, in which the three female respondents were discharged finally, were purported to be revived, despite there being no prayer in Writ Petition***

No.300/2013 for the same. When this was pointed out, Ms. Meenakshi Arora very fairly stated that she would not be pursuing those complaints, and would be content to have a declaration from this Court as to the constitutional validity of Section 2(q) of the 2005 Act.

JUDGMENT

Hon'ble Mr. Justice R.F. Nariman :—

1. Leave granted.

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

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

4. Nothing happened for over three years till the same duo of mother and daughter filed two separate complaints against the same respondents in October, 2010. An application was moved before the learned Metropolitan Magistrate for a discharge of respondent Nos. 2 to 4 stating that as the complaint was made under Section 2(a) read with Section 2(q) of the 2005 Act, it can only be made against an adult male person and the three respondents not being adult male persons were, therefore, required to be discharged. The Metropolitan Magistrate passed an order dated 5.1.2012 in which such discharge was refused. In a writ petition filed against the said order, on 15.2.2012, the Bombay High Court, on a literal construction of the 2005 Act, discharged the aforesaid three respondents from the complaint. We have been informed that this order has since attained finality.

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

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

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

In view of the above discussion and in view of the fact that the decision of the Delhi High Court in Kusum Lata Sharma's case has not been disturbed by the Supreme Court, we are inclined to read down the provisions of section 2(q) of the DV Act and to hold that the provisions of "respondent" in section 2(q) of the DV Act is not to be read in isolation but has to be read as a part of the scheme of the DV Act, and particularly along with the definitions of "aggrieved person", domestic relationship" and "shared household" in clauses (a), (f) and (s) of section 2 of the DV Act. If so read, the complaint alleging acts of domestic violence is maintainable not only against an adult male person who is son or brother, who is or has been in a domestic relationship with the aggrieved complainant- mother or sister, but the complaint can also be filed against

a relative of the son or brother including wife of the son / wife of the brother and sisters of the male respondent. In other words, in our view, the complaint against the daughter-in-law, daughters or sisters would be maintainable under the provisions of the DV Act, where they are co- respondent/s in a complaint against an adult male person, who is or has been in a domestic relationship with the complainant and such corespondent/s. It must, of course, be held that a complaint under the DV Act would not be maintainable against daughter-in-law, sister-in- law or sister of the complainant, if no complaint is filed against an adult male person of the family.

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

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

8. Ms. Meenakshi Arora, learned senior counsel appearing on behalf of the respondents, countered each of these submissions. First and foremost, she argued that the 2005 Act is a piece of social beneficial legislation enacted to protect women from domestic violence of all kinds. This being the case, it is clear that any definition which seeks to restrict the reach of the Act would have to be either struck down as being violative of Article 14 of the Constitution or read down. According to her, given the object of the statute, which is discernible clearly from the statement of objects and reasons, the preamble, and various provisions of the 2005 Act which she took us through, it is clear that the expression adult male person is a classification not based on any intelligible differentia, and not having any rational relationship with the object sought to be achieved by the Act. In fact, in her submission, the said expression goes contrary to the object of the Act, which is to afford the largest possible protection to women from domestic violence by any person, male or female, who happens to share either a domestic relationship or shared household with the said woman. In the alternative, she argued that the High Court judgment was right, and that if the said expression is not struck down, it ought to be read down in the manner suggested to make it constitutional. She also added that the doctrine of severability would come to her rescue, and that if the said expression were deleted from Section 2(q), the Act as a whole would stand and the object sought to be achieved would only then be fulfilled. She referred to a large number

of judgments on Article 14 and the doctrine of severability generally. She also argued that within the definition of shared household in Section 2(s) of the Act, the respondent may be a member of a joint family. She has adverted to the amendment made to the Hindu Succession Act in 2005, by which amendment females have also become coparceners in a joint Hindu family, and she argued that therefore the 2005 Act is not in tune with the march of statutory law in other areas. She also countered the submission of Shri Raval stating that the 2005 Act is in fact a piece of beneficial legislation which is not penal in nature but which affords various remedies which are innovative in nature and which cannot be availed of in the ordinary civil courts. She added that Section 31 alone was a penal provision for not complying with a protection order, and went on to state that the modern rule as to penal provisions is different from that sought to be contended by Shri Raval, and that such rule requires the court to give a fair interpretation to the provisions of these statutes, neither leaning in favour of the accuser or the accused. She also added that given the beneficial statute that we have to strike down/interpret, a purposive construction alone should be given, and as the offending expression adult male person is contrary to such purpose and would lead to absurdities and anomalies, it ought to be construed in tune with the Act as a whole, which therefore would include females, as well, as respondents. She also pointed out that, at present, the sweep of the Act was such that if a mother-in-law or sister-in-law were to be an aggrieved person, they could only be aggrieved against adult male members and not against any opposing female member of a joint family for example, a daughter-in-law or a sister-in- law. This will unnecessary stultify what was sought to be achieved by the Act, and would make the Act a dead letter insofar as these persons are concerned. She also argued that the Act would become unworkable in that the reliefs that were to be given would only be reliefs against adult male members and not their abettors who may be females.

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

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

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

It is first necessary to discern the true purpose or object of the impugned enactment because it is only with reference to the true object of the enactment that the existence of a rational nexus of the differentia on which the classification is based, with the object sought to be achieved by

the enactment, can be examined to test the validity of the classification. In Francis Bennion's Statutory Interpretation, (1984 edn.), the distinction between the legislative intention and the purpose or object of the legislation has been succinctly summarised at p. 237 as under: The distinction between the purpose or object of an enactment and the legislative intention governing it is that the former relates to the mischief to which the enactment is directed and its remedy, while the latter relates to the legal meaning of the enactment. There is thus a clear distinction between the two. While the purpose or object of the legislation is to provide a remedy for the malady, the legislative intention relates to the meaning or exposition of the remedy as enacted. While dealing with the validity of a classification, the rational nexus of the differentia on which the classification is based has to exist with the purpose or object of the legislation, so determined. The question next is of the manner in which the purpose or object of the enactment has to be determined and the material which can be used for this exercise. For determining the purpose or object of the legislation, it is permissible to look into the circumstances which prevailed at the time when the law was passed and which necessitated the passing of that law. For the limited purpose of appreciating the background and the antecedent factual matrix leading to the legislation, it is permissible to look into the Statement of Objects and Reasons of the Bill which actuated the step to provide a remedy for the then existing malady. In A. Thangal Kunju Musaliar v. M. Venkitachalam Potti [(1955) 2 SCR 1196 : AIR 1956 SC 246 : (1956) 29 ITR 349] , the Statement of Objects and Reasons was used for judging the reasonableness of a classification made in an enactment to see if it infringed or was contrary to the Constitution. In that decision for determining the question, even affidavit on behalf of the State of the circumstances which prevailed at the time when the law there under consideration had been passed and which necessitated the passing of that law was relied on. It was reiterated in State of West Bengal v. Union of India [(1964) 1 SCR 371 : AIR 1963 SC 1241] that the Statement of Objects and Reasons accompanying a Bill, when introduced in Parliament, can be used for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation. Similarly, in Pannalal Binjraj v. Union of India [1957 SCR 233 : AIR 1957 SC 397 : (1957) 31 ITR 565] a challenge to the validity of classification was repelled placing reliance on an affidavit filed on behalf of the Central Board of Revenue disclosing the true object of enacting the impugned provision in the Income Tax Act.

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

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

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

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

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

STATEMENT OF OBJECTS AND REASONS

1. Domestic violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention

on Elimination of All Forms of Discrimination Against Women (CEDAW) in its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.

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

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

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

(i) It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation. However, whereas the Bill enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any female relative of husband or the male partner, it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner.

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

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

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

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

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

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

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

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

16. What is of great significance is that the 2005 Act is to provide for effective protection of the rights of women who are victims of violence of any kind occurring within the family. The preamble also makes it clear that the reach of the Act is that violence, whether physical, sexual, verbal, emotional or economic, are all to be redressed by the statute. That the perpetrators and abettors of such violence can, in given situations, be women themselves, is obvious. With this object in mind, let us now examine the provisions of the statute itself.

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

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

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

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

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

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

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

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

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

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

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

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

Explanation I.For the purposes of this section,

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

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

(iii) verbal and emotional abuse includes

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

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

(iv) economic abuse includes

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

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

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

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

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

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

(a) committing any act of domestic violence;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) While passing an order under sub-section (1), sub-section (2) or sub- section (3), the court may also pass an order directing the officer-in- charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

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

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

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

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

(a) the loss of earnings;

(b) the medical expenses;

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

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

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

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

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

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

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

26. Relief in other suits and legal proceedings.

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

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

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

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

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

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

18. It will be noticed that the definition of domestic relationship contained in Section 2(f) is a very wide one. It is a relationship between persons who live or have lived together in a shared household and are related in any one of four ways - blood, marriage or a relationship in the nature of marriage, adoption, or family members of a joint family. A reading of these definitions makes it clear that domestic relationships involve persons belonging to both sexes and includes persons related by blood or marriage. This necessarily brings within such domestic relationships male as well as female in-laws, quite apart from male and female members of a family related by blood. Equally, a shared household includes a household which belongs to a joint family of which the respondent is a member. As has been rightly pointed out by Ms. Arora, even before the 2005 Act was brought into force on 26.10.2006, the Hindu Succession Act,1956 was amended, by which Section 6 was amended, with effect from 9.9.2005, to make females coparceners of a joint Hindu family and so have a right by birth in the property of such joint family. This being the case,

when a member of a joint Hindu family will now include a female coparcener as well, the restricted definition contained in Section 2(q) has necessarily to be given a relook, given that the definition of shared household in Section 2(s) of the Act would include a household which may belong to a joint family of which the respondent is a member. The aggrieved person can therefore make, after 2006, her sister, for example, a respondent, if the Hindu Succession Act amendment is to be looked at. But such is not the case under Section 2(q) of the 2005 Act, as the main part of Section 2(q) continues to read adult male person, while Section 2(s) would include such female coparcener as a respondent, being a member of a joint family. This is one glaring anomaly which we have to address in the course of our judgment.

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

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

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

passed by the Magistrate under Section 19(1)(c) against female relatives of such person would be unenforceable as they cannot be made parties to petitions under the Act.

22. When we come to Section 20, it is clear that a Magistrate may direct the respondent to pay monetary relief to the aggrieved person, of various kinds, mentioned in the Section. If the respondent is only to be an adult male person, and the money payable has to be as a result of domestic violence, compensation due from a daughter-in-law to a mother-in-law for domestic violence inflicted would not be available, whereas in a converse case, the daughter-in-law, being a wife, would be covered by the proviso to Section 2(q) and would consequently be entitled to monetary relief against her husband and his female relatives, which includes the mother-in-law.

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

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

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

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

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

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

Negativing this contention, this Court held:

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

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

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

Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in Heydon case [(1584) 3 Co Rep 7a : 76 ER 637] which became the historical source of purposive interpretation. The court would also invoke the legal maxim construction of ut res magis valeat quam pereatin such cases i.e. where alternative constructions are possible the court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way.

If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125 Cr.P.C, such a woman is to be treated as the legally wedded wife.[Para 20]

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

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

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

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

32. We have also been referred to D.S. Nakara v. Union of India, (1983) 1 SCC 305. This judgment concerned itself with pension payable to Government servants. An office Memorandum of the Government of India dated 25.5.1979 restricted such pension payable only to persons who had retied prior to a specific date. In holding the date discriminatory and arbitrary and striking it down, this Court went into the doctrine of classification, and cited from Re: Special Courts Bill, (1979) 2 SCR 476 and Maneka Gandhi v. Union of India, (1978) 2 SCR 621, and went on to hold that the burden to affirmatively satisfy the court that the twin tests of intelligible differentia

having a rational relation to the object sought to be achieved by the Act would lie on the State, once it has been established that a particular piece of legislation is on its face unequal. The Court further went on to hold that the petitioners challenged only that part of the scheme by which benefits were admissible to those who retired from service after a certain date. The challenge, it was made clear by the Court, was not to the validity of the Scheme, which was wholly acceptable to the petitioners, but only to that part of it which restricted the number of persons from availing of its benefit. The Court went on to hold:

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

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

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

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

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

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

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

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

54. A reasonable classification is one which includes all who are similarly situated and none who are not. Mathew, J., while explaining the meaning of the words, similarly situated

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

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

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

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

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

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

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

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

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

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

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

40. An application of the aforesaid severability principle would make it clear that having struck down the expression adult male in Section 2(q) of the 2005 Act, the rest of the Act is left intact

and can be enforced to achieve the object of the legislation without the offending words. Under Section 2(q) of the 2005 Act, while defining respondent, a proviso is provided only to carve out an exception to a situation of respondent not being an adult male. Once we strike down adult male, the proviso has no independent existence, having been rendered otiose.

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

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

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

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

44. However, it still remains to deal with the impugned judgment. We have set out the manner in which the impugned judgment has purported to read down Section 2(q) of the impugned Act. The doctrine of reading down in constitutional adjudication is well settled and has been reiterated from time to time in several judgments, the most recent of which is contained in Cellular Operators Association of India v. TRAI, (2016) 7 SCC 703. Dealing with the doctrine of reading down, this Court held:-

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

statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so. (emphasis supplied) [paras 50 and 51]

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

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

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

❑❑❑

VAISHALI ABHIMANYU JOSHI VERSUS NANASAHEB GOPAL JOSHI

SUPREME COURT OF INDIA

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

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

Civil Appeal No. 6448 of 2017
(Arising out of SLP (C) No. 24045 of 2016)

Decided on : **9th May, 2017**

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

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

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

which order was challenged by the appellant by means of writ petition which has been dismissed by judgment dated 07.07.2016 The High Court has held that in view ofthe express language in Section 15 as also the Second Schedule of Act, 1887, the Small Causes Court constituted under Act, 1887 cannot entertain and trythe counter claim. Aggrieved by the order of theHigh Court, the appellant has come up in this appeal.

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

Hon'ble Mr. Justice Ashok Bhushan :—

Leave granted.

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

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

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

The appellant got married with one Abhimanyu who is son of the respondent on 10.02.2000 Theappellant started residing in the suit flat No. 4, 45/4, Arati Society Shilavihar Colony, Paud Fata, Pune since 2004 alongwith her husband. The flat was alloted to the respondent by the Society inthe year 1971. On 13th June, 2011, the husbandof appellant left her at the suit flat and shifted to live with his parent at Mrutunjay Society. A daughter, namely, Ishwari was born from the wedlock ofthe appellant and the Abhimanyu, who was about 9 years in the year 2014. The respondent along with his wife had been residing in another flat nearby. The appellant was treated with cruelty by her husband and other members of the family. A suit for divorce on the basis of cruelty being P.A No. 23/2011 was filed by the appellant against her husband. A notice was sent on behalf of therespondent to the appellant on 23.01.2013 revoking the gratuitous licence and asking theappellant to stop the use and occupation of thesuit flat. The appellant replied the notice. Therespondent filed Suit No. 77/2013 in the Small Causes Court, Pune seeking for following reliefs:

> ***"A.*** *By an order of mandatory injunction thedefendant may be directed to stop the use and occupation of the suit flat and remove her belongings therefrom.*
>
> ***B.*** *The defendant may be restrained by an orderof perpetual prohibitory injunction fromusing/occupying the suit flat.*
>
> ***C.*** *The defendant may be restrained by an orderof perpetual prohibitory injunction fromobstructing the plaintiff and his family members to possess, use and occupy thesuit flat.*
>
> ***D.*** *Interim orders in terms of clause A, B, C above may be passed.*
>
> ***E.*** *Costs of the suit may be awarded to theplaintiff from the defendant.*
>
> ***F.*** *Any other just and other equitable orders inthe interest of justice may please be passed."*

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

> ***"i.*** *The suit & injunction application at Exh.5 ofthe plaintiff may kindly be dismissed with heavy costs.*
>
> ***ii.*** *It may be declared that the suit flat is theshared household.*
>
> ***iii.*** *The plaintiff, his agents, representatives, relatives or anyone claiming through him may kindly be restrained by an injunction fromdispossessing, disturbing the possession ofthe defendant in any manner from the suit flat, as per S.19 of D.V Act.*
>
> ***iv.*** *The plaintiff, his agents, representatives, relatives or anyone claiming through him may kindly be restrained by an injunction fromentering in the suit flat as per S.19 of DV Act.*

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

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

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

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

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

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

10. Shri Vinay Navare, learned counsel for therespondent refuting the submission of learned counsel for the appellant contends that counter claimof the appellant is clearly barred by Section 15 read

with Schedule II of the Act, 1887. He has referred to Item Nos. 11, 17 and 19. He submits that Provincial Small Cause Court is a Court which has limited jurisdiction. Referring to provisions of Order L of Civil Procedure Code he submits that only limited provisionsof Civil Procedure Code have been made applicable which indicates that no substantive issue can be decided by Provincial Small Cause Court. Learned counsel further made reference to Section 12 and Section 18 of Act, 1887 by which, according to him,the Registrar, who is a Chief Ministerial Officer of theCourt, is empowered to try certain suits which theJudge, Provincial Small Cause Court by general or special order directs. He submits that power given to Registrar to decide certain issues also militate againstthe idea that substantive issues can be decided by a Judge, Small Causes Court.

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

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

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

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

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

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

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

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

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

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

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

(17) *a suit to obtain in injunction;"*

16. The submission which has been pressed by thelearned counsel for the respondent is that the High Court for holding that Judge, Small Causes Court has no jurisdiction has relied on Section 15 read with clause (11) of Second Schedule. In paragraph 14 of thejudgment, the High Court gives the following reasoning for deciding against the appellant:

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

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

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

The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged that domestic violence is undoubtedly a human rights issue. The United Nations Committee on Convention on Eliminationof All Forms of Discrimination Against Women in its General Recommendations has recommended that State parties should act to protect womenagainst violence of any kind, especially that occurring within the family. The phenomenon ofdomestic violence in India is widely prevalent but has remained invisible in the public domain. Thecivil law does not address this phenomenon in its entirety. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498-A of the Indian Penal Code. In order to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent theoccurrence of domestic violence in the societythe Protection of Women from DomesticViolence Bill was introduced in Parliament.

Statement of Objects and Reasons

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

***

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

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

***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) *Notwithstanding anything contained elsewhere in this Act, but subject to theprovision of sub-section (2), the Court ofSmall Causes shall have jurisdiction to entertain and try all suits and proceedings between in licensor and licensee, or a landlord and tenants, relating to therecovery of possession of any immovable property situated in the area within thelocal limits of the jurisdiction of the Courtof Small Causes, or relating to the recoveryof the licence fee or charges or rent therefor, irrespective of the value of thesubject matter of such suits or proceedings.*

(2) *Nothing contained in sub-section (1) shall apply to suits or proceedings for therecovery of possession of any immovable property or of licence fee or charges or rent thereof, to which the provisions of theBombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955,the Bombay Provincial Municipal Corporations Act, 1919 or the Maharashtra Housing and Area Development Act, 1976, or any law for the time being in force, apply."*

26. Section 26 sub-Section (1) begins with "notwithstanding anything contained elsewhere in this Act". In the suit which was filed by therespondent before the Judge, Small Causes Court, the plaintiff (respondent herein) has claimed himself to be licensor and appellant as gratuitous licensee. In paragraph 9 of the plaint following has been pleaded by the plaintiff:

"9. *The Plaintiff submits that the Defendant has falsely stated in the Marriage petition bearing PA No. 23/2011 that she is in actual and physical possession of the suit flat even though she has been in use of the suit flat only as a gratuitous licensee. The plaintiff*

through his advocate served a notice to the Defendant on 23.01.2013, revokingthe gratuitous license and asking the Defendant to stop the use and occupation of the suit flat…"

27. Although the relief which has been claimed bythe plaintiff does not specifically contain any relief regarding recovery of possession from the appellant but the reliefs sought for indicate that the appellant is sought to be restrained from using the suit flat.

28. It is relevant to note that Item No. 4 of Second Schedule which included "a suit for the possession ofimmovable property or for the recovery of an interest in such property" had been deleted by MaharasthraAct 24 of 1984. Section 26 begins with 'non obstante' clause which shall override all contrary provisions contain in Act, 1887. Maharasthra Act 24 of 1984 has been brought by inserting Section 26 and by deleting Item No. 4 of Second Schedule only to make suit between licensor and licensee to be filed before theJudge, Small Causes Court. The suit filed by theplaintiff is virtually a suit for possession of the suit flatfrom the appellant who is occupying the same. Plaintiff alleged in the plaint that the gratuitous licence of the appellant has been terminated on 23.01.2013, hence, appellant is not entitled to use theflat and is liable to remove her belongings.

29. "Notwithstanding anything contained elsewhere in this Act" as used in Section 26(1) of Act, 1887 are words of expression of the widest amplitude engulfing the contrary provisions contained in theAct. The suit in question has been filed by theplaintiff for enforcement of his right as a licensor after allegedly terminating the gratuitous licence of theappellant. On a plain reading Item No. 11 of Schedule II covers determination or enforcement of any such right or interest in immovable property. But by virtueof Section 26 sub-Section (1) as applicable in State ofMaharasthra, Item No. 11 of Schedule 2 has to give way to Section 26(1) and a suit between licensor and licensee which is virtually a suit for recovery ofimmovable property is fully maintainable in Judge, Small Causes Court that is why the suit has been instituted by the plaintiff in the Judge, Small Causes Court claiming the right and interest in theimmovable property.

30. When the suit filed by the plaintiff for determination or enforcement of his right as a licensor can be taken cognizance by Judge, Small Causes Court we fail to see that why the relief claimed by theappellant in the Court of Small Causes within themeaning of Section 26 of Act. 2005 cannot be considered by the Judge, Small Causes Court. In factsof the present case, the bar and embargo underItem No. 11 of Schedule II read with Section 15 ofAct, 1887 stand whittled down and engulfed by virtueof Section 26 sub-Section (1) as applicable in Maharashtra.

31. A statutory provision containing non obstanteclause has to be given full effect. This Court in Union ofIndia v. G.M Kokil, 1984 Supp SCC 196 has laid down in paragraph 11 as below:

"11. *…It is well-known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect ofall contrary provisions. Thus the non obstante clause in Section 70, namely, "notwithstanding anything contained in that Act" must mean notwithstanding anything to the contrary contained in that Act and as such it must refer to theexempting provisions which would be contrary tothe general applicability of the Act…"*

32. Learned counsel for the appellant has placed reliance on a judgment of the Bombay High Court in Writ Petition No. 5648 of 2015, Ambreen Akhoon v.Aditya Aurn Paudwal Decided on 4th August, 2015. Theissue which was involved in the said case has been noted in paragraph 2 which is to the following effect:

"2. This Writ Petition involves a question of law as to whether any relief can be sought against therelative of the respondent husband in theproceedings filed under Section 26 of theProtection of Women from Domestic ViolenceAct before the Family Court?"

33. After considering the provisions of Act, 2005 and certain precedents, the Bombay High Court has laid down following in paragraph 18:

> ***"18.*** *As a question of law is raised before this Court, the Court has restricted its finding only to that extent and answered that the relatives of thehusband being respondents under Section 2(q) ofthe D V Act can be made party respondents beforethe Family Court if the proceedings specifiedunder Section 26 of the D.V Act are preferred."*

34. In the present case, the issue which is raised is entirely different and pertains to the jurisdiction ofSmall Causes Court to entertain counter claim filed bythe appellant seeking an order of residence. Theabove judgment is not relevant for answering the issue raised in the present case.

35. Learned counsel for the appellant has placed reliance on judgments of this Court in Allahabad Bankv. Canara Bank, (2000) 4 SCC 406; Solidaire India Ltd. v.Fair Growth Financial Services Ltd., (2001) 3 SCC 71 andBank of India v. Ketan Parekh, (2008) 8 SCC 148 forthe proposition that a special Act overrides a generalAct and when a conflict is found in two special Acts,the special Act latter in point of time has to prevail. He further contends that dominant purpose of theAct has to be looked into while deciding the question as to which of the Act shall prevail over other. Inthe facts of the present case especially Section 26 as inserted in the State of Maharashtra by MaharasthraAct 24 of 1984, it is not necessary to enter into theissue of conflict between Act, 1887 and Act, 2005. We have already observed above that the suit in thenature of present suit was cognizable before theJudge, Small Causes Court, hence, in the said suit determination of claim of the appellant seeking a right of residence under Section 19 is also not excluded from consideration. It is further to be noted that Act, 2005 was enacted to secure a social purpose. The provisions of the Act have to be construed widely. This Court in Hiral P. Harsora v. Kusum Narottamdas Harsora, (2016) 10 SCC 165 had occasion to consider the ambit and scope of Act, 2005. In paragraph 25 following has been stated by this Court:

> ***"25.*** *When we come to Section 26 of the Act,the sweep of the Act is such that all theinnovative reliefs available under Sections 18 to 22 may also be sought in any legal proceeding before a civil court, family court or criminal court affectingthe aggrieved person and the respondent. Theproceeding in the civil court, family court or criminal court may well include female members ofa family, and reliefs sought in those legal proceedings would not be restricted by thedefinition of "respondent" in the 2005 Act. Thus, an invidious discrimination will result, depending upon whether the aggrieved person chooses to institute proceedings under the 2005 Act or chooses to add to the reliefs available in either a pending proceeding or a later proceeding in a civil court, family court or criminal court. It is clear that there is no intelligible differentia between a proceeding initiated under the 2005 Act and proceeding initiated in other fora under other Acts, in which the self-same reliefs grantable under*

this Act, which are restricted to an adult male person, are grantable by the other fora also against female members of a family…"

36. Section 26 of the Act, 2005 has to be interpreted in a manner to effectuate the very purpose and object of the Act. Unless the determination of claim by an aggrieved person seeking any order as contemplated by Act, 2005 is expressly barred from consideration by a civil court, this Court shall be loath to read in bar in consideration of any such claim in any legal proceeding before the civil court. When the proceeding initiated by plaintiff in the Judge, Small Causes Court alleged termination of gratuitous licence of the appellant and prays for restraining the appellant from using the suit flat and permit the plaintiff to enter and use the flat, the right of residence as claimed by the appellant is inter-connected with such determination and refusal of consideration of claim of the appellant as raised in her counter claim shall be nothing but denying consideration of claim as contemplated by Section 26 of the Act, 2005 which shall lead to multiplicity of proceeding, which can not be the object and purpose of Act, 2005.

37. We, thus, are of considered opinion that the counter claim filed by the appellant before Judge, Small Causes Court in Civil Suit NO. 77 of 2013 was fully entertainable and courts below committed error in refusing to consider such claim.

38. We, however, make it clear that we have neither entered into the merits of the claim of the appellant nor shall be understood to have expressed any opinion on the claim either way and the merits of the claim has to be considered by the court in accordance with law.

39. In the result, the appeal is allowed, the judgment of the High Court dated 07.07.2016, judgment and order dated 05.11.2014 of 5th Additional Judge, Small Causes Court, Pune and judgment dated 17.12.2015 of the District Judge, Pune are set aside. It is held that counter claim filed by the appellant in Civil Suit No. 77 of 2013 is fully entertainable by Judge, Small Causes Court and needs to be considered in accordance with law.

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LANDMARK JUDGMENTS ON

MISCELLANEOUS

SHREYA VIDYARTHI VERSUS ASHOK VIDYARTHI & ORS.

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Ranjan Gogoi & Hon'ble Mr. Justice N.V. Ramana**

Shreya Vidyarthi ...Appellant
Versus
Ashok Vidyarthi & Ors. ...Respondents

Civil Appeal Nos.3162-3163 of 2010
[Arising out of Special Leave Petition
(Civil) No.12985 of 2016]

Decided on : **16th December, 2015**

While there can be no doubt that a Hindu Widow is not a coparcener in the HUF of her husband and, therefore, cannot act as Karta of the HUF after the death of her husband the two expressions i.e. Karta and Manager may be understood to be not synonymous and the expression "Manager" may be understood as denoting a role distinct from that of the Karta. Hypothetically, we may take the case of HUF where the male adult coparcener has died and there is no male coparcener surviving or as in the facts of the present case, where the sole male coparcener (respondent-plaintiff - Ashok Vidyarthi) is a minor. In such a situation obviously the HUF does not come to an end. The mother of the male coparcener can act as the legal guardian of the minor and also look after his role as the Karta in her capacity as his (minor's) legal guardian.

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi :—

1. The appellant before us is the 8th Defendant in Suit No. 630 of 1978 which was instituted by the firstrespondent herein as the plaintiff. The said suit filed for permanent injunction and in the alternative for a decree of partition and separation of shares by metes and bounds was dismissed by the learned Trial Court. In appeal, the High Court reversed the order of the Trial Court and decreed the suit of the respondent-plaintiff with a further declaration that he is entitled to 3/4th share in the suit property, namely, House No. 7/89, Tilak Nagar, Kanpur whereas the appellant (defendant No. 8 in the suit) is entitled to the remaining 1/4th share in the said property. Aggrieved, these appeals have been filed.

2. The relevant facts which will have to be noticed may be enumerated hereinunder.

In the year 1937 one Hari Shankar Vidyarthi married Savitri Vidyarthi, the mother of the respondent-plaintiff.

Subsequently, in the year 1942, Hari Shankar Vidyarthi was married for the second time to one Rama Vidyarthi. Out of the aforesaid second wedlock, two daughters, namely, Srilekha Vidyarthi and Madhulekha Vidyarthi (defendants 1 and 2 in Suit No. 630 of 1978) were born.

The appellant-eighth defendant Shreya Vidyarthi is the adopted daughter of Srilekha Vidyarthi (since deceased) and also the legatee/ beneficiary of a Will left by Madhulekha Vidyarthi.

3. The dispute in the present case revolves around the question whether the suit property, as described above, was purchased by sale deed dated 27.9.1961 by Rama Vidyarthi from the joint family funds or out of her own personal funds. The suit property had been involved in several previous litigations between the parties, details of which may now require a close look.

4. In the year 1968 Suit No. 147/1968 was instituted by Savitri Vidyarthi (mother of the respondent-plaintiff) contending that the suit property being purchased from the joint family funds a decree should be passed against the daughters of Rama Vidyarthi from interfering with her possession. This suit was dismissed under the provisions of Order VII Rule 11 CPC on account of failure to pay the requisite court fee. In the said suit the respondent-plaintiff had filed an affidavit dated 24.2.1968 stating that he had willfully relinquished all his rights and interests, if any, in the suit property. The strong reliance placed on the said affidavit on behalf of the appellant in the course of the arguments advanced on her behalf needs to be dispelled by the fact that an actual reading of the said affidavit discloses that such renunciation was only in respect of the share of Rama Devi in the suit property and not on the entirety thereof. Consistent with the above position is the suit filed by the respondent-plaintiff i.e. Suit No. 21/70/1976 seeking partition of the joint family properties. The said suit was again dismissed under the provisions of Order VII Rule 11 CPC for failure to pay the requisite court fee. It also appears that Rama Vidyarthi the predecessor-in-interest of the present appellant had filed Suit No. 37/1969 under Section 6 of the Specific Relief Act for recovery of possession of two rooms of the suit property which, according to her, had been forcibly occupied by the present respondentplaintiff.

During the pendency of the aforesaid suit i.e. 37/1969 Rama Vidyarthi had passed away. The aforesaid suit was decreed in favour of the legal heirs of the plaintiff-Rama Vidyarthi namely, Srilekha and Madhulekha Vidyarthi on 4.2.1976.

5. It is in the aforesaid fact situation that the suit out of which the present appeals have arisen i.e. Suit No. 630 of 1978 was filed by the present respondent-plaintiff impleading Srilekha Vidyarthi (mother of the appellant) and Madhulekha Vidyarthi (testator of the Will in favour of the appellant) as defendants 1 and 2 and seeking the reliefs earlier noticed.

6. The specific case pleaded by the plaintiff in the suit was that the plaintiff's father, Hari Shankar Vidyarthi, died on 14.3.1955 leaving behind his two widows i.e. Savitri Vidyarthi (first wife) and Rama Vidyarthi (second wife).

According to the plaintiff, the second wife i.e. Rama Vidyarthi had managed the day to day affairs of the entire family which was living jointly. The plaintiff had further pleaded that Rama Vidyarthi was the nominee of an insurance policy taken out by Hari Shankar Vidyarthi during his life time and that she was also receiving a monthly maintenance of a sum of Rs. 500/- on behalf of the family from the "Pratap Press Trust, Kanpur" of which Hari Shankar Vidyarthi was the managing trustee. In the suit filed, it was further pleaded that Rama Vidyarthi received a sum of Rs. 33,000/- out of the insurance policy and also a sum of Rs. 15,000/- from Pratap Press Trust, Kanpur as advance maintenance allowance. It was claimed that the said amounts were utilized to purchase the suit property on 27.9.1961. It was, therefore, contended that the suit property is joint family property having been purchased out of joint family funds. The plaintiff had further stated that all members of the family including the first wife, the first respondent

and his two step sisters i.e. Srilekha and Madhulekha Vidyarthi had lived together in the suit property. As the relationship between the parties had deteriorated/changed subsequently and the plaintiffrespondent and his mother (Savitri Vidyarthi) were not permitted to enter the suit property and as a suit for eviction was filed against the first respondent (37 of 1969) by Rama Vidyarthi the instant suit for permanent injunction and partition was instituted by the respondent-plaintiff.

7. The plaintiff's suit was resisted by both Srilekha and Madhulekha, primarily, on the ground that the suit property was purchased by their mother Rama Vidyarthi from her own funds and not from any joint family funds. In fact, the two sisters, who were arrayed as defendants 1 and 2 in the suit, had specifically denied the existence of any joint family or the availability of any joint family funds.

8. The Trial Court dismissed the suit by order dated 19.8.1997 citing several reasons for the view taken including the fact that respondent-plaintiff was an attesting witness to the sale deed dated 27.9.1961 by which the suit property was purchased in the name of Rama Vidyarthi; there was no mention in the sale deed that Rama Vidyarthi was representing the joint family or that she had purchased the suit property on behalf of any other person. The learned Trial Court further held that in the year 1955 when Hari Shankar Vidyarthi had died there was no joint family in existence and in fact no claim of any joint family property was raised until the suit property was purchased in the year 1960-61. The Trial Court was also of the view that if the other members of the family had any right to the insurance money such a claim should have been lodged by way of a separate suit. Aggrieved by the dismissal of the suit, the respondent-plaintiff filed an appeal before the High Court.

9. Certain facts and events which had occurred during the pendency of the appeal before the High Court will require a specific notice as the same form the basis of one limb of the case projected by the appellant before us in the present appeal, namely, that the order of the High Court is an ex-parte order passed without appointing a legal guardian for the appellant for which reason the said order is required to be set aside and the matter remanded for a de novo consideration by the High Court.

10. The first significant fact that has to be noticed in this regard is the death of Madhulekha Vidyarthi during the pendency of the appeal and the impleadment of the appellant as the 8th respondent therein by order dated 31.08.2007. This was on the basis that the appellant is the sole legal heir of the deceased Madhulekha. The said order, however, was curiously recalled by the High Court by another order dated 10.10.2007. The next significant fact which would require notice is that upon the death of her mother Srilekha Vidyarthi, the appellant-defendant herself filed an application for pursuing the appeal in which an order was passed on 16/18.05.2009 to the effect that the appellant is already represented in the proceedings through her counsel (in view of the earlier order impleading the appellant as legal heir of Madhulekha). However, by the said order the learned counsel was given liberty to obtain a fresh vakalatnama from the appellant which, however, was not so done. In the aforesaid fact situation, the High Court proceeded to consider the appeal on merits and passed the impugned judgment on the basis of consideration of the arguments advanced by the counsel appearing on behalf of the appellant at the earlier stage, namely, one Shri A.K. Srivastava and also on the basis of the written arguments submitted on behalf of the deceased Srilekha Vidyarthi. It is in these circumstances that the appellant has now, inter alia, contended that the order passed by the High Court is without appointing any

guardian on her behalf and contrary to the provisions of Order XXXII Rules 3, 10 and 11 of the CPC.

11. Insofar as the merits of the appeal are concerned, the High Court took the view that on the facts before it, details of which will be noticed in due course, there was a joint family in existence in which the second wife Rama Vidyarthi had played a predominant role and that the suit property was purchased out of the joint family funds namely the insurance money and the advance received from the Pratap Press Trust, Kanpur. Insofar as the devolution of shares is concerned, the High Court took the view that following the death of Hari Shankar Vidyarthi, as the sole surviving male heir, the respondent-plaintiff became entitled to 50% of the suit property and the remaining 50% was to be divided between the two wives of Hari Shankar Vidyarthi in equal proportion. Srilekha and Madhulekha Vidyarthi, i.e. defendants 1 and 2 in the suit, as daughters of the second wife, would be entitled to share of Rama Vidyarthi, namely, 25% of the suit property. On their death, the appellant would be entitled to the said 25% share whereas the remaining 25% share (belonging to the first wife) being the subject matter of a Will in favour of her minor grandchildren (sons of the respondent-plaintiff), the respondentplaintiff would also get the aforesaid 25% share of the suit property on behalf of the minors. Accordingly, the suit was decreed and the order of dismissal of the suit was reversed.

12. The aforesaid order of the High Court dated 12.08.2009 was attempted to be recalled by the appellant-8th defendant by filing an application to the said effect which was also dismissed by the High Court by its order dated 24.11.2009. Challenging both the abovesaid orders of the High Court, the present appeals have been filed.

13. Having heard learned counsels for the parties, we find that two issues in the main arise for determination in these appeals. The first is whether the High Court was correct in passing the order dated 24.11.2009 on the recall application filed by the appellant and whether, if the appellant had really been proceeded ex-parte thereby rendering the said order untenable in law, as claimed, should the matter be remitted to the High Court for reconsideration. The second question arising is with regard to the order dated 12.08.2009 passed by the High Court in First Appeal No. 693 of 1987 so far as the merits thereof is concerned.

14. The detailed facts in which the appellant-8th defendant came to be impleaded in the suit following the death of Madhulekha Vidyarthi (defendant No. 2) and thereafter on the death of Srilekha Vidyarthi (defendant No. 1) has already been seen. From the facts recorded by the High Court in its order dated 24.11.2009 it is clear and evident that the appellant had participated in the proceeding before the High Court at various stages through counsels. Therefore, there is no escape from the conclusion that the order passed in the appeal was not an ex-parte order as required to be understood in law. The appellant was already on record as the legal heir of Madhulekha Vidyarthi (defendant No. 2) and was represented by a counsel. The High court had passed its final order after hearing the said counsel and upon consideration of the written arguments filed in the case. In its order dated 24.11.2009 the High Court has observed that full opportunity of hearing on merits was afforded to the appellant. Even before us, the appellant has been heard at length on the merits of the case. In these circumstances there can hardly be any justification to remand the matter to the High Court for a fresh consideration by setting aside the impugned order.

15. Insofar as the merits of the order of the High Court is concerned, the sole question involved is whether the suit property was purchased by Rama Vidyarthi, (defendant No.1) out of the joint family funds or from her own income.

The affidavit of Rama Vidyarthi in Suit No. 147 of 1968 filed by Savitri Vidyarthi discloses that she was looking after the family as the Manager taking care of the respondent No.1, her step son i.e. the son of the first wife of Hari Shankar Vidyarthi. In the said affidavit, it is also admitted that she had received the insurance money following the death of Hari Shankar Vidyarthi and the same was used for the purchase of the suit property along with other funds which she had generated on her own. The virtual admission by the predecessor-in-interest of the appellant of the use of the insurance money to acquire the suit property is significant. Though the claim of absolute ownership of the suit property had been made by Rama Vidyarthi in the aforesaid affidavit, the said claim is belied by the true legal position with regard to the claims/entitlement of the other legal heirs to the insurance amount. Such amounts constitute the entitlement of all the legal heirs of the deceased though the same may have been received by Rama Vidyarthi as the nominee of her husband. The above would seem to follow from the view expressed by this Court in Smt. Sarbati Devi & Anr. vs. Smt. Usha Devi[1] which is extracted below. (Paragraph 12)

> *"**12.** Moreover there is one other strong circumstance in this case which dissuades us from taking a view contrary to the decisions of all other High Courts and accepting the view expressed by the Delhi High Court in the two recent judgments delivered in the year 1978 and in the year 1982. The Act has been in force from the year 1938 and all along almost all the High Courts in India have taken the view that a mere nomination effected under Section 39 does not deprive the heirs of their rights in the amount payable under a life insurance policy. Yet Parliament has not chosen to make any amendment to the Act. In such a situation unless there are strong and compelling reasons to hold that all these decisions are wholly erroneous, the Court should be slow to take a different view. The reasons given by the Delhi High Court are unconvincing. We, therefore, hold that the judgments of the Delhi High Court in Fauza Singh case and in Uma Sehgal case do not lay down the law correctly. They are, therefore, overruled. We approve the views expressed by the other High Courts on the meaning of Section 39 of the Act and hold that a mere nomination made under Section 39 of the Act does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them."*

16. The fact that the family was peacefully living together at the time of the demise of Hari Shankar Vidyarthi; the continuance of such common residence for almost 7 years after purchase of the suit property in the year 1961; that there was no discord between the parties and there was peace and tranquility in the whole family were also rightly taken note of by the High Court as evidence of existence of a joint family. The execution of sale deed dated 27.9.1961 in the name of Rama Vidyarthi and the absence of any mention thereof that she was acting on behalf of the joint family has also been rightly construed by the High Court with reference to the young age of the plaintiff-respondent (21 years) which may have inhibited any objection to the dominant

1 1984 (1) SCC 424

position of Rama Vidyarthi in the joint family, a fact also evident from the other materials on record.

Accordingly, there can be no justification to cause any interference with the conclusion reached by the High Court on the issue of existence of a joint family.

17. How could Rama Vidyarthi act as the Karta of the HUF in view of the decision of this Court in Commissioner of Income Tax vs. Seth Govindram Sugar Mills Ltd.[2] holding that a Hindu widow cannot act as the Karta of a HUF which role the law had assigned only to males who alone could be coparceners (prior to the amendment of the Hindu Succession Act in 2005). The High Court answered the question in favour of the respondent-plaintiff by relying on the decision of this Court in Controller of Estate Duty, Madras Vs. Alladi Kuppuswamy[3] wherein the rights enjoyed by a Hindu widow during time when the Hindu Women's Rights to Property Act, 1937 remained in force were traced and held to be akin to all rights enjoyed by the deceased husband as a coparcener though the same were bound by time i.e. life time of the widow (concept of limited estate) and without any authority or power of alienation. We do not consider it necessary to go into the question of the applicability of the ratio of the decision in Controller of Estate Duty, Madras (supra) to the present case inasmuch as in the above case the position of a Hindu widow in the co-parcenary and her right to co-parcenary property to the extent of the interest of her deceased husband was considered in the context of the specific provisions of the Estate Duty Act, 1953. The issue(s) arising presently are required to be answered from a somewhat different perspective.

18. While there can be no doubt that a Hindu Widow is not a coparcener in the HUF of her husband and, therefore, cannot act as Karta of the HUF after the death of her husband the two expressions i.e. Karta and Manager may be understood to be not synonymous and the expression "Manager" may be understood as denoting a role distinct from that of the Karta. Hypothetically, we may take the case of HUF where the male adult coparcener has died and there is no male coparcener surviving or as in the facts of the present case, where the sole male coparcener (respondent-plaintiff - Ashok Vidyarthi) is a minor. In such a situation obviously the HUF does not come to an end. The mother of the male coparcener can act as the legal guardian of the minor and also look after his role as the Karta in her capacity as his (minor's) legal guardian. Such a situation has been found, and in our opinion rightly, to be consistent with the law by the Calcutta High Court in Sushila Devi Rampuria v. Income Tax Officer and Anr.[4] rendered in the context of the provisions of the Income Tax Act and while determining the liability of such a HUF to assessment under the Act. Coincidently the aforesaid decision of the Calcutta High Court was noticed in Commissioner of Income Tax vs. Seth Govindram Sugar Mills Ltd. (supra).

19. A similar proposition of law is also to be found in decision of the Madhya Pradesh High Court in Dhujram v. Chandan Singh & Ors.[5] though, again, in a little different context. The High Court had expressed the view that the word 'Manager' would be consistent with the law if understood with reference to the mother as the natural guardian and not as the Karta of the HUF.

2 AIR 1966 SC 24

3 [1977 (3) SCC 385]

4 AIR 1959 Cal 697

5 1974 MPL J554

20. In the present case, Rama Vidyarthi was the step mother of the respondent-plaintiff -Ashok Vidyarthi who at the time of the death of his father - Hari Shankar Vidyarthi, was a minor. The respondent plaintiff was the only surviving male coparcener after the death of Hari Shankar Vidyarthi. The materials on record indicate that the natural mother of Ashok Vidyarthi, Smt. Savitri Vidyarthi, had played a submissive role in the affairs of the joint family and the step mother, Rama Vidyarthi i.e. second wife of Hari Shankar Vidyarthi had played an active and dominant role in managing the said affairs. The aforesaid role of Rama Vidyarthi was not opposed by the natural mother, Savitri Vidyarthi. Therefore, the same can very well be understood to be in her capacity as the step mother of the respondentplaintiff-Ashok Vidyarthi and, therefore, consistent with the legal position which recognizes a Hindu Widow acting as the Manager of the HUF in her capacity as the guardian of the sole surviving minor male coparcener. Such a role necessarily has to be distinguished from that of a Karta which position the Hindu widow cannot assume by virtue of her dis-entitlement to be a coparcener in the HUF of her husband. Regrettably the position remain unaltered even after the amendment of the Hindu Succession Act in 2005.

21. In the light of the above, we cannot find any error in the ultimate conclusion of the High Court on the issue in question though our reasons for the aforesaid conclusion are somewhat different.

22. Before parting we may note that the history of the earlier litigation between the parties involving the suit property would not affect the maintainability of the suit in question (630 of 1978). Suit No.37 of 1969 filed by Rama Vidyarthi was a suit under Section 6 of the Specific Relief Act whereas Suit No.147 of 1968 and Suit No. 21/70/1976 filed by first wife Savitri Vidyarthi and Ashok Vidyarthi, respectively, were dismissed under Order VII Rule 11 CPC on account of non-payment of court fee. In these circumstances, the suit out of which the present appeal has arisen i.e. Suit No. 630 of 1978 was clearly maintainable under Order VII Rule 13 CPC.

23. The apportionment of shares of the parties in the suit property made by the High Court, in the manner discussed above, also does not disclose any illegality or infirmity so as to justify any correction by us. It is our considered view that having held and rightly that the suit property was a joint family property, the respondent-plaintiff was found entitled to seek partition thereof and on that basis the apportionment of shares in the suit property between the plaintiff and the contesting eighth defendant was rightly made by the High Court in accordance with the reliefs sought in the suit.

24. For the aforesaid reasons, we do not find any merit in these appeals, the same are being accordingly dismissed.

However, in the facts of the case we leave the parties to bear their own costs.

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L. GOWRAMMA (D) BY LR. VERSUS SUNANDA (D) BY LRS. & ANR.

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Kurian Joseph & Hon'ble Mr. Justice R.F. Nariman**

L. Gowramma (D) by Lr. – Appellant
Versus
Sunanda (D) by Lrs. & Anr. – Respondents

Civil Appeal Nos. 174-175 of 2016
(Arising out of S.L.P. (Civil) Nos.24809-24810 of 2008)

Decided on : **12th January, 2016**

Hindu Law Women's Rights Act, 1933 (Mysore Act No. X of 1933) – Sections 8(1)(d) and 10(1)(g) – Order of succession – Section 8(1)(d) can have no application to a case where joint family property passes to a single coparcener not by survivorship but by partition – Succession to a Hindu male dying intestate will vest only in widow under Section 4(1)(ii) to exclusion of daughters who are mentioned in subsequent Clause (iii) – Under Section 10(1)(g) it is only property taken by inheritance by a female from her husband that is included in Stridhan – This would not include unmarried daughters as property taken by inheritance by a female from her father is not included.(Paras 17, 19 and 20)

(1997) 10 SCC 684 ; [1968] 1 SCR 124 – Relied. ILR 2014 Karnataka 1335 – Approved.

Facts of Case:

Instant appeals raise question on true construction of some of provisions of Hindu Law Women's Rights Act, 1933 (Mysore Act No. X of 1933). Widow has executed a will on 9.5.1990 bequeathing her share in joint family property in favour of only one of three daughters namely the third defendant. 4th defendant has been joined in suit inasmuch as first defendant widow had sold one of scheduled items of suit property namely item No.3 to the said 4th defendant during the pendency of suit.

Findings of Court:

There is also another way of looking at the issue raised in present appeals. A partition of joint family property among brothers is expressly mentioned in Section 8(1)(b). Therefore, upon partition of joint family property between Thimmappa and his older brother, it is only their mother, their unmarried sisters and widows and unmarried daughters of their pre-deceased undivided brothers who have left no male issue who get a share under the Section. Unlike sub-section (a), unmarried daughters of Thimmappa do not get any share at the partition between Thimmappa and his brother.

Result : Appeals allowed. Judgments passed by Courts below set aside.

Cases referred :

Byamma Vs. Ramdev reported in I.L.R. 1991 KAR 3245 – Referred.

Sathyaprema Manjunatha Gowda (Smt) Vs. Controller of Estate Duty, Karnataka, (1997) 10 SCC 684 – Relied.

Nagendra Prasad Vs. Kempananjamma, [1968] 1 SCR 124 – Relied.

Smt. Ramakka and others Vs. Smt. Thanamma since deceased by LR, P. Srinivas and Others, ILR 2014 Karnataka 1335 – Approved.

HINDU LAW WOMENS RIGHTS ACT : S.10(1)(g), S.4(1)(ii), S.8(1)(d)

IMPORTANT POINT

Property taken by inheritance by a female from her father is not included in Stridhan.

JUDGMENT

Hon'ble Mr. Justice R.F. Nariman :—

1. Delay condoned in filing the special leave petitions.

2. Leave granted.

3. These appeals raise an interesting question on the true construction of some of the provisions of the Hindu Law Women's Rights Act, 1933 (Mysore Act No.X of 1933). One Venkatsubbaiah had two sons Mahabalaiah and Thimmappa. After the death of Venkatsubbaiah the two sons and the wife of Mahabalaiah constituted a joint Hindu family. Mahabalaiah being the elder brother was the Karta of the said family. In the year 1940-1941, Mahabalaiah and Thimmappa partitioned and divided their joint family properties and got possession of their respective shares. Thimmappa died on 9.10.1952, leaving behind him his widow one Gowramma and three daughters. The widow has executed a will on 9.5.1990 bequeathing her share in the joint family property in favour of only one of the three daughters namely the third defendant. The 4th defendant has been joined in the suit inasmuch as the first defendant widow had sold one of the scheduled items of the suit property namely item No.3 to the said 4th defendant during the pendency of the suit.

4. One of the said daughters namely Sunanda filed a suit against defendant No.1 – her mother, defendant Nos. 2 and 3 – her sisters, and defendant No.4 – the purchaser, being O.S. No.46 of 1994. After setting out the relevant facts, the Civil Judge, Senior Division by judgment dated 28.3.2005 framed as many as 12 issues and ultimately decided on application of Section 10(2)(g) of the 1933 Act that the plaintiff would be entitled to a 1/4th share in the scheduled properties and the suit was decreed accordingly.

5. In a first appeal filed by defendant No.1, the first Appellate Court agreed with the conclusions both on facts as well as law with the trial court. Accordingly, the first appeal was dismissed on 5.8.2005.

6. Thereafter, a review petition was filed and by the judgment dated 24.11.2007, the review was dismissed but this time adverting to Section 8(1)(d) of the 1933 Act and decreeing the suit with reference to the said Section. The review also was accordingly dismissed.

7. Shri R.S. Hegde, learned counsel appearing on behalf of the appellant has urged before us that the applicable Section of the 1933 Act is Section 4, and not Sections 8 and 10, and accordingly

the succession of a Hindu male dying intestate vests property only in the widow to the exclusion of the daughters and hence the plaintiff's suit should have been dismissed on this ground.

8. On the other hand, Shri S.N. Bhat, learned counsel, invited our attention to Section 8(1)(d) of the Act and according to him since joint family property passed to Thimmappa who was a single coparcener by survivorship, on partition in 19401941, all the classes of females mentioned in Section 8 would be entitled to a share in the said property which would include not only his widow but also his unmarried daughters.

9. For a proper appreciation of the controversy at hand, we set out the relevant Sections of the Hindu Law Women's Rights Act, 1933 (Mysore Act No.X of 1933).

"Part I

INHERITANCE

4. Order of succession:-

(1) The succession to a Hindu male dying intestate shall, in the first place, vest in the members of the family of the propositus mentioned below, and in the following order:-

i) the male issue to the third generation ;

ii) the widow ;

iii) daughters ;

iv) daughter's sons

XXX XXX XXX

8. Certain females entitled to shares at partition-

(1) (a) At a partition of joint family property between a person and his son or sons, his mother, his unmarried daughters and the widows and unmarried daughters of his predeceased undivided sons and brothers who have left no male issue shall be entitled to share with them.

(b) At a partition of joint family property among brothers, their mother, their unmarried sisters and the widows and unmarried daughters of their predeceased undivided brothers who have left no male issue shall be entitled to share with them.

(c) Sub-sections (a) and (b) shall also apply mutatis mutandis to a partition among other coparceners in a joint family.

(d) Where joint family property passes to a single co-parcener by survivorship, it shall so pass subject to the right to shares of the classes of females enumerated in the above sub-sections.

XXX XXX XXX

10. What is "stridhana" –

(1) "Stridhana" means property of every description belonging to a Hindu female, other than property in which she has, by law or under the terms of an instrument, only a limited estate.

(2) "Stridhana" includes :

XXX XXX XXX XXX

(g) property taken by inheritance by a female from another female and property taken by inheritance by a female from her husband or son, or from a male relative connected by blood except when there is a daughter or daughter's son of the propositus alive at the time the property is so inherited.

(3) All gifts and payments other than or in addition to, or in excess of, the customary presents of vessels, apparel and other articles of personal use made to a bride or bridegroom in connection with their marriage or to their parents or guardians or other person on their behalf, by the bridegroom, bride or their relatives or friends, shall be the stridhana of the bride."

10. A cursory reading of Section 8 would reveal that various females mentioned in the Section would be entitled to a share of joint family property in the circumstances mentioned therein. Under Sections 8(1)(a) to 8(1)(c) there has necessarily first to be a partition in the circumstances mentioned in each of the said sub-sections whereas under sub-section (d) what is required is that joint family properties should pass to a single coparcener by survivorship. If this condition of subclause (d) is met, then all the women mentioned in sub-clauses (a) to (c) would be entitled to a share therein.

11. Shri Bhat relied upon a judgment delivered by B.P. Singh,J. in Byamma v. Ramdev reported in I.L.R. 1991 KAR 3245. After setting out Section 8 of the 1933 Act, it was held:-

"It is well settled that devolution of joint family property, which come to the hands of a son from his father or grand-father or great-grand-father as unobstructed heritage is governed by the Rule of Survivorship. A male coparcener acquires right to such property by birth. This is different from property that may come to the hands of a coparcener in which he has no right by birth. This is what is known as obstructed heritage, and such property devolve by succession and not by survivorship. Such a distinction is well known in Hindu Law. Therefore, when Section 8(1)(d) of the Mysore Act refers to the properties passing on to a single coparcener by survivorship, it has reference to the ancestral properties which come to his hands upon partition or otherwise. It is also well settled that if a coparcener dies, his interest devolves upon other coparceners by survivorship. As long as the joint family is in existence, all the coparceners jointly own all the properties. Each coparcener is a full owner of each property owned by the joint family. The effect of partition is severance of status and, as a consequence, each coparcener becomes entitled to separate possession and enjoyment of his share in the joint family properties. Partition by itself does not create a right because the right of a coparcener existed even before partition. It only brings about demarcation of his interest with a right to separate possession and enjoyment. It is therefore, not correct to state that when a coparcener, upon partition, gets his share in the joint family properties, it does not come to him by survivorship. The right which accrues to the coparcener is by operation of the Rule of Survivorship and the partition only demarcates his share in the joint family properties. As observed earlier, unobstructed heritage always devolves by operation of the Rule of Survivorship and there is no exception to this Rule. It has therefore been held that where a father disposes of by a Will, his interest in the joint family properties in favour of his son, the properties in the hands of the son still retain the character of coparcenary property, and not self-acquired property.

I, therefore, hold that the properties to which Chowdappa became entitled, upon partition passed on to him by survivorship. I find no substance in the contention raised on behalf of the respondents that it passed on to him by reason of partition and not by survivorship.

In view of Section 8(1) of the Act, there can be no doubt that a single coparcener such as Chowdappa took the ancestral property, subject to the right to shares of female members of the joint family enumerated in Clauses (a), (b) or (c) of Section 8(1) of the Mysore Act. The plaintiff, being a widow of a pre-deceased son, was entitled to a share equal to one half of the share to which her husband would have been entitled if he were alive [vide Section 8(1) (a) of the Mysore Act]. I therefore hold that the plaintiff is entitled to claim one half of the share which her husband could have claimed if he was alive. In the instant case her husband would have got half share in the properties in a partition between his father and himself in the year 1946 when Chowdappa became a single coparcener. Consequently, she is entitled to 1/4th share in the suit schedule properties." (at para nos.10, 11, 12 and 17)

12. Unfortunately for Shri Bhat, this Court in Sathyaprema Manjunatha Gowda (Smt) v. Controller of Estate Duty, Karnataka, (1997) 10 SCC 684, has taken a view which is directly contrary to the view of the single Judge of the Karnataka High Court.

13. In Sathyaprema's case (supra), the question posed was whether in the facts and circumstances of the case the Tribunal was correct in holding that neither the unmarried daughter nor the wife of the deceased had any interest in the joint family property of the deceased while he was alive. This Court stated that the only question for consideration is whether the estate left by the husband and father of the widow and unmarried daughter respectively on partition was obtained by survivorship applying Section 8(1)(d) of the Act.

14. This Court exhaustively discussed the meaning of the expressions "survivor" and "survivorship" and ultimately held:-

"Here, we are concerned with Manjunatha Gowda who had obtained property at a partition with coparceners. Survivorship, therefore, is the living of one of two or more persons after the death of the others having interest to succeed in the property by succession. The shares in the coparcenery property changes with death or birth of other coparceners. However, in the case of survivorship it is not of the same incidence. He received the property at the partition without there being any other coparcener. It is an individual property and, therefore, he did not receive it by survivorship but by virtue of his status being a coparcener of the Hindu Joint Family along with his father and brothers.

Under these circumstances, the conclusion reached by the High Court that since it is by partition, not by survivorship, clause (d) of sub-section (1) of Section 8 does not get attracted, is not (sic) correct. No doubt, the learned counsel relied upon the judgment of this Court in Nagendra Prasad v. Kempananjamma [AIR 1968 SC 209] which was also considered by the High Court in the impugned judgment. This Court therein has explained that the object of Section 8(1)(d) is to give a right to claim a share in the joint family property to all females referred to in clauses (a) to (c) thereof. Merely because partition by one of the coparceners under clauses (a) to (c) is a condition for a class of family members entitled to a share in the property, it does not apply to a case where class of family members entitled under clause 8(1)(d) since it stands altogether on a different footing and, therefore, partition is not a condition precedent for claiming a share by a class of family members enumerated in Section 8(1)(a) of the Act. But that principle has

no bearing to the facts in this case for the reason that the property held was not received by survivorship. Under these circumstances, family members enumerated under Section 8(1)(d) are notentitled to a share in the estate left by the deceased. Thus we do not find any illegality in the view taken by the High Court warranting interference." (at paragraph nos.13-15)

15. In fact, this follows from a reading of Section 8. Whereas Sections 8(1)(a)(b) and (c) refers to a partition among coparceners in a joint family, sub-section (d) refers to property passing to a single coparcener only by survivorship. In this behalf, in Nagendra Prasad v. Kempananjamma, [1968] 1 SCR 124, this Court by a majority judgment held:-

"This intention can only be given effect to on the basis that clause (d) does not restrict itself to finding out females on the basis of an assumed partition between the last two male coparceners. It is significant that clause (d) gives a right independently of a partition and we do not see why its scope should be restricted by assuming a partition." (at page No.128).

16. In fact, even the dissenting Judge held:-

"Clause (d) applies to a case when the family property passes by survivorship to a sole surviving coparcener. In such a case there can be no partition, as is the case under clause (a) or (b) or (c). Indeed, the property becomes incapable of partition and but for clause (d) no female relative would have any right to a share. To save such a result clause (d) provides that the rights of the female relatives should not be lost only by reason of the property passing to the sole surviving coparcener. Sub-section 5, furthermore, gives such female relatives as fall under subsection 1 a right to have their shares separated and thus makes them co-sharers subject to whose rights the sole surviving coparcener takes the property. Therefore, whereas under clauses (a), (b) and (c) the rights fluctuate according to the position of the female relatives in the family when the partition takes place there is no such uncertainty in the case falling under clause (d) as the sole surviving coparcener takes the property subject to the right to shares of female relatives falling under the provisions of clause (a) or (b) or (c). Such is the scheme of Section 8(1)."

17. The dissenting Judge basically dissented on the point that under sub-clause (d), a partition has to be assumed because it is only on such assumption that females on whom a right to share is conferred can be ascertained. It is clear, therefore, that Section 8(1)(d) can have no application to a case where joint family property passes to a single coparcener not by survivorship but by partition.

A recent view of Section 8(1)(d) in Smt. Ramakka and others v. Smt. Thanamma since deceased by LR, P. Srinivas and Others, ILR 2014 Karnataka 1335, has been taken by a Division Bench of the Karnataka High Court. While construing Section 8(1)(d), the Division Bench has held:-

"When the coparcenary property passes to a sole surviving coparcener, provision has been made in clause (d) of Section 8(1). This clause, in protecting the rights of females, had necessarily to give females the right to share in the coparcenary property even if there be no partition at all, because, on passing of property to a sole surviving coparcener, there could not possibly be any partition sought by the male members of the coparcenary body. The right conferred by clause (d) is, therefore, an independent right and not connected with the rights granted to the females under clauses (a), (b) and (c). The females who are to get benefit are all those to whom a right to a share in the joint family property would have accrued if there had been a partition either under clause (a), or clause (b) or clause (c). The language of clause (d) has to be interpreted as

laying down that right to shares will vest in all females of the joint Hindu family who would have possibly received the right to a share if at any earlier time there had been partition in the family in any of the three manners laid down in clauses (a), (b) and (c). It is significant that clause (d) gives a right independent of a partition and its scope should not be restricted by assuming a partition."

This is the correct view of the law on Section 8(1)(d), and we endorse it.

18. There is also another way of looking at the issue raised in the present appeals. A partition of joint family property among brothers is expressly mentioned in Section 8(1)(b). Therefore, upon partition of joint family property between Thimmappa and his older brother, it is only their mother, their unmarried sisters and widows and unmarried daughters of their pre-deceased undivided brothers who have left no male issue who get a share under the Section. Unlike sub-section (a), unmarried daughters of Thimmappa do not get any share at the partition between Thimmappa and his brother.

19. The ground on which the judgments below rested, namely Section 10(1)(g), was not even sought to be supported by Shri Bhat. And for a very good reason. In order that Section 10(1)(g) apply, first and foremost the property referred to is "stridhana" which is defined as property of every description belonging to a Hindu female other than property in which she has by law or under the terms of an instrument only a limited estate. Under Section 10(1)(g) it is only property taken by inheritance by a female from her husband that is included in stridhana. This would not include the unmarried daughters as property taken by inheritance by a female from her father is not included.

20. In this view of the matter, Shri Hegde is right in saying that the succession to a Hindu male dying intestate will vest only in the widow under Section 4(1)(ii) to the exclusion of the daughters who are mentioned in a subsequent clause i.e. clause (iii) by virtue of the expression "in the following order". This being the case, it is clear that the appeals will have to be allowed and the judgments of the courts below set aside. The suit will stand dismissed as a consequence.

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R. KASTHURI VERSUS M. KASTHURI AND ANR

SUPREME COURT OF INDIA

Bench : **Hon'ble Mr. Justice Ranjan Gogoi and Hon'ble Mrs. Justice R. Banumathi**

R. Kasthuri & ors. ...Appellant(s)
Versus
M. Kasthuri & ors. ...Respondent(s)

Civil Appeal No (s). 432 Of 2018
[Arising out of Special Leave Petition
(Civil) No.12985 of 2016]

Decided on : **16th January, 2018**

The appellant-plaintiff filed a petition in Civil Court at Madras seeking to declare that applellant- Plaintiff 1 is the legally wedded wife of the late Gunaseelan and Plaintiff 2 to 4 are legitimate children of the plaintiff 1 and the late Gunaseelan and these are the legal heirs of the deceased person. The suit arose in the situation when the legal heir-ship of the plaintiffs was challenged by the Defendant 1 and 2 who also claimed to be the wife and legitimate child of the deceased person. Here, in the second appeal to the High Court , it was claimed that the nature of the suit and the relief clearly shows that the civil court had no jurisdiction to entertain the suit as the matter completely lies within the domain of the Family Court constituted under Family Court Act, 1984. The Supreme Court decided that there is no family dispute involved between the plaintiff and defendant because it is not a matrimonial matter as the suit arose after the death of the concerned husband. The present dispute is of civil nature as it will be resolved on the basis of evidence to be tendered by the parties which will be judged by the Evidence Act, 1872. Therefore, it is held that the High Court was incorrect in holding the suit filed by the appellant-plaintiff to be not maintainable by law. The order of the High Court was set aside.

ORDER

1. Leave granted.

2. The appellants – plaintiffs had instituted a civil suit (O.S. No.222 of 1998) in the City Civil Court at Madras seeking, inter alia, following reliefs:

> *"**A.** Declaring that the first plaintiff is the legally wedded wife of the deceased Gunaseelan S/o V.M. Aalai.*
>
> ***B.** Declaring that the plaintiffs 2 to 4 are the Signature Not Verified Digitally signed by legitims to children of the first plaintiff and late Gunaseelan S/o Alai.*
>
> ***C.** Declaring that the first plaintiff as wife, the plaintiffs 2 to 4 as children and the 3rd defendant as mother are the legal heirs of late Gunaseelan S/o V.M. Aalai."*

3. The suit was filed in a situation where the legal heirship obtained by the plaintiffs – appellants was sought to be challenged by the defendants 1 and 2 who claimed to be the wife and son of late Gunaseelan whom the plaintiff no.1 also claimed to be her husband.

4. The suit was decreed by the learned trial Court which decree was affirmed in First Appeal. The High Court, in Second Appeal, took the view that having regard to the nature of the suit and the reliefs claimed the civil court had no jurisdiction to entertain the suit which lay within the domain of the Family Court constituted under the Family Courts Act, 1984. (hereinafter referred to as "the Act") Accordingly, on the aforesaid basis the decree has been reversed.

5. The objects and reasons behind the enactment of the Act which is reproduced herein below would suggest that the reason for constitution of family courts is for settlement of family disputes, if possible, by pre-litigation proceedings. If the dispute cannot be settled the same has to be adjudicated by adoption of a process which is different from what is adopted in ordinary civil proceedings.

> *"Statement of objects and reasons:*
>
> *Several associations of women, other organisations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes."*

6. Sections 13, 14 and 15 of the Act spell out a special procedure. The other provisions of the Act i.e. Section 4(4) would indicate that a major objective behind the enactment of the Act is to have a specialized body to preserve and save the institution of marriage.

7. In the present case, there is no family dispute between the plaintiffs and the defendants. The dispute arose after the demise of Gunaseelan to whom both the plaintiff No.1 and the defendant No.1 claim to be married. The other plaintiffs and defendant No.2 are the children claimed to be born out of the respective marriages.

8. The above would indicate that the dispute between the parties is purely a civil dispute and has no bearing on any dispute within a family which needs to be resolved by a special procedure as provided under the Act. No issue with regard to the institution of marriage and the need to preserve the same also arises in the present case. That apart, the dispute between the parties can only be resolved on the basis of evidence to be tendered by the parties, admissibility of which has to be adjudged within the four corners of the provisions of the Indian Evidence Act, 1872. In such a proceeding it would be clearly wrong to deprive the parties of the benefit of the services of counsels.

9. Taking into account all that has been said above we are of the view that the High Court was not correct in holding the suit filed by the plaintiffs – appellants to be not maintainable in law. Accordingly, we set aside the order of the High Court dated 15th June, 2015 passed in S.A. No.725 of 2005 and remand the matter to the High Court for a decision on merits of the Second Appeal filed by the defendants.

10. Consequently and in the light of the above, the appeal is allowed and the order of the High Court is set aside.

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"The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework".

Transfer Petition (Civil) No. 1278 of 2016 Santhini vs. Vijaya Venketesh

Hon'ble Mr. Justice Kurian Joseph

झारखण्ड राज्य विधिक सेवा प्राधिकार
न्याय सब के लिए
ACCESS TO JUSTICE FOR ALL
JHARKHAND STATE LEGAL SERVICES AUTHORITY

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