॥ आ नो भद्राः क्रतवो यन्तु विश्वतः ॥

"Let noble thoughts come to us from every side."

RIG VEDA

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

It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.

Hon'ble Mr. Justice Dipak Misra

Bhuwan Mohan Singh v. Meena, Cr. App. No. 1331 of 2014, (2015) 6 SCC 353

Compiled by

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

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SUPREME COURT OF INDIA

Dated : 6TH MAY, 2016

Hon'ble the Chief Justice of India vide order dated 6th May, 2016 has been pleased to reconstitute the **'Committee for sensitization of Family Court Matters'**, comprising the following Hon'ble Judges :-

1. Hon'ble Mr. Justice Dipak Misra
   Judge, Supreme Court of India

2. Hon'ble Mr. Justice Navin Sinha
   Chief Justice, High Court of Chhattisgarh

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

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

Sd/-
[Ravindra Maithani]
Secretary General

(i) PPS to Hon'ble Mr. Justice Navin Singh,
Hon'ble Chief Justice, High Court of Chhattisgarh

(ii) PS to Hon'ble Mr. Justice D.N. Patel
Hon'ble Judge, High Court of Jharkhand

PREFACE

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

Family is one of oldest institution that has played an important Role in stability and prosperity of civilization. The amazing persistence of Indian Culture is a consequence of the permanent position accorded to the family, for civilization is directly dependent on the effective functioning of the family; and in India the Family attained a social importance, even a religious significance.

Almost everything of lasting value in civilization has its roots in the family. The family was the first successful peace group, the man and woman learning how to adjust their antagonisms while at the same time teaching the pursuits of peace to their children. Family harmony provides a sense of belonging and a feeling of security unlike many other types of relationships. When conflict arises, it threatens that security. Whether the disharmony initiates from within the family unit or from external sources, individual family members and the family as a whole can experience a range of negative emotions and consequences. Unresolved conflict may irreparably damage a marriage and the entire family if family members do not seek help.

Further, the urbanization, Industrialization and less dependence on agriculture has given rise to nuclear family and many unforeseen problems. Ego and disproportionate emotional outburst has opened floodgates of litigation between spouses. Family matters are to be viewed from different perspective. The Family Courts Act, 1984 also seeks to promote conciliation in Family matters.

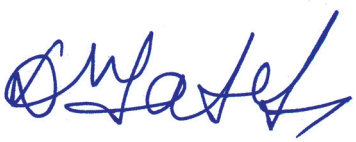
His Lordship Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India has said about the role and responsibilities of Family Court's Judge in ***Bhuwan Mohan Singh Vs. Meena {(2015) 6 SCC 353}*** and I quote- ***"The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It***

not only gives rise to more Family Problems but also gradually builds unthinkable and everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the Scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes etc."

His Lordship's aforementioned golden words leaves no doubt that family matters needs due sensitivity from all stakeholders. This work of JHALSA is an attempt to collect landmark judgments of the Apex Court on the topics- Duty of Family Court, Divorce, Alimony and Maintenance, Adoption, Custody of Children & Visitation Rights and Stridhan at one place.

Our attempt is to prepare a handbook which may be useful to Judges, Lawyers, Social Workers and the common Litigant.

It is important to note here that My Lord Justice Dipak Misra's deliberations in the ***State Level Seminar on the Role of Principal Judges in Family Court Matters & Victim Emancipation through Compensation on 20/02/16*** at Nyaya Sadan, Ranchi has brought about positive sea change in all the stakeholders. Under His Lordship's able leadership and guidance, we shall definitely be able to achieve our objectives. I assure His Lordship that no stone shall be left unturned in fulfilling Your Lordship's dreams.



(JUSTICE D.N. PATEL)

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LANDMARK JUDGMENTS ON

DUTY OF FAMILY COURT

SHAMIMA FAROOQUI V. SHAHID KHAN

(2015) 5 Supreme Court Cases 705

Shamima Farooqui . . Appellant;
Versus
Shahid Khan . . Respondent.

Bench : Hon'ble Mr. Justice Dipak Misra and Hon'ble Mr. Justice Prafulla C. Pant
Criminal Appeals Nos. 564-65 of 2015
Date of Judgment : April 6, 2015

What is disturbing is that though the application for grant of maintenance was filed in the year 1998, it was not decided till 17.2.2012. It is also shocking to note that there was no order for grant of interim maintenance. It needs no special emphasis to state that when an application for grant of maintenance is filed by the wife the delay in disposal of the application, to say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon.

An application for grant of maintenance has to be disposed of at the earliest. The family courts, The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions Under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied.

The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc."

JUDGMENT

The Judgment of the Court was delivered by

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

2. The facts which are requisite to be stated for adjudication of these appeals are that the appellant filed an application under Section 125 of the Code of Criminal Procedure (CrPC) contending, inter alia, that she married Shahid Khan, the respondent herein, on 26.4.1992 and during her stay at the matrimonial home she was prohibited from talking to others, and the husband not only demanded a car from the family but also started harassing her. A time came when he sent her to the parental home where she was compelled to stay for almost three months. The indifferent husband did not come to take her back to the matrimonial home, but she returned with the fond and firm hope that the bond of wedlock would be sustained and cemented with love and peace but as the misfortune would have it, the demand for the vehicle continued and the harassment was used as a weapon for fulfilment of the demand. In due course she came to learn that the husband had illicit relationship with another woman and he wanted to marry her. Usual to sense of human curiosity and wife's right when she asked him she was assaulted. The situation gradually worsened and it became unbearable for her to stay at the matrimonial home. At that juncture, she sought help of her parents who came and took her to the parental home at Lucknow where she availed treatment. Being deserted and ill-treated and, in a way, suffering from fear psychosis she took shelter in the house of her parents and when all her hopes got shattered for reunion, she filed an application for grant of maintenance at the rate of Rs.4000/- per month on the foundation that husband was working on the post of Nayak in the Army and getting a salary of Rs.10,000/- approximately apart from other perks.

3. The application for grant of maintenance was resisted with immense vigour by the husband disputing all the averments pertaining to demand of dowry and harassment and further alleging that he had already given divorce to her on 18.6.1997 and has also paid the Mehar to her.

4. A reply was filed to the same by wife asserting that she had neither the knowledge of divorce nor had she received an amount of Mehar.

5. During the proceeding before the learned Family Judge the wife-appellant examined herself and another, and the respondent-husband examined four witnesses, including himself. The learned Family Judge, Family Court, Lucknow while dealing with the application forming the subject

matter Criminal Case No. 1120 of 1998 did not accept the primary objection as regards the maintainability under Section 125 CrPC as the applicant was a Muslim woman and came to hold even after the divorce the application of the wife under Section 125 CrPC was maintainable in the family court. Thereafter, the learned Family Judge appreciating the evidence brought on record came to opine that the marriage between the parties had taken place on 26.4.1992; that the husband had given divorce on 18.6.1997; that she was ill treated at her matrimonial home; and that she had come back to her parental house and staying there; that the husband had not made any provision for grant of maintenance; that the wife did not have any source of income to support her, and the plea advanced by the husband that she had means to sustain her had not been proved; that as the husband was getting at the time of disposal of the application as per the salary certificate Rs.17654/- and accordingly directed that a sum of Rs.2500/- should be paid as monthly maintenance allowance from the date of submission of application till the date of judgment and thereafter Rs.4000/- per month from the date of judgment till the date of remarriage.

6. The aforesaid order passed by the learned Family Judge came to be assailed before the High Court in Criminal Revision wherein, the High Court after adumbrating the facts referred to the decisions in ***Anita Rani v. Rakeshpal Singh***[1], ***Dharmendra Kumar Gupta v. Chander Prabha Devi***[2], R***akesh Kumar Dikshit v. Jayanti Devi***[3], ***Ashutosh Tripathi v. State of U.P.***[4], ***Paras Nath Kurmi v. The Session Judge***[5] and ***Sartaj v. State of U.P. and others***[6] and came to hold[7] that though the learned principal Judge, Family Court had not ascribed any reason for grant of maintenance from the date of application, yet when the case for maintenance was filed in the year 1998 decided on 17.2.2012 and there was no order for interim maintenance, the grant of Rs.2500/- as monthly maintenance from the date of application was neither illegal nor excessive. The High Court took note of the fact that the husband had retired on 1.4.2012 and consequently reduced the maintenance allowance to Rs.2000/-from 1.4.2012 till remarriage of the appellant herein. Being of this view the learned Single Judge modified the order passed by the Family Court. Hence, the present appeal by special leave, at the instance of the wife.

7. We have heard Dr. J.N. Dubey, learned senior counsel for the appellant. Despite service of notice, none has appeared for the respondent.

8. It is submitted by Dr. Dubey, learned senior counsel that Section 125 CrPC is applicable to the Muslim women and the Family Court has jurisdiction to decide the issue. It is urged by him that the High Court has fallen into error by opining that the grant of maintenance at the rate of Rs.4,000/- per month is excessive and hence, it should be reduced to Rs.2000/- per month from the date of retirement of the husband i.e. 1.4.2012 till her re-marriage. It is also contended that the High Court failed to appreciate the plight of the appellant and reduced the amount and hence, the impugned order is not supportable in law.

9. First of all, we intend to deal with the applicability of Section 125 CrPC to a Muslim woman who has been divorced. In ***Shamim Bano v. Asraf Khan***[8], this Court after referring to the

1 1991 (2) Crimes 725 (All)
2 1990 Cr.L.J. 1884
3 1999 (2) JIC, 323 (ACC)
4 1999 (2) 763, Allahabad J.I.C
5 1999 (2) JIC 522 All
6 2000 (2) JIC 967 All
7 Shahid Khan v. Shamima Farooqui, Criminal Revision No. 134 of 2012, order dated 17-9-2013 (All)
8 (2014) 12 SCC 636

Constitution Bench decisions in ***Danial Latifi v. Union of India***[9] and ***Khatoon Nisa v. State of U.P.***[10] had opined as follows:(Shamim Bano case[8], SCC p. 644, paras 13-14)

> *"13. The aforesaid principle clearly lays down that even after an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench opined that as the Magistrate could exercise power under Section 125 of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under Section 125 of the Code and the effect of ultimate consequence.*
>
> *14. Slightly recently, in* ***Shabana Bano v. Imran Khan****[11], a two-Judge Bench, placing reliance on Danial Latifi (supra), has ruled that:-*
>
> *"21. The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only."*
>
> *Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in Khatoon Nisa (supra)."*
>
> *In view of the aforesaid dictum, there can be no shadow of doubt that Section 125 CrPC has been rightly held to be applicable by the learned Family Judge.*

10. On a perusal of the order passed by the Family Court, it is manifest that it has taken note of the fact that the salary of the husband was Rs.17,654/- in May, 2009. It had fixed Rs.2,500/- as monthly maintenance from the date of submission of application till the date of order i.e. 17.2.2012 and from the date of order, at the rate of Rs.4,000/- per month till the date of remarriage. The High Court has opined that while granting maintenance from the date of application, judicial discretion has to be appropriately exercised, for the High Court has noted that the grant of maintenance at the rate of Rs.2,500/- per month from the date of application till date of order, did not call for modification.

11. The aforesaid finding of the High Court, affirming the view of the learned Family Judge is absolutely correct. But what is disturbing is that though the application for grant of maintenance was filed in the year 1998, it was not decided till 17.2.2012. It is also shocking to note that there was no order for grant of interim maintenance. It needs no special emphasis to state that when an application for grant of maintenance is filed by the wife the delay in disposal of the application, to say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon. An application for grant of maintenance has to be disposed of at the earliest. The family courts,

9 (2001) 7 SCC 740
10 (2014) 12 SCC 646
11 (2010) 1 SCC 666

which have been established to deal with the matrimonial disputes, which include application under Section 125 CrPC, have become absolutely apathetic to the same.

12. The concern and anguish that was expressed by this Court in ***Bhuwan Mohan Singh v. Meena and Ors.***[12], is to the following effect:(SCC p. 170. paras 12-13)

> *"12. The Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. A three-Judge Bench in* ***K.A. Abdul Jaleel v. T.A. Shahida****[13], while highlighting on the purpose of bringing in the Family Courts Act by the legislature, opined thus: (SCC p. 170, para 10)*
>
> > *"10. The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith."*
>
> *13. The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions Under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc." [emphasis supplied]*

13. When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the Courts to curtail them. There need not be hurry

12 AIR 2014 SC 2875
13 (2003) 4 SCC 166

but procrastination should not be manifest, reflecting the attitude of the Court. As regards the second facet, it is the duty of the Court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. It cannot allow it to sing the song of the brook. "Men may come and men may go, but I go on for ever." This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a pro-active approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more.

14. Coming to the reduction of quantum by the High Court, it is noticed that the High Court has shown immense sympathy to the husband by reducing the amount after his retirement. It has come on record that the husband was getting a monthly salary of Rs.17,654/-. The High Court, without indicating any reason, has reduced the monthly maintenance allowance to Rs.2,000/-. In today's world, it is extremely difficult to conceive that a woman of her status would be in a position to manage within Rs.2,000/- per month. It can never be forgotten that the inherent and fundamental principle behind Section 125 CrPC is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to leave her matrimonial home. The statute commands there has to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar. There can be no shadow of doubt that an order under Section 125 CrPC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right.

15. While determining the quantum of maintenance, this Court in ***Jabsir Kaur Sehgal v. District Judge Dehradun & Ors.***[14] has held as follows:(SCC p. 12, para 8)

> *"The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to*

14 (1997) 7 SCC 7

when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."

16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In ***Chaturbhuj v. Sita Bai***[15], it has been ruled that: (SCC p. 320, para 6)

> *"Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in* ***Captain Ramesh Chander Kaushal v. Veena Kaushal****16 falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in* ***Savitaben Somabhai Bhatiya v. State of Gujarat****[17]."*

17. This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

18. In this context, we may profitably quote a passage from the judgment rendered by the High Court of Delhi in ***Chander Prakash Bodhraj v. Shila Rani Chander Prakash***[18] wherein it has been opined thus: (SCC Online Del para 7)

> *"7. ... An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him."*

19. From the aforesaid enunciation of law it is limpid that the obligation of the husband is on a higher pedestal when the question of maintenance of wife and children arises. When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance.

20. In the instant case, as is seen, the High Court has reduced the amount of maintenance from Rs.4,000/- to Rs.2,000/-. As is manifest, the High Court has become oblivious of the fact that she has to stay on her own. Needless to say, the order of the learned Family Judge is not manifestly perverse. There is nothing perceptible which would show that order is a sanctuary of errors. In fact, when the order is based on proper appreciation of evidence on record, no revisional court

15 (2008) 2 SCC 316
16 (1978) 4 SCC 70
17 (2005) 3 SCC 636
18 AIR 1968 Delhi 174

should have interfered with the reason on the base that it would have arrived at a different or another conclusion. When substantial justice has been done, there was no reason to interfere. There may be a shelter over her head in the parental house, but other real expenses cannot be ignored. Solely because the husband had retired, there was no justification to reduce the maintenance by 50%. It is not a huge fortune that was showered on the wife that it deserved reduction. It only reflects the non-application of mind and, therefore, we are unable to sustain the said order.

21. Having stated the principle, we would have proceeded to record our consequential conclusion. But, a significant one, we cannot be oblivious of the asseverations made by the appellant. It has been asserted that the respondent had taken voluntary retirement after the judgment dated 17.2.2012 with the purpose of escaping the liability to pay the maintenance amount as directed to the petitioner; that the last drawn salary of respondent taken into account by the learned Family Judge was Rs.17,564/- as per salary slip of May, 2009 and after deduction of AFPP Fund and AGI, the salary of the respondent was Rs.12,564/- and hence, even on the basis of the last basic pay (i.e. Rs.9,830/-) of the respondent the total pension would come to Rs.14,611/- and if 40% of commutation is taken into account then the pension of the respondent amounts to Rs.11,535/-; and that the respondent, in addition to his pension, hand received encashment of commutation to the extent of 40% i.e. Rs.3,84,500/- and other retiral dues i.e. AFPP, AFGI, Gratuity and leave encashment to the tune of Rs.16,01,455/-. The aforesaid aspects have gone uncontroverted as the respondent-husband has not appeared and contested the matter. Therefore, we are disposed to accept the assertions. This exposition of facts further impels us to set aside the order of the High Court.

22. Consequently, the appeals are allowed, the orders passed by the High Court are set aside and that of the Family Court is restored. There shall be no order as to costs.

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BHUWAN MOHAN SINGH V. MEENA

(2015) 6 Supreme Court Cases 353

Bhuwan Mohan Singh . . Appellant;
Versus
Meena And Others . . Respondents.

Criminal Appeal No. 1331 of 2014
Bench : Hon'ble Mr. Justice Dipak Misra and Hon'ble Mr. Justice V. Gopala Gowda
Date of Judgment : July 15, 2014

The Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner.

A three-Judge Bench in K.A. Abdul Jaleel v. T.A. Shahida, while highlighting on the purpose of bringing in the Family Courts Act by the legislature, opined thus: - "The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith."

The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation.

A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.

JUDGMENT

The Judgment of the Court was delivered by

Dipak Misra, J. — Leave granted. The two issues that pronouncedly emanate in this appeal by special leave are whether the Family Court while deciding an application under Section 7 of the Family Court Act, 1984 (for brevity, "the Act") which includes determination of grant of maintenance to the persons as entitled under that provision, should allow adjournments in an extremely liberal manner remaining oblivious of objects and reasons of the Act and also keeping the windows of wisdom closed and the sense of judicial responsiveness suspended to the manifest perceptibility of vagrancy, destitution, impecuniosity, struggle for survival and the emotional fracture, a wife likely to face under these circumstances and further exhibiting absolute insensitivity to her condition, who, after loosing support of the husband who has failed to husband the marital status denies the wife to have maintenance for almost nine years as that much time is consumed to decide the lis and, in addition, to restrict the grant of maintenance to the date of order on some kind of individual notion. Both the approaches, as we perceive, not only defeat the command of the legislature but also frustrate the hope of wife and children who are deprived of adequate livelihood and whose aspirations perish like mushroom and possibly the brief candle of sustenance joins the marathon race of extinction. This delay in adjudication by the Family Court is not only against human rights but also against the basic embodiment of dignity of an individual.

2. Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short "the Code") was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the Court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able bodied. There is no escape route unless there is an order from the Court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds.

3. Presently to the facts which lie in an extremely small compass. The marriage between the appellant and the husband was solemnized on 27.11.1997 as per Hindu rites and ritual, and in the wedlock a son was born on 16.12.1998. The respondent, under certain circumstances, had to leave the marital home and thereafter filed an application on 28.8.2002 under Section 125 of the Code in the Family Court, Jaipur, Rajasthan, claiming Rs.6000/- per month towards maintenance. The Family Court finally decided the matter on 24.8.2011 awarding monthly maintenance of Rs.2500/- to the respondent-wife and Rs.1500/- to the second respondentson. Be it stated, during the continuance of the Family Court proceedings, number of adjournments

were granted, some taken by the husband and some by the wife. The learned Family Judge being dissatisfied with the material brought on record came to hold that the respondent-wife was entitled to maintenance and, accordingly, fixed the quantum and directed that the maintenance to be paid from the date of the order.

4. Being dissatisfied with the aforesaid order the respondent-wife preferred S.B. Criminal Revision Petition No. 1526 of 2011 before the High Court of Judicature at Rajasthan and the learned single Judge, vide order dated 28.5.2012[1], noted the contention of the wife that the maintenance should have been granted from the date of application, and that she had received nothing during the proceedings and suffered immensely and, eventually, directed that the maintenance should be granted from the date of filing of the application.

5. Criticizing the aforesaid order, it is submitted Mr. Jay Kishor Singh learned counsel for the appellant that when number of adjournments were sought by the wife, grant of maintenance from the date of filing of the application by the High Court is absolutely illegal and unjustified. It is his submission that the wife cannot take advantage of her own wrong.

6*. Mr. Mohit Paul, learned counsel for the respondents would submit that the Family Court adjourned the matter sometimes on its own and the enormous delay took place because of non-cooperation of the husband in the proceedings and, therefore, the wife who was compelled to sustain herself and her son with immense difficulty should not be allowed to suffer. It is proponed by him that the High Court by modifying the order and directing that the maintenance should be granted from the date of filing of the application has not committed any legal infirmity and hence, the order is inexceptionable.

7. At the outset, we are obliged to reiterate the principle of law how a proceeding under Section 125 of the Code has to be dealt with by the court, and what is the duty of a Family Court after establishment of such courts by the Family Courts Act, 1984. In ***Smt. Dukhtar Jahan v. Mohammed Farooq***[2], the Court opined that: (SCC P. 361 para 16)

> *"16. ... proceedings under Section 125 of the Code, it must be remembered, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner."*

8. A three-Judge Bench in ***Vimla (K.) v. Veeraswamy (K.)***[3], while discussing about the basic purpose under Section 125 of the Code, opined that Section 125 of the Code is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife.

9. A two-Judge Bench in ***Kirtikant D. Vadodaria v. State of Gujarat and another***[4], while adverting to the dominant purpose behind Section 125 of the Code, ruled that: (SCC p. 489, para 15)

> *"15. ... While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents etc. and to prevent destitution and vagrancy by compelling those who can support those who are unable to support*

1 Meena v. State of Rajasthan, Criminal Revision Petition No. 1526 of 2011, order dated 28-5-2012 (Raj)

* Ed.: Para 6 corrected vide Official Corrigendum No. F.3/Ed. B.J./46/2014 dated 28-8-2014

2 (1987) 1 SCC 624

3 (1991) 2 SCC 375

4 (1996) 4 SCC 479

themselves but have a moral claim for support. The provisions in Section 125 provide a speedy remedy to those women, children and destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation."

10. In ***Chaturbhuj v. Sita Bai***[5], reiterating the legal position the Court held: (SCC p. 320, para 6)

> *"6. ... Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain* ***Ramesh Chander Kaushal v. Veena Kaushal***[6] *falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in* ***Savitaben Somabhai Bhatiya v. State of Gujarat***[7]*."*

11. Recently in ***Nagendrappa Natikar v. Neelamma***[8], it has been stated that it is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children.

12. The Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. A three-Judge Bench in ***K.A. Abdul Jaleel v. T.A. Shahida***[9], while highlighting on the purpose of bringing in the Family Courts Act by the legislature, opined thus: (SCC p. 170, para 10)

> *"The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith."*

13. The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics

5 (2008) 2 SCC 316
6 (1978) 4 SCC 70
7 (2005) 3 SCC 636
8 2013 (3) SCALE 561
9 (2003) 4 SCC 166

by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.

14. While dealing with the relevant date of grant of maintenance, in ***Shail Kumari Devi and another v. Krishan Bhagwal Pathak alias Kishun B. Pathak***[10], the Court referred to the Code of Criminal Procedure (Amendment) Act, 2001 (Act 50 of 2001) and came to hold that : (SCC p. 639, para 21)

> *"21. ... even after the amendment of 2001, an order for payment of maintenance can be paid by a court either from the date of order or when express order is made to pay maintenance from the date of application, then the amount of maintenance may be paid from that date, i.e., from the date of application."*

The Court referred to the decision in ***Krishna Jain v. Dharam Raj Jain***[11] wherein it has been stated that: (*Shail Kumari Devi case*[10], SCC p. 645, para 37)

> *"37. ... to hold that, normally maintenance should be made payable from the date of the order and not from the date of the application unless such order is backed by reasons would amount to inserting something more in the sub-section which the legislature never intended. The High Court had observed that it was unable to read in sub-section (2) laying down any rule to award maintenance from the date of the order or that the grant from the date of the application is an exception."*

The High Court had also opined that whether maintenance is granted from the date of the order or from the date of application, the Court is required to record reasons as required under sub-section (6) of Section 354 of the Code.

15. After referring to the decision in Krishna Jain (supra), the Court adverted to the decision of the High Court of Andhra Pradesh in ***K. Sivaram v. K. Mangalamba***[12] wherein it has been ruled that the maintenance would be awarded from the date of the order and such maintenance could be granted from the date of the application only by recording special reasons. The view of the learned single Judge of the High Court of Andhra Pradesh stating that it is a normal rule that the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance was not accepted by this Court. Eventually, the Court ruled thus: (*Shail Kumari Devi case*[10], SCC p. 647, para 43)

> *"43. We, therefore, hold that while deciding an application under Section 125 of the Code, a Magistrate is required to record reasons for granting or refusing to grant maintenance to wives, children or parents. Such maintenance can be awarded from the date of the order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary. No special reasons, however, are required to be recorded by the court. In our judgment, no such requirement can be read in sub-section (1) of Section 125 of the Code in absence of express provision to that effect."*

10 (2008) 9 SCC 632
11 1992 Cri LJ 1028 (MP)
12 1990 Cri LJ 1880 (AP)

16. In the present case, as we find, there was enormous delay in disposal of the proceeding under Section 125 of the Code and most of the time the husband had taken adjournments and some times the court dealt with the matter showing total laxity. The wife sustained herself as far as she could in that state for a period of nine years. The circumstances, in our considered opinion, required grant of maintenance from the date of application and by so granting the High Court has not committed any legal infirmity. Hence, we concur with the order of the High Court. However, we direct, as prayed by the learned counsel for the respondent, that he may be allowed to pay the arrears along with the maintenance awarded at present in a phased manner. Learned counsel for the appellant did not object to such an arrangement being made. In view of the aforesaid, we direct that while paying the maintenance as fixed by the learned Family Court Judge per month by 5th of each succeeding month, the arrears shall be paid in a proportionate manner within a period of three years from today.

17. Consequently, the appeal, being devoid of merits, stands dismissed.

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SMRUTI PAHARIYA VERSUS SANJAY PAHARIYA

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3465 OF 2009

(@ SPECIAL LEAVE PETITION (CIVIL) NO. 17402 OF 2008)
Bench : Hon'ble The Chief Justice of India K.G. Balakrishnan
Hon'ble Mr. Justice P. Sathasivam,
Hon'ble Mr. Justice Asok Kumar Ganguly

Smruti Pahariya .....Appellant(s)
- Versus -
Sanjay Pahariya ....Respondent(s)

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

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

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

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

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

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

JUDGMENT

GANGULY, J.

1. Leave granted.

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

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

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

5. On 19.11.2007, after the mandatory period of six months, the matter came up before the Family Court. It appears from the affidavit filed by the wife in this proceeding before the Bombay High Court that on 3.11.2007, advocate of the parties informed the husband that the matter will be listed on 19.11.2007 and a draft affidavit of deposition was sent to him through E-mail. It is not in dispute that both the parties had the same advocate. It also appears from the affidavit of the wife that on 18.11.2007 the advocate received a text SMS in his mobile from the respondent-husband that he is unable to attend the court on 19.11.2007.

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

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

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

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

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

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

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

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

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

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

   IV. Whether on a proper construction of Section 13B (2) of the said Act, which speaks of 'the motion of both the parties', this Court can hold that the Family Court can dissolve a marriage and grant a decree of divorce in the absence of one of the parties and without actually ascertaining the consent of that party who filed the petition for divorce on mutual consent jointly with the other party?

10. This fourth question assumes general importance since it turns on the interpretation of the section. Apart from that, this question is relevant here in view of various recitals in the judgment

and decree of the learned Judge of the Family Court. It appears that the Family Court granted the decree of divorce by proceeding on the presumption of continuing consent of the husband.

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

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

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

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

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

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

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

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

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

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

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

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

22. In many cases, marriages simply fail for no fault of the parties but as a result of discord and disharmony between them. In such situations, putting an end to this relationship is the only way out of this social bondage. But unfortunately, initially the marriage laws in every country were 'fault oriented'. Under such laws marriage can be dissolved only by a Court's decree within certain limited grounds which are to be proved in an adversarial proceeding. Such 'fault' oriented divorce laws have been criticized as 'obsolete, unrealistic, discriminatory and sometimes immoral' (Foster, Divorce Law Reform; the choices before State page 112).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

50. In our view it is only the mutual consent of the parties which gives the Court the jurisdiction to pass a decree for divorce under Section 13B. So in cases under Section 13B, mutual consent of the parties is a jurisdictional fact. The Court while passing its decree under Section 13B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The Court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent. In the facts of the case, the impugned decree was passed within about three weeks from the expiry of the mandatory period of six months without actually ascertaining the consent of the husband, the respondent herein.

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

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

53. The appeal is disposed of as follows:-

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

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

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

(K.G. BALAKRISHNAN)
(P. SATHASIVAM)
(ASOK KUMAR GANGULY)

New Delhi

May 11, 2009

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K.A. ABDUL JALEEL VS T.A. SHAHIDA

Appeal (Civil) 3322 of 2003

(2003) 4 SCC 166

K.A. Abdul Jaleel
Vs.
T.A. Shahida

Date of Judgment : 10/04/2003
Bench : Hon'ble The Chief Justice of India, Hon'ble Mr. Justice S.B. Sinha &
Hon'ble Mr. Justice AR. Lakshmanan.

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

S.B. SINHA, J :

Leave granted.

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

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

In respect of properties an agreement marked Exhibit A1 was executed by the parties, in terms whereof it was agreed that the properties purchased from the aforesaid amount will be transferred in the name of the respondent by the appellant. The appellant herein pronounced Talaq on 01.11.1995 after his relationship with the respondent became strained. In terms of the said agreement dated 17.09.1994, the respondent filed a suit marked O.S. No.85 of 1995 in the Family Court on 08.12.1995. The appellant

in his written statement alleged that the said agreement was signed by him under threat and coercion and further contended that several documents purported to have been executed by him in support thereof were also obtained by applying force.

Both the parties examined themselves as also proved various documents in the said suit before the Family Court.

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

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

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

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

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

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

jurisdiction of the Family Court extends, inter alia, in relation to properties of spouses or of either of them which would clearly mean that the properties claimed by the parties thereto as a spouse of other; irrespective of the claim whether property is claimed during the subsistence of a marriage or otherwise.

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

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

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

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

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

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

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

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

undue influence upon the appellant. The said contention has been negatived by both the Family Court as also the High Court.

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

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LANDMARK JUDGMENTS ON

DIVORCE

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

RIG VEDA

DR. (MRS.) MALATHI RAVI, M.D. VERSUS DR. B.V. RAVI, M.D.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5862 OF 2014

(Arising out of S.L.P. (C) No. 17 of 2010)
Bench : Hon'ble Mr. Justice Sudhansu Jyoti Mukhopadhaya & Hon'ble Mr. Justice Dipak Misra

Dr. (Mrs.) Malathi Ravi, M.D. ... Appellant
Versus
Dr. B.V. Ravi, M.D. ...Respondent

Marriage as a social institution is an affirmance of civilized social order where two individuals, capable of entering into wedlock, have pledged themselves to the institutional norms and values and promised to each other a cemented bond to sustain and maintain the marital obligation. It stands as an embodiment for continuance of the human race. Despite the pledge and promises, on certain occasions, individual incompatibilities, attitudinal differences based upon egocentric perception of situations, maladjustment phenomenon or propensity for non-adjustment or refusal for adjustment gets eminently projected that compels both the spouses to take intolerable positions abandoning individual responsibility, proclivity of asserting superiority complex, betrayal of trust which is the cornerstone of life, and sometimes a pervert sense of revenge, a dreadful diet, or sheer sense of envy bring the cracks in the relationship when either both the spouses or one of the spouses crave for dissolution of marriage – freedom from the institutional and individual bond.

The case at hand initiated by the husband for dissolution of marriage was viewed from a different perspective by the learned Family Court Judge who declined to grant divorce as the factum of desertion as requisite in law was not proved but the High Court, considering certain facts and taking note of subsequent events for which the appellant was found responsible, granted divorce. The High Court perceived the acts of the appellant as a reflection of attitude of revenge in marriage or for vengeance after the reunion pursuant to the decree for restitution of marriage.

Presently to the factual matrix in entirety and the subsequent events. We are absolutely conscious that the relief of dissolution of marriage was sought on the ground of desertion. The submission of the learned counsel for the appellant is that neither subsequent events nor the plea of cruelty could have been considered. There is no cavil over the fact that the petition was filed under Section 13(1) (ib). However, on a perusal of the petition it transpires that there are assertions of ill-treatment, mental agony and torture suffered by the husband.

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

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

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

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

JUDGMENT

Dipak Misra, J.

Leave granted.

2. Marriage as a social institution is an affirmance of civilized social order where two individuals, capable of entering into wedlock, have pledged themselves to the institutional norms and values and promised to each other a cemented bond to sustain and maintain the marital obligation. It stands as an embodiment for continuance of the human race. Despite the pledge and promises, on certain occasions, individual incompatibilities, attitudinal differences based upon egocentric perception of situations, maladjustment phenomenon or propensity for non-adjustment or refusal for adjustment gets eminently projected that compels both the spouses to take intolerable positions abandoning individual responsibility, proclivity of asserting superiority complex, betrayal of trust which is the cornerstone of life, and sometimes a pervert sense of revenge, a dreadful diet, or sheer sense of envy bring the cracks in the relationship when either both the spouses or one of the spouses crave for dissolution of marriage – freedom from the institutional and individual bond. The case at hand initiated by the husband for dissolution of marriage was viewed from a different perspective by the learned Family Court Judge who declined to grant divorce as the factum of desertion as requisite in law was not proved but the High Court, considering certain facts and taking note of subsequent events for which the appellant was found responsible, granted divorce. The High Court perceived the acts of the appellant as a reflection of attitude of revenge in marriage or for vengeance after the reunion pursuant to the decree for restitution of marriage. The justifiability of the said analysis within the parameters of Section 13(1) of the Hindu Marriage Act, 1955 (for brevity "the Act") is the subject-matter of assail in this appeal, by special leave, wherein the judgment and decree dated 11.09.2009 passed by the High Court of Karnataka in MFA No. 9164 of 2004 reversing the decree for restitution of conjugal rights granted in favour of the wife and passing a decree for dissolution of marriage by way of divorce allowing the petition preferred by the respondent-husband, is called in question.

3. The respondent-husband, an Associate Professor in Ambedkar Medical College, Kadugondanahalli, Bangalore, filed a petition, M.S. No. 5 of 2001 under Section 13(1) the Act seeking for a decree for judicial separation and dissolution of marriage. However, in course of the proceeding the petition was amended abandoning the prayer for judicial separation and converting the petition to one under Section 13(1)(ib) of the Act seeking dissolution of marriage by way of divorce.

4. In the petition filed before the Family court, it was averred by the respondent-husband that the marriage between the parties was solemnized in accordance with Hindu Rites and customs on 23.11.1994. After the marriage the husband and wife stayed together for one and a half years in the house of the father of the husband but from the very first day the appellant-wife was noncooperative, arrogant and her behaviour towards the family members of the husband was unacceptable. Despite the misunderstanding, a male child was born in the wedlock and thereafter, the wife took the child and left the house and chose not to come back to the husband or his family for a period of three years. It was pleaded that there had been a marital discord and total noncompatibility, and she had deserted him severing all ties. It was also alleged that she had left the tender child in the custody of her parents and joined a post graduate course in the Medical College of Gulbarga. All the efforts by the husband to bring her back became an exercise in futility inasmuch as the letters written by him were never replied. Despite the non-responsive attitude of the wife, he, without abandoning the hope for reconciliation for leading a normal married life, went to the house of his in-laws, but her parents ill treated him by forcibly throwing him out of the house.

5. It was the assertion of the husband that after she completed her course, she started staying with her parents along with the child at Bangalore and neither he nor his family members were invited for the naming giving ceremony of the child. As set forth, the conduct of the wife caused immense mental hurt and trauma, and he suffered unbearable mental agony when the family members of his wife abused and ill treated him while he had gone to pacify her and bring her back to the matrimonial home. All his solicitations and beseechments through letters to have normalcy went in vain which compelled him to issue a notice through his counsel but she chose not to respond to the same. Under these circumstances, the petition was filed for judicial separation and thereafter, as has been stated earlier, prayer was amended seeking dissolution of marriage on the ground of desertion since she had deliberately withdrawn from his society.

6. The wife filed objections contending, inter alia, that when she was residing in the matrimonial home, the sister and brother-in-law of the husband, who stayed in the opposite house, were frequent visitors and their interference affected the normal stream of life of the couple. They influenced the husband that he should not allow his wife to prosecute her studies and be kept at home as an unpaid servant of the house. The husband, as pleaded, was torn in conflict as he could not treat the wife in the manner by his sister and brother-in-law had desired and also could not openly express disagreement. At that juncture, as she was in the family way, as per the customs, she came to her parental home and by the time the child was born the sister and brother-in-law had been successful in poisoning the mind of the husband as a result of which neither he nor his relatives, though properly invited, did not turn up for the naming ceremony. All her attempts to come back to the matrimonial home did not produce any result since the husband was acting under the ill-advice of his sister and brother-in-law. It was put forth that he had without any reasonable cause or excuse refused to perform his marital obligations. The plea of mental hurt and trauma was controverted on the assertion that she had never treated him with cruelty nor was he summarily thrown out of the house of her parents.

7. Be it stated, the wife in the same petition filed an application under Section 9 of the Act for restitution of conjugal rights to which an objection was filed by the husband stating, inter alia, that no case had been made out for restitution of conjugal rights but, on the contrary, vexatious

allegations had been made. It was further averred that the wife had deserted him for more than five years and she had been harassing him constantly and consistently.

8. In support of their respective pleas the husband and wife filed evidence by way of affidavit and were crossexamined at length by the other side. On behalf of the husband 12 documents were exhibited as Exts. P-1 to P-12 and the wife examined one witness and exhibited four documents, Exts. R-1 to R-4.

9. The family court formulated the following points for consideration: -

"(1) Whether the petitioner proves that respondent assaulted him for a continuous period of not less than 2 years immediately proceeding the presentation of the petition?

(2) Whether the respondent proves that the petitioner without reasonable excuse withdrawn from the society?

(3) Whether the petitioner is entitled for decree of divorce as prayed for?

(4) Whether the respondent is entitled for decree of restitution of conjugal right as prayed for?

(5) What order?"

10. The learned Principal Judge of the family court, appreciating the oral and documentary evidence on record came to hold that the material on record gave an impression that there was no scuffle between the husband and the wife; that even after the birth of the child the husband and his family members used to visit the wife at her parental home to see the child; that there was no material on record to show that when he went to his inlaws house to see the child, he was ill-treated in any manner; that after the child was born he had taken the child along with her for vaccination and spent sometime; that though the husband and his relatives were invited for naming ceremony of the child, they chose not to attend; that the husband was able to recognize his son from the photograph in Ext. R-2; that the plea of the husband that he was not allowed to see the child did not deserve acceptation; that the circumstances did not establish that wife had any intention to bring the conjugal relationship to an end but, on the contrary, she was residing in her parents' house for delivery and then had to remain at Gulbarga for prosecuting her higher studies; that while she was studying at Gulbarga, as is evident from Ext. R-4, the husband stayed there for two days, i.e., 27.5.1999 and 28.5.1999; that from the letters vide Exts. P-3, P-7, P-9 and P-11 nothing was discernible to the effect that the wife went to Gulbarga for her studies without his permission and she had deserted him; that the husband had not disclosed from what date he stopped visiting the house of the wife's parents after the birth of the child; that the letters written by the husband did not reflect the non-cooperative conduct of the wife; that there was no sufficient evidence to come to a definite conclusion that the wife had deserted the husband with an intention to bring the matrimonial relationship to an end; that assuming there was desertion yet the same was not for a continuous period of two years immediately preceding the presentation of the petition; that the husband only wrote letters after 15.9.1999 and nothing had been brought on record to show what steps he had taken for resumption of marital ties with the wife if she had deserted him; that the wife was not allowed to come back to the matrimonial home because of intervention of his sister and brother-inlaw; that the explanation given by the wife to her nonresponse to the letters was that when she was thinking to reply the petition had already been filed was acceptable; that as the husband was working at Ambedkar Medical College in the Department of Biochemistry and wife had joined in the Department of Pathology

which would show that she was willing to join the husband to lead a normal marital life; and that it was the husband who had withdrawn from the society of the wife without any reasonable cause. Being of this view, the learned Family Judge dismissed the application for divorce and allowed the application of the wife filed under Section 23(a) read with Section 9 of the Act for restitution of conjugal rights.

11. After the said judgment and decree was passed by the learned Family Judge, the respondent did not prefer an appeal immediately. He waited for the wife to join and for the said purpose he wrote letters to her and as there was no response, he sent a notice through his counsel. The wife, eventually, joined on 22.8.2004 at the matrimonial house being accompanied by her relative who was working in the Police Department. As the turn of events would uncurtain, the wife lodged an FIR No. 401/2004 dated 17.10.2004 at Basaveshwaranagar alleging demand of dowry against the husband, mother and sister as a consequence of which the husband was arrested being an accused for the offences under Section 498A and 506 read with Section 34 of the Indian Penal Code and also under the provisions of Dowry Prohibition Act. He remained in custody for a day until he was enlarged on bail. His parents were compelled to hide themselves and moved an application under Section 438 of the Code of Criminal Procedure and, ultimately, availed the benefit of said provision. After all these events took place, the husband preferred an appeal along with application for condonation of delay before the High Court which formed the subject-matter of M.F.A. No. 9164/04 (FC). The High Court condoned the delay, took note of the grounds urged in the memorandum of appeal, appreciated the subsequent events that reflected the conduct of the wife and opined that the attitude of the wife confirmed that she never had the intention of leading a normal married life with the husband and, in fact, she wanted to stay separately with the husband and dictate terms which had hurt his feelings. The High Court further came to the conclusion that the husband had made efforts to go to Gulbarga on many an occasion, tried to convince the wife to come back to the matrimonial home, but all his diligent efforts met with miserable failure. As the impugned judgment would reflect, the behaviour of the wife established that she deliberately stayed away from the marital home and intentionally caused mental agony by putting the husband and his family to go through a criminal litigation. That apart, the High Court took the long separation into account and, accordingly, set aside the judgment and decree for restitution of conjugal rights and passed a decree for dissolution of marriage between the parties.

12. We have heard Mr. Shanth Kumar V. Mohale, learned counsel for the appellant and Mr. Balaji Srinivasan, learned counsel for the respondent.

13. Assailing the legal sustainability of the judgment of the High Court, Mr. Shanth Kumar, learned counsel appearing for the appellant, submitted that when the petition for divorce was founded solely on the ground of desertion and a finding was returned by the family court that the ingredients stipulated under Section 13(1)(ib) of the Act were not satisfied making out a case of desertion on the part of the wife, the High Court should have concurred with the same and not proceeded to make out a case for the respondent-husband on the foundation of mental cruelty. It is urged by him that the High Court has taken note of subsequent events into consideration without affording an opportunity to the appellant to controvert the said material and that alone makes the decision vulnerable in law. Learned counsel would submit that the High Court has erroneously determined the period of communication of letters and the silence maintained by the wife which is factually incorrect and, in fact, the concept of desertion, as is understood

in law, has not been proven by way of adequate evidence but, on the contrary, the analysis of evidence on record by the Family Court goes a long way to show that there was, in fact, no desertion on the part of the wife to make out a case for divorce. It is his further submission that the High Court has opined that the marriage between the parties had irretrievably been broken and, therefore, it was requisite to grant a decree for dissolution of marriage by divorce which cannot be a ground for grant of divorce. Learned counsel has placed reliance on the decisions in ***Lachman Utamchand Kirpalani v. Meena @ Mota***[1]***, K. Narayanan v. K. Sreedevi***[2]***, Mohinder Singh v. Harbens Kaur***[3] ***and Smt. Indira Gangele v. Shailendra Kumar Gangele***[4]**.**

14. Mr. Balaji Srinivasan, learned counsel for the respondent-husband, has urged that if the petition filed by the husband is read in entirety, it would be clear that the husband had clearly pleaded about the mental hurt and trauma that he had suffered because of the treatment meted out to him by his wife and her family members. He has drawn our attention to the evidence to show that for a long seven and a half years despite the best efforts he could not get marital cooperation from his wife and as the High Court has accepted the same, the impugned judgment is flawless. He has highlighted about the nonresponsive proclivity of the wife when she chose not to reply to the letters of the husband beseeching her to join his company while she was staying at Gulbarga. He has also drawn our attention to the cross-examination of the husband where he has deposed that after the delivery of the son on 12.1.1998 when she was discharged, he and his mother had gone to bring the wife and the child to their home but she went to her parental home and further neither he nor his family members were invited for the naming ceremony which was performed in October, 1998. Learned counsel has drawn our attention to the subsequent events which have been brought on record by way of affidavit as well as the rejoinder filed by the appellant-wife to the counter affidavit to highlight the subsequent conduct for the purpose of demonstrating the cruel treatment of the wife. It is canvassed by him that the subsequent events can be taken note of for the purpose of mental cruelty by this Court and the decree of divorce granted by the High Court should not be disturbed.

15. To appreciate the rivalised submissions raised at the Bar, we have carefully perused the petition and the evidence adduced by the parties and the judgment of the Family Court and that of the High Court. The plea that was raised for grant of divorce was under Section 13(1)(ib) of the Act. It provides for grant of divorce on the ground of desertion for a continuous period of not less than two year immediately preceding the presentation of the petition. The aforesaid provision stipulates that a husband or wife would be entitled to a dissolution of marriage by decree of divorce if the other party has deserted the party seeking the divorce for a continuous period of not less than two years immediately preceding the presentation of the petition. Desertion, as a ground for divorce, was inserted to Section 13 by Act 68/1976. Prior to the amendment it was only a ground for judicial separation. Dealing with the concept of desertion, this Court in ***Savitri Pandey v. Prem Chandra Pandey***[5] has ruled thus:-

> *"Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the*

1 AIR 1964 SC 40
2 AIR 1990 Ker 151
3 AIR 1992 P&H 8
4 AIR 1993 MP 59
5 (2002) 2 SCC 73

obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to a host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbai Shah v. Prabhavati[1] *held that if a spouse abandons the other in a state of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion.*

16. In the said case, reference was also made to Lachman Utamchand Kirpalani's case wherein it has been held that desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation.

17. In the case at hand, the Family Court, on the basis of the evidence brought on record, has recorded a finding that there was no desertion for a continuous period of two years. The High Court has reversed it by emphasizing on certain aspects of conduct. Analysing the evidence, we are of the considered opinion that it is not established that the appellant-wife had deserted the husband for a continuous period of not less than two years immediately preceding the presentation of the petition. It is because the petition was presented in the year 2001 and during the cross-examination of the husband it has been admitted by him that he had gone to Gulbarga in May, 1999 for two days. The Family Court, on the basis of material brought on record, has opined that there is no sufficient evidence to come to a definite conclusion that the wife deserted him with intention to bring the matrimonial relationship to an end and further the period of two years was not completed. The High Court, as it seems to us, has not dealt with this aspect in an appropriate manner and opined that the wife had no intention to lead a normal married life with the husband.

    Therefore, the allegation of desertion, as enshrined under Section 13(1)(ib) has not been established. The finding on that score as recorded by the learned Principal Judge, Family Court, deserves to be affirmed and we so do.

18. Presently to the factual matrix in entirety and the subsequent events. We are absolutely conscious that the relief of dissolution of marriage was sought on the ground of desertion. The submission of the learned counsel for the appellant is that neither subsequent events nor the plea of cruelty

could have been considered. There is no cavil over the fact that the petition was filed under Section 13(1)(ib). However, on a perusal of the petition it transpires that there are assertions of ill-treatment, mental agony and torture suffered by the husband.

19. First we intend to state the subsequent events. As has been narrated earlier, after the application of the wife was allowed granting restitution of conjugal rights, the husband communicated to her to join him, but she chose not to join him immediately and thereafter went to the matrimonial home along with a relative who is a police officer. After she stayed for a brief period at the matrimonial home, she left her husband and thereafter lodged FIR No. 401/2004 on 17.10.2004 for the offences under Sections 498A and 506/34 of the Indian Penal Code and the provisions under Dowry Prohibition Act, 1961 against the husband, his mother and the sister. Because of the FIR the husband was arrested and remained in custody for a day. The ladies availed the benefit of anticipatory bail. The learned trial Magistrate, as we find, recorded a judgment of acquittal. Against the judgment of acquittal, the appellant preferred an appeal before the High Court after obtaining special leave which was ultimately dismissed as withdrawn since in the meantime the State had preferred an appeal before the Court of Session. At this juncture, we make it absolutely clear that we will not advert to the legal tenability of the judgment of acquittal as the appeal, as we have been apprised, is subjudice. However, we take note of certain aspects which have been taken note of by the High Court and also brought on record for a different purpose.

20. The seminal question that has to be addressed is whether under these circumstances the decree for divorce granted by the High Court should be interfered with. We must immediately state that the High Court has referred to certain grounds stated in the memorandum of appeal and taken note of certain subsequent facts. We accept the submission of the learned counsel for the appellant that the grounds stated in the memorandum of appeal which were not established by way of evidence could not have been pressed into service or taken aid of. But, it needs no special emphasis to state that the subsequent conduct of the wife can be taken into consideration. It settled in law that subsequent facts under certain circumstances can be taken into consideration.

21. In ***A. Jayachandra v. Aneel Kaur***[6] it has been held thus: -

> *"If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct."*

22. In ***Suman Kapur v. Sudhir Kapur***[7] this Court had accepted what the High Court had taken note of despite the fact that it was a subsequent event. It is necessary to reproduce the necessary paragraphs from the said decision to perceive the approach of this Court: -

> *"46. The High Court further noted that the appellant wife sent a notice through her advocate to the respondent husband during the pendency of mediation proceedings in the High Court wherein she alleged that the respondent was having another wife in USA whose identity was concealed. This was based on the fact that in his income tax return, the husband mentioned the social security number of his wife as 476-15-6010, a number which did not belong to the appellant wife, but to some American lady (Sarah Awegtalewis).*

6 (2005) 2 SCC 22

7 (2009) 1 SCC 422

47. The High Court, however, recorded a finding of fact accepting the explanation of the husband that there was merely a typographical error in giving social security number allotted to the appellant which was 476-15-6030. According to the High Court, taking undue advantage of the error in social security number, the appellant wife had gone to the extent of making serious allegation that the respondent had married an American woman whose social security number was wrongly typed in the income tax return of the respondent husband."

23. From the acceptance of the reasons of the High Court by this Court, it is quite clear that subsequent events which are established on the basis of non-disputed material brought on record can be taken into consideration. Having held that, the question would be whether a decree for divorce on the ground of mental cruelty can be granted. We have already opined that the ground of desertion has not been proved. Having not accepted the ground of desertion, the two issues that remain for consideration whether the issue of mental cruelty deserves to be accepted in the obtaining factual matrix in the absence of a prayer in the relief clause, and further whether the situation has become such that it can be held that under the existing factual scenario it would not be proper to keep the marriage ties alive. Learned counsel for the appellant has urged with vehemence that when dissolution of marriage was sought on the ground of desertion alone, the issue of mental cruelty can neither be raised nor can be addressed to. Regard being had to the said submission, we are constrained to pose the question whether in a case of the present nature we should require the respondent-husband to amend the petition and direct the learned Family Judge to consider the issue of mental cruelty or we should ignore the fetter of technicality and consider the pleadings and evidence brought on record as well as the subsequent facts which are incontrovertible so that the lis is put to rest. In our considered opinion the issue of mental cruelty should be addressed to by this Court for the sake of doing complete justice. We think, it is the bounden duty of this Court to do so and not to leave the parties to fight the battle afresh after expiry of thirteen years of litigation. Dealing with the plea of mental cruelty which is perceptible from the material on record would not affect any substantive right of the appellant. It would be only condoning a minor technical aspect. Administration of justice provokes our judicial conscience that it is a fit case where the plentitude of power conferred on this Court under Article 142 deserves to be invoked, more so, when the ground is statutorily permissible. By such exercise we are certain that it would neither be supplanting the substantive law nor would it be building a structure which does not exist. It would be logical to do so and illogical to refrain from doing so.

24. Before we proceed to deal with the issue of mental cruelty, it is appropriate to state how the said concept has been viewed by this Court. In ***Vinit Saxena v. Pankaj Pandit***[8], while dealing with the issue of mental cruelty, the Court held as follows: -

"31. It is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as

8 (2006) 3 SCC 778

to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

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35. Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered."

25. In ***Samar Ghosh v. Jaya Ghosh***[9], this Court has given certain illustrative examples wherefrom inference of mental cruelty can be drawn. The Court itself has observed that they are illustrative and not exhaustive. We think it appropriate to reproduce some of the illustrations:-

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

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

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

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

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

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

26. In the said case the Court has also observed thus:-

9 (2007) 4 SCC 511

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

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

27. In ***Vishwanath Agrawal, s/o Sitaram Agrawal v. Sarla Vishwanath Agrawal***[10], while dealing with mental cruelty, it has been opined thus: -

"22. The expression "cruelty" has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status."

28. In the said case, analyzing the subsequent events and the conduct of the wife, who was responsible for publication in a newspaper certain humiliating aspects about the husband, the Court held as follows: -

"In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent wife had really humiliated him and caused mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious."

29. In ***U. Sree v. U. Srinivas***[11], the Court, taking note of the deposition of the husband that the wife had consistently ill treated him inasmuch as she had shown her immense dislike towards his "sadhna" in music and had exhibited total indifference to him, observed as follows: -

"It has graphically been demonstrated that she had not shown the slightest concern for the public image of her husband on many an occasion by putting him in a situation of embarrassment leading to humiliation. She has made wild allegations about the conspiracy in the family of her husband to get him remarried for the greed of dowry and there is no iota of evidence on record to substantiate the same. This, in fact, is an aspersion not only on the character of the husband but also a maladroit effort to malign the reputation of the family."

10 (2012) 7 SCC 288

11 (2013) 2 SCC 114

30. In ***K. Srinivas Rao v. D.A. Deepa***[12], while dealing with the instances of mental cruelty, the court opined that to the illustrations given in the case of Samar Ghosh certain other illustrations could be added. We think it seemly to reproduce the observations: -

> *"Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."*

31. Presently, we shall advert to the material on record. It is luminous from it that the wife has made allegations that the sister and brother-in-law of the husband used to interfere in the day-to-day affairs of the husband and he was caught in conflict. The said aspect has really not been proven. It has been brought on record that the sister and brother-in-law are highly educated and nothing has been suggested to the husband in the cross-examination that he was pressurized by his sister in any manner whatsoever. It is her allegation that the sister and brother-in-law of the husband were pressurizing him not to allow the wife to prosecute higher studies and to keep her as an unpaid servant in the house. On a studied evaluation of the evidence and the material brought on record it is demonstrable that the wife herself has admitted that the husband had given his consent for her higher education and, in fact, assisted her. Thus, the aforesaid allegation has not been proven. The allegation that the husband was instigated to keep her at home as an unpaid servant is quite a disturbing allegation when viewed from the spectrum of gender sensitivity and any sensitive person would be hurt when his behavior has remotely not reflected that attitude. The second aspect which has surfaced from the evidence is that the wife had gone to the parental home for delivery and therefrom she went to the hospital where she gave birth to a male child. However, as the evidence would show, the husband despite all his co-operation as a father, when had gone to the hospital to bring the wife and child to his house, she along with the child had gone to her parental house. This aspect of the evidence has gone totally unchallenged. Perceived from a social point of view, it reflects the egocentric attitude of the wife and her non-concern how such an act is likely to hurt the father of the child. The next thing that has come in evidence is that the respondent was not invited at the time of naming ceremony. He has categorically disputed the suggestion that he and his family members were invited to the ceremony. It is interesting to note that a suggestion has been given that they did not attend the ceremony as in the invitation card the names of the parents of the husband had not been printed. It has been asserted by the husband that the said incident had caused him tremendous mental pain. View from a different angle, it tantamounts to totally ignoring the family of the husband.

32. Another incident deserves to be noted. The wife went to Gulbarga to join her studies and the husband was not aware of it and only come to know when one professor told about it. Thereafter he went to Gulbarga and stayed in a hotel and met the wife in the hostel on both the days. Despite his request to come to the house she showed disinclination. When he enquired about the child, he was told that the child was in her mother's house. These are the incidents which are antecedent to the filing of the petition.

33. We have already stated the legal position that subsequent events can be taken note of. After the judgment and decree was passed by the learned Family Judge, the husband sent a notice through his counsel dated 14.7.2004 and intimated her as follows: -

12 (2013) 5 SCC 226

"According to the operative portion of the order, my client has to welcome you to join him with the child within three months which please note.

My client's address is Dr. B.V. Ravi, M.D., residing in No. 428. 2nd Across, 6th Main, 3rd Stage, 3rd Block, Basaveshwaranagar, Bangalore-79 and his Telephone No. 23229865. In obedience to the Hon'ble Court order, you called upon to join Dr. B.V. Ravi to the above said address any day after 18th of July, 2004, as this period upto 17th is inauspicious because of "Ashada"."

34. As it appears, she did not join and the husband was compelled to send a telegram. Thereafter, on 13.8.2004 a reply was sent on her behalf that she would be joining after 15.8.2004 but the exact date was not intimated. Thereafter, on 14.8.2004 a reply was sent to the legal notice dated 14.7.2004 sent by the husband. It is appropriate to reproduce the relevant two paragraphs: -

"In this context, we hereby inform you that our client will be coming to join your client in the above said address along with the child on Sunday the 22nd August 2004 as the auspicious NIJASHRAVANA MONTH commences from 16th August 2004.

Further our client expects reasonable amount of care and cordiality from your client's side. Please ensure the same."

35. The purpose of referring to these communications is that despite obtaining decree for restitution of conjugal rights the wife waited till the last day of the expiration of the period as per the decree to join the husband. There may be no legal fallacy, but the attitude gets reflected. The reply also states that there is expectation of reasonable amount of care and cordiality. This reflects both, a sense of doubt and a hidden threat. As the facts unfurl, the wife stays for two months and then leaves the matrimonial home and lodges the first information report against the husband and his mother and sister for the offences punishable under Sections 498A, 506/34 of the Indian Penal Code and under the provisions of Dowry Prohibition Act. The husband suffers a day's custody and the mother and the sister availed anticipatory bail.

36. The High Court has taken note of all these aspects and held that the wife has no intention to lead a normal marital life. That apart, the High Court has returned a finding that the marriage has irretrievably been broken down. Of course, such an observation has been made on the ground of conduct. This Court in certain cases, namely, ***G.V.N. Kameswara Rao v. G. Jabilli***[13]***, Parveen Mehta v. Inderjit Mehta***[14]***, Vijayakumar R. Bhate v. Neela Vijayakumar Bhate***[15]***, Durga Prasanna Tripathy v. Arundhati Tripathy***[16]***, Naveen Kohli v. Neelu Kohli***[17] ***and Samar Ghosh v. Jaya Ghosh (supra)***, has invoked the principle of irretrievably breaking down of marriage.

37. For the present, we shall restrict our delineation to the issue whether the aforesaid acts would constitute mental cruelty. We have already referred to few authorities to indicate what the concept of mental cruelty means. Mental cruelty and its effect cannot be stated with arithmetical exactitude. It varies from individual to individual, from society to society and also depends on the status of the persons. What would be a mental cruelty in the life of two individuals belonging

13 (2002) 2 SCC 296
14 (2002) 5 SCC 706
15 (2003) 6 SCC 334
16 (2005) 7 SCC 353
17 (2006) 4 SCC 558

to particular strata of the society may not amount to mental cruelty in respect of another couple belonging to a different stratum of society.

The agonized feeling or for that matter a sense of disappointment can take place by certain acts causing a grievous dent at the mental level. The inference has to be drawn from the attending circumstances. As we have enumerated the incidents, we are disposed to think that the husband has reasons to feel that he has been humiliated, for allegations have been made against him which are not correct; his relatives have been dragged into the matrimonial controversy, the assertions in the written statement depict him as if he had tacitly conceded to have harboured notions of gender insensitivity or some kind of male chauvinism, his parents and he are ignored in the naming ceremony of the son, and he comes to learn from others that the wife had gone to Gulbarga to prosecute her studies. That apart, the communications, after the decree for restitution of conjugal rights, indicate the attitude of the wife as if she is playing a game of Chess. The launching of criminal prosecution can be perceived from the spectrum of conduct. The learned Magistrate has recorded the judgment of acquittal. The wife had preferred an appeal before the High Court after obtaining leave. After the State Government prefers an appeal in the Court of Session, she chooses to withdraw the appeal. But she intends, as the pleadings would show, that the case should reach the logical conclusion. This conduct manifestly shows the widening of the rift between the parties. It has only increased the bitterness. In such a situation, the husband is likely to lament in every breath and the vibrancy of life melts to give way to sad story of life.

38. From this kind of attitude and treatment it can be inferred that the husband has been treated with mental cruelty and definitely he has faced ignominy being an Associate Professor in a Government Medical College. When one enjoys social status working in a Government hospital, this humiliation affects the reputation. That apart, it can be well imagined the slight he might be facing. In fact, the chain of events might have compelled him to go through the whole gamut of emotions. It certainly must have hurt his self-respect and human sensibility. The sanguine concept of marriage presumably has become illusory and it would not be inapposite to say that the wife has shown anaemic emotional disposition to the husband. Therefore, the decree of divorce granted by the High Court deserves to be affirmed singularly on the ground of mental cruelty.

39. Presently, we shall proceed to deal with grant of maintenance. Both the appellant and the respondent are doctors and have their respective jobs. The son is hardly sixteen years old and definitely would require financial support for education and other supportive things to lead a life befitting his social status. The High Court, while granting a decree for divorce should have adverted to it. However, we do not think it appropriate to keep anything alive in this regard between the parties. The controversy is to be put to rest on this score also. Considering the totality of circumstances, the status the appellant enjoys and the strata to which the parties belong, it becomes the bounden duty of the respondent to provide for maintenance and education for the son who is sixteen years old. At this juncture, we may note that a proceeding was initiated before the learned Principal Judge, Family Court, Bangalore and in the said proceeding the learned Principal Judge passed the following order: -

"Matter is settled before the mediation centre where in parties have entered into a memorandum of settlement.

Contents of the Memorandum of Settlement are admitted by the Parties. Court is satisfied that the same is voluntary. As per the terms of settlement para 5 clause (i) petitioner has deposited Rs.3,00,000/- in the name of minor child in Karnataka Bank, copy of fixed deposit receipt and R.D. Account pass book are filed along with memo. Hence petition is allowed in terms of settlement. Memorandum of settlement shall be a part of the decree."

40. Learned counsel for the respondent would submit that the amount has been settled. Though there has been a settlement of Rs.3,00,000/- yet that was at a different time and under different circumstances. The present appeal was pending. The duty of this Court is to see that the young son born in the wedlock must get acceptable comfort as well as proper education. It is the duty of the Court also to see that a minor son should not live in discomfort or should be deprived of requisite modern education. We are conscious, the appellant is earning but that does not necessarily mean that the father should be absolved of his liability. Regard being had to the social status and strata and the concept of effective availing of education we fix a sum of Rs.25,00,000/- (twenty five lacs) excluding the amount already paid towards the maintenance and education of the son. The said amount shall be deposited by the respondent within a period of six months before the learned Principal Judge, Family Court at Bangalore and the amount shall be kept in a fixed deposit in a nationalized bank in the joint account of the appellant and the minor son so that she can draw quarterly interest and expend on her son. After the son attains majority the joint account shall continue and they would be at liberty to draw the amount for the education or any urgent need of the son.

41. With the aforesaid directions, we affirm the decree for divorce passed by the High Court. The appeal stands disposed of accordingly but without any order as to costs.

[Sudhansu Jyoti Mukhopadhaya]
[Dipak Misra]

New Delhi;

June 30, 2014.

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MANISH GOEL VERSUS ROHINI GOEL

(Special Leave Petition (C) No. 2954 of 2010) FEBRUARY 5, 2010

Manish Goel

v.

Rohini Goel

Bench : Hon'ble Mr. Justice Aftab Alam and Hon'ble Mr. Justice B.S. Chauhan

2010 (2) SCR 414

the statutory period of six months for filing the second petition under Section 13-B(2) of the Act has been prescribed for providing an opportunity to parties to reconcile and withdraw petition for dissolution of marriage. Learned counsel for the petitioner is not able to advance arguments on the issue as to whether, statutory period prescribed under Section 13-B(1)of the Act is mandatory or directory and if directory, whether could be dispensed with even by the High Court in exercise of its writ/appellate jurisdiction.

Thus, this is not a case where there has been any obstruction to the stream of justice or there has been injustice to the parties, which is required to be eradicated, and this Court may grant equitable relief. Petition does not raise any question of general public importance. None of contingencies, which may require this Court to exercise its extraordinary jurisdiction underArticle 142 of the Constitution, has been brought to our notice in the case at hand.

The Order of the Court was delivered by

ORDER

DR. B.S. CHAUHAN, J.

1. This case reveals a very sorry state of affairs that the parties, merely being highly qualified, have claimed even to be higher and above the law, and have a vested right to use, misuse and abuse the process of the Court. Petitioner, the husband, possesses the qualifications of CA, CS and ICWA, while the proforma respondent-wife is a Doctor (M.D., Radio-Diagnosis) by profession. The parties got married on 23rd July, 2008 in Delhi. Their marriage ran into rough weather and relations between them became strained immediately after the marriage and they are living separately since 24.10.2008. Petitioner-husband filed a Matrimonial Case under Section 12 of the Hindu Marriage Act, 1955 (hereinafter called as "the Act") for annulment of marriage before a competent Court at Gurgaon. The respondent-wife, Smt. Rohini Goel filed a petition under Section 12 r/w Section 23 of the Domestic Violence Act, 2005 before the competent Court at Delhi. An FIR was also lodged by her against petitioner-husband and his family members under Sections 498-A, 406 and 34 of Indian Penal Code, 1860 at PS Janakpuri, New Delhi.

2. It is stated at the Bar that by persuasion of the family members and friends, the parties entered into a compromise and prepared a Memorandum of Understanding dated 13.11.2009 in the proceedings pending before the Mediation Centre, Delhi by which they agreed on terms and conditions incorporated therein, to settle all their disputes and also for dissolution of their

marriage. The parties filed an application under Section 13-B(1) of the Act before the Family Court, i.e. ADJ-04 (West) Delhi seeking divorce by mutual consent. The said HMA No.456 of 2009 came before the Court and it recorded the statement of parties on 16.11.2009. The parties moved another HMA No. 457 of 2009 to waive the statutory period of six months in filing the second petition. However, the Court rejected the said application vide order dated 1.12.2009 observing that the Court was not competent to waive the required statutory period of six months under the Act and such a waiver was permissible only under the directions of this Court as held by this Court in Anil Kumar Jain v. Maya Jain (2009) 10 SCC 415. Hence, this petition.

3. The learned counsel for the petitioner submits that there is no prohibition in law in entertaining the petition under Article 136 of the Constitution against the order of the Family Court and in such an eventuality, there was no occasion for the petitioner to approach the High Court as therelief sought herein cannot be granted by any court other than this Court. Thus, the petitioner has a right to approach this Court against the order of the Family Court and the petitioner cannot be non-suited on this ground alone.

4. Article 136 of the Constitution enables this Court, in its discretion to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

Undoubtedly, under Article 136 in the widest possible terms, a plenary jurisdiction exercisable on assuming appellate jurisdiction has been conferred upon this Court. However, it is an extra-ordinary jurisdiction vested by the Constitution in the Court with implicit trust and faith and thus, extra ordinary care and caution has to be observed while exercising this jurisdiction. There is no vested right of a party to approach this Court for the exercise of such a vast discretion, however, such a course can be resorted to when this court feels that it is so warranted to eradicate injustice. Such a jurisdiction is to be exercised by the consideration of justice and call of duty. The power has to be exercised with great care and due consideration but while exercising the power, the order should be passed taking into consideration all binding precedents otherwise such an order would create problems in the future. The object of keeping such a wide power with this Court has been to see that injustice is not perpetuated or perpetrated by decisions of courts below. More so, there should be a question of law of general public importance or a decision which shocks the conscience of the court are some of the prime requisites for grant of special leave. Thus, unless it is shown that exceptional and special circumstances exist that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity warranting review of the decision appealed against, such exercise should not be done. The power under Article 136 cannot be used to short circuit the legal procedure prescribed in overriding power. This Court generally does not permit a party to by-pass the normal procedure of appeal or reference to the High Court unless a question of principle of great importance arises. It has to be exercised exceptionally and with caution and only in such an extraordinary situations. More so, such power is to be exercised taking into consideration the well established principles which govern the exercise of overriding constitutional powers (vide Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax, West Bengal AIR 1955 SC 65; The Union of India v. Kishorilal Gupta & Bros. AIR 1959 SC 1362; Murtaza & Sons & Anr. v. Nazir Mohd. Khan & Ors. AIR 1970 SC 668; Sirpur Paper Mills Ltd. v. Commissioner of Wealth Tax, Hyderabad AIR 1970 SC 1520; The Municipal Corporation, Bhopal v. Misbahul Hasan & Ors. AIR 1972 SC 892; Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of

Gujarat and Ors. AIR 1991 SC 2176; Tirupati Balaji Developers Pvt. Ltd. & Ors. v. State of Bihar & Ors. AIR 2004 SC 2351; and F.G.P. Ltd. v. Saleh Hooseini Doctor (2009) 10 SCC 223).

5. In Union of India & Ors. v. Karnail Singh (1995) 2 SCC 728, this court while dealing with the similar issue held as under:

> *"It is true that this Court when exercises its discretionary power under Article 136 or passes any order under Article 142, it does so with great care and due circumspection. But, when we are settling the law in exercise of this court's discretion, such law, so settled, should be clear and become operational instead of being kept vague, so that it could become a binding precedent in all similar cases to arise in future."*

6. It has been canvassed before us that under Article 142 of the Constitution, this Court is competent to pass any order to do complete justice between the parties and grant decree of divorce even if the case may not meet the requirement of statutory provisions. The instant case presents special features warranting exercise of such power. We are fully alive of the fact that this court has been exercising the power under Article 142 of the Constitution for dissolution of marriage where the Court finds that 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. Decree of divorce has been granted to put quietus to all litigations between the parties and to save them from further agony, as it is evident from the judgments in Romesh Chander v. Savitri AIR 1995 SC 851; Kanchan Devi v. Promod Kumar Mittal AIR 1996 SC 3192; Anita Sabharwal v. Anil Sabharwal (1997) 11 SCC 490; Ashok Hurra v. Rupa Bipin Zaveri AIR 1997 SC 1266; Kiran v. Sharad Dutt (2000) 10 SCC 243; Swati Verma v. Rajan Verma AIR 2004 SC 161; Harpit Singh Anand v. State of West Bengal (2004) 10 SCC 505; Jimmy Sudarshan Purohit v. Sudarshan Sharad Purohit (2005) 13 SCC 410; Durga P. Tripathy v. Arundhati Tripathy AIR 2005 SC 3297;; Naveen Kohli v. Neelu Kohli AIR 2006 SC 1675; Sanghamitra Ghosh v. Kajal Kumar Ghosh (2007) 2 SCC 220; Rishikesh Sharma v. Saroj Sharma (2007) 2 SCC 263; Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511; and Satish Sitole v. Ganga AIR 2008 SC 3093.

   However, these are the cases, where this Court came to rescue the parties on the ground for divorce not provided for by the legislature in the statute.

7. In Anjana Kishore v. Puneet Kishore (2002) 10 SCC 194, this Court while allowing a transfer petition directed the court concerned to decide the case of divorce by mutual consent, ignoring the statutory requirement of moving the motion after expiry of the period of six months under Section 13-B(2) of the Act.

8. In Anil Kumar Jain (supra), this Court held that an order of waiving the statutory requirements can be passed only by this Court in exercise of its powers under Article 142 of the Constitution. The said power is not vested with any other court.

9. However, we have also noticed various judgments of this Court taking a contrary view to the effect that in case the legal ground for grant of divorce is missing, exercising such power tantamounts to legislation and thus transgression of the powers of the legislature, which is not permissible in law (vide Chetan Dass v. Kamla Devi AIR 2001 SC 1709; and Vishnu Dutt Sharma v. Manju Sharma (2009) 6 SCC 379).

10. Generally, no Court has competence to issue a direction contrary to law nor the Court can direct an authority to act in contravention of the statutory provisions. The courts are meant

to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. (Vide State of Punjab & Ors. v. Renuka Singla & Ors (1994) 1 SCC 175; State of U.P. & Ors. v. Harish Chandra & Ors. AIR 1996 SC 2173; Union of India & Anr. v. Kirloskar Pneumatic Co. Ltd. AIR 1996 SC 3285; Vice Chancellor, University of Allahabad & Ors. v. Dr. Anand Prakash Mishra & Ors. (1997) 10 SCC 264; and Karnataka State Road Transport Corporation v. Ashrafulla Khan & Ors. AIR 2002 SC 629).

11. A Constitution Bench of this Court in Prem Chand Garg & Anr. v. Excise Commissioner, U.P. & Ors. AIR 1963 SC 996 held as under:

> *"An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws."*

The Constitution Benches of this Court in Supreme Court Bar Association v. Union of India & Anr. AIR 1998 SC 1895; and E.S.P. Rajaram & Ors. v. Union of India & Ors. AIR 2001 SC 581 held that under Article 142 of the Constitution, this Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. It is not to be exercised in a case where there is no basis in law which can form an edifice for building up a superstructure.

12. Similar view has been reiterated in A.R. Antulay v. R.S. Nayak & Anr. (1988) 2 SCC 602; Bonkya alias Bharat Shivaji Mane & Ors. v. State of Maharashtra (1995) 6 SCC 447; Common Cause, a Registered Society v. Union of India & Ors. AIR 1999 SC 2979; M.S. Ahlawat v. State of Haryana AIR 2000 SC 168; M.C. Mehta v. Kamal Nath & Ors. AIR 2000 SC 1997; State of Punjab & Anr. v. Rajesh Syal (2002) 8 SCC 158; Government of West Bengal v. Tarun K. Roy & Ors. (2004) 1 SCC 347; Textile Labour Association v. Official Liquidator AIR 2004 SC 2336; State of Karnataka & Ors. v. Ameerbi & Ors. (2007) 11 SCC 681; Union of India & Anr. v. Shardindu AIR 2007 SC 2204; and Bharat Sewa Sansthan v. U.P. Electronic Corporation Ltd. AIR 2007 SC 2961.

13. In Teri Oat Estates (P) Ltd. v. UT. Chandigarh (2004) 2 SCC 130, this Court held as under:

> *"36….. sympathy or sentiment by itself cannot be a ground for passing an order in relation whereto the appellants miserably fail to establish a legal right. … despite an extraordinary constitutional jurisdiction contained in Article 142 of the Constitution of India, this Court ordinarily would not pass an order which would be in contravention of a statutory provision."*

14. In Laxmidas Morarji (dead) by L.Rs. v. Behrose Darab Madan (2009) 10 SCC 425, while dealing with the provisions of Article 142 of the Constitution, this Court has held as under:

> *" ….The power under Article 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments. Though the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme Court cannot pass an order or grant relief which is totally*

inconsistent or goes against the substantive or statutory enactments pertaining to the case. The power is to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties." (Emphasis added)

15. Therefore, the law in this regard can be summarised to the effect that in exercise of the power under Article 142 of the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provisions nor the power is exercised merely on sympathy.

16. The instant case requires to be examined in the light of aforesaid settled legal propositions. Parties got married on 23.7.2008 and as they could not bear each other, started living separately from 24.10.2008. There had been claims and counter claims, allegations and criminal prosecution between them. Petitioner approached the Competent Court at Gurgaon for dissolution of marriage. Admittedly, that case is still pending consideration. Parties filed the petition for divorce by mutual consent only in November 2009 before the Family Court, Delhi. Learned counsel for the petitioner could not explain as to how the case for divorce could be filed before the Family Court, Delhi during the pendency of the case for divorce before the Gurgaon Court. Such a procedure adopted by the petitioner amounts to abuse of process of the court. Petitioner has approached the different forums for the same relief merely because he is very much eager and keen to get the marriage dissolved immediately even by abusing the process of the Court. In Jai Singh v. Union of India AIR 1977 SC 898, this Court while dealing with a similar issue held that a litigant cannot pursue two parallel remedies in respect of the same matter at the same time. This judgment has subsequently been approved by this Court in principle but distinguished on facts in Awadh Bihari Yadav v. State of Bihar AIR 1996 SC 122; and Arunima Baruah v. Union of India (2007) 6 SCC 120.

17. In Dr. Buddhi Kota Subbarao v. K. Parasaran & Ors. AIR 1996 SC 2687, this Court has observed as under:-

"No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner he wishes. However, access to justice should not be misused as a licence to file misconceived and frivolous petitions."

18. Even otherwise, the statutory period of six months for filing the second petition under Section 13-B(2) of the Act has been prescribed for providing an opportunity to parties to reconcile and withdraw petition for dissolution of marriage. Learned counsel for the petitioner is not able to advance arguments on the issue as to whether, statutory period prescribed under Section 13-B(1) of the Act is mandatory or directory and if directory, whether could be dispensed with even by the High Court in exercise of its writ/appellate jurisdiction.

Thus, this is not a case where there has been any obstruction to the stream of justice or there has been injustice to the parties, which is required to be eradicated, and this Court may grant equitable relief. Petition does not raise any question of general public importance. None of contingencies, which may require this Court to exercise its extraordinary jurisdiction under Article 142 of the Constitution, has been brought to our notice in the case at hand.

19. Thus, in view of the above, we do not find any justification to entertain this petition. It is accordingly dismissed.

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SUMAN KAPUR VS SUDHIR KAPUR

In the Supreme Court of India
Civil Appellate Jurisdiction

(2009) 1 SCC 422

Civil Appeal No. 6582 of 2008
Arising out of Special Leave Petition (Civil) No. 10907 of 2007
Bench : Hon'ble Mr. Justice C.K. Thakker & Hon'ble Mr. Justice D.K. Jain

Suman Kapur ...Appellant
Versus
Sudhir Kapur ...Respondent

Abortion by a woman without her husband's knowledge and consent will amount to mental cruelty and a ground for divorce, the Supreme Court has held.

"Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of the other for a long time may lead to mental cruelty. A sustained course of abusive and humiliating treatment calculated to torture, discommode or render life miserable for the spouse," said a Bench consisting of Justices C.K. Thakker and D.K. Jain.

It was held: "The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty. Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness, causing injury to mental health or deriving sadistic pleasure, can also amount to mental cruelty."

The conduct must be much more than jealousy, selfishness, possessiveness, which caused unhappiness and dissatisfaction and emotional upset but might not be a reason for grant of divorce on the ground of mental cruelty.

Absence of intention

It was held: "To establish legal cruelty, it is not necessary that physical violence should be used. Continuous cessation of marital intercourse or total indifference on the part of the husband towards marital obligations would lead to legal cruelty. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs the act complained of could otherwise be regarded as cruelty. Mens rea is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill treatment."

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

In the instant case, Suman Kapur was aggrieved at the decree of divorce granted against her by a trial court and confirmed by the Delhi High Court. Both courts gave a finding that her three abortions without the knowledge and consent of her husband, Sudhir Kapur, was a valid ground

for divorce. Disposing of the appeal, the Bench noted that Sudhir Kapur got remarried on March 5, 2007 before the expiry of the period of 90 days for filing appeal before this court and a child was born from the second marriage.

"Since, we are confirming the decree of divorce on the ground of mental cruelty as held by both courts, i.e. the trial court as well as the High Court, no relief can be granted so far as the reversal of decree of the courts below is concerned. At the same time, however, in our opinion, the respondent-husband should not have remarried before the expiry of period stipulated for filing appeal. Ends of justice would be met if we direct the respondent to pay Rs. 5 lakh to the appellant."

JUDGMENT

C.K. THAKKER, J.

1. Leave granted.

2. The present appeal is filed by the appellant-wife being aggrieved and dissatisfied with the decree of divorce dated August 07, 2004 passed by the Additional District Judge, Delhi in HMA No. 322/2001/96 and confirmed by the High Court of Delhi on January 29, 2007 in Matrimonial Appeal No. 62 of 2004.

3. The facts in nutshell are that the appellant Suman Kapur is the wife and respondent Sudhir Kapur is the husband. The matrimonial alliance was entered into between the parties as per Hindu rites and rituals in Delhi on March 04, 1984. It was the case of the appellant that both the parties were friends from childhood and were knowing each other since 1966. They had also studied together in the same school. They were very close since 1974 and after a friendship of more than a decade, they decided to marry. The marriage was inter-caste marriage. Though initially parents of both the parties were opposed to the marriage, subsequently, they consented. The parties have no issue from the said wedlock.

4. The appellant has a brilliant academic record and has been the recipient of the prestigious Lalor Foundation Fellowship of United States of America (USA), offered to young scientists for outstanding performance in the area of research. According to her, at the time of her marriage, she was in employment with the Department of Bio-chemistry in the All India Institute of Medical Sciences (AIIMS) and was also pursuing her Ph.D.

5. It is the case of the appellant that she conceived for the first time in 1984, within a period of about one month of the marriage, but on account of being exposed to harmful radiations as a part of lab work of her Ph.D. thesis, she decided to terminate the pregnancy. The appellant asserted that it was done with the knowledge and consent of the respondent-husband.

6. Again, in 1985, she conceived. But even that pregnancy was required to be terminated on the ground of an acute kidney infection for which she had to undergo an IVP, which entailed six abdominal X-rays and radiometric urinary reflect test with radioactive drinking dye. She claimed that even the second pregnancy was terminated with the knowledge and consent of the respondent- husband.

7. According to the appellant, third time she became pregnant in 1989, but she suffered natural abortion on account of having a congenitally small uterus and thus prone to recurrent miscarriages.

8. It is the case of the appellant that though she was well-placed and having good job in AIIMS in Delhi, only with a view to accompany her husband who was serving in Bombay, she left the job. In 1988, the parties together left for USA. The appellant was awarded Lalor Foundation Fellowship in USA for which she had to move to Kansas city and could not join the respondent-husband at the place of his work.

9. The case of the respondent-husband, on the other hand was that since solemnization of marriage between the parties, the attitude, conduct and behaviour of the appellant-wife towards the respondent as well as his family members was indignant and rude. It was alleged by him that first pregnancy was terminated in 1984 by the appellant-wife without consent and even without knowledge of the respondent. Same thing was repeated at the time of termination of second pregnancy in 1985. He was kept in complete dark about the so-called miscarriage by the appellant-wife in 1989. The respondent was thus very much aggrieved since he was denied the joy of feeling of fatherhood and the parents of the respondent were also deprived of grand-parenthood of a new arrival. It was also contended by the respondent that the attitude of the appellant-wife towards her in-laws was humiliating. Several instances were cited in support of the said conduct and behaviour by the husband.

10. The respondent-husband, therefore, filed HMA No. 322/2001/96 in the Court of Additional District Judge, Delhi under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as `the Act') for getting divorce from the appellant-wife. Two grounds were taken by the respondent-husband in the said petition, i.e. (i) cruelty and (ii) desertion. It was alleged by the husband that the wife was all throughout conscious, mindful and worried of one thing and that was her career. In view of her thinking only in one direction, she deprived the respondent-husband of conjugal rights and matrimonial obligations. She also treated the family members of the respondent-husband with cruelty. She, without consent or even knowledge of the respondent- husband, got her pregnancy terminated twice in 1984 as well as in 1985 and falsely stated that there was natural miscarriage at the time of third pregnancy in 1989. At no point of time, she had taken consent of the husband nor even she had informed about the termination of pregnancy or about miscarriage to the respondent. At several occasions, she had stated that she was not interested at all in living with the respondent-husband and to perform marital obligations. She had made it explicitly clear to the respondent-husband that she was not willing to be a mother at the cost of her career. She had specifically told the respondent-husband that if he was very much interested and eager to be a father and his mother (respondent's mother) wanted to be a grand-mother, he could enter into marriage tie with any other woman, but the appellant-wife would not give up her career. She had also stated that she had no objection if the respondent adopts a child which action would not adversely affect her career. She had issued a notice to the respondent-husband that it would be better that they would peacefully separate from each other so that the respondent-husband may be able to fulfil the wishes of his parents and the appellant-wife may pursue her future career. The respondent- husband, therefore, submitted that the case attracted both the provisions, viz. (i) cruelty on the part of the wife under clause (ia) of sub-section (1) of Section 13 and (ii) desertion of matrimonial home and refusal to perform marital obligations falling under clause (ib) of sub-section (1) of Section 13 of the Act. On both the grounds, the respondent- husband was entitled to a decree of divorce.

11. The appellant-wife in her objections denied the allegations of the husband. According to her, she was doing her best to please her husband as well as her in-laws. Precisely for that purpose,

she had left her service in Delhi and joined the husband. It was admitted that she was in service and was also interested in career as she was well- educated lady and wanted to contribute to the society. But that did not mean that she was not performing her marital obligations. It was an admitted fact that immediately after her marriage, she conceived and she was very happy about it. Unfortunately, however, for the circumstances beyond her control, she was compelled to get the pregnancy terminated with the knowledge and consent of her husband. The same thing was repeated in 1985. In 1989, there was natural miscarriage. She also contended that she had to go to USA for receiving prestigious award of Lalor Foundation Fellowship. According to her, instead of being happy about the progress of the wife, the husband had initiated the present proceedings with jealousy and hence, he was not entitled to a decree of divorce. Even otherwise, there was no cruelty on her part. According to the wife, during regular intervals, the parties used to stay together and the appellant had never refused to perform her matrimonial obligations or even had shown her intention to deprive the husband of conjugal rights. It was, therefore, submitted that the husband was not entitled to the relief sought by him and the petition was liable to be dismissed.

12. The trial Court after hearing the parties held that the husband was not entitled to a decree of divorce on the ground that the wife had deserted the husband for a continuous period of not less than two years immediately preceding the presentation of the petition. He, however, held that it was fully established by the husband that there was cruelty on the part of the wife. The wife without the knowledge and consent of the husband got her pregnancy terminated twice - firstly in 1984 and secondly in 1985. The husband was also not informed about natural miscarriage in 1989. A finding was also recorded by the trial Court that the wife was not ready and willing to perform matrimonial obligations and she always attempted to stay away from her husband by depriving conjugal rights of the husband. It was, therefore, a case of mental cruelty. The trial Court also referred to several letters written by wife to the husband, and notice issued by the wife through an advocate which went to show that she was not interested in performing marital obligations and continuing marital relations with the husband. The Court also relied upon various entries made by the appellant-wife in her diary which suggested that all throughout she was worrying about her future and her career. For wife, according to the trial Court, her career was the most important factor and not matrimonial obligations. The trial Court, therefore, held that the case was covered by mental cruelty which was shown by the wife towards the husband and the husband was entitled to a decree of divorce on that ground.

13. Being aggrieved by the decree passed by the trial Court, the wife preferred an appeal in the High Court of Delhi. The High Court again appreciated the evidence on record and confirmed the decree of divorce passed by the trial Court. The High Court, however, held that it was not necessary for the Court to consider mental cruelty so far as termination of pregnancy was concerned, since in the opinion of the High Court, even otherwise from the letters and entries in diary, it was proved that there was mental cruelty on the part of the wife. Accordingly, the decree of divorce passed by the trial Court was confirmed by the High Court.

14. The said order has been challenged in the present proceedings. On July 16, 2007, notice was issued by this Court. The respondent appeared and affidavit-in-reply and affidavit-in-rejoinder were thereafter filed. Considering the nature of controversy, the Registry was directed to place the matter for final hearing and accordingly, the matter has been placed before us.

15. We have heard the learned counsel for the parties.

16. The learned counsel for the appellant contended that both the courts had committed an error of law in granting a decree of divorce against the appellant-wife. It was submitted that the courts below ought not to have held that there was mental cruelty on the part of the appellant-wife and the respondent-husband was entitled to a decree of divorce on that ground. It was also submitted that once the High Court has not considered the allegation as to termination of pregnancy without the consent of the husband, no decree for divorce on the ground of mental cruelty could have been passed by it. Even if all the allegations leveled against the wife had been accepted, they were in the nature of `normal wear and tear' in a matrimonial life of a couple which would not fall within the mischief of clause (ia) of sub- section (1) of Section 13 of the Act and the orders passed by the courts below are liable to be set aside. It was further submitted that even otherwise, the wife is entitled to an appropriate relief from this Court inasmuch as from the evidence, it is clearly established that the High Court confirmed the decree passed by the trial Court on January 29, 2007 and before the period of filing Special Leave to Appeal to this Court expires, the respondent- husband entered into re-marriage with a third party and from the said wedlock, he is having an issue. It was, therefore, submitted that the husband has created a situation which had seriously prejudiced the appellant and the Court may not allow the respondent-husband to take undue advantage of the situation created by him.

17. The learned counsel for the respondent-husband, on the other hand, supported the decree passed by the trial Court and confirmed by the High Court. It was urged that the trial Court on the basis of evidence adduced by the parties recorded a finding of fact that the conduct and behaviour of the wife was in the nature of mental cruelty and accordingly allowed the petition filed by the husband. The High Court, though convinced on all grounds, did not think it fit to enter into correctness or otherwise of the finding recorded with regard to illegal termination of pregnancy by wife without the knowledge and consent of the husband since it was convinced that even otherwise on the basis of evidence on record, mental cruelty of the wife was established. It was not necessary for the High Court to consider and to record a finding as to illegal termination of pregnancy by wife since the decree passed by the trial Court could be confirmed. As far as mental cruelty is concerned, on the basis of other evidence and material on record, a finding had been recorded by the trial Court. The said finding was a finding of fact which was confirmed by the High Court. In exercise of jurisdiction under Article 136 of the Constitution, this Court will not interfere with the said finding and hence the appeal deserves to be dismissed.

18. Regarding re-marriage by the husband, it was stated that after the decree of divorce passed by the trial Court, the husband did not re-marry. But the decree of divorce was confirmed by the High Court. The husband thereafter had taken the action which cannot be said to be illegal or otherwise unlawful. The wife, therefore, cannot take a technical contention that the husband should have waited till the period of filing Special Leave to Appeal to this Court would expire. It was, therefore, submitted that the appeal deserves to be dismissed.

19. Having heard the learned counsel for the parties, on the facts and in the circumstances of the case, in our opinion, it cannot be said that by recording a finding as to mental cruelty by the wife against the husband, the Courts below had committed any illegality.

20. Section 13 of the Hindu Marriage Act provides for grant of divorce in certain cases. It enacts that any marriage solemnized whether before or after the commencement of the Act may be dissolved on a petition presented either by the husband or by the wife on any of the grounds specified therein. Clause (ia) of sub- section (1) of Section 13 declares that a decree of divorce

may be passed by a Court on the ground that after the solemnization of marriage, the opposite party has treated the petitioner with cruelty.

21. Now, it is well-settled that the expression `cruelty' includes both (i) physical cruelty; and (ii) mental cruelty. The parties in this connection, invited our attention to English as well as Indian authorities. We will refer to some of them.

Mental Cruelty

22. The concept of cruelty has been dealt with in Halsbury's Laws of England [Vol.13, 4th Edition Para 1269] as under;

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

23. In Gollins V. Gollins 1964 AC 644: (1963)2 All ER 966, Lord Reid stated:

> *"No one has ever attempted to give a comprehensive definition of cruelty and I do not intend to try to do so. Much must depend on the knowledge and intention of the respondent, on the nature of his (or her) conduct, and on the character and physical or mental weakness of the spouses, and probably no general statement is equally applicable in all cases except the requirement that the party seeking relief must show actual or probable injury to life, limb or health".*

24. Lord Pearce also made similar observations;

> *"It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from normal standards of conjugal kindness causes injury to health or an apprehension of it, is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances would considered that the conduct complained of is such that this spouse should not be called on to endure it".*

[see also Russell v. Russell, (1897) AC 395 : (1895-99) All ER Rep 1].

25. The test of cruelty has been laid down by this court in the leading case of N.G. Dastane v. S. Dastane, (1975)2 SCC 326 thus:

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

26. In Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan & Anr., (1981) 4 SCC 250, this Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. It was further stated that to establish legal cruelty, it is not necessary that physical violence should be used. Continuous cessation of marital intercourse or total indifference on the part of the husband towards marital obligations would lead to legal cruelty.

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

28. In V. Bhagat v. D. Bhagat (Mrs.), (1994) 1 SCC 337, the Court observed;

"Mental Cruelty in Section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such unintentional. If it is physical, it is a question of fact and degree.

If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as

cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment or conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made".

29. This Court in Chetan Dass v. Kamla Devi, (2001) 4 SCC 250, stated;

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

30. Mental cruelty has also been examined by this Court in Parveen Mehta v. Inderjit Mehta(2002) 5 SCC 706 thus;

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

31. In A. Jayachandra v. Aneel Kaur, (2005) 2 SCC 22, the Court observed as under:

> *"The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse, same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial dispute."*

32. In Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778, the Court said;

> *"It is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such willful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.*
>
> *The word "cruelty" has not been defined and it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted".*

33. It was further stated:

"Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters.

The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.

The legal concept of cruelty which is not defined by the statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complaints, accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for wife, or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellants, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The Court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure."

34. Recently, in Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511, this Court held;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

35. Now, coming to the facts of the case, from the evidence of Smt. Vimal Kapur (mother- in-law of appellant-wife and mother of respondent-husband) who is examined as PW 1 and Sudhir Kapur, husband-PW 2, the trial Court held that the wife was interested in her career only and she had neglected towards matrimonial obligations and exercise of conjugal rights by the husband. The trial Court also held that termination of pregnancy by wife was without consent or even knowledge of the husband which was in the nature of mental cruelty. But keeping

the said element of mental cruelty aside, the High Court was convinced that the allegation of mental cruelty towards the husband by the wife was clearly established from the evidence on record adduced by the respondent-husband. The High Court noted that the appellant-wife was constantly and continuously avoiding staying with the husband and preventing him to have matrimonial relations. From the letters of the appellant- wife also, the High Court held that it was the wife who had stated that she had completely lost interest in the marriage and she was willing to get divorce. The High Court further noted that the appellant-wife sent a notice through her advocate to the respondent-husband during the pendency of mediation proceedings in the High Court wherein she alleged that the respondent was having another wife in USA whose identity was concealed. This was based on the fact that in his income-tax return, the husband mentioned the Social Security Number of his wife as 476-15-6010, a number which did not belong to the appellant-wife, but to some American lady (Sarah Awegtalewis). The High Court, however, recorded a finding of fact accepting the explanation of the husband that there was merely a typographical error in giving Social Security Number allotted to the appellant which was 476-15-6030. According to the High Court, taking undue advantage of the error in Social Security Number, the appellant wife had gone to the extent of making serious allegation that the respondent had married to an American woman whose Social Security Number was wrongly typed in the income tax return of the respondent-husband.

36. The High Court also observed that the appellant wanted to pursue her professional career to achieve success. In her written statement itself, she had admitted that she was very much interested in her career; that she was independent since 1979 and she was keen to live independent life.

37. The High Court also took a serious note of an entry in the personal diary of the appellant-wife dated September 14, 1986 wherein she stated;

> *"I said, "we started this journey as two individuals and if you can do so fine otherwise forget and don't bring the ghost of parents in between the two of us. He did not like the use of words ghosts and first cursed my vocabulary and then he said "you do not have any, but I have better ties". At this I told him you are given these 15 days and you can find another wife for yourself. He has this notion that he will go to USA (NY) and I will stay with his parents and I told him I will not and he says this was the deal in July and when I refuted he said "no you had promised". I told him you have just now paid the fine and you are again using the same tricks again. Naturally, he did not like and said to me "I am not and have never with you played tricks". I said sorry- I do not trust you any further and he said it is your fault. It may now be my fault but I think it is just quits. I don't think I will write to anybody back in Delhi now for 15 days and if I can find myself work here any kind".*

38. From the above letter, it is clear that the appellant-wife had described the parents of the husband as `ghost'.

39. In the letter dated June 21, 1988, she stated;

> *"I really wish you would understand my urge in pursuing my freedom away from the hawk eyes of your mother, sister and all other relatives. But, as I am not ready to share the economic gains of this job with you and other family members. I don't expect either you or them to understand my need and commitment for this job, or any job. I am*

bound to cause friction with so many people around me- I was at war with just you around me in Bombay."

40. In another letter, she stated that the respondent-husband should not make a condition for the wife of living together. She stated;

"I am not a good person to waste all your potential, emotion on. I do not deserve it.

... ...

Please do not make living together a condition for the coming few months. And do not read from these lines that I do not miss you- I do so individually and circumstantially- but as is my way of working I am not ready to stop myself for bonds and I believe the same for you. I wish the best and topmost for you-the most perfect, one can hope to be and wish that nothing becomes a barrier between you and you and your achievements. Even me. It will be best if we could help each other constructively; I also believe that we can do so- it is just that we believe in different things.

... ...

If possible, stand out of all this mess and try to work the best possible solution for us and your family. I do want you to remember that you are only one son and your family commitments. I would honour- but not at the cost of my spiritual search in life."

41. She further said that the respondent- husband should not bring her marital status preventing her from pursuing her career in the name of marriage. She stated that when she was unable to give even a child to the respondent- husband, up to what stage, they should live together. She clarified that she did not want to close her avenues in life at least at that stage. She also did not want to forego her chances whatever she would believe about her chances. She did not believe in love any more. She expressly stated that she did not believe in Indian social value system and she was very happy in the foreign country.

42. She stated;

"Mujhe is vivah ke naam per apne raste se mat roke. Ho sakta he mein he galat hoon- per mujhe nahin lagta. Dampati ke tarah hum saath ji liye hein- purani quality of life se kuch neechey hi star per jiye hein- ye aur koin jaane ya na jaane- Cambridge school se ek dosre ko bada hota dekh suman- sudhir achhey se jaante hein. Es vivah mein aapko santan bhi na de saki- phir kahan tak jaruri hai ki hum saath rahe? Aap mere vicharo se to kabhi sahmat nahin honge per auron ki rai kar lein-jis kisiki bhi- apni jindgi suljha lein. Mujh se ye ummid karma chod de ke kisi vyaktigat (per mujh se unrelated) ya samajik karan se abhi mein apna rehne sochne ka tarika badloon. Jaisa maine pehle likha- jindagi ji kar jaise bhi, job hi, jab bhi samajh aayega tabhi aayega, jaise main apne liye chhot chahti hoon vaise he apni oar se jitna mujhe adhikar hein aapko bhi mukt karti hoon. Meine to kareeb chheh page par hi ye patr samapt kar diya-except for some help that I needed for car, etc-buy your fax today was quite unsettling. I don't like to close my avenues in life- at lease not yet. I was naove to believe whatever I did for marriage as a constitution and marriage to you. I am not ready to forgo my chances- whatever I believe to be chances for what I have experienced as being married. I think the best alternative will be you stay in India for some more time. Chances are that even if you get an assignment outside Kansas we would be living separately. So decide for

yourself cause when time comes I am going to do so for myself. I will this time not make a compromise and regret it a few months later and make both our lives miserable. I have done that several times in the past-at least you should have enough of it to stop trying to push me against my belief.

My way of loving is not like that. I do not even believe in love any more. There is no bigger lie that any one could tell another person. I do not even believe in the Indian social value system. So I am better off being here away from every person and every thing that I grew up with. Whenever I have understood things to be a different shade I will decide whether I want to be here or there."

43. The High Court, in contrast, referred to the letters written by the respondent- husband. It noted that those letters were full of love and affection. According to the High Court, the husband tried his level best to keep the marriage tie to subsist and made all attempts to persuade the wife explaining and convincing her about the sacred relations of husband and wife, the need and necessity of child in their life and also feelings of his parents who wanted to become grand parents. According to the High Court, however, nothing could persuade the wife who was only after her career. In the light of the above facts and circumstances, the Court held that the trial Court did not commit any error of fact or of law in passing the decree for divorce on the ground of mental cruelty.

44. The High Court in paragraph 28 of the judgment stated;

"Applying the above principles to the facts of the present case, I feel the respondent has been able to establish and prove `cruelty' under Section 13(1) (ia) of the Act. The conduct of the appellant has been examined above. I have referred to the letters exchanged between the parties during the period 1986 onwards till 1994. Some of the letters have been written by the appellant herself. These letters reveal the conflict and difference between the parties. The present case also reveals that the respondent was bending over his heels to placate and woo the appellant till 1994 but thereafter gave up. The respondent was deeply in love and was emotionally attached to her. He has however over the passage of time developed a hatred and ill-will for the appellant. There is no apparent ground and reason for the same except the conduct of the appellant."

45. We find no infirmity in the approach of the High Court. The finding relating to mental cruelty recorded by the trial Court and confirmed by the High Court suffers from no infirmity and we see no reason to interfere with the said finding.

46. The fact, however, remains and it has been brought to the notice of this Court that the respondent got re-married on March 05, 2007 before the expiry of period of filing Special Leave to Appeal to this Court under Article 136 of the Constitution. It was also stated that a child was born from the said wedlock on December 20, 2007. Thus, the marriage had been performed within a period of ninety days of the order impugned in the present appeal.

47. Since, we are confirming the decree of divorce on the ground of mental cruelty as held by both the courts, i.e. the trial Court as well as by the High Court, no relief can be granted so far as the reversal of decree of the courts below is concerned. At the same time, however, in our opinion, the respondent-husband should not have re-married before the expiry of period stipulated for filling Special Leave to Appeal in this Court by the wife.

48. It is true that filing of appeal under Article 136 of the Constitution is not a right of the party. It is the discretion conferred on this Court to grant leave to the applicant to file appeal in appropriate cases. But, since the Constitution allows a party to approach this Court within a period of ninety days from an order passed by the High Court, we are of the view that no precipitate action could have been taken by the respondent-husband by creating the situation of fait accompli. Considering the matter in its entirety, though we are neither allowing the appeal nor setting aside the decree of divorce granted by the trial Court and confirmed by the appellate Court in favour of respondent-husband, on the facts and in the circumstances of the case, in our opinion, ends of justice would be met if we direct the respondent-husband to pay an amount of Rs. Five lakhs to the appellant-wife. The said payment will be made on or before 31st December, 2008.

49. The appeal is disposed of accordingly. The parties will bear their own costs all throughout.

(C.K. THAKKER)
(D.K. JAIN)

NEW DELHI,

November 07, 2008.

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NAVEEN KOHLI VS NEELU KOHLI

Appeal (Civil) 812 of 2004
Date of Judgment: 21/03/2006

(2006) 4 SCC 558

Naveen Kohli
Vs.
Neelu Kohli

Bench: Hon'ble Mr. Justice B.N. Agrawal, Hon'ble Mr. Justice A.K. Mathur & Hon'ble Mr. Justice Dalveer Bhandari

It was held that the marriage had been wrecked beyond any hope of salvation, the court held that public interest and the interests of all concerned lay in the recognition, in law, of this fact.

That even though the wife was not agreeable to a divorce by mutual consent and seemed to have resolved to live in agony only to make the life of her husband a miserable hell, public interest lay in the dissolution of the marriage bond. Keeping a sham of a marriage alive in law was held to be more conducive to immorality and potentially more prejudicial to the public interest than the dissolution of marriage. Not granting a divorce under such circumstances was held to be disastrous for the parties. The granting of divorce would offer them the chance, both psychologically and emotionally, to settle down after a while and start a new chapter in life.

The Supreme Court directed that the marriage between Naveen and Neelu Kohli be dissolved, subject to the husband giving Rs 25 lakh to the wife as permanent maintenance.

JUDGMENT

Dalveer Bhandari, J

This appeal is directed against the judgment of the Allahabad High Court dated 07.07.2003 passed by the Division Bench in First Appeal No.323 of 2003.

The appellant and the respondent are husband and wife. The appellant has filed a petition under the Hindu Marriage Act, 1955 for divorce. The Family Court after comprehensively dealing with the matter ordered cancellation of marriage between the parties under Section 13 of the Hindu Marriage Act which was solemnized on 20.11.1975 and directed the appellant to pay Rs.5 lacs as her livelihood allowance. The appellant deposited the amount as directed.

The respondent aggrieved by the said judgment preferred First Appeal before the Division Bench of the Allahabad High Court. After hearing the parties the appeal was allowed and the decree passed by the Family Court, Kanpur City seeking divorce and annulment of the marriage was dismissed.

The appellant aggrieved by the said judgment of the High Court had preferred special leave petition under Article 136 of the Constitution of India. This Court granted special leave to appeal to the appellant.

Brief facts which are necessary to dispose of this appeal are recapitulated.

The appellant, Naveen Kohli got married to Neelu Kohli on 20.11.1975. Three sons were born out of the wedlock of the parties. The appellant constructed three factories with the intention of providing a separate factory for his three sons. He also constructed bungalow no.7/36 A for their residence. The parties got all their three sons admitted and educated in a public school in Nanital. According to the appellant, the respondent is bad tempered and a woman of rude behaviour. After marriage, she started quarrelling and misbehaving with the appellant and his parents and ultimately, the appellant was compelled to leave the parental residence and started to reside in a rented premises from May 1994. According to the version of the appellant, the respondent in collusion with her parents got sufficient business and property transferred in her name.

The appellant alleged that in the month of May 1994, when he along with the respondent and their children visited Bombay to attend the golden jubilee marriage anniversary of his father-in-law, he noticed that the respondent was indulging in an indecent manner and found her in a compromising position with one Biswas Rout. Immediately thereafter, the appellant started living separately from the respondent since May 1994. The appellant suffered intense physical and mental torture.

According to the appellant, the respondent had withdrawn Rs.9,50,000/- from the Bank Account of the appellant and deposited the same in her account.

The appellant alleged that the respondent got a false first information report registered against him under Sections 420/467/468 and 471 IPC which was registered as Case No.156 of 1995. According to him, the respondent again got a case under Sections 323/324 I.P.C. registered in the police station Panki, Kanpur City and efforts were made to get the appellant arrested.

The appellant filed a Civil Suit No. 1158/1996 against the respondent. It was also reported that the appellant was manhandled at the behest of the respondent and an FIR No.156 of 1996 was filed by the eldest son at the behest of the respondent against the appellant in police station, Panki complaining that the appellant had physically beaten her son, Nitin Kohli.

The respondent in her statement before the Trial Court had mentioned that she had filed an FIR against the appellant under Section 420/468 IPC at the Police Station, Kotwali and the respondent had gone to the extent of filing a caveat in the High Court in respect of the said criminal case so that the appellant may not obtain an order from the High Court against her filing the said FIR.

In the same statement, the respondent had admitted that she had filed an FIR No.100/96 at the Police Station, Kohna under Section 379/323 IPC against the appellant.

The respondent had also filed a complaint against the appellant and his mother under Sections 498A/323/504/506 IPC at Police Station, Kohna.

The respondent in her statement had admitted that she had opposed the bail of the appellant in the criminal case filed at the Police Station, Kotwali on the basis of legal advice. In that very statement she further admitted that after the police had filed final report in both the criminal cases relating to Police Station, Kotwali and Police Station, Kohna, she had filed protest petition in those cases.

This clearly demonstrates the respondent's deep and intense feeling of revenge. The respondent in her statement had also admitted that she had filed a complaint in the Women Cell, Delhi in September 1997. According to the appellant, the respondent had filed a complaint no.125 of 1998 against the appellant's lawyer and friend alleging criminal intimidation which was found to be false.

According to the appellant, the respondent filed a forged complaint under sections 397/398 of the Companies Act before the Company Law Board, New Delhi and in the affidavit of the respondent she stated that the appellant was immoral, alcoholic, and was having affairs with numerous girls since marriage. She also called him a criminal, infidel, forger and her manager to denigrate his position from the proprietor to an employee of her company.

The appellant also mentioned that the respondent filed a false complaint in Case No.1365 0f 1988 using all kinds of abuses against the appellant.

On 8.7.1999, the respondent filed a complaint in the Parliament Street Police Station, New Delhi and made all efforts to ensure the appellant's arrest with the object of sending him to jail. The appellant was called to the police station repeatedly and was interrogated by the police and only after he gave a written reply and the matter on scrutiny was found to be false, the appellant with great difficulty was able to save himself from imprisonment.

On 31.3.1999 the respondent had sent notice for breaking the Nucleus of the HUF, expressly stating that the Family Nucleus had been broken with immediate effect and asking for partition of all the properties and assets of the HUF and stating that her share should be given to her within 15 days. According to the appellant, this act of the respondent clearly broke all relations between the appellant and the respondent on 31.3.1999.

The respondent had filed a complaint against the appellant under Section 24 of the Hindu Marriage Act directing payment of maintenance during the pendency of the case. This was rejected by the Trial Court and she later filed an appeal in the High Court.

The appellant had deposited Rs.5 lacs on Court's directions but that amount was not withdrawn by the respondent. On 22.1.2001 the respondent gave an affidavit before the High Court and got non-bailable warrants issued against the appellant. Consequently, the appellant was harassed by the police and ultimately he got the arrest order stayed by the High Court. The respondent admitted in her statement that she got the advertisement published in the English National Newspaper 'Pioneer'. The advertisement reads as under :

PUBLIC NOTICE Be it known to all that Mr. Naveen Kohli S/o Mr. Prem Kumar Kohli was working with my Proprietorship firm as Manager. He has abandoned his job since May 1996 and has not resumed duties.

He is no more in the employment of the firm. Any Body dealing with him shall be doing so at his own risk, his authority to represent the firm has been revoked and none should deliver him orders, cash cheques or drafts payable to the firm.

NEELU KOHLI Sole Proprietor M/s NITIN RUBBERS 152-B, Udyog Nagar, Kanpur The respondent in her statement before the Court did not deny the contents of the affidavit but merely mentioned that she did not remember whether she called the appellant a criminal, infidel and a forger in the affidavit filed before the Company Law Board.

The respondent did not deny her using choicest abuses against the appellant but merely stated that she did not remember.

The respondent also filed a contempt petition in the Company Law Board against its order of the Company Law Board dated 25.9.2000 in order to try and get the appellant thrown out of the little apartment and urged that the appellant be sent to jail.

Before the Family Court, the respondent stated about solemnization of the marriage with the appellant on 20.11.1975. In her written statement she had denied the fact that she was either a rude or a quarrelsome lady. The respondent also denied that she had mentally, physically and financially harassed and tortured the appellant. She also stated that she never refused cohabitation with the appellant. She also denied indulging in any immoral conduct. She averred in the written statement that the appellant has been immorally living with a lady named 'Shivanagi'.

The appellant and the respondent filed a number of documents in support of their respective cases. On the basis of the pleadings and the documents, the Additional Principal Judge of Family Court framed the following issues :-

"1. Whether the respondent treated the plaintiff with cruelty by registering various criminal cases, getting the news published and initiating civil proceedings?

2. Whether the defendant treated the plaintiff with cruelty by her objectionable behaviour as stated in the plaint?

3. Whether respondent has made false allegation against the plaintiff? If yes, its impact?

   Whether in the presence of plaintiff, the defendant displayed her behaviour with Dr. Viswas Rout which comes in the category of immorality as has been stated in para 11 of the plaint? If yes, its impact?

4. Whether the petition is not maintainable on the basis of preliminary objections 1 to 3 of the written statement?

5. Whether plaintiff has kept Smt. Shivanagi with him as his concubine? If yes, its impact?

6. Whether suit of the plaintiff is barred by the provisions of Section 11, C.P.C.?

7. Whether plaintiff is entitled to get the decree of dissolution of marriage against defendant?

8. Whether plaintiff is entitled to get any other relief?"

Issues number 1 & 2 relate to the term 'Cruelty' and Issue no. 3 is regarding impact of false allegations levelled by the respondent against the appellant. All these three issues were decided in favour of the appellant and against the respondent. The learned Trial Court came to a definite conclusion that the respondent had filed a very large number of cases against the appellant and got him harassed and tortured by the police. It also declared him an employee of the factory of which the respondent is a proprietor by getting an advertisement issued in the newspaper. According to findings of the Trial Court, the appellant was mentally, physically and financially harassed and tortured by the respondent.

The Trial Court framed specific issue whether the appellant had kept Smt. Shivangi with him as his concubine. This allegation has been denied by the appellant. The respondent had failed to produce any witness in respect of the aforesaid allegation and was consequently not able to prove the same. The Trial Court stated that both parties have levelled allegations of character assassination against each other but failed to prove them.

The Trial Court stated that many a times efforts have been made for an amicable settlement, but on the basis of allegations which have been levelled by both the parties against each other, there is no cordiality left between the parties and there is no possibility of their living together. According to the Trial court, there was no possibility to reconnect the chain of marital life between the parties. Hence, the Trial Court found that there is no alternative but to dissolve the marriage between the parties.

The Trial Court also stated that the respondent had not filed any application for allowing permanent maintenance and Stridhan but, in the interest of justice, the Trial Court directed the appellant to deposit Rs.5,00,000/- toward permanent maintenance of the respondent. The Trial Court also ordered that a decree of dissolution of marriage shall be effective after depositing the payment of Rs.5,00,000/- by the appellant. Admittedly, the appellant had immediately deposited the said amount.

The respondent, aggrieved by the judgment of the Principal Judge, Family Court, Kanpur City, preferred the first appeal before the High Court, which was disposed of by a Division Bench of the Allahabad High Court.

According to the High Court, the Trial Court had not properly appreciated and evaluated the evidence on record. According to the High Court, the appellant had been living with one Shivangi. As per the High Court, the fact that on Trial Court's directions the appellant deposited the sum of Rs.5,00,000/- within two days after the judgment which demonstrated that the appellant was financially well off. The Division Bench of the High Court held that actions of the appellant amounted to misconduct, un-condonable for the purpose of Section 13(1)(a) of the Hindu Marriage Act. The appeal was allowed and the Trial Court judgment has been set aside. The suit filed by the appellant seeking a decree of divorce was also dismissed.

The appellant preferred a Special Leave Petition before this Court. We have carefully perused the pleadings and documents on record and heard the learned counsel appearing for the parties at length.

Both the parties have levelled allegations against each other for not maintaining the sanctity of marriage and involvement with another person. According to the respondent, the appellant is separately living with another woman, 'Shivanagi'. According to the appellant, the respondent was seen indulging in an indecent manner and was found in compromising position with one Biswas Rout. According to the findings of the Trial Court both the parties failed to prove the allegations against each other. The High Court has of course reached the conclusion that the appellant was living with one 'Shivanagi' for a considerable number of years. The fact of the matter is that both the parties have been living separately for more than 10 years. Number of cases including criminal complaints have been filed by the respondent against the appellant and every effort has been made to harass and torture him and even to put the appellant behind the bars by the respondent. The appellant has also filed cases against the respondent.

We would like to examine the facts of the case in the light of the settled position of law which has been crystallized by a series of judgments.

In the light of facts and circumstances of this case we would also like to examine the concept of Irretrievable Breakdown of Marriage particularly with reference to recently decided cases.

Impact of Physical and Mental Cruelty in Matrimonial Matters.

The petition for divorce was filed primarily on the ground of cruelty. It may be pertinent to note that, prior to the 1976 amendment in the Hindu Marriage Act, 1955 cruelty was not a ground for claiming divorce under the Hindu Marriage Act. It was only a ground for claiming judicial separation under Section 10 of the Act. By 1976 Amendment, the Cruelty was made ground for divorce. The words which have been incorporated are "as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party". Therefore, it is not necessary for a party claiming divorce to prove that the cruelty treatment is of such a nature as to cause

an apprehension reasonable apprehension that it will be harmful or injurious for him or her to live with the other party.

The Court had an occasion to examine the 1976 amendment in the case of N.G. Dastane v. S. Dastane [(1975) 2 SCC 326: AIR 1975 SC 1534], The Court noted that "....whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent".

We deem it appropriate to examine the concept of 'Cruelty' both in English and Indian Law, in order to evaluate whether the appellant's petition based on the ground of cruelty deserves to be allowed or not.

D. Tolstoy in his celebrate book "The Law and Practice of Divorce and Matrimonial Causes" (Sixth Edition, p. 61) defined cruelty in these words: "Cruelty which is a ground for dissolution of marriage may be defined as willful 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 concept of cruelty in matrimonial matters was aptly discussed in the English case in Bertram v. Bertram [(1944) 59, 60] per Scott, L.J. observed: "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."

In Cooper vs. Cooper [(1950) WN 200 (HL)], it was observed as under:

"It is true that the more serious the original offence, the less grave need be the subsequent acts to constitute a revival."

Lord Denning, L.J. in Kaslefsky v. Kaslefsky [(1950) 2 All ER 398, 403] observed as under:

"If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament.

This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperiled."

"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 [(1966) 1 All ER 524, 536], the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case like any civil case, may be proved by a preponderance of probability".

The High Court of Australia in Wright v. Wright [(1948) 77 CLR 191, 210], has also taken the view that "the civil and not the criminal standard of persuasion applies to matrimonial causes, including issues of adultery". The High Court was therefore in error in holding that the petitioner must establish the charge of cruelty "beyond reasonable doubt". The High Court adds that "This must be in accordance with the law of evidence", but we are not clear as to the implications of this observation."

Lord Pearce observed:

"It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all

the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called on to endure it.

* * * I agree with Lord Merriman whose practice in cases of mental cruelty was always to make up his mind first whether there was injury or apprehended injury to health. In the light of that vital fact the court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently weighty to say that from a reasonable person's point of view, after a consideration of any excuse which this respondent might have in the circumstances, the conduct is such that this petitioner ought not to be called on to endure it.

* * * The particular circumstances of the home, the temperaments and emotions of both the parties and their status and their way of life, their past relationship and almost every circumstance that attends the act or conduct complained of may all be relevant."

Lord Reid in Gollins v. Gollins [1964 AC 644 : (1963) 2 All ER 966]:

"No one has ever attempted to give a comprehensive definition of cruelty and I do not intend to try to do so.

Much must depend on the knowledge and intention of the respondent, on the nature of his (or her) conduct, and on the character and physical or mental weaknesses of the spouses, and probably no general statement is equally applicable in all cases except the requirement that the party seeking relief must show actual or probable injury to life, limb or health.

The principles of law which have been crystallized by a series of judgments of this Court are recapitulated as under :-

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

In the case of Sbhoba Rani vs. Madhukar Reddi reported in (1988) 1 SCC 105, this Court had an occasion to examine the concept of cruelty. The word 'cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(i)(a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be

regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment.

The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions and their culture and human values to which they attach importance. Each case has to be decided on its own merits.

The Court went on to observe as under : "It will be necessary to bear in mind that there has been marked changed in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case.

The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them.

There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents.

Lord Denning said in Sheldon v. Sheldon, [1966] 2 All E.R. 257 (CA) 'the categories of cruelty are not closed'. Each case may be different. We deal with the conduct of human beings who are no generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty."

In the case of V. Bhagat vs. D. Bhagat reported in (1994) 1 SCC 337, this Court had occasion to examine the concept of 'mental cruelty'. This Court observed as under:

"16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be decided in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

The word 'cruelty' has to be understood in the ordinary sense of the term in matrimonial affairs. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case. There may be instances of cruelty by unintentional but inexcusable conduct of any party. The cruel treatment may also result from the cultural conflict between the parties. Mental cruelty can be caused by a party when the other spouse levels an allegation that the petitioner is a

mental patient, or that he requires expert psychological treatment to restore his mental health, that he is suffering from paranoid disorder and mental hallucinations, and to crown it all, to allege that he and all the members of his family are a bunch of lunatics. The allegation that members of the petitioner's family are lunatics and that a streak of insanity runs though his entire family is also an act of mental cruelty. This Court in the case ofSavitri Pandey vs. Prem Chandra Pandey reported in (2002) 2 SCC 73, stated that mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other.

In this case, this Court further stated as under: "9. Following the decision in Bipinchandra case [AIR 1957 SC 176] this Court again reiterated the legal position in Lachman Utamchand Kirpalani v. Meena [AIR 1964 SC 40] by holding that 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. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation."

In this case, this Court further stated that cruelty can be said to be an act committed with the intention to cause suffering to the opposite party. This Court in the case of Gananth Pattnaik vs. State of Orissa reported in (2002) 2 SCC 619 observed as under:

"The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case."

This Court, in the case of Parveen Mehta vs. Inderjit Mehta reported in (2002) 5 SCC 706, defined cruelty as under:

"Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of

mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty.

The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subject to mental cruelty due to conduct of the other."

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

In Chetan Dass vs. Kamla Devi reported in (2001) 4 SCC 250 , this Court observed that the matrimonial matters have to be basically decided on its facts. In the words of the Court:

"Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well.

The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society.

The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case."

In Sandhya Rani vs. Kalyanram Narayanan reported in (1994) Supp. 2 SCC 588, this Court reiterated and took the view that since the parties are living separately for the last more than three years, we have no doubt in our mind that the marriage between the parties has irretrievably broken down. There is no chance whatsoever of their coming together. Therefore, the Court granted the decree of divorce.

In the case of Chandrakala Menon vs. Vipin Menon reported in (1993) 2 SCC 6, the parties had been living separately for so many years. This Court came to the conclusion that there is no scope of settlement between them because, according to the observation of this Court, the marriage has irretrievably broken down and there is no chance of their coming together. This Court granted decree of divorce.

In the case of Kanchan Devi vs. Promod Kumar Mittal reported in (1996) 8 SCC 90, the parties were living separately for more than 10 years and the Court came to the conclusion that the marriage between the parties had to be irretrievably broken down and there was no possibility of reconciliation and therefore the Court directed that the marriage between the parties stands dissolved by a decree of divorce.

In Swati Verma vs. Rajan Verma reported in (2004) 1 SCC 123, a large number of criminal cases had been filed by the petitioner against the respondent. This Court observed that the marriage between the parties had broken down irretrievably with a view to restore good relationship and to put a quietus to all litigations between the parties and not to leave any room for future litigation, so that they may live peacefully hereafter, and on the request of the parties, in exercise of the power vested in this Court under Article 142 of the Constitution of India, the Court allowed the application for divorce

by mutual consent filed before it under Section 13-B of the Hindu Marriage Act and declared the marriage dissolved and granted decree of divorce by mutual consent.

In Prakash Chand Sharma vs. Vimlesh [1995 Supp (4) SCC 642], the wife expressed her will to go and live with the husband notwithstanding the presence of the other woman but the husband was not in a position to agree presumably because he has changed his position by remarriage. Be that as it may, a reconciliation was not possible.

In V. Bhagat v. D. Bhagat (supra), this Court while allowing the marriage to dissolve on ground of mental cruelty and in view of the irretrievable breakdown of marriage and the peculiar circumstances of the case, held that the allegations of adultery against the wife were not proved thereby vindicating her honour and character. This Court while exploring the other alternative observed that the divorce petition has been pending for more than 8 years and a good part of the lives of both the parties has been consumed in this litigation and yet, the end is not in sight and that the allegations made against each other in the petition and the counter by the parties will go to show that living together is out of question and rapprochement is not in the realm of possibility. This Court also observed in the concluding part of the judgment that:

"Before parting with this case, we think it necessary to append a clarification. Merely because there are allegations and counter allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of the divorce proceedings by itself a ground. There must be really some extra- ordinary features to warrant grant of divorce on the basis of pleading (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself.

But while scrutinising the evidence on record to determine whether the ground(s) alleged is/are made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluable mess, when the Court finds it in the interest of both parties."

Again in A. Jaychandra v. Aneel Kumar, (2005) 2 SCC 22, a 3 judge Bench of this Court observed that the expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, a proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents

that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

The expression 'cruelty' has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the Court will have no problem in determining it. It is a question of fact and degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted (See Sobha Rani v. Madhukar Reddi (1988) 1 SCC 105). To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

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

The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty

in each particular case and as noted above, always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hyper- sensitive approach would be counter-productive to the institution of marriage. The Courts do not have to deal with ideal husbands and ideal wives. It has to deal with particular man and woman before it. The ideal couple or a mere ideal one will probably have no occasion to go to Matrimonial Court.

In Durga P.Tripathy v. Arundhati Tripathy, (2005) 7 SCC 353, this Court further observed that Marriages are made in heaven. Both parties have crossed the point of no return. A workable solution is certainly not possible. Parties cannot at this stage reconcile themselves and live together forgetting their past as a bad dream. We, therefore, have no other option except to allow the appeal and set aside the judgment of the High Court and affirming the order of the Family Court granting decree for divorce.

In Lalitha v. Manickswamy, I (2001) DMC 679 SC that the had cautioned in that case that unusual step of granting the divorce was being taken only to clear up the insoluble mess when the Court finds it in the interests of both the parties.

Irretrievable Breakdown of Marriage Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. Because of the change of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into services, the divorce cannot be granted. Ultimately, it is for the Legislature whether to include irretrievable breakdown of marriage as a ground of divorce or not but in our considered opinion the Legislature must consider irretrievable breakdown of marriage as a ground for grant of divorce under the Hindu Marriage Act, 1955. The 71st Report of the Law Commission of India briefly dealt with the concept of Irretrievable breakdown of marriage. This Report was submitted to the Government on 7th April, 1978. We deem it appropriate to recapitulate the recommendation extensively. In this Report, it is mentioned that during last 20 years or so, and now it would around 50 years, a very important question has engaged the attention of lawyers, social scientists and men of affairs, namely, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory.

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

"The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this court, as prima facie a good ground for divorce.

When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of

such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous."

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

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

On May 22, 1969, the General Assembly of the Church of Scotland accepted the Report of their Moral and Social Welfare Board, which suggested the substitution of breakdown in place of matrimonial offences. It would be of interest to quote what they said in their basis proposals:

"Matrimonial offences are often the outcome rather than the cause of the deteriorating marriage. An accusatorial principle of divorce tends to encourage matrimonial offences, increase bitterness and widen the rift that is already there. Separation for a continuous period of at least two years consequent upon a decision of at least one of the parties not to live with the other should act as the sole evidence of marriage breakdown."

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

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

We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases do not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist.

Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems then are sought to be solved.

The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

When we carefully evaluate the judgment of the High Court and scrutinize its findings in the background of the facts and circumstances of this case, then it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory.

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

The findings of the High Court that the respondent wife's cautioning the entire world not to deal with the appellant (her husband) would not lead to mental cruelty is also wholly unsustainable.

The High Court ought to have examined the facts of the case and its impact. In the instant case, the following cases were filed by the respondent against the appellant.

1. The respondent filed FIR No. 100/96 at Police Station, Kohna under Sections 379/323 IPC

2. The respondent got a case registered under Sections 323/324 registered in the police station Panki, Kanpur City.

3. At the behest of the respondent FIR No.156 of 1996 was also filed in the police station, Panki.

4. The respondent filed FIR under Section 420/468 IPC at the Police Station, Kotwali.

5. The respondent got a case registered under Section under Sections 420/467/468 and 471 IPC.

6. The respondent filed a complaint against the appellant under Sections 498A/323/504/506 IPC at Police Station, Kohna.

7. The respondent had even gone to the extent of opposing the bail application of the appellant in criminal case filed at the police station, Kotwali

8. When police filed final report in two criminal cases at police station, Kotwali and police station, Kohna, the respondent filed protest petition in these cases.

9. The respondent filed complaint no.125 of 1998 in the Women Cell, Delhi in September 1997 against the appellant's lawyer and friend alleging criminal intimidation.

10. The respondent filed a complaint under sections 397/398 before the Company Law Board, New Delhi.

11. The respondent filed a complaint in Case No.1365 0f 1988 against the appellant.

12. Again on 8.7.1999, the respondent filed a complaint in the Parliament Street Police Station, New Delhi and made all efforts to get the appellant arrested.

13. On 31.3.1999, the respondent have sent a notice for breaking the Nucleus of the HUF.

14. The respondent filed a complaint against the appellant under Section 24 of the Hindu Marriage Act.

15. The respondent had withdrawn Rs.9,50,000/- from the bank account of the appellant in a clandestine manner.

16. On 22.1.01 the respondent gave affidavit before the High Court and got non-bailable warrants issued against the appellant.

17. The respondent got an advertisement issued in a national newspaper that the appellant was only her employee. She got another news item issued cautioning the business associates to avoid dealing with the appellant.

The findings of the High Court that these proceedings could not be taken to be such which may warrant annulment of marriage is wholly unsustainable.

Even at this stage, the respondent does not want divorce by mutual consent. From the analysis and evaluation of the entire evidence, it is clear that the respondent has resolved to live in agony only to make life a miserable hell for the appellant as well. This type of adamant and callous attitude, in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together, or living together again.

The High Court ought to have appreciated that there is no acceptable way in which the parties can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist.

Undoubtedly, it is the obligation of the Court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. The course which has been adopted by the High Court would encourage continuous bickering, perpetual bitterness and may lead to immorality.

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.

The High Court ought to have visualized that preservation of such a marriage is totally unworkable which has ceased to be effective and would be greater source of misery for the parties.

The High Court ought to have considered that a human problem can be properly resolved by adopting a human approach. In the instant case, not to grant a decree of divorce would be disastrous for the parties. Otherwise, there may be a ray of hope for the parties that after a passage of time (after obtaining a decree of divorce) the parties may psychologically and emotionally settle down and start a new chapter in life.

In our considered view, looking to the peculiar facts of the case, the High Court was not justified in setting aside the order of the Trial Court. In our opinion, wisdom lies in accepting the pragmatic reality of life and take a decision which would ultimately be conducive in the interest of both the parties.

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 extra-ordinary 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 lacs) to the respondent towards permanent maintenance to be paid within eight weeks. This amount would include Rs.5,00,000/- (Rupees five lacs 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 lacs) 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.

Before we part with this case, on the consideration of the totality of facts, this Court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce. A copy of this judgment be sent to the Secretary, Ministry of Law & Justice, Department of Legal Affairs, Government of India for taking appropriate steps.

The appeal is accordingly disposed of. In the facts and circumstances of the case we direct the parties to bear their own costs.

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VINITA SAXENA VS PANKAJ PANDIT

Appeal (Civil) 1687 of 2006
Date of Judgment: 21/03/2006

(2006) 3 SCC 778

Vinita Saxena
Vs.
Pankaj Pandit

Bench: Hon'ble Mrs. Justice Ruma Pal & Hon'ble Mr. Justice A.R. Lakshmanan

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

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

In Re : Cruelty It was submitted that in order to make out a ground for divorce under Section 13(1)(i-a) of the Act, the conduct complained of should be grave and weighty so as to come to the conclusion that the appellant spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". For this proposition, he relied on the judgment of this Court in A. Jayachandra vs. Aneel Kaur (supra). Para 13 of the aforementioned judgment is as under:

"But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it"

LEGAL PROPOSITION ON THE ASPECT OF CRUELTY It is settled by catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the Section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

The word 'cruelty' has not been defined and it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or

physical, intentional or unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions, their culture and human values to which they attach importance. Judged by standard of modern civilization in the background of the cultural heritage and traditions of our society, a young and well educated woman like the appellant herein is not expected to endure the harassment in domestic life whether mental, physical, intentional or unintentional. Her sentiments have to be respected, her ambition and aspiration taken into account in making adjustment and her basic needs provided, though grievances arising from temperamental disharmony. This view was taken by the Kerala High Court in the case reported in AIR 1991 Kerala 1.

In 1993 (2) Hindu L.R. 637, the Court had gone to the further extent of observing as follows:

"Sometime even a gesture, the angry look, a sugar coated joke, an ironic overlook may be more cruel than actual beating"

Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.

The legal concept of cruelty which is not defined by statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all question of cruelty is that the whole matrimonial relations must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complains accusations or taunts. It may be mental such as indifference and frigidity towards wife, denial of a company to her, hatred and abhorrence for wife or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure.

JUDGMENT

(Arising out of S.L.P.(C) No.26418 of 2004)

Dr. AR. Lakshmanan, J.

Leave granted.

The above appeal was filed by the appellant, wife of the respondent herein, against the judgment and final order dated 10.9.2004 passed by the High Court of Delhi in F.A.O. No. 235 of 2002 whereby the Civil Writ Petition filed by the appellant was dismissed.

The short facts are as follows:

The marriage between the appellant-Vinita Saxena and the respondent-Pankaj Pandit was soleminzed on 7.2.1993 as per Hindu rites and customs. No child was born out of wedlock. The marriage, according to the appellant, lasted for five months and was never consummated on account of the fact that the respondent was incapable of performing his matrimonial obligations. According to the appellant, from the first day of the marriage, the respondent's mother treated the appellant with utmost cruelty both mental and physical and that the reason for cruelty was the respondent's mental disorder. The respondent's case is a case of Paranoid Schizophrenia and the appellant discovered only after the marriage that the respondent was under constant treatment and observations of different doctors even prior to the marriage for the said ailment. Though the appellant knew the respondent prior to her marriage, in fact, it is only after the marriage, the appellant realised and discovered the mental disorder of the respondent. The appellant was never told by the respondent nor his parents that he was suffering from such serious mental disorder and that he was under the treatment and used to take strong medicines before the marriage. According to Dr. C.R. Samanta, who was a consultant psychiatrist at Aashlok Hospital, the respondent was a case of Schizophrenia and depression. On 4.7.1993, the appellant tried to discuss regarding the problems she was facing with the respondent and her mother-in-law, who objected strongly and accused the appellant of defaming the respondent. At her instance, the appellant was beaten mercilessly by the respondent, which made him nervous to the extent that he consumed "Baygon Spray" to commit suicide. The appellant and her brother immediately took the respondent to the hospital in order to save the respondent's life. Again, Dr. C.R. Samantha prescribed certain medicines i.e. (1) Triperidol (2) Pacitane (3) Prodep to the respondent. The respondent was hospitalised for four days at Aashlok Hospital, Safdarjung Enclave and was discharged after giving proper treatment on 7.7.1993. According to the appellant, Triperidol is given in case of acute and chronic psychoses anxiety disorders, mania, Schizophrenia as per the medical advise. The situation further became worse on 8.7.1993 and 9.7.1993. Again on the instigation of the respondent's mother, the respondent slapped and abused the appellant mercilessly and she was not even allowed to have food that day and the next day morning i.e. on 9.7.1993. On 9.7.1993, the appellant was pushed and kicked out of the matrimonial home by her mother-in-law and the respondent and thereafter, the appellant was not permitted to return again.

The appellant filed H.M.A. Petition on 30.6.1994 against the respondent for dissolution of marriage under Section 13(1)(1-a) and (iii) of the Hindu Marriage Act,1955 hereinafter referred to as "the Act" on the grounds of mental and physical cruelty and insanity before the Court of District Judge at Delhi. The trial Court vide its order dated 15.5.1993, relying on the facts and averments made by the parties as well as taking the medical documents placed on record observed that a letter of request should be written to the Medical Superintendent, L.N.J.P. Hospital to constitute a panel of doctors to examine

the respondent and to report about his mental state. However, this order was subsequently set aside by the High Court in a Revision Petition filed by the respondent. After the marriage had broken down the appellant pursued further studies and completed M.S. (Structural Engineering) from IIT Delhi and in 1996, left for her Ph.D. programme to U.S.A. Father of the appellant, J.S. Saxena, deposed as PW-II and the appellant as PW-I and Dr. D.S. Arora, Medical Superintendent, Aashlok Hospital and Dr Kuldeep Kumar of Safdarjung Hospital recorded their statement as PW-III and PW-IV respectively supporting the case of the appellant. The respondent, however, got only his statement recorded and before his cross-examination could be concluded, deliberately did not appear in the witness box to complete his deposition. The trial Court, vide order dated 19.3.2001, dismissed the petition filed by the appellant under Section 13(1)(1-a) and (iii) of the Act for the grant of decree of divorce. Being aggrieved by the said order, the appellant filed an appeal before the High Court. The High Court vide order dated 10.9.2004 dismissed the appeal filed by the appellant holding that the respondent is not suffering from Schizophrenia and that there is insufficient material on record to establish the cause of cruelty and further held that the incidents of cruelty is not so grave which come within the scope of concept of cruelty. The High Court also held that the testimonies of the doctors examined by the appellant to prove that the respondent was suffering from Schizophrenia cannot be looked into for the reason that the respondent was not under the treatment of the above doctors. Aggrieved by the said order, the appellant filed this appeal by way of special leave petition before this Court. The respondent filed a counter affidavit. It is stated in the counter affidavit that the special leave petition is devoid of any merit inasmuch as the Courts below have given findings of fact in favour of the respondent and the Courts below have rejected the pleas of the appellant on the ground that she has not made out any case for grant of divorce. It was submitted that the appellant even before the marriage was having intimacy with the respondent from 1986 to 1993 and she did not find any abnormality in the behaviour of the respondent. It was also submitted that the appellant has not made out any case seeking divorce on the ground of causing cruelty to her inasmuch as she has failed to prove any instance leading to causing such cruelty to her by the respondent. It was submitted that the respondent is willing to take the appellant and keep her happy to the fullest and it is the desire of the respondent that the marriage should not break on the ground that she is building up her career in America for the past 12 years. Since concurrent findings of fact is in favour of the respondent, the appellant ought not to be stated that the respondent and his mother were involved in causing cruelty to her and that the Courts below have also disbelieved the version of the appellant that the cruelty was caused by the respondent due to his mental disorder. It was further contended that the appellant did not lead any evidence to prove as a matter of fact that the respondent was suffering from Schizophrenia and that the appellant has filed the petition deliberately and wilfully and with a view to harass the respondent and his mother. It was also contended that the mere branding of spouse as Schizophrenic is not sufficient and that the degree of mental disorder of the spouse must be proved to be such that the appellant spouse cannot be reasonably be expected to live with the other. It was also submitted that from the evidence and pleadings, it has clearly been stated that the appellant was having sex with the respondent without any problem and there is no truth in the allegation made by the appellant. The other allegations mentioned in the Divorce Petition have not been proved at all and that the appeal filed by the appellant deserves to be rejected. We heard Ms. Kamini Jaiswal, learned counsel appearing for the appellant-wife and Mr. Dhruv Mehta, learned counsel appearing for the respondent-husband. We have perused the pleadings, annexures filed along with the appeal and the orders passed by the courts below and the grounds of appeal. Learned counsel for the appellant while reiterating the averments made in the appeal submitted the following grounds for granting divorce as prayed for by the appellant-wife :

1) Non-consummation of the marriage itself would constitute mental cruelty to a married woman.

2) The respondent attempted to commit suicide also amounts to mental cruelty and harassment.

3) The appellant has lived only for five months after the marriage and she was mercilessly beaten by the respondent and his mother.

4) There was absolutely nothing to show that the documents and prescription given by the doctors have been concocted. They are the official records of the Hospital.

5) The medical prescriptions and the evidence of doctors clearly illustrate that the respondent was under the treatment of Dr. Samantha and was a case of Paranoid Schizophrenia.

6) The respondent, before his cross examination could be concluded, deliberately did not appear in the witness box to complete his deposition and his evidence had to be closed.

7) The appellant was denied the matrimonial bliss of physical relation by the respondent because of his incompetency which itself constitute cruelty for a married woman.

8) The threat to commit suicide by the respondent amounts to cruelty and the Courts below took cognizance of the fact that the respondent consumed "Baygon spray".

9) Because Dr. Samantha was not alive, the medical record authored by him can only be proved by secondary evidence though Dr. D.S. Arora, medical Superintendent who certified on oath that the respondent was admitted in Aashlok Hospital and stated that he had brought the records in respect of Pankaj Pandit. He also identified the signatures of Dr. Samantha and the medical prescriptions of his having treated the respondent have also been produced and proved by him where it had been categorically stated that the respondent is suffering from Paranoid Schizophrenia.

10) Likewise on the ground of non-availability of Dr. Abhyankar, who had authored the medical prescription as he was no more in service of the hospital cannot be fatal to disregard the evidence of the other doctor, who produced and proved the entire record.

11) The marriage between the appellant and the respondent hardly lasted for five months and both of them are living separately for the last 13 years. Learned counsel appearing for the appellant cited the following decisions:

    1) Shrikant Anandrao Bhosale vs. State of Maharashtra, (2002) 7 SCC 748,

    2) A. Jayachandra vs. Aneel Kaur, (2005) 2 SCC 22,

    3) Smt. Uma Wanti vs. Arjan Dev , AIR 1995 P&H 312

    4) Harbhajan Singh Monga vs. Amarjeet Kaur AIR 1986 MP 41

    5) Mrs. Rita Nijhawan vs. Shri Balkishan Nijhawan, AIR 1973 Delhi

    6) Yuvraj Digvijay Singh vs. Yuvrani Pratap Kumari, AIR 1970 SC 137.

    7) Vijay Kumar Ramchandra Bhate vs. Neela vijaykumar Bhate, AIR 2003 SC 2462

    8) B.N. Panduranga Shet vs. N. Vijaylaxmi, AIR 2003 Karnataka 357

Mr. Dhruv Mehta, learned counsel appearing for the respondent, per contra, after referring to the grounds of divorce and the findings recorded by the trial Court and the High Court which has affirmed the findings of the trial Court, submitted that in order to make out a ground for divorce under Section

13(1)(iii) of the Act, it is not necessary to establish that the respondent is suffering continuously or intermittently from mental disorder but it must further be established that it is of such a kind and to such an extent that the appellant cannot be reasonably be expected to live with the respondent. In other words, the burden is not discharged by merely establishing that the respondent is suffering from mental disorder which in the present case would include Schizophrenia by virtue of the Explanation to the said provision but the appellant must further lead evidence to establish that the mental disorder is of such a kind and to such an extent that the appellant cannot reasonably be expected to live with the respondent.

According to learned counsel for the respondent, the above contention finds support from a decision of this Court in Ram Narain Gupta vs. Smt. Rameshwari Gupta, 1988(4) SCC 247. For ready reference, the relevant paras from the said judgment are as under:

"20. The context in which the ideas of unsoundness of 'mind' and 'mental disorder' occur in the section as grounds for dissolution of a marriage, require the assessment of the degree of the 'mental disorder'. Its degree must be such that the spouse seeking relief cannot reasonably be expected to live with the other. All mental abnormalities are not recognised as grounds for grant of decree. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage few marriages would, indeed, survive in law. xx xx xx

28. The reasoning of the High Court is that the requisite degree of the mental disorder which alone would justify dissolution of the marriage has not been established. This, it seems to us, to be not an unreasonable assessment of the situation - strong arguments of Shri Goel to the contrary notwithstanding.

xx xx xx

30. ..the burden of proof of the existence of the requisite degree of mental disorder is on the spouse basing the claim on that state of facts.

33. This medical concern against too readily reducing a human being into a functional non entity and as a negative unit in family or society is law's concern also and is reflected, at least partially, in the requirements of Section 13(1)(iii). In the last analysis, the mere branding of a person as schizophrenic will not suffice. For purposes of Section 13(1)(iii) 'schizophrenia' is what schizophrenia does."

It was further submitted that the aforesaid judgment of this Court has been followed by the Karnataka High Court in the case of B.N. Panduranga Shet vs. N. Vijayalaxmi, (supra). Learned counsel also relied on the decision of the Calcutta High Court in the case of Rita Roy vs. Sitesh Chandra AIR 1982 Calcutta 138 and the decision of the Himachal Pradesh High Court reported in (1995) DMC 71 (DB). Learned counsel also cited the judgment of this Court in Rakesh K. Gupta vs. Ram Gopal Agarwala & Ors., AIR 2005 SC 2426 for the proposition that even in a custody dispute between the husband and wife wherein it was alleged by the husband that the wife is suffering from Paranoid Schizophrenia, this Court still awarded custody of the child to the mother.

According to the learned counsel, the evidence which has been brought on record by the appellant is wholly insufficient to infer that the respondent was suffering from the said mental disorder and the doctors who are alleged to have treated the respondent have not been examined as witnesses by the appellant and what has been brought on record are certain prescriptions made by the said doctors and the same are sought to be proved by examining the Medical Superintendent of Aashlok Hospital, Safdarjung Enclave. Therefore, he submitted that in view of the above fact, no inference can be drawn

that the respondent was suffering from Paranoid Schizophrenia and that the appellant has not been discharged of the burden as required by the statutory provision. Learned counsel contended that the words used in sub-clause (iii) of Section 13(1) to the effect that "mental disorder of such a kind and to such an extent that the appellant cannot reasonably be expected to live with the respondent" must be given full effect as it is a well accepted principle of statutory interpretation that a Court must make every effort to give effect to all words in a statute since Parliament cannot be held to have been wasting its words or saying something in vain. Learned counsel, for this proposition, relied on the following two decisions of this Court:

(a) Shin Etsu Chemical Company Ltd. Vs. Aksh Optifibre Ltd., (2005) 7 SCC 234.

(b) Union of India vs. Popular Construction , (2001) 8 SCC 470 Concluding his submissions, learned counsel submitted that the appellant having failed to establish the aforementioned requirement of the statute, the appeal must fail on this ground.

In Re : Cruelty It was submitted that in order to make out a ground for divorce under Section 13(1)(i-a) of the Act, the conduct complained of should be grave and weighty so as to come to the conclusion that the appellant spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". For this proposition, he relied on the judgment of this Court in A. Jayachandra vs. Aneel Kaur (supra). Para 13 of the aforementioned judgment is as under:

"13. ..but before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it"

It was argued that the trial Court, after examining the evidence, has come to the conclusion that the acts complained of are not such as would constitute cruelty and in any event the ground for divorce under Section 13(1)(i-a) is not made out. It was submitted that the trial Court had occasioned to see the demeanour of witnesses and, therefore, the view taken by the trial Court unless it can be said to be perverse should not be faulted with. It was also contended that the approach in such cases should be to perverse the matrimonial home. The judgment in the case of Savitri Pandey vs. Prem Chandra Pandey, (2002) 2 SCC 73 was relied on for this purpose. Answering the contention raised by the counsel for the appellant that the parties have not lived together for a long time and therefore, this is a fit case to pass a decree of divorce, learned counsel for the respondent, submitted that this is a wholly untenable argument and has to be rejected by this Court. For this, he relied on the ruling of this Court in the case of A. Jayachandra vs. Aneel Kaur (supra). Concluding his arguments, learned counsel appearing for the respondent submitted that both the trial Court and the High Court have recorded concurrent findings and have rejected the prayer of the appellant to grant decree of divorce under Section 13(1)(i-a) and (iii) of the Act and, therefore, this Court under Article 136 of the Constitution of India cannot interfere with the said findings unless it is established that the findings recorded by the trial Court and the High Court are perverse. Arguing further, he submitted that the findings of the trial Court are based on the consideration of the entire evidence and well reasoned and in similar circumstances, this Court refused to interfere with the concurrent findings of fact arrived at by the Courts in Savitri Pandey vs. Prem Chandra Pandey (supra).

We have given our thoughtful and anxious consideration for the rival submissions made by the respective counsel appearing on either side. The appellant filed a petition for divorce underSection 13(1)(i-a) and (iii) of the Act on the ground of mental and physical cruelty. It is also her case that

on account of Paranoid Schizophrenia that the respondent was suffering from, the appellant could not be reasonably expected to live with the respondent. Section 13 (1)(i-a) and (iii) are reproduced hereunder:

"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 * * * * *

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

Explanation - In this clause, -

(a) the expression "mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

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

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

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

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

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

Explanation - In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly. (I-A) Either party to a marriage, whether solemnized before or after the commencement of this Act may also present a petition for the dissolution of the marriage by a decree of divorce on the ground -

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

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

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground -

(i) in the case of any marriage solemnized before the commencement of this act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; or

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

(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956) , or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

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

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

It is not in dispute that the marriage has lasted hardly for five months and was never consummated on account of the fact that the respondent was incapable of performing his matrimonial obligations. The appellant has examined herself as PW-1. She has specifically stated in her deposition that the marriage was not consummated at all. It has further come out in her deposition that she accompanied the respondent at AIIMS and met Prof. Dr. Prema Bali, Sexologist and Marriage Counsellor. In her deposition, it had also come out that the Doctor informed her that the respondent cannot perform the marital obligations. She was also informed by the said Doctor that the respondent was a Psychopathic case and he has no power of concentration. She was also informed that the disease is of incurable in nature. The appellant has further deposed that respondent kept on sleeping for three days immediately after solemnization of marriage and the appellant was told that she should not disturb him. It was further stated in her evidence that on 4.7.1993, the appellant was blamed for the respondent's illness and was mercilessly beaten up and on the same day the respondent consumed "Baygon Spray" to commit suicide and he was taken to Aashlok Hospital, Safdarjung Enclave by the appellant and her brother. In her cross-examination, the appellant has stated that though they were studying together in the Engineering College, however, there were no special meetings between them except meeting in the class. It has also come on record that there was no intimacy between the appellant and the respondent. The appellant has emphatically denied the allegation about the intimacy between the appellant and the respondent prior to marriage w.e.f. 1987. She also stated on oath that it was a marriage though of her choice but solemnized only after her parents had given the consent. In the cross- examination, the respondent has not been able to shake or destroy the case of the appellant.

In support of her case, PW-2, J.S. Saxena father of the appellant, was examined. He supported the appellant's case and corroborated her evidence. Even in the cross-examination of PW-2, there is no material change or inconsistency. With regard to the grant of cruelty, there is deposition of the appellant and her father on record which clearly establishes and proves that the appellant was treated with cruelty by the respondent and his mother. With regard to the plea of mental insanity i.e. Section 13(1) (iii), the appellant adduced the evidence of Dr. D.S. Arora, Medical Superintendent, Aashlok Hospital

as well as Dr. Kuldeep Kumar of Safdarjung Hospital. Dr. D.S. Arora, a summoned witness produced the entire record pertaining to the respondent. He exhibited the case of the respondent maintained by Dr. C.R. Samantha. Dr. D.S. Arora identified the signatures of Dr. C.R. Samantha and proved Ex. PW-3/1. The original record of respondent was produced in the Court. Dr. D.S. Arora also proved the prescriptions Ex. PW-3/2 and Ex. PW-3/3. Ex. PW-3/5 was the prescription written by Dr. D.S. Arora and it was bearing his signatures. The entire medical history and record of the respondent pertaining to his medical illness, his visit and admission to Aashlok Hospital on 4.7.1993 and discharge on 7.7.1993 as well as the case history of the respondent maintained by Dr.C.R. Samantha were duly proved and exhibited. According to the medical record, the respondent was admitted with reference to a case of Psychopathic and depression for the last fortnight, now admitted for disturbed consciousness. He was suggested to take Triperidol medicine. The other prescription has been authored by Dr. D.S. Arora who stated that the respondent had consumed "Baygon Spray". It was also specified that the respondent is a known case of depression. Medicine 'Triperidol' was suggested to be administered to him. With regard to the consumption of "Baygon Spray", a stomach wash was carried out upon the respondent and he was administered injections 'Atropine', and 'Dextrose-1/V and PAM 1 to 1/V. The evidence of Dr. D.S. Arora and the record signed by Dr. C.R. Samantha are admissible in evidence and has been legally proved. The evidence of Dr. Kuldeep Kumar of Safdarjung Hospital also establishes the case of mental insanity and the fact that the respondent was a case of Paranoid Schizophrenia. The said Doctor produced the original record and made necessary deposition. He had brought the originals during his examination and it is recorded that the respondent had visited the Psychiatric Ward on 12.12.1992 along with his mother. Dr. Abhyankar also recorded about the history of respondent's illness. It was also recorded by the said Doctor that the respondent suffers from delusion of persecution and reference effect and on the physical examination it had been observed that the respondent has clear systematized delusion of persecution and reference and, therefore on the review it is clear that the respondent is suffering from Paranoid Schizophrenia. The medical record of the respondent maintained by the Safdarjung hospital (Outdoor Patient Department) has been established that the respondent visited Hospital on 21.12.1992 and was advised for psychological testing. It was observed in a medical sheet that the respondent was initially diagnosed for psychosis. However, on subsequent visits and after detailed examination it has been confirmed that he suffers from Paranoid Schizophrenia. The appellant has also produced on record a communication dated 9.5.1994 addressed by Professor Dr. Prema Bali, who was working in the Institute of Sexology and Marriage Counselling. Dr. Prema Bali is the relative of respondent and she has communicated to the appellant that the respondent has a psychiatric problem as his case is a case of Paranoid Schizophrenia.

It would be pertinent to observe that there is no evidence whatsoever adduced by the respondent or on his behalf. In fact, after recording of the examination-in-chief and part cross-examination, the respondent refused to come in the witness box and ran away. The observation has been made by the trial Court in the proceedings. A RESEARCH ON THE DISEASE "Schizophernia is one of the most damaging of all mental disorders. It causes its victims to lose touch with reality. They often begin to hear, see or feel things that aren't really there (hallucinations) or become convinced of things that simply aren't true (delusions). In the paranoid form of this disorder, they develop delusions of persecution or personal grandeur. The first signs of paranoid schizophrenia usually surface between the ages of 15 and 34. There is no cure, but the disorder can be controlled with medications. Severe attacks may require hospitalization.

The appellant has filed Annexures L,M,N,O,P and Q which are extracts about the aforesaid disease. The extracts are sum and substance of the disease and on a careful reading it would be well established that the evidence and documents on record clearly make out a case in favour of appellant and hence appellant was entitled to the relief prayed. In the memorandum and grounds of Appeal, some salient features of the disease have also been specified. Some of the relevant part of the extracts from various medical publications are reproduced herein below:

What is the disease and what one should know?

* A psychotic lacks insight, has the whole of his personality distorted by illness, and constructs a false environment out of his subjective experiences.

* It is customary to define 'delusion' more or less in the following way. A delusion is a false unshakeable belief, which is out of keeping with the patient's social and cultural background.' German psychiatrists tend to stress the morbid origin of the delusion, and quite rightly so. A delusion is the product of internal morbid processes and this is what makes it unamenable to external influences. * Apophanuous experiences which occur in acute schizophrenia and form the basis of delusions of persecution, but these delusions are also the result of auditory hallucinations, bodily hallucinations and experiences of passivity. Delusions of persecution can take many forms. In delusions of reference, the patient feels that people are talking about him, slandering him or spying on him. It may be difficult to be certain if the patient has delusions of self-reference or if he has self-reference hallucinosis. Ideas of delusions or reference are not confined to schizophrenia, but can occur in depressive illness and psychogenic reactions.

Causes The causes of schizophrenia are still under debate. A chemical imbalance in the brain seems to play a role, but the reason for the imbalance remains unclear. One is a bit more likely to become schizophrenic if he has a family member with the illness. Stress does not cause schizophrenia, but can make the symptoms worse. Risks Without medication and therapy, most paranoid schizophrenics are unable to function in the real world. If they fall victim to severe hallucinations and delusions, they can be a danger to themselves and those around them.

What is schizophrenia?

Schizophrenia is a chronic, disabling mental illness characterized by:

* Psychotic symptoms * Disordered thinking * Emotional blunting How does schizophrenia develop?

Schizophrenia generally develops in late adolescence or early adulthood, most often:

* In the late teens or early twenties in men * In the twenties to early thirties in women What are the symptoms of schizophrenia?

Although schizophrenia is chronic, symptoms may improve at times (periods of remission) and worsen at other times (acute episodes, or period of relapse).

Initial symptoms appear gradually and can include:

* Feeling tense * Difficulty concentrating * Difficulty sleeping * Social withdrawal What are psychotic symptoms?

Psychotic symptoms include:

* Hallucinations: hearing voices or seeing things * Delusions : bizarre beliefs with no basis in reality (for example, delusions of persecution or delusions of grandeur) These symptoms occur during

acute or psychotic phases of the illness, but may improve during periods of remission. A patient may experience * A single psychotic episode during the course of the illness * Multiple psychotic episodes over a lifetime * Continuous psychotic episodes During a psychotic episode, the patient is not completely out of touch with reality. Nevertheless, he/she has difficulty distinguishing distorted perceptions of reality (hallucinations, delusions) from reality, contributing to feelings of fear, anxiety, and confusion. The disorder can prove dangerous for some - especially when symptoms of paranoia combine with the delusional symptoms of schizophrenia. In fact, doctors say paranoid schizophrenics are notorious for discontinuing the treatments which help control their symptoms.

The Indian Drug Review has specified the Drug Trifluoperidol as a sedative and tranquilizer. With regard to administration it has been suggested that it is given to patient suffering from Schizophrenia. Incidentally this drug was being administered on medical advice to the respondent."

In our view, the trial Court failed to appreciate the uncontroverted evidence of the appellant who had proved the case on every count. It has been established beyond doubt by the Medical doctors who had deposed as witnesses and brought the original medical record of the respondent that the respondent is suffering from mental disorder. Further ground for grant of divorce on the plea of mental insanity/ mental disorder is different than cruelty. The appellant, in our view, had proved beyond doubt that the respondent suffered from mental disorder and that the appellant suffered cruelty by and at the behest of the respondent.

Learned single Judge of the High Court failed to appreciate that in the absence of any evidence led by the respondent, the appellant's evidence had to be relied upon and on the basis of the evidence, the decree for divorce was bound to be granted in favour of the appellant. The appellant had also given specific instances of cruelty which clearly establish that she had a reasonable apprehension that it will be harmful or injurious for her to live with the respondent.

LEGAL PROPOSITION ON THE ASPECT OF CRUELTY

It is settled by catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the Section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

The word 'cruelty' has not been defined and it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions, their culture and human values to which they attach importance. Judged by standard of modern civilization in the background of the cultural heritage and traditions of our society, a young and well educated woman like the appellant herein is not expected to endure the

harassment in domestic life whether mental, physical, intentional or unintentional. Her sentiments have to be respected, her ambition and aspiration taken into account in making adjustment and her basic needs provided, though grievances arising from temperamental disharmony. This view was taken by the Kerala High Court in the case reported in AIR 1991 Kerala 1.

In 1993 (2) Hindu L.R. 637, the Court had gone to the further extent of observing as follows:

"Sometime even a gesture, the angry look, a sugar coated joke, an ironic overlook may be more cruel than actual beating"

Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.

The legal concept of cruelty which is not defined by statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all question of cruelty is that the whole matrimonial relations must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complains accusations or taunts. It may be mental such as indifference and frigidity towards wife, denial of a company to her, hatred and abhorrence for wife or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure.

As to what constitute the required mental cruelty for purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer.

The modern view of cruelty of one spouse to another in the eye of law has been summarised as follows in (1977) 42 DRJ 270 Halsbury Laws of England Vol.12, 3rd edition page 270:-

"The general rule in all kinds of cruelty that the whole matrimonial relations must be considered and that rule is of special value when the cruelty consists not of violent acts, but of injurious reproaches,

complaints, accusations of taunts. Before coming to a conclusion, the judge must consider the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from the point of view. In determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status."

This Court in Dastane vs. Dastane AIR 1975 SC 1575 observed as under:-

"The Court has to deal not with an ideal husband and an ideal wife, (assuming any such exist) but with the particular man and women before it. The ideal couple or a mere ideal one will probably have no occasion to go to a matrimonial court or, even if they may not be able to drawn their differences, their ideal attitudes may help them overlook or gloss over mutual fault and failures.

Marriage without sex The Division Bench in the case of Rita Nijhawan vs. Balkrishan Nijhawan in AIR 1973 Delhi 200 at 209 observed as follows:

"Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favourable influence on a woman's mind and body. The result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifres woman's brain, develops her character and trebles her vitality. It must be recognized that nothing is more fatal to marriage than disappointment in sexual intercourse."Section 13(1)(iii) 'mental disorder' as a ground of divorce is only where it is of such a kind and degree that the appellant cannot reasonably be expected to live with the respondent. Where the parties are young and the mental disorder is of such a type that sexual act and procreation of children is not possible it may furnish a good ground for nullifying the marriage because to beget children from a Hindu wedlock is one of the principal aim of Hindu Marriage where sanskar of marriage is advised for progeny and offspring. This view was taken in AIR 1991 MP 205. This Court in Digvijay Singh vs. Pratap Kumari, AIR 1970 SC 137 has held as follows "A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity, establish that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings."

Lord Denning in Sheldon v. Sheldon (1966) 2 All ER 257, "The categories of cruelty are not disclosed. Each case may be different. We deal with the conduct of human being who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capability to tolerate the conduct complained of. Such is the wonderful realm of cruelty."

Spouses owe rights and duties each to the other and in their relationship they must act reasonably. In every case where cruelty exists it is possible to say that the spouse at fault has been unreasonable. The list of cruelty, therefore, should be breach of the duty to act reasonably, whether in omission or commission, causing injury to health. Such a list avoids imputing on intention where in fact none may exist. Further all such matters are foresight, desires, wishes, intention, motives, perception, obtuseness, persistence and indifference would remain relevant but merely as matter of evidence bearing upon the requirement to act reasonably or as aggravation of the matters charged.

We can also take note of the fact that the respondent had filed a revision against the order of the trial Court's direction for setting up of a medical Board to examine the respondent. At the time of hearing, this Court directed the counsel for the respondent to ascertain from the respondent as to whether he is willing to submit himself for medical examination. However, the respondent refused to submit himself for medical examination and go before the medical Board. This would but confirm the contention of the appellant that the respondent is suffering from Paranoid Schizophrenia and that this Court can draw adverse inference in view of the conduct of the respondent. In the case of Smt. Uma Rani vs. Arjan Devi (supra), it has been held that unsoundness of mind may be held to be cruelty.

In the case of Harbhajan Singh Monga vs. Amarjeet Kaur (Supra), it has been held that attempt to commit suicide by one spouse has been found to amount to cruelty to other.

The observation made by this Court in the case of Shobha Rani vs. Madhukar Reddi, AIR 1988 SC 121 can be reproduced to appreciate the facts and circumstances of the case on hand. It reads as follows:

"There has been a marked change in the life around us. In matrimonial duties and responsibilities in particular, there is a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. The Judges and lawyers, therefore, should not import their own notions of life. Judges may not go in parallel with them. There may be a generation gap between the Judges and the parties. It would be better if the Judges keep aside their customs and manners. It would be also better if Judges less depend upon precedents."

Humane aspects which this Court should consider:

- The appellant was 24 years of age when she got married. ? The marriage lasted for four to five months only when she was compelled to leave the matrimonial home.
- The marriage between the parties was not consummated as the respondent was not in a position to fulfil the matrimonial obligation. ? The parties have been living separately since 1993. 13 years have passed they have never seen each other.
- Both the parties have crossed the point of no return. ? A workable solution is certainly not possible.
- Parties at this stage cannot reconcile themselves and live together forgetting their past as a bad dream.
- Parties have been fighting the legal battle from the year 1994.
- The situation between the parties would lead to a irrefutable conclusion that the appellant and the respondent can never ever stay as husband and wife and the wife's stay with the respondent is injurious to her health. ? The appellant has done her Ph.d. The respondent, according to the appellant, is not gainfully employed anywhere.
- As a matter of fact, after leaving his deposition incomplete during the trial, the respondent till date has neither appeared before the trial Court nor before the High Court.

The facts and circumstances of the case as well as all aspects pertain to humanity and life would give sufficient cogent reasons for us to allow the appeal and relieve the appellant from shackles and chain of the respondent and let her live her own life, if nothing less but like a human being.

In our view, the orders of the Courts below have resulted in grave miscarriage of justice to the appellant who has been constrained into living with a dead relationship for over 13 years. The resultant agony and injustice that has been caused to the appellant, it is a fit case for interference under Article 136 of the Constitution of India and reversal of findings of the Courts below which have resulted in grave miscarriage of justice. In the result, the civil appeal stands allowed. There will be a decree for divorce in favour of the appellant-wife and against the respondent-husband. The order of the trial Court as affirmed by the High Court, stands set aside. There will be no order as to costs.

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DURGA PRASANNA TRIPATHY VS ARUNDHATI

Appeal (Civil) 5184 of 2005
Date of Judgment: 23/08/2005

(2005) 7 SCC 353

Durga Prasanna Tripathy
Vs.
Arundhati Tripathy

Bench : Hon'ble Mrs. Justice Ruma Pal & Hon'ble Mr. Justice A.R. Lakshmanan

This appeal is directed against the judgment dated 23.12.2003 passed by the High Court of Orissa at Cuttack in Civil Appeal No. 10 of 2001 whereby the High Court allowing the appeal filed by the respondent-herein/wife under Section 13(1) of the Hindu Marriage Act, 1955 on the ground of cruelty and desertion

This is a most unfortunate case where both the parties could not carry on their marital ties beyond a period of 7 months of their marriage. The marriage between the parties took place on 05.03.1991 and it is the specific case of the appellant that the respondent deserted him on 22.10.1999 and never again returned to her matrimonial home. Today the position is that the parties have been living separately for almost 14 years which means that there is an irretrievable breakdown of marriage and that because of such breakdown of marriage the marriage between the parties has been rendered a complete deadwood. Learned counsel for the appellant argued that no useful purpose will be served by keeping such a marriage alive on paper, which would only aggravate the agony of the parties. Therefore, he would pray that in the fitness of things and in the interest of justice, the marriage between the parties is forthwith terminated by a decree of divorce. We have perused the orders passed by the Family Court and also of the High Court. Both the Family Court as well as the High Court made efforts to bring about a reconciliation/rapprochement between the parties. The Family Court in this regard gave a clear finding that in spite of good deal of endeavour to effect a reconciliation the same could not be effected because of the insistence of the respondent to remain separately from her in-laws. It was totally an impracticable solution.

In our view that 14 years have elapsed since the appellant and the respondent have been separated and there is no possibility of the appellant and the respondent resuming the normal marital life even though the respondent is willing to join her husband. There has been an irretrievable breakdown of marriage between the appellant the respondent.

Both parties have crossed the point of no return. A workable solution is certainly not possible. Parties cannot at this stage reconcile themselves and live together forgetting their past as a bad dream. We, therefore, have no other option except to allow the appeal and set aside the judgment of the High Court and affirming the order of the Family Court granting decree for divorce. The Family Court has directed the appellant to pay a sum of Rs. 50,000/- towards permanent alimony to the respondent and pursuant to such direction the appellant had deposited the amount by way of bank draft. Considering the status of parties and the economic condition of the appellant who is facing criminal prosecution and out of job and also considering the status of the wife who

is employed, we feel that a further sum of Rs. 1 lakh by way of permanent alimony would meet the ends of justice. This shall be paid by the appellant within 3 months from today by an account payee demand draft drawn in favour of the respondent Arundhati Tripathy and the dissolution shall come into effect when the demand draft is drawn and furnished to the respondent.

JUDGMENT

(Arising out of S.L.P. (Civil) No. 9794 OF 2004)

Dr. AR. Lakshmanan, J.

Leave granted.

This appeal is directed against the judgment dated 23.12.2003 passed by the High Court of Orissa at Cuttack in Civil Appeal No. 10 of 2001 whereby the High Court allowing the appeal filed by the respondent-herein/wife under Section 13(1) of the Hindu Marriage Act, 1955 on the ground of cruelty and desertion.

The marriage between the appellant and the respondent was solemnized on 05.03.1991. After the marriage, the parties led their conjugal life in the village to which the appellant belongs and the respondent-wife persuaded the appellant to stay at Bhubaneswar, the place of her service as well as her parental place. The husband did not approve such proposal as a result of which dispute arose between the parties. It was alleged that the respondent-wife behaved with her husband and her in-laws in a cruel manner. She deserted the appellant by staying in the house of her father since 22.10.1991. The appellant and his parents tried their best to bring the respondent-wife to the marital home but all their efforts were in vain. Thereafter, on 26.05.1996, for the marriage ceremony of the appellant's younger brother, the mother of the appellant also went to bring the respondent but the latter was not inclined to come but misbehaved and insulted her mother-in-law. The appellant's father expired and for which also the father of the respondent was requested by the appellant to send the respondent to the house of the appellant since being the eldest daughter-in-law but then also the respondent did not come. Even after the death of the appellant's father, the respondent in spite of several requests by the appellant and his family members did not join the company of the appellant. The respondent, furthermore, joined the Office of the Civil Supplies at Puri and in view of this, the respondent and her father always insisted the appellant to shift to Bhubaneswar. The appellant, in view of this, after about 7 years from the date of separation took redress of the Court. After leaving the appellant, the respondent also joined as a Junior Assistant in the office of the Civil Supply Corporation.

The respondent-wife denied the allegations made against her. She further stated in her written statement that due to maltreatment of the appellant's mother and brother she came back to her parents house. She also stated that she was willing to live separately from her mother-in-law and brother-in-law. She, therefore, prayed for dismissal of the proceedings.

Both parties led oral evidence in support of their respective cases. The appellant was examined as P.W.1. During his evidence he corroborated the facts made in the original application for divorce. He has also stated that he is not willing to stay with the respondent as husband and wife after a long lapse of about 9 years and there is no chance of reunion between the parties. The respondent examined herself as O.P.W1. She also filed bunch of documents. On the basis of the pleadings and evidence of the parties, the Courts below framed an issue whether there is just and sufficient cause to pass a decree of divorce against the respondent-wife on the grounds of cruelty and desertion or not.

The Family Court, Cuttack passed its judgment and allowed the petition filed by the appellant-herein under Section 13 of the Hindu Marriage Act and thereby granted decree of divorce. The Family Court, after having heard the parties and after perusing the evidence on record, held as follows:-

"When the wife-respondent declines to come to the marital home, undoubtedly it gave mental shock to the petitioner-husband, which knew no bounds. There is also no chance of reunion or reconciliation between the parties. The only course open to the Court is to pass a decree of divorce thereby to put an end to the litigation. The husband-petitioner has proved to the satisfaction of the Court that the wife-respondent is not only cruel, but also deserted him since more than seven years, which are good grounds for passing a decree of divorce."

"However, as regards the alimony the learned Judge directed the petitioner-husband to pay Rs.50,000/- to the wife-respondent towards her permanent alimony, which was to be paid/deposited in the shape of bank draft."

Aggrieved by the judgment of the Family Court, the respondent filed a civil appeal before the High Court of Orissa under Section 19 of the Family Courts Act, 1984.

The appellant contended before the High Court that while allowing the proceedings under Section 13(1) of the Hindu Marriage Act on the ground of cruelty and desertion, the Family Court dissolved the marriage solemnized between the parties on 05.03.1991 and has directed the appellant to pay a sum of Rs.50,000/- towards permanent alimony to the respondent and pursuant to such direction, the appellant has deposited the amount by way of a bank draft.

The High Court, vide its judgment dated 23.12.2003, set aside the decree of divorce passed by the Family Court and allowed the appeal filed by the respondent herein holding that the appellant had failed to prove cruelty and desertion as against the respondent.

Aggrieved against the judgment of the High Court, the appellant preferred the above Special Leave Petition.

We heard Mr. Ranjan Mukherjee, learned counsel appearing for the appellant and Ms. S.S. Panicker, learned counsel appearing for the respondent.

Mr. Ranjan Mukherjee, learned counsel for the appellant, submitted that the High Court has failed to appreciate that the failure of the respondent to substantiate the alleged reasons for staying away and omission to demonstrate readiness and willingness to discharge continuing obligation to return to matrimonial home taken together were sufficient to establish animus deserendi, necessary to prove legal desertion by the wife as per the principles laid down by this Court in a number of cases. He would further submit that the appellant has proved the desertion of the respondent- wife to the satisfaction of the Courts below and after considering all the aspects and evidence led in support of the desertion, the Family Court, after satisfying itself that a reunion between the parties is not possible, has passed a decree of divorce and in pursuance to the direction of the Family Court, the appellant had deposited a sum of Rs.50,000/- by way of a bank draft in favour of the respondent herein. It was further submitted that the High Court has failed to appreciate that in the present case both have been staying separately for about the last 14 years and in the meantime, the respondent has got a job at Bhubaneswar and moreover the appellant and his family members had on quite a number of times tried to get the respondent to her matrimonial home but of no avail. It was further submitted that the High Court has failed to appreciate that the allegations of dowry demand as made by the respondent by the mother-in-law and the brother-in-law are concocted afterthoughts of the respondent to defend her inexplicable

stand which is evident from the fact that though the respondent had left her matrimonial home in the year 1991 itself she had only chosen to lodge a complaint against her mother-in-law and brother-in-law before the Mahila Commission only in the year 1988 i.e. after about 7 years.

Mr. Ranjan Mukherjee further submitted that the parties have been living separately for almost 14 years which means that there is an irretrievable breakdown of marriage and that because of such breakdown of marriage, the marriage between the parties has been rendered a complete deadwood. Mr. Ranjan Mukherjee, in support of his submissions, cited the following judgments of this Court.

1. Anjana Kishore vs. Puneet Kishore, (2002) 10 SCC 194 (Three-Judge Bench)
2. Swati Verma (Smt) vs. Rajan Verma and Others (2004) 1 SCC 123
3. Sanat Kumar Agarwal vs. Nandini Agarwal, (1990) 1 SCC 475
4. Adhyatma Bhattar Alwar vs. Adhyatma Bhattar Sri Devi, (2002) 1 SCC 308
5. G.V.N. Kameswara Rao vs. G. Jabilli, (2002) 2 SCC 296

Ms. S.S. Panicker, learned counsel for the respondent submitted that the plea and evidence of the appellant before the Family Court was at variance and that in absence of corroboration the allegation of the appellant as to the desertion or cruelty by the respondent-wife could not be proved by the appellant. It was submitted that the High Court has rightly arrived at the conclusion that the order of the Family Court was erroneous as the same was passed by misquoting the evidence of the respondent. She would further submit that there is no error in the impugned order of the High Court much less an error requiring interference by this Court under Article 136 of the Constitution of India. It was submitted that the order of the Family Court is prima facie illegal, erroneous and that the Family Court failed to take into account the evidence adduced by the parties in its proper perspective. According to learned counsel for the respondent, a perusal of the evidence would make it amply clear that the appellant in his evidence has clearly admitted that he had himself led the respondent on 23.10.1991 in her father's house which was contrary to the statement in the divorce petition wherein he had made a specific allegation that the respondent had left the matrimonial home on her own accord. He had not written any letter nor taken any relations to persuade the respondent to lead marital life with him and that he was also not willing to stay with the respondent and to continue the marital relations. Learned counsel for the respondent invited our attention to the evidence led in by both the parties and misquoting of the evidence by the Court. The respondent, on the contrary, in her evidence had stated that after 23.10.1991 she had been to the matrimonial home with her father and other relations but the appellant refused to accept her, so she had to take shelter at her parental home, that the appellant was on visiting terms to her parental home that she had led conjugal life with the appellant till February, 1996, that even in the year 1997, the respondent had stayed with the appellant at Jajpur in a rented accommodation but was again forced to quit because of harassment by the in-laws that she was also willing to stay with the appellant at Jaipur and was interested in continuing their marital relations. Learned counsel submitted that the Family Court has failed to take note that the wife had categorically stated before the Conciliation Officer as also in the evidence and pleadings before the Family Court that she was interested and willing to live with the husband and that the appellant on the other hand had clearly stated that he did not want to continue the marital relations. Learned counsel further argued that the appellant has also not been able to prove the allegations of cruelty against the respondent and that the appellant had only alleged that the conduct of the respondent of not returning to the matrimonial home, her lack of cooperation in establishing normal cohabitation, her repeatedly

causing social embarrassment to the appellant by not performing the last rites of the father-in-law and not participating in a marriage ceremony of the appellant's brother and filing false complaint against the mother-in-law and brother-in-law had caused mental depression, anguish and frustration to the appellant amounts to mental cruelty. She would also further submit that the allegations which are necessary to constitute desertion are not present in the instant case. It was also submitted that the appellant filed divorce petition in the year 1998 that is almost 7 years after the alleged desertion by the wife from 23.10.1991 and that the appellant has not given any valid explanation for the unexplained delay in filing the divorce petition. Concluding her arguments, she submitted that the appellant was not entitled to a decree of divorce on the ground of desertion and he and his family members were themselves responsible for the respondent quitting the matrimonial home and, therefore, the appellant cannot be permitted to take advantage of his own wrong for obtaining a decree for divorce in violation of the provisions of theHindu Marriage Act. She submitted that the High Court was, therefore, correct in setting right an apparent error on the face of the order of the Family Court as the order of the Family Court was passed without taking into the evidence of the respondent and the appellant.

We have carefully gone through the pleadings, the evidence led and the judgments cited by learned counsel for the appellant. Learned counsel for the respondent has not cited any ruling in support of her contentions.

This is a most unfortunate case where both the parties could not carry on their marital ties beyond a period of 7 months of their marriage. The marriage between the parties took place on 05.03.1991 and it is the specific case of the appellant that the respondent deserted him on 22.10.1999 and never again returned to her matrimonial home. Today the position is that the parties have been living separately for almost 14 years which means that there is an irretrievable breakdown of marriage and that because of such breakdown of marriage the marriage between the parties has been rendered a complete deadwood. Learned counsel for the appellant argued that no useful purpose will be served by keeping such a marriage alive on paper, which would only aggravate the agony of the parties. Therefore, he would pray that in the fitness of things and in the interest of justice, the marriage between the parties is forthwith terminated by a decree of divorce. We have perused the orders passed by the Family Court and also of the High Court. Both the Family Court as well as the High Court made efforts to bring about a reconciliation/rapprochement between the parties. The Family Court in this regard gave a clear finding that in spite of good deal of endeavour to effect a reconciliation the same could not be effected because of the insistence of the respondent to remain separately from her in-laws. It was totally an impracticable solution.

In this context, we may usefully refer to page 35 of the paper book which reads as follows:

"Be that as it may, good deal of endeavour was made by the Conciliation Cell attached to the Court as per Section 9 of the Family Courts Act and as well as by this Court for a compromise between the parties, but the respondent-wife insisted and wanted to remain separately from her in- laws which was totally impracticable on the part of the petitioner-husband."

This apart, since October, 1991 till date the respondent has not taken any steps from her side to go back to her matrimonial home. The said fact gets reflected from her own deposition before the Family Court wherein she has deposed as under:- "On 23.10.1991, the petitioner left me in the house of my father. I went to the marital home with my father and other relations, but the petitioner created trouble and did not accept me as his wife. So I came away to my father and has taken shelter there."

"The petitioner left me in my father's house after the marriage on 23.10.1991. It is not a fact that I came away suo moto from the marital home deserting the petitioner. Again I came and stayed in the marital home from December, 1991 till February 1992 and thereafter came to my father's house."

The Family Court has given cogent and convincing reasons for passing the decree of divorce in favour of the appellant. Having been convinced that there was no chance of reunion or reconciliation between the parties, more so because of the complaint filed by the respondent before the Mahila Commission, the Family Court with a view to put a quietus to the litigation inter se and the bitterness between the parties rightly passed the decree of divorce.

The Division Bench of the High Court by the impugned judgment has reversed the finding of the Family Court. The learned Judges of the High Court held against the appellant on two points, namely:-

(a) Misquoting of the evidence of the respondent, by the Family Court; and

(b) Inconsistent plea of the appellant with regard to leaving the matrimonial home by the respondent.

Both the aforesaid points taken into consideration by the learned Judges of the High Court cannot, in our view, be construed as a finding upon the merits of the case.

In our view that 14 years have elapsed since the appellant and the respondent have been separated and there is no possibility of the appellant and the respondent resuming the normal marital life even though the respondent is willing to join her husband. There has been an irretrievable breakdown of marriage between the appellant the respondent. The respondent has also preferred to keep silent about her absence during the death of her father-in-law and during the marriage ceremony of her brother-in-law. The complaint before the Mahila Commission does not implicate the appellant for dowry harassment though the respondent in her evidence before the Family Court has alleged dowry harassment by the appellant. It is pertinent to mention here that a complaint before the Mahila Commission was lodged after 7 years of the marriage alleging torture for dowry by the mother-in-law and brother-in-law during the initial years of marriage. The said complaint was filed in 1998 that is only after notice was issued by the Family Court on 27.03.1997 on the application filed by the appellant under Section 13 of the Hindu Marriage Act. The Family Court, on examination of the evidence on record, and having observed the demeanor of the witnesses concluded that the appellant had proved that the respondent is not only cruel but also deserted him since more than 7 years. The desertion as on date is more than 14 years and, therefore, in our view there has been an irretrievable breakdown of marriage between the appellant and the respondent. Even the Conciliation Officer before the Family Court gave its report that the respondent was willing to live with the appellant on the condition that they lived separately from his family. The respondent in her evidence had not disputed the fact that attempts have been made by the appellant and his family to bring her back to the matrimonial home for leading a conjugal life with the appellant. Apart from that, relationship between the appellant and the respondent have become strained over the years due to the desertion of the appellant by the respondent for several years. Under the circumstances, the appellant had proved before the Family Court both the factum of separation as well as animus deserendi which are the essential elements of desertion. The evidence adduced by the respondent before the Family Court belies her stand taken by her before the Family Court. Enough instances of cruelty meted out by the respondent to the appellant were cited before the Family Court and the Family Court being convinced granted the decree of divorce. The harassment by the in-laws of the respondent was an after-thought since the same was alleged after a gap of 7 years of marriage and desertion by the respondent. The appellant having failed in his efforts to get back the respondent to her matrimonial home and having faced the trauma of performing the last rites of his deceased father without the respondent and having

faced the ill-treatment meted out by the respondent to him and his family had, in our opinion, no other efficacious remedy but to approach the Family Court for decree of divorce.

In the following two cases, this Court has taken a consistent view that where it is found that the marriage between the parties has irretrievably broken down and has been rendered a dead wood, exigency of the situation demands, the dissolution of such a marriage by a decree of divorce to put an end to the agony and bitterness:

(a) Anjana Kishore vs. Puneet Kishore (2002) 10 SCC 194

(b) Swati Verma (Smt.) vs. Rajan Verma & Ors. (2004) 1 SCC 123

Likewise, in the following three cases, this Court has observed that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case and those facts have to be viewed as to the purpose which is revealed by those facts or by conduct and expression of intention, both anterior and subsequent to the actual act of separation.

(a) Sanat Kumar Agarwal vs. Nandini Agarwal (1990) 1 SCC 475

(b) Adhyatma Bhattar Alwar vs. Adhyatma Bhattar Sri Devi (2002) 1 SCC 308

(c) G.V.N. Kameswara Rao vs. G. Jabilli (2002) 2 SCC 296

The submission made by Mr. Ranjan Mukherjee that the marriage between the appellant and the respondent has for all practical purposes become dead, that there can be no chance of being retrieved and that it was better to bring the marriage to an end merits acceptance and force.

In Chanderkala Trivedi (Smt) vs Dr. S.P. Trivedi, (1993) 4 SCC 232, which is an appeal before this Court against the grant of decree for divorce by the Bombay High Court on the ground of cruelty. When leave was granted, this Court observed that they are granting leave because it appears to them that the marriage between the parties was in all practical purposes dead and the enforced continuity of the marriage will only mean that the parties will spend more years in bitterness against each other. Since the husband was in a position to provide reasonable maintenance or permanent alimony, this Court granted special leave. At the time of final hearing, this Court deleted the findings and has, however, decided not to interfere with the order passed by a Division Bench of the Bombay High Court. The husband, on the persuasion of this Court, agreed to provide a one bed-room flat to the wife in a locality where it can be available between Rs. 3 and 4 lacs. Therefore, while dismissing the appeal, this Court directed the husband to purchase a flat for the wife and further deposit a sum of Rs. 2 lacs by means of a demand draft in the name of the appellant with the Family Court. In V. Bhagat vs. D. Bhagat (Mrs), (1994) 1 SCC 337 = AIR 1994 SC 710, this Court while allowing the marriage to dissolve on ground of mental cruelty and in view of the irretrievable breakdown of marriage and the peculiar circumstances of the case, held that the allegations of adultery against the wife were not proved thereby vindicating her honour and character. This Court while exploring the other alternative observed that the divorce petition has been pending for more than 8 years and a good part of the lives of both the parties has been consumed in this litigation and yet, the end is not in sight and that the allegations made against each other in the petition and the counter by the parties will go to show that living together is out of question and rapproachment is not in the realm of possibility. This Court at page 720 of AIR has observed thus:

"Before parting with this case, we think it necessary to append a clarification. Merely because there are allegations and counter allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of

the divorce proceedings by itself a ground. There must be really some extra- ordinary features to warrant grant of divorce on the basis of pleading (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is/are made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluable mess, when the Court finds it in the interest of both parties."

The decision reported in Romesh Chander vs. Savitri AIR 1995 SC 851 = 1995 AIR SCW 647 is yet another case where this Court in its powers under Article 142 of the Constitution directed the dissolution of the marriage subject to the transfer of the house of the husband in the name of the wife. In that case, the parties had not enjoyed the company of each other as husband and wife for 25 years, this is the second round of litigation which routing through the trial court and the High Court has reached the Supreme Court. The appeal was based on cruelty. Both the Courts below have found that the allegation was not proved and consequently it could not be made the basis for claiming divorce. However, this Court after following the earlier decisions and in exercise of its power under Article 142 of the Constitution directed the marriage between the appellant and the respondent shall stand dissolved subject to the appellant transferring the house in the name of his wife within four months from the date of the order and the dissolution shall come into effect when the house is transferred and possession is handed over to the wife.

The facts and circumstances in the above three cases disclose that reunion is impossible. Our case on hand is one such. It is not in dispute that the appellant and the respondent are living away for the last 14 years. It is also true that a good part of the lives of both the parties has been consumed in this litigation. As observed by this Court, the end is not in sight. The assertion of the wife through her learned counsel at the time of hearing appears to be impractical. It is also a matter of record that dislike for each other was burning hot.

Before parting with this case, we think it necessary to say the following: Marriages are made in heaven. Both parties have crossed the point of no return. A workable solution is certainly not possible. Parties cannot at this stage reconcile themselves and live together forgetting their past as a bad dream. We, therefore, have no other option except to allow the appeal and set aside the judgment of the High Court and affirming the order of the Family Court granting decree for divorce. The Family Court has directed the appellant to pay a sum of Rs. 50,000/- towards permanent alimony to the respondent and pursuant to such direction the appellant had deposited the amount by way of bank draft. Considering the status of parties and the economic condition of the appellant who is facing criminal prosecution and out of job and also considering the status of the wife who is employed, we feel that a further sum of Rs. 1 lakh by way of permanent alimony would meet the ends of justice. This shall be paid by the appellant within 3 months from today by an account payee demand draft drawn in favour of the respondent Arundhati Tripathy and the dissolution shall come into effect when the demand draft is drawn and furnished to the respondent. In the result, the Civil Appeal is allowed. There will be no order as to costs.

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A. JAYACHANDRA VS ANEEL KAUR

Case No.: Appeal (Civil) 7763-7764 of 2004
(Arising out of S.L.P (C) Nos. 8655-8656 of 2003)
Date of Judgment: 02/12/2004

(2005) 2 SCC 22

A. Jayachandra
Vs.
Aneel Kaur

Bench: Hon'ble Mrs. Justice Ruma Pal, Hon'ble Mr. Justice Arijit Pasayat &
Hon'ble Mr. Justice C.K. Thakker

Parties to a marriage tying nuptial knot are supposed to bring about the union of souls. It creates a new relationship of love, affection, care and concern between the husband and wife. According to Hindu Vedic philosophy it is sanskar a sacrament; one of the sixteen important sacraments essential to be taken during one's lifetime. There may be physical union as a result of marriage for procreation to perpetuate the lineal progeny for ensuring spiritual salvation and performance of religious rites, but what is essentially contemplated is union of two souls. Marriage is considered to be a junction of three important duties i.e. social, religious and spiritual.

This case presents a very unpleasant tale of two highly educated professionals (doctors by profession) fighting a bitter matrimonial battle.

To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct. In the instant case, after filing of the divorce petition a suit for injunction was filed, and the respondent went to the extent of seeking detention of the respondent.

She filed a petition for maintenance which was also dismissed. Several caveat petitions were lodged and as noted above, with wrong address. The respondent in her evidence clearly accepted that she intended to proceed with the execution proceedings, and prayer for arrest till the divorce case was finalized. When the respondent gives priority to her profession over her husband's freedom it points unerringly at disharmony, diffusion and disintegration of marital unity, from which the Court can deduce about irretrievable breaking of marriage.

even if marriage has broken down irretrievably decree of divorce cannot be passed. In all these cases it has been categorically held that in extreme cases the Court can direct dissolution of marriage on the ground that the marriage broken down irretrievably as is clear from paragraph 9 of Shiv Sunder's case (supra). The factual position in each of the other cases is also distinguishable. It was held that long absence of physical company cannot be a ground for divorce if the same was on account of husband's conduct. In Shiv Sunder's case (supra) it was noted that the husband was leading adulterous life and he cannot take advantage of his wife shunning his company. Though the High Court held by the impugned judgment that the said case was similar, it unfortunately failed to notice the relevant factual difference in the two cases. It is true that irretrievable breaking of marriage is not one of the statutory grounds on which Court can direct dissolution of marriage, this Court has with a view to do complete justice and shorten the agony of the parties engaged in long drawn legal battle, directed in those cases dissolution of marriage. But as noted in the said cases themselves those were exceptional cases.

In the aforesaid legal and factual background the inevitable conclusion is that the appellant is entitled to a decree of divorce and we direct accordingly.

JUDGMENT

ARIJIT PASAYAT, J.

Leave granted.

Parties to a marriage tying nuptial knot are supposed to bring about the union of souls. It creates a new relationship of love, affection, care and concern between the husband and wife. According to Hindu Vedic philosophy it is sanskar a sacrament; one of the sixteen important sacraments essential to be taken during one's lifetime. There may be physical union as a result of marriage for procreation to perpetuate the lineal progeny for ensuring spiritual salvation and performance of religious rites, but what is essentially contemplated is union of two souls. Marriage is considered to be a junction of three important duties i.e. social, religious and spiritual.

This case presents a very unpleasant tale of two highly educated professionals (doctors by profession) fighting a bitter matrimonial battle.

Background facts sans unnecessary details are as follows:

The appellant (hereinafter referred to as the 'husband') and the respondent (hereinafter referred to as the 'wife') tied nuptial knot on 10.10.1978. They were blessed with two children. Both are majors by now. The marriage was what is commonly known as "love marriage". Appellant and the respondent were co-students in the medical college. They belong to different parts of the country; the appellant-husband is a Telugu Brahmin while the respondent-wife belongs to Sikh religion. They were both working in the hospital which was established by the appellant's father Dr. A. Ram Murthy. Allegedly finding the behaviour of the respondent-wife obnoxious, humiliating and amounting to mental cruelty, a notice was given by the appellant-husband on 5.3.1997 seeking divorce by mutual consent to avoid

unnecessary complications. It was stated therein that they had not shared the bed and there was no physical contact between them for over two years. It was indicted in the notice that the respondent had treated appellant with cruelty and her conduct amounted to desertion for two years and was, therefore, neither safe, desirable nor advisable to continue marital relationship. A response was given by respondent on 21.3.1997 denying the allegations. It was suggested that there should be a free and heart to heart discussion to sort out the problems for a harmonious married life. The aforesaid task which admittedly took place did not bring any result and ultimately a petition under Section 13 of the Hindu Marriage Act, 1955 (in short the 'Act') was filed before Family Courts, Hyderabad. It was categorically stated therein that the behaviour and conduct of the respondent was causing immense emotional stress, mental agony, and there being no sharing of the bed and cohabitation for more than two years, prayer was made to grant decree of divorce for dissolving the marriage between the parties. It was specifically stated that the respondent has ill-treated her husband, abused him in vulgar language in the home and at the hospital and at other places thereby causing mental agony, damage and loss personally and professionally and also in the social circle; allegations were made about his character. Caveats were filed at different places with a view to forestall legal action, and create an impression of innocence. Caveats were admittedly lodged at the wrong address of the appellant. Counter affidavit was filed by the respondent denying the allegations. It was stated that her bona fide acts in advising her husband to act properly and to be decent in his behaviour was misconstrued and was being projected as nagging and insulting behaviour. The petition for divorce was filed on unfounded allegations.

At this juncture it would be relevant to note that after the petition was filed by the appellant-husband, a suit for injunction bearing OA No. 89/97 in respect of right to practise in the hospital was filed by the respondent. The said suit was not objected to by the appellant and the suit was decreed on 20.11.1997. Subsequently, an execution petition was filed praying for attachment of hospital equipments belonging to the appellant, and also for civil detention of the appellant for alleged disobedience of the order of injunction. It was categorically stated by the respondent during trial that she was not willing to withdraw the application until divorce case was finalized. An application for maintenance was also filed before the Family Court, Hyderabad, where the matter was pending claiming a sum of Rs.13,000/- p.m., though admittedly the respondent is a professional doctor. Subsequently, another suit was filed for perpetual and mandatory injunction bearing O.S. No. 43/1999 against the appellant for allowing respondent and the staff appointed by her use of certain portion of the hospital and use of the medical instruments.

Evidence was led by the parties. The respondent stated in her evidence that she had complete faith and trust in her husband and no doubt about his integrity and character. But at the same time, she stated that she had advised him on five counts to be discreet and decent in his behaviour. By judgment dated 18.6.2001 Family Court, Hyderabad, passed decree for judicial separation with effect from the date of the decree. Though the Family Court found that unfounded allegations which caused mental agony were made by the respondent, and her alleged acts clearly caused mental agony and mental cruelty, yet keeping in view the welfare of the children instead of decree for divorce a decree for judicial separation was felt to be more appropriate. Both the appellant and respondent challenged the judgment before the High Court. While the appellant-husband took the stand that a decree for divorce should have been passed, the respondent-wife questioned legality of the decree for judicial separation. By the impugned judgment a Division Bench of the High Court dismissed the husband's appeal while allowing the wife's appeal. It was held that the materials on records were not sufficient to prove any mental cruelty. The entire evidence led by the appellant did not even emit smell of cruelty. It was noted that even if it was

a fact that the respondent was using abusive language and making allegations of adultery with nursing staff, the husband ought to have examined some witnesses from the hospital and since it was not done, cruelty was not established.

Learned counsel for the appellant submitted that the approach of the High Court is clearly erroneous. It did not examine the evidence led in detail and upset the findings recorded by the trial Court after analyzing the evidence in great detail. It was not even pointed out as to how the evidence led by the appellant was in any way deficient to prove cruelty. Mere non-examination of staff of the hospital cannot be a ground to discard the cogent and credible evidence led by the appellant. It was further submitted that mental cruelty was clearly established and in any event the marriage has broken down irretrievably and on that score alone the decree of divorce should have been passed.

Learned counsel for the respondent-wife submitted that no particulars of alleged cruelty were indicated. Making vague allegations about the mis-behaviour was not sufficient for accepting the prayer for divorce. The evidence was scanty and in no way established mental cruelty. What amounts to cruelty has been dealt with by this Court in S. Hanumantha Rao v. S. Ramani[1]. The accepted factual position shows that till 1993 the relationship was smooth except some stray incidents of discord which are normal in any marriage and such normal wear and tear in relationship cannot be a ground for seeking divorce. It was submitted that even if it is accepted, for the sake of argument, that marriage has broken down that cannot be a ground to grant a decree for divorce. Reference was made to the decisions of this Court in Chetan Dass v. Kamla Devi[2], G.V.N. Kameswara Rao v. G. Jabilli[3] andShyam Sunder Kohli v. Sushma Kohli @ Satya Devi[4].

Further submission was that in the case at hand it cannot be said that the requisite ingredients for constituting cruelty have been satisfied.

The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, a proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents

1 1999 (3) SCC 620

2 AIR 2001 SC 1709

3 2002 (2) SCC 296

4 JT 2004 (8) SC 166

that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

The expression 'cruelty' has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the Court will have no problem in determining it. It is a question of fact and degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted (See Sobh Rani v. Madhukar Reddi, AIR 1988 SC 121).

To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

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

The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty

in each particular case and as noted above, always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hyper-sensitive approach would be counter- productive to the institution of marriage. The Courts do not have to deal with ideal husbands and ideal wives. It has to deal with particular man and woman before it. The ideal couple or a mere ideal one will probably have no occasion to go to Matrimonial Court. (See Dastane v. Dastane, AIR 1975 SC 1534).

On reading of judgments of the trial Court and the High Court one thing is clear. While the trial Court analysed the evidence in great detail and found that the accepted stand of the respondent-wife regarding her behaviour and conduct caused mental agony and amounted to mental cruelty, the High Court did not discuss the evidence at all. On the specious ground that witnesses from the hospital were not examined and, therefore, adverse inference was to be drawn. There was not even any discussion as to how the evidence led was insufficient to establish mental cruelty. The High Court's view that if at all it was a fact that respondent was using abusive language and making allegations of adultery with nursing staff, some witnesses from the hospital were necessary to be examined is clearly indefensible. That alone should not have been made the determinative factor to discard evidence on record. On that ground alone the judgment of the High Court is vulnerable. The evidence as led and which is practically undisputed is that the respondent had asked the husband to do certain things which cannot be termed to be a simple advice for proper behaviour. For example in her evidence respondent clearly accepted that she had said five things to be followed by him. Surprisingly, most of them related to ladies working in the hospital. Though respondent tried to show that they were simple and harmless advice, yet on a bare reading thereof it is clear that there were clear manifestations of her suspecting the husband's fidelity, character and reputation. By way of illustration, it may be indicated that the first so called advice was not to ask certain female staff members to come and work on off-duty hours when nobody else was available in the hospital. Second was not to work behind the closed doors with certain members of the staff. Contrary to what she had stated about having full faith in her husband, the so called advices were nothing but casting doubt on the reputation, character and fidelity of her husband. Constant nagging on those aspects, certainly amounted to causing indelible mental agony and amounts to cruelty. The respondent was not an ordinary woman. She was a doctor in the hospital and knew the importance of the nature of duty and the necessity of members of the staff working even during off hours and the working conditions. There was another instance which was specifically dealt with by the trial Court. Same related to the alleged extra marital relationships of the appellant with another married lady who was wife of his friend. Though the respondent tried to explain that she was not responsible for making any such aspersions, the inevitable conclusion is to the contrary.

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

Several decisions, as noted above, cited by learned counsel for the respondent to contend even if marriage has broken down irretrievably decree of divorce cannot be passed. In all these cases it has been categorically held that in extreme cases the Court can direct dissolution of marriage on the ground that the marriage broken down irretrievably as is clear from paragraph 9 of Shiv Sunder's case (supra). The factual position in each of the other cases is also distinguishable. It was held that long absence of physical company cannot be a ground for divorce if the same was on account of husband's conduct. In Shiv Sunder's case (supra) it was noted that the husband was leading adulterous life and he cannot take advantage of his wife shunning his company. Though the High Court held by the impugned judgment that the said case was similar, it unfortunately failed to notice the relevant factual difference in the two cases. It is true that irretrievable breaking of marriage is not one of the statutory grounds on which Court can direct dissolution of marriage, this Court has with a view to do complete justice and shorten the agony of the parties engaged in long drawn legal battle, directed in those cases dissolution of marriage. But as noted in the said cases themselves those were exceptional cases.

In the aforesaid legal and factual background the inevitable conclusion is that the appellant is entitled to a decree of divorce and we direct accordingly.

The appeals are allowed with no order as to costs.

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PARVEEN MEHTA VS INDERJIT MEHTA

Appeal (Civil) 3930 of 2002
Date of Judgment: 11/07/2002

(2002) 5 SCC 296

Parveen Mehta
Vs.
Inderjit Mehta

Bench: Hon'ble Mr. Justice D.P. Mohapatra & Hon'ble Mr. Justice Brijesh Kumar.

What is the meaning and import of the expression 'cruelty' as a matrimonial offence is the core questionn on the determination of which depends the result and the fate of this case.

We find is that right from the beginning the matrimonial relationship between the parties was not normal; the spouses stayed together at the matrimonial home for a short period of about six months; the respondent had been trying to persuade the appellant and her parents to agree to go for proper medical treatment to improve her health so that the parties may lead a normal sexual life; all such attempts proved futile. The appellant even refused to subject herself to medical test as advised by the doctor. After 21st June, 1987 she stayed away from the matrimonial home and the respondent was deprived of her company. In such circumstances, the respondent who was enjoying normal health was likely to feel a sense of anguish and frustration in being deprived of normal cohabitation that every married person expects to enjoy and also social embarrassment due to the behavior of the appellant. Further, the conduct of the appellant in approaching the police complaining against her husband and his parents and in not accepting the advice of the superior judicial officer Mr.S.K.Jain and taking a false plea in the case that she had conceived but unfortunately there was miscarriage are bound to cause a sense of mental depression in the respondent. The cumulative effect of all these on the mind of the respondent, in our considered view, amounts to mental cruelty caused due to the stubborn attitude and inexplicably unreasonable conduct of the appellant.

JUDGMENT

D.P. MOHAPATRA, J.

Leave granted.

What is the meaning and import of the expression 'cruelty' as a matrimonial offence is the core question on the determination of which depends the result and the fate of this case.

The appellant is the wife of the respondent. They were married according to Hindu rites and customs on 6th December, 1985. The marriage was preceded by negotiation between the two families, ring exchange ceremony, etc. A meeting between the boy and the girl was also arranged at Yamuna Nagar in the State of Haryana. After marriage the spouses stayed together at Panipat where the respondent was posted as a Judicial Officer. They lived together till 28th April, 1986 when they parted company never to stay together again. It is the case of the respondent that right from the first day of the marriage he sensed something abnormal with his wife; he was unable to consummate the marriage as there was

no cooperation from the side of the wife for sexual intercourse. Despite several attempts cohabitation was not possible for lack of cooperation on the part of the wife. It is the further case of the respondent that when he first met his wife when some members of the two families met he had noticed that she was looking very frail and weak. When he wanted to know the reason for such state of her health her father and other relations told him that she had been undergoing a strict diet control and had been making efforts to reduce her w.eight On questioning his wife immediately after the marriage the respondent could ascertain that she was suffering from some ailment and she was under the treatment of Vaid Amar Nath Sastry of Chandigarh. On 10th December, 1985 the respondent took his wife to see Mr.Sastry at Chandigarh who informed him that father of the girl was his close friend and he was already seized of the problems of her health. He gave some medicines to be taken by her. Thereafter they returned to Yamuna Nagar where parents of the respondent were living. Subsequently, the respondent took the appellant to Panipat where he was posted and they started living there and continued with the medicines. In February, 1986 the appellant agreed to be examined by Dr.B.M.Nagpal of Civil Hospital, Panipat. The doctor advised a thorough check up and diagnosis. However, this was not possible since the appellant did not cooperate and ultimately gave out because she was not interested in taking any medical treatment.

The respondent further alleged that the state of health of the appellant continued to deteriorate; she continued to lose weight; she suffered from asthmatic attacks; on account of her ailment her behavior became quarrelsome; and on trifle matters she threatened to leave the matrimonial home. It was further contended that during her stay at Panipat when Surinder Singh Rao and Virender Jain, friends of the respondent visited his place, the appellant refused to prepare tea and started misbehaving with him in presence of the outsiders thereby causing embarrassment to him. Ultimately on 28th April, 1986 her brother and brother's wife came to Panipat and took the appellant with them. It was the further case of the respondent that when the appellant was with her parents several attempts were made by him offering to give her the best possible medical treatment so that the condition of her health may improve and both of them could lead a happy married life. All such attempts failed. The offer of medical treatment was rejected and even nature of the ailment suffered by her was not disclosed to the respondent.

On one occasion when Shri S.K. Jain, a senior officer of the Judicial Service, then the Legal Remembrancer of Haryana and who later became a Judge of the High Court was discussing the matter with the parties with a view to bring about a settlement the appellant caught hold of the shirt collar of the respondent and created an ugly and embarrassing situation. Again on 30th July 1986 the appellant accompanied by a number of persons searched for the respondent in the Court premises at Kaithal and not finding him there forcibly entered his house and threatened him. A report about the incident was sent to the superior officer of the respondent. Alleging the aforestated facts and circumstances the respondent filed the petition in August, 1996 seeking dissolution of the marriage on the grounds of cruelty and desertion.

The appellant refuted the allegations made in the petition. She denied that her husband had been misled regarding the state of her health before their marriage. She alleged that the marriage was duly consummated and the phera ceremony was performed; and that her husband had been expressing full love and affection towards her. She denied that she suffered from any serious ailment and had been treated by Vaid Amar Nath Sastri. It was her case that she had become pregnant from the wedlock but unfortunately there was miscarriage. It was the further case of the appellant that the respondent and his parents wanted to pressurise the appellant and her parents to agree for a divorce by mutual

consent. On 21st June, 1987 when a meeting of relations of both sides took place at the house of her mother's sister Smt.Parakash Kapur at Yamuna Nagar the respondent stated that the appellant was too frail and weak; that she must be suffering from some disease and therefore, he was not prepared to take her back. Thereafter several attempts were made by her parents and other relations to persuade the respondent to take the appellant to his house but such attempts were of no avail on account of want of any response from the respondent and his parents.

On the pleadings of the parties, the Trial Court framed the following issues :

"1) Whether the respondent-wife has deserted the petitioner, if so, its effect? OPP

2) Whether the respondent-wife is guilty of cruelty, if so, its effect?

OPP

3) Whether this petition is barred by latches, in accordance with Section 23(1a) and (d) of the Act?

OPP

4) Relief."

Both the parties led evidence, both oral and documentary, in support of their cases. The Trial Court on assessing the evidence on record, dismissed the petition for divorce filed by the respondent.

The respondent filed an appeal, FAO No.42-M/99 before the High Court assailing the judgment of the Trial Court. The appeal was allowed by the learned Single Judge by the judgment rendered on 1st June, 2000. The learned Single Judge granted the prayer of the respondent for dissolution of the marriage on the ground of cruelty and further held that as the marriage took place about 14 years ago and there was no child out of the wedlock it would be in the interest of justice that the parties should be separated from each other. The operative portion of the judgment is quoted hereunder :

"In view of the discussion as such the only conclusion which can be arrived at is that despite the fact that the respondent is a good lady but has created the aforesaid situation because of her own act and conduct concerning the non-disclosure of her state of health and concealment by her above acted as a mental and physical cruelty to the appellant which entitles him to a decree of divorce. Therefore, the findings of the learned District Judge on issue Nos.1 to 3 are reversed.

For the foregoing reasons, the appeal is allowed, marriage between the parties stands dissolved and a decree of divorce on the grounds of desertion and cruelty is hereby granted in favour of the appellant (husband) and against the respondent (wife). In the circumstances of the case, the parties are left to bear their own costs. However, it would be appropriate to ask the husband not to remarry till 30.9.2000. Hence ordered accordingly."

The wife, who is the appellant herein, filed an appeal before the Division Bench, Letters Patent Appeal No.1000 of 2000, assailing the judgment of the learned Single Judge. The Division Bench of the High Court by the judgment rendered on 8th August, 2000 dismissed the Letters Patent Appeal in limine. The Division Bench held: "Even otherwise, in the facts and circumstances of the case in hand, in our view, it cannot be said that the husband has tried to take advantage of any wrong on his part. Rather, he did make the best possible effort to explore the possibility of detecting the deficiency or disease, if any, and for treatment of poor health of his wife. But, all in vain. We find no merit in the Letters Patent Appeal. It is, therefore, dismissed in limine." The said judgment is under challenge in this appeal.

Shri Ujjagar Singh, learned senior counsel appearing for the appellant contended that in the context of facts and circumstances of the case the High Court has erred in granting the prayer for divorce by the respondent on the sole ground of cruelty. He further contended that even assuming that the spouses did not enjoy normal sexual relationship with each other on account of frail health of the appellant and there were heated exchanges between the parties followed by the appellant catching hold of shirt collar of the husband, that is not sufficient to establish a case of cruelty for the purpose of Section 13(1) (ia) of the Act. Shri Singh also contended that if the ground of cruelty fails then the further ground stated in favour of the decree of divorce that the marriage has irretrievably broken down will be of no avail to the respondent.

Shri Sudhir Chandra, learned senior counsel appearing for the respondent strenuously contended that in the facts and circumstances of the case the High Court rightly recorded the finding of cruelty by the appellant towards the respondent. Elucidating the point Shri Sudhir Chandra submitted that the respondent was kept in the dark about the poor state of health of the appellant at the time of the marriage negotiations despite the query made by him about the reason for her frail and weak health. After marriage when the respondent was prepared to provide the best possible medical treatment to improve her health neither the appellant nor her parents extended their cooperation in the matter. Further, the erratic and impulsive behavior of the wife caused serious embarrassment to the respondent before his friends and colleagues. The cumulative effect of all the aforesaid facts and circumstances of the case, according to Shri Sudhir Chandra, give rise to reasonable apprehension in the mind of the respondent that it is not safe to continue matrimonial relationship with the appellant. Thus a case of cruelty for the purpose of Section 13(1)(ia) was made out. It was the further contention of Shri Sudhir Chandra that the respondent remarried in December, 2000, two years after the judgment of the Single Judge and nearly four months after the judgment of the Division Bench was rendered. In the facts and circumstances of the case, urged Shri Sudhir Chandra, this is not a fit case for this Court to interfere with the judgment and decree passed by the High Court in exercise of its jurisdiction under Article 136 of the Constitution of India.

As noted earlier, the learned Single Judge granted the respondent's prayer for dissolution of the marriage on the ground of 'cruelty'. Therefore, the question arises whether in the facts and circumstances of the case a case for divorce under Section 13(1)(ia) of the Hindu Marriage Act,1955 (for short 'the Act') has been made out. The answer to this question depends on determination of the question formulated earlier. In Section 13(1) it is laid down that :

"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 xxx xxx xxx (ia) has, after the solemnization of the marriage, treated the petitioner with cruelty;"

Under the statutory provision cruelty includes both physical and mental cruelty. The legal conception of cruelty and the kind of degree of cruelty necessary to amount to a matrimonial offence has not been defined under the Act. Probably, the Legislature has advisedly refrained from making any attempt at giving a comprehensive definition of the expression that may cover all cases, realising the danger in making such attempt. The accepted legal meaning in England as also in India of this expression, which is rather difficult to define, had been 'conduct of such character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger' (Russel v. Russel [(1897) AC 395 and Mulla Hindu Law, 17th Edition, Volume II page 87]. The provision in clause (ia) of Section 13(1), which was introduced by the Marriage Laws (Amendment) Act 68 of

1976, simply states that 'treated the petitioner with cruelty'. The object, it would seem, was to give a definition exclusive or inclusive, which will amply meet every particular act or conduct and not fail in some circumstances. By the amendment the Legislature must, therefore, be understood to have left to the courts to determine on the facts and circumstances of each case whether the conduct amounts to cruelty. This is just as well since actions of men are so diverse and infinite that it is almost impossible to expect a general definition which could be exhaustive and not fail in some cases. It seems permissible, therefore, to enter a caveat against any judicial attempt in that direction (Mulla Hindu Law, 17th Eidition, Volume II, page 87).

This Court in the case of Dastane vs. Dastane, AIR 1975 SC 1534, examined the matrimonial ground of cruelty as it was stated in the old Section 10(1)(b) and observed that any inquiry covered by that provision had 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 to live with the respondent. It was further observed that it was 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 though, of course, harm or injury to health, reputation, the working character or the like would be an important consideration in determining whether the conduct of the respondent amounts to cruelty or not. In essence what must be taken as fairly settled position is that though the clause does not in terms say so it is abundantly clear that the application of the rule must depend on the circumstances of each case; that 'cruelty' contemplated is conduct of such type that the petitioner cannot reasonably be expected to live with the respondent. The treatment accorded to the petitioner must be such as to cause an apprehension in the mind of the petitioner that cohabitation will be so harmful or injurious that she or he cannot reasonably be expected to live with the respondent having regard to the circumstances of each case, keeping always in view the character and condition of the parties, their status environments and social values, as also the customs and traditions governing them.

In the case of Savitri Pandey vs. Prem Chandra Pandey, (2002) 2 SCC 73, this Court construing the question of 'cruelty' as a ground of divorce under Section 13(1)(ia) of the Act made the following observations :

"Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(i-a) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent.

Concurrent findings of fact arrived at by the courts cannot be disturbed by this Court in exercise of powers under Article 136 of the Constitution of India. Otherwise also the averments made in the petition and the evidence led in support thereof clearly show that the allegations, even if held to have been proved, would only show the sensitivity of the appellant with respect to the conduct of the respondent which cannot be termed more than ordinary wear and tear of the family life."

This Court, construing the question of mentral cruelty under Section 13(1)(ia) of the Act, in the case of G.V.N.Kameswara Rao vs. G.Jabilli, (2002) 2 SCC 296, observed :

"The court has to come to a conclusion whether the acts committed by the counter-petitioner amount to cruelty, and it is to be assessed having regard to the status of the parties in social life, their customs, traditions and other similar circumstances. Having regard to the sanctity and importance of marriages in a community life, the court should consider whether the conduct of the counter-petitioner is such that it has become intolerable for the petitioner to suffer any longer and to live together is impossible, and then only the court can find that there is cruelty on the part of the counter-

petitioner. This is to be judged not from a solitary incident, but on an overall consideration of all relevant circumstances."

Quoting with approval the following passage from the judgment in V.Bhagat vs. D.Bhagat, (1994) 1 SCC 337, this Court observed therein:

"Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made".

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

In the case in hand the foundation of the case of 'cruelty' as a matrimonial offence is based on the allegations made by the husband that right from the day one after marriage the wife was not prepared to cooperate with him in having sexual intercourse on account of which the marriage could not be consummated. When the husband offered to have the wife treated medically she refused. As the

condition of her health deteriorated she became irritating and unreasonable in her behaviour towards the husband. She misbehaved with his friends and relations. She even abused him, scolded him and caught hold of his shirt collar in presence of elderly persons like Shri S.K.Jain. This Court in the case of Dr.N.G.Dastane Vs. Mrs.S.Dastane (supra), observed : "Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment".

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

Judged in the light of the principles discussed above what we find is that right from the beginning the matrimonial relationship between the parties was not normal; the spouses stayed together at the matrimonial home for a short period of about six months; the respondent had been trying to persuade the appellant and her parents to agree to go for proper medical treatment to improve her health so that the parties may lead a normal sexual life; all such attempts proved futile. The appellant even refused to subject herself to medical test as advised by the doctor. After 21st June, 1987 she stayed away from the matrimonial home and the respondent was deprived of her company. In such circumstances, the respondent who was enjoying normal health was likely to feel a sense of anguish and frustration in being deprived of normal cohabitation that every married person expects to enjoy and also social embarrassment due to the behavior of the appellant. Further, the conduct of the appellant in approaching the police complaining against her husband and his parents and in not accepting the advice of the superior judicial officer Mr.S.K.Jain and taking a false plea in the case that she had conceived but unfortunately there was miscarriage are bound to cause a sense of mental depression in the respondent. The cumulative effect of all these on the mind of the respondent, in our considered view, amounts to mental cruelty caused due to the stubborn attitude and inexplicably unreasonable conduct of the appellant.

The learned Single Judge in his judgment has discussed the evidence in detail and has based his findings on such discussions. In the Letters Patent Appeal the Division Bench on consideration of the facts and circumstances of the case agreed with the findings recorded by the learned Single Judge. In the context of the facts and circumstances on record we are of the view that the learned Single Judge rightly came to the conclusion that the prayer of the respondent for dissolution of the marriage on the ground of cruelty under Section 13(1)(ia) of the Act was acceptable. Therefore, the Division Bench committed no error in upholding the judgment of the learned Single Judge.

As noted earlier the parties were married on 6th December, 1985. They stayed together for a short period till 28th April 1986 when they parted company. Despite several attempts by relatives and well-

wishers no conciliation between them was possible. The petition for the dissolution of the marriage was filed in the year 1996. In the meantime so many years have elapsed since the spouses parted company. In these circumstances it can be reasonably inferred that the marriage between the parties has broken down irretrievably without any fault on the part of the respondent. Further the respondent has re- married in the year 2000. On this ground also the decision of the High Court in favour of the respondent's prayer for dissolution of the marriage should not be disturbed. Accordingly this appeal fails and is dismissed. There will, however, be no order for costs.

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SAVITRI PANDEY VS PREM CHANDRA PANDEY

Case No.: Appeal (Civil) 20-21 of 1999
Date of Judgment : 08/01/2002

(2002) 2 SCC 73

Savitri Pandey
Vs.
Prem Chandra Pandey

Bench: Hon'ble Mr. Justice R.P. Sethi & Hon'ble Mr. Justice Y.K. Sabharwal

Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(i-a) of the Act.

Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health.

Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health.

Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party.

Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent

Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbhai Shah v. Prabhavati [AIR 1957 SC 176] held that if a spouse abandons

the other in a state of temporary passions, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion

the appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction of this Court under Article 142 of the Constitution for dissolving the marriage.

JUDGMENT

SETHI, J.

Alleging cruelty and desertion against the husband, the appellant- wife approached the Matrimonial Court under Section 13 of the Hindu Marriage Act (hereinafter referred to as "the Act") praying for dissolution of her marriage with the respondent by a decree of divorce. She also prayed for direction to the respondent to return her ornaments given to him at the time of marriage. The Family Judge allowed the petition and dissolved the marriage of the parties on the ground of desertion by the husband. The appellant was also granted a decree of Rs.12,000/- towards the price of the scooter, allegedly given at the time of the marriage and payment of Rs.500/- per month as permanent alimony. Both the husband and the wife preferred appeals against the order of the Family Court as the wife was not satisfied with the part of the order refusing to grant a decree in her favour in respect of properties claimed by her and the husband was aggrieved by the order of dissolution of the marriage by a decree of divorce. Both the appeals were disposed of by the impugned order holding that the appellant-wife herself was a defaulting party and neither the allegations of cruelty nor of desertion were proved. The order passed underSection 27 of the Hindu Marriage Act and for permanent alimony was also set aside. The grievance of the appellant-wife is that the High Court was not justified in setting aside the findings of fact arrived at by the Family Court and that she had proved the existence of cruelty and desertion against the respondent. It is contended that as the appellant-wife was proved to have been living separately, it was to be presumed that the respondent had deserted her.

The facts of the case giving rise to the filing of the present appeals are that marriage between the parties was solemnised on 6.5.1987. The appellant-wife lived with the respondent-husband till 21st June, 1987 and according to her the marriage between the parties was never consummated. After 21st June, 1987 the parties started living separately. The appellant alleged that her parents spent more than Rs.80,000/- with respect to the ceremonies of the marriage and also gave several articles in the form of ornaments, valuables, cash and kind as per demand of the respondent. The respondent and his family members allegedly made further demands of Colour TV, Refrigerator and some other ornaments besides hard cash of Rs.10,000/-. The father of the appellant obliged the respondent by giving him Rs.10,000/- in the first week of June, 1987 but could not fulfil the other demands of his parents. The respondent and his family members were alleged to have started torturing the appellants on false pretexts. Aggrieved by the attitude of the respondent and his family members, the appellant states to have filed a petition under Section 13of the Act seeking dissolution of marriage by a decree of divorce along with prayer for the return of the property and grant of permanent alimony. The respondent also filed a petition seeking divorce and grant of other reliefs. However, on 14.5.1996 the respondent filed an application for withdrawal of his matrimonial case which was allowed on 19.5.1996. The appellant had alleged that the respondent was having illicit relations with a lady residing in Gaya at Bihar with whom he was stated to have solemnised the marriage. The allegations made in the petition were denied by the respondent and it was stated that in fact the appellant-wife was taking advantage of her own wrongs.

On the basis of the pleadings of the parties, the following issues were framed:

"1. Whether the defendant has treated the petitioner with cruelty? If so, its effect?

2. Whether the petitioner is entitled to relief under Sec.27 of the Hindu Marriage Act? If so, its effect?

3. Whether the defendant is entitled to any relief? If so, its effect?

4. To what relief, parties are entitled?"

It may be noticed that no issue with regard to alleged desertion was insisted to be framed. With respect to the issue of cruelty, the Family Court concluded that no evidence had been led to prove the allegations. The Court, however, held: "but it is proved that the respondent had deserted the petitioner, hence the petitioner will get or is entitled to for a decree of divorce". On appreciation of evidence led in the case, the Division Bench of the High Court held: "We also do not find any evidence that the wife has been treated with cruelty by the husband. We are also of the view that there is no evidence that petitioner is deserted."

We have heard the learned counsel for the parties and perused the record.

Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(ia) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent. Concurrent findings of fact arrived at by the courts cannot be disturbed by this Court in exercise of powers under Article 136 of the Constitution of India. Otherwise also the averments made in the petition and the evidence led in support thereof clearly shows that the allegations, even if held to have been proved, would only show the sensitivity of the appellant with respect to the conduct of the respondent which cannot be termed more than ordinary wear and tear of the family life.

No decree of divorce could be granted on the ground of desertion in the absence of pleading and proof. Learned counsel for the appellant submitted that even in the absence of specific issue, the parties had led evidence and there was sufficient material for the Family Court to return a verdict of desertion having been proved. In the light of the submissions made by the learned counsel, we have opted to examine this aspect of the matter despite the fact that there was no specific issue framed or insisted to be framed.

"Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is

not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbhai Shah v. Prabhavati [AIR 1957 SC 176] held that if a spouse abandons the other in a state of temporary passions, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. It further held:

"For the office 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 different 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 ort 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 years period and the Bombay Act prescribed 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 decide to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses to 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 and 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."

Following the decision in Bipinchandra's case (supra) this Court again reiterated the legal position in ***Lachman Utamchand Kirpalani v. Meena alias Mota***[1] by holding that 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. For the offence of desertion so far as deserting spouse is concerned, two essential conditions must be there (1) the factum of separation and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation.

To prove desertion in matrimonial matter it is not always necessary that one of the spouse should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case.

There is another aspect of the matter which disentitles the appellant from seeking the relief of divorce on the ground of desertion in this case. As desertion in matrimonial cases means the withdrawal of one party from a state of things, i.e., a marital status of the party, no party to the marriage can be permitted to allege desertion unless he or she admits that after the formal ceremonies of the marriage, the parties had recognised and discharged the common obligation of the married life which essentially requires the cohabitation between the parties for the purpose of consummating the marriage. Cohabitation by the parties is an essential of a valid marriage as the object of the marriage is to further the perpetuation of the race by permitting lawful indulgence in passions for procreation of children. In other words, there can be no desertion without previous cohabitation by the parties. The basis for this theory is built upon the recognised position of law in matrimonial matters that no-one can desert who does not actively or wilfully bring to an end the existing state of cohabitation. However, such a rule is subject to just exceptions which may be found in a case on the ground of mental or physical incapacity or other peculiar circumstances of the case. However, the party seeking divorce on the ground of desertion is required to show that he or she was not taking the advantage of his or her own wrong.

In the instant case the appellant herself pleaded that there had not been cohabitation between the parties after the marriage. She neither assigned any reason nor attributed the non-resumption of cohabitation to the respondent. From the pleadings and evidence led in the case, it is apparent that the appellant did not permit the respondent to have cohabitation for consummating the marriage. In the absence of cohabitation between the parties, a particular state of matrimonial position was never permitted by the appellant to come into existence. In the present case, in the absence of cohabitation and consummation of marriage, the appellant was disentitled to claim divorce on the ground of desertion.

No evidence was led by the appellant to show that she was forced to leave the company of the respondent or that she was thrown away from the matrimonial home or that she was forced to live separately and that the respondent had intended animus deserendi. There is nothing on record to hold

1 [AIR 1964 SC 40]

that the respondent had ever declared to bring the marriage to an end or refuses to have cohabitation with the appellant. As a mater of fact the appellant is proved to have abandoned the matrimonial home and declined to cohabit with the respondent thus forbearing to perform the matrimonial obligation.

In any proceedings under the Act whether defended or not the court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under Section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties.

For upholding the judgment and decree of the Family Court, Shri Dinesh Kumar Garg, the learned counsel appearing for the appellant submitted that as after the decree of divorce the appellant had remarried with one Sudhakar Pandey and out of the second marriage a child is also stated to have been born, it would be in the interest of justice and the parties that the marriage between them is dissolved by a decree of divorce. In support of his contention he has relied upon judgments of this Court in ***Anita Sabharwal v. Anil Sabharwal[2], Shashi Garg (Smt.) v. Arun Garg[3], Ashok Hurra v. Rupa Bipin Zaveri[4] and Madhuri Mehta v. Meet Verma[5].***

To appreciate such a submission some facts have to be noticed and the interests of public and society to be borne in mind. It appears that the marriage between the parties was dissolved by a decree of divorce vide the judgment and decree of the Family Court dated 8.7.1996. The respondent-husband filed appeal against the judgment and decree on 19.1.1997. As no stay was granted, the appellant solemnised the second marriage on 29.5.1997, admittedly, during the pendency of the appeal before the High Court. There is no denial of the fact that right of at least one appeal is a recognised right under all systems of civilised legal jurisprudence. If despite the pendency of the appeal, the appellant chose to solemnise the second marriage, the adventure is deemed to have been undertaken at her own risk and the ultimate consequences arising of the judgment in the appeal pending in the High Court. No person can be permitted to flout the course of justice by his or her overt and covert acts. The facts of the cases relied upon by the learned counsel for the appellant are distinct having no proximity with the facts of the present case. In all the cases relied upon by the appellant and referred to hereinabove, the marriage between the parties was dissolved by a decree of divorce by mutual consent in terms of application under Section 13B of the Act. This Court while allowing the applications filed under Section 13B took into consideration the circumstances of each case and granted the relief on the basis of compromise. Almost in all cases the other side was duly compensated by the grant of lumpsum amount and permanent provision regarding maintenance.

This Court in ***Ms.Jorden Diengdeh v. S.S. Chopra***[6] suggested for a complete reform of law of marriage and to make a uniform law applicable to all people irrespective of religion or caste. The Court observed:

"It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. .... There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of

2 [1997 (11) SCC 490]

3 [1997 (7) SCC 565]

4 [1997 (4) SCC 226]

5 [1997 (11) SCC 81]

6 [AIR 1985 SC 935]

legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situation in which couples like the present have found themselves.

Marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in ***V. Bhagat v. Mrs.D.Bhagat***[7] held that irretrievable breakdown of the marriage is not a ground by itself to dissolve it.

As already held, the appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction of this Court under Article 142 of the Constitution for dissolving the marriage.

At this stage we would like to observe that the period of limitation prescribed for filing the appeal under Section 28(4) is apparently inadequate which facilitates the frustration of the marriages by the unscrupulous litigant spouses. In a vast country like ours, the powers under the Act are generally exercisable by the District Court and the first appeal has to be filed in the High Court. The distance, the geographical conditions, the financial position of the parties and the time required for filing a regular appeal, if kept in mind, would certainly show that the period of 30 days prescribed for filing the appeal is insufficient and inadequate. In the absence of appeal, the other party can solemnise the marriage and attempt to frustrate the appeal right of the other side as appears to have been done in the instant case. We are of the opinion that a minimum period of 90 days may be prescribed for filing the appeal against any judgment and decree under the Act and any marriage solemnised during the aforesaid period be deemed to be void. Appropriate legislation is required to be made in this regard. We direct the Registry that the copy of this judgment may be forwarded to the Ministry of Law & Justice for such action as it may deem fit to take in this behalf. There is no merit in these appeals which are dismissed with costs throughout.

(R.P. SETHI)
(Y.K. SABHARWAL)

January 8, 2002

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7 [AIR 1994 SC 710]

G.V.N. KAMESWARA RAO VS G. JABILLI

Appeal (Civil) 140 of 2002
Date of Judgment : 10/01/2002

(2002) 2 SCC 296

G.V.N. Kameswara Rao
Vs.
G. Jabilli

Bench: Hon'ble Mr. Justice D.P. Mohapatra & Hon'ble Mr. Justice K.G. Balakrishnan

The husband who had been unsuccessfully fighting litigation for the past more than 15 years for snapping his marital ties with the respondent wife is the appellant before us. various incidents brought out in the evidence would show that the relationship between the parties was irretrievably broken, and because of the non-cooperation and the hostile attitude of the respondent, the appellant was subjected to serious traumatic experience which can safely be termed as 'cruelty' coming within the purview of Section 13(1)(ia) of the Hindu Marriage Act. Therefore, we hold that the appellant is entitled to the decree for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act.

Under Section 13(1) (ia) of the Hindu Marriage Act, on a petition presented either by the husband or wife, the marriage could be dissolved by a decree of divorce on the ground that the other party has, after the solemnization of the marriage, treated the petitioner with cruelty. 'Cruelty' is not defined in the Act. Some of the provisions of the Hindu Marriage Act were amended by Hindu Marriage Laws (Amendment) Act, 1976. Prior to the amendment, 'cruelty' was one of the grounds for judicial separation under Section 10 of the Act. Under that Section, "cruelty" was given an extended meaning by using an adjectival phrase, viz. "as to cause reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party". By the Amendment Act of 1976, "cruelty" was made one of the grounds for divorce under Section 13.

The omission of the words, which described 'cruelty' in the unamended Section 10 of the Hindu Marriage Act, has some significance in the sense that it is not necessary to prove that the nature of the cruelty is such as to cause reasonable apprehension in the mind of the petitioner that it would be harmful for the petitioner to live with the other party. English Courts in some of the earlier decisions had attempted to define "cruelty" as an act which involves conduct of such a nature as to have caused damage to life, limb or health or to give rise to reasonable apprehension of such danger. But we do not think that such a degree of cruelty is required to be proved by the petitioner for obtaining a decree for divorce. Cruelty can be said to be an act committed with the intention to cause sufferings to the opposite party. Austerity of temper, rudeness of language, occasional outburst of anger, may not amount to cruelty, though it may amount to misconduct.

"The mental cruelty in Section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties

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

We do not think that this is a case, where the appellant could be denied relief by invoking Section 23(1)(a) of the Hindu Marriage Act. On the other hand, various incidents brought out in the evidence would show that the relationship between the parties was irretrievably broken, and because of the non-cooperation and the hostile attitude of the respondent, the appellant was subjected to serious traumatic experience which can safely be termed as 'cruelty' coming within the purview of Section 13(1)(ia) of the Hindu Marriage Act. Therefore, we hold that the appellant is entitled to the decree for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act. However, we make it clear that any order of maintenance passed in favour of the respondent will stand unaffected by this decree for dissolution of the marriage. We also make it clear that if any rights have been accrued to the respondent in the joint assets of both, she would be at liberty to take appropriate action to enforce such right.

JUDGMENT

K.G. Balakrishnan, J.

Leave granted.

The husband who had been unsuccessfully fighting litigation for the past more than 15 years for snapping his marital ties with the respondent wife is the appellant before us. The appellant is double doctorate holder -- one in Mathematics from Andhra University and another from U.S.A., and had been working in United States during the relevant period. The respondent is a post- graduate in Home Science and was working as a lecturer in the year 1979. The appellant came to India in 1979 and gave advertisement in the newspaper seeking matrimonial alliance from a suitable bride. The relatives of the respondent responded to the advertisement and there was mutual consultation between the parties, which led to the marriage of the appellant with the respondent on 30.7.1979. After the marriage, the appellant and respondent stayed together for some period and thereafter, the appellant left India for United States. The respondent was asked to join him after having obtained the visa and completing other formalities. The respondent, after a period of six months, joined the appellant in United States. It appears that the marital life of the appellant and the respondent ran into rough weather from the very beginning of their stay in United States. There used to be occasional quarrel between the parties. A daughter, Sandhya, was born to them on 10.6.1981. In 1982, the appellant, respondent and their daughter Sandhya came to India, but the appellant returned to United States in November 1982 itself and the respondent joined him only in April 1983. In January 1985, the respondent along with her daughter returned to India and it seems that the misunderstandings between the parties deepened and ultimately the appellant filed application for divorce under Section 13 of the Hindu Marriage Act,

1955 alleging that after the solemnization of their marriage, the respondent treated the appellant with cruelty.

The respondent contested the proceedings and denied all the allegations made by the appellant in the petition and also made counter-allegations alleging that the appellant was responsible for wrecking the marriage. Parties on either side examined witnesses to substantiate their allegations. The learned Family Court Judge after assessing the rival contentions and the evidence adduced by the parties, came to the conclusion that the respondent had treated the appellant with mental cruelty and, therefore, the appellant was entitled to get a decree for dissolution of marriage. This was challenged by the respondent before the Hon'ble High Court of Andhra Pradesh and the Division Bench of the High Court reversed the decision of the Family Court holding that the appellant was at fault and he had been trying to take advantage of his own wrongs; hence, he was not entitled to get a decree in his favour in view of Section 23(1)(a) of the Hindu Marriage Act. The Judgment of the Division Bench is challenged before us.

We heard learned Senior Counsel for the appellant, Mr. L. Nageswara Rao and Mr. M.N. Rao, learned Counsel on behalf of the respondent. The learned senior Counsel for the appellant contended that there was complete breakdown of the marriage due to the attitude of the respondent and the appellant was under severe mental agony and that the various acts committed by the respondent amounted to mental cruelty and the High Court was not justified in reversing the finding of the Family Court. The learned Counsel for the respondent, on the other hand, contended that there were differences of opinion between the appellant and the respondent on many matters, but the respondent had not done anything to cause mental pain or agony to the appellant. It was argued that the Family Court Judge passed his decision based on a solitary incident and, therefore, the same had been rightly reversed by the High court.

For proper appreciation of the disputes between the parties, it is necessary to consider the various allegations made by the appellant in his petition and also the counter-allegations made by the respondent in her reply. The appellant alleged that respondent entered into marriage with the appellant because of the persuasion of her sisters and brother and that the respondent was not taking any interest or co-operating to have a happy married life. The appellant alleged that the respondent joined him in the United States after a period of six months unwillingly, and right from the beginning of her life in United States, she picked up quarrel with the appellant and created scenes on many occasions. The appellant alleged that it was known to the Indian community, mainly to the people of Andhra Pradesh, who had settled down in and around the area where the appellant was residing, that the respondent was not having a good relationship with the appellant. He also alleged that the respondent was not doing any household work and the appellant had to do all the work himself and his brother Ravi, who was staying with him, was helping him. The appellant alleged that the respondent used to insult the appellant in the presence of his friends and guests and that the respondent was taking no interest in sharing bed with the appellant and this caused mental and physical agony to the appellant.

The respondent had denied all these allegations made by the appellant in the petition and she also made counter-allegations. But it is pertinent to note that the respondent has no case that they were having a happy married life and the attempt of the respondent was to put the blame at the doorstep of the appellant. She stated that the appellant had no interest to live with the respondent and was all the time attending parties, watching TV and playing cards and the respondent was completely neglected by the appellant. The respondent alleged that the appellant used to treat her as an intruder.

The respondent also stated that she was not given proper medical aid when she was in labour pain and had to give pre-mature birth to the baby without any medical assistance.

It is true that the Family Court rightly found that all the allegations made by the appellant in the petition were not satisfactorily substantiated by him. But nevertheless, some glaring facts are to be noted in this case. The married life of the appellant and respondent started in 1979 and right from the very beginning, the parties were under severe mental stress. Both the parties mutually tried to put the blame on each other. In 1982, the appellant, the respondent and their daughter returned to India. The respondent, however, refused to accompany the appellant back to the United States, and according to the appellant, she threw up the visa and other papers at him and joined him in United States only in 1983 and the subsequent evidence shows that the respondent had not willingly joined the appellant. She came back to India with her daughter in 1985. Though the appellant stated that the appellant's nephew, Ramu received her, she refused to talk to him and left with her own relatives. The respondent has denied these facts. However, it is important to note that the appellant has alleged that he did not know the whereabouts of the respondent and his child, at least for some period, after they returned to India. This is evident from the fact that the appellant wrote two letters to his daughter and these letters had to be re-directed to the address of the appellant. She was staying at Araku Valley, which was evidently not known to the appellant. The appellant stated that he suffered severe mental torture and, only after some searching inquiry, he could come to know that she was staying with her sister at Araku Valley. The appellant along with his two relatives went to Araku Valley to persuade the respondent to join the society of the appellant, but the very entry of the appellant and his relatives to the house was prevented by the respondent and later, only at the intervention of her sister, Suryakantham, they were permitted to enter the house. It may be noticed that the respondent and her child left United States in January 1985. The nature of the treatment meted out to the appellant by the respondent, even when he was meeting her after an interval of one year, is satisfactorily proved by the evidence of PW4 and his evidence was completely accepted by the Family Court Judge. The appellant being highly educated person having a position in life must have felt serious humiliation. The incident also shows that the respondent did not extend courteous behaviour to the appellant even in the presence of others. The conduct of the respondent assumes importance as this incident happened when they both were meeting each other after a long lapse of time.

Another important incident, which found favour with the Family Court is that the respondent had filed a criminal complaint before the police alleging that she was beaten by the appellant and his mother. The appellant and his mother were called to the police station and they had to be there for more than 10 hours. The explanation offered by the respondent for this incident is far from satisfactory. According to the respondent, she was being ill-treated by the appellant and his mother, and on one day, while preparing the breakfast when she used the blender for grinding the pulses, her mother-in-law got angry and scolded her saying that she had not brought any article from her house, so she should not have used the blender. Further, the respondent alleged that the appellant and his mother threw away all her bags and clothes and the appellant's mother asked her son to get the respondent out and the appellant became wild and gave a blow to the respondent with a sharp-edged weapon and it was under those circumstances that with bleeding injuries, she had gone to the police station and filed a complaint before the police. It is important to note that police did not register any case evidently as it was a domestic quarrel and not of a serious nature, and the incident shows the innate lack of self-control which had driven the respondent to this exorable conduct. But the humiliation and agony

suffered by the appellant and his mother, considering their status in life and the social circumstances, was too much.

Under Section 13(1) (ia) of the Hindu Marriage Act, on a petition presented either by the husband or wife, the marriage could be dissolved by a decree of divorce on the ground that the other party has, after the solemnization of the marriage, treated the petitioner with cruelty. 'Cruelty' is not defined in the Act. Some of the provisions of the Hindu Marriage Act were amended by Hindu Marriage Laws (Amendment) Act, 1976. Prior to the amendment, 'cruelty' was one of the grounds for judicial separation under Section 10 of the Act. Under that Section, "cruelty" was given an extended meaning by using an adjectival phrase, viz. "as to cause reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party". By the Amendment Act of 1976, "cruelty" was made one of the grounds for divorce underSection 13 and relevant provision reads as follows:-

"Divorce (1) Any marriage solemnized, whether before or after the commencement of the 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) .

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty, or (ib) ..

(ii)-(ix) "

The omission of the words, which described 'cruelty' in the unamended Section 10 of the Hindu Marriage Act, has some significance in the sense that it is not necessary to prove that the nature of the cruelty is such as to cause reasonable apprehension in the mind of the petitioner that it would be harmful for the petitioner to live with the other party. English Courts in some of the earlier decisions had attempted to define "cruelty" as an act which involves conduct of such a nature as to have caused damage to life, limb or health or to give rise to reasonable apprehension of such danger. But we do not think that such a degree of cruelty is required to be proved by the petitioner for obtaining a decree for divorce. Cruelty can be said to be an act committed with the intention to cause sufferings to the opposite party. Austerity of temper, rudeness of language, occasional outburst of anger, may not amount to cruelty, though it may amount to misconduct.

This Court, in Dr. N. G. Dastane vs. Mrs. S. Dastane AIR 1975 SC 1534 held at page154, paragraph 34 as follows:-

"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 Court has to come to a conclusion whether the acts committed by the counter-petitioner amount to cruelty, and it is to be assessed having regard to the status of the parties in social life, their customs,

traditions and other similar circumstances. Having regard to the sanctity and importance of marriages in a community life, the Court should consider whether the conduct of the counter- petitioner is such that it has become intolerable for the petitioner to suffer any longer and to live together is impossible, and then only the Court can find that there is cruelty on the part of the counter-petitioner. This is to be judged not from a solitary incident, but on an overall consideration of all relevant circumstances.

This Court had an occasion to consider this question in some cases.

In S. Hanumantha Rao vs. S. Ramani 1999 (3) SCC 620, the husband alleged that the respondent wife had no interest in the marriage life and within a period of two months of the marriage, she went back to her parents house and stayed there for two and a half months. After about six months, she took off her mangalsutra and threw it at the appellant. The respondent wife explained that she removed the mangalsutra in privacy and handed over the same to the appellant on his own request. This Court held that removal of mangalsutra would not constitute cruelty within the meaning of Section 13(1)(ia).

In V. Bhagat vs. D. Bhagat(Mrs.) 1994(1) SCC 337, the husband was a practicing lawyer and the respondent wife was working in a television company at the time of marriage. They had a grown up son and a daughter. The husband alleged adultery on the part of the respondent. Respondent wife denied the allegations and she also suggested that the appellant was suffering from some mental hallucination. This Court, in paragraph 16 at page 347, observed as under:-

"The mental cruelty in Section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must be had to the context in which they were made."

The case of the appellant that he had been subjected to cruelty by the wife is not put as such solely on the basis of one or two incidents. Their marriage life started in 1979 with so many ups and downs. Both of them did not live together for a longer period as happily married couple. The appellant has succeeded in proving that the attitude of the respondent was not cordial and cooperative. The respondent also alleged that their marriage life was not happy and cheerful. The way in which the appellant was treated by the respondent when he visited her sister's house at Araku Valley and the subsequent filing of the criminal complaint whereby the appellant was subjected to severe humiliation would go to show that the respondent was not prepared to extend any kind of cooperation to the appellant. The respondent's allegation that she was physically assaulted by the appellant and his mother is not very convincing. The fact that there was a bleeding injury on her hand was taken note of seriously by the High Court but the question is, in those circumstances, would an ordinary prudent person rush to the police station and file a complaint to see that her husband and his mother be kept in police custody for unduly long hours. These incidents throw an insight into her past conduct when she was staying with the appellant. The mental cruelty faced by the appellant is to be assessed having regard to his status in his

life, educational background, the environment in which he lived. The appellant could have suffered traumatic experience because of the police complaint and the consequent loss of reputation and prestige in the society. Married life of the appellant with the respondent had never been happy. The appellant would say that from 1985 onwards, he has not been having conjugal relationship with the respondent and even prior thereto the respondent was not properly discharging her marital obligations.

The High Court has held in the impugned judgment that the appellant himself was responsible for many of the unhappy incidents and therefore, he shall not be allowed to take advantage of his own fault and the decree for dissolution of marriage shall be denied to him in view of Section 23(1)(a) of the Hindu Marriage Act. We do not think that the High Court was justified in holding this view. The decision was based on the fact that the appellant had executed a power of attorney in favour of his brother-in-law, Rama Rao, authorizing him to take steps for seeking divorce in the year 1982. The appellant admitted having executed that power of attorney. According to the appellant, the respondent, after she came to India in 1982, refused to come back to United States even after much persuasion and under those circumstances, he executed the power of attorney, but later on came to know that power of attorney holder could not file an application. That would only show that right from 1982, the relationship between the appellant and the respondent was not good and the parties thought of divorce. But the appellant did not file any application in 1982. As regards the incident relating to police complaint also, in his statement the appellant had admitted that the respondent had a scratch injury. But there is nothing in the evidence to show that either the appellant or his mother caused any serious injury to the respondent.

We do not think that this is a case, where the appellant could be denied relief by invoking Section 23(1)(a) of the Hindu Marriage Act. On the other hand, various incidents brought out in the evidence would show that the relationship between the parties was irretrievably broken, and because of the non-cooperation and the hostile attitude of the respondent, the appellant was subjected to serious traumatic experience which can safely be termed as 'cruelty' coming within the purview of Section 13(1)(ia) of the Hindu Marriage Act. Therefore, we hold that the appellant is entitled to the decree for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act. However, we make it clear that any order of maintenance passed in favour of the respondent will stand unaffected by this decree for dissolution of the marriage. We also make it clear that if any rights have been accrued to the respondent in the joint assets of both, she would be at liberty to take appropriate action to enforce such rights. The appeal is allowed. Parties to bear their respective costs.

(D.P. MOHAPATRA)
(K.G. BALAKRISHNAN)

January 10, 2002.

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MAHARANI KUSUMKUMARI AND ANR. VS. SMT. KUSUMKUMARI JADEJA AND ANR.

1991 SCR (1) 193

1991 SCC (1) 582 JT 1991 (1) 278 1991 SCALE (1)103

Petitioner: Maharani Kusumkumari and Anr.
Vs.
Respondent: Smt. Kusumkumari Jadeja and Anr.

Date of Judgment : 01/02/1991

Bench: Hon'ble Mr. Justice L.M. Sharma & Hon'ble Mr. Justice M.M. Punchhi

Hindu Marriage Act, 1955: Section II-Petition to declare marriage a nullity-Whether maintainable after death of petitioner's spouse.

Practice and Procedure: Proceedings involving issues relating to marital status-Question dependent upon nature of action and the law governing the same-Provisions of the relevant statute very material.

It was contended on behalf of the appellants that having regard to the very special relationship between husband and wife,a marriage cannot be dissolved or declared to be a nullity unless both of them are parties thereto. The martial status of a person sands on a much higher footing than other positions one may hold in the society and cannot be allowed to be challenged lightly,and that the marriage of a person, therefore, cannot be declared as nullity after his death when he does no have an opportunity to contest. Reliance was placed upon the language of Section 11 of the Hindu Marriage Act.

On behalf of the respondent, it was pointed out that having regard to the language of Section 16 of the Hindu Marriage Act as it it stood before its amendment in 1976,he children born of the respondent would not have been entitled to the benefit of the section in absence of a decree declaring the marriage of their parents as nullity, and this was precisely the reason that the respondent had to commence the present litigation

On the question: whether a petition under Section 11 of the Hindu Marriage Act, 1955 for declaring the marriage of the petitioner as a nullity is maintainable after the death of the petitioner's spouse.

Dismissing the appeal, this Court,

HELD: An application under Section11 of the Hindu Marriage Act, 1955 before its amendment in 1976, was maintainable at the instance of a party to the marriage even after the death of the other spouse.

In the instant case, the proceeding was started in 1974 that is, before the amendment was made in the Hindu Marriage Act,1955. Section II did not contain the words "against the other party". At that time all that was required was that the application had to be filed by a party to the marriage

under challenge. On the plain language of the section as it stood then,it could not be claimed that in absence of the other spouse as a party to the proceedings, the same would not be maintainable.

By the amendment in section 11, in so far the cases where marriage can be declared as nullity, the application of the rule protecting the legitimacy was widened. If that had not been,the children born of such marriages would have been deprived of the advantage on the death of either of the parents.

The intention of the legislature in enacting section 16 was to protect the legitimacy of the children who would have been legitimate if the Act had not been passed in 1955.

There is no reason to interpret section 11 in a manner which would narrow down its field. With respect to the nature of the proceedings, what the court has to do in an application under section 11 is not to bring about any change in the marital status of the parties. The effect of granting a decree of nullity is to discover the flow in the marriage at the time of its performance and accordingly to grant a decree declaring it to be void.

JUDGMENT

CIVIL APPELLATE JURISDICTION: Civil Appeal No.2215 of 1977.

From the Judgement and Order dated 237 1976 of the Madhya Pradesh High Court in Misc. Appeal No.23 of 1976.

T.U. Metha, S.K. Gambhir, Vivek Gambhir and Surinder Karnail for the Appellants.

Uday U. Lalit and A.G.Ratnaparkhi for the Respondents.

The Judgement of the Courtwas delivered by **SHARMA. J.** The question for decision in this appeal by special leave is whether a petition under s.11 of the Hindu Marriage Act, 1955, for declaring the marriage of the petitioner as nullity is maintainable after the death of the petitioners' spouse.

2. The appellant no. 1, hereinafter referred to as the Maharani, was married to Maharaja Rameshwarsighji in1960 and a daughter, the appellant no.2, was born of the wedlock in 1964. The relationship between the husband and the wife thereafter ceased to be cordial and the appellants started living in Bombay and the Maharaja within his estate in Madhya Pradesh. According to the case of the respondent no.1 the Maharaja decided to remarry without legally separating from the appellant Maharani. The respondent who is a relation of the Maharaj's mother, respondent No.2, was misled both by the Maharaja and his mother in believing that the first marriage of the Maharaja had been dissolved and under the belief she married the Maharaja and the couple got several issues. In 1974 when the Maharaja died, an application for grant of Letters of Administration was filed by the appellant Maharani and the respondent applied for probate on the basis of an alleged will which is denied by the appellant. The proceedings are still pending. In this background the respondent no. 1 filed the present application under s. 11 of the Hindu Marriage Act for declaring her marriage as nullity. The Maharaja's mother was impleaded as the sole respondent. When the appellants learnt about the case, they intervened and were joined as parties.

3. The appellants challenged the maintainability of the application on the ground that the marriage could not be declared nullity after the death of the Maharaja. Both the trial court and the High Court have rejected the appellants' plea.

4. Mr. Mehta, the learned counsel for the appellants, has contended that having regard to the very special relationship between husband and wife, a marriage cannot dissolved or declared to be a nullity unless both of them are parties thereto. The marital status of a person stands on a much higher footing than other positions one may hold in the society or may have in relation to a property; and cannot be allowed to be challenged lightly. The marriage of a person, therefore, cannot be declared as a nullity after his death when he does not have an opportunity to contest. He relied upon the language of s.11. After its amendment in 1976 the section read this:

> *"11. Void marriages:- Any marriage solemnized after the commencement of this Act shall be null and void and may , on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i),(iv) and (v) of Section 5." (emphasis added)*

5. The present proceeding was started in 1974, that is, before the amendment, and the section did not contain the words which have been underlined by us above. At that time all that was required was that the application had to be filed by a party to the marriage under challenge. On the plain language of the section as it stood then, it could not be claimed that in absence of the other spouse as a party to the proceeding, the same would not be maintainable. The argument of Mr. Mehta is that the section had the same meaning before and after the amendment and the addition of the words in 1976 was merely clarificatory in nature. He strongly relied upon the 69th Report of the Law Commission.

6. The Report recommended several amendments in the Hindu Marriage Act which led to the passing of the Amending Act of 1976.

Reliance was placed on paragraph 6.1A of Chapter 6 of the Report which referred to the divergent views taken by the High Courts of Punjab and Madras on the question of maintainability of a petition under s.11 after the death of the other spouse. The Commission, thereafter, observed thus:

> *"We ought, however, to point out that in such a case, the proper remedy is a suit under the Specific Relief Act. A petition under section 11 of the Hindu Marriage Act cannot be appropriate, because the other spouse is an essential party to any such petition. This should be clarified by an amendment."*

It has been argued before us that the view of the Madras High Court referred to in the Report is the correct view which was accepted by the Law Commission, and since there was scope for controversy on the language of the section, the legislature agreeing with the Law Commission added the aforementioned additional words by way of clarification. It is urged that such interpretation of the section did not lead to any injustice inasmuch as a suit for such a declaration was and is maintainable in the civil court. Reliance has also been placed on "Rayden and Jackson's Law and Practice in Divorce and Family matters." (15th Edn.), and several English cases in support of the proposition that on the death of a party to a matrimonial action the cause of action does not service. Reference has been made to the case of Butterfield v. Butterfield, I.L.R. (Vol.50) Calcutta 153, where after the wife had obtained a decree nisi for dissolution of her marriage the husband died. Following the English case of Stanhope v. Stanhope,[1886] 11 P.D.103, it was held that the decree could not be confirmed.

7. The learned counsel for the respondent relied upon certain observation made in other High Courts' judgments supporting his stand. He pointed out that having regard to the language of s. 16, as it stood before the amendment, the children born of the respondent would not have been entitled to the benefit of the section in the absence of a decree declaring the marriage of their parents as nullity, and this was precisely the reason that the respondent had to commence the present litigation.

8. We have considered the argument of Mr. Mehta closely but do not find ourselves in a position to agree with him. It is not correct to suggest that one uniform rule shall apply for deciding the maintainability of all proceedings involving issues relating to marital status. The question will be dependent upon the nature of the action and law governing the same. The provisions of the relevant statute relating to a proceeding in question will be very material. This aspect has been taken note of by Rayden and Jackson also in their book which has been relied upon by Mr. Mehta. The passage at page 650 summarises the position in the following words:

> *"Death of a party: effect on suit. In many cases the fact of the death of one of the parties will render the process meaningless by reason of the circumstances that a marriage brought to an end by death could no longer be dissolved by an Act of the court. But there is no general rule that, where one of the parties to a divorce suit has died, the suit abates, so that no further proceedings can be taken in it. It has been said that it is unhelpful to refer to abatement at all. The real question in such cases is whether, where one of the parties to a divorce suit has died, further proceedings in the suit can or cannot be taken. The answer to that question, when it arises, depends in all cases on two matters and in some cases also on a third. The first matter is the nature of the further proceedings sought to be taken. The second matter is the true construction of the relevant statutory provision or provisions, or of a particular order made under them, or both. The third matter is the applicability of section I (I) of the Law Reforms (Miscellaneous Provisions) Act 1934."*

9. The dispute issue in the present appeal has to be answered by considering the nature of the proceedings and the true construction of the relevant provisions of the Hindu Marriage Act. Under the general law a child for being legitimate has to be born in lawful wedlock, and if the marriage is void or declared to be so by the court, it will necessarily have the effect of bastardising the child born of the parties to such a marriage. By enacting s. 5(i) of the Act, the legislature abolished polygamy, which had always remained permissible and prevalent among the Hindus in the past. The Act was bringing about a very significant departure in this regard; and taking into account the possibility of violation of the law in numerous cases atleast for sometime to come special provisions were included under s.16 of the Act with the object of protecting the legitimacy of the children. The original section before the amendment of 1976 read as follows:

> *"16. Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity.*
>
> *Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void annulled by a decree of nullity*

any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possession of acquiring any such rights by reason of his not being the legitimate child of his parents."

It will be seen that the benefit of the section was confined to only such cases where a decree of nullity was granted under s. 11 or s.12. it did not extend to other cases. In 1976 s.11 was amended by inserting the words "against the other party", and along with the same s.16 was amended as it read now. the following words in s. 16(i).

"...and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act."

enlarged the applicability of the beneficial provisions, so as not to deny the same to children who are placed in circumstances similar to those of the present respondent. By the amendment in s.11, in so far the cases where marriage can be declared as nullity, the application of the rule protecting the legitimacy was widened. If that had not been done, the children born of such marriage would have been deprived of the advantage on the death of either of the parents. By the simultaneous amendment of the two sections it can safely be deduced that the Parliament did not hold identical views as expressed by the Law Commission's Report.

10. Even if it be assumed that the meaning of the section was not free from ambiguity, the rule of beneficial construction is called for in ascertaining its meaning. The intention of the legislature in enacting s.16 was to protect the legitimacy of the children who would have been legitimate if the Act had not been passed in 1955. There is no reason to interpret s.11 in a manner which would narrow down its field. With respect to the nature of the proceeding, what the court has to do in an application under s.11 is not bring about any change in the marital status of the parties. The effect of granting a decree of nullity is to discover the flaw in the marriage at the time of its performance and accordingly to grant a decree declaring it to be void. we, therefore, hold that an application under s.11 before its amendment in 1976, was maintainable at the instance of a party to the marriage even after the death of the other spouse. Accordingly, this appeal is dismissed with costs.

Appeal dismissed

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DHARMENDRA KUMAR VS. USHA KUMAR

1977 AIR 2218

1978 SCR (1) 315 1977 SCC (4) 12
DATE OF JUDGMENT 19/08/1977

Petitioner: Dharmendra Kumar
Vs.
Respondent: Usha Kumar

Bench: Hon'ble Mr. Justice A.C. Gupta, Hon'ble Mr. Justice Syed Murtaza Fazalali

Hindu Marriage Act 1955-Section 13(1A)(ii).-23(1)(a)-If divorce can be obtained for absence of restitution of conjugal rights after decree for restitution is granted by a person who refuses to have restitution-Whether such a conduct amounts to a wrong within the meaning of sec. 23 (1) (a) of the Act.

The respondent-wife was granted a decree for restitution of conjugal rights on her application under s. 9 of Hindu Marriage Act, 1955 by Additional Senior Sub-Judge, Delhi the respondent presented a petition under s. 13(1A) (ii) of the Act in the Court of Additional District Judge, Delhi for dissolution of the marriage by a decree of divorce-stating therein that there bad been no restitution of conjugal rights between the parties after the passing of the decree for restitution of conjugal rights. The appellant-husband, in his written statement admitted that there had been no restitution of conjugal rights, between the parties after the passing of the decree in earlier proceedings, but stated that he made attempts to comply with the decree dated 27th August 77 by writing several registered letters inviting the respondent to live with him to which, according to him she never replied. The husband contended that she herself prevented the restitution of conjugal rights and was making a capital out of her own wrong which she was not entitled to do.

Section 13 as it stood before the 1964 amendment permitted only the spouse who had obtained the decree for restitution of conjugal rights to apply for relief by way of divorce. The party against whom the decree was passed was not given that right. The relief which is available to the spouse against whom a decree for restitution of conjugal rights has been passed cannot reasonably be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be a "wrong" within the meaning of s. 23(1)(a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled. Mere non-compliance with a decree for restitution does not constitute wrong within the meaning of section 23(1)(a)

JUDGMENT

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 949 of 1977.

Appeal by Special Leave from the Judgment and Order dated 19-10-1976 of the Delhi High Court in F.A.0., No. 170 of 1976.

Naunit Lal, R. K. Baweja and Miss Lalita Kohli, for the Appellant.

S. L. Watel, C. R. Somasekharan, R. Watel and M. S. Ganesh, for the Respondent.

The following Judgment of the Court was delivered by

GUPTA, J.-On her application made under section 9 of the Hindu Marriage Act, 1955, the respondent was granted a decree for restitution of conjugal rights by the Additional Senior Sub-Judge, Delhi on August 27, 1973. A little over two years after that decree was passed, on October 28, 1975 she presented a petition under section 13 (IA) (ii) of the Act in the Court of the Additional District Judge, Delhi, for the dissolution of the marriage by a decree of divorce. Section 13 (IA) (ii) as it stood at the material time reads :

> *"Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-*
>
> *(i) x x x*
>
> *(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.*
>
> *The provision was amended in 1976 reducing the period of two years to one year, but this amendment is not relevant to the present controversy. In the petition under section 1 3 (IA)*
>
> *(ii) she-we shall hereinafter refer to her as the petitioner-stated that there had been 'no restitution of conjugal rights between the parties to the marriage after the passing of the decree for restitution of conjugal rights and that there was no other legal ground why the relief prayed for should not be granted. Her husband, the appellant before us, in his written statement admitted that there had been no restitution of conjugal rights between the parties after the passing of the decree in the earlier proceeding, but stated that he made attempts "to comply with the decree (for restitution of conjugal rights) by writing several registered letters to the petitioner" and "otherwise" inviting her to live with him. He complained that the petitioner "refused to receive some of the letters and never replied to those which she received", and according to him the petitioner "has herself prevented the restitution of conjugal rights she prayed for and now seeks to make a capital out of her own wrong". The objection taken in the written statement is apparently based on section 2 3 (1) (a) of the Act. The relevant part of section 2 3 (1) (a) states :*

Decree in proceedings.

> *"23. (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that-*

(a) any of the grounds for granting relief exists and the petitioner..... is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief....."

On the pleadings the following issue was raised as issue No. 1

"Whether the petitioner is not in any way taking advantage of her own wrong for the reasons given in the written statement ?"

Subsequently the following additional issue was also framed

"Whether the objection covered by issue No. 1 is open to the respondent under the law ?"

This additional issue was heard as a preliminary issue. The Additional District Judge, Delhi, who heard the matter, relying on a Full Bench decision of the Delhi High Court reported in I.L.R. (1971) 1 Delhi 6, (Ram Kali v. Gopal Dass), and a later decision of a learned single Judge of that court reported in I.L.R. (1076) 1 Delhi 725, (Gajna Devi v. Purshotam Giri) held that no such circumstance has been alleged in the instant case from which it could be said that the petitioner was trying to take advantage of her own wrong and, therefore, the objection covered by issue No. 1 was not available to the respondent The Additional District Judge accordingly allowed the petition and granted the petitioner a decree of divorce as prayed for. An appeal from this decision taken by the husband was summarily dismissed by the Delhi High Court. In the present appeal the husband questions the validity of the decree of divorce granted in favour of the petitioner.

Section 13 (IA) (ii) of the Hindu Marriage Act, 1955 allows either party to a marriage to present a petition for the dissolution of the marriage by a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for the period specified in the provision after the passing of the decree for restitution of conjugal rights. Sub-section (IA) was introduced in section 13 by section 2 of the Hindu Marriage (Amendment) Act, 1964 (44 of 1964). Section 13 as it stood before the 1964 amendment permitted only the spouse who had obtained the decree for restitution of conjugal rights to apply for relief by way of divorce; the party against whom the decree was passed was not given that right. The grounds for granting relief under section 1 3) including sub-section (IA) however continue to be subject to the provisions of section 23 of the Act. We have quoted above the part of section 23 relevant for the present purpose. It is contended by the appellant that the allegation made in his written statement that the conduct of the petitioner in not responding to his invitations to live with him meant that she was trying to take advantage of her own wrong for the purpose of relief under section 1 3 (1 A) (ii) On the admitted facts, the petitioner was undoubtedly entitled to ask for a decree of divorce. Would the allegation, if true, that she did not respond to her husband's invitation to come and live with him disentitle her to the relief ? We do not find it possible to hold that it would. In Ram Kali's case (supra) a Full Bench of the Delhi High Court held that mere non-compliance with the decree for restitution does not constitute a wrong within the meaning of section 2 3 (1) (a). Relving on and explaining this decision in the later case of Gajna Devi v. Purshotam Giri (supra) a learned Judge of the same High Court observed "Section 23 existed in the statute book prior to the insertion of section 13(1A)..... Had Parliament intended that a party which is guilty of a matrimonial offence and against which a decree for judicial separation or restitution of conjugal rights had been passed, was in view of section 23 of the Act, not entitled to obtain divorce, then it would have inserted an exception to section 13 (1 A) and with such exception, the provision of section 13(1A) would practically become redundant as the guilty party could never reap benefit of obtaining divorce, while the innocent party was entitled to obtain it even under the statute as it was before the amendment. Section 23 of the Act, therefore, cannot be construed so as to make the effect

of amendment of the law by insertion of section 13(1A) nugatory advantage of his or her own wrong" occurring in clause(a) of section 23(1) of the Act does not apply to taking advantage of the statutory right to obtain dissolution of marriage which has been conferred on him by section 13(1A).

In such a case, a party is not taking advantage of his own wrong, but of the legal right following upon of the passing of the decree and the failure of the parties to comply with the decree....."

In our opinion the law has been stated correctly in Ram Kali v. Gopal Das (supra) and Gajna Devi v. Purshotam Giri (supra). Therefore, it would not be very reasonable to think that the relief which is available to the spouse against whom a decree for restitution has been passed, should be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be a 'wrong' within the meaning of section 23 (1) (a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled. In the case before us the only allegation made in the written statement is that the petitioner refused to receive or reply to the letters written by the appellant and did not respond to his other attempts to make her agree to Eve with him. This allegation, even if true, does not amount to misconduct grave enough to disentitle the petitioner to the relief she has asked for. The appeal is therefore dismissed but without any order as to costs.

Appeal dismissed.

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NARAYAN GANESH DASTANE VS. SUCHETA NARAYAN DASTANE

1975 AIR 1534

1975 SCR (3) 967 1975 SCC (2) 326
DATE OF JUDGMENT 19/03/1975

Petitioner: Narayan Ganesh Dastane
Vs.
Respondent: Sucheta Narayan Dastane

Bench: Hon'ble Mr. Justice Y.V. Chandrachud, Hon'ble Mr. Justice P.K. Goswami & Hon'ble Mr. Justice N.L. Untwalia

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

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

The spouses possess high academic qualifications and each one claims a measure. of social respectability and cultural sophistry. The evidence shows some traces of these. But of this there need be no doubt,: the voluminous record which they have collectively built up in the case contains a fair reflection of their rancour and acrimony, The appellant, Dr. Narayan Ganesh Dastane, passed his M.Sc. in Agriculture from the Poona University. He was sent by the Government of India to Australia in the Colombo Plan Scheme. He obtained his Doctorate in Irrigation Research from an Australian University and returned to India in April, 1955. He worked for about 3 years as an Agricultural Research Officer and in October, 1958 he left Poona to take charge of a new post as an Assistant Professor of Agronomy in the 'Post-Graduate School, Pusa Institute, Delhi. At present be is said to be working on a foreign assignment.

His father was a solicitor-cum lawyer practising in Poona.

The respondent, Sucheta, comes from Nagpur but she spent her formative years mostly in Delhi. Her father was transferred to Delhi in 1949 as an Under Secretary in the Commerce Ministry of the Government of India and she came to Delhi along with the rest of the family. She passed her B.Sc. from the Delhi University in 1954 and spent a year in Japan where her father was attached to the

Indian Embassy. After the rift in her marital relations, she obtained a Master's Degree in Social Work. She has done field work in Marriage Conciliation and Juvenile Delinquency. She is at present working in the Commerce and Industry Ministry, Delhi.

In April, 1956 her parents arranged her marriage with the appellant. But before finalising the proposal, her father- B. R. Abhyankarwrote two letters to the appellant's father saying in the first of these that the respondent "had a little misfortune before going to Japan in that she had a bad attack of sunstroke which affected her mental condition for sometime". In the second letter which followed at an interval of two days, "cerebral malaria" was mentioned as an additional reason of the mental affectation. The letters stated that after a course of treatment at the Yeravada Mental Hospital, she was cured : "you find her as she is today". The respondent's father asked her appellant's father to discuss the matter, if necessary, with the doctors of the Mental Hospital or with one Dr. P. L. Deshmukh, a relative of the respondent's mother. The letter was written avowdely'in order that the appellant and his people "should not be in the dark about an important episode" in the life of the respondent, which "fortunately, had ended happily".

Dr. Deshmukh confirmed what was stated in the letters and being content with his assurance, the appellant and his father made no enquiries with the Yeravada Mental Hospital. The marriage was performed at Poona on May 13, 1956. The appellant was then 27 and the respondent 21 years of age.

They lived at Arbhavi in District Belgaum from June to October, 1956. On November 1, 1956 the appellant was transferred to Poona where the two lived together till 1958.

During this period a girl named Shubha was born to them on March 11, 1957. The respondent delivered in Delhi where ,her parents lived and returned to Poona in June, 1957 after an absence, normal on such occasions, of about 5 months. In October, 1958 the appellant took a job in the Pusa Institute of Delhi, On March 21, 1959 the second daughter, Vibha, was born. The respondent delivered at Poona where the appellant's parents lived and returned to Delhi in August, 1959. Her parents were living at this time in Djakarta, Indonesia.

In January, 1961, the respondent went to Poona to attend the marriage of the appellant's brother, a doctor-by profession, who has been given an adoption in the Lohokare family. A fortnight after the marriage, on February 27, 1961 the appellant who had also gone to Poona for the marriage got the respondent examined by Dr. seth, a Psychiatrist in charge of the Yeravada Mental Hospital. Dr. Seth probably wanted adequate data to make his diagnosis and suggested that he would like to have a few sittings exclusively with the respondent. For reasons good or bad, the respondent was averse to submit herself to any such scrutiny. Either she herself or both she and the appellant decided that she should stay for some time with a relative of bers, Mrs-Gokhale. On the evening of the 27th, she packed her titbits and the appellant reached her to Mrs. Gokhale's house.

There was no consultation thereafter with Dr. Seth.

According to the appellant, she had promised to see Dr, Seth but she denies that she made any such promise. She believed that the appellant was building up a case that she was of unsound mind and she was being lured to walk into that trap.

February 1961 was the last that they lived together-. But on the day of parting she was three months in the family way. The third child, again a girl, named Pratibha was born on August 19, 1961 when her parents were in the midst of a marital crisis.

Things had by then come to an impossible pass. And close relatives instead of offering wise counsel were fanning the fire of discord that was devouring the marriage. A gentleman called Gadre whose letter-head shows an "M.A. (Phil.) M.A. (Eco.) LL.B.", is a maternal uncle of the respondent. On-March 2, 1961 he had written to tile appellant's father a pseudonymous letter now proved to be his, full of malice and sadism. He wrote :

> *"I on my part consider myself to be the father of 'Brahmadev ..... This is only the beginning. From the spark of your foolish and half-baked egoism, a big conflagration of family quarrels will break out and all will perish therein This image of the mental agony suffered by all your kith and' kin gives me extreme happiness..... You worthless person, who cherishes a desire to spit on my face, now behold that all the world is going to spit on your old cheeks.*
>
> *So why should I loose the opportunity of giving you a few severe slaps on your cheeks and of fisting your ear. It is my earnest desire that the father-in-law should beat your son with foot-ware in a public place."*

On March 11, 1961 the appellant returned to Delhi all alone. Two days later the respondent followed him but she went straight to her parents' house in)Delhi. On the 15th, the appellant wrote a letter to the police asking for protection as he feared danger to his life from the respondent's parents and relatives. On the 19th, the respondent saw the appellant but that only gave to the parties one more chance to give vent to mutual dislike and distrust. After a brief meeting, she left the broken home for good. On the 20th, the appellant once again wrote to the police renewing his request for protection.

On March 23, 1961 the respondent wrote to the appellant complaining against his conduct and asking for money for the maintenance of herself and the daughters. On May 19, 1961 the respondent wrote a letter to the Secretary, Ministry of Food and Agriculture, saying that the appellant had deserted her, that he had treated her with extreme cruelty and asking that the Government should make separate provision for her maintenance. On March 25, her statement was recorded by an Assistant Superintendent of Police, in which she alleged desertion and ill-treatment by the appellant. Further statements were recorded by the police and the Food Ministry also followed up respondent's letter of May 19 but ultimately nothing came out of these complaints and cross complaints. As stated earlier, the third daughter, Pratibha, was born on August 19, 1961. On November 3, 1961 the appellant wrote to respondent's father complaining of respondent's conduct and expressing regret that not even a proper invitation was issued to him when the naming ceremony of the child was performed. On December 15, 1961 the appellant wrote to respondent's father stating that he had decided to go to the court for seeking separation from the respondent. The proceedings out of which this appeal arises were instituted on February 19, 1962.

The parties are Hindus but we do not propose, as is commonly done and as has been done in this case, to describe the respondent as a "Hindu wife in contrast to non-Hindu wives as if wotmen professing this or that particular religion are exclusively privileged in the matter of good sense, loyalty and conjugal kindness. Nor shall we refer to the appellant as a "Hindu husband" as if that species unfailingly projects the image of tyrant husbands. We propose to consider the evidence on its merits, remembering of course the peculiar habits, ideas, susceptibilities and expectations of persons belonging to the strata of society to which these two belong. All circumstances which constitute the ,occasion or setting for the conduct complained of have relevance but we think that no assumption can be made that

respondent is the oppressed and appellant the oppressor. The evidence in any case ought to bear a secular examination.

The appellant asked for annulment of his marriage by a decree of nullity under section 12(1) (c) of 'The Hindu Marirage Act', 25 of 1955, ("The Act") on the ground that his consent to the marriage was obtained by fraud. Alternatively, he asked for divorce under section 13 (1) (iii) on the ground that the respondent was incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition. Alternatively, the appellant asked for Judicial separation under section 10(1) (b) on the ground that the respondent had treated him with such cruelty as to cause a reasonable apprehension in his mind that. it would be harmful or injurious for him to live with her.

The appellant alleged that prior to the marriage, the respondent was treated in the Yeravada Menfal Hospital for Schizophrenia but her father fraudulently represented that she was treated for sun-stroke and cerebral malaria. The trial court rejected this contention. It also rejected the contention that the respondent was of unsound mind.It,however, held that the respondent was guilty of cruelty and on that ground it passed a decree for judicial separation.

Both sides went in appeal to the District Court which dismissed the appellant's appeal and allowed the respondent's, with the result that the petition filed by the appellant stood wholly dismissed.

The appellant then filed Second Appeal No. 480 of 1968 in the Bombay High Court. A learned single Judge of that court dismissed that appeal by a judgment dated February 24, 1969.

This Court granted to the appellant special leave to appeal, limited to the question of judicial separation on the ground of cruelty.

We are thus not concerned with the question whether the appellant's consent to the marriage was obtainede by fraud or whether the respondent bad been of unsound mind for the requisite period preceding the presentation of the petition.

The decision-of the-High Court on those questions must be treated as final and can not be reopened. In this appeal by special leave, against the judgment rendered by the High Court in Second Appeal, we would not have normally permitted the parties to take us through the evidence in the case. Sitting in Second Appeal, it was not open to the High Court itself to reappreciate evidence. Section 100 of the Code of Civil Procedure restricts the jurisdiction of the High Court in Second appeal to questions of law or to substantial errors or defects in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. But the High Court came to the conclusion that both the courts below had "failed to apply the correct principles of law in determining the issue of cruelty". Accordingly, the High Court proceeded to consider the evidence for itself and came to the conclusion independently that the appellant had failed to establish that the respondent had treat him with cruelty. A careful consideration of the evidence by the High Court ought to be enough assurance that the finding of fact is correct and it is not customary for this Court in appeals under Article 136 of the Constitution to go into minute details of evidence and weigh them one against the other, as if for the first time. Disconcertingly, this normal process is beset with practical difficulties.

In judging of the conduct of the respondent, the High Court assumed that the words of abuse or insult used by the respondent "could not have been addressed in vacuum. Every abuse, insult, remark or retort must have been probably in exchange for remarks and rebukes from the husband..... a court is bound to consider the probabilities and infer, as I have done, that they must have been in the context

of the abuses, insults, rebukes and remarks made by the husband and without evidence on the record with respect to the conduct of the husband in response to which the wife behaved in a particular way on each occasion, it is difficult, if not impossible to draw inferences against the wife."

We find this approach difficult to accept. Under section 103 of the Code of Civil Procedure, the High Court may, if the evidence on the record is sufficient, determine any issue of 'fact necessary for the disposal of the appeal which has not been determined by the lower appellate court or which has been wrongly determined by such court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100. But, if the High Court takes upon itself the duty to determine an issue of fact its power to appreciate evidence would be subject to the same restraining conditions to which the power of any court of facts is ordinarily subject. The limits of that power are not wider for the reason that the evidence is being appreciated by the High Court and not by the District Court. While appreciating ,evidence, inferences may and have to be drawn but courts of facts have to remind themselves of the line that divides an inference from guesswork.

If it is proved, as the High Court thought it was, that the respondent had uttered words of abuse and insult, the High Court was entitled to infer that she had acted in retaliation, provided of course there was evidence, direct or circumstantial, to justify such an inference. But the High Court itself felt that there was no evidence on the record with regard to the conduct of the husband in response to which the wife could be said to have behaved in the particular manner. The High Court reacted to this situation by saying that since there was no evidence regarding the conduct of the husband, "it is difficult, if not impossible, to draw inferences against the wife". If there was no evidence that the husband had provoked the wife's utterances, no inference could be drawn against the husband.

There was no question of drawing any inferences against the wife because, according to the High Court, it was established on the evidence that she had uttered the particular words of abuse and insult. The approach of the High Court is thus erroneous and its findings are vitiated. We would have normally remanded the matter to the High Court for a fresh consideration of the evidence but this proceeding has been pending for 13 years and we thought that rather than delay the decision any further, we should undertake for ourselves the task which the High Court thought it should undertake under section 103 of the Code. That makes it necessary to consider the evidence in the case.

But before doing so, it is necessary to clear the ground of certain misconceptions, especially as they would appear to have influenced the judgment of the High Court. First, as to the nature of burden of Proof which rests on a petitioner in a matrimonial petition under the Act. Doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it., This principle accords with commonsense as it is so much earlier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of section 10 (1) (b) of the Act.

But does the law require, as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt ? In other words, though the burden lies on the petitioner to establish the charge of cruelty, what is the standard of proof to be applied in order Lo judge whether the burden has been discharged ?

The normal rule which governs civil proceedings is that a fact can be said to be estabilshed if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, section 3, a fact issaid to be proved when the court either believes it to exist or considersits existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the

supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where. the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue"(1) ; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear" (2).

But whether the issue is one of cruelty or of a loan on a promote, the test to apply is whether on a preponderance of robabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged. Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so' nicely balanced that a reasonable, (1) Per Dixon,J.in Wright v.Wright (1948)77 C.L.R.191at p. 210. (2) Blyth v. Blyth, [1966] 1 A.E.R. 524 at 536. not a vascillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature.

Neither section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor section 23 which governs the jurisdiction of the court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the court the power to pass a decree if it is "satisfied" on matters mentioned in clauses (a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases.

The misconception regarding the standard of proof in matrimonial cases arises perhaps from a loose description of the respondent's conduct in such cases as constituting a "matrimonial offence". Acts of a spouse which are calculated to impair the integrity of a marital union have a social significance. To mar' or not to marry and if so whom, may well be a private affair but the freedom to break a matrimonial tie is not. The society has a stake in the institution of marriage and therefore the erring spouse is treated not as a mere defaulter but as an offender.]But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for the dissolution of a marriage, has no bearing on the standard of proof in matrimonial cases.

In England, a view was at one time taken that the petitioner in a matrimonial petition must establish his case beyond a reasonable doubt but in Blyth v. Blyth(P), the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case; like any civil case, may be proved by a preponderance of probability". The High Court of Austraila in Wright v. Wright (2) , has also taken the view that "the civil and not the criminal standard of persuasion applies to matrimonial causes, including issues of adultery". The High Court was therefore

in error in holding that the petitioner must establish the charge of cruelty "beyond reasonable doubt". The High Court adds that "This must be in accordance with the law of evidence", but we are not clear as to the implications of this observation.

Then, as regards the meaning of "Cruelty". The High Court on this question begins with the decision in Moonshee Bazloor Rubeem v. Shamsoonnissa Begum(3), where the Privy Council observed:

> *"The Mohomedan law, on a question of what is legal cruelty between Man and Wife, would probably not differ materially from our own of which one of the most recent exposition is the following :- 'There must be actual violence (1) [1966] A.E.R. 524 at 536. (2) 1948, 77 C.L.R. 191 at 210. (3) 11 Moore's Indian Appeals 551. of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it'."*

The High Court then refers to the decisions of some of the Indian Courts to illustrate "The march of the Indian Courts with the Englishs Courts" and cites the following passage from D. Tolstoy's "The Law and Practice of Divorce and Matrimonial Causes" (Sixth Ed., p. 61):

> *"Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger."*

The High Court concludes that "Having regard to these principles and the entire evidence in the case, in my judgment, I find that none of the acts complained of against the respondent can he considered to be so sufficiently grave and weighty as to be described as cruel according to the matrimonial law."

An awareness of foreign decisions could be a useful asset in interpreting our own laws. But it has to be remembered that we have to interpret in this case a specific provision of a specific enactment, namely, section 10(1) (b) of the Act. What constitutes cruelty must depend upon the terms of this statute which provides :

> *"10(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-*
>
> *(b) has treated the petitioner with such cruelty as to cause areasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;"*

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

It is not necessary, as under the English law, that the cruelty must be of such a character as to cause "danger" to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other. The risk of relying on English decisions in this field may be shown by the learned Judge's reference to a passage from Tolstoy (p. 63) in which the learned author, citing Horton v. Horton(1), says :

> *"Spouses take each other for better or worse, and it is not enough to show that they find life together impossible, even if there results injury to health." (1) [1940] P. 187.*

If the danger to health arises merely from the fact that the spouses find it impossible to live together as where one of the parties shows an attitude of indifference to the other, the charge of cruelty may perhaps fail. But under section 10(1) (b), harm or injury to health, reputation, the working career or the like, would be an important consideration in determining whether the conduct of the respondent amounts to cruelty. Plainly, what we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent.

One other matter which needs to be clarified is that though under section 10(1) (b), the apprehension of the petitioner that it will be harmful or injurious to live with the other party has to be reasonable, it is wrong, except in the context of such apprehension, to import the concept of a reasonable man as known to the law of negligence for judging of matrimonial relations. Spouses are undoubtedly supposed and expected to conduct their joint venture as best as they might but it is no function of a court inquiring into a charge of cruelty to philosophise on the modalities of married life. Some one may want to keep late hours to finish the day's work and some one may want to get up early for a morning round of golf. The court cannot apply to the habits or hobbies of these the test whether a reasonable man situated similarly will behave in a similar fashion. "The question whether the misconduct complained of constitutes cruelty and the like for divorce purposes is determined primarily by its effect upon the particular person complaining of the acts. The question is not whether the conduct would be cruel to a reasonable person or a person of average or normal sensibilities, but whether it would have that effect upon the aggrieved spouse,. That which may be cruel to one person may be laughed off by another, and what may not be cruel to an individual under one set of circumstances may be extreme cruelty under another set of circumstances."(1) The Court has to deal, not with an ideal husband and ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures. As said by Lord Reid in his speech in Gollins v. Gollins (2).

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

We must therefore try and understand this Dr. Dastane and his wife Sucheta as nature has made them and as they have shaped their lives.

(1) American Jurisprudence, 2nd Ed., Vol. 24, p. 206.

(2) [1963] 2 A.E.R. 966,970.

The only rider is the interdict of section 23 (1) (a) of the Act that the relief prayed for can be decreed only if the court is satisfied that the petitioner is not in any way taking advantage of his own wrong. Not otherwise. We do not propose to spend time on the trifles of their married life. Numerous incidents have been cited by the appellant as constituting cruelty but the simple trivialities which can truly be described as the reasonable, wear and tear of married life have to be ignored. It is in the context of such trivialities that one says that spouses take each other for better or worse. In many marriages each

party can, if it so wills, discover many a cause for complaint but such grievances arise mostly from temperamental disharmony. Such disharmony or incompatibility is not cruelty and will not furnish a cause for the dissolution of marriage. We will therefore have regard only to grave and weighty incidents and consider these to find what place they occupy on the marriage canvas.

The spouses parted company on February 27, 1961, the appellant filed his petition on February 19, 1962 and the trial began in September, 1964. The 3-1/2 years' separation must naturally have created many more misunderstandings and further embitterment. In such an atmosphere, truth is a common casualty and therefore we consider it safer not to accept the bare word of the appellant either as to what the respondent said or did or as to the genesis of some of the more serious incidents. The evidence of the respondent too would be open to the same criticism but the explanation of her words and deeds, particularly of what she put in cold print, must come from her oral word and that has to be examined with care.

The married life of these spouses is well-documented, almost incredibly documented. They have reduced to writing what crossed their minds and the letters which they have written to each other bear evidence of the pass to which the marriage had come. Some of these were habitually written as the first thing in the morning like a morning cup (if tea while some were written in the silence of mid-night soon after the echo of harsh words had died down. To think that this young couple could indulge in such an orgy of furious letter-writing is to have to deal with a problem out of the ordinary for it is seldom that a husband and wife, while sharing a common home, adopt the written word as a means of expression or communication.

The bulk of the correspondence is by the wife who seems to have a flair for letter-writing. She writes in some style and as true as "The style is the man", her letters furnish a clue to her personality. They are a queer mixture of confessions and opprobrious accusations. It is strange that almost every one connected with this couple his a penchant for writing. The wife, apart from her voluminous letters, has written an autobiographical account of her unfortunate experiences in the Yeravada Hospital, calling it "Mee Antaralat Tarangat Asta" ("while I was floating in space").

The husband's father idealised the Shiva-Parvati relationship in a book called : "Gauriharachai Goad Kahani" ("The sweet story of Gaurihar"). Quite a few of the wifes relatives including a. younger sister of hers and of course her maternal uncle have set their pen to paper touching some aspect or the other of her married life. Perhaps, it was unfortunate that the promised millennium that did not come began with a letter. That was the letter of April 25, 1956 which the wife's lather wrote to the husband's father while the marriage negotiations were in progress. The marriage took place on May 13, 1956.

Nothing deserving any serious notice happened till August, 1959 except that the letters Exs. 556, 238, 243 and 244 show that quite frequently the respondent used to get into fits of temper and say things for which She would express regret later. In the letter Ex. 556 dated November 23, 1956 she admits to having behaved "very badly"; in Ek. 238 dated March 26, 1959 she admits that she was behaving like an "evil star" and had harassed the appellant; in Ex. 243 dated May 5, 1959 she says that she was aware of her "lack of sense" and asks for forgiveness for having insulted the appellant, his parents, his sister and her husband; and in Ex. 244 dated May 22, 1959 she entreats the appellant that he should not feel guilty for the insults hurled by her at his parents.

The period from August 1959 to March 1960 was quite critical and the correspondence covering that period shows that an innate lack of self-control had driven the respondent to inexorable conduct. By the letter. Ex. 256 dated February 16, 1960 the appellant complained to the respondent's father who

was then in Indonesia that the respondent kept on abusing him, his parent and sister and that he was extremely unhappy. The appellant says in the letter that differences between a husband and wife were understandable but that it was impossible to tolerate the respondent constantly accusing him and his relatives of wickedness. The appellant complains that the respondent used to say that the book written by his father should be burnt to ashes, that the appellant should apply the ashes to his forehead, that the whole Dastane family was utterly mean and that she wished that his family may be utterly ruined. The appellant was gravely hurt at the respondent's allegation that his father's 'Sanad' bad been once forfeited. The appellant tells the respondent's father that if he so desired he could ask her whether anything stated in the letter was untrue and that he had conveyed to her what be was stating in the letter. It may be stated that the respondent admits that the appellant had shown her this letter before it was posted to her father. On March 21. 1960 the respondent wrote a letter (Ex. 519) to the appellant's parents admitting the truth of the allegations made by the appellant in Ex. 256.

On June 23, 1960 the respondent made a noting in her own hand stating that she had accused the appellant of being a person with a beggarly luck, that she had said that the food eaten at his house, instead of being digested would cause worms in the stomach and that she had given a threat :

"murder shall be avenged with murder".

During June 1, 1960 to December 15, 1960 the marital relations were subjected to a stress and strain which ultimately wrecked the marriage. In about September, 1960 the appellants father probably offered to mediate and asked the appellant and the respondent to submit to him their respective complaints in writing. The appellant's bill of complaints is at Ex. 426 dated October 23, 1960. The letter much too long to be reproduced, contains a sorry tale. The gist of the more important of the appellant's grievances in regard to the period prior to June, 1960 is this : (1)' The respondent used to describe the appellant's mother as a boorish woman; (2) On the day of 'Paksha' (the day oil which oblations are offered to ancestors) she used to abuse the ancestors of the appellant; (3) She tore off the 'Mangal- Sutra'; (4) She beat the daughter Shubha while she was running a high temperature of 104'; (5) One night she started behaving as if she was 'possessed'. She tore off the Mangal-Sutra once again and said that she will not put it on again; and (6) She used to switch on the light at midnight and sit by the husband's bedside nagging him through the night, as a result he literally prostrated himself before her on several occasions.

The gist of the incidents from May to October, 1960 which the appellant describes as 'a period of utmost misery' is this. (1) The respondent would indulge in every sort of harassment and would blurt out anything that came to her mind; (2) One day while a student of the appellant called Godse was sitting in the outer room she shouted :

"You are not a man at all"; (3) In the heat of anger she used to say that she would pour kerosene on her body and would set fire to herself and the house; (4) She used to lock out the appellant when he was due to return from the office. On four or five occasions he had to go back to the office without taking any food; (5) For the sheer sake of harassing him she would hide his shoes, watch, keys and other things.

The letter Ex. 426 concludes by saying : , "She is a hard headed, arrogant, merciless, thoughtless, unbalanced girl devoid of sense of duty. Her ideas about a husband are : He is a dog tied at doorstep who is supposed to come and go at her beck and call whenever ordered. She behaves with the relatives of her husband as if they were her servants. When I see her besides herself with fury, I feel afraid that

she may kill me at any moment. I have become weary of her nature of beating the daughters, scolding and managing me every night uttering abuses and insults."

Most of these incidents are otherwise, supported, some by the admissions of the respondent herself, and for their proof we do not have to accept the bare word of the appellant.

On July 18, 1960 the respondent wrote a letter (Ex. 274) to the appellant admitting that within the bearing of a visitor she had beaten the daughter Shubha severely. When the appellant protested she retorted that if it was a matter of his prestige, be should not have procreated the children.

She has also admitted in this letter that in relation to her daughters she bad said that there will be world deluge because of the birth of those "ghosts". On or about July 20. 1960 she wrote another letter (Ex. 275) to the appellant admitting that she had described him as "a monster in a human body", that she had and that be'should not have procreated children. that he should "Pickle them and preserve them in a jar" and that she had given a threat that she would see to it that he loses his job and then she would publish the news in the Poona newspapers. On December 15, 1960 the appellant wrote a letter (Ex. 285) to the respondent's father complaining of the strange and cruel behaviour not only of the respondent but of her mother. He says that the respondent's mother used to threaten him that since she was the wife of an Under Secretary she knew many important persons and could get him dismissed from service, that she used to pry into his correspondence in his absence and that she even went to the length of saying that the respondent ought to care more for her parents because she could easily get another husband but not another pair of parents.

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

The correspondence subsequent to February 27, 1961 shall have to be considered later in a different,, though a highly important, context. Some of those letters clearly bear the stamp of being written under legal advice. The parties had fallen out for good and the domestic war having ended inconclusively they were evidently preparing ground for a legal battle.

In regard to the conduct of the respondent as reflected in her admissions, two contentions raised on her behalf must be considered. It is urged in the first place that the various letters containing admissions were written by her under coercion. There is no substance in this contention. In her written statement, the respondent alleged that the appellant's parents had coerced her into writing the letters. At the trial she shifted her ground and said that the coercion proceeded from the appellant himself. That apart, at a time when the marriage had gone asunder and the respondent sent to the appellant formal letters resembling a lawyer's notice, some of them by registered post, no allegation was made that the appellant or his parents had obtained written admissions from her. Attention may be drawn in this behalf to the letters Exs. 299 and 314 dated March 23 and May 6, 1961 or to the elaborate complaint Ex. 318 dated May 19, 1961 which she made to the Secretary to Government of India, Ministry of Food and Agriculture.

Prior to that on September 23, 1960 she had drawn up a list of her complaints (Ex. 424) which begins by saying : "He has oppressed me in numerous ways like the following." But she does not speak therein of any admission or writing having been obtained from her. Further, letters like Exs. 271 and 272 dated respectively June 23 and July 10, 1960 which besides containing admissions on her part also contain allegations against the appellant could certainly not have been obtained by coercion. Finally, considering that the respondent was always surrounded by a group of relatives who had assumed

the role of marriage-counsellors, it is unlikely that any attempt to coerce her into making admissions would have been allowed to escape unrecorded. After all, the group here consists of greedy letter-writers.

The second contention regarding the admissions of the respondent is founded on the provisions of section 23(1)(a) of the Act under which the court cannot decree relief unless it is satisfied that "the petitioner is not in any way taking advantage of his own wrong'. The fulfilment of the conditions mentioned in, section 23(1) is so imperative that the legislature has taken the care to provide that "then, and in such a case, but not otherwise, the court shall decree such relief accordingly". It is urged that the appellant is a bigoted and egocentric person who demanded of his wife an impossibly rigid standard of behaviour and the wife's conduct must be excused as being in selfdefence. In other words, the husband is said to have provoked the wife to say and act the way she did and he cannot be permitted to take advantage of his own wrong. The appellant, it is true, seems a stickler for domestic discipline and these so-called perfectionists can be quite difficult to live with. On September 22, 1957 the respondent made a memorandum (Ex. 379) of the instructions given by the appellant, which makes interesting reading:

"Special instructions given by my husband.

(1) On rising up in the morning, to look in the minor.

(2) Not to fill milk vessel or tea cup to the brim.

(3) Not to serve meals in brass plates cups and vessels.

(4) To preserve carefully the letters received and if addresses of anybody are given therein to note down the same in the note book of addresses.

(5) After serving the first course during meals, not to repeatedly ask 'what do you want?' but to inform at the beginning of the meals how much and which are the courses.

(6) As far as possible not to dip the fingers in any utensils.

(7) Not to do any work with one hand.

(8) To keep Chi. Shuba six feet away from the primus stove and Shegari.

(9) To regularly apply to her 'Kajal' and give her tomato juice, Dodascloin etc. To make her do physical exercise, to take her for a walk and not to lose temper with her for a year.

(10) To give him his musts and the things he requires when he starts to go outside.

(11) Not to talk much.

(12) Not to finish work somehow or the other; for example to write letters in good hand writing, to take a good paper, to write straight and legibly in a line.

(13) Not to make exaggerations in letters.

(14) To show imagination in every work. Not to note down the milk purchased on the calendar."

Now, this was utterly tactless but one cannot say that it called for any attack in self-defence. The appellant was then 28 and the respondent 22 years of age. In that early morning flush of the marriage' young men and women do entertain lavish expectations of each other do not and as years roll by they see the folly of. their ways. But we think that the wife was really offended by the instructions given by

the appellant. The plea of self-defence seems a clear after-thought which took birth when there was a fundamental failure of faith and understanding.

Reliance was then placed on certain letters to show that the husband wanted to assert his will at any cost, leaving the wife no option but to retaliate. We see no substance in this grievance either. The, plea in the written statement is one of the denial of conduct alleged and not of provocation. Secondly, there are letters on the record by which the wife and her relatives had from time to time complimented the husband and his parents for their warmth, patience and understanding.

Counsel for the respondent laid great emphasis on the letter, Ex. 244 dated May 22, 1959 written by her to the appellant in which she refers to some "unutterable question" put by him to her. It is urged that the appellant was pestering her with a demand for divorce and the "unutterable question" was the one by which he asked for divorce. No such inference can in our opinion be raised. The respondent has not produced the letter to which Ex. 244 is reply; in the written statement there is hardly a suggestion that the appellant was asking her for a divorce; and the appellant was not asked in his evidence any explanation in regard to the "unutterable question".

These defences to the charge of cruelty must accordingly be rejected. However, learned counsel for the respondent is right in stressing the warning given by Denning L.J., in Kaslefsky v. Kaslefsky that : "If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread especially in undefended cases. The temptation must be resisted test we slip into a state of affairs where the institution of marriage itself is imperilled." But we think that t1o hold in this case that the wife's conduct does not amount to cruelty is to close for ever the door of cruelty so as to totally prevent any access thereto. This is not a case of mere austerity of temper, petulance of manners, rudeness of language or a want of civil attention to the needs of the husband and the household. Passion and petulance have perhaps to be suffered in silence as the price of what turns out to be an injudicious selection of a partner. But the respondent is the mercy of her inflexible temper. She delights in causing misery to her husband and his relation-, and she willingly suffers the calculated insults which her relatives hurled at him and his parents : the false accusation that, "the pleader's Sanad of that old bag of your father was forfeited"; "I want to see the ruination of the whole Dastane dynasty", "burn (1)[1950] 2 A.E.R. 398,403.

the book written by your father and apply the ashes to your forehead"; "you are not a man" conveying that the children were not his; "you are a monster in a human body. "I will make you lose your job and publish it in the Poona newspapers"-these and similar outbursts are not the ordinary wear and tear of married life but they became, by their regularity a menace to the peace and well-being of the household. Acts like the tearing of the Mangal-Sutra, locking out the husband when he is due to return from the office, rubbing chillie powder on the tongue of an infant child, beating a child mercilessly while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him are acts which tend to destroy the legitimate ends and objects of matrimony. Assuming that there was some justification for occasional sallies or show of temper, the pattern of behaviour which the respondent generally adopted was grossly excessive.

The conduct of the respondent clearly amounts to cruelty within the meaning of section 10(1) (b) of the Act. Under that provision, the relevant consideration is to see whether the conduct is such as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for him to live with the respondent. The threat that she will put an end of her own life or that she will set the house on fire, the threat that she will make him lose his job and have the matter published in

newspapers and the, persistent abuses and insults hurled at the appellant and his parents are all of so grave an order as to imperil the appellant's sense of personal safety. mental, happiness, job satisfaction and reputation. Her once-too-frequent.

apologies do not reflect genuine contrition but were merely impromptu device to tide over a crisis temporarily. The next question for consideration is whether the appellant had at any time condoned the respondent's cruelty. Under section 23(1) (b) of the Act, in any proceeding under the Act whether defended or not, the relief prayed for can be decreed only and only if "where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty".

The respondent did not take up the plea in her written statement that the appellant bad condoned her cruelty. Probably influenced by that omission, the trial court did not frame any issue on condonation. While granting a decree of judicial separation on the ground of cruelty, the learned Joint Civil Judge, Junior Division, Poona, did not address himself to the question of condonation. In appeal, the learned Extra Assistant Judge, Poona, having found that the conduct of the respondent did not amount to cruelty, the question of condonation did not arise. The High Court in Second Appeal confirmed the finding of the 1st Appellate Court on the issue of cruelty and it further held that in any case the alleged cruelty was condoned by the appellant.

The condonation, according to the High Court, consisted in the circumstance that the spouses co-habited till February 27, 1961 and a child was born to them in August, 1961.

Before us, the question of condonation was argued by both the sides. It is urged on behalf of the appellant that there is no evidence of condonation while the argument of the respondent is that condonation is implicit in the act of co-habitation and is proved by the fact that on February 27, 1961 when the spouses parted, the respondent was about 3 months pregnant. Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of section 23(1) (b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if we are satisfied "but not otherwise", that the petitioner has not in any manner condoned the cruelty. It is, of course, necessary that there should be evidence on the record of the case to show that the appellant had condoned the cruelty.

Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things : forgiveness and restoration(1). The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty. But that evidence does not consist in the mere fact that the spouses continued to share a common home during or for some time after the spell of cruelty. Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued co-habitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws.

The evidence of condonation consists here in the fact that the spouses led a normal sexual life despite the respondent's Acts of cruelty. This is not a case where the spouses, after separation, indulged in a stray act of sexual intercourse, in which case the necessary intent to forgive and restore may be said to be lacking. Such stray acts may bear more than one explanation. But if during co-habitation the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which

characterises normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status may reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied by the nobler graces of marital life. One might then as well magine that the sexual act was undertaken just in order to kill boredom or even in a spirit of revenge. Such speculation is impermissible. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. Therefore, evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. Intercourse, of course, is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But intercourse in circumstances as obtain here would raise a strong inference of condonation with its dual requirement, forgiveness and restoration. That inference stands uncontradicted, the appellant not having explained the circumstances in which he came to lead and live a normal sexual life with the respondent, even after a series of acts of cruelty on her part.

But condonation of a matrimonial offence is not to be likened to a full Presidential Pardon under Article 72 of the Constitution which, once granted, wipes out the guilt beyond the possibility of revival. Condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety.

> *"No matrimonial offence is erased by condonation. It is obscured but not obliterated" (1). Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence(2). Condoned cruelty can therefore be revived, say, by desertion or adultery."*

Section 23 (1) (b) of the Act, it may be urged, speaks of condonation but not of its revival and therefore the English doctrine of revival should not be imported into matters arising under the Act. Apparently, this argument may seem to receive some support from the circumstances that under the English law, until the passing of the Divorce Reform Act, 1969 which while abolishing the traditional bars to relief introduces defences in the nature of bars, at least one matrimonial offence, namely, adultery could not be revived if once condoned (3). But a closer examination of such an argument would reveal its weakness. The doctrine of condonation was established by the old ecclesiastical courts in Great Britain and was adopted by the English Courts from the canon law. 'Condonation' is a technical word which means and implies a conditional waiver of the right of the injured spouse to take matrimonial proceedings. It is not 'forgiveness' as commonly understood (4). In England condoned adultery could not be received because of the express provision contained in section 3 of the Matrimonial Causes Act, 1963 which was later incorporated into section 42(3) of the Matrimonial Causes Act, 1965. In the absence of any such provision in the Act governing the charge of cruelty, the word 'condonation' must receive the meaning which it has borne for centuries in the world of law(").

'Condonation' under section 23 (1) (b) therefore means conditional forgiveness, the implied condition being that no further matrimonial offence shall be committed.

(1) See Words and Phrases Legally Defined (Butterworths) 1969 Ed., Vol I, p. 305, ("Condonation").

(2) See Halsbury's Laws of England, 3rd Ed., Vol. 12, p. 3061.

(3) See Rayden on Divorce, 11th Ed. (1971) pp. 11, 12, 23, 68, 2403.

(4) See Words and Phrases Legally Defined (Butterworths) 1969 Ed., p. 306 and the Cases cited therein.

(5) See Ferrers vs Ferrers (1791) 1 Hag. Con 130 at pp. 130, 131.

It therefore becomes necessary to consider the appellant's argument that even on the assumption that the appellant had condoned the cruelty, the respondent by her subsequent conduct forfeited the conditional forgiveness, thereby reviving the original cause of action for judicial separation on the ground of cruelty. It is alleged that the respondent treated the appellant with cruelty during their brief meeting on March 19, 1961, that she refused to allow to the appellant any access to the children, that on May 19, 1961 she wrote a letter (Ex. 318) to the Secretary to the Government of India, Ministry of Food and Agriculture, New Delhi, containing false and malicious accusations against the appellant and his parents and that she deserted the appellant and asked the Government to provide her with separate maintenance.

These facts, if proved, shall have to be approached and evaluated differently from the facts which were alleged to constitute cruelty prior to its condonation. The incidents on which the appellant relied to establish the charge of cruelty had to be grave and weighty. And we found them to be so. In regard to the respondent's conduct subsequent to condonation, it is necessary to bear in mind that such conduct may not be enough by itself to found a decree for judicial separation and yet it may be enough to revive the condoned offence. For example, gross familiarities short of adultery(1) or desertion for less than the statutory period (2) may be enough to revive a condoned offence. The incident of March 19, 1961 is too trifling to deserve any notice. That incident is described by the appellant himself in the complaint (Ex. 295) which he made to the police on March 20, 1961. He says therein that on the 19th morning, the respondent went to his house with some relatives, that those relatives-instigated her against him, that they entered his house though he asked them not to do so and that she took away certain household articles with her. As shown by her letter (Ex. 294) dated the 19th itself, the articles which she took away were some petty odds and ends like a do]], a slate, a baby hold-all, two pillows, a bundle of clothes and a baby-cart. The police complaint made by the appellant betrays some hypersensitivity.

As regards the children, it does seem that ever since February 27, the appellant was denied a chance to meet them. His letters Exs. 307. 309 and 342 dated April 20, April 21 and November 23, 1961 respectively contain the grievance that the children were deliberately not allowed to see him., From his point of view the grievance could be real but then the children, Shubha and Vibha, were just 4 and 2 years of age in February, 1961 when their parents parted company.

Children of such tender age need a great amount of looking after and they could not have been sent to meet their father unescorted. The one person who could so escort them was the mother who bad left or bad to leave the matrimonial home for good. The appellant's going to the house of the respondent's parents where he was living was in the circumstances an impracticable proposition. Thus, the wall that divided the parents denied to the appellant access to his children.

(1) Halsbury's Law-, of England, 3rd Ed., Vol. 12, p. 306, para 609.

(2) Beard vs. Beard [1945] 2 A.E.R. 306.

The allegations made by the respondent in her letter to the Government, Ex. 318 dated May 19, 1961 require a close consideration. It is a long letter, quite an epistle, in tune with the, respondent's proclivity as a letter-writer. By that letter, she asked the Government to provide separate maintenance for herself

and the children. The allegations contained in the letter to which the appellant's counsel has taken strong exception are these : (1) During the period that she lived with the appellant, she was subjected to great harassment as well as mental and physical torture; (2) The appellant had driven her out of the house on February 27, 1961; (3) The appellant had deserted her and had declared that he will not have any connection with her and that he will not render any financial help for the maintenance of herself and the children. He also refused to give medical help to her in her advanced stage of pregnancy; (4) The appellant had denied to her even the barest necessities of life like food and clothing; (5) The parents of (he appellant were wicked persons and much of her suffering was due to the influence which they had on the appellant; (6) The appellant used to threaten her that he would divorce her, drive her out of the house and even do away with her life, (7) The plan to get her examined by Dr. Seth of the Peravada Mental Hospital was an insincere wicked and evil move engineered by the appellant, his brother and his father, (8) On her refusal to submit to the medical examination any further, she was driven out of the house with the children after being deprived of the valuables on her person and in her possession; and (9) The appellant had subjected her to such cruelty as to cause a reasonable apprehension in her mind that it would be harmful or injurious for her to live with him.

Viewed in isolation, these allegations present a different and a somewhat distorted picture. For their proper assessment and understanding, it is necessary to consider the context in which those allegations came to be made. We will, for that purpose, refer to a few letters.

On March 7, 1961 the respondent's mother's aunt, Mrs. Gokhale wrote a letter (Ex. 644) to the respondent's mother. The letter has some bearing on the events which happened in the wake of the separation which took place on February 27, 1961. It shows that the grievance of the respondent and her relatives was not so much that a psychiatrist was consulted as that the consultation was arranged without any prior intimation to the respondent. The letter shows that the appellant's brother Dr. Lohokare, and his brother-in-law Deolalkar, expressed regret that the respondent should have been got examined by a psychiatrist without previous intimation to any of her relatives. The letter speaks of a possible compromise between the husband and wife and it sets out the terms which the respondent's relatives wanted to place before the appellant. The terms were that the respondent would stay at her parents' place until her delivery but she would visit the appellant off and on; that the children would be free to visit the appellant; and that in case the appellant desired that the respondent should live with him, he should arrange that Dr. Lohokare's mother should stay with them in Delhi for a few days. The last term of the proposed compromise Was that instead of digging the past the husband and wife should live in peace and happiness. The letter bears mostly the handwritting of the respondent herself and the significance of that circumstance is that it was evidently written with her knowledge and consent. Two things are clear from the letter : one, that the respondent did not want to leave the appellant and two, that she did not either want to prevent the children from seeing the appellant. The letter was written by one close relative of the respondent to another in the ordinary course of events and was not, so to say, prepared in order to create evidence or to supply a possible defence. It reflects a genuine attitude, not a make believe pose and the feelings expressed therein were shared by the, respondent whose handwriting the letter bears.

This letter must be read along with the letter Ex. 304 which the respondent sent to the appellant on April 18, 1961. She writes :

> *"I was sorry to hear that you are unwell and need treatment. I would always like never to fail in my wifely duty of looking after you, particularly when you are ailing, but you will, no doubt, agree that even for this, it will not be possible for me to join you in the*

house out of which you have turned me at your father's instance. 'This is, therefore, just to keep you informed that if you come to 7/6 East Patel Nagar, I shall be able to nurse you properly and my parents will ever be most willing to afford the necessary facilities under their care to let me carry out this proposal of mine."

There is no question that the respondent had no animus to desert the appellant and as stated by her or on her behalf more than once, the appellant had on February 27, 1961 reached her to Mrs. Gokhale's house in Poona, may be in the hope that she will cooperate with Dr. Seth in the psychiatric exploration. She did not leave the house of her own volition.

But the appellant had worked himself up to believe that the respondent had gone off her mind. On March 15, 1961 he made a complaint (Ex. 292) to the Delhi Police which begins with the recital that the respondent was in the Mental Hospital before marriage and that she needed treatment from a psychiatrist. He did say that the respondent was "a very loving and affectionate person" but he qualified it by saying : "when excited, she appears to be a very dangerous woman, with confused thinking".

On April 20, 1961 the appellant wrote a letter (Ex. 305) to the respondent charging her once again of being in an "unsound state of mind". The appellant declared by that letter that he will not be liable for any expenses incurred by her during her stay in her parents' house. On the same date he wrote a letter (Ex. 307) to the respondent's father reminding him that he, the appellant, had accepted a girl "who had returned from the Mental Hospital". On April 21, 1961 he wrote it letter (Ex. 309) to the Director of Social Welfare, Delhi Administration, in which he took especial care to declare that the respondent "was in the Poona Mental Hospital as a lunatic before the marriage". The relevance of these reiterations regarding the so-called insanity of the respondent, particularly in the last letter, seems only this, that the appellant was preparing ground for a decree of divorce or of annulment of marriage. He was surely not so naive as to believe that the Director of Social Welfare could arrange to "give complete physical and mental rest" to the respondent. Obviously, the appellant was anxious to disseminate the information as widely as possible that the respondent was of unsound mind.

On May 6, 1961 the respondent sent a reply (Ex. 314) to the appellant's letter, Ex. 305, dated April 20, 1961. She expressed her willingness to go back to Poona as desired by him, if he could make satisfactory arrangements for her stay there. But she asserted that as a wife she was entitled to live with him and there was no purpose in her living at Poona "so many miles away from Delhi, without your shelter". In regard to the appellant's resolve that he will not bear the expenses incurred by her, she stated that not a pie remitted by him will be illspent and that, whatever amount he would send her will be, accounted for fully. It is in this background that on May 19, 1961 the respondent wrote the letter Ex. 318 to the Government. When asked by the Government to offer his explanation, the appellant by his reply Ex. 323 dated July 19, 1961 stated that the respondent needed mental treatment, that she may have written the letter Ex. 318 in a "madman's frenzy" and that her father had "demoralised" her. In his letter Ex. 342 dated November 23 , 1961 to the respondent's father, he described the respondent as "'your schizophrenic daughter".

Considered in this context, the allegations made by the respondent in her letter Ex. 318 cannot revive the original cause of action. These allegations were provoked by the appellant by his persistent and purposeful accusation, repeated times without number, that the respondent was of unsound mind. He snatched every chance and wasted no opportunity to describe her as a mad woman which, for the purposes of this appeal, we must assume to be wrong and unfounded. He has been denied leave to

appeal to this Court from the finding of the High Court that his allegation that the respondent was of unsound mind is baseless. He also protested that he was not liable to maintain the respondent.

It is difficult in these circumstances to accept the appellant's argument either that the respondent deserted him or that she treated him with cruelty after her earlier conduct was condoned by him. It is true that the more serious the original offence, the less grave need be the subsequent acts to constitute a revival(1) and in cases of cruelty, "very slight fresh evidence is needed to show a resumption of the cruelty. for cruelty of character is bound to show itself in conduct and behaviour, day in and day out, night in and night out". But the conduct of the respondent after condonation cannot be viewed apart from the conduct of the appellant after condonation. Condonation is conditional forgiveness but the grant of such forgiveness does not give

(1) Cooper vs. Cooper (1950) W.N. 200 (H.L.)

(2) Per Scott L. J. in Batram vs. Batram (1944) p. 59 at p. 60.

to the condoning spouse a charter to malign the other spouse. If this were so, the condoned spouse would be required mutely to submit to the cruelty of the other spouse without relief or remedy. The respondent ought not to have described the appellant's parents as "wicked" but that perhaps is the only allegation in the letter Ex. 318 to which exception may be taken. We find ourselves unable to rely on that solitary circumstance to allow the revival of condoned cruelty.

We therefore hold that the respondent was guilty of cruelty but the appellant condoned it and the subsequent conduct of the respondent is not such as to amount to a revival of the original cause of action. Accordingly, we dismiss the appeal and direct the appellant to pay the costs of the respondent.

Appeal dismissed.

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LACHMAN UTAMCHAND KIRIPLANI VS MEENA ALIAS MOTA

Equivalent citations: 1964 AIR 40, 1964 SCR (4) 331
DATE OF JUDGMENT: 14/08/1963

AIR 1964 SC 40

Lachman Utamchand Kiriplani
Vs.
Meena alias Mota

Bench: Sinha, Bhuvneshwar P.(CJ), Das, Sudhi Ranjan, Subbarao, K., Dayal, Raghubar, Ayyangar, N. Rajagopala

Husband and wife-judicial separation-Desertion without just-cause-offer to return to matrimonial home must be shown to be bona fide-Petition for judicial separation-Burden of proof-Hindx Marriage Act, 1955 (25 of 1955), s. 10(1)(a).

Where an application is made under s. 10(1)(a) of the Hindu Marriage Act, 1955, for a decree for judicial separation on the ground of desertion, the legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent intentionally forsook and abandoned him or her without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bona fide attempt on the respondent's part to return to the matrimonial home and that the petitioner did not by his or her action by word or conduct provide a just cause to the other spouse to desist from, making any attempt at reconciliation or resuming cohabitation; -but where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse.

An offer to return to the matrimonial home after sometime, though desertion had started, if genuine and sincere and represented his or her true feelings and intention, would bring to an end the desertion because thereafter the animus deserendi would be' lacking, though the factum of separation might continue; but on the other hand, if the offer was not sincere and there was in reality no intention to return, the mere fact that letters were written expressing such an intention would not interrupt the desertion from continuing.

In the present case, the evidence was clear that the respondent left her matrimonial home with the permission of her husband and his parents and that it was not possible to infer from the evidence given by Dr. Lulla that the respondent decided to abandon the appellant. The letters demonstrated beyond any reasonable doubt that the wife did not demonstrated beyond band with the requisite animus, but on the other hand, showed her willingness to go over to Bombay as soon as she regained her health. In view of the false allegations made by the appellant in his letter dated April 1, 1954, in which he charged the respondent with unchastity and leading a fast and reckless life, from that date the desertion, if any, on the part of the respondent came to an end and from that date the appellant was guilty of desertion.

JUDGMENT

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 292 of 1961. Appeal from the judgment and decree dated July 16, 1959, of the Bombay High Court in Appeal from the Original Decree No. 802 of 1957.

J. C. Bhatt and N. N. Keswam, for the appellant.

C. B. Agarwala, C. M. Mehta and V. J. Merchant, for the respondent.

August 14, 1963. The Judgment of B. P. Sinha, C.J., S. K.Das, Raghubar Dayal and N. Rajagopala Ayyangar,JJ. was delivered by Ayyangar, J. Subba Rao, J. delivered a dissenting opinion.

AYYANGAR J.-This is an appeal against the judgment of the High Court of Bombay reversing the judgment and decree of the City Civil Court at Bombay by which a decree for judicial separation granted by' the trial judge was reversed and it comes before us on a certificate of fitness granted by the High Court under Art. 133(1) (c) of the Constitution. The appellant, the husband, filed a petition in the City Civil Court, Bombay, under s. 10(1) (a) of the Hindu Marriage Act, 1955 (which we shall hereafter refer to as the Act), praying for a decree against the respondent, his wife, for judicial separation on the ground that in terms of that provision she had "deserted" him for "a continuous period of not less than two years immediately preceding the presentation of his petition". The petition was presented on September 20, 1956, and the material allegation was that the wife had left the matrimonial home on February 26, 1954, and had not thereafter come back to him and that this constituted "desertion" within the meaning of the provision just cited. The learned trial Judge held that the appellant had established to the satisfaction of the Court that the respondent-wife had left the matrimonial home with the intention of permanently breaking it up and that such desertion continued during the requisite period of two years and in consequence granted the decree for judicial separation, as prayed for. The wife preferred an appeal, to the High Court and the learned judges disagreeing with the finding of the learned trial judge that the leaving, by the wife, of the matrimonial home was with the intention of deserting the appellant, reversed the decree of the trial judge and directed the dismissal of the appellant's petition with costs. It is the correctness of this reversal that is canvassed in the appeal before us.

Even at the outset we might state that the decision of the appeal does not depend so much on any substantial question of law but rather on an appreciation of the facts on two matters on the basis of which the learned Judges of the High Court have decided the case against the appellant: (1) whether the appellant had established that the respondent had an irrevocable determination to break up the matrimonial home when she admittedly left the petitioner on February 26, 1954, and did not return to him thereafter, it being common ground that the onus of proving this to the reasonable satisfaction of the Court was on the appellant, and (2) whether the respondent had a justifiable cause for not returning to the husband the existence of which prevented her admitted absence from the matrimonial home from constituting "desertion" as to serve as the foundation for an order for judicial separation under s. 10(1) (a) of the Act.

Before, however, dealing with these two points which from the crux of the matter in dispute in the appeal, it is necessary to summarise, briefly, the history of the married life of the parties. The parties are Sindhi Hindus of the: Bhai Bund community. The appellant is a practicing doctor while the respondent is said to have had read up to the High school classes. While the appellant's father and his family were people of but moderate means, the respondent's father was a very affluent business,Man-

his business spreading over almost the entire South .East Asia. He had business houses in Singapore, Dakarta, ,Hong Kong, Manila etc. Besides, while the appellant and his parents appear to have been of an orthodox and conservative outlook and bent of mind, the respondent and her parent's apparently did not set much store by orthodoxy, and were liberal and modern. It looks to us as if it is possible that the trouble between the spouses was in part at least due to these variations.

The parties were married at Hyderabad in Sind (now in Pakistan) on November 11, 1946. The appellant was living with his father and mother and his two sisters and after her marriage the respondent commenced to live with him in this household. The parties are not agreed as to whether their marital life was happy even to start with, for while it was the case of the husband that the same was unhappy even from the very beginning, the respondent's version was that for the first month or so her relationship with her husband was happy, but nothing much turns on this because from soon thereafter both of them agree in saying -that they were not pulling on well together. It is not necessary either to tract the source of the friction between the spouses or narrate the incidents which are related in connection therewith as they are hardly relevant for the decision of the real points arising in the appeal. The only other circumstance to be noted in connection with the early period of their married life was that on July 19, 1947, a son, Ashok, was born to the respondent who, it may be mentioned, is now living with the appellant.

It is common experience that in some cases, the birth of a child puts an end to minor misunderstandings and bickerings between the spouses, for the parties concentrate on lavishing in common their love on the child and thus the two are brought together but in the case on band, it does not seem to have had this effect and the relation between the parties does not appear to have been smoothened by Ashok's birth. With the partition of the sub-continent the parties migrated to India.

The appellant, his parents and his two sisters who were all living with him moved over to Bombay along with the respondent and their young child but apparent-

ly. the accommodation which they could 'then secure was pot sufficient for this large family, and as a result the appellant took the respondent, his child and his two sisters to Colombo and left them in the care of his maternal uncle, one Narian Das, to stay there till he could find a sufficiently commodius home in Bombay. The respondent stayed for a very short time at Colombo and though she admitted that she was treated with kindness and affection by this uncle, apparently all was not well in the relationship between the appellant's sisters and the respondent. What emerged out of this was that she left Colombo without informing either Narian Das or the appellant and came over to India. She came to Poona and Lonavala and started staying with her mother who was there. There is a complaint by the appellant against her leaving his uncle without informing him and on the other hand there is a complaint by the respondent about the way in which her sisters-in-law behaved towards tier ,but we pass over these incidents and the respective cases ,as, not having any material bearing on the points at issue in the appeal. The appellant having come to know of her ,arrival at Lonavala, it is common ground that he went there and induced her to come over and stay with him at ,Bombay. This was sometime towards the end of January, 1948.

The period from January, 1948, to 1954 might be dealt with together. During this period she was staying most of the time with the appellant at Bombay but his complaint is that she used to leave him very often and that pressure had to be exerted or inducements offered to get her back to Bombay to stay with him. This is, -of course, denied by the respondent whose story is that every time it was with his consent that she went and that she came back of her own accord. It is not, however, necessary

to decide which of these versions is correct, though the learned trial judge who had an opportunity of seeing these two as witnesses was inclined to accept the version of the husband in respect of any matter on which he, was contradicted by his wife. It is only necessary to add that though during these 4 or 5 years or so, the parties were living together most of the time the relations between them had not become normalised. Besides, it might be mentioned that the relationship between the parents of the two spouses were also strained and similarly the relationship between the appellant and his wife's parents as also between the respondent and her husbands parents.

We next come to a crucial event. On February 26, 1954, the respondent left the appellant's house at Bombay (Colaba) and went to Poona. She was taken from the house by her father who had come there in the evening and she traveled with him to poona by train. It is the case of the appellant that the respondent left his home with the main items of her jewellery and clothes without the knowledge and consent of himself and his parents and at a time when there was no one in the house except a maid-servant and that he came to know of the respondent's departure only from the maid-servant, when he later returned to the house. On the other hand, it is the case of the respondent that she left the house after permission had been obtained by her father from her fatherin-law and after she herself had obtained the permission of her husband and that at the time of the departure when her father came to take her, her father-in-law, mother-in-law and the appellant were all present in the house and that the jewels etc., were given to her by her mother-in-law who bade her good-bye and wished her a happy journey. The learned trial judge accepted the appellant's story that the respondent did not seek or obtain anyone's permission for quitting the house and that she left the house without the knowledge or consent 'of anyone. The materiality of the acceptance of the appellant's version stems from the fact that in order to 'constitute desertion the withdrawal of the deserting spouse from the matrimonial home should be without reasonable cause and "without the consent or against the wish of such party" [vide Explanation to s. 10(1) of the Act]. On the other hand, the learned Judges of the High Court were inclined to accept the wife's version that she had the consent of her husband to leave the home. For reasons we shall set out in its proper place we are in agreement with the learned trial Judge and do not share the views of the learned judges who accepted the wife's version of this event. We shall, however, revert to it after completing the narrative of the events leading up to the filing of the petition.

It is the case of the appellant that he came to know a few days after her leaving him that his wife was staying at Poona with her parents. According to his evidence he considered that, having regard to the manner in which his wife left him, no useful purpose would be served by any trip of his to Poona to persuade her to come back. It was his further case that a friend of his-one Dr. Lulla, an M.R.C.P. of London who was employed as a doctor in a hospital in a suburb of Bombay-suggested that the two of them go to Poona and try to induce the respondent to come back to Bombay. This proposal, he says, he accepted and the appellant as well as Dr. Lulla who has been. examined as a witness on his side have testified to the fact that in the last week of May, 1954, both of them went to Poona one evening, met the respondent at her parents' house and appealed to her to come back to Bombay to live with the appellant. According to the evidence of both these witnesses, the respondent, when requested to come back to Bombay, stated that she was determined never again to come back to her husband's house. The respondent denied the entire story and stated that neither the appellant nor Dr. Lulla ever came to Poona during her stay there, nor of course ever talked to her. The learned trial Judge who had the opportunity of seeing Dr. Lulla in the box entertained a very favorable opinion of his respectability and credibility and accepted in toto his evidence that the respondent intimated to him her fixed determination not to come back to the appellant. In the background of the previous history of the relationship between

the parties and the manner in which the respondent left, the husband's home on February 26, 1954, as found by the trial Judge, he recorded a finding that the factum of desertion which was not in dispute was accompanied by "'animus deserendi' which had been satisfactorily established by the declaration she made to the appellant and his friend. The learned Judges of the High Court were not disposed to differ from the learned trial judge as regards the reality of the visit to Poona of Dr. Lulla accompanied by the appellant and their meeting the respondent there. They were, however, not in-

clined to attach any value to Dr. Lulla's testimony as regards the statement made by the respondent because of two factors: (1) the time lag between May, 1954, when he met her and April, 1957, when he gave evidence; the learned judges were inclined to hold that the witness could not properly remember correctly the dialogue after that interval ; (2) the fact that Dr. Lulla could not reproduce verbatim the questions put to the respondent and the answers she gave was considered by them as a circumstance which would detract from the acceptability of, the evidence regarding the matters about which he deposed. For these reasons the learned Judges found that though Dr. Lulla might have visited the respondent in May, 1954, as spoken to by him, there was no proper proof before the Court that the respondent had given expression to a determination not to return to the husband. We shall deal later with this appreciation of Dr. Lulla's evidence and the weight to be attached to it, but, to continue the narrative, the respondent left India for Singapore on July 7, 1954, and returned from abroad in April, 1956. During this period there has been some correspondence between the parties by way of telegrams and letter which have considerable relevance on the issues involved in the case and the points in controversy between the parties.

Before, however, referring to the events of that period a few more incidents which happened prior to the departure of the respondent from India have to be noticed After Dr. Lulla's meeting the respondent at the end of May, 1954, the next event of some importance is that the respondent and her father came to Bombay during June, 1954, for the purpose of the respondent obtaining a passport to enable her to leave India. At that time, it is common ground, that the respondent stayed with her paternal uncle-one Tola Ram-whose house was in Colaba and about five minutes' walk from the appellant's residence. It is the case of the appellant that when the respondent and her father came over to Bombay in June they stayed there for about a month. This however, is denied by the respondent and her father who say that the duration of their stay at Bombay at Tola Ram's house was only for a little over a fortnight. It matters little which version is correct but one thing is clear that notwithstanding the admitted stay in Bombay for two weeks or more she never went to her husband's house either to see him or even to see her son, Ashok, then a boy of about 7 years. The learned Judges of the High Court have not adverted to this circumstance which we consider has material bearing in deciding between the rival versions as to whether the respondent did or did not leave the husband's home with his permission and consent and the blessings of the parents-in-law. It is also to be noticed, and about this there is no dispute, that in the application for the passport and in the passport itself it was not the appellant's name or address that was given as her Indian residential address but that of Tola Ram in Colaba. As stated earlier, the respondent left Bombay by air for abroad on . July 7, 1954. Before taking off she was in Bombay for nearly 24 hours before the plane's departure. It is not in dispute that even then, she did not visit her husband or her child though she was staying at Tola Ram's. From Bombay the respondent reached Singapore by air and it is admitted that she sent no intimation or information to the appellant either regarding her departure, the place to which she had gone or the proposed duration of her stay. The appellant having come to know through other sources of the respondent having gone to Singapore, sent her a cablegram on the 20th July reading :

"Extremely surprised at your suddenly secretly leaving India without my knowledge and consent. Return immediately first plane"..

to which the respondent replied also by a cablegram "Returning within a few months".

These telegrams would, at least, make one thing clear that the appellant's case that he had no knowledge of the respondent leaving India was not an after-thought and is probably true. On receipt of this telegram dated the 23rd July the appellant replied the next day "You must return immediately".

of course, the respondent did not return but her case was that she replied by a letter dated August 2, 1954. There is a controversy between the parties as to whether this letter was really written at all, or if written, was posted and to the proper address. It is, however, common ground, and found by both the Courts, that the appellant did not receive any letter from the respondent bearing that date or written at about that time or with the contents which according to her were the contents of that letter. The learned trial judge was inclined to the view that the respondent did write a letter on that date but he was not satisfied that the copy which she produced which has been marked as Ex. 4 in the case represented either a true copy of it or carried the contents of that letter. He, therefore, discarded Ex. 4 from consideration. The learned judges of the High Court on the other hand, took the view that a letter was written by the respondent on that date and they were prepared to accept her story that the original of that letter which was stated to be in manuscript-written in her own hand,. was copied from the typescript which she produced and which was marked as Ex. 4. The evidentiary value of that letter was stated to consist in its disclosure of the state of mind of the respondent and the learned judges held that its contents indicated the readiness and willingness on the part of the respondent to join her husband and therefore negatived any animus to desert or to continue the desertion, if there was any such intention originally on her part. We shall reserve the discussion of the evidentiary value of this letter to a later stage but shall here merely set out the material parts of it:

"I really feel surprised why you want me to return to Bombay by first plane without any reason.

Dear, I was particularly pained to read that I have suddenly and secretly left the place without your consent. What has prompted you to write this I really do not understand.

Dear, how comes this change. You know I was not keeping good health and considerably gone down in spirit and weight for reasons which I do not like to discuss here since You are fully aware. It was you who suggested that I should go over and stay at my father's place and at your suggestion I did so. You are fully aware that I was accompanying my father to Singapore for a few months for a change and you gave consent. As soon as I feel better I shall return to Bombay."

The appellant not having received this letter (if it was written) and not having received any reply to his cable dated July 24, 1954, asking the respondent to return immediately to India, was, according to him, hearing stones that she was moving from place to place. He thereupon' sent her a cablegram on February 24, 1955, and addressed it to both her Singapore and Djakarta addresses as he was not quite sure as to where exactly she was. That telegram read :

"Since your secret departure you not replying my telegrams, letters. Myself shocked. You wandering different countries leading reckless life spoiling my reputation. Your most disgraceful behaviour ruining my life." At the time the cable was received the respondent was still at Singapore and on the 26th she replied by cable :

"Your allegations in your cable dated 24th not correct. Cannot understand your attitude. I have departed with your knowledge with my father because of ailing health due to reasons you are well

aware. Keeping quiet life with my parents. Have not received your letter ; only telegrams which have been replied by cable and letter."

and to this the appellant replied also by cable:

"Your telegram dated 26th February contains all foul lies. Myself shocked at your fabricating false stories to justify your secretly quitting home and flouting my repeated instructions."

But even before the receipt of this last cable from the appellant the respondent wrote to him a letter from Singapore dated March 3 in which, after setting out the text of the cablegrams exchanged, she made a positive assertion that she wrote a, letter to him on August 2, 1954. The rest of the letter was concerned with inviting him to come abroad and stay with her and her father at Hong Kong to which place she said she was leaving the next day and she promised him real pleasure if he stopped working for his parents and commenced having pleasure with the respondent in her father's house. After the dispatch of this letter on the 3rd of March the respondent received the appellants cable in which he reiterated his allegation that she had left his house secretly and without his knowledge and was thereafter flouting his instructions., On March 10, 1955, she sent him a cable from Hong Kong refuting this allegation and adverting to the invitation' contained in her letter dated March 3, 1955, she, said.

"Why don't you come out of Bombay house-hold atmosphere and see for yourself. Cannot understand, what you mean by flouting repeated instructions."

The letter of the 3rd was dispatched by the respondent by registered post and when this was received as well as the cables from the respondent, the appellant wrote in reply a letter sent by registered post dated April 1, 1955, in which he passed severe strictures against her conduct and in her continuing abroad without obeying his instructions. We shall have to deal in somewhat great detail with the contents of this letter. Ordinarily read it might seem to indicate that the appellant was charging the respondent with improper behaviour even amounting to sexual immorality. While in the witness box the appellant specifically repudiated that he intended any Such imputation and, in fact, made it clear that he was neither basing his petition on any allegation of immorality nor that he ever intended to impute any such conduct to her. The learned trial judge accepted this explanation of the appellant and interpreted the letter as the outpourings of an angry and grieved husband and was not, therefore, inclined to read the expressions used therein as imputing unchastity to her. On the other hand, the learned judges of the High Court analysed the text of the letter and considered that it clearly made false and unfounded imputations of unchastity on the respondent and for that reason they held that even if the respondent be held to have had an animus deserendi when she quitted her husband's home on February 26, 1954, and continued to retain that animus, still having regard to the false and malicious amputations of unchastity made by the appellant in his letter dated April 1, 1955, they held that she had justifiable cause for not returning to him thereafter and this formed one of the prime grounds for directing the dismissal of the appellant's petition for judicial separations We shall have to discuss these conflicting views and the different -interpretations of this letter, in the light of the evidence adduced in the case when dealing with it. We shall, however, pass this over for the present and continue the narrative.

The respondent received this letter while she was still at Hong Kong. But the next day she left for Manila and she replied from the latter place on April 12, 1955. The main points made in this reply were : (1) She left the house of the appellant with the consent of himself and his parents, (2) The reason for her leaving Bombay to stay with her parents was that her health was poor and -she wanted to recoup it

by a trip abroad. The stay abroad was therefore only for the improvement of her health., (3) The reason for her vacationing with her parents being for the improvement of her health and for no other-not for leading the gay life which was suggested in the appellant's letter dated April 1, 1955. She added :

"As soon as my health has completely improved I shall, of course, come back to you and to our son." This, was the end of the correspondence between the parties. It is common ground that she did not inform the appellant as to when she would be returning to India which was in April, 1956. Nor did she inform the appellant after her arrival in the country, nor did she go to his home-Bombay-to meet him or her son. just about the time some relations of the respondent were vacationing for the summer in Kashmir and she accompanied them there and spent the summer in the valley. No communications passed between the appellant and the respondent during this period either. It was after this that the petitioner filed the petition out of which this appeal arises, on September 20, 1956. After the respondent was served with notice of the petition some attempt was made to effect a reconciliation but it is not necessary to notice this because if there had been desertion, as required by law and the duration of that desertion amounted to two years, the terms of s. 10(1) of the Act are satisfied and the fact that thereafter the guilty spouse repents or recants is not by itself a ground for refusing the relief to which the injured spouse is entitled (Compare s. 23(1) of the Act). From the above narration it will be seen that there are three points of contested fact on which the decision 2 3 -2 S. C. India/61 of this appeal would turn : (1) whether the respondent left the appellant's home on February 26, 1954, with his consent or whether she did so without such consent., (2) What was the intention or animus of the respondent-in leaving her matrimonial home, and in regard to this the interview with Dr. Lulla and the other matters to which we have referred earlier and which transpired before the respondent left India on July 7, 1954, would have relevance., (3) The proper interpretation of the letter of April 1, 1955, writ-ten by the appellant to the respondent and whether in the circumstances of the case it would afford legal justification for the respondent's refusal thereafter to return to the matrimonial home, and to these questions we shall immediately address ourselves.

Before doing so, however, it might be convenient to refer briefly to the law on the topic. The relevant statutory provision may first be set out. Reading only the portion that is material s. 10(1)enacts "10. (1) Either party to a marriage whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-

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

This sub-section is followed by an Explanation which runs :

"Explanation.-In this section, the expression 'desertion', with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage."

The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal from Bombay where the. Court had to consider the provisions of s. 3(1) of the Bombay Hindu Divorce Act, 1947, whose language is in pari material with that of s.

10(1) of the Act. In the judgment of this Court in Bipin Chander v. Prabhawati[1] there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion

1 [1956] S.C.R. 838.

were considered and the following summary of the law in Halsbury's Laws of England (3rd Edn.), Vol. 12, was cited with approval :

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. The position was thus further explained by this Court:

"If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.....

Desertion is a matter of inference to be drawn from the facts 'and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference ; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact there has been a separation, the essential question always is whether that act could be attributable to an animus descrendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may havecommenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time."

Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled law that the burden of proving desertion-the "factum" as well as the "animus deserenai is on the petitioner, and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause.

As Denning, L.J., observed : (Dunn v. Dunn)[2] : "The burden he (Counsel for the husband) said was on her to prove just cause (for living apart). The argument contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to' distinguish between a legal burden of proof laid down by law and a provisional burden raised by the state of the evidence..... The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves that fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal ; and indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has

2 [1948] 2 All. E.R. 822, 823.

the husband proved that she deserted him without cause? Take this case. The wife was very deaf, and for that reason could not explain to the court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. If there were a legal burden on the wife he would be right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case: Has that burden been discharged?"

This, in our opinion, is as well the law in this country under the Act.

The other matter is this. Once desertion, as defined earlier, is established there is no obligation on the deserted husband (taking the case where he is the deserted spouse) to appeal to the deserting spouse to change her mind, and the circumstance that the deserted husband makes no effort to take steps to effect a reconciliation with the wife does not debar him from obtaining the relief of judicial separation, for once desertion is proved the deserting spouse, so long as she evinces no sincere intention to effect a reconciliation and return to the matrimonial home, is presumed to continue in desertion. of course, the matter would wear a different complexion and different considerations would arise where before the end of the statutory period of 2 years or even thereafter before the filing of the petition for judicial separation the conduct of the deserted spouse was such as to make the deserting spouse desist from making any attempt at reconciliation. If he or she so acts as to make it plain to the deserting spouse that any offer on the part of the latter to resume cohabitation would be rejected, then the deserting spouse could obviously not be blamed for not bringing the desertion to an end. Or again, if before the end of the period of two years or the filing of the petition his or her conduct is such as to provide a just cause for the deserting spouse for not resuming cohabitation, the petition cannot succeed, for the petitioner would have to establish that the desertion was without just cause during the entire period referred to in s. 10(1)(a) of the Act: before he can succeed.

There were a few submissions made to us by learned counsel for the appellant regarding the nature of the "just cause", particularly whether this should amount to "cruelty" or other matrimonial offence etc., based on a construction of certain other provisions of the Act, but as these have no substance and were not persisted in, we consider it unnecessary even to refer to them.

We shall now proceed to consider the facts in the light of these principles with a view to find out whether the appellant has proved that the respondent had deserted him without just cause for the requisite period. We start with the admitted circumstance that the respondent left the husband's home on February 26, 1954. It was not suggested that the husband threw her out or that she left because of any expulsive conduct on his part. There is therefore no suggestion or case that she left for any justifiable cause. The next question that would fall for determination is whether she left with his consent. As we have stated earlier, on this point the learned judges of the High Court have recorded a finding different from that of the trial Judge. The case of the respondent was that she had the consent of her parents-in-law and also of the husband, and she even went to the length of suggesting that it was he who suggested that she might go abroad with her father in order to improve her health. Now as to the obtaining the consent of the respondent's parents-in-law, the evidence was this. The respondents father who was her second witness deposed as follows: There had always been disinclination on the part of the appellant and his parents in permitting the respondent to go over to her parents' place on most earlier occasions. When permission was thus sought for such a purpose, there had always been friction and trouble. In connection with his taking his daughter with him when he intended to leave India in July, 1954 he sought their permission on more than two occasions but the same was refused.

Subsequently a friend and a neighbour of his at Poona--one Maganmalpromised to intercede with the appellants father. The latter spoke to the appellant's father and obtained permission and informed the witness.

The entire story of Maganmal having spoken to appellant's father and obtained the latter's permission was denied by the appellant as false and the learned trial Judge was not inclined to believe the story as true. Maganmal who gave evidence as D.W. 3 admitted that he could not claim to be any close friend of the petitioner's father and, in fact, he admitted to what might ordinarily constitute a state of unfriendliness between them. Kanayalal who had married the appellant's sister was the adopted son of one Nanikram who was stated to have died leaving a will by which he disposed of his properties in favour of a trust. The trustees, including Maganmal who was one of the trustees, upheld the validity of the will and claimed the properties for the trust, but Kanayalal challenged the truth and validity of the will and claimed the property as the heir of Nanikram. It was stated by Maganmal that himself and the appellant's father became acquainted with each other when they happened to meet in connection with this trust estate and when the appellant's father came to him to sponsor the interests of his son-in-law. This apart, the talk between himself and the appellant's father as a result of which the permission is said to have been granted was thus stated by Maganmal in his evidence:

"I (Maganmal) talked to the petitioner's father in Bombay in collection with the securing of permission for the respondent at the most for five months. I straightaway talked to the petitioner's father about the securing of the permission for the respondent. There was no other topic discussed between myself and the petitioner's father. The talk between myself and the petitioner's father took place in the compound of Ishardas Temple when I and the petitioner's father came out of the temple. I took the petitioner's father aside when I had a talk with the petitioner's father."

This would not be a very credible story, because if to the requests of the respondent's father on two or three occasions the appellant's father had refused permission it does not stand to reason that to a person situated as Maganmal was in relation to him he would have yielded merely because it was mentioned by Maganmal. The learned trial Judge who had an opportunity of seeing Maganmal in the box was not impressed with his evidence and for the reasons we have set out earlier regarding the relationship between the appellant's father and Maganmal learned trial judge considered that the story of Maganmal being deputed to obtain permission and his having obtained permission was false. We are inclined to agree with the learned trial judge in this appreciation of the oral testimony. If Maganmal's evidence is rejected then the entire superstructure of the respondent's case about the consent of the appellant's parents must fall to the ground. In this connection there arc a few other matters to mention. It was common ground that the appellant's father was, at the time of the trial, away at Tokyo on business and he was not in a position to be examined as a witness. The learned judges of the High Court, however, drew an inference adverse to the appellant from (1) his not calling his mother as a witness, and (2) the non-examination of maidservant who was stated to have been in the house at the time when the respondent left it on February 26, 1954. We do not agree with the learned judges of the High Court in the inference so drawn. If Maganmal's evidence is rejected, as it must, the father of the respondent who supported the story of Maganmal's intervention would not come out with flying colours and if his evidence as to this part is rejected we consider that it was not incumbent on the appellant to adduce the negative evidence of his mother etc., at the risk of an adverse inference being drawn against him in the event oil his not doing so.

Besides, there are some circumstances which lead to the inference that the story spoken to by the respondent about her parents-in-law being per sent at the time of her departure and their loading her

with gifts of jewellery and clothes is not credible. If really the respondent had left the house with the consent and goodwill of the appellant's parents or if as she would have it in some of her letters, it was the appellant himself who suggested her going abroad with her father to recoup her health. there could be no explanation for the conduct of the respondent in ,not going over to the house of the appellant during her stay in Bombay in June, 1954, for a fortnight or more when she was there in connection with her passport, and when she stayed admittedly within a few minutes' walk of the appellant's place. There would also be no explanation for her failure to inform the appellant and his parents about her departure from Bombay on July 7, 1954. It is only necessary to add that even in the first cable which the appellant sent her on coming to know of her departure from India the appellant complained that she had left India secretly without his knowledge and consent to which there was no contradiction in the reply by cable that she sent on July 22, 1954, though in her later cablegrams and letters she asserted that she had such a consent. There are several other matters which have been mentioned by the learned trial judge, such as the discrepancies in the several versions that the respondent spoke to from time to time and between these and the evidence given by her father and that of Maganmal coupled with her case as set out in the -pleadings as circumstances for discarding the entire story as false, but to these it is not necessary for us to advert in view of the broad features we have pointed out which have led us to the conclusion that the respondent did not leave the house of the appellant with his consent but that she did so of her own accord and without his knowledge.

The next matter for enquiry is as to the animus which prompted the respondent to leave the appellant's house. There was admittedly no incident which led to the departure from the matrimonial home which could throw light on that question nor is there any contemporaneous declaration of the respondent. The learned trial judge has set out the history of the relationship of the parties ever since their marriage up to 1954 as the background in which the simple act of leaving should be viewed for the purpose of determining the animus with which that act was done. The learned Judges of the High Court considered that this was not a proper approach to the question. Without deciding on the correctness of the approach of the learned trial judge, we shall proceed on the basis that the learned judges were right in discarding the earlier history of the relationship between the parties as irrelevant for determining whether the respondent in removing herself from her husband's house did or did not intend her withdrawal to be permanent and with a view to disrupt their marriage and terminate their married life. We shall consequently confine ourselves to the events and matters which transpired after she left the appellant's home to determine what her intention was at the time when she left it. The first matter to which reference must be made is the fact that after reaching Poona on February 26, 1954, until the end of May of that year she never wrote any letter to her husband. If, as we have found earlier, she left the appellant's house without his Consent or even knowledge, the failure on her part to intimate to him as to where she had gone would certainly be a relevant circumstance indicative of the animus which impelled her to leave the home. This is, no doubt, a slight circumstance, but she has really no explanation to offer for her silence and particularly so when taken in conjunction with the case that she put forward that she left her husband's place with the blessings of her parents-in-law and almost at the suggestion of her husband in order that her health might improve.

The next circumstance which, however, is very much more important, is her declaration on the occasion when the appellant and Dr. Lulla visited her at Poona towards the end of May. The learned trial judge, as stated earlier, has accepted that Dr. Lulla and the appellant did visit her at Poona as spoken to by them and that her story denying this meeting is false. The learned Judges of the High Court also did not accept her denial of the meeting, but they however refused to attach any importance to the

evidence of Dr. Lulla for the reason that he was unable to specify the exact words of the questions put to her and her answers. We do not agree with the learned judges about the value to be attached to the evidence of Dr. Lulla. The relevant portion of Dr. Lulla's evidence runs thus :

"I told her (the respondent) to go back to Bombay and then settle the differences whatever they were between the petitioner and the respondent but she said that she was not prepared to go back for ever. There was no further talk between myself and the respondent. The petitioner had a talk with the respondent first and then I had a talk with the respondent. I cannot recollect what the petitioner actually told the respondent. The respondent did not mention the differences which she had with the petitioner' She only stated that she was not prepared to come back to the petitioner for ever."

Now, it will be seen that this evidence is categorical. It Consists of two parts: The first is as regards the gist of the conversation between the appellant, and the respondent when they were together. He admits he was not present when they talked to each other and it is the question and answer at that stage, i.e., between the appellant and the respondent that the witness is unable to state to the Court. The second part of the evidence is in relation to the questions that he himself put to the respondent. There is, no ambiguity in his evidence either about the questions which he put nor about the answers which she gave. The comment of the learned judges that the witness was unable to reproduce the exact words of the question put to the respondent and the words of her answer does not obviously apply to this second part of the witness's testimony. If Dr. Lulla be treated as a truthful witness, and even the learned judges of the High Court did not express any view to the contrary, it is clear that the respondent had specifically stated to him that she would never come back to her husband's home. There is thus clear evidence and satisfactory proof that besides the factum of desertion there was also the animus descrendi at the time when she left the husband's house or at least at the time of this meeting -it Poona at the end of May, 1954.

The matter does not rest here for there is further proof of her animus afforded by her conduct up to the time of her leaving India for abroad on July 7, 1954. We are, here, referring to three matters: (1) Her presence in Bombay for a fortnight or for a month, whichever it be, at her uncle Tola Ram's place five minutes walk from the appellant's residence and her failure to call on the appellant even for the purpose of seeing her boy Ashok; (2) her conduct in giving her address in India as Tola Ram's place in the application for a passport and in the passport itself; and (3) her failure to inform the appellant of her departure from Bombay and her not calling on him even when she was leaving India for a stay of a considerable duration abroad. If then the conduct of the respondent was an act of desertion with the requisite animus when it started, the question next to be considered is whether it continued for the duration of two years before the presentation of the appellant's petition under s. 10(1)(a) of the Act to satisfy the requirements of the statute. We have already set out the correspondence which passed between the parties. In the first telegram which was exchanged between them and which started immediately the appellant got information that the respondent had left India-towards the end of July, 1954-he required the respondent to return to India immediately. In her replies she stated that she would return, not immediately-we are not, here, concerned so much with the reasons which she gave for not so returning-but after her health improved. If her offer to return after sometime was genuine and sincere and represented her then true feelings and intention it cannot be disputed that the desertion would be brought to an end because thereafter the animus deserendi would be lacking, though the factum of separation might continue. On the other hand, it cannot also be disputed that if the offer was not sincere and there was in reality no intention to return, the mere fact that letters were written expressing such an intention would not interrupt the desertion from continuing. The question

for inquiry would, therefore, be whether these offers by the respondent to return were sincere. In this connection it is riot without significance that there are admittedly several occasions on which the respondent could have returned to India but she did not do so until April 1956. One of these was when one. Mr. Choith Rama relation of the parties-returned to India. It is admitted by both the respondent as well as her father that it was possible for the respondent to have returned to India with Choith Ram but it was stated that she did not do so because she had not been invited to some wedding in the appellant's house. We consider this explanation not satisfactory or convincing. If, as -we have found, she had left the appellant's house without his consent, and she expressed her determination not to return to him when the appellant and Dr. Lulla met her in May in Poona, and when in spite of repeated assertions in her letters and telegrams that she would be coming back, but she fails so to return when she had occasion and opportunity to do so, we consider that her acts and conduct in failing to return are entitled to more weight as evidence of her true intention than her assurances contained in her letters. We are not, therefore, prepared to hold that bona fide intended to return to her husband when in her letters and telegrams, to which we have already adverted, she expressed her intention to return to him. Besides, it would be seen that even after she returned to India in April, 1956, she did not go straight to her husband's house or even inform him of her return to India but on the other hand went away to Kashmir and that state of things continued until the petition was filed on September 20, 1956. If nothing more happened between the parties it is clear that the petitioner would be entitled to the relief which he sought as there was satisfactory proof of desertion as defined by the statute for the full term of two years.

The point, however, that forms one of the major bases of the judgment of the learned Judges and which was strenuously sought to be supported by Mr. Aggarwala, learned counsel for the respondent, was based upon the letter of the appellant dated April 1, 1955, as affording a justification in law for her refusal to come back to join him.

Before proceeding to deal with the contents of the letter and the other points urged in relation to it, it might perhaps be useful to set out the legal position in the light of which the entire matter has to be considered. As stated by Scott. L. J., in Tickler v. Tickler[3], quoting the words of Lord Romer in an earlier decision :

"The question whether a deserting spouse has a reasonable cause for trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be a question of fact."

The question for consideration in such cases is "Is the conduct of the deserted spouse such as to excuse the deserting spouse from making any attempt to put an end to the desertion or from attempting any reconciliation?" (Vide also Brewer v. Brewer[4]. The basis of this rule rests on this, that such conduct on the part of the deserted spouse would legally operate as a consent to the existing separation and would have the effect of absolving the deserting spouse from any obligation to return to the matrimonial home or 964. to make amends for her improper conduct, for the petitioner in a petition for judicial separation grounded on desertion by the other spouse has to prove that for the period of two years specified in s. 10(1) (a) of the Act the respondent has without cause been in desertion and that intention must be proved to exit through out that period. If, therefore, during that period the respondent has just cause to remain apart he or she would not be in desertion and the petition for judicial separation would fail.

3 [1943] 1 All E.R. 7, 59.

4 [1961] 3 All E.R. 957,

It would be seen that we have here the interaction of two distinct matters which have to coexist in order that desertion might come to an end. In the first place, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial home. In this one has to have regard to the conduct of the deserted spouse. But there is one other matter which is also of equal importance, that is, that the conduct of the deserted spouse should have had such an. impact on the mind of the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. But where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse. It appears to us that the principle that the conduct of the deserted spouse which is proved not to have caused the deserting spouse to continue the desertion does not put an end to the desertion appears to be self-evident and deducible from the legal concepts underlying the law as to desertion. The position is besides supported by authority. We might usefully refer to the following passage in the judgment of Willmer, L.J., in Brewer v. Brewer[5] where, explaining certain observations of Lord Macmillan in Pratt v. Pratt [6], he said :

"It remains for consideration however, exactly what Lord Macmillan meant when he spoke of the husband 'making it plain' to his deserting wife that he will not receive her back. He cannot have meant, I apprehend, that a deserting wife is entitled to take advantage of any chance statement that her husband may have made, irrespective of whether it had any effect on her mind. It seems to me that what Lord Macmillan must have meant was that a deserted husband cannot complain if what he has said or done has in fact caused hi-, wife to desist from making any attempt at reconciliation which she otherwise would have made. If this view be right, it becomes obvious at once that the question whether the conduct of the husband was such .is to bring the wife's desertion to an end cannot be treated, as counsel for the wife (at any rate at one point of his argument) appeared to invite us to treat it, as an abstract question of law. It becomes necessary to consider the facts of the particular case, in order to ascertain what in fact was the impact on the mind of the deserting spouse of anything which was said or done by the deserted spouse."

We should add that this expresses our own view of the legal position.

We shall now proceed to consider the letter of the appellant dated April 1, 1955, and its significance for the purposes of the defence of the respondent in the light of these principles. The questions that arise on this letter fall into two broad classes : (1) The exact meaning and construction of the expressions used in the letter, and (2) its impact on the mind of the respondent. As to the meaning of the letter the rival contentions are these. According to the appellant the letter was merely the outpourings of an angry and grievously injured husband who found his wife persisting in keeping away from him and expressing happiness at her stay in and movement from place to place in foreign countries. In this connection the expressions used in the letter were put to the appellant in great detail during his cross examination and the burden of his explanation was that he never intended to impute any unchastity to the respondent. It is not necessary to set out the entirety of the letter but we would make a few extracts for the purpose of judging whether the letter could bear the interpretation which the appellant asserted was his intention in writing that letter:

"They (the appellant's parents) have overlooked all your faults and treated you with love and kindness like their own daughter and have made all possible efforts to raise you up from your low turpitude and

5 [1961] 3 All. E.R. 957.

6 [1939] A.C. 417, 420.

make you a decent woman It is your perverted funny notions of pleasure giving vent to your past and present associations, both in India and abroad, that are the root cause of all your evil and irrational deeds. ... Just think how often have I counseled you against your unceasing pleasure hunt which has brought only shame and misery to our whole family It is a wonder that you find pleasure in leaving home, leaving your husband, wandering from country to country, leading reckless life under the guise of being in the company of your relations and uncles whom you find readily available at every port. And you have gone SO far in this direction, that you find yourself unable to break your past links and get out of the muddle created by you and seek pleasure and happiness in your own home by being a faithful and devoted wife In spite of all my efforts, you have completely deserted me and chosen the path of pleasure and perversion,at any cost. You are only looking for some cloak to cover your guilt and continue to live your life of degradation with impunity. I refuse to furnish you with that cloak and I refuse to be drawn into your game."

As we have stated earlier, the appellant expressly disclaimed in the witness box that he ever considered her unchaste or that in that letter or otherwise he imputed unchastity to her. The learned trial judge believed the appellant's testimony as to what he intended to convey by this letter and was of the view that the contents were reasonably capable of being understood in the manner suggested by the appellant. We cannot say that this is not a possible interpretation of the letter and that it must be held that it was intended to impute unchastity to the wife. We must, however, hasten to point out that the intention of the writer is neither very relevant nor, of course, decisive of the matter. The question is what the words were reasonably capable of being understood, and if they have been so understood it is no answer that the writer did not intend his words to have that meaning. In view of what we are about to say, it would not be really necessary for us to say whether, reasonably understood. the words would not impute sexual immorality to the respondent, but we shall assume that the learned Judges of the High Court were right in their interpretation of the. letter and the insinuations it contained. The question, however, is how she understood and what her reactions were.

The next question for consideration therefore relates to the impact of this letter on the respondent, for it is ultimately that that would determine, in the present case the legal effect of the conduct of the appellant in terminating or not terminating the desertion that up to then continued. As to this, the position stands thus : The evidence of the respondent was that she received the letter at Hong Kong, and she stated :

"I read that a bit. On the next day I left for Manila. .... There I was appraised of the contents of the letter and then I was shocked at the contents of the letter and my health became worse at Manila."

The letter is stated to have been received in the evening and she was to leave Hong Kong for Manila at 10 a.m. the next day. According to one portion of her evidence she read a part of the letter on the day she received it but she had no time to read the whole letter, but she corrected herself later and stated that the entire letter was then read, but that she understood only a portion of the letter on the day it was received and the rest of it explained to her in Manila. It was her cousin--one Khem Chand-who is said to have been asked to read and explain the letter because she did not understand fully its contents. This was at Hong Kong and he read that letter during the night after he returned home from office. Before he finished reading that letter she said she went to bed. He was reading, that letter till late that night. She, however, slept by then. Khem Chand she said, promised to explain the contents the next morning but there was no time 1eft for this as she left for Manila that day. It is apparent from this state of evidence that it did not have very much upon the respondent or that she under-stood the letter as really charging her with immorality. It' is just possible 24-2 S. C. India/64 that she understood

its contents as merely an admonition ,by the husband at her being away from him and at her conduct in asking him to go over to Hong Kong instead -of returning to him immediately, as he desired in his telegrams. She apparently attached not much significance to this letter and that is clear from the way in which she got the letter read and explained to her partly at Hong Kong and the rest at Manila. And this notwithstanding that her father was there to assist her in understanding the contents of that letter and its implications.

This is so far as the oral testimony of the respondent is concerned, but possibly of more significance and of higher evidentiary value than the inference to be drawn from the statements in her deposition in Court is the reply that she sent from Manila to this letter on April 12, 1955. It is necessary to examine with some care the contents of this reply. It is addressed to him.as 'My dearest husband'. It consists of five paragraphs. In the first she acknowledges as letter dated April 1, 1955. of the contents of that letter those regarding which she deals in the 1st paragraph are: (1) his statement that he had not received any letter from her dated August 2, 1954 and (2) a denial of the fact that she left his house without his knowledge and consent and an assertion that he and his parents consented that she should go and stay 'With her relations for a while. The second paragraph is again taken up with the same matter and repeats (1) that she .did not leave the house without his knowledge and consent, and (2) she left the house only for reasons of her health. The third paragraph states that her health had improved but that she would like to stay a little longer with her parents in order to improve it more and then she would return to him and to her "dear son Ashok". The next paragraph is concerned with denying the unfounded accusations contained in his letter and these are characterised as "merely the product of his hallucination" and that she would ignore them because they are not based on truth and in the final paragraph she ends by repeating that site was vacationing with her parents only for the improvement of her health and for no other purpose and lie would kindly allow her to stay with her parents a little longer for her welfare and advantage and she winds up the letter by assuring him "As soon as my health is completely improved I shall of course come back home to you and to our son".

Now to the question as to what is the impact of the appellant's letter on the mind of the respondent. In the face of this letter could it be said that she understood the appellant's letter as a justification for her to stay apart? For this purpose it is not necessary to consider whether she understood it as imputing unchastity to her or not. As we have already pointed out, it is doubtful whether she did so. If it were so it would not be reasonable for her to read the letter at Hong Kong in part or not understanding it there and not attaching any significance to it as an imputation of a serious character against her morality. But in whatever way she understood it, it is obvious that it did not have any effect on her mind in the matter of persuading her or impelling her to stay apart from her husband, for we find in her reply repeated assertions that she intended to come back to the husband. We do not, therefore, agree with the learned judges of the High Court that the appellant's letter of April 1, 1955, would constitute an interruption of her desertion which had commenced from February-May, 1954, by its being a just cause for her to remain away from the matrimonial home.

As already stated, the letter of April 12, 1955, was the last letter which passed between the parties and though she stayed abroad for nearly a year thereafter she did not write to the appellant and even when she came to India in April, 1956, she did not go to her matrimonial home as she had promised to do in this last letter of hers just referred to. A point similar to the one dealt with by us in relation to the telegram of the respondent dated June 24, 1955, and her letter dated March 3, 1955, arising out of the statements contained in them that she intended to return to the husband on coming over to India and the effect of such a statement in terminating the desertion has also to be considered with reference to

the promise to return to the husband contained in this letter of hers dated April 12, 1955. As already pointed out, if the offer to return was genuine and sincere and was made with the intention of being kept and as indicative of a desire felt to return to the matrimonial home it would constitute a break in the desertion and thus disentitle the appellant to any relief under s. 10(1) of the Act because in the face of such an intention the desertion of two years duration could not be established. We are, however, satisfied that the intention expressed in this letter to return to the husband was not genuine or sincere. This is shown beyond doubt by the following facts: (1) She wrote no letter to the appellant after April 12, 1955, right up to the date of the petition, (2) she did not intimate to him about her arrival in India-a fact strongly suggesting her disinclination to meet him and to go to his house, (3) that even after she returned to India nearly a year after her letter of April 12, 1955, she did not go to her husband nor was any attempt made by her to contact her husband through friends before the filing of the petition. The facts therefore and her conduct outweigh any assertion contained in this letter and they convince us that she did not entertain any genuine desire to return to her husband's home when she wrote those words in her letter to him dated April 12, 1955.

It was not contested that if desertion started in February May, 1954, as we have found, and was not put an end to and if no justifiable cause for the continuance of the desertion was afforded by the appellant's letter of April 1, 1955, there was no other defence to the petition of the appellant under s. 10(1) of the Act.

The result is that the appeal is allowed, the judgment of the High Court reversed and the decree for judicial, separation passed by the learned trial judge restored with costs here and in the High Court.

SUBBA RAO J.-I regret my inability to agree. This appeal by certificate presents a facet of the social and sociological problem of a young Hindu woman landed by marriage in a joint family and of her predicament therein. As Rajagopala Ayyangar, J., has traced the course of the litigation, it is not necessary to cover the ground overagain. Two questions arise for consideration, namely, (1) whether there was desertion by the respondent without reasonable cause of her matrimonial home; and (2) whether the appellant had prevented the respondent during the statutory period from bringing the desertion to an end. Before I consider the evidence in the case, it will be convenient to notice the relevant aspects of the law pertaining to the doctrine of desertion. The Hindu Marriage Act, 1955 (Act 25 of 1955), hereinafter called the Act, codified the law in that regard. The material provisions of the Act read thus : .

Section 10. (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the District Court praying for a decree for judicial separation on the around that the other party-

(a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

Explanation.-In this section, the expression "desertion", with its grammatical variations and cognate expressions, means, the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party,, and includes the willful neglect of the petitioner by the other party to the marriage."

Under this section a spouse can ask for judicial separation if the other spouse has deserted her or him for a continuous period of not less than two years. This provision introduces a revolutionary change in the Hindu law of marriage. It is given retrospective effect. A spouse in India except in some states, who

never expected any serious consequences of desertion, suddenly found himself or herself on May 18, 1955, in the predicament of his or her marriage being put in peril. If by that date the prescribed period of two years had run out, he or she had no locus penitential and could retrieve the situation only by mutual consent. Section 10(1)(a) does not proprio vigore bring about dissolution of marriage. It is a stepping stone for dissolution. On the deserted spouse obtaining a decree for judicial separation, the said spouse can bring about divorce by efflux of time under s. 13 (1) (viii) of the Act. The expression "desertion" came under the judicial scrutiny of this Court in Bipin Chander jaisinghbhai Shah v. Prabha (1) [1956] S.C.R. 838.

wati(1). There, the question arose under s. 3 (1)(d) of the Bombay Hindu Divorce Act, 1947 (Bom. 22 of 1947)., This Court, on the facts of that case, held that there was no desertion. The said section read :

"(1) A husband or wife may sue for divorce on any of the following grounds, namely.....

(d) that the defendant has deserted the plaintiff for a continuous period of four years.

"Desertion" was defined in s. 2(b) in these terms: "'Desert' means to desert without reasonable cause and without the consent or against the will of the spouse." Sinha, J., as he then was, speaking on behalf of the Court after considering the relevant textbooks and decisions on the subject, summarized the law thus, at p. 851 "For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively.

The learned judge dealt with the mode of putting an end to the state of desertion as follows, at p., 852 :

"Hence, if a deserting spouse takes advantage of the locus penitantiae thus provided by law and decides to come back to the deserted spouse by a bonafide offer of resuming the matrimonial home with all the implications of marital life, before the statutory p eriod is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former."

Based on that reasoning the learned Judge proceeded to lay down the duty of. the deserted spouse during the crucial period "Hence it is necessary that during all the period that there has been a desertion the deserted spouse 'must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable."

Adverting again to the burden of proof and the nature of evidence required to prove desertion, the learned judge made the following observations, at p. 852 :

"It is also well settled that in proceedings for divorce the plaintiff must, prove the offence of desertion like any other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted, for to the satisfaction of the Court."

Collating the aforesaid observations, the view of this Court may be stated thus : Heavy burden lies upon a petitioner who seeks divorce on the ground of desertion to prove four essential conditions, namely.' (1) the factum of separation; (2) animus deserendi; (3) absence of his or her consent; and (4)

absence of his or her conduct 'giving reasonable cause to the deserting spouse to leave the matrimonial home. The offence of desertion must be proved beyond any reasonable doubt and as a rule prudence the evidence of the petitioner shall be corroborated. In short this Court equated the proof required in a matrimonial case to that in a criminal case. I am bound by this decision. I would, therefore, proceed to discuss the law from the point reached by this Court in the said decision.

There is some controversy on the question on Whom the burden of proof lies to establish that the deserting spouse has just cause or not to leave the matrimonial home. The judgment of this Court is clear and unambiguous and it throws the burden on the petitioner seeking divorce. This view is consistent with that expressed in leading judgment of English Courts.

In Pratt v. Pratt(1) the House of Lords considered the said aspect. Lord Macmillan stated, at p. 438, thus:

"In my opinion, what is required of a petitioner for divorce on the ground of desertion is proof that throughout th e whole course of 3 years the respondent [1939] 3 All E.R. 437.

has without cause been in desertion.....In fulfilling its duty of determining whether,on the evidence, a case of desertion without cause has been proved, the Court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. if, on the facts, it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may, have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion".

On the question of just cause, Lord Romer made some pertinent remarks, at p. 443, which are relevant to the present enquiry. There, as here, though under different circumstances, the deserting spouse, the wife, after previous correspondence did not call on her husband.

In that context, Lord Romer observed:

It would, in my opinion, be quite unreasonable to bold that the respondent, guilty though she was of the serious matrimonial offence of desertion, should be expected to present herself at her husband's door without any knowledge of how she would be received, 'and therefore at the risk of being subjected to the indignity of having admission refused by her husband or by one of his servants..... It could not be expected that she should suddenly make an unheralded entry into his house."

Though it was necessary, in order to put an end to her desertion, for the wife to take some active step towards returning to the matrimonial home, Lord Romer held that she had taken such steps by writing letters and that the fact that 'she. did not physically appear in the matrimonial home did not make is any the less a just cause on her part. In Dunn v. Dunn[7], Denning L.J., as he then was, laid down the scope of burden of proof in such a case, at P-823, thus:

"The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal ; and indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the court has still, at the end of the case, to ask itself : Is the legal burden discharged? Has the husband proved that she deserted him without cause?"

7 [1948] 2 All E.R. 822.

This passage brings out the well known distinction between legal burden and onus of proof. Legal burden always remains on the petitioner ; and onus of proof shifts and is a continuous process. But, as the learned Lord points out, the court has to hold on the evidence whether the legal burden to establish desertion without cause has been established by the petitioner.

In Day v. Day[8], the husband petitioned for divorce on the ground that his wife had deserted him. The wife relied on the fact that the husband committed adultery and that, therefore, the desertion was not without cause. The Court held that the burden was upon the petitioning husband to prove that his adultery was not the cause of his wife's desertion and that he had proved the same, as the facts proved established that she had formed her intention not to resume cohabitation independently of his adultery. The legal position is stated thus, at p. 853 :

"On the facts of the present case that involves the husband proving affirmatively that the mind of the wife was not in any way affected by her knowledge of the husband's adultery. Clearly the burden is a heavy one, and doubtless in many cases it will be one that a petitioner will not be able to discharge."

In Brewerv. Brewer[9], the Court of Appeal explained the views expressed by Lord Macmillan and Lord Romer in Pratt v. Pratt(1). Willmer, L.J. after quoting the observations of Lord Macmillan in Peatt's case[10], proceeded to state:

"This passage, although not necessary for the decision of that case, was expressly approved and adopted by Lord Romer in Cohen v. Cohen(1), and must, I think, be accepted as authoritative having regard to the fact that all the other members of the House expressed their concurrence with Lord Romer."

The case-law here and in England throws the burden of proof on the petitioning spouse to prove that desertion was without cause.

Another aspect of the question may now be touched upon. The definition of desertion under s. 10of the Act, the argument proceeds, is much wider than that under the English law or under the Bombay Act considered by this Court. Emphasis is laid upon the following words in the explanation to s. 10(1) of the Act :

"includes the willful neglect of the petitioner by the other party to the marriage."

The expression "includes", the argument proceeds, enlarges the scope of the word "desertion", and takes in by definition the conscious neglect on the part of the offending spouse, without the requisite animus deserendi. This argument, if accepted, would impute an intention to the Parliament, which was entering the field for the first time, to bring about a revolutionary change not sanctioned even in a country like England where divorce or separation for desertion had long been in vogue. We would be attributing to the Parliament an incongruity, for, in the first part of the explanation it was importing all the salutary restrictions on the right to Judicial separation. but in the second part it would be releasing the doctrine, to a large extent, of the said restrictions. By such a construction the legislation would be made to defeat its own purpose. On the other hand, the history of the doctrine of "desertion" discloses some limitations thereon conceived in the interests of society and the Parliament by the inclusive definition couched in wide language could not have intended to remove those limitations. The inclusive definition is only intended to incorporate therein the doctrine of "constructive desertion" known to English law and the language is designedly made wide to cover the peculiar circumstances of

8 [1957] 1 All E.R. 848.

9 [1961] 3 All E.R. 957.

10 [1939] 2 All E.R. 437.

our society. In Rayden[11] on Divorce, 7th Edn., the expression "constructive desertion" is defined thus, at p. 155 :

"Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves his wife, and the case of a man who compels his wife by his conduct, with the same intention, to leave him. This is the doctrine of constructive desertion."

Adverting to the question of animus in the case of constructive desertion, the learned author proceeded to observe, at p. 156, thus :

"It is as necessary in cases of constructive desertion to prove both the factum and the animus on the part of the spouse charged with the offence of desertion as it is in cases of simple desertion. The practical difference between the two cases lies in the circumstances which will constitute such proof, for, while the intention to bring the matrimonial consortium to an end exists in both cases, in simple desertion there is an abandonment, whereas in constructive desertion there is expulsive conduct."

The ingredients of desertion as well as constructive desertion are the same, namely, animus and factum, though in one case there is actual abandonment and in the other there is expulsive conduct. Under certain circumstances the deserted spouse may even stay under the same roof or even in the same bed-room. In our society, it is well known that in many a home the husband would be guilty of expulsive conduct towards his wife by completely neglecting her to the extent of denying her all marital rights, but still the wife, because of social and economic conditions, may continue to live under the same roof. The words "willful neglect" in the explanation were certainly designed to cover constructive desertion in the English law. If so, it follows that willful conduct must satisfy the ingredients of desertion as indicated above. Hence, the appellant could not take advantage of the inclusive definition unless he established all the ingredients of constructive desertion, namely, animus, factum and want of just cause.

There is yet another legal contention which may be disposed of before I consider the facts. It is based on s. 9 of the Act, which reads :

(1) when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court, for restitution of conjugal rights and the Court on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. (2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce."

The contention on behalf of the appellant is that s. 9(2) of the Act affords a dictionary for the expression "without reasonable cause" and that it shows that reasonable cause in the explanation could only, be that cause which will be a legal ground for the offending spouse to resist the petition by the other for restitution of conjugal rights. It is further contended that under cl. (2) thereof such legal ground could only be the legal ground on which there could be judicial separation or nullity of marriage and, therefore, the reasonable cause in the explanation to s. 10should also be only such grounds like cruelty etc. There is a fallacy in this argument. An illustration will bring it out. A husband files an application against the wife for restitution of conjugal rights under s. 9 of the Act. The wife can plead, inter alia, that the husband is not entitled to restitution of conjugal rights as lie has deserted her without

11 [1940] 2 All. E.R. 331, 335.

reasonable cause. Section 9(2) of the Act does not afford any dictionary for ascertaining the meaning. of the expression "reasonable cause". We have to fall back again for its meaning on the principles laid down by decided cases and the facts of each case. That apart, s. 9 and s. 10 deal with different subjects-one with restitution of conjugal rights and the other with judicial separation. We cannot import the provisions of the one into the other, except in so far as the sections themselves provide for it. The explanation does not expressly or by necessary implication equate reasonable cause with a legal ground for sustaining a plea against an action for restitution of conjugal rights. Indeed, it is a limitation on one of such legal grounds. There is an essential distinction between the scope of the two sections. The Legislature even in socially advanced countries lean,, on the side of sanctity of marriage ; therefore, under s. 9 of the Act, our Parliament imposes stringent conditions to non-suit a claim for restitution of conjugal rights. On the same reasoning, under s. 10 of the Act, it does not permit separation of spouses on the ground of desertion except when the desertion is without reasonable cause. The expression "reasonable cause" must be so construed as to bring about a union rather than separation. The said expression is more comprehensive than cruelty and such other causes. It takes in every cause which in a given situation appears to be reasonable to a Court justifying a spouse to desert the other spouse. This view is consistent with the English law on the subject. In Halsbury's Laws of England, 3rd Edn., Vol. 12, the author says, in para. 484, at p. 257 thus :

"Any matrimonial offence, if proved, is a ground for the other spouse withdrawing from cohabitation. Further conduct which falls short of a matrimonial offence, that is conduct not amounting to cruelty or adultery, may excuse desertion."

In Edwards v. Edwards[12] this idea was succinctly brought out. There it was stated that conduct short of cruelty or other matrimonial offence, might afford cause for desertion. So too, in an earlier decision in Yeatman v. Yeatman[13] it was held that reasonable cause was not necessarily a distinct matrimonial offence on which a decree or judicial separation or dissolution of marriage could be founded. I am, therefore. of the opinion that s. 9 of the Act does not throw any light on the construction of the expression "without reasonable cause" and that whether there is a reasonable cause or not in a given case shall be decided only on the evidence and the peculiar circumstances of that case.

The result of the said discussion may be stated thus The legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent abandoned him or her without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bona fide attempt on the respondent's part to return to the matrimonial home and that the petitioner did not prevent the other spouse by his or her action by word or conduct from cohabitation. The expression "willful neglect" included in the section does not introduce a new concept in Indian law unknown to the English law, but is only an affirmation of the doctrine of constructive desertion. The said doctrine is not rigid but elastic and without doing violence to the principles governing it, it can be applied to the peculiar situations that arise in an Indian society and home. No inspiration could 'be derived from s. 9 of the Act in order to construe the scope of the expression "without reasonable cause" and whether there is a reasonable cause or not is a question of fact to be decided on the facts of each case. I shall now proceed to consider the facts of the case. The main question is whether the appellant has proved that the respondent deserted him within the meaning of the term as explained above. To ascertain that fact from a correct perspective it is necessary to notice broadly the marital life of the couple since their marriage. The appellant is an

12 L.R [1950] P. 8.

13 L.R. [1868] 1. P. & D. 489.

M.B.,B.S. and a medical practitioner carrying on his profession in Bombay. He belongs to a well-to-do family, his father being a businessman. The family is comparatively old-fashioned in habits and customs. The respondent is the daughter of one Vasanmal, a businessman, who had -branches in Singapore, Hongkong, Jakarta and Manila. Though he spent most of. his time in foreign countries in connection with his business, he always left his family in India and he used to visit his family in India whenever he could conveniently do so. Though the learned counsel for the appellant attempted to argue that the members of Vasanmal's family, including the respondent, were leading a fast life, there is nothing on the record, except some vague suggestions here and there, to support the said argument. It may be accepted that the respondent's father is comparatively a richer man than the appellant. On November 10, 1946, the appellant and the respondent were married at Hyderabad (Sind). On July 19, 1947, a male child was born to them and was named Ashok. Unfortunately for the couple, their even course of life was disturbed by the partition of India. In October, 1947, they had to migrate, as many others did, from Pakistan to India. Though the respondent's father was maintaining a family house at Lonavla, about 70 miles from Bombay, the members of the appellant's family including the respondent, went to the Colombo and were staying with the appellant's mother's brother. In or, about December, 1947, the appellant, along with his mother, left Ceylon for Bombay leaving the respondent and appellant's sisters in his uncle's house at Colombo. The respondent's version is that, as her sisters-in-law ill-treated her, she was not happy there and therefore she had to leave that place, along with her child, in January, 1948, to her parents' house at Lonavla. At the end of January, 1948, the appellant and his mother went to Lonavla and brought the respondent to Bombay. At the end of the first week of February, 1948, the respondent went back to Lonavla and came back to Bombay in or about August or September, 1948, and was living with the appellant for about 3 months. In or about that time, the respondent's parents shifted their residence from Lonavla to Poona and settled down there. Poona is about 100 miles from Bombay. In December, 1948, the respondent visited her parents at Poona and returned back to Bombay in February, 1949. According to her from February 26, 1954, she was living with the appellant in his house at Bombay and she a permitted to go and see her parents ; but according to the a pellant, she was going now and thento her parents' house. Much is made of her frequent visits to her parents' home, but it is ignore that the frequent visits were only made during the difficult days the evacuees were passing through. But the fact remains that from 1949 for about 4 years she was continuously living with her husband in his house. It is common case that the couple were not happy in their married life. The husband and wife give their versions of the reasons for this estrangement. The husband, as P.W. 1, attempts to throw the blame wholly on the wife He says that the respondent was disrespectful and indifferent to him, that she was proud and arrogant, that she refused to wear the clothes which were made for her by his parents on the ground that they were made of inferior stuff, that she was very disobedient and disrespectful to his parents, that she used to leave for her parents' house very often and sometimes without informing him, that she had no love or affection for him, that when she was in her parents' house she used to play cards, and drank at the parties given by her father, that she did not like to have children and that she was rude and insulting in her behaviour towards him and his parents. In the cross-examination lie admits that lie saw her drinking only twice or thrice at her father's parties, but none of his friends saw her drinking nor did she drink from 1947. He further admits that he saw her playing cards without stakes, but he had not seen personally her playing cards after 1946 or 1947. He admits that the relationship between his mother and the respondent's parents was not cordial. He describes her acts of disobedience thus:

"On the next day of our marriage, it was customary that she should put on the saree which we got made for her. We had such a saree already prepared. She refused to put on such a saree saying that the

same was too inferior to be put on by her. She on many occasions ordered him to do certain things for her. For example, on one day I told her that she should not spread her sarees on the sofa but she should keep the sarees wrapped and keep them in a cupboard. On the next day the same thing was repeated, namely, that she kept her saree spread on the sofa. I called her and requested her to wrap it. She asked me as to why I should not do the same. I protested and told her that I was speaking to her in a polite way and why she should order me to do things, whereupon she told me that her friends' husbands even do boot-polish and why I should not do even such trifling things."

A perusal of his evidence discloses that though he is an educated man he belongs to the old, school and takes offence for the most trivial things which another would ignore. A perusal of his entire evidence also discloses that he is highly respectful to his parents and that he was particular that his wife also should be obedient to them and particularly to his mother. Though the learned counsel for the appellant painted the respondent in his opening address as a highly sophisticated woman, addicted to all the evils of drink, dance etc., the evidence of the appellant, even if entirely accepted, shows that she is not highly educated, that she has not been ad. dieted to any bad habits such as drink, playing cards, smoking etc., and that she was living in the family house of her husband, though now and then she was going to her parents' house. ID the cross-examination the appellant also stated that he had to take the respondent in 1953 or 1954 to Dr. Marfatia, a psychiatrist, for treatment, indicating thereby that was under some nervous or mental strain.

Now let us see what the respondent says about her life in her husband's house. She says that at the time of her marriage her father gave a dowry of Rs. 25,000.00 and several presents and gifts, including clothes worth about Rs. 10,000.00, but her mother-in-law was not satisfied with the amount of dowry given by her father ; that her parentsin-law would not ordinarily permit her to visit her parents' house, that whenever such permission was asked for they used to refuse a number of times, but would allow her to go only once in a way ; that she, was abused for trivial things, such as when handkerchief '& were missing ; that the treatment of her mother-in-law and sisters-in-law from the beginning was cruel and when they made complaints to the appellant, he used to abuse her; that in Ceylon also they ill-treated her; that between 1949 and 1954 she was allowed to go to her parents' house only on two occasions, that is, once on the wedding of one of her sisters and the second time on the wedding of her cousin and during those occasions . she stayed with them only for a few days; that she'" refused permission to go to Poona even when her uncle died; that her parents-in-law,, not only said many 25-2 S C India/64 dirty things of her but they did not allow her to speak to her son ; that when her father-in-law scolded her son, he started weeping and she was scolded for interfering : that this incident happened in 1953 and that since then her husband ceased to talk with her ; that she was also prevented by her mother-in-law from doing any work for her husband or for her son, that she was also beaten by her husband sometimes ; that she was not allowed to see her child when he was ill; that in 1951 she heard that her husband attempted to remarry and even asked her to sign a paper giving her consent for him to do so that she was made to sleep on a bench in the drawing room till about the year 1952 and thereafter on the floor as her mother-in-law did not provide her with a bed. Her evidence discloses that she had no freedom in her husband's house, that she was abused and insulted by her parents-in-law and sisters-in-law, that she was not given the usual comforts which she expected in her husband's home, that she was not allowed to look after her husband and her child, that the husband took the side of his mother whenever there was trouble between her and her mother-in-law. There may be some exaggeration in this version, but by and large this evidence fits in what generally happens in an old-fashioned house where a girl with modern upbringing goes to stay as a daughter-in law of the house. It may therefore

be accepted that she was lead,rig a miserable life in her husband's house and she must have been under a terrible nervous strain.

What does the father of the respondent, who was painted as villain of the piece, say about this unfortunate situation in which his daughter was placed? Whatever may be said about him, his evidence discloses that he is very much attached to his daughter and he attempted to do what an affectionate father could possibly do in the circumstances. He supports -the evidence given by his daughter in regard to dowry and the reluctance of her parents-in-law to send her to his house whenever he requested the them to do so and also he speaks to the complaint made to him by his daughter about the ill-treatment meted out to her by her in-laws and also the want of cordiality between his family and the family of the appellant. I have gone through his evidence carefully He does not impress me as one who was out to wreck the life of his daughter out of pride or anger, but a loving father who tried his best to make her happy and to reconcile the couple, if possible. Whenever there was trouble he tried to persuade them to live together and whenever she was unhappy he tried to take her to his home and give her the necessary warmth of love and affection.

Neither the mother-in-law nor the father-in-law nor the sisters-in-law were examined in the case. If the mother inlaw had been examined, more details could have elicited, but unfortunately she was kept back, in my opinion, for obvious reasons.

The said evidence broadly gives the picture of the respondent's unhappy life in her husband's house and the mental strain she was putting up there.

In those circumstances in the month of November, 1953, respondent's father came to India and was very anxious to take her to his house at Poona and thereafter, with him, to foreign countries for a short time to enable her to recoup her health. With that object, the father approached the appellant's family cautiously and through mediators to at their permission. He says, in his evidence, that after he came to India he met the respondent at her husband's place of residence and observed that she was very pale, that she had lost weight and appeared to be much worried and unhappy. He asked the appellant and his parents to allow her to be taken to Poona, but the permission was not granted. Two or three months thereafter, he again came to Bombay two or three times and made similar requests, but they were all turned down. On one occasion, the respondent described to him her miserable condition under her husband's roof and be consoled her that he would get her the permission to visit him. He requested one Manganmal to intercede on his behalf with the appellant's father and get his permission to take the respondent to his house and thereafter abroad for recoupment of health. About a week thereafter, Manganmal told him that he had seen the appellant's father and made the request on his behalf, but the appellant's father wanted to confer with his wife and so he asked him to see him again a week thereafter. A week thereafter, he saw the appellant's father and repeated the request. The appellant's father requested him to see him 3 or 4 days thereafter. He went to him again, when the appellant's father gave the necessary permission. The witness promised to go to him on February 26, 1954 to fetch his daughter. He went there at 4.30 p.m. on that day and left ,or Poona by the Deccan Queen at about 5.30 p.m. on the same day. At the time when he went to appellant's house to fetch the respondent, the appellant's father and mother were present, but the appellant was not there. The respondent took the permission of her parents-in-law and accompanied him. This version is natural. It is unthinkable that a man of the status of respondent's father would carry away his daughter from her husband's house without taking the permission of her husband or her parents-in-law. It is not likely that the respondent would have run away from the house of her husband in the absence of her husband and parents in-law taking away the jewels with her as was suggested on behalf -of the

appellant. There is nothing in the cross-examination worth the name to belie the version given by this witness. It was the most natural thing any father in the position of the respondent's father would do in the said circumstances. I do not see any Justification to reject his evidence. The respondent in her evidence supports the evidence given by her father and, in addition, she says that on February 26, 1954, she took the permission of her husband before leaving the place. She asked him to allow her to take-her son, but lie refused to give the permission. It is said that while she said that her husband was in the house, her father said that he was not there. But she clearly says in her evidence that her husband was in another room and that she went to that room to take his permission. Obviously, the husband was not willing to face his father-in-law. Manganmal, who interceded on behalf of the respondent's father with the appellant's father, gives evidence as D.W. 3. He is the Managing Director of Chotirmall & Co., with branches in India and in foreign countries. He is a friend of the respondent's father. He corroborates the evidence of the respondent's father. He says in his evidence that he went to the appellant's house and asked his father to allow the respondent to stay with her father while he was in India, as, she had not been to her father's house for years. In the cross-examination it was suggested that he was not a friend of the appellant's father, that he, along with others, was a co-trustee with Kanayalal, a son-in-law of the appellant's father, of Nanikram's trust, and that in the dispute that was raised by Kanayalal's father, Nanikram, in respect of the subject-matter -of the trust, Kanayala was supporting his father whereas Manganmal was supporting the trust. He admits that he does not claim to be a friend of the appellant's father and that there was conflict of views between him and Kanayalal in respect of the trust, but adds that on that account there was no lack of cordiality between himself and the appellant's father. He is a respectable witness. He gave straightforward answers to the questions put to him. He did, not support the respondent's father completely in that he did not say that he asked for permission for the respondent's father taking the respondent to foreign countries. Presumably the further request was made by the respondent's father himself and not by this witness. If he had come to lie in the witness-box, he would have added the further request also. There is nothing unusual in the respondent's father requisitioning the services of this gentleman in preference to others more close to the appellant's father, for this witness is a respectable man and very well known to him and in A position and was also willing,, to intercede on his behalf. I do not see any reason why the evidence of this witness should be rejected.

As against this evidence, the appellant says that on February 26, 1954, he was not present when the respondent left his house, that no one, except the maid-servant was present in the house when the respondent left the house, that in the evening at about 6 O'clock he discovered that the respondent had left his house leaving some message with the maid-servant and taking away all her jewels and valuable clothes. He further says that he wrote some letters to his wife soon thereafter, but he did not receive any reply from her. But this was denied by the respondent; and there is nothing except his word for this. This is a remarkable story. If his wife had left him when nobody was present in the house, he would not have taken it so philosophically as he asks us to believe. On his own showing, he went to Poona only two or three months thereafter. He does not even tell us what was the message that she left with the maid-servant. The maid-servant was not examined. Neither his father nor his mother nor his sister were put in the witness-box. When three witnesses, the respondent, her father and a friend of her father, definitely gave evidence that the appellant's parents were approached and that they gave their consent, it was the duty of the appellant to examine them. No doubt some sort of explanation was given that the father was in Japan, but none in respect of his mother or the maid-servant. When the burden was upon the appellant to establish desertion, it is strange indeed that he should have thought fit to keep back the best evidence from the witnessbox. When the respondent and her father

depose that: they took the consent of the appellant's parents and if the parents of the appellant did not choose to come to the witness-box to deny it, a court ordinarily should accept the evidence of the father and the daughter unless their evidence is ex facie unnatural or -inherently improbable. But that cannot be said in this case, for what the respondent's father is said to have done is the most natural in the circumstances. It is said that the City Civil. Judge had seen the respondent's father, Manganmal and the respondent in the witness-box and he did not accent their evidence and that, therefore, the High Court should not have taken a different view. On this aspect of the case, after considering the evidence of the witnesses, the High Court says thus "The parents of the petitioner were available to give evidence in this case. but they have not been examined: nor has any explanation been given why the maidservant with whom a message was left by the opponent when she left the house, has not been examined in the case. We are left in this case with the two diametrically opposite version of the two interested parties:..... Having regard to these circumstances, we are of the view that the departure of the opponent from the house of the petitioner was, if not with his express permission, with his consent and full knowledge though such consent was given on account, of Some exasperation on his part."

I entirely agree with this view. It is consistent with the evidence given by the respondent's witnesses and also with the circumstances of the case and subsequent conduct of the parties. The appellant and his parents must have given the consent, though not willingly, either because of the importunities of the respondent's father or because of, the social pressure put oft them through the intervention of a respectable outsider. But they did not like the respondent's parents and therefore they did not like the respondent going to their house. It was a permission reluctantly given and she was afraid that it would be wit& draw.-Li. That is why there was no correspondence between the couple during all the days she was staying at Poona and she did not even meet the appellant or his parents when she was boarding the ship at Bombay. I would therefore, bold that the respondent left her matrimonial home with the permission of the appellant and his parents for the purpose of staying with her father at Poona and thereafter to leave for foreign countries for short stay to recoup her health. Strong reliance is placed upon an incident that is alleged to have taken place in May 1954. According to the appellant, he and his friend, Dr. Lulla, went to Poona to persuade her to come back to his house, but she definitely told, them that she would never return to his house. It is said that this incident would show that she had decided to leave him permanently. In the petition this May incident was not specifically 'mentioned nor was it stated that it afforded a cause of action. There was no mention of the appellant and his friend Dr. Lulla going to her and her, stating to them that she would never return to his house. Before the High Court the learned counsel appearing for the appellant did not seek to rely upon this meeting 2nd the reply alleged to have been given by the respondent as furnishing a cause of action for founding a claim for relief of judicial separation. This incident was relied upon: only in support of the appellant's case that the respondent, was intransigent throughout and was unwilling to go back: to the petitioner. Indeed, the learned counsel appears to admit that the evidence of the appellant and Dr. Lulla was not clear as to what was the precise question asked and what was the exact answer given by the respondent. It would, therefore, be seen that this incident did not loom large either in the pleadings or in the arguments before the High Court. But it became a sheet-anchor of the appellant's case before us. Let me, therefore, consider this aspect of the case in some detail.

The appellant says in his evidence that he went to Poona along with Dr. Lulla towards the end of May 1954, that he saw the respondent at Poona and inquired of her to why she left his house secretly and that she told him that she had decided not to come back to him. This is interested evidence and is inconsistent with my finding that she left his house with his consent as well as with the consent of his

parents. His evidence is supported by the evidence of Dr. Lulla. But the respondent contradicts this evidence. She denies the incident altogether. She is also A interested witness. Dr. Lulla, as D.W.3, says that he went to Poona along with the appellant, that the appellant tiled to persuade the respondent to come back to him, that thereafter he also tried to persuade her to come back to the appellant, but she told them both that she had made up her mind not to go back for ever. He is a doctor with a fairly good practice and a friend of the appellant. But his crossexamination discloses that he did not ask the respondent why she left the appellant, that he was with the respondent at Poona only for a few minutes, that he could not recollect what the appellant told the respondent actually and that she only stated that she was not prepared to come back to the appellant for ever. It also shows that they went to Poona without any intimation, that they had decided to meet her alone, that they thought that they could persuade her in a few minutes' time to come back to the appellant, and that, therefore, when they' left for Poona they did not make any arrangements for the next day, for they expected to return back by the midnight train. This evidence is attacked on many grounds. It is said that Dr. Lulla is a friend of the appellant and, therefore, he went to him in getting rid of his wife as the appellant was not happy with her. It is pointed out that if this incident had happened, this would have been mentioned in the earlier correspondence, in the notice issued and in the plaint filed. It is also argued that his entire evidence was artificial and appears to be improvised for the occasion, for the way he went about the business appears to be very casual. It is asked whether Dr. Lulla, who was going on a serious attempt of reconciliation, would go to Poona without the appellant informing the respondent or her father that they were coming if his intention was to meet her alone, how did he expect that her parents would not be there when he went? And how did he also think that the estrangement that was prolonged could have been put an end to in a few minutes? If he was serious about it as he pretends he was, he would have gone there with preparations for a stay of one or two days after making necessary arrangements in respect of his professional work. There is much to be said for this argument. I have come across in my experience highly respected persons lying, in the witness-box to help a friend or save one from a trouble. But the City Civil Judge accepted his evidence. The High Court says about his evidence thus:

"The learned trial judge appears to have been considerably impressed by the testimony of Dr. Lulla. He regarded Dr. Lulla as an independent person who was not likely 'to tell an untruth to support the case of the petitioner. The learned judge also took the view, having regard to the contradictory statements made by the opponent in her evidence that the testimony of the opponent was not reliable. Sitting in appeal it will be difficult or us to ignore the appreciation of evidence by the learned trial judge. It must, however, be observed that Dr. Lulla was deposing to an incident which took place about three years prior to the date on which he gave evidence, and he did not claim to remember the exact words in which the conversation took place between the petitioner and the opponent or between the petitioner and himself. Dr. Jethmqlani, who appears on behalf of the petitioner, does not seek to rely upon this meeting and the replies alleged to have been given by the opponent as furnishing a cause of action for founding a claim to relief for judicial separation. .. .. in the absence of evidence as to what precisely were the questions put to and the answers given by the opponent, it is difficult to hold, even on the view that there was in the month of May 1954 a meeting between the petitioner and Dr. Lulla on the one hand and the opponent on the other as alleged by the petitioner, that the opponent had in unmistakable terms informed the petitioner and Dr. Lulla that she had no desire to return at any time to the matrimonial home."

This finding appears to me to be couched in euphemistic terms. Though the learned judges were not inclined to disturb the finding of the learned trial judge that Dr. Lulla met the respondent along

with the appellant, they were not willing to accept his evidence that she told them that she would not return to the matrimonial home for ever. I feel a real doubt whether the appellant and Dr. Lulla met the respondent at all. But let me assume for the purpose of this case, as the High Court was inclined to assume, that they went there. But Dr. Lulla admits in his evidence that he did not remember the exact words used by the respondent in speaking to the appellant; if so, he could not have also remembered the exact words used by her in answering the appellant's question. Afterall the emphasis is on the solitary word "ever". The witness was speaking to an incident that took place about 3 years before he gave evidence and in respect of a conversation that took place for a few minutes. It is not advisable to rely upon his memory in regard to the words alleged to have been used by the respondent, particularly when he comes to give evidence on behalf of a friend when the tendency would be to give the necessary twist to a conversion of which one could not remember the exact words. The High Court as Well as the learned Advocate, who appeared for the appellant in the High Court, did not, rightly, rely upon the phraseology used in the alleged conversation between the appellant and the respondent. Even if the incident had taken place, it fits in with my earlier finding, namely, -that the respondent's father had taken the permission of the appellant's parents, though given with reluctance. The appellant might have had second thoughts and intended to go back on the consent and to persuade the respondent to come back to his home and not leave India. With that intention he might have taken his friend Dr. Lulla to Poona, where the respondent was living. She might have refused to return as the appellant was going back on his consent. She must have been obviously very angry and must have curtly refused to come back. Even if she had used the word "ever"-which I believe is only a gloss added to her statement intentionally or by lapse of memory-it must have been said in a huff. If every statement made by a spouse in a huff in a short conversation with her husband were taken in its face value, many a home would be broken. I cannot, therefore, give any value to the evidence of Dr. Lulla. I would hold that it is very doubtful whether this incident had taken place, that even if it did, the evidence given by Dr. Lulla could not be taken to be a reproduction of the actual words used by the respondent, and that, even if she had used those words, it was only a statement made in a huff in a short interview and could not be taken as a final word on the subject as to compel a court to hold that she deserted her husband without reasonable cause.

Some emphasis is also made on her conduct in not meeting her husband or his.parents when she came to Bombay to board the ship and also on her not giving her husband's house as the address in the relevant papers prepared for the journey. It was argued that the place where she was staying at Bombay was very near to that of her husband and it is unthinkable that she would not have gone there, if she was going abroad with permission, to see her husband or his parents or her child. This argument misses the real point. Here we are considering the case of a wife who was ill-treated in her husband's house and who, at the instance of her father and his friend, got reluctant permission from her husband and parents-in-law and if Dr. Lulla's evidence were true, the appellant went back on his consent and was trying to prevent her from going with her father. In such a situation it is impossible to expect an unfortunate woman like the respondent to create more unpleasantness to herself by going to her husband's house before departure and to take the risk of spoiling her planned holiday. The fact that her husband's address was not given in the relevant travel papers could not be attributed to her, for they must have been prepared in usual course at the instance of the gentleman who was helping them in that regard. If once it was accepted that she deserted her husband permanently, these circumstances may have relevance, but once it was conceded that she was going with the permission of her husband, though unwillingly given, this conduct would fall in a piece with the respondent's case. I would, therefore, not give much value to such circumstances in the situation in which the respondent

was placed. The respondent left Bombay on July 7, 1954, for the Far East with her father. Much was made about her leaving India with her father. IF she had eloped with a stranger, no doubt that would be a different matter. But here a father was taking his daughter to give her a holiday so that she may improve her health. By taking her away for short time from the oppressive surroundings which affected her health,I do not see any justification for the comment that she had deserted her husband. It must also be remembered that the respondent's father was not living with his family in the Far East. His wife and children have all along been in India. He was taking the respondent only for a temporary sojourn; and what is wrong in a father taking his daughter for a holiday in those circumstances ? If he had taken the appellant's or his parents' consent, it was not suggested that there was anything wrong in her so going. If lie or his daughter did not take such a consent, it might be an improper or an inadvisable thing to do. But such a conduct in the case of a wife leaving with her father temporarily to a foreign country as an escape from an oppressive atmosphere cannot be described as reprehensible even by a Hindu society; much less can it be treated as a desertion. It was a natural reaction to an extraordinary situation. She might have known that her conduct would anger her husband, but she would not have thought that it would be a permanent obstacle in their relationship. Be it as it may, I have already found that she left with her father with the consent of the appellant and his father, and that even if the appellant subsequently retracted from his consent, her departure might be only improper, but could not conceivably amount to legal desertion.

Till now I was considering only the oral evidence. But hereafter we come across unimpeachable documentary evidence which shows the attitude of the couple to each other. I shall proceed to consider the documentary evidence on the assumption favourable to the appellant, namely, that he, along with Dr. Lulla, went to Poona in May 1954, retracted his permission given earlier, and persuaded her to come back to the matrimonial home, but she refused to do so and left with her father for foreign Countries.

I am definitely of the view that in -,he circumstances narrated above the exact words used by her could not be field to have been proved by the vague oral evidence of Dr. Lulla and that, even if she had expressed herself strongly in a buff, such expression could not in the circumstances be considered to be decisive of her determination to leave the matrimonial home for ever. She left for the Far East on July 7, 1954. Within a fortnight from that date, on July 20, 1954, the appellant gave a cable to the respondent to the following effect "Extremely surprised at your suddenly secretly leaving India without my knowledge and consent return immediately first plane."

On July 22/23, 1954, as soon as the respondent received the cable from the appellant, she gave a cable in reply thus "Returning within few months".

On July 24, 1954, the appellant gave another cable to the respondent to the following effect :

"You must return immediately."

Pausing here for a moment, let me recapitulate the position. If the respondent definitely told the appellant and Dr. Lulla that she bad given him up and that she would not return to the matrimonial home, why did the appellant send a cable telling her that he was surprised at her secretly leaving India and asking her to return immediately? And why did she reply that she would return in a few months?. The cable given by the appellant is more consistent with the fact that neither of them understood that she had left him for ever. Indeed, the cable reflected his anger on her departure along with her father, because, though permission was given earlier, he did not like her to go. Whatever ambiguity there may be, her immediate reply was inconsistent with her determination to leave him for ever, unless

we assume, as we are asked to do, that the cable 'was a link in the chain of the plan conceived by her and her father to resist an action that might be taken by the. husband in a court of law. In July 1954 what was the action which the appellant could have taken and what was the defence, if such an action was taken, that could be sustained on the basis of this cable? At that time the Act was not passed. The Act was passed in 1955 and came into force on May 18, 1955. Therefore, the only action which the husband could have taken 'Linder the law, as it then stood, was to file a suit for restitution of conjugal rights, and this cable could not possibly be a defence against such an action. If she wanted to join him again she could have submitted to the decree. The Bombay Hindu Divorce Act, 1947, may not have any extra-territorial operation. Even if it has, four years of desertion had to run out before she could be divorced; and there was no particular urgency for her to create any eviedence at that stage. To may this cable is destructive of tile case of the appellant that she left him for ever. His reply cable also is only consistent with the fact that there was no break between them.

Now, I come to a letter dated August 2, 1954, over which there is some controversy, the appellant alleging that it was a forged one and the respondent stating that it was ,a draft of the letter she sent to her husband. It reads " My dear husband, Darling I received your two telegrams, copies of which enclosed herewith.

I immediately cabled you that I shall be returning within few months, however I really feel surprised why you want me return to Bombay by first plane without any reason.

Dear I was particularly pained to read that I have suddenly and secretely left the place without your consent. What has prompted you to write this I really don't understand. Dear how came this change. You know I was not keeping good health and considerably gone down in spirit and weight for reasons which I (10 not like to discuss here since you are fully aware of it. It was you who suggested that I should go over and stay at my father's place and it was at your suggestion that I did so.

You were fully aware that I was accompanying my father to Singapore for a few months for a change and you gave consent As soon as I feel better I shall return to Bombay.

1 hope yourself, Ashok and all the other family members are 0. K. Give my loves to Ashok and Best regards to Mother and Father. Yours forever, Meena."

The respondent, in her examination-in-chief, says:-

"I had written a letter dated 2nd August 1954 to my husband, a copy whereof has been preserved by me, I produce the copy of the letter dated 2nd August 1954."

That was not objected to and the copy of the letter was put in and marked as Ex. No. 4. In the cross-examination there is some confusion, but she broadly stated that her father dictated to her the letter, that the said letter was typed, that she copied from that typed letter and that Ex. 4 is that typed letter. The father in his cross-examination, deposes that the respondent had written a letter dated August 2, 1954, to the appellant, that he had a draft of that letter and the same was written after consulting him. The appellant denied that he received that letter. The learned City Civil Judge found thus :-

"I am not prepared to hold that the copy letter Ex. 4 was fabricated subsequently, because there are references to the letter dated 2-8-1954 in subsequent letters addressed by the respondent to the petitioner."

But he held that the appellant did not receive such a letter. The trial Court held that the letter not being a copy of what was written the respondent to the appellant, it could not be regarded is a secondary

evidence of the contents of the letter. But the High Court pointed out that it was not the case of the respondent that it was a secondary evidence of the contents of the letter written by her, but her case was that the text of Ex. 4 and the letter written to the appellant was the same; and in support of her case she produced the letter from which she had copied out the letter she had addressed to the appellant. Both the Courts, therefore, held that Ex. 4 was the typed letter from which the respondent drafted her letter to her husband. Undoubtedly, Ex. 4 cannot be a secondary evidence of the letter written by the respondent to her husband, but it certainly corroborates her oral evidence that she wrote a letter with similar recitals contained in Ex. 4 to her hus-

band on the date Ex. 4 bears. As pointed out by the learned City Civil Judge as well as by the High Court, the subsequent letters written by her clearly demonstrate that Ex. 4 could not have been fabricated subsequently and a letter must have been written by her on August 2, 1954. In view of the concurrent findings of fact, I do not think it is necessary to consider the evidence over again. I accept the concurrent findings that a letter dated August 2, 1954, with contents similiar to those in Ex. 4 was written by the respondent to her husband.

It is contended that the said letter was written at the instance of the father and on his dictation to furnish evidence in an action that might be brought by the appellant against there spondent. Let me first take the comment,VI . Z., would a wife write a letter to her husband in consultation with her father? Ordinarily in the case of married couples it is true that a wife would not write letters to her husband after consulting her father. But the circumstances under which the respondent wrote letter were not ordinary ones. Here, there was trouble between the husband and wife. The husband, according to the respondent, gave his consent, though reluctantly, for her to leave with her father to the Far East, but soon there-after gave two cables asking her to return immediately. Naturally she would tell that fact to her father and seek his advice in the matter ofreplying to her husband. There is nothing wrong in her father helping her to send a suitable reply, so that the husband may not be offended. The second comment, namely, that this 'letter was intended to be a shield against a possible action by the appellant, is devoid of merits. At the time the letter was written the Act had not come into force and this letter could not have been an answer to a possible action the husband might take for restitution of conjugal rights. There was no particular urgency for her to create evidence on that date against a possible action under the Bombay Act, even if it applied to her. This letter demonstrates beyond any reasonable doubt that the wife did not desert her husband with the requisite animus, but, on the other hand, shows her willingness to go over to Bombay as soon as she regained her health. To this letter no reply was sent by the appellant and he says in his evidence that he did not receive the said letter. It is very difficult to believe Ms statement. He is obviously denying the receipt of this .letter a,,; it establishes that she had not the animus to desert him. On February 24, 1955, he again gave a cable in the following terms --

"Since your secret departure you not replying my telegrams letters myself shocked you wandering different countries leading reckless life spoiling my reputation your most disgraceful behaviour ruining my life."

This cable contains incorrect statements. Whether he received the letter dated August 2, 1954, or not, admittedly he had received the cable given by her. I have already held that he must have received the letter dated August 2, 1954. He imputes to her in this cable reckless life and disgraceful behaviour. Where did he get this information that she was leading a bad life? In his evidence he does not say that she was leading any disgraceful life. There is nothing on the record to show that the respondent was leading a bad life, and indeed the appellant admits that she was not even leading a fast one, she never

danced, played cards or drank, at any rate, according to the appellant, from the year 1947. This cable must have irritated any respectable woman. Yet on February 26, 1955, she gave the following cable :-.

"Your allegation,% in your cable dated twenty fourth not correct cannot understand your attitude stop I have departed with your knowledge with my father because of falling health due to reasons you are well aware stop keeping quiet life with my parents stop have not received your letter only telegrams which have been replied by cable and letter."

This reply is in subdued terms and it shows her respectable attitude towards the appellant inspite of his provocation. Therein she denies his wild accusations and restates that she went with her father with his consent and that she had replied to Ms cables by cables as well as by letter. On March 4, 1955, the appellant gave another cable to hercharging her with fabricating false stories. On March 3, 1955, before the respondent received the above cable, she wrote a letter to the appellant giving a detailed reply to his cables. Therein she denied that she was leading any reck-

26-2 S.C. India/64 less life and told him that she was either with her father or uncle and also that she did not receive any letters from him. Then she proceeded to state :-

You know darling I being away from the people who despise me, I have improved my health considerably, I wish you could come and meet me her outside that suspicious atmosphere and you will know the real pleasure. I am very lonely without you and my son Ashok who is always with me in my sleep. I long to see both of you and therefore I beg to come out here.. Please do come and do not disappoint me. You know in your heart that I love you so much. This trip outside India will make you good and we shall have a very happy life. You are working so hard for your parents and never think of me and your health which as I know is deteriorating and I also know that you are not happy. Darling, I assure you that this change for few months will improve your health considerably. You need good rest to think on all your problems of daily life which you can do only along and outside the influence of the people who are around you. I hope you will understand and at least come out here for a change-for a short period. I shall do what you want me to do, but please, darling, do come; Please give my Charanawandana to father and mother and love to Ashok."

This letter is criticized on the ground that it was another attempt to create evidence at the instance of her father and also on the ground that she asked her husband to come away from his parents. To me this letter appears to be an honest attempt on the part of the wife to reconcile with her husband. It mentions his troubles and requests him to come over the East not for any permanent stay but only as a temporary sojourn to recoup his health and to enjoy a holiday along with her. As I have already stated, by that time the Act was not passed and therefore this letter could not have been written to set up any defence against any possible action by the husband. I find it very difficult to see any sinister motive in this well meant reply to her husband, and particularly after his cable attributing to her reckless life. After dispatching this letter she received a cable dated March 4, 1955, wherein the appellant attributed to her the conduct of fabricating false stories. To that cable she sent a reply cable on March 10, 1955, denying the said allegation and telling him that somebody was wrecking their lives and asking him to come over to Hongkong. On April 2, 1955, the appellant wrote a long letter to the respondent in reply to her letter dated March 3, 1955. Therein he chastised her for making insinuations against his parents, who had done much for her welfare and happiness. Emphasizing upon the word "pleasure" in her letter dated March 3, 1955, he proceeded to state :-

"'Pleasure'! that, indeed, is the crux of the whole problem. It is your perverted funny notions of pleasure giving vent to your past and present associations, both in India and abroad, that are the root cause of all your evil and irrational deeds."

Pursuing the same idea, he observed:-

"Just remember my efforts all these years to improve you and make you a happy and contented wife. It is a wonder that you find pleasure in leaving home, leaving your husband, wandering from country to country, leading reckless life under the guise of being in the company of your relations and uncles whom you find readily available at every port. And you have gone so far in this direction, that you find yourself unable to break your past links and get out of the muddle created by you and seek pleasure and happiness in your own home by being a faithful and devoted wife."

He did not stop with that, but proceeded to state "....you have proceeded to Hongkong and other places, in defiance of my clear instruction to return And, in order to cloak all these evil things you are now inventing dirty excuses, evidently meant for the consumption of the outside world whom you want to fool, so that you may be able to justify your disgraceful conduct and continue to live your life of "pleasure" without let or hindrance."

What is more, he told her that in her letters she had fabricated false and malicious stories to cover up her outrageous conduct for misleading the outside world. He finally ended with the following words expressing his determination to ignore her further correspondence:-

"However, if you still choose to fling further filth in my face by writing to me such letters and telegrams, I shall have no choice but to ignore and make no reply to the same. Inspite of all my efforts, you have completely deserted me and chosen the path of pleasure and per-version at any cost. You are only looking for same cloak to cover your guilt and continue to live your life of degradation with impunity. I refuse to furnish you with that cloak and I refuse to be drawn in your game."

There is considerable argument on the import of this letter. On behalf of the appellant it is contented that the contents of this letter were nothing more than an emotional outburst of a deserted husband and that the words used therein should not be understood literally. It is argued on behalf of the respondent that this letter did not mince matters in attributing infidelity and unchastity to the respondent and it communicated a final determination on his part not to have anything to do with her. The former argument was accepted by the City Civil Court, but the latter contention had the approval of the High Court. Shah, J., after reading the relevant portions of the document, came to the following conclusion:-

Whatever may be the protestations made by the petitioner in his evidence before the Court, it is impossible to accede to the contention of Mr. Jethmalani that his letter was merely the outpouring of an anguished heart. The letter in no unmistakable terms charges the opponent with infidelity not occasional but a persistent and chosen life of infidelity-and also charges with inventing a scheme whereby she may be able to live that life of infidelity under an appearance of being respectfuly married. If after this letter the opponent was unwilling to carry out the petitioner's direction and to forthwith go and live with him, in our judgment, no fault can be found with her."

Deasi, J., in his separate judgment wholly agreed with Shah, J. Theappellant is a graduate and it cannot be said that he does not know English. The terms of the letter indicate that his standard of English is rather high and he has sufficient vocabulary at Ms command. It is not necessary to cover the ground overagain, as I entirely agree with the construction laced upon that letter by Shah and Deasi, JJ. The expressions "outrageous conduct" reckless life", "wild ventures", disgustful conduct", "life of pleasure",

"past links", "relations readily available at every port" and such others found in the letter leave no room to doubt that the said expressions were intended to impute an immoral and dissipated life to her. Whether he used those words really believeing that. she was such a bad woman or whether he used the wild language because he was angry that she went with her father need not be speculated upon. What matters is that he designedly couched his letter without leaving any room for doubt in clear and precise phraseology and told her that she was a bad woman and, therefore, he had nothing more to do with her. To such an outrageous letter, how did the respondent react? She must have been extremely offended as any self-respecting woman would be. But she controlled herself and replied to him by letter dated April 12, 1955 in a subdued and dignified manner. After repeating that the appellant and his parents gave her consent to leave with her father, she again repeated that she left with her father to improve her health. She told him that her health improved a little and that she would return to him and to her son after sometime. Adverting to his fulminations in his letter she said :

"I find it unnecessary to reply to the other unfounded accusations contained in your letter because I know and I am sure that the basis of the same are your hallucinations, of what I am not. I deny your charges all over again and you know that they are not true. I believe that the best way is to ignore them since they are not based on truth."

She ended her letter thus :

"Please do not indulge in misgivings. As soon as my health has completely improved, I shall of course, come back home to you and to our son. "

This letter shows that she was very much offended and she was also sorry. She told him in mild words that all his accusations were false and requested him not to indulge in such things. She promised to come as soon as her health improved. Here the arguments advanced by learned counsel for the appellant may be noticed.

Firstly, the usual argument, namely, that this letter was written to the dictation of her father as a shield against a possible action by the appellant, is repeated ; and secondly, this letter indicates that the false accusations made by her husband did not so operate on her mind as to induce her to give up her idea of coming back to him. The first argument calls for the same answer, which I have given in the context of other correspondence. There is nothing wrong in the respondent consulting her father, who any day was more affectionate to her than the appellant could possibly have been. There is no point in the second contention. This letter clearly shows that she was highly offended by the false accusations ; but she replied in a dignified manner asking him neither to make nor to believe such accusations. She should be unusual woman if she was not offended by this letter. This reply reflects more her selfcontrol than her indifference or insensitiveness. This letter, read along with the letter written by the appellant on April 2, 1955, demonstrates that she was always ready and willing to come back to him inspite of his accusations. Some comment is made on the basis of the answers she gave in her evidence in regard to the manner she got the contents explained to her. Those answers were given in the stress of cross-examination. Those could not possibly detract from the admitted facts that she received the said letter and gave her reply. The letter and her answers speak for themselves. The ingenuity of the cross-examining counsel could not add to or detract from either. So far as the letters go, they proved beyond reasonable doubt that however inadvisable it may be for the respondent to go to the Far East with her father, she had not the least intention of leaving her husband permanently. She was always ready and willing to go back to her husband.

On April 8, 1956, the respondent returned to India. The appellant's complaint is that she did not inform him that she was coming and that she did not come to his house. The contention on behalf of the respondent is that after she received the letter dated April 2, 1955, she was highly offended and that, therefore, she expected some step on the part of her husband to meet her or send somebody to take her to his home. In her evidence she says that after she arrived in India, her father spoke to two or three persons for rapprochement and one of them was Kishinchand of Messers. J. Kimatrai and Kundanmal and that her father told her that Kishinchand had a talk with the appellant, but the latter refused to take her back. She adds that after her return no efforts were made either by her husband or on his behalf or by his parents to call her back to his house and she thought that somebody would be sent by her husband to fetch her from Poona to Bombay according to the custom. The appellant admits in his evidence that sometime in the month of May or June 1955 he came to know that the Tespondent had returned to India. Assuming that he was speaking the truth, it is clear from the evidence that he knew of her return about a month after she returned, but presumably he was standing on his rights and prestige and did not move in the matter. It is suggested to her that instead of going to her husband's house, in April 1956 she went to Kashmir for a holiday. She admits that she went, but explains that her father's brother's children had holidays and as they proceeded to Kashmir, she also accompanied them. I do not see any bearing of this Kashmir trip on the question of desertion. If she was waiting for an invitation to go to her husband's place there is nothing wrong in her accompanying the children to Kashmir. The respondent's father says that about 2 months after their arrival in India, he waited for an invitation from the appellant, but as he did not move in the matter, he met one or two friends of his to bring about a rapprochement between the couple, but they could not do anything in the matter. There is nothing unnatural in the father making the said attempts to bring about reconciliation between the couple. There is no reason to reject his evidence in this regard. I shall assume that no mediators were sent by the respondent's father to, bring about a rapprochement between the couple. Even so, after the letter dated April 2, 1955 the husband, who knew that the respondent had come to India, should have taken some steps directly or indirectly to induce her to come to his house. If he stood on his prestige, the respondent could not be blamed, if after the rebuffs she received and the adment attitude of the appellant communicated to her in the said letter, she did not take the first step. In this context another circumstance may also be noticed. The respondent and also her father say that in November 1955, a sister of the appellant was married but no invitation was sent to the respondent. The respondent says that this fact also made her to apprehend that she would not be received if she straightaway went to the appellant's house. In the circumstances if she did not directly on landing in India go to her husband's house but waited for an invitation from him, I cannot say that her attitude was either unreasonable or that it should be attributed to her final determination to desert her husband. On this aspect of the case, Shah, J., observed in his judgment :

"The conduct of the opponent in not meeting her son after she returned to India may appear to be unnatural, but, if after receiving a highly offensive letter from the petitioner, she did not take an initiative to return to the matrimonial home and waited for some invitation from, or from some amends on the part of, the petitioner, that conduct may not be regarded as improbable or justifying an' inference that she was seeking to continue the state of desertion which had previously started."

I am in entire agreement with these observations. On the other hand the conduct of the appellant is telltale and reflects his determination to discard her. According to him he came to know that the respondent came to India in April or May 1956, but a few days thereafter instead of inviting her to come, he went to a lawyer for consultation and thereafter filed the petition for judicial separation in

September 1956. It is manifest that he was waiting for the statutory time to run out and soon thereafter he rushed to the Court. The respondent, who obviously did not know the passing of the Act, fell into his trap.

Pausing here, let me summarize the facts. The respondent belongs to a fairly rich family. She must have been brought up in comfort and with love and affection. She was not highly educated ; she has read, we are told, upto sixth standard. She was married to the appellant, who belongs to a well-to-do family. The appellant is an M.B.B.S. and has been carrying on the profession of a doctor in Bombay. After the marriage, the respondent came to live in the joint family house of the appellant in 1947. There were misunderstanding between the parents of the respondent and the appellant and the latter's sisters. The respondent was ill-treated, insulted and was not even allowed to look after her only child. The husband, for one reason or other, either because of his respect for his parents or because of his weakness or because of both, though at the beginning he was affectionate to his wife, was not able to stand up for her and later on he fell in line with his parents and sisters and began to ill-treat her. Though in the earlier years she was allowed to go to her parents' house now and then, later on the appellant and his parents refused her permission to go to her parents' house or allowed her to do so once in a while with great reluctance, when her father, on one of his infrequent visits, was in India. She was not even permitted to go when her uncle died. The appellant also contemplated a second marriage, but, for one reason or other, it did not come off. By the year 1954 she was in a nervous strain and necessarily that must have affected her health. Her father, who came to India at the end of 1953, heard her complaints and saw her physical and mental condition. He did what a loving father should do in the circumstances. Giving up the ideas of false prestige, he approached the parents of the appellant directly and through a friend and persuaded them to permit the respondent to go to his house and thereafter to the Far East with him for a short stay to recoup her health. The respondent also took the permission of her husband. After some time, the husband I am assuming that his version of the visit along with Dr. Lulla, to Poona was true-changed his mind and asked her to come back, but she refused to come back. From her standpoint she obviously did not like her husband going back on his word and disturbing her planned holiday, to which she was looking forward. From the standpoint of the husband, he was angry because as, a Hindu husband he expected his wife to obey him whether his demand was reasonable or not. The wife, perhaps' did not tell him the day when she would be leaving with her father to the Far East. She must have been afraid that he would prevent her somehow from going abroad. That explains her conduct in not seeing him or his parents at Bombay before she boarded the ship. The subsequent correspondence shows that the appellant was telling her from his commanding position that she should give up her holiday and come back to him immediately and she, on her part, was persuading him in a subdued tone to permit her to stay for a few months and promising to come back thereafter. The letter dated April 2, 1955, was an unexpected and unmerited blow to her. Therein she was charged with unchastity and leading a fast and reckless life. Even a Hindu wife would be enraged and insulted by such dastardly conduct on the part of her husband. Even so she sent a reply couched in a dignified and controlled language denying his allegations and stating that she would return in a few months. She was not even invited by the appellant when his sister was married in November 1955. She therefore, came back to India only in April 1956. In view of the serious allegations made by the appellant in his letter dated April 2, 1954, and in view of his determined attitude disclosed therein, she naturally and properly expected that the husband would invite her or send somebody to take her back to his home. Instead of doing so, though he knew that the respondent had come to India, he did not make any attempt to invite her or send a relation to bring her to his home as he used to do on previous occasions when she went to her father's house. By that time as the Act came into force, he

found his opportunity for which he was waiting and took advantage of the situation. As the statutory period of two years had expired from the date she left India, he rushed to the Court. On these facts, I have no doubt that the appellant failed to establish that the respondent deserted him without any reasonable cause. Even if she deserted him within the meaning of s. 10 of the Act, I would hold that by writing the letter dated April 2, 1955, she ceased to be in desertion from that date. A fair reading of that letter, read in the context of her offer to return within a few months, shows beyond any doubt that he closed the door for her return long before the statutory period had expired. When the respondent wrote to the appellant telling him that she would come in a few months, he wrote to her saying that she was leading an immoral life and that he would no longer be "drawn into her game." Even after that letter, she wrote back denying his charges and promising to come as soon as her health improved. I have no doubt that, at any rate from April 2, 1955, the desertion, if any, on the part of the respondent, came to an end and from that date the appellant was guilty of desertion.

For the aforesaid reasons, I agree with the conclusion arrived at by the High Court. The appeal deserves to be dismissed and I accordingly dismiss it with costs.

ORDER OF COURT In accordance with the majority opinion, the appeal is allowed with costs here and in the High Court.

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BIPIN CHANDER JAISINGHBHAI SHAH VS PRABHAWATI

Equivalent Citations: 1956 Scr 838
Date of Judgment: 19/10/1956

1957 AIR 176

Bipin Chander Jaisinghbhai Shah
Vs.
Prabhawati.

Bench: Hon'ble Mr. Justice Bhuvneshwar P. Sinha, Hon'ble Mr. Justice B. Jagannadhadas & Hon'ble Mr. Justice T.L. Venkatarama Aiyyar

HMA-section 13- divorce- ground of desertion - For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely

(1) the factum of separation, and

(2) the intention to bring cohabitation permanently to an end (animus deserendi).

Similarly two elements are essential so far as the deserted spouse is concerned:

(1) the absence of consent, and

(2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively....

Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus deserendi coincide in point of time.

JUDGMENT

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 247 of 1953. Appeal by special leave from the judgment and decree dated August 22, 1952 of the Bombay High Court in Appeal No. 66 of 1952 arising out of the decree dated March 7, 1952 of Bombay High Court in its Ordinary Original Civil Jurisdiction in Suit No. 1177 of 1951.

M. C. Setalvad, Attorney-General for India, Purshottam Tricumdas, T. Godiwala, J. B. Dadachanji, Rameshwar Nath and S. N. Andley, for the appellant.

C. K. Daphtary, Solicitor-General of India and Sardar Bahadur, for the respondent.

1956, October 19. The Judgment of the Court was delivered by

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

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 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.

6 [1955] A.C. 402. 417.

7 [1939] A C. 417, 420.

The next event of importance in this narrative is the plaintiff's solicitor's letter of July 15, 1947, addressed to the defendant, care of her father at Jalgaon. The defendant's cousin's marriage was performed towards the end of June and she could have come back to her husband's place, soon thereafter' Her evidence is that after the marriage had been performed she was making preparations to go back to Bombay but her father detained her and asked her to await a letter from the plaintiff. The defendant instead of getting an invitation from the plaintiff to come back to the marital home received the solicitor's letter aforesaid, which, to say the least, was not calculated to bring the parties nearer. The letter is in these terms:-

"Madam, Under instructions from our client Bipin Chandra J. Shah we have to address you as under:-

That you were married to our client in or about April 1942 at Patan. Since the marriage you and our client lived together mostly in Bombay and son by name Kirit was born on or about the 10th day of September 1944.

Our client. states that he left for Europe in January last and returned by the end of May last. After our client's return, our client learnt that during our client's absence from India you developed intimacy with one Mahendra and you failed to give any satisfactory reply when questioned about the same and left for your parents under the pretext of attending to the marriage ceremony of your cousin. You have also taken the minor with you and since then you are residing with your father to evade any satisfactory explanation.

Our client states that under the events that have happened, our client has become entitled to obtain a divorce and our client does not desire to keep you any longer under his care and protection. Our client desires the minor to be kept by him and we are instructed to request you to send back the minor to our client or if necessary our client will send his agent to bring the minor to him. Our client further states that in any event it will be in the interest of the minor that he should stay with our client. Our client has made this inquiry about the minor to avoid any unpleasantness when our client's agent comes to receive the minor". The letter is remarkable in some respects,apart from antedating the birth of the son Kirit by a year. The letter does not in terms allege that the defendant was in desertion, apart from mentioning the fact that she had left against the plaintiff's wishes or that she had done so with the intention of permanently abandoning her marital duties. On the other hand, it alleges that "You are residing with your father to avoid any satisfactory explanation". The most important part of the letter is to the effect that the plaintiff had "become entitled to obtain a divorce" and that he "does not desire to keep you any longer under his care and protection". Thus if the solicitor's letter is any indication of the working of the mind of the plaintiff, it makes it clear that at that time the plaintiff did not believe that the defendant had been in desertion and that the plaintiff had positively come to the determination that he was no longer prepared to affirm the marriage relationship. As already indicated, one of the essential conditions for success in a suit for divorce grounded upon desertion is that the deserted spouse should have been willing to fulfill his or her part of the marital duties. The statement of the law in para 457 at p. 244 of Halsbury's Laws of England (3rd Edn. Vol 12) may be usefully quoted:

"The burden is on the petitioner to show that desertion without cause subsisted, throughout the statutory period. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole of the three year period. It has been said that a petitioner should be able honestly to say that he or she was all along willing to fulfill the duties of the marriage, and that the desertion was against his or her will, and continued throughout the statutory period without his or her consent; but in practice it is accepted that once desertion has been started by the fault of the deserting spouse, it is

no longer necessary for the deserted spouse to show that during the three years preceding the petition be or she actually wanted the other spouse to come back, for the intention to desert is presumed to continue. That presumption may, however, be rebutted". Applying those observations to the facts of the present case, can the plaintiff honestly say that be was all along willing to fulfill the duties of the marriage and that the defendant's desertion, if any, continued throughout the statutory period without his consent. The letter, Ex. A) is an emphatic no. In the first place, even the plaintiff in that letter did not allege any desertion and, secondly, he was not prepared to receive her back to the matrimonial home. Realising his difficulty when cross-examined as to the contents of that letter, he wished the court to believe that at the time the letter was written in his presence he was "in a confused state of mind" and did not remember exactly whether he noticed the sentence -that he did not desire to keep his wife any longer. Pressed fur- ther in cross-examination, he was very emphatic in his answer and stated:-

"It is not true that by the date of this letter I had made up my mind not to take her back. It was my hope that the letter might induce her parents to find out what had happened, and they would persuade her to come back. I am still in the confused state of mind that despite my repeated attempts my wife puts me off".

In our opinion, the contents of the letter could not thus be explained away by the plaintiff in the witness box. On the other hand, it shows that about seven weeks after the wife's departure for her father's place the plaintiff had at least for the time being convinced himself that the defendant was no more a suitable person to live with. That, as found by us, be was justified in this attitude by the reprehensible conduct of his wife during his absence is beside the point. This letter has an importance of its own only in so far as it does not corroborate the plaintiff's version that the defendant was in desertion and that the plaintiff was all along anxious to induce her to come back to him. This letter is more consistent with the supposition that the husband was very angry with her on account of her conduct as betrayed by the letter, Ex. E and that the wife left her husband's place in shame not having the courage to face him after that discovery. But that will not render her in the eye of the law a deserter, as observed by Pollock, M. R. in Bowron v. Bowron[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.

8 [1925] P. 187, 192.

9 3 Sw. & Tr. 350.

10 [1923] P. 18.

11 [1924] P. 19.

But it is not necessary that at the time the wife left her husband's home, she should have at the same time the animus deserendi. Let us therefore examine the question whether the defendant in this case, even if she had no such intention at the time she left Bombay, subsequently decided to put an end to the matrimonial tie. This is in consonance with the latest pronouncement of the Judicial Committee of the Privy Council in the case of Lang v. Lang[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

12 [1955] A.G. 402, 417.

of the talk between them. That the plaintiff's attachment for the defendant had not completely dried up is proved by the fact that when he came to know that she had been suffering from typhoid he went to Patan to see her. On this occasion which was the second visit the plaintiff does not say that he proposed to her to come back and that she refused to do so. He only says that she did not express any desire to come back. That may be explained as being due to diffidence on her part. But in respect of the first and the third visits the plaintiff states that on both those occasions he wanted her to come back but she refused. On the other hand, the defendant's version is that the purpose of his visit was only to take away the child and not to take her back to his home. It is also the plaintiff's complaint that the defendant never wrote any letter to him offering to come back. The wife's answer is that she did write a few letters before the solicitor's letter was received by the father and that thereafter under her father's advice she did not writeany more to the plaintiff. In this connection it becomes necessary to examine the evidence of her cousin Babulal and her father Popatlal. Her cousin, Babulal, who was a member of her father's joint family, deposes that on receipt of the letter, Ex. A, a fortnight later he and his father, since deceased, came to Bombay and saw the plaintiff. They expostulated with him and pleaded the defendant's cause and asked the plaintiff to forgive and forget and to take her back. The plaintiff's answer was that he did not wish to keep his wife. The defendant's father's evidence is to the effect that after receipt of the letter, Ex. A, he came to Bombay and saw the plaintiff's father at his residence and protested to him that "a false notice had been given to us". The plaintiff's father is said to have replied that they "would settle the matters amicably" He also deposes as to his brother and his brother's son having gone to the plaintiff. He further states that he with his wife and the defendant went to Patan and saw the plaintiff's mother and in consultation with her made arrangements to send her back to 'Bombay. But before that could be done the telegram, Ex. B, and the letter, Ex. D, were received and consequently he gave up the idea of sending the defendant to Bombay without straightening matters. Both these witnesses on behalf of the defendant further deposed to the defendant having done several times and stayed with the plaintiff's family, particularly his mother at Patan along with the boy. The evidence of these two witnesses on behalf of the defendant is ample corroboration of the defendant's ,case and the evidence in court that she has all along been ready and willing to go back to the matrimonial home. The learned trial Judge has not noticed this evidence and we have not the advantage of his comment on this corroborative evidence. This body of evidence is in consonance with the natural course of events. The plaintiff himself stated in the witness box that he had sent the solicitor's' letter by way of a shock treatment to the defendant's family so that they might persuade his wife to come back to his matrimonial home. The subsequent telegram and letters (assuming that both the letters of the 13th and 15th November had been posted in the usual course and received by the addressees) would give a shock to the family. Naturally thereafter the members of the family would be up and doing to see that a reconciliation is brought about between the husband and the wife. Hence the visits of the defendant's uncle and the father would be a natural conduct after they had been apprised of the rupture between them. We therefore do not see any sufficient reasons for brushing aside all that oral evidence which has been believed by the Lower Appellate Court and had not in terms been disbelieved by the trial court. This part of the case on behalf of the defendant and her evidence is corroborated by the evidence of the defendant's relatives aforesaid. It cannot be seriously argued that evidence should be disbelieved, because the witnesses happened to be the defendant's relatives. They were naturally the parties most interested in bringing about a reconciliation They were anxious not only for the welfare of the defendant but were also interested in the good name of the family and the community as is only natural in families like these which have not been so urbanised as to completely ignore the feelings of the community. They would therefore be the persons most

anxious in the interests of all the parties concerned to make efforts to bring the husband and the wife together and to put an end to a controversy which they con- sidered to be derogatory to the good name and, prestige of the families concerned. The plaintiff's evidence, on the other hand, on this part of the case is uncorroborated. Indeed his evidence stands uncorroborated in many parts of his case and the letters already discussed run counter to the tenor of his evidence in court. We therefore feel inclined to accept the defendant's case that after her leaving her husband's home and after the performance of her cousin's marriage she was ready and willing to go back to her husband. It, follows from what we have said so far that the wife was not in desertion though she left her husband's home without any fault on the part of the plaintiff which could justify her action in leaving him, and that after the lapse of a few months' stay at her father's place she was willing to go back to her matrimonial home. This conclusion is further supported by the fact that between 1948 and 1951 the defendant stayed with her mother- in-law at Patan whenever she was there, sometimes for months, at other times for weeks. This conduct is wholly inconsistent with the plaintiff's case that the defendant was in desertion during the four years that she was out of her matrimonial home. It is more consistent with the defen- dant's attempts to. get herself re-established in her husband's home after the rupture in May 1947 as aforesaid. It is also in evidence that at the suggestion of her mother- in-law the defendant sent her three year old son to Bombay so that be might induce his' ,father to send for the mother, The boy stayed in Bombay for about twenty days and then was brought. back to Patan by his father as he (the boy) was unwilling to stay there without the mother., This was in August_September 1948 when the defendant deposes to having questioned her husband why she bad not been called back and the husband's answer was evasive. Whether or not this statement of the defendant is true, there can be no doubt that the defendant would not have allowed her little boy of about three years of age to be sent alone to Bombay except in the hope that he might be instrumental in bringing about a reconciliation between the father and the mother. The defendant has deposed to the several efforts made by her mother-in-law and her father-in-law to intercede on her behalf with the plaintiff but without any result. There is no explanation why the plaintiff could not examine his father and mother in corroboration of his case of continuous desertion for the statutory period by the defendant. Their evidence would have been as valuable, if not more, as that of the defendant's father and cousin as discussed above. Thus it is not a case where evidence was not available in corroboration of the plaintiff's case. As the plaintiff's evidence on many important aspects of the case has remained uncorroborated by evidence which could be available to him, we must hold that the evidence given by the plaintiff falls short of proving his case of desertion by his wife. Though we do not find that the essential ingredients of desertion have been proved by the plaintiff, there cannot be the least doubt that it was the defendant who had by her objectionable conduct brought about a rupture in the matrimonial home and caused the plaintiff to become so cold to her after she left him.

In view of our finding that the plaintiff has failed to prove his case of desertion by the defendant, it is not necessary to go into the question of animus revertendi on which considerable argument with reference to case-law was addressed to us on both sides. For the aforesaid reasons we agree with the Appellate Bench of the High Court in the conclusion at which they had arrived, though not exactly for the same reasons. The appeal is accordingly dismissed. But as the trouble started on account of the defendant's con- duct, though she is successful in this Court, we direct that each party must bear its own costs throughout. Appeal dismissed.

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LANDMARK JUDGMENTS ON

ALIMONY & MAINTENANCE

"An application for grant of maintenance has to be disposed of at the earliest. When an application for grant of maintenance is filed by the wife the delay in disposal of the application, to say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon. 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. 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."

Justice Dipak Misra
2015 (5) SCC 705

KHATOON NISA VS STATE OF U.P. AND ORS.

Bench: Hon'ble Mr. Justice G. Pattanaik, Hon'ble Mr. Justice M Shah, Hon'ble Mr. Justice D Raju, Hon'ble Mr. Justice S Variava & Hon'ble Mr. Justice D Dharmadhikari

2003 (1) AWC 128 SC, JT 2002 (7) SC 631, 2002 (6) SCALE 165

In Crl. A. Nos. 213-216/96 and 569/95

These appeals raise the question, as to whether a magistrate is entitled to invoke his jurisdiction under Section 125 of the Code of Criminal Procedure (Cr. P.C.) to grant maintenance in favour of divorced Muslim women.

Subsequent to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short "the Act") as it was considered that the jurisdiction of the magistrate underSection 125 Cr. P.C. can be invoked only when the condition precedent mentioned in Section 5 of the Act are complied with, in the case in hand, the magistrate came to a finding that there has been no divorce in the eye of law and as such, the magistrate has the jurisdiction to grant maintenance under Section 125 of the Cr. P.C. This finding of the magistrate has been upheld by the High Court. The validity of the provisions of the Act was for consideration before the constitution bench in the case of Danial Latifi and Anr. v. Union of India. In the said case by reading down the provisions of the Act, the validity of the Act has been upheld and it has been observed that under the Act itself when parties agree, the provisions of Section 125 Cr. P.C. could be invoked as contained in Section 5 of the Act and even otherwise, the magistrate under the Act has the power to grant maintenance in favour of a divorced woman, and the parameters and considerations are the same as those in Section 125 Cr. P.C.. It is undoubtedly true that in the case in hand, Section 5 of the Act has not been invoked. Necessarily, therefore, the magistrate has exercised his jurisdiction under Section 125 Cr. P.C. But, since the magistrate retains the power of granting maintenance in view of the constitution bench decision in Danial Latifi's case (supra) under the Act and since the parameters for exercise of that power are the same as those contained in Section 125 Cr. P.C., we see no ground to interfere with the orders of the magistrate granting maintenance in favour of a divorced Muslim woman. In fact, Mr. Qamaruddin, learned counsel appearing for the appellants, never objected to pay maintenance as ordered by the magistrate. But he seriously disputes the findings of the magistrate on the status of the parties and contends that the magistrate was wholly in error in coming to the conclusion that there has been no divorce between the parties in the eye of law.

ORDER

1. These two appeals are directed against the judgment of a learned single judge of the Allahabad High Court, Lucknow bench, by grant of certificate from the said judgment. The two appeals are filed by the ceiling surplus tenure holder and his wife and one of the dispute was whether there has been a divorce between them as early as in the year 1969.

2. After coming into force of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as 'the Act') before the prescribed authority, the tenure holder took a stand that the land recorded in the name of his wife who has already been divorced since 1969 cannot be clubbed. The wife also took a similar stand. Section 3(7) of the Act defines the expression 'family'

in relation to a tenure holder to mean himself or herself and his wife or her husband as the case may be, (other than a judicially separated wife or husband), minor sons and minor daughters (other than married daughters). Since the prescribed authority was required to determine the ceiling surplus in the hand of the tenure holder, one of the questions for consideration was whether in fact there has been a divorce between the tenure holder and his wife as claimed by them or it was merely a subterfuge to get over the rigours of the provisions of the Ceiling Act. On the basis of materials produced before it, the prescribed authority came to the conclusion that in fact there had been no divorce and the parties adopted divorce attempts for escaping the ceiling law. The said prescribed authority also came to the conclusion that there was no other document excepting the family register kept with the pradhan, where the wife and the husband have been entered separately. In fact the prescribed authority gave due weight to the family register which had been kept with the rural development officer who was the competent authority to issue the family register. Having come to the aforesaid conclusion, the prescribed authority concluded that the land standing in the name of Khatoon Nisa, wife of Rahmatullah, the tenure holder, has to be clubbed with the holding of the tenure holder, inasmuch as they come within the definition of the 'family' under Section 3 (7) of the Act.

3. Being aggrieved by the aforesaid order of the prescribed authority, both Sh. Rahmatullah and his wife, Smt. Khatoon Nisa, preferred appeals under Section 13 of the Act and the appellate authority affirmed the conclusion arrived at by the prescribed authority and came to the conclusion that there has been no error committed by the prescribed authority in treating the appellant being members of the same family for the purpose of the provisions of the Act. The two appeals thus having been dismissed, the matter was carried to the High Court under Article 226of the Constitution. The learned judge of the High Court, without being guided by the parameters for exercise of power under Article 226 against an order of an inferior tribunal, went on to examine the issue as to whether there can be a divorce under the Muslim law by uttering three times the word 'talaq' in one sitting and having elaborately delved into the same came to the conclusion that such 'talaq' is unconstitutional and cannot be sustained. Having thus came to the aforesaid conclusion, the court affirmed the conclusion of the prescribed authority under the Ceiling Act in the matter of determination of the surplus land in the hands of the tenure holder. The court having granted certificate against the judgment the appeals came to be filed.

4. Dr. Dhawan learned senior counsel appearing for the appellants, contended that the High Court while exercising its power of supervisory jurisdiction of a writ of certiorari is called upon to examine the correctness of the conclusion arrived at by the inferior tribunal and will be justified in interfering with those conclusions if the inferior tribunal either has admitted inadmissible evidence under consideration or has rejected any admissible piece of material or that the conclusion is such which cannot be said to be a reasonable one on the materials on record or that the finding is based on no evidence. These being the parameters for exercise of the power, the High Court should have limited its consideration only to the materials on which the prescribed authority and appellate authority under the Act came to the conclusion and the High Court was not called upon to examine the larger issue about the constitutionality and legality of a divorce made by a Muslim male by uttering talaq three times at one sitting. Dr. Dhawan also urged that the conclusion of the prescribed authority as well as that of the appellate authority cannot be sustained in law since the judgment is not based on the relevant materials. So far as the first submission of Dr. Dhawan is concerned, we find force in the same as in our opinion in the writ

petition filed by the tenure holder and his wife, it was not necessary for the court to examine a larger issue on the question of the constitutionality and validity of a divorce by a Muslim man by uttering 'talaq' thrice in one sitting. We, therefore, do not intend to delve into that question and in our opinion the aforesaid conclusion of the High Court was not required to be gone into in the case in hand and the said conclusion would not operate as law of the land until and unless the same arises in an appropriate case and decided accordingly. So far as the second contention of Dr. Dhawan is concerned we, however, do not agree with the same and after perusing the order of the prescribed authority as well as that of the appellate authority, we do not find any error of law much less any error apparent on the face of the order which required to be corrected by issuance of a writ of certio-rari. The materials on the basis of which the conclusion of the prescribed authority as well as that of the appellate authority was based cannot be said to be on irrelevant materials nor the ultimate conclusion can be said to be one without any evidence for the same. In that view of the matter the ultimate determination of the ceiling land in the hand of the surplus holder does not require any interference by the Court. These appeals are, therefore, disposed of accordingly.

5. All applications filed in these matters also stand disposed of.

6. This appeal stands disposed of in terms of our judgment delivered today in crl. appeal Nos. 213-216/1996.

7. This writ petition was filed as a counterblast to criminal appeals nos. 213-216/1996 which have already been disposed of by us today.

8. After going through the prayer of the writ petition and on examining the averments made in the writ petition, we find that there is no material on the basis of which the Court is in a position to grant any appropriate relief. This writ petition accordingly stands dismissed.

9. These appeals raise the question, as to whether a magistrate is entitled to invoke his jurisdiction under Section 125 of the Code of Criminal Procedure (Cr. P.C.) to grant maintenance in favour of divorced Muslim women.

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

contained in Section 125 Cr. P.C., we see no ground to interfere with the orders of the magistrate granting maintenance in favour of a divorced Muslim woman. In fact, Mr. Qamaruddin, learned counsel appearing for the appellants, never objected to pay maintenance as ordered by the magistrate. But he seriously disputes the findings of the magistrate on the status of the parties and contends that the magistrate was wholly in error in coming to the conclusion that there has been no divorce between the parties in the eye of law.

11. In view of our aforesaid conclusion, it is not necessary for us to examine the correctness of the finding on the status of the parties, inasmuch as that finding was merely for the purpose of exercising jurisdiction under Section 125 Cr. P.C. and has no bearing at all in deciding the status of the parties.

12. These appeals stand disposed of accordingly.

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SHABANA BANO VS IMRAN KHAN

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Crl.A. @ SLP(Crl.)NO.717/09
Bench: Hon'ble Mr. Justice B. Sudershan Reddy & Hon'ble Mr. Justice Deepak Verma

(2010) 1 SCC 666

CRIMINAL APPEAL NO.2309 OF 2009
[Arising out of S.L.P.(Crl.) No.717 of 2009]

Shabana Bano ....Appellant
Versus
Imran Khan ....Respondent

The point stands settled by judgment of this Court reported in (2001) 7 SCC 740 titled Danial Latifi & Anr. Vs. Union of India pronounced by a Constitution Bench of this Court. Paras 30, 31 and 32 thereof fully establish the said right of the appellant. The said paragraphs are reproduced herein under:

i) A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

ii) Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Bano's case [(1985) 2 SCC 556 Mohd. Ahmed Khan vs. Shah Bano Begum & Ors.]. In this case to find out the personal law of Muslims with regard to divorced women's rights, the starting point should be Shah Bano's case and not the original texts or any other material - all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another

conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Bano's case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Bano's case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Bano's case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality."

The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the Family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only.

JUDGMENT

Deepak Verma, J.

1. Leave granted.

2. Appellant Shabana Bano was married to the respondent Imran Khan according to Muslim rites at Gwalior on 26.11.2001. According to the appellant, at the time of marriage, necessary household goods to be used by the couple were given. However, despite this, the respondent-husband and his family members treated the appellant with cruelty and continued to demand more dowry.

3. After some time, the appellant became pregnant and was taken to her parents' house by the respondent. The respondent threatened the appellant that in case his demand of dowry is not met by the appellant's parents, then she would not be taken back to her matrimonial home even after delivery.

4. Appellant delivered a child in her parental home. Since even after delivery, respondent did not think it proper to discharge his responsibility by taking her back, she was constrained to file a petition under Section 125 of the Code of Criminal Procedure (for short, 'Cr.P.C.') against the respondent in the Court of Family Judge, Gwalior. It was averred by the appellant that respondent has been earning a sum of Rs. 12,000/- per month by doing some private work and she had no money to maintain herself and her new-born child. Thus, she claimed a sum of Rs.3000/- per month from the respondent towards maintenance.

5. On notice being issued to the respondent, he denied all the contents of the petition filed by the appellant under Section 125 of the Cr.P.C. except admitting his marriage with the appellant.

6. Preliminary objections were raised by the respondent that appellant has already been divorced on 20.8.2004 in accordance with Muslim Law. Thus, under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as `Muslim Act'), appellant is not entitled to any maintenance after the divorce and after the expiry of the iddat period. It was also contended by him that appellant herself is earning Rs.6,000/- per month by giving private tuitions and is not dependent on the income of the respondent, thus, she is not entitled to any maintenance. It was also contended by respondent that appellant had gone to her parental home on her own free-will and accord, after taking all the jewellery and a sum of Rs.1000/- and

despite notice being sent, she has not returned to her matrimonial home. Thus, for all these reasons, she is not entitled to receive any amount of maintenance.

7. The Family Court was pleased to frame issues and parties went to trial. After considering the matter from all angles, the learned Judge of the Family Court partly allowed the appellant's application as under:

"(1) respondent shall pay Rs.2000/- per month as maintenance allowance to the petitioner from 26.4.2004, date of institution of petition to the date of divorce, i.e. 20.8.2004 and thereafter from 20.8.2004 to the period of iddat.

(2) respondent will bear cost of the suit of himself as well as of petitioner."

8. Thus, the claim of the appellant was allowed to the extent of Rs. 2,000/- per month towards maintenance from the date of institution of the petition till the date of divorce, i.e., 20.8.2004 and further from the said date till the expiry of iddat period but amount of maintenance thereafter was denied.

9. The appellant was, therefore, constrained to carry the matter further by filing Criminal Revision before the Gwalior Bench of the High Court of Madhya Pradesh. The said Criminal Revision came to be disposed of by learned Single Judge on 26.9.2008 and the order of the Family Court has substantially been upheld and consequently, the appellant's Revision has been dismissed. It is this order and the order passed by the Family Court which are the subject-matter of challenge in this appeal by grant of special leave.

10. At the outset, learned counsel for the appellant contended that learned Single Judge has gravely erred in dismissing the appellant's Revision on misconception of law on the ground that after divorce of a Muslim wife, a petition under Section 125 of the Cr.P.C. would not be maintainable. It was also contended that learned Single Judge proceeded on wrong assumption in dismissing appellant's Revision claiming maintenance under Section 125 of the Cr.P.C. It was also argued that both the courts below completely lost sight of the provisions of Section 7(1)(f) of the Family Courts Act, 1984 (hereinafter referred to as the 'Family Act').

11. On the other hand, Shri S.K. Dubey, learned Senior Counsel for the respondent contended that no illegality or perversity can be found in the order passed by the learned Single Judge and the same calls for no interference. It was also contended that the appeal being devoid of any merit and substance, deserves to be dismissed.

12. In the light of the aforesaid contentions, we have heard the learned counsel for the parties and perused the records.

13. The basic and foremost question that arises for consideration is whether a Muslim divorced wife would be entitled to receive the amount of maintenance from her divorced husband underSection 125 of the Cr.P.C. and, if yes, then through which forum.

14. Section 4 of Muslim Act reads as under:

"4. Order for payment of maintenance:

-(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order

directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

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

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under Section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order."

15. Section 5 thereof deals with the option to be governed by the provisions of Section 125 to 128of the Cr.P.C. It appears that parties had not given any joint or separate application for being considered by the Court. Section 7 thereof deals with transitional provisions.

16. Family Act, was enacted w.e.f. 14th September, 1984 with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.

17. The purpose of enactment was essentially to set up family courts for the settlement of family disputes, emphasizing on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. In other words, the purpose was for early settlement of family disputes.

18. The Act, inter alia, seeks to exclusively provide within jurisdiction of the family courts the matters relating to maintenance, including proceedings under Chapter IX of the Cr.P.C.

19. Section 7 appearing in Chapter III of the Family Act deals with Jurisdiction. Relevant provisions thereof read as under:

"7. Jurisdiction-(1) Subject to the other provisions of this Act, a Family Court shall -

(a) have and exercise all the jurisdiction exercisable by any district Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation.- The suits and proceedings referred to in this sub- section are suits and proceedings of the following nature, namely:-

(a) ....

(b) ....

(c) ....

(d) ....

(e) ....

(f) a suit or proceeding for maintenance;

(g) ...."

20. Section 20 of the Family Act appearing in Chapter VI deals with overriding effect of the provisions of the Act. The said section reads as under :

"20. Act to have overriding effect - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

21. Bare perusal of Section 20 of the Family Act makes it crystal clear that the provisions of this Act shall have overriding effect on all other enactments in force dealing with this issue.

22. Thus, from the abovementioned provisions it is quite discernible that a Family Court established under the Family Act shall exclusively have jurisdiction to adjudicate upon the applications filed under Section 125 of Cr.P.C.

23. In the light of the aforesaid contentions and in view of the pronouncement of judgments detailing the said issue, learned counsel for the appellant submits that matter stands finally settled but learned Single Judge wholly misconstrued the various provisions of the different Acts as mentioned hereinabove, thus, committed a grave error in rejecting the appellant's prayer.

24. In our opinion, the point stands settled by judgment of this Court reported in (2001) 7 SCC 740 titled Danial Latifi & Anr. Vs. Union of India pronounced by a Constitution Bench of this Court. Paras 30, 31 and 32 thereof fully establish the said right of the appellant. The said paragraphs are reproduced hereinunder :

"30. A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal

Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

31. Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

32. As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Bano's case [(1985) 2 SCC 556 Mohd. Ahmed Khan vs. Shah Bano Begum & Ors.]. In this case to find out the personal law of Muslims with regard to divorced women's rights, the starting point should be Shah Bano's case and not the original texts or any other material - all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Bano's case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Bano's case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Bano's case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality."

25. Judgment of this Court reported in (2007) 6 SCC 785 titled Iqbal Bano Vs. State of U.P.& Anr. whereby the provisions contained in Section 125 of the Cr.P.C. have been aptly considered and the relevant portion of the order passed in Iqbal Bano's case reads as under:

"10. Proceedings under Section 125 Cr.P.C. are civil in nature. Even if the Court noticed that there was a divorced woman in the case in question, it was open to it to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 Cr.P.C. and claims made under the Act are tried by the same court. In Vijay Kumar Prasad Vs State of Bihar (2004) 5 SCC 196 it was held that proceedings under Section 125 Cr.P.C. are civil in nature. It was noted as follows: (SCC p.200, Para 14).

14. The basic distinction between Section 488 of the old Code and Section 126 of the Code is that Section 126 has essentially enlarged the venue of proceedings for maintenance so as to move the place where the wife may be residing on the date of application. The change was thought necessary because of certain observations by the Law Commission, taking note of the fact that often deserted wives are compelled to live with their relatives far away from the place where the husband and wife last resided together. As noted by this Court in several cases, proceedings

under Section 125 of the Code are of civil nature. Unlike clauses (b) and (c) of Section 126 (1) an application by the father or the mother claiming maintenance has to be filed where the person from whom maintenance is claimed lives."

26. In the light of the findings already recorded in earlier paras, it is not necessary for us to go into the merits. The point stands well settled which we would like to reiterate.

27. The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the Family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only.

28. Learned Single Judge appeared to be little confused with regard to different provisions ofMuslim Act, Family Act and Cr.P.C. and thus was wholly unjustified in rejecting the appellant's Revision.

29. Cumulative reading of the relevant portions of judgments of this Court in Danial Latifi (supra) and Iqbal Bano (supra) would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.

30. In the light of the aforesaid discussion, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry.

31. As a necessary consequence thereof, the matter is remanded to the Family Court at Gwalior for its disposal on merits at an early date, in accordance with law. The respondent shall bear the cost of litigation of the appellant. Counsel's fees Rs.5,000/-.

32. Consequently, the appeal stands allowed to the extent indicated above.

[B. SUDERSHAN REDDY]
[DEEPAK VERMA]

New Delhi.

December 04, 2009.

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SMT. JASBIR KAUR SEHGAL VS THE DISTRICT JUDGE DEHRADUN & ORS

Smt. Jasbir Kaur Sehgal
Vs.
The District Judge Dehradun & Ors.

Bench : Hon'ble Mrs. Justice Sujata V. Manohar & Hon'ble Mr. Justice D. P. Wadhwa

This is wife's appeal against the judgment dated October 14, 1996 of the High Court of Judicature at Allahabad. She is aggrieved by the impugned judgment under which she was awarded maintenance pendente lite under Section 24 of the Hindu Marriage Act, 1955 (for short `the Act') at the rate of Rs. 1500/- per month.

On an application filed by the wife in the trial court in proceeding for divorce initiated by her husband, respondent No.3 herein, she was awarded Rs. 2,500/- (Rupees two thousand and five hundred only) as expenses of litigation and maintenance pendente lite at the rate of Rs. 1000/- per month. Her revision before the District Judge Dehradun against this order was dismissed. She further filed writ petition under Article 227 of the Constitution of India in the High Court. By the impugned judgment the High Court enhanced the maintenance to Rs. 1500/- per month.

The question then arises as to from which date the wife would be entitled to claim the enhanced amount of maintenance pendente lite. If wife has no source of income it is the obligation of the husband to maintain her and also children of the marriage on the basis of the provision contained in the Hindu Adoption and Maintenance Act, 1956. Her right to claim maintenance fructifies on the date of the filing of the petition for divorce under the Act. Having thus fixed the date as the filing of the petition for divorce it is not always that the court has to grant the maintenance from that date.

The court has discretion in the matter as to from which date maintenance underSection 24 of the Act should be granted. The discretion of the court would depend upon multiple circumstance which are to be kept in view. These could be the time taken to serve the respondent in the petition the date of filing of the application under Section 241 of the Act; conduct of the parties in the proceedings; averments made in the application and the reply there to; the tendency of the wife to inflate the income out of all proportion and that of the husband to suppress the same; and the like. There has to be honesty of purpose for both the parties which unfortunately we find lacking in this case.

We are therefore of the opinion that ends of justice would be met if we direct that maintenance pendente lite as fixed by this judgment to be payable from the date of impugned order of the High Court which is October 16, 1996. We order accordingly. The impugned judgment of the High Court shall stand modified to that extent. All arrears of maintenance shall be paid within a period of two months from today and then regularly every month.

Present :

Hon'ble Mrs. Justice Sujata V. Manohar Hon'ble Mr. Justice D.P. Wadhwa Ms. Shalu Sharma, Rajesh K. Sharma, Rakesh K. Sharma, Advs., for the appellant.

P.P. Tripathi, Arvind Varma, Advs. for K.L. Mehta & Co., Advs. for the Respondents.

JUDGMENT

The following Judgment of the Court was delivered :

D.P. Wadhwa, J.

Leave granted.

This is wife's appeal against the judgment dated October 14, 1996 of the High Court of Judicature at Allahabad. She is aggrieved by the impugned judgment under which she was awarded maintenance pendente lite under Section 24 of the Hindu Marriage Act, 1955 (for short `the Act') at the rate of Rs. 1500/- per month. On an application filed by the wife in the trial court in proceeding for divorce initiated by her husband, respondent No.3 herein, she was awarded Rs. 2,500/- (Rupees two thousand and five hundred only) as expenses of litigation and maintenance pendente lite at the rate of Rs. 1000/- per month. Her revision before the District Judge Dehradun against this order was dismissed. She further filed writ petition under Article 227 of the Constitution of India in the High Court. By the impugned judgment the High Court enhanced the maintenance to Rs. 1500/- per month.

Respondent 1 and 2 in this appeal are respectively the District Judge, Dehradun and the Additional Civil Judge (IInd), Dehradun who are described as proforma respondents. It is not proper or even justified on the part of the appellant to implead the courts as respondents and respondents 1 and 2 are, therefore, struck off from the record of this appeal.

Parties were married on October 2, 1963. The husband at that time was an army officer. He retired and Lt. Colonel on August 10, 1986. On September 28, 1989 he filed the petition for divorce against his wife under Section 13 of the Act on the alleged grounds of cruelty and desertion. He stated that within two years of the marriage the wife started creating problem for him and she persisted in her behaviour right till the year 1989. In this span of 26 years in their married life, they have become the parents of four children, two sons and two daughters. Eldest daughter who is 34 years old and unmarried is living with her mother who maintains her. Second child is so who is working with Mukul Overseas Pvt. Ltd. on a monthly salary of Rs. 7500/- per month and is living in a house in Safdarjung Enclave in New Delhi. Third child is a daughter aged 26 years. She is also unmarried and unemployed and is living with the father. Fourth child is a son of 20 years of age, he is unemployed and had studied upto 11th class. Husband says that being head of the family he is to maintain two sons and a daughter as they are dependent on him. His claim is that he is presently having a meagre salary of Rs. 5000/- per month and is employed as consultant/adviser with M/s. Mukul International Private Limited. Both Mukul Overseas (P) Ltd. and Mukul International (P) Ltd. belong to same group.

After retirement from the army, respondent-husband joined the Oil and Natural Gas Commission (ONGC) as a Director and was posted at Dehradun. He retired from that post on August 21, 1995. Thereafter from January 1, 1996 husband is working with M/s. Mukul International Pvt. Ltd. as aforesaid. After deduction of income-tax at source, husband says he is getting an amount of Rs. 4700/- per month. Husband admits that he has a house in NOIDA which was on rent with the army and lease was terminated by letter dated January 29, 1996 from the Ministry of Defence. He says repairs are being carried on in the house and presently he is living with her eldest son in his house. He further says he is not getting any pension as on his permanent absorption in ONGC, he had opted to receive lumpsum amount in lieu of pension and prorata gratuity amount in lieu of pension and prorata gratuity amounting to Rs. 2,60,456/-. In addition the husband also received an amount of

Rs. 55,775/- on account of D.C.R. Gty. Husband has also filed his computation of taxable income for the assessment years 1992- 93, 1995-96 and 1996-97. He has though not filed any assessment order. Since he retired from ONGC in August, 1995 it would be appropriate to see his computation of taxable income for the year ending March 31, 1995. His gross salary income in Rs. 1,88,281/- and after deduction of House Rent Allowance it comes to Rs. 1,78,614. Income from house property he say is Rs. 22716/-, interest income is Rs. 3179/-. Total of these three items would be Rs. 2,04,509/-. Then there are claims of standard deduction, repairs in the house and tax rebate on saving amounting to Rs. 68,922/- which include payment on account of LIC, PF, PPF, MEP, NSC and general insurance. The amount of tax payable comes to Rs. 35716/- on a taxable income of Rs. 1,81,790/-. For the assessment year 1996-97 (year ending on March 31, 1996) the salary income shown is 1,18,151/-, income from house property is Rs. 18, 930/- and after standard deduction, and other deduction and the rebate the income tax payable is Rs. 18, 464/- on the net income of Rs. 1,31,200/-.

Wife says that the husband has not given true account of his assets and income and has rather suppressed the same. Though the wife has not been able to give any specific evidence to support her contention but circumstance show that the husband has not given true state of affairs of his income. He has pleaded that both his wife and his eldest daughter are earning Rs. 10,000/- per month but there is no basis for such an allegation. The fact remains that the wife has no source of income and she is also maintaining her eldest unmarried daughter. Under the Hindu Adoptions &Maintenance Act, 1956 it is the obligation of a person to maintain her unmarried daughter if she is unable to maintain herself. In this case since the wife has no income of her own, it is the obligation of the husband to maintain her and her two unmarried daughters one of whom is living with wife and one with him. Section 24 of the Act no doubt talks of maintenance of wife during the pendency of the proceedings but this section, in our view, cannot be read in isolation and cannot be given restricted meaning to hold that it is maintenance of the wife alone and no one else. Since wife is maintaining the eldest unmarried daughter, her right to claim maintenance would include her own maintenance and that of her daughter. This fact has to be kept in view while fixing the maintenance pendente lite for the wife. We are aware of the provisions of Section 26 of the Act providing for custody of minor children, their maintenance and education but that section operates in its own field.

Husband has filed this counter affidavit in the appeal before us and on our direction both the parties have filed additional affidavits. On one date when this appeal came up for hearing we were told that the husband had left that morning itself for Canada for further treatment after his bypass surgery in India and that his expenses visiting the Canada and as well as the expenses for the treatment there were being met by his friend. In his affidavit husband has stated that his friend Sontosh Singh for his treatment in Canada paid his fare. He is, however, silent about the expense if any met by Sontosh Singh for his treatment in Canada. A copy of the statutory declaration of Sontosh Singh which is dated March 21, 1997 has also been filed. In this Sontosh Singh does say that he has undertaken to bear the cost of passage and maintenance of respondent during his stay in Canada and North America. It is a matter of common knowledge that medical treatment in Canada is high and an ordinary person cannot afford the expenses which are met by taking medical insurance. As to what expenses husband incurred for his bypass surgery in India has not been disclosed. On our query as to how much foreign exchange husband obtained while going to Canada, it was stated that Dollar U.S. 1,350 were obtained at a cost of about Rs. 50,000/-. From where all these monies came from we are left in dark. Husband had not filed any certificate of his salary from his present employer though the wife has contended that both the firms Mukul Overseas Pvt. Ltd and Mukul International Pvt. Ltd. are owned by the

husband himself which fact husband had denied. Though we are not concerned with the income of his son which is stated to be Rs. 7,500/- per month, it would have been better if the husband had given complete details as to the perquisites enjoyed by his son, the rent he is paying for his rented accommodation at Safdarjung Enclave and the like. Claim of the husband that though his house in NOIDA fell vacant in January, 1996, it has neither been further let nor the husband himself living there because of certain repairs and on that account he is residing with his son does not appeal to us. It does appear to us from the affidavit of the husband that it conceals more than what it tells of his income and other assets. Attempt has been made to conceal his true income and that leads us to draw an adverse inference against the husband about his income that it is much more than what is being disclosed to us. The claim of the husband that from an income of Rs. 4,750/- per month which is getting from Mukul International Pvt. Ltd. he has to maintain himself, his two sons and daughter is absorb particularly when the eldest son is earning more than the husband and it is the husband who is living with him. Husband has also not disclosed retrial benefits if any from the ONGC and the amount of provident fund he obtained from there. Husband has interest income from Unit Trust of India and also from the fixed deposit receipt but again he has not disclosed the number of units he is holding and the amount of the fixed deposits in his name, from all these we have to hold that the annual income of the respondent-husband is even on modest estimate to be Rs. 2,40,000/- annually which would come to Rs. 20,000/- per month. Considering the diverse claims made by the parties one inflating the income and the other suppressing an element of conjecture and guess work does enter for arriving at the income of the husband. It cannot be done by any mathematical precision.

Wife has no fixed abode of residence She say she is living in Gurudwara with her eldest daughter for safety. On the other hand husband has sufficient income and a house to him. Wife has not claimed and litigation expenses in this appeal. She is aggrieved only because of the paltry amount of maintenance fixed by the court. No set formula can be laid for fixing the amount of maintenance. It has, in very nature of things, to depend on the facts and circumstance of each case. Some scope for liverage can, however, be always there. Court has to consider the status of the parties, their respective needs, capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and those; he is obliged under the law and statutory but involuntary payments or deductions. Amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate. In the circumstances of the present case we fix maintenance pendente lite at the rate of Rs. 5,000/- per month payable by respondent-husband to the appellant-wife.

The question then arises as to from which date the wife would be entitled to claim the enhanced amount of maintenance pendente lite. If wife has no source of income it is the obligation of the husband to maintain her and also children of the marriage on the basis of the provision contained in the Hindu Adoption and Maintenance Act, 1956. Her right to claim maintenance fructifies on the date of the filing of the petition for divorce under the Act. Having thus fixed the date as the filing of the petition for divorce it is not always that the court has to grant the maintenance from that date. The court has discretion in the matter as to from which date maintenance underSection 24 of the Act should be granted. The discretion of the court would depend upon multiple circumstance which are to be kept in view. These could be the time taken to serve the respondent in the petition the date of filing of the application under Section 241 of the Act; conduct of the parties in the proceedings; averments made in the application and the reply there to; the tendency of the wife to inflate the income out of

all proportion and that of the husband to suppress the same; and the like. There has to be honesty of purpose for both the parties which unfortunately we find lacking in this case. We are therefore of the opinion that ends of justice would be met if we direct that maintenance pendente lite as fixed by this judgment to be payable from the date of impugned order of the High Court which is October 16, 1996. We order accordingly. The impugned judgment of the High Court shall stand modified to that extent. All arrears of maintenance shall be paid within a period of two months from today and then regularly every month.

The appeal is allowed with costs. Counsel fee Rs. 2,500/-.

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CHATURBHUJ VS SITA BAI

Appeal (Crl.) 1627 of 2007 (Arising out of SLP (Crl.) No.4379 of 2006)
Date of Judgment: 27/11/2007

(2008) 2 SCC 316

Chaturbhuj
Vs.
Sita Bai

Bench: Hon'ble Dr. Justice Arijit Pasayat & Hon'ble Mr. Justice Aftab Alam

The respondent had filed an application under Section 125 of Cr.P.C. claiming maintenance from the appellant. Trial Court directed to pay Rs.1500/- p.m.

Revision petition was filed by the present appellant was dismissed . The matter was further carried before the High Court by filing an application in terms of Section 482 Cr.P.C. The High Court noticed that the conclusions have been arrived at on appreciation of evidence and, therefore, there is no scope for any interference.

The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children.

The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves

The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In Bhagwan v. Kamla Devi (AIR 1975 SC 83) it was observed that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.

JUDGMENT

Dr. ARIJIT PASAYAT, J.—Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court, Indore Bench, dismissing the revision petition filed by the appellant in terms of Section 482 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.'). The challenge before the High Court was to the order passed by learned Judicial Magistrate, First Class, Neemuch,

M.P. as affirmed by the learned Additional Sessions Judge, Neemuch, M.P. The respondent had filed an application under Section 125 of Cr.P.C. claiming maintenance from the appellant. Undisputedly, the appellant and the respondent had entered into marital knot about four decades back and for more than two decades they were living separately. In the application it was claimed that she was unemployed and unable to maintain herself. Appellant had retired from the post of Assistant Director of Agriculture and was getting about Rs.8,000/- as pension and a similar amount as house rent. Besides this, he was lending money to people on interest. The appellant claimed Rs.10,000/- as maintenance. The stand of the appellant was that the applicant was living in the house constructed by the present appellant who had purchased 7 bighas of land in Ratlam in the name of the applicant. She let out the house on rent and since 1979 was residing with one of their sons. The applicant sold the agricultural land on 13.3.2003. The sale proceeds were still with the applicant. The appellant was getting pension of about Rs.5,700/- p.m. and was not getting any house rent regularly. He was getting 2-3 thousand rupees per month. The plea that the appellant had married another lady was denied. It was further submitted that the applicant at the relevant point of time was staying in the house of the appellant and electricity and water dues were being paid by him. The applicant can maintain herself from the money received from the sale of agricultural land and rent. Considering the evidence on record, the trial Court found that the applicant-respondent did not have sufficient means to maintain herself.

3. Revision petition was filed by the present appellant. Challenge was to the direction to pay Rs.1500/- p.m. by the trial Court. The stand was that the applicant was able to maintain herself from her income was reiterated. The revisional court analysed the evidence and held that the appellant's monthly income was more than Rs.10,000/- and the amount received as rent by the respondent-claimant was not sufficient to maintain herself. The revision was accordingly dismissed. The matter was further carried before the High Court by filing an application in terms of Section 482 Cr.P.C. The High Court noticed that the conclusions have been arrived at on appreciation of evidence and, therefore, there is no scope for any interference.

4. Section 125 Cr.P.C. reads as follows:

"125. (1) If any person having sufficient means neglects or refuses to maintain

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

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

Explanation .For the purposes of this Chapter,

(a) 'minor' means a person who, under the provisions of the Indian Majority Act, 1875 (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.";] (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any port of each month's allowance 4 [allowance for the maintenance or the interim maintenance and expenses of proceeding , as the case may be] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

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

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

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

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

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

they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat and Ors. (2005 (2) Supreme 503).

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

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

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

9. In the instant case the trial Court, the Revisional Court and the High Court have analysed the evidence and held that the respondent wife was unable to maintain herself. The conclusions are essentially factual and they are not perverse. That being so there is no scope for interference in this appeal which is dismissed.

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SAVITABEN SOMABHAI BHATIYA VS STATE OF GUJARAT AND ORS

Appeal (crl.) 399 of 2005

(2005) 3 SCC 636

Savitaben Somabhai Bhatiya
Vs.
State of Gujarat and Ors.

Date of Judgment : 10/03/2005
Bench: Hon'ble Dr. Justice Arijit Pasayat & Hon'ble Mr. Justice S.H. Kapadia

Scope and ambit of Section 125 of the Code of Criminal Procedure, 1973 (in short the 'Code').

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

Legislature considered it necessary to include within the scope of the provision an illegitimate child but it has not done so with respect to woman not lawfully married. However, desirable it may be, as contended by learned counsel for the appellant to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in Section 125 of the Code, there is no scope for enlarging its scope by introducing any artificial definition to include woman not lawfully married in the expression 'wife'.

JUDGMENT

ARIJIT PASAYAT, J.

Leave granted.

A brief reference to the factual position would suffice because essentially the dispute has to be adjudicated with reference to scope and ambit of Section 125 of the Code of Criminal Procedure, 1973 (in short the 'Code').

The case at hand according to appellant is a classic example of the inadequacies of law in protecting a woman who unwittingly entered into relationships with a married man.

Factual position as projected by the appellant is as follows:-

Appellant claims that she was married to respondent No.2 some time in 1994 according to the customary rites and rituals of their caste. Though initially, the respondent No.2 treated her nicely, thereafter he started ill-treating her and she was subjected to mental and physical torture. On enquiry about the reason for such a sudden change in his behaviour, the appellant came to know that respondent No.2 had developed illicit relationship with a lady named Veenaben. During the period the appellant stayed with the respondent, she became pregnant and subsequently, a child was born. As respondent No.2 neglected the appellant and the child born, an application in terms of Section 125 of the Code was filed claiming maintenance. The application was filed before the learned Judicial Magistrate, First Class (hereinafter referred to as the 'JMFC') Himmatnagar. Respondent No.2 opposed the application

by filing written statements taking the stand that the appellant was not his legally married wife and the child (respondent No.3) was not his son. He also denied having developed illicit relationship with Veenaben. He claimed that actually she was married to him more than 22 years back and two children were born. Their son Hament had died in the road accident in July 1990. In the Claim Petition name of Veenaben was mentioned as the legal heir and in the Voters List, Ration Card and Provident Fund records, Veenaben was shown as the wife of respondent No.2. On 23.6.1998 learned JMFC allowed the Claim Petition and granted maintenance. A criminal revision was filed by respondent No.2 before learned Additional Sessions Judge, Sabaakatha, Dist. Himmatnagar, who by his order dated 26.11.1998 set aside the judgment dated 23.6.1998 as passed by the learned JMFC and remanded the matter to the trial Court for adjudication afresh after affording an opportunity to respondent No.2 to cross examine the witnesses of the appellant. By order dated 31.7.1999, learned JMFC after considering the matter afresh awarded maintenance to both the appellant and the child.

A Criminal Revision Application No.65/95 was filed by respondent No.2 against the order dated 31.7.1999. By order dated 12.7.2001, learned Additional District Judge, Sabarkatha dismissed the application. The respondent No.2 filed a Special Criminal Application No.568/2001 before the Gujarat High Court which by the impugned order held that the appellant was not legally wedded wife of respondent No.2. Reliance was placed on documents filed by respondent No.2 to conclude that before the alleged date of marriage between the appellant and respondent No.2, the latter was already married to Veenaben with reference to the documents produced. However, maintenance granted to the child (respondent No.3) was maintained and amount as awarded to him i.e. Rs.350/- was enhanced to Rs.500/-. A direction was also given to pay the enhanced amount from the date of order of the learned JMFC i.e. 31.7.1999.

In support of the appeal, learned counsel for the appellant submitted that the High Court has taken a too technical view in the matter. Strict proof about a valid marriage is not the sine qua non for getting maintenance under Section 125 of the Code. The documents produced by respondent No.2 to substantiate the plea of earlier marriage with Veenaben should not have been given primacy over the clinching evidence adduced by the appellant to show that she was unaware of the alleged marriage. Since respondent No.2 is guilty of fraud and mis-representation, the equity should not weigh in his favour. Law is intended to protect destitute and harassed woman and rigid interpretation given to the word 'wife' goes against the legislative intent. In any event, nothing has been shown by respondent No.2 to show that there is any customary bar for a second marriage. Customs outweigh enacted law. That being the position, the order passed by the learned JMFC should be restored. It was residually submitted that when the amount was claimed as maintenance there was statutory limitation prescribed at Rs.500/- which has been done away with by omitting the words of limitation so far as the amount is concerned by amendment in 2001 to the Cr.P.C. Therefore, taking into account the high cost of living the quantum of maintenance should be enhanced for the child.

In response, learned counsel for respondent No.2 submitted that law is fairly well settled regarding the definition of the expression 'wife' and there is no scope for giving an extended meaning to include a woman who is not legally married.

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

The provision is enacted for social justice and specially to protect women and children as also old and infirm poor parents and falls within the constitutional sweep of Article 15(3) reinforced byArticle 39 of the Constitution of India, 1950 (in short the 'Constitution'). The provision gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves. Its provisions are applicable and enforceable whatever may be personal law by which the persons concerned are governed. (See Nanak Chand v. Chandra Kishore (AIR 1970 SC 446). But the personal law of the parties is relevant for deciding the validity of the marriage and therefore cannot be altogether excluded from consideration. (See Smt. Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and Anr.(AIR 1988 SC 644) There is no inconsistency between Section 125 of the Code and the provisions in the Hindu Adoption and Maintenance Act, 1956 (in short the 'Adoption Act'). The scope of the two laws is different.

Section 125 of the Code at the point of time when the petition for maintenance was filed reads as follows:

"125(1)- If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

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

Provided that the Magistrate may order the father of a minor female child referred to in clause

(b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation:- For the purposes of this Chapter-

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

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

By the Code of Criminal Procedure (Amendment) Act, 2001 (Central Act 50 of 2001) the words 'not exceeding five hundred rupees in the whole' have been omitted w.e.f. 24.9.2001.

In Dwarika Prasad Satpathy v. Bidyut Prava Dixit and Anr. (AIR 1999 SC 3348) it was held that the validity of the marriage for the purpose of summary proceedings under Section 125 of the Code is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceedings is not as strict as is required in a trial of offence under Section 494 of Indian Penal Code, 1860 (in short the 'IPC'). If the claimant in proceedings under Section 125 succeeds in showing that she and the respondent have lived together as husband and wife, the Court has to presume that they are legally wedded spouses, and in such a situation one who denies the marital

status can rebut the presumption. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe as to whether the said procedure was complete as per the Hindu rites, in the proceedings under Section 125 of the Code. It is to be noted that when the respondent does not dispute the paternity of the child and accepts the fact that marriage ceremony was performed though not legally perfect, it would hardly lie in his mouth to contend in proceedings under Section 125 of the Code that there was no valid marriage as essential rites were not performed at the time of said marriage. The provision under Section 125 cannot be utilized for defeating the rights conferred by the legislature on the destitute women, children or parents who are victims of social environment. The provision is a measure of social justice and as noted above specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution.

The sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfill. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause-the cause of the derelicts. (See Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors. (AIR 1978 SC 1807).

In Smt. Yamunabai's case (supra), it was held that expression 'wife' used in Section 125 of the Code should be interpreted to mean only a legally wedded wife. The word 'wife' is not defined inthe Code except indicating in the Explanation to Section 125 its inclusive character so as to cover a divorcee. A woman cannot be a divorcee unless there was a marriage in the eye of law preceding that status. The expression must therefore be given the meaning in which it is understood in law applicable to the parties. The marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is therefore not entitled to the benefit of Section 125 of the Code or the Hindu Marriage Act, 1955 (in short the 'Marriage Act'). Marriage with person having living spouse is null and void and not voidable. However, the attempt to exclude altogether the personal law applicable to the parties from consideration is improper. Section 125 of the Code has been enacted in the interest of a wife and one who intends to take benefit under sub- section (1) (a) has to establish the necessary condition, namely, that she is the wife of the person concerned. The issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes such status or relationship with reference to the personal law that an application for maintenance can be maintained. Once the right under the provision in Section 125 of the Code is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law. The issue whether the Section is attracted or not cannot be answered except by reference to the appropriate law governing the parties.

But it does not further the case of the appellant in the instant case. Even if it is accepted as stated by learned counsel for the appellant that husband was treating her as his wife it is really inconsequential. It is the intention of the legislature which is relevant and not the attitude of the party.

In Smt. Yamunabai's case (supra) plea similar to the one advanced in the present case that the appellant was not informed about the respondent's earlier marriage when she married him was held to be of no avail. The principle of estoppel cannot be pressed into service to defeat the provision of Section 125 of the Code.

It may be noted at this juncture that the legislature considered it necessary to include within the scope of the provision an illegitimate child but it has not done so with respect to woman not lawfully married. However, desirable it may be, as contended by learned counsel for the appellant to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected inSection 125 of the Code, there is no scope for enlarging its scope by introducing any artificial definition to include woman not lawfully married in the expression 'wife'.

As noted by this Court in Vimala (K.) v. Veeraswamy (K.) (1991 (2) SCC 375) when a plea of subsisting marriage is raised by the respondent-husband it has to be satisfactorily proved by tendering evidence to substantiate that he was already married.

In the instant case the evidence on record has been found sufficient by the Courts below by recording findings of fact that earlier marriage of respondent was established.

In that view of the matter, the application so far as claim of maintenance of the wife is concerned stands dismissed.

That brings us to the other question relating to adequacy of the quantum of maintenance awarded to the child. It is not in dispute that when the Claim Petition was filed, Rs.500/- was claimed as maintenance as that was the maximum amount which could have been granted because of the un-amended Section 125. But presently, there is no such limitation in view of the amendment as referred to above.

Learned counsel for respondent No.2 submitted that there was no amendment made to the Claim Petition seeking enhancement. We find that this is a too technical plea. As a matter of fact,Section 127 of the Code permits increase in the quantum. The application for maintenance was filed on 1.9.1995. The order granting maintenance was passed by the learned JMFC on 31.7.1999. The High Court enhanced the quantum awarded to the child from Rs.350/- to Rs.500/- with effect from the order passed by learned JMFC. No dispute has been raised regarding enhancement and in fact there was a concession to the prayer for enhancement before the High Court as recorded in the impugned judgment. Considering the peculiar facts of the case, we feel that the amount of maintenance to the child can be enhanced to Rs.850/- with effect from today.

Learned counsel for the respondent No.2 has submitted that as a humanitarian gesture, the respondent No.2 agrees to pay a lump-sum amount to settle the dispute. In case the respondent No.2 pays a sum of rupees two lakhs only within a period of four months to the appellant, the same shall be in full and final settlement of the claim of respondent No.3 for maintenance. While fixing the quantum we have taken note of the likely return as interest in case it is invested in fixed deposit in a Nationalised Bank, and the likely increase in the quantum of maintenance till respondent No.3 attains majority. Till deposit is made, the quantum fixed by this order shall be paid. If the respondent No.2 wants to make lump-sum payment in terms of this order, the amount shall be paid by the Bank draft in the name of respondent No.3 with appellant as mother guardian. The amount shall be kept in a fixed deposit with monthly interest payment facility till respondent No.3 attains majority.

The appeal is accordingly disposed of.

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SAMAR GHOSH VERSUS JAYA GHOSH

DATE OF JUDGMENT: 26/03/2007

Appeal (Civil) 151 of 2004

PETITIONER: Samar Ghosh
Vs.
RESPONDENT: Jaya Ghosh

Bench : Hon'ble Mr. Justice B.N. Agrawal, Hon'ble Mr. Justice P.P. Naolekar & Hon'ble Mr. Justice Dalveer Bhandari

Apex Court put down the law with regard to mental cruelty as grounds for divorce in matrimonial law. The significance of the nature of conduct constituting cruelty lies in the fact that the "fault" or "matrimonial offence" theory is followed in Indian matrimonial law. Irretrievable breakdown of marriage is not grounds for divorce according to statutory law, and divorce can only be granted by establishing that the erring spouse has committed an "offence" like adultery, cruelty or desertion.

JUDGMENT

Dalveer Bhandari, J.

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

The appellant and the respondent knew each other since 1983. The respondent, when she was serving as the Deputy Secretary in the Department of Finance, Government of West Bengal, used to meet the appellant between November 1983 and June 1984. They cultivated close friendship which later developed into courtship. The respondent's first husband, Debashish Gupta filed a belated appeal against the decree of divorce obtained by her from the District Court of Patna. Therefore, during the pendency of the appeal, she literally persuaded the appellant to agree to the marriage immediately so that the appeal of Debashish Gupta may become infructuous. The marriage between the parties was solemnized on 13.12.1984. According to the appellant, soon after the marriage, the respondent asked the appellant not to interfere with her career. She had also unilaterally declared her decision not to give birth to a child for two years and the appellant should not be inquisitive about her child and he should try to keep himself aloof from her as far as possible. According to the appellant, there was imposition of rationing in emotions in the arena of love, affection, future planning and normal human relations though he tried hard to reconcile himself to the situation created by the respondent.

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

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

The indication was towards Prabir Malik. The appellant and the respondent virtually began to live separately from September, 1985.

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

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

The appellant also learnt that the respondent used to tell her mother that she was contemplating divorce to the appellant. The respondent's daughter had also disclosed to the appellant that her mother had decided to divorce him. According to the appellant, though they lived under the same roof for some time but the respondent virtually began to live separately from April, 1989 at her parent's house. In April 1990 the appellant's servant Prabir Malik had left for Burdwan on getting a job. The respondent used to come from her parents house to drop her daughter to her school La Martinere.

She used to come to the flat at Minto Park from the school to cook food only for herself and leave for the office. The appellant began to take his meals outside as he had no other alternative.

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

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

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

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

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

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

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

Prabir Malik was examined as witness no.4. He narrated that he had known the appellant for the last 8/9 years. He was working as his servant-cum-cook. He also stated that since April 1990 he was serving at the Burdwan Collectorate. He stated that after getting the job at Burdwan Collectorate, he used to visit the Minto Park flat of the appellant on 2nd and 4th Saturdays. He stated that the relationship between the appellant and the respondent was not cordial. He also stated that the appellant told him that the respondent cooks only for herself but does not cook for the appellant and he used to eat out and sometimes cooked food for himself. He stated that the brothers and sisters of the appellant did not visit Minto Park flat. He also stated that the daughter of the respondent at times used to say that the appellant was not her father and that she had no blood relationship with him. He stated that on 4th Saturday, in the month of August, 1990, he came to the flat of the appellant. On seeing him the respondent got furious and asked him for what purpose he had come to the flat? She further stated that the appellant had no residence, therefore, she had allowed him to stay in her flat. She also said that it was her flat and she was paying rent for it. According to the witness, she further stated that even the people living on streets and street beggars have some prestige, but these people had no prestige at all. At that time, the father of the respondent was also present.

According to Prabir Malik, immediately after the incident, the appellant left the flat.

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

The respondent has examined herself. According to her statement, she indicated that she and the appellant were staying together as normal husband and wife. She denied that she ill-treated Prabir Malik. She further stated that the brothers and sisters of the appellant used to stay at Minto Park flat whenever they used to visit Calcutta. She stated that they were interfering in the private affairs, which was the cause of annoyance of the respondent. She denied the incident which took place after 24.8. 1990. However, she stated that the appellant had left the apartment on 27.8.1990. In the crossexamination, she stated that the appellant appeared to be a fine gentleman. She admitted that the relations between the appellant and the respondent were not so cordial. She denied that she ever mentioned to the appellant that she did not want a child for two years and refused cohabitation.

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

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

He stated that he was also unaware of appellant's byepass surgery.

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

"1. Is the suit maintainable?

2. Is the respondent guilty of cruelty as alleged?

3. Is the petitioner entitled to decree of divorce as claimed?

4. To what other relief or reliefs the petitioner is entitled?"

Issue no. 1 regarding maintainability of the suit was not pressed, so this issue was decided in favour of the appellant.

The trial court, after analyzing the entire pleadings and evidence on record, came to the conclusion that the following facts led to mental cruelty:

1. Respondent's refusal to cohabit with the appellant.

2. Respondent's unilateral decision not to have children after the marriage.

3. Respondent's act of humiliating the appellant and virtually turning him out of the Minto Park apartment. The appellant in fact had taken shelter with his friend and he stayed there till official accommodation was allotted to him.

4. Respondent's going to the flat and cooking only for herself and the appellant was forced to either eat out or cook his own meals.

5. The respondent did not take care of the appellant during his prolonged illness in 1985 and never enquired about his health even when he underwent the bye-pass surgery in 1993.

6. The respondent also humiliated and had driven out the loyal servant-cum-cook of the appellant, Prabir Malik.

The learned Additional District Judge came to the finding that the appellant has succeeded in proving the case of mental cruelty against the respondent, therefore, the decree was granted by the order dated 19.12.1996 and the marriage between the parties was dissolved. The respondent, aggrieved by the said judgment of the learned Additional District Judge, filed an appeal before the High Court. The Division Bench of the High Court vide judgment dated 20.5.2003 reversed the judgment of the Additional District Judge on the ground that the appellant has not been able to prove the allegation of mental cruelty. The findings of the High Court, in brief, are recapitulated as under:

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

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

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

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

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

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

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

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

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

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

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

The finding of the High Court that the appellant started living with the respondent amounted to condonation of the act of cruelty is unsustainable in law.

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

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

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

It may be pertinent to mention that in 1993, the appellant had a heart problem leading to bye-pass surgery, even at that juncture, the respondent did not bother to enquire about his health even on telephone and when she was confronted in the cross-examination, she falsely stated that she did not know about it. Mr. A. K. Dasgupta, father of the respondent and father-in-law of the appellant, was examined by the respondent. In the cross-examination, he stated that his daughter and son-in-law were living separately and he never enquired about this. He further said that the appellant left the apartment, but he never enquired from anybody about the cause of leaving the apartment. He also stated that he did not know about the heart trouble and bye-pass surgery of the appellant. In the impugned judgment, the High Court has erroneously placed reliance on the evidence submitted by

the respondent and discarded the evidence of the appellant. The evidence of this witness is wholly unbelievable and cannot stand the scrutiny of law.

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

The High Court also failed to take into consideration the most important aspect of the case that admittedly the appellant and the respondent have been living separately for more than sixteen and half years (since 27.8.1990).

The entire substratum of the marriage has already disappeared. During this long period, the parties did not spend a single minute together. The appellant had undergone bye-pass surgery even then the respondent did not bother to enquire about his health even on telephone. Now the parties have no feelings and emotions towards each other.

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

The learned Additional District Judge decreed the appellant's suit on the ground of mental cruelty. We deem it appropriate to analyze whether the High Court was justified in reversing the judgment of the learned Additional District Judge in view of the law declared by a catena of cases. We deem it appropriate to deal with the decided cases.

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

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

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

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

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

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

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

In the instant case, our main endeavour would be to define broad parameters of the concept of 'mental cruelty'. Thereafter, we would strive to determine whether the instances of mental cruelty enumerated in this case by the appellant would cumulatively be adequate to grant a decree of divorce on the ground of mental cruelty according to the settled legal position as crystallized by a number of cases of this Court and other Courts.

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

> *"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent\005."*

In the case of Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan & Anr. reported in (1981) 4 SCC 250, this Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social

conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

In the case of Shobha Rani v. Madhukar Reddi reported in (1988) 1 SCC 105, this Court had an occasion to examine the concept of cruelty. The word 'cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(i)(a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other.

The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment. In Rajani v. Subramonian AIR 1990 Ker. 1 the Court aptly observed that the concept of cruelty depends upon the type of life the parties are accustomed to or their economic and social conditions, their culture and human values to which they attach importance, judged by standard of modern civilization in the background of the cultural heritage and traditions of our society.

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

> *"16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it*

is a case of accusations and allegations, regard must also be had to the context in which they were made."

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

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

In Savitri Pandey v. Prem Chandra Pandey reported in (2002) 2 SCC 73, the Court stated as under:

"Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other."

This Court in the case of Gananath Pattnaik v. State of Orissa reported in (2002) 2 SCC 619 observed as under:

"The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case."

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

"Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of

the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

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

In A. Jayachandra v. Aneel Kaur reported in (2005) 2 SCC 22, the Court observed as under:

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

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

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

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

> *"As to what constitutes the required mental cruelty for the purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer."*

In Shobha Rani's case (supra) at pp.108-09, para 5, the Court observed as under:

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

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

In a recent decision of this Court in the case of Rishikesh Sharma v. Saroj Sharma reported in 2006 (12) Scale 282, this Court observed that the respondent wife was living separately from the year 1981 and the marriage has broken down irretrievably with no possibility of the parties living together again. The Court further observed that it will not be possible for the parties to live together and therefore there was no purpose in compelling both the parties to live together. Therefore the best course was

to dissolve the marriage by passing a decree of divorce so that the parties who were litigating since 1981 and had lost valuable part of life could live peacefully in remaining part of their life. The Court further observed that her desire to live with her husband at that stage and at that distance of time was not genuine.

This Court observed that under such circumstances, the High Court was not justified in refusing to exercise its jurisdiction in favour of the appellant who sought divorce from the Court.

"Mental cruelty" is a problem of human behaviour. This human problem unfortunately exists all over the world. Existence of similar problem and its adjudication by different courts of other countries would be of great relevance, therefore, we deem it appropriate to examine similar cases decided by the Courts of other jurisdictions.

We must try to derive benefit of wisdom and light received from any quarter.

ENGLISH CASES:

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

Conduct of such a character as to have caused danger to life, limb, or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger. {see: Russell v. Russell (1895) P. 315 (CA)}.

In England, the Divorce Reform Act, 1969 came into operation on January 1, 1971. Thereafter the distinction between the sexes is abolished, and there is only one ground of divorce, namely that the marriage has broken down irretrievably. The Divorce Reform Act, 1969 was repealed by the Matrimonial Causes Act, 1973, which came into force on January 1, 1974. The sole ground on which a petition for divorce may be presented to the court by either party to a marriage is that the marriage has broken down irretrievably.

Lord Stowell's proposition in Evans v. Evans (1790) 1 Hagg Con 35 was approved by the House of Lords and may be put thus: before the court can find a husband guilty of legal cruelty towards his wife, it is necessary to show that he has either inflicted bodily injury upon her, or has so conducted himself towards her as to render future cohabitation more or less dangerous to life, or limb, or mental or bodily health. He was careful to avoid any definition of cruelty, but he did add: 'The causes must be grave and weighty, and such as to show an absolute impossibility that the duties of married life can be discharged'. But the majority of their Lordships in Russell v. Russell (1897) (supra) declined to go beyond the definition set out above. In this case, Lord Herschell observed as under:

> *"It was conceded by the learned counsel for the appellant, and is, indeed, beyond controversy, that it is not every act of cruelty in the ordinary and popular sense of that word which amounted to saevitia, entitling the party aggrieved to a divorce; that there might be many wilful and unjustifiable acts inflicting pain and misery in respect of which that relief could not be obtained."*

Lord Merriman, in Waters v. Waters (1956) 1 All. E.R. 432 observed that intention to injure was not necessary ingredient of cruelty.

Sherman, J. in Hadden v. Hadden, The Times, December 5, 1919, (also reported in Modern Law Review Vol.12, 1949 at p.332) very aptly mentioned that he had no intention of being cruel but his intentional acts amounted to cruelty. In this case, it was observed as under:

'It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called upon to endure it.'

Lord Simon in Watt (or Thomas) v. Thomas [(1947) 1 All E.R. 582 at p. 585] observed as under:

> *"\005 the leading judicial authorities in both countries who have dealt with this subject are careful not to speak in too precise and absolute terms, for the circumstances which might conceivably arise in an unhappy married life are infinitely various. Lord Stowell in Evans v. Evans 1790 (1) Hagg Con 35 avoids giving a "direct definition".*

While insisting that "mere austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty."

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

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

Lord Reid, concurring, reserved opinion as to cases of alleged cruelty in which the defender had shown deliberate intention, though he did not doubt that there were many cases where cruelty could be established without its being necessary to be satisfied by evidence that the defender had such an intention. Lord Tucker, also concurring, said:

'Every act must be judged in relation to its attendant circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse and the offender's knowledge of the actual or probable effect of his conduct on the other's health are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies.'

In Prichard v. Pritchard (1864) 3 S&T 523, the Court observed that repeated acts of unprovoked violence by the wife were regarded as cruelty, although they might not inflict serious bodily injury on the husband. Wilde, J.O. in Power v. Power (1865) 4 SW & Tr. 173 aptly observed that cruelty lies in the cumulative ill conduct which the history of marriage discloses.

In Bravery v. Bravery (1954) 1 WLR 1169, by majority, the Court held as under:

'If a husband submitted himself to an operation for sterilization without a medical reason and without his wife's knowledge or consent it could constitute cruelty to his wife. But where such an operation was performed to the wife's knowledge, though without her consent and she continued to live with him for thirteen years, it was held that the operation did not amount to cruelty.'

Lord Tucker in Jamieson v. Jamieson (1952) I All E.R. 875 aptly observed that "Judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purposes of matrimonial suits, and experience has shown the wisdom of this course".

In Le Brocq v. Le Brockq [1964] 3 All E.R. 464, at p. 465, the court held as under:

> *"I think \005. that 'cruel' is not used in any esoteric or 'divorce court' sense of that word, but that the conduct complained of must be something which an ordinary man or a jury \005.. would describe as 'cruel' if the story were fully told."*

In Ward v. Ward [(1958) 2 All E.R. 217, a refusal to bear children followed by a refusal of intercourse and frigidity, so that the husband's health suffered, was held to be cruelty; so also the practice by the husband of coitus interruptus against the wish of his wife though she desired to have a child. (Also see: White (otherwise Berry) v. White [1948] 2 All E.R. 151; Walsham v. Walsham, [1949] I All E.R. 774; Cackett (otherwise Trice) v. Cackett, [1950] I All E.R. 677; Knott v. Knott [1955] 2 All E.R. 305.

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

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

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

In the same case, Salmon, L. J. stated at p. 263:

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

There can be cruelty without any physical violence, and there is abundant authority for recognizing mental or moral cruelty, and not infrequently the worst cases supply evidence of both. It is for the judges to review the married life of the parties in all its aspects. The several acts of alleged cruelty, physical or mental, should not be taken separately. Several acts considered separately in isolation may be trivial and not hurtful but when considered cumulatively they might well come within the description of cruelty. (see: Jamieson v. Jamieson, [1952] I All E.R. 875; Waters v. Waters, [1956] I All E.R. 432.

> *"The general rule in all questions of cruelty is that the whole matrimonial relations must be considered." (per Lord Normand in King v. King [1952] 2 All E.R. 584). In Warr v. Warr [1975] I All ER 85), the Court observed that "Section 1(2)(c) of the*

Matrimonial Causes Act, 1973 provides that irretrievable breakdown may be proved by satisfying the court that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition."

AMERICAN CASES:

In Jem v. Jem [(1937) 34 Haw. 312], the Supreme Court of Hawaii aptly mentioned that cruel treatment not amounting to physical cruelty is mental cruelty. While dealing with the matter of extreme cruelty, the Supreme Court of South Dakota in the case of Hybertson v. Hybertson (1998) 582 N.W. 2d 402 held as under:

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

In Rosenbaum v. Rosenbaum [(1976) 38 Ill.App.3d. 1] the Appellate Court of Illinois held as under:

"To prove a case entitling a spouse to divorce on the ground of mental cruelty, the evidence must show that the conduct of the offending spouse is unprovoked and constitutes a course of abusive and humiliating treatment that actually affects the physical or mental health of the other spouse, making the life of the complaining spouse miserable, or endangering his or her life, person or health."

In the case of Fleck v. Fleck 79 N.D. 561, the Supreme Court of North Dakota dealt with the concept of cruelty in the following words:

"The decisions defining mental cruelty employ such a variety of phraseology that it would be next to impossible to reproduce any generally accepted form. Very often, they do not purport to define it as distinct from physical cruelty, but combine both elements in a general definition of 'cruelty,' physical and mental. The generally recognized elements are:

(1) A course of abusive and humiliating treatment;

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

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

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

"It is well recognized that no exact inclusive and exclusive definition of legal cruelty can be given, and the courts have not attempted to do so, but generally content themselves with determining whether the facts in the particular case in question constitute cruelty or not. Especially, according to the modern view, is the question whether the defending

spouse has been guilty of legal cruelty a pure question of fact to be resolved upon all the circumstances of the case."

CANADIAN CASES:

In a number of cases, the Canadian Courts had occasions to examine the concept of 'cruelty'. In Chouinard v. Chouinard 10 D.L.R. (3d) 263], the Supreme Court of New Brunswick held as under:

> *"Cruelty which constitutes a ground for divorce under the Divorce Act, whether it be mental or physical in nature, is a question of fact. Determination of such a fact must depend on the evidence in the individual case being considered by the court. No uniform standard can be laid down for guidance; behaviour which may constitute cruelty in one case may not be cruelty in another. There must be to a large extent a subjective as well as an objective aspect involved; one person may be able to tolerate conduct on the part of his or her spouse which would be intolerable to another. Separation is usually preceded by marital dispute and unpleasantness. The court should not grant a decree of divorce on evidence of merely distasteful or irritating conduct on the part of the offending spouse. The word 'cruelty' denotes excessive suffering, severity of pain, mercilessness; not mere displeasure, irritation, anger or dissatisfaction; furthermore, the Act requires that cruelty must be of such a kind as to render intolerable continued cohabitation."*

In Knoll v. Knoll 10 D.L.R. (3d) 199, the Ontario Court of Appeal examined this matter. The relevant portion reads as under:

> *"Over the years the courts have steadfastly refrained from attempting to formulate a general definition of cruelty. As used in ordinary parlance "cruelty" signifies a disposition to inflict suffering; to delight in or exhibit indifference to the pain or misery of others; mercilessness or hard-heartedness as exhibited in action. If in the marriage relationship one spouse by his conduct causes wanton, malicious or unnecessary infliction of pain or suffering upon the body, the feelings or emotions of the other, his conduct may well constitute cruelty which will entitle a petitioner to dissolution of the marriage if, in the court's opinion, it amounts to physical or mental cruelty "of such a kind as to render intolerable the continued cohabitation of the spouses."*

In Luther v. Luther [(1978) 5 R.F.L. (2d) 285, 26 N.S.R. (2d) 232, 40 A.P.R. 232], the Supreme Court of Nova Scotia held as under:

> *"7. The test of cruelty is in one sense a subjective one, namely, as has been said many times, is this conduct by this man to this woman, or vice versa, cruelty? But that does not mean that what one spouse may consider cruel is necessarily so. Cruelty must involve serious and weighty matters, which, reasonably considered, may cause physical or mental suffering. It must furthermore -- an important additional requirement -- be of such a nature and kind as to render such conduct intolerable to a reasonable person."*

The Supreme Court further held as under:

> *"9. To constitute mental cruelty, conduct must be much more than jealousy, selfishness or possessiveness which causes unhappiness, dissatisfaction or emotional upset. Even less can mere incompatibility or differences in temperament, personality or opinion be elevated to grounds for divorce."*

In another case Zalesky v. Zalesky 1 D.L.R. (3d) 471, the Manitoba Court of Queen's Bench observed that where cohabitation of the spouses become intolerable that would be another ground of divorce. The Court held as under:

> *"There is now no need to consider whether conduct complained of caused 'danger to life, limb, or health, bodily or mentally, or a reasonable apprehension of it' or any of the variations of that definition to be found in the Russell case.*
>
> *In choosing the words 'physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses' Parliament gave its own fresh complete statutory definition of the conduct which is a ground for divorce under s. 3(d) of the Act."*

AUSTRALIAN CASES:

In Dunkley v. Dunkley (1938) SASR 325, the Court examined the term "legal cruelty" in the following words:

> *"'Legal cruelty', means conduct of such a character as to have caused injury or danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of danger. Personal violence, actual or threatened, may alone be sufficient; on the other hand, mere vulgar abuse or false accusations of adultery are ordinarily not enough; but, if the evidence shows that conduct of this nature had been persisted in until the health of the party subjected to it breaks down, or is likely to break down, under the strain, a finding of cruelty is justified."*

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

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

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

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

In the Report, it is mentioned that the germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much

earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case Lodder v. Lodder 1921 New Zealand Law Reports 786. Salmond J., in a passage which has now become classic, enunciated the breakdown principle in these words:

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

In the said Report, it is mentioned that restricting the ground of divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet such a situation has arisen in which the marriage cannot survive. The marriage has all the external appearances of marriage, but none in reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a fagade, when the emotional and other bonds which are of the essence of marriage have disappeared. It is also mentioned in the Report that in case the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce, then the parties alone can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

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

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

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

> *"74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice*

of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

75. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

76. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist."

77. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems then are sought to be solved.

78. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

79. When we carefully evaluate the judgment of the High Court and scrutinize its findings in the background of the facts and circumstances of this case, it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory."

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

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

Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty

in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie.

By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty. When we take into consideration aforementioned factors along with an important circumstance that the parties are admittedly living separately for more than sixteen and half years (since 27.8.1990) the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the respondent.

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

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

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

This appeal is accordingly disposed of but, in the facts and circumstances of the case, we direct the parties to bear their own costs.

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DANIAL LATIFI & ANR VS UNION OF INDIA

Writ Petition (Civil) 868 of 1986
Date of Judgment : 28/09/2001

(2001) 7 SCC 740

Danial Latifi & Anr.
Vs.
Union of India

Bench: Hon'ble Mr. Justice G.B. Pattanaik, Hon'ble Mr. Justice S. RAjendra Babu, Hon'ble Mr. Justice D.P. Mohapatra, Hon'ble Mr. Justice Doraiswamy Raju & Hon'ble Mr. Justice Shivaraj V. Patil

The Supreme Court in the case of Daniel Latifi v. Union of India a held that reasonable and fair provisions include provision for the future of the divorced wife (including maintenance) and it does not confine itself to the iddat period only. The Constitutional validity of the Act was also upheld.

JUDGMENT

RAJENDRA BABU, J.:

The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 [hereinafter referred to as the Act] is in challenge before us in these cases.

The facts in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. (1985) 2 SCC 556, are as follows.

The husband appealed against the judgment of the Madhya Pradesh High Court directing him to pay to his divorced wife Rs.179/- per month, enhancing the paltry sum of Rs.25 per month originally granted by the Magistrate. The parties had been married for 43 years before the ill and elderly wife had been thrown out of her husbands residence. For about two years the husband paid maintenance to his wife at the rate of Rs.200/- per month. When these payments ceased she petitioned under Section 125 CrPC. The husband immediately dissolved the marriage by pronouncing a triple talaq. He paid Rs.3000/- as deferred mahr and a further sum to cover arrears of maintenance and maintenance for the iddat period and he sought thereafter to have the petition dismissed on the ground that she had received the amount due to her on divorce under the Muslim law applicable to the parties. The important feature of the case was that the wife had managed the matrimonial home for more than 40 years and had borne and reared five children and was incapable of taking up any career or independently supporting herself at that late stage of her life - remarriage was an impossibility in that case. The husband, a successful Advocate with an approximate income of Rs.5,000/- per month provided Rs.200/- per month to the divorced wife, who had shared his life for half a century and mothered his five children and was in desperate need of money to survive.

Thus, the principle question for consideration before this Court was the interpretation of Section 127(3)(b) CrPC that where a Muslim woman had been divorced by her husband and paid her mahr, would it indemnify the husband from his obligation under the provisions of Section 125CrPC. A Five-Judge Bench of this Court reiterated that the Code of Criminal Procedure controls the proceedings in

such matters and overrides the personal law of the parties. If there was a conflict between the terms of the Code and the rights and obligations of the individuals, the former would prevail. This Court pointed out that mahr is more closely connected with marriage than with divorce though mahr or a significant portion of it, is usually payable at the time the marriage is dissolved, whether by death or divorce. This fact is relevant in the context of Section 125 CrPC even if it is not relevant in the context of Section 127(3)(b) CrPC. Therefore, this Court held that it is a sum payable on divorce within the meaning of Section 127(3)(b) CrPC and held that mahr is such a sum which cannot ipso facto absolve the husbands liability under the Act.

It was next considered whether the amount of mahr constitutes a reasonable alternative to the maintenance order. If mahr is not such a sum, it cannot absolve the husband from the rigour ofSection 127(3)(b) CrPC but even in that case, mahr is part of the resources available to the woman and will be taken into account in considering her eligibility for a maintenance order and the quantum of maintenance. Thus this Court concluded that the divorced women were entitled to apply for maintenance orders against their former husbands under Section 125 CrPC and such applications were not barred under Section 127(3)(b) CrPC. The husband had based his entire case on the claim to be excluded from the operation of Section 125 CrPC on the ground that Muslim law exempted from any responsibility for his divorced wife beyond payment of any mahr due to her and an amount to cover maintenance during the iddat period and Section 127(3)(b)CrPC conferred statutory recognition on this principle. Several Muslim organisations, which intervened in the matter, also addressed arguments. Some of the Muslim social workers who appeared as interveners in the case supported the wife brought in question the issue of mata contending that Muslim law entitled a Muslim divorced woman to claim provision for maintenance from her husband after the iddat period. Thus, the issue before this Court was: the husband was claiming exemption on the basis of Section 127(3)(b) CrPC on the ground that he had given to his wife the whole of the sum which, under the Muslim law applicable to the parties, was payable on such divorce while the woman contended that he had not paid the whole of the sum, he had paid only the mahr and iddat maintenance and had not provided the mata i.e. provision or maintenance referred to in the Holy Quran, Chapter II, Sura

241. This Court, after referring to the various text books on Muslim law, held that the divorced wifes right to maintenance ceased on expiration of iddat period but this Court proceeded to observe that the general propositions reflected in those statements did not deal with the special situation where the divorced wife was unable to maintain herself. In such cases, it was stated that it would be not only incorrect but unjust to extend the scope of the statements referred to in those text books in which a divorced wife is unable to maintain herself and opined that the application of those statements of law must be restricted to that class of cases in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. This Court concluded that these Aiyats [the Holy Quran, Chapter II, Suras 241-242] leave no doubt that the Holy Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Holy Quran. On this note, this Court concluded its judgment.

There was a big uproar thereafter and Parliament enacted the Act perhaps, with the intention of making the decision in Shah Banos case ineffective.

The Statement of Objects & Reasons to the bill, which resulted in the Act, reads as follows :

The Supreme Court, in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. [AIR 1985 SC 945), has held that although the Muslim Law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim Law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husbands liability ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 of the Code of Criminal Procedure.

2. This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill accordingly provides for the following among other things, namely:-

   (a) a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to mahr or dower and all the properties given to her by her relatives, friends, husband and the husbands relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the deliver of the properties;

   (b) where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where, a divorced woman has no relatives or such relatives or any one of them has not enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

The object of enacting the Act, as stated in the Statement of Objects & Reasons to the Act, is that this Court, in Shah Banos case held that Muslim Law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, but it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973 and, therefore, it cannot be said that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance beyond the period of iddat to his divorced wife, who is unable to maintain herself.

As held in Shah Banos case, the true position is that if the divorced wife is able to maintain herself, the husbands liability to provide maintenance for her ceases with the expiration of the period of iddat but

if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 CrPC. Thus it was held that there is no conflict between the provisions of Section 125 CrPC and those of the Muslim Personal Law on the question of the Muslim husbands obligation to provide maintenance to his divorced wife, who is unable to maintain herself. This view is a reiteration of what is stated in two other decisions earlier rendered by this Court in Bai Tahira vs. Ali Hussain Fidaalli Chothia, (1979) 2 SCC 316, andFuzlunbi vs. K.Khader Vali & Anr., (1980) 4 SCC 125.

Smt. Kapila Hingorani and Smt. Indira Jaisingh raised the following contentions in support of the petitioners and they are summarised as follows :

1. Muslim marriage is a contract and an element of consideration is necessary by way of mahr or dower and absence of consideration will discharge the marriage. On the other hand, Section 125CrPC has been enacted as a matter of public policy.

2. To enable a divorced wife, who is unable to maintain herself, to seek from her husband, who is having sufficient means and neglects or refuses to maintain her, payment of maintenance at a monthly rate not exceeding Rs.500/-. The expression wife includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. The religion professed by a spouse or the spouses has no relevance in the scheme of these provisions whether they are Hindus, Muslims, Christians or the Parsis, pagans or heathens. It is submitted thatSection 125 CrPC is part of the Code of Criminal Procedure and not a civil law, which defines and governs rights and obligations of the parties belonging to a particular religion like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 CrPC, it is submitted, was enacted in order to provide a quick and summary remedy. The basis there being, neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves, these provisions have been made and the moral edict of the law and morality cannot be clubbed with religion.

3. The argument is that the rationale of Section 125 CrPC is to off- set or to meet a situation where a divorced wife is likely to be led into destitution or vagrancy. Section 125 CrPC is enacted to prevent the same in furtherance of the concept of social justice embodied in Article 21 of the Constitution.

4. It is, therefore, submitted that this Court will have to examine the questions raised before us not on the basis of Personal Law but on the basis that Section 125 CrPC is a provision made in respect of women belonging to all religions and exclusion of Muslim women from the same results in discrimination between women and women. Apart from the gender injustice caused in the country, this discrimination further leads to a monstrous proposition of nullifying a law declared by this Court in Shah Banos case. Thus there is a violation of not only equality before law but also equal protection of laws and inherent infringement of Article 21 as well as basic human values. If the object of Section 125 CrPC is to avoid vagrancy, the remedy thereunder cannot be denied to Muslim women.

5. The Act is an un-islamic, unconstitutional and it has the potential of suffocating the muslim women and it undermines the secular character, which is the basic feature of the Constitution; that there is no rhyme or reason to deprive the muslim women from the applicability of the provisions of Section 125 CrPC and consequently, the present Act must be held to be discriminatory and violative of Article 14 of the Constitution; that excluding the application ofSection 125 CrPC is violative of Articles 14 and 21 of the Constitution; that the conferment of

power on the Magistrate under sub-section (2) of Section 3 and Section 4 of the Act is different from the right of a muslim woman like any other woman in the country to avail of the remedies under Section 125 CrPC and such deprivement would make the Act unconstitutional, as there is no nexus to deprive a muslim woman from availing of the remedies available under Section 125CrPC, notwithstanding the fact that the conditions precedent for availing of the said remedies are satisfied.

The learned Solicitor General, who appeared for the Union of India, submitted that when a question of maintenance arises which forms part of the personal law of a community, what is fair and reasonable is a question of fact in that context. Under Section 3 of the Act, it is provided that a reasonable and fair provision and maintenance to be made and paid by her former husband within the iddat period would make it clear that it cannot be for life but would only be for a period of iddat and when that fact has clearly been stated in the provision, the question of interpretation as to whether it is for life or for the period of iddat would not arise. Challenge raised in this petition is dehors the personal law. Personal law is a legitimate basis for discrimination, if at all, and, therefore, does not offend Article 14 of the Constitution. If the legislature, as a matter of policy, wants to apply Section 125 CrPC to Muslims, it could also be stated that the same legislature can, by implication, withdraw such application and make some other provision in that regard. Parliament can amend Section 125 CrPC so as to exclude them and apply personal law and the policy of Section 125 CrPC is not to create a right of maintenance dehors the personal law. He further submitted that in Shah Banos case, it has been held that a divorced woman is entitled to maintenance even after the iddat period from the husband and that is how Parliament also understood the ratio of that decision. To overcome the ratio of the said decision, the present Act has been enacted and Section 3(1)(a) is not in discord with the personal law.

Shri Y.H.Muchhala, learned Senior Advocate appearing for the All India Muslim Personal Law Board, submitted that the main object of the Act is to undo the Shah Banos case. He submitted that this Court has harzarded interpretation of an unfamiliar language in relation to religious tenets and such a course is not safe as has been made clear by Aga Mahomed Jaffer Bindaneem vs. Koolsom Bee Bee & Ors., 24 IA 196, particularly in relation to Suras 241 and 242 Chapter II, the Holy Quran.. He submitted that in interpreting Section 3(1)(a) of the Act, the expressions provision and maintenance are clearly the same and not different as has been held by some of the High Courts. He contended that the aim of the Act is not to penalise the husband but to avoid vagrancy and in this context Section 4 of the Act is good enough to take care of such a situation and he, after making reference to several works on interpretation and religious thoughts as applicable to Muslims, submitted that social ethos of Muslim society spreads a wider net to take care of a Muslim divorced wife and not at all dependent on the husband. He adverted to the works of religious thoughts by Sir Syed Ahmad Khan and Bashir Ahmad, published from Lahore in 1957 at p. 735. He also referred to the English translation of the Holy Quran to explain the meaning of gift in Sura 241. In conclusion, he submitted that the interpretation to be placed on the enactment should be in consonance with the Muslim personal law and also meet a situation of vagrancy of a Muslim divorced wife even when there is a denial of the remedy provided underSection 125 CrPC and such a course would not lead to vagrancy since provisions have been made in the Act. This Court will have to bear in mind the social ethos of Muslims, which are different and the enactment is consistent with law and justice.

It was further contended on behalf of the respondents that the Parliament enacted the impugned Act, respecting the personal law of muslims and that itself is a legitimate basis for making a differentiation; that a separate law for a community on the basis of personal law applicable to such community, cannot

be held to be discriminatory; that the personal law is now being continued by a legislative enactment and the entire policy behind the Act is not to confer a right of maintenance, unrelated to the personal law; that the object of the Act itself was to preserve the personal law and prevent inroad into the same; that the Act aims to prevent the vagaries and not to make a muslim woman, destitute and at the same time, not to penalise the husband; that the impugned Act resolves all issues, bearing in mind the personal law of muslim community and the fact that the benefits of Section 125 CrPC have not been extended to muslim women, would not necessarily lead to a conclusion that there is no provision to protect the muslim women from vagaries and from being a destitute; that therefore, the Act is not invalid or unconstitutional.

On behalf of the All India Muslim Personal Law Board, certain other contentions have also been advanced identical to those advanced by the other authorities and their submission is that the interpretation placed on the Arabic word mata by this Court in Shah Banos case is incorrect and submitted that the maintenance which includes the provision for residence during the iddat period is the obligation of the husband but such provision should be construed synonymously with the religious tenets and, so construed, the expression would only include the right of residence of a Muslim divorced wife during iddat period and also during the extended period under Section 3(1)(a) of the Act and thus reiterated various other contentions advanced on behalf of others and they have also referred to several opinions expressed in various text books, such as, -

1. The Turjuman al-Quran by Maulana Abul Kalam Azad, translated into English by Dr. Syed Abdul Latif;
2. Persian Translation of the Quran by Shah Waliullah Dahlavi
3. Al-Manar Commentary on the Quran (Arabic);
4. Al-Isaba by Ibne Hajar Asqualani [Part-2]; Siyar Alam-in-Nubla by Shamsuddin Mohd. Bin Ahmed BinUsman Az-Zahbi;
5. Al-Maratu Bayn Al-Fiqha Wa Al Qanun by Dr. Mustafa As- Sabai;
6. Al-Jamil ahkam-il Al-Quran by Abu Abdullah Mohammad Bin Ahmed Al Ansari Al-Qurtubi;
7. Commentary on the Quran by Baidavi (Arabic);
8. Rooh-ul-Bayan (Arabic) by Ismail Haqqi Affendi;
9. Al Muhalla by Ibne Hazm (Arabic);
10. Al-Ahwalus Shakhsiah (the Personal Law) by Mohammad abu Zuhra Darul Fikrul Arabi.

On the basis of the aforementioned text books, it is contended that the view taken in Shah Banos case on the expression mata is not correct and the whole object of the enactment has been to nullify the effect of the Shah Banos case so as to exclude the application of the provision ofSection 125 CrPC, however, giving recognition to the personal law as stated in Sections 3 and 4 of the Act. As stated earlier, the interpretation of the provisions will have to be made bearing in mind the social ethos of the Muslim and there should not be erosion of the personal law.

[On behalf of the Islamic Shariat Board, it is submitted that except for Mr. M. Asad and Dr. Mustafa-as-Sabayi no author subscribed to the view that the Verse 241 of Chapter II of the Holy Quran casts an obligation on a former husband to pay maintenance to the Muslim divorced wife beyond the iddat period. It is submitted that Mr. M. Asads translation and commentary has been held to be unauthentic

and unreliable and has been subscribed by the Islamic World League only. It is submitted that Dr. Mustafa-as-Sabayi is a well-known author in Arabic but his field was history and literature and not the Muslim law. It was submitted that neither are they the theologists nor jurists in terms of Muslim law. It is contended that this Court wrongly relied upon Verse 241 of Chapter II of the Holy Quran and the decree in this regard is to be referred to Verse 236 of Chapter II which makes paying mata as obligatory for such divorcees who were not touched before divorce and whose Mahr was not stipulated. It is submitted that such divorcees do not have to observe iddat period and hence not entitled to any maintenance. Thus the obligation for mata has been imposed which is a one time transaction related to the capacity of the former husband. The impugned Act has no application to this type of case. On the basis of certain texts, it is contended that the expression mata which according to different schools of Muslim law, is obligatory only in typical case of a divorce before consummation to the woman whose mahr was not stipulated and deals with obligatory rights of maintenance for observing iddat period or for breast-feeding the child. Thereafter, various other contentions were raised on behalf of the Islamic Shariat Board as to why the views expressed by different authors should not be accepted.

Dr. A.M.Singhvi, learned Senior Advocate who appeared for the National Commission for Women, submitted that the interpretation placed by the decisions of the Gujarat, Bombay, Kerala and the minority view of the Andhra Pradesh High Courts should be accepted by us. As regards the constitutional validity of the Act, he submitted that if the interpretation of Section 3 of the Act as stated later in the course of this judgment is not acceptable then the consequence would be that a Muslim divorced wife is permanently rendered without remedy insofar as her former husband is concerned for the purpose of her survival after the iddat period. Such relief is neither available under Section 125 CrPC nor is it properly compensated by the provision made in Section 4 of the Act. He contended that the remedy provided under Section 4 of the Act is illusory inasmuch as firstly, she cannot get sustenance from the parties who were not only strangers to the marital relationship which led to divorce; secondly, wakf boards would usually not have the means to support such destitute women since they are themselves perennially starved of funds and thirdly, the potential legatees of a destitute woman would either be too young or too old so as to be able to extend requisite support. Therefore, realistic appreciation of the matter will have to be taken and this provision will have to be decided on the touch stone of Articles 14, 15 and alsoArticle 21 of the Constitution and thus the denial of right to life and liberty is exasperated by the fact that it operates oppressively, unequally and unreasonably only against one class of women. While Section 5 of the Act makes the availability and applicability of the remedy as provided bySection 125 CrPC dependent upon the whim, caprice, choice and option of the husband of the Muslim divorcee who in the first place is sought to be excluded from the ambit of Section 3 of the post-iddat period and, therefore, submitted that this provision will have to be held unconstitutional.

This Court in Shah Banos case held that although Muslim personal law limits the husbands liability to provide maintenance for his divorced wife to the period of iddat, it does not contemplate a situation envisaged by Section 125 CrPC of 1973. The Court held that it would not be incorrect or unjustified to extend the above principle of Muslim Law to cases in which a divorced wife is unable to maintain herself and, therefore, the Court came to the conclusion that if the divorced wife is able to maintain herself the husbands liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to recourse to Section 125 CrPC. This decision having imposed obligations as to the liability of Muslim husband to pay maintenance to his divorced wife, Parliament endorsed by the Act the right of a Muslim woman to be paid maintenance at the time of divorce and to protect her rights.

The learned counsel have also raised certain incidental questions arising in these matters to the following effect-

1) Whether the husband who had not complied with the orders passed prior to the enactments and were in arrears of payments could escape from their obligation on the basis of the Act, or in other words, whether the Act is retrospective in effect?

2) Whether Family Courts have jurisdiction to decide the issues under the Act?

3) What is the extent to which the Wakf Board is liable under the Act?

The learned counsel for the parties have elaborately argued on a very wide canvass. Since we are only concerned in this Bench with the constitutional validity of the provisions of the Act, we will consider only such questions as are germane to this aspect. We will decide only the question of constitutional validity of the Act and relegate the matters when other issues arise to be dealt with by respective Benches of this Court either in appeal or special leave petitions or writ petitions.

In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and women are assigned, invariably, a dependant role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question.

Now it is necessary to analyse the provisions of the Act to understand the scope of the same. The Preamble to the Act sets out that it is an Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto. A divorced woman is defined under Section 2(a) of the Act to mean a divorced woman who was married according to Muslim Law, and has been divorced by, or has obtained divorce from her husband in accordance with Muslim Law; iddat period is defined under Section 2(b) of the Act to mean, in the case of a divorced woman,-

(i) three menstrual courses after the date of divorce, if she is subject to menstruation;

(ii) three lunar months after her divorce, if she is not subject to menstruation; and

(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy whichever is earlier. Sections 3 and 4 of the Act are the principal sections, which are under attack before us. Section 3 opens up with a non-obstante clause overriding all other laws and provides that a divorced woman shall be entitled to -

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

(b) where she maintains the children born to her before or after her divorce, a reasonable provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim Law; and

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

Where such reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made and paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be. Rest of the provisions of Section 3 of the Act may not be of much relevance, which are procedural in nature.

Section 4 of the Act provides that, with an overriding clause as to what is stated earlier in the Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim Law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order. If any of the relatives do not have the necessary means to pay the same, the Magistrate may order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order. Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them has not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board, functioning in the area in which the divorced woman resides, to pay such maintenance as determined by him as the case may be. It is, however, significant to note thatSection 4 of the Act refers only to payment of maintenance and does not touch upon the provision to be made by the husband referred to in Section 3(1)(a) of the Act.

Section 5 of the Act provides for option to be governed by the provisions of Sections 125 to 128CrPC. It lays down that if, on the date of the first hearing of the application under Section 3(2), a divorced

woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 CrPC, and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

A reading of the Act will indicate that it codifies and regulates the obligations due to a Muslim woman divorcee by putting them outside the scope of Section 125 CrPC as the divorced woman has been defined as Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law. But the Act does not apply to a Muslim woman whose marriage is solemnized either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either underIndian Divorce Act, 1969 or the Indian Special Marriage Act, 1954. The Act does not apply to the deserted and separated Muslim wives. The maintenance under the Act is to be paid by the husband for the duration of the iddat period and this obligation does not extend beyond the period of iddat. Once the relationship with the husband has come to an end with the expiry of the iddat period, the responsibility devolves upon the relatives of the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives, or no relatives are able to support the divorcee, then the Court can order the State Wakf Boards to pay the maintenance.

Section 3(1) of the Act provides that a divorced woman shall be entitled to have from her husband, a reasonable and fair maintenance which is to be made and paid to her within the iddat period. Under Section 3(2) the Muslim divorcee can file an application before a Magistrate if the former husband has not paid to her a reasonable and fair provision and maintenance or mahr due to her or has not delivered the properties given to her before or at the time of marriage by her relatives, or friends, or the husband or any of his relatives or friends. Section 3(3) provides for procedure wherein the Magistrate can pass an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may think fit and proper having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of her former husband. The judicial enforceability of the Muslim divorced womans right to provision and maintenance under Section (3)(1)(a) of the Act has been subjected to the condition of husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat.

A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorce and, therefore, the word provision indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles. The expression within should be read as during or for and this cannot be done because words cannot be construed contrary to their meaning as the word within would mean on or before, not beyond and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided inSection 3(3) but no where the Parliament

has provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

The important section in the Act is Section 3 which provides that divorced woman is entitled to obtain from her former husband maintenance, provision and mahr, and to recover from his possession her wedding presents and dowry and authorizes the magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a reasonable and fair provision for his divorced wife; and (2) to provide maintenance for her. The emphasis of this section is not on the nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, within the iddat period. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both reasonable and fair provision and maintenance by paying these amounts in a lump sum to his wife, in addition to having paid his wifes mahr and restored her dowry as per Section 3(1)(c) and3(1)(d) of the Act. Precisely, the point that arose for consideration in Shah Banos case was that the husband has not made a reasonable and fair provision for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are a reasonable and fair provision and maintenance to be made and paid as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs to be made and paid to her within the iddat period, it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4of the Act, which empowers the magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to provision. Obviously, the right to have a fair and reasonable provision in her favour is a right enforceable only against the womans former husband, and in addition to what he is obliged to pay as maintenance; thirdly, the words of the Holy Quran, as translated by Yusuf Ali of mata as maintenance though may be incorrect and that other translations employed the word provision, this Court in Shah Banos case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether mata was rendered maintenance or provision, there could be no pretence that the husband in Shah Banos case had provided anything at all by way of mata to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to mata is only a single or one time transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word provision inSection 3(1)(a) of the Act incorporates mata as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables a reasonable and fair provision and a reasonable and fair provision as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Banos case, actually codifies the very rationale contained therein.

A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support is satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right loses its significance. The object and scope of Section 125CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Banos case. In this case to find out the personal law of Muslims with regard to divorced womens rights, the starting point should be Shah Banos case and not the original texts or any other material all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Banos case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Banos case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Banos case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality.

In Shah Banos case this Court has clearly explained as to the rationale behind Section 125 CrPC to make provision for maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or destitution on the part of a Muslim woman. The contention put forth on behalf of the Muslims organisations who are interveners before us is that under the Act vagrancy or destitution is sought to be avoided but not by punishing the erring husband, if at all, but by providing for maintenance through others. If for any reason the interpretation placed by us on the language ofSections 3(1)(a) and 4 of the Act is not acceptable, we will have to examine the effect of the provisions as they stand, that is, a Muslim woman will not be entitled to maintenance from her husband after the period of iddat once the Talaq is pronounced and, if at all, thereafter maintenance could only be recovered from the various persons mentioned in Section 4 or from the Wakf Board. This Court in Olga Tellis v. Bombay Municipal Corporation, 1985(3) SCC 545, and Maneka Gandhi v. Union of India, 1978 (1) SCC 248, held that the concept of right to life and personal liberty guaranteed under Article 21 of the Constitution would include the right to live with dignity. Before the Act, a Muslim woman

who was divorced by her husband was granted a right to maintenance from her husband under the provisions of Section 125 CrPC until she may re-marry and such a right, if deprived, would not be reasonable, just and fair. Thus the provisions of the Act depriving the divoced Muslim women of such a right to maintenance from her husband and providing for her maintenance to be paid by the former husband only for the period of iddat and thereafter to make her run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Section 125 CrPC. Such deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or Christian women or women belonging to any other community. The provisions prima facie, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion. It is well settled that on a rule of construction a given statute will become ultra vires or unconstitutional and, therefore, void, whereas another construction which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that Legislature does not intend to enact unconstitutional laws. We think, the latter interpretation should be accepted and, therefore, the interpretation placed by us results in upholding the validity of the Act. It is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way.

The learned counsel appearing for the Muslim organisations contended after referring to various passages from the text books to which we have adverted to earlier to state that the law is very clear that a divorced Muslim woman is entitled to maintenance only upto the stage of iddat and not thereafter. What is to be provided by way of Mata is only a benevolent provision to be made in case of divorced Muslim woman who is unable to maintain herself and that too by way of charity or kindness on the part of her former husband and not as a result of her right flowing to the divorced wife. The effect of various interpretations placed on Suras 241 and 242 of Chapter 2 of Holy Quran has been referred to in Shah Banos case. Shah Banos case clearly enunciated what the present law would be. It made a distinction between the provisions to be made and the maintenance to be paid. It was noticed that the maintenance is payable only upto the stage of iddat and this provision is applicable in case of a normal circumstances, while in case of a divorced Muslim woman who is unable to maintain herself, she is entitled to get Mata. That is the basis on which the Bench of Five Judges of this Court interpreted the various texts and held so. If that is the legal position, we do not think, we can state that any other position is possible nor are we to start on a clean slate after having forgotten the historical background of the enactment. The enactment though purports to overcome the view expressed in Shah Banos case in relation to a divorced Muslim woman getting something by way of maintenance in the nature of Mata is indeed the statutorily recognised by making provision under the Act for the purpose of the maintenance but also for provision. When these two expressions have been used by the enactment, which obviously means that the Legislature did not intend to obliterate the meaning attributed to these

two expressions by this Court in Shah Banos case. Therefore, we are of the view that the contentions advanced on behalf of the parties to the contrary cannot be sustained.

In Arab Ahemadhia Abdulla and etc vs. Arab Bail Mohmuna Saiyadbhai & Ors. etc., AIR 1988 (Guj.) 141; Ali vs. Sufaira, (1988) 3 Crimes 147; K. Kunhashed Hazi v. Amena, 1995 Crl.L.J. 3371;K. Zunaideen v. Ameena Begum, (1998] II DMC 468; Karim Abdul Shaik v. Shenaz Karim Shaik, 2000 Cr.L.J. 3560 and Jaitunbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh & Anr., 1999 (3) Mh.L.J. 694, while interpreting the provision of Sections 3(1)(a) and 4 of the Act, it is held that a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband which must include maintenance for future extending beyond the iddat period. It was held that the liability of the former husband to make a reasonable and fair provision under Section 3(1)(a) of the Act is not restricted only for the period of iddat but that divorced Muslim woman is entitled to a reasonable and fair provision for her future being made by her former husband and also to maintenance being paid to her for the iddat period. A lot of emphasis was laid on the words made and paid and were construed to mean not only to make provision for the iddat period but also to make a reasonable and fair provision for her future. A Full Bench of the Punjab and Haryana High Court in Kaka v. Hassan Bano & Anr., II (1998) DMC 85 (FB), has taken the view that under Section 3(1)(a) of the Act a divorced Muslim woman can claim maintenance which is not restricted to iddat period. To the contrary it has been held that it is not open to the wife to claim fair and reasonable provision for the future in addition to what she had already received at the time of her divorce; that the liability of the husband is limited for the period of iddat and thereafter if she is unable to maintain herself, she has to approach her relative or Wakf Board, by majority decision in Umar Khan Bahamami v. Fathimnurisa, 1990 Cr.L.J. 1364; Abdul Rashid v. Sultana Begum, 1992 Cr.L.J. 76; Abdul Haq v. Yasima Talat; 1998 Cr.L.J. 3433; Md. Marahim v. Raiza Begum, 1993 (1) DMC 60. Thus preponderance of judicial opinion is in favour of what we have concluded in the interpretation of Section 3 of the Act. The decisions of the High Courts referred to herein that are contrary to our decision stand overruled.

While upholding the validity of the Act, we may sum up our conclusions:

1) a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

In the result, the writ petition Nos. 868/86, 996/86, 1001/86, 1055/86, 1062/86, 1236/86, 1259/86 and 1281/86 challenging the validity of the provisions of the Act are dismissed.

All other matters where there are other questions raised, the same shall stand relegated for consideration by appropriate Benches of this Court.

[G.B. PATTANAIK], [S. RAJENDRA BABU], [D.P. MOHAPATRA],
SEPTEMBER 28, 2001. **[DORAISWAMY RAJU], [SHIVARAJ V. PATIL]**

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SANTA SHARMA VERSUS SUSHIL SHARMA

DATE OF JUDGMENT: 16/02/2000
Bench : Hon'ble Mr. Justice G.T.Nanavati & Hon'ble Mr. Justice S.N.Phukan

Writ Petition (Cri.) No. 656 of 1997

Petitioner: Santa Sharma
Vs.
Respondent: Sushil Sharma

This appeal is filed against the judgment and order of the High Court of Delhi in Writ Petition (Cri.) No. 656 of 1997. Sushil Sharma had filed the writ petition seeking a writ of Habeas Corpus in respect of two minor children Nell and Monica, aged 7 and 3 years respectively. It was alleged that the children are in illegal custody of Sarita Sharma, whom he had married on 23.12.1988. The High Court allowed the petition and directed Sarita to restore the custody of two children to Sushil Sharma. The passports of the two children were also ordered to be handed over to Sushil Sharma and it was also dedared that it was open to Sushll Sharma to take the children to U.S.A. without any hindrance

"Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of aminor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor,"

Ordinarily, a female child should be flowed to remaln with the mother so that she can be properly locked after. It is also not desirable that two chHdren are separatee from each other. If a female child has to stay w<th the mother it:will be in the interest of both the children that they both stay with the mother. Here In India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time if must be said that the son, who is elder than daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the chiidren, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have. allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have (erected the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of mother returning to U,S.A. in the interest of .the children. Therefore.. we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A, with the children would depend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the court in U.S.A. the circumstances under vvhich' she had left U.S.A. with the children Without taking permission of the Court. There is a possibility that: both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights.

JUDGMENT

G.T. NANAVATI. J.

This appeal is filed against the judgment and order of the High Court of Delhi in Writ Petition (Cri.) No. 656 of 1997. Sushil Sharma had filed the writ petition seeking a writ of Habeas Corpus in respect of two minor children Nell and Monica, aged 7 and 3 years respectively. It was alleged that the children are in illegal custody of Sarita Sharma, whom he had married on 23.12.1988. The High Court allowed the petition and directed Sarita to restore the custody of two children to Sushil Sharma. The passports of the two children were also ordered to be handed over to Sushil Sharma and it was also dedared that it was open to Sushll Sharma to take the children to U.S.A. without any hindrance. Sarita has., therefore, filed this appeal.

Sushil initiated proceedings .for dissolution of his marriage in the District Court of Tarrant County, Texas, U.SA.m 1995. In the said proceedings interim orders were passed from time to time with resped: to the care and custody of the children and visitation rights of Sushii :and Sarita. Even while the divorce proceedings were pending Sushii and Sarita lived together, from November, 1996.to Marth, 1997. They again separated. This time Sarita had taken the children along with her. It was stated in the writ petition that the Associate Judge, taking note of the fact that Sarita had gone away with the children, passed an order for putting the chhdren in the care of Sushii and Sarita was only given visitation rights. On 7.5.1997 Sarita had picked up the children from Sushll residence in exercise of her visitation rights. She was to leave the children in the school the next day morning. Sushii got the information from the school that the children were not brought back to the school. On making inquiries he came to know that Sarita had vacated her apartment and gone away somewhere. He had, therefore, inforrned the police and a warrant for her arrest was also issued.

It was further stated in the petition that his further inquiries revealed that Sarita had, without obtaining any order from the American Court, flown away to India with the children It was further stated in the petition that on 12.8.1997 a divorce decree was passed by the Associate Judge and In view of the conduct of Sarita he has also passed an order declaring that the sole custody of the children shall be of Sushll. She had been denied even the visitation rights. Sushll then filed a writ petition in the Delhi High Court on 9.9.1997. Sarita's contention In the reply to the petition was that by virtue of the orders dated 5.2.1996 and 2.4.1997 she and Sushil were both appointed as Possessory Conservators and, therefore, on 7.5.1997 both the children were in her lawful custody. It was also her contention that she had brought the children to India with full knowledge of Sushil. It was also her contention that Sushil is not a person fit to be given physical custody of the children as he is alcoholic and violent as disclosed by the material on record of the divorce proceeding. The High Court held that in view of the Interim orders passed by the American Court Sarita committed a wrong in not informing that Court and taking its permission to remove the children from out of the jurisdiction of that Court. The High Court took note of the fact that s competent Court having territorial jurisdiction has now passed a decree of divorce and ordered that only the father. i.e. Sushil, shall have the custody of the children. The High Court rejected the contention of Santa that the decree of divorce and the order for the custody of the children were obtained by Sushi'l by practicing fraud on the Court and further observed that even If that Is so, she should approach the American Court for revocation of that order. Taking this view the High Court allowed the writ petition and gave the directions referred to above.

The learned counsel appearing for the appellant submitted that In a Habeas Corpus petition what a Court should consider Is whether the person,. In respect of whom a writ of Habeas Corpus is sought,

is kept in illegal custody or is detained against his wish. He further submitted that a Habeas Corpus petition is not an appropriate proceeding for securing custody of minor chlidren staying with the mother. He further submitted that when she came to India with the children she was the natural lawful guardian of the children and also managing conservator of the children. With respect to the decree of divorce and order for custody of the children, he submitted that the said decree and order ware obtained by the respondent by suppressing material facts from the Court and the said decree and order, even otherwise, should not be taken as binding on 'the Courts in India, as they are not consistent with the law applicable to the parties. He lastly submitted that even if the said decree and order are treated as valid for the present the High court should not have allowed the writ petition without considering the welfare of the children.

The record of the divorce proceeding which has come on the record of this case disdoses that prior to their separation Sushil and Sarita with their two children and Sushil's mother were staying together in U.S.A. The record further discloses that there were serious differences between the two. Sushil was alcoholic and had used violence against Sarita. Sarita's conduct was also not very satisfactory. Before she came to India with the children she was in lawful custody of the children. The question is whether the custody became illegal as she had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court without its permission. After she came to India a decree of divorce and the order for the custody of the children have been passed. Therefore, it is also required to be considered whether her custody of the children became legal thereafter.

Mr. R.K. Jain, teamed senior counsel appearing for the respondent submitted that the facts of this case are simllar to the facts of Surinder Kaur Sandhu v. Harbax Sinah Sandhu [(1984) 3 SCC 698] and following the decision in that case this appeal should be dismissed. In that case this Court after referring to the facts observed as under:

> *"We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of has custody. The modern theory of conflict of Laws recognises and, In any event,prefers the jurisdiction of the State which has the most intimate contact with the issues arising In the case. Jurisdiction Is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for She time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only resuit in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law or that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but. by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or the with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (See International*

Shoe Company v. State of Washington [90 L Ed 95 (1945): 326 US 310], which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.) It is our duty and function to protect the wife against the burden of litigating in an inconvenience forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."

In that case the huband had removed the boy from England and brought him to India and the wife after obtaining an order of the English Court, whereby- the boy became the Ward of the Court, came to India and filed a petition in she High Court Punjab and Haryana seeking a writ of Habeas Corpus. The High Court rejected the wfre's petition on the grounds, inter alla that her status in England is that of a foreigner, a factory worker and a wife living separately from the husband; that she had no relatives in England; and that, the child would have to h've in lonely and dismal surroundings in England. It was also dismissed on the ground that the husband had gone through a traumatic experience of a conviction on a criminal charge; that he was back home in an atmosphere which welcomed him; that his parents were in affluent circumstances; and that, the child would grow in an atmosphere of self-confidence and self-respect if he was permitted to live with them. After considering the legal position this Court observed.' "Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of aminor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor,"

in Phanwaii Joahi v. Madhav Umie [(1998) I SCC 112J, this Court after referring to the decision of the Privy Council in Mckee v. McKee [1951 AC 352: (1951) I All ER 942] and that of House of Lords in J v.C (1970 AC 668: (1969) I All ER 788], the two decisions 'in which contrary view was taken,, namely, H (Infacnts). Re ((1966) I All ER 886: (1966) I WLR 381, CA] and E f Infants). Re [(1967) I All ER 8813, also the decision of this Court in Elizabeth Dinshaw v. Aryand M Pinshaw [(1987) I SCC 423 and also the Hague Convention of 1900 observed as under:

"As of today, about 45 countries are parties to this Convention. India is not yet a signatory. Under the Convention, any child below 16 years who had been "wrongfully' removed or retained in another contracting State, could be returned back to the country from which the child had been removed, by application to a central authority."

"So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the court In the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in McKee v. McKee unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. as explained In 1., Re. As recently as 1996-97, it has been held In P (A minor) (Child Abduction: Non-Convention Country), Re: by Ward, LJ. [1996 Current Law Year Book, pp. 165-166] that in deciding whether to order the return of a child who has been abductad from his or her country of habitual residence - which was not a party to the Hague Convention, 1380, - the courts' 10 overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisitions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established. See also A (A minor) (Abduction: Non-Convention Country) [Re,

The times 3-7-97 by Ward. LJ. (CA) (quoted in Current Law, August 1997, p. 13]. This answers the contention relating to removal of the child from U.S.A."

Therefore, it will not be proper to be guided entirely by the fact that the appellant Santa had removed the children from U.S.A. despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in U.S.A. respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in U.S.A. they may be able to get better education, it is doubtful of the respondent will be in a position to take proper care of the children when they are so young. Out of them one Is a female child. She is aged about 5 years. Ordinarily, a female child should be flowed to remain with the mother so that she can be properly locked after. It is also not desirable that two children are separate from each other. If a female child has to stay with the mother it will be in the interest of both the children that they both stay with the mother. Here In India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time if must be said that the son, who is elder than daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have. allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have (erected the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of mother returning to U,S.A. in the interest of .the children. Therefore, we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A, with the children would depend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the court in U.S.A. the circumstances under which she had left U.S.A. with the children Without taking permission of the Court. There is a possibility that: both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights.

For the reasons stated above, we allow this appeal, set aside the judgment and order of the High Court and dismiss the writ petition filed by the respondent.

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RAMESH CHANDER KAUSHAL VS VEENA KAUSHAL & ORS

Equivalent citations: 1978 AIR 1807, 1978 SCR (3) 782

(1978) 4 SCC 70

Ramesh Chander Kaushal
Vs.
Veena Kaushal & Ors.

Date of Judgment : 27/04/1978
Bench: Hon'ble Mr. Justice V.R. Krishnaiyer & Hon'ble Mr. Justice D.A. Desai

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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ROSY JACOB VERSUS JACOB A. CHAKRAMAKKAL

1973 AIR 2090

1973 SCR (3) 918 1973 SCC (1) 840

DATE OF JUDGMENT 05/04/1973

Petitioner: Rosy Jacob
Vs.
Respondent: Jacob A. Chakramakkal

Bench : Hon'ble Mr. Justice I.D. Dua, Hon'ble Mr. Justice A. Alagiriswami & Hon'ble Mr. Justice C.A. Vaidyialingam

In Rosy Jacob Vs. Jacob A. Chakramakkal, (1973) 1 SCC 840, a three-Judge Bench of the Supreme Court in a rather curt language had observed that the children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

The requirement of indispensable tolerance and mental understanding in matrimonial life is its basic foundation. The two spouses before us who are both educated and cultured and who come from highly respectable families must realise that reasonable wear and tear and normal jars and shocks of ordinary married life has to be put up with in the larger interests of their own happiness and of the healthy, normal growth and development of their offspring, whom destiny has entrusted to their joint parental care. Incompatibility of tamprament has to be endeavored to be disciplined into compatibility and not to be magnified by abnormal impluses or impulsive desires and passions. The husband is not disentitled to a house and a housewife, even though the wife has achieved the status of an economically emancipated woman; similarly the wife is not a domestic slave, but a responsible partner in discharging their joint, parental obligation in promoting the welfare of their children and in sharing the pleasure of their children's company. 'Both parents have, therefore, to cooperate and work harmoniously for their children who should feel proud of their parents and of their home, bearing in mind that their children have a right to expect from their parents such a home.

Guardians and Wards. Act, 1890, Sec. 25-Husband's application for the custody of children-Welfare of the children is the dominant consideration.

On the wife's application, judicial separation was granted under the Indian Divorce Act by the single Judge of the High Court. The custody of the eldest son was maintained with the husband while that of the daughter and the youngest son was given to the wife. In the Letters Patent Appeal preferred by the husband, the Division Bench varied the order directing handing over the custody of the daughter and the youngest son also to the husband. The principal question before the Court

was whether the husband's application for the custody of the children u/s 25 of the Guardian and Wards Act, 1890, was maintainable and, if so, what are the considerations which the Court should bear in mind in exercising the discretion regarding custody of children.

Allowing the appeal,

HELD: (i) On the facts and circumstances of the case, namely, that the Court cannot make any order under the Divorce Act, as the daughter had attained majority, and no guardian could be appointed U/S. 19 of the Guardians and Wards Act, 1890 during the life time of the existing guardian, husband's application was competent. Welfare of the children is the primary consideration, and hyper technicalities should not be allowed to deprive the guardian necessary assistance from the Court in effectively discharging his duties and obligations towards his ward.

(ii) The controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents. The Court while exercising the discretion should consider all relevant facts and circumstances so as to ensure the welfare of the children.

The contention that if the husband is not unfit to be the guardian of his minor children, then the question of their welfare does not at all arise, is misleading. If the custody of the father cannot promote the children's welfare, equally or better, than the custody of the mother, then, he cannot claim indefeasible right to their custody u/s 25 merely because there is no defect in his personal character and he has attachment for his children-which every normal parent has. As the daughter has just attained puberty and the youngest son was of the tender age, in the interest of their welfare, the mother should have the custody in preference to the father.

JUDGMENT

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1295 & 1296 of 1972.

Appeals by special leave from the judgment and order dated April 26, 1972 of the Madras High.Court in O.S.A. Nos. 2 and 3 of 1971.

K. N. Balasubramanian and Lily Thomas, for the appellant.

The respondent appeared in person.

The Judgment of the Court was delivered by

DUA, J.-The real controversy in these two appeals by special leave preferred by the wife against her husband, lies in a narrow compass. These appeals are directed against the judgment and order of a Division Bench of the Madras High Court allowing the appeals by the husband and dismissing the cross-objections by the wife from the judgment and order of a learned single judge of the same High Court dismissing about 25 applications seeking diverse kinds of reliefs, presented by one or the other party. According to the learned single Judge (Maharajan J.) "these 25 applications represent but a fraction of the bitterness and frustration of an accomplished Syrian Christian couple who after making a mess of their married life have endeavoured to convert this Court into a machinery for wreaking private vengeance'. This observation reflects the feelings of the husband and the wife towards each other in the present litigation. The short question which we are called upon to decide relates to the guardianship of the three children of the parties and the solution of this problem primarily requires consideration of the welfare of the children.

The appellant, Rosy Chakramakkal (described herein as wife) was married to respondent Jacob A. Chakramakkal (described herein as husband) sometime in 1952. Three children were born from this wedlock. Ajit alias Andrews,, son, was born in 1955, Maya alias Mary was born in 1957 and Mahesh alias Thomas was born in 1961. Sometime in 1962 the wife started proceedings for judicial separation (O.M.S. 12 of 1962). on the ground that the husband had inflicted upon her several acts of physical, mental and moral cruelty and obtained a decree on April 15, 1964. Sadasivam J., while granting the decree directed that Ajit alias Andrews (son) the eldest child should be kept in the custody of the husband and Mary alias Maya (daughter) and Thomas alias Mahesh (youngest son) should be kept in the custody of the wife. The husband was directed to pay to the wife Rs.200/ per mensem towards the expenses and maintenance of the wife and the two children.

The wife applied to Sadasivam J., sometime later for a direction that Ajit alias Andrews should also be handed over to her or in the alternative for a direction 'that the boy should be admitted in a boarding school. In this application (no. 2076 of 1964) it was alleged by the wife that the husband had beaten Ajit on the ground that he had accepted from his mother' (the wife) a fountain pen as a present. This was denied by the husband but the learned Judge, after elaborate enquiry, held that he had no doubt that the husband had caused injuries to the boy on account of his sudden out burst of temper on learning that Ajit had received a fountain pen by way of present from his mother on his birth day. Ajit was accordingly to be handed over to the mother subjected to certain conditions.

The husband preferred an appeal against the decree made in O.A4.S. 12 of 1962 (O.S.A. 65 of 1964) and another appeal against the order made by Sadasivam J., (in application no. 2076 of 1964 in O.M.S. 12 of 1962) directing the custody of the eldest son Ajit to be handed over to the wife (O.S.A. 63 of 1964). On August 2, 1966 the appellate bench confirmed the decree for judicial separation granted by Sadasivam J., and also issued certain, directions based on agreement of the parties with respect to the custody of the children, as. also reduction of the monthly maintenance payable by the husband to the wife from Rs. 200/to Rs. 15011- p.m., inclusive of maintenance payable for Mahesh. According to this order the eldest boy Ajit alias Andrews directed to remain in the custody of the father and to be educated 'by him at his expense : Mahesh alias Thomas was directed to be in the custody of the mother to be educated at her expense: and the second child Maya alias Mary was directed to be put in a boarding school, the expenses of her board and education to be met in equal shares by both the parents.

The husband also undertook that 'he will arrange to have the presence of his mother or sister at his residence to attend to the children whenever they are with him and never to leave the children alone at his residence or to the care of his servants or others". Later both the husband and wife presented a series of applications in the appellate court seeking modifications of its directions. That court ultimately made an order on February 2, 1967 modifying its earlier directions. The modified order directed Maya to be left in the exclusive custody of the wife who was at liberaty to educate her in the manner she thought best at her own cost. The appellate court also modified the direction regarding maintenance and ordered that the husband should pay to the wife maintenance at the rate of Rs. 200/- p.m. as awarded by the learned single judge. Subsequently the directions of the appellate, court regarding access of the mother and the father to the children were also sought by the parties to be modified to the prejudice of each other. The matters are stated to have been heard by most of the Judges of the Madras High Court at one stage or the other and according to Maharajan J., ',he parties even tried to secure transfer of these proceedings by making wild allegations of partiality against some of the Judges. The husband who is an advocate of the Madras High Court, had, according to the wife, been filing cases

systematically against her and the wife, who, in the opinion of Maharajan J., has the gift of the gab also argued her own cases. The children for whose welfare the parents are supposed to have been fighting as observed by Maharajan J., are given a secondary consideration and the quarrelling couple have lost all sense of proportion. On account of these considerations the learned single Judge felt that it would be a waste of public time to consider in detail the trivialities of the controversy pressed by both the parties to this litigation.

According to the learned single Judge the following four points arose for his judicial determination.

> *"(1) Whether by defaulting to pay the maintenance decreed, the husband must be held guilty of contempt and shall not be allowed to prosecute his applications before he purges himself of contempt?*
>
> *(2) What is the proper order to pass as regards the custody of the three children of the marriage in the light of the events that have occurred subsequent to the judgement of the appellate court and under the Guardians and Wards Act ?*
>
> *(3) What is the proper order to pass as to the access of either parent to the children in the custody of the other?*
>
> *(4) Whether in the light of the subsequent events, the order regarding maintenance allowance should be reduced, enhanced or altered in any manner and if so, how?'*
>
> *On the first point the learned single Judge came to the conclusion that the husband could not be declined hearing merely because he had not paid the maintenance as directed by the matrimonial court. The amount in respect of which the husband had defaulted payment could be recovered through execution proceedings. On point no. 2 the learned single Judge proceeded to consider the question of the custody of the three children with the preliminary observation that the controlling factor governing their custody would be their welfare and not the rights of their parents. The eldest child Ajit alias Andrews, according to the learned Judge, was doing well at the school and was progressing satisfactorily both mentally and physically. There was accordingly no reason 'to. transfer his custody from his father to his mother. As regards the second child Maya alias Mary, as she was about to attain puberty and the wife being anxious that till she got married she must be in the mother's vigilant and affectionate custody she was to remain with her mother. Mahesh alias Thomas, who was considered to be of tender years and in the formative stage of life requiring sense of emotional security which a mother alone could give, was also kept in the custody of his mother. With respect to Maya and Mahesh it was further observed that from their educational. point of view the wife was a more suitable custodian than the husband because she was running a primary school from nursery to fifth standard with more than a hundred pupils and was also residing in a portion or the school premises enjoying certain facilities in her capacity as the founder and principal of that school. The husband, who was described as a grass widower without female relatives to look after the children, was not preferred to the wife as, while being with her, the children would be living in an academic atmosphere. With respect to the husband's complaint that from the moral point of view the wife was not fit to have the custody of the children, Maharajan J., observed that earlier Sadasivam J., had dealt with the entire evidence relating to this charge and had found no sufficient ground for such amputations and that they were*

likely to cause mental pain to the wife and affect her health. The husband had even been held guilty of mental and moral cruelty to the wife. The husband's contention that his opinion was reversed by the appellate bench was disposed of by Maharajan J., after quoting the following passage from the appellate judgment dated August 2, 1966 "But it is to be clearly understood that there should be no slur on the part of either the appellant or the respondent because of the several proceedings in court and other happenings outside. The decree for judicial separation which is confirmed does not cast any cloud on the reputation or character of the husband or the wife. They have reached this settlement keeping in view all the circumstances and particularly the welfare of their minor children."

According to Maharajan 3., the appellate bench had felt satisfied that the charge of immorality levelled by the husband against the wife was not established because had it not been so satisfied the bench would not have entrusted two of the three children to the wife. The husband was in the circumstances held by Maharajan J., disentitled to reopen the question of the wife's immorality. In any event, Maharajan J., also rejected the charge of immorality as unproved, for the same reasons which had weighed with Sadasivam J. With respect to point no. 3 the learned single Judge gave the following directions :

"(1) On the first Sunday of every month, except during the school vacations, the husband shall send Ajit alias Andrews to the wife by 8.00 a.m. and the wife shall send back the child by 8. p.m. the same day.

(2) The wife shall send Maya alias Mary and Thomas alias Mahesh to the husband's by 8 a.m. on the last Sunday of every month, except during the school vacations, and the husband shall send them back by 8 p.m. the same day.

(3) Each party shall send the children by a conveyance taxi, rickshaw or bus, after prepaying the fare thereof.

(4) The wife shall send Mary alias Maya and Thomas alias Mahesh to the husband, so hat they might stay with him and Ajit alias Andrews for thirty days during the summer vacation. The exact time and dates of departure and arrival will be fixed with reference to the convenience of parties and after change, of letters between them at least one months prior to the commencement of the vacation' Likewise, the husband will send Ajit to the wife to enable him to spend the whole Dasara and Christamas vacations in the company of his mother, sister and brother."

On the fourth point the learned single Judge, fater considering at length the wife's allegations against the husband with respect to his extravagance and inability, reduced the quantum of maintenance payable by him to the wife to Rs. 100/- p.m., the reduced amount being payable with effect from January 1, 1971. The husband was directed to pay the monthly maintenance on or before the 10th of the succeeding month. This order was made with the observation that the earning capacity of the wife was superior to that of the husband.

It is unnecessary to refer to the formal orders separately passed in the various applications. Suffice it to say that the parties were left to bear to their own costs and hope was expressed in the coneluding para of the judgment by Maharajan, J. that "the parties will refrain from rushing to this court with applications of the kind that have been dismissed and will apply themselves assiduously to the improvement of

their status in their respective professions and to alleviation of the pain of material failure, which has unfortunately been visited upon the three lovely and sprightly children that they have produced."

Contrary to the hope expressed by learned Judge, the matter was taken to the appellate bench of the High Court under cl. 15 of the Letters Patent (O S. Appeal Nos. 2 and 3 of 1971). The wife also pressented cross-objections against the reduction of alimony and against directions as regards the father's access of Maya. A large number of applications were presented to the Court parties praying for diverse reliefs including action for contempt of court for disobedience of the court's orders. The hearing of the appeals somewhat surprisingly lasted for more than a year (March 1971 to March 1972). We find no justification for such prolonged hearing on a fairly simple matter like this. According to the Letters Patent Bench the arguments on both sides "mainly rested upon the character of each". The husband is said to have repeatedly accused the wife with immorality. In the opinion of the Letters Pantent Bench "the truth or otherwise of the matter may assume importance only for the purpose of deciding upon the fitness of the person to 'be the guardian of the children". Final orders were passed on April 26, 1972 by means of which the husband was held to be better fitted to be the guardian of the three children and to have their custody. This decision was stated to be based on evidence and in view of ss. 17, 19 and 25 of the Guardians and Wards Act. This is what one of the Judges constituting the Letters Patent Bench (Gokul Krishnan, J.,) said in this connection "In our opinion, the principles to be applied to cases of this kind will be the same both under the Indian Divorce Act and the Guardians and Wards Act, 1890. But since the father has specifically filed a petition, O.P. No. 270 of 1970, under section 25 of the Guardians and Wards Act, and that being a special law for the purpose will certainly apply, we shall concentrate on the Guardians and Wards Act, 1890".

After quoting S. 19 of the Guardians and Wards Act the learned Judge proceeded :

> *"It is thus clear that the special enactment definitely states that the father is the guardian of the minor until he is found unfit to be the guardian of the person of the minor. The welfare of the minor is the paramount consideration in the matter of apointing guardian for the person of minor, and cannot be said to be in conflict with the terms of section 19 of the Guardians and Wards Act which recognize the father as the guardian. Bear ing this in mind, we proceed to consider as to who is fit and proper to be the guardian for the person of the minor children in this case."*

In his view the principle on which the Court should decide the fitness of the guardian mainly depends on two factors :

(i) the father's fitness or otherwise to be the guardian and

(ii) the interests of the minors. Considering these factors it was felt that both the parties in the present case loved their children who were happy during their stay with both of their parents. There was in his view, absolutely no proof as regards disqualification of the husband to be the guardian of the minor children. It may here be pointed out that both the Judges constituting the Letters Patent Bench wrote separate judgments. Gokulakrishnan J., commenting on the Judgment of Maharajan J., observed thus :

"Maharajan J. in his judgment under appeal no doubt referred to section 19 of the Guardians and Wards Act, but would observe that if the Court finds that the welfare of the minor children could be protected only in the maternal custody, the Court has power to put the children in the care of custody of the mother. The learned Judge clearly observed that Ajit, the eldest boy, who is in the custody of

the appellant, is quite healthy and cheerful, doing well at school and that his sojourn with the father has not prejudicially affected him physically or mentally. But at the same breath, the learned Judge says that Maya and Mahesh 'are of tender years and in the formative stage of their life and need a sense of emotional security, which a mother alone can give.'In the case of Maya and Mahesh, the learned Judge has applied a different standard in regard to their custody. Considering the present age of both Maya and Mahesh and taking into consideration the upbringing of Ajit by the appellant having him in his custody, we are of the view that the same amount of sense of emotional security can be enjoyed by Maya and Mahesh at the hands of the appellant also. The learned Judge's reasoning that the mother is running a school and has also facilities to make these two children live in the academic atmosphere rather than with their father, cannot have any force, in. view of the clear and categorical principles laid down in the various decisions noticed (supra) and also in view of the clear intendment and spirit of the Guardians and Wards Act, which prescribes that father is the guardian of his minor child unless other wise found unfit. The academic qualification of the mother, her financial status and the other standards cannot at all weigh in the matter when the appellant has not been rejected as a person unfit to be the guardian of the minors. If they should weigh, the poorer and affectionate father with moderate capacity to protect his children will be deprived of the custody of the minor children on the flimsy ground of 'welfare of the minor children'. That is how and why ',the welfare of the minor children' must be read with 'fitness or unfitness of the father to be guardian of the minors. Once it is found that the father is the fit and proper person to be the guardian of his minor children, unless it is otherwise found that he is not fit, it must be presumed that the children's interests will be properly protected by the father. As far as the present case is concerned, when the trial court itself has found that Ajit has been properly looked after and brought up very well in his academic career by the appellant, there cannot be any difficulty in coming to the conclusion that Maya and Mahesh will also be looked after and protected and imparted with proper education by the affectionate father, the appellants After reproducing certain observations from the judgment', of (i) Sadasivam J., dated April 15, 1964, (ii) Veeraswamy 1.. (as he then was) and Krishnaswami Reddy J., dated February 1967 in C.M.P. 415 in O.S.A. nos. 63 & 65 of 1969, Ramamurthy J., dated April 24, 1968 in application nos. 769 and 770 of 1968 in O.M.S. 12 of 1962 and after referring to the view of Maharajan J., that Ajit when produced in Court was found quite healthy and cheerful and was doing well at school, Venkataraman J. in his concurring judgment observed thus :-

> *"Regarding the other children, he gave their custody to the mother, because he thought that they were of tender years and needed emotional security which a mother alone could give.*
>
> *Here, with respect we must differ from the learned Judge. We find that the father is quite fit to have the custody of the children, and. in law, custody of the minor children cannot be refused to him. We are also satisfied from what we saw of the appellant and, heard from him during the several hearings, that he is very deeply attached to his children and is quite competent to have their custody. It wilt be enough if the mother is allowed a somewhat liberal access to the three children."*

With respect to alimony the appellate bench concluded that the wife was managing her school very successfully; she had purchased a mini-bus and also possessed wet lands in her village The husband on the other hand was not getting on well in his profession which he attributed to the present litigation : his house at Adyar was stated to be under mortgage and he had practically sold everything in his native village with the exception of one, or one-and-half acres of land. In view of the financial position of the

wife and the husband and in view of the fact that all the three children were to be in the custody of the husband the appellate bench considered it unnecessary for the' husband to pay any maintenance to the wife. The payment of the arrears of alimony was also suspended as the appellate bench considered itself empowered to do so under the proviso to s. 37 of the Indian Divorce Act. In so far as access of the wife to' the children is concerned a detailed order was passed by the bench about the right of the wife to take the daughter with her during the summer and Christmas vacations and also during several days every month, particularly during the periods. We do not consider it necessary to state in full the details of that order. With respect to Ajit and Mahesh also a detailed order was made fixing the precise days and even time when the wife could bring the children from the father to stay with her. In the event of any difficulty in getting custody of the children from the wife, it was ordered at the instance of the husband, that he could take the police help on the strength of the High Court judgment. We find it extremely difficult to appreciate this direction. Orders from the Court in execution would have 'been more appropriate. Police intervention in such personal domestic differences in the present case, where parties belong to educated respectable families should have been avoided.

In this Court a preliminary objection to the hearing of the wife's appeal was raised by the husband, who, being an advocate, personally addressed us in opposing these appeals. Indeed in June, 1972 he had presented Civil Miscellaneous Petitions Nos. 4188 and 4189 of 1972 for revoking special leave, and it was these applications which he pressed before us at the outset. These lengthy applications covering nearly 50 pages mainly contain arguments on the merits and there is hardly any cogent ground made out justifying revocation of the special leave. It is no, doubt open to this Court to revoke special leave when it transpires that special leave had been secured by the appellant on deliberate misrepresentation on a material point having a bearing on the question of granting such leave. The extraordinary discretionary power vested in this Court by the Constitution under Act, 136 is in the nature of a special residuary power exercisable in its judicial discretion outside the purview of ordinary law in cases where the needs of justice demand interference. Being discretionary power intended only to Promote the cause of justice when there is no other adequate remedy, this Court expects those seeking resort to this reserve. of constitutional power for securing justice to be absolutely fair and frank with this Court in correctly stating the relevant facts and circumstances of the case. In the event of a party making a misrepresentation on a point having a bearing on the question of the exercise of judicial discretion and thereby-trying to over-reach this Court the party forfeits the claim to the discretionary relief : the same is the case when such misrepresentation is discovered by this Court and brought to its notice after the grant of special leave and this Court is competent and indeed it considers it proper to revoke the special-leave thus Obtained. But the misrepresentation must be deliberate and on a point having such relevance to the question of special leave that if true facts were known this Court would leave in all Probability declined special leave. Applying this test to the, present case we arc unable to find any such deliberate misrepresentation by the, appellant indicating intention to mislead or over-reach this Court. The points to which our attention was drawn seem to relate to the merits of the controversies between the parties which would fall for determination on the hearing of the appeal after considering the arguments pro and con. The preliminary objection thus fails and must be disallowed.

Turning to the merits of these appeals, it may be pointed out that with the exception of O.P. No. 270 of 1970 filed by the husband under S. 25 of the Guardians and Wards Act all the other applications presented by the parties and disposed of by Maharajan J., were off-shoots of O.M.S. 12 of 1962 in which the wife had obtained a decree for judicial separation. The first contention raised on behalf of the

appellant was that O.P. No. 270 of 1970 did not lie. It was strenuously pressed by Shri Balasubaramania lyer the counsel for the appellant wife that the husband's application under s. 25, Guardians and Wards Act was not competent because none of the children had been illegally removed from the lawful custody of their father, the custody of the two children having been lawfully entrusted to the wife in proceedings to which the husband was a party. It was emphasised in this connection that the custody of the girl Maya and of the boy Mahesh had been lawfully entrusted to ,the wife by a competent Court and unless there is actual physical removal of the children from the custody of the father, S. 25 would. not be attracted.

Now the first thing to be notified is that this objection as to the competence of the application under S. 25 is in the nature of a preliminary objection. But it was not raised either before the learned single Judge or before the Letters Patent Bench in the manner in which it is pressed before us. In this Court also in the special leave appeal the objection seems to be based on the argument that the Guardians and Wards Act would be inapplicable to cases where orders have been made in. matrimonial proceedings, and s. 19 of the Guardians and Wards Act cannot control the custody or children given by a consent decree under the Indian Divorce Act. However, as the objection was stated to pertain to jurisdiction we allowed the parties to address us on this point.

For determining the question of competence of the husband's application under s. 25 of the Guardians and Wards Act (18 of 1890) it is necessary to examine the scheme of that Act as also the relevant provisions of the Indian Divorce Act.

The Guardians and Wards Act was enacted in order to consolidate and amend the law relating to Guardian and Ward. But as provided by s.3, this Act is not to be construed, inter alia ,to take away any Power possessed by any High Court. According to s.4, which is the definition section, a "minor' is a Person who, under the provisions of the Indian Majority Act, 1875 is to be deemed not to have attained his majority. Under S. 3 of that Act this age is fixed at 18 years, except for those, for whose person or property or both a guardian has already been appointed by a court of justice (other than a guardian for a suit under Chapter XXXI, C.P.C.) and for whose property, superintendence has been assumed by a Court of Wards, for whom it is fixed at 21 years. A "ward" under this Act means a minor for whose person or property or both there is a guardian and "guardian" is a person having the care of the person of a minor or of his property or both. Chapter 11 of this Act (18 of 1890), consisting of ss.5 to 19 (s. 5 applicable to European British subjects has since been repealed, deals with the Appointment and Declaration of Guardians. Section 7 empowers the Court to make orders as to guardianship where it is satisfied that it is for the welfare of the minor that an order should be made appointing his guardian or declaring a person to be such guardian. Section 7(3) places certain restrictions with respect to cases where guardians have been appointed by will or other instrument or appointed or declared by court. Section 8 provides for persons entitled to apply under s. 7 : they include Collectors as specified in cls. (c) and (d). Sections 9 to 11 provide for jurisdiction of. courts, form of applications and procedure on admission of applications. Section 12 provides for interlocutory orders subject to certain restrictions. Next important sections are ss. 17 and 19. Section 17 which provides for the matters to be considered by the court in appointing or declaring guardian reads :

> *"17. Matters to be considered by the Court in appointing guardian.*
>
> *(1) In appointing or declaring the, guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.*

(2) In considering what will be the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of the deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference."

Section 19, which prohibit the Court from appointing guardians in certain cases, reads :

"19. Guardians not to be appointed by the Court in certain cases Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person.

(a)of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b)of a minor whose father is living and is not, in the opinion of the Court. unfit to be guardian of the person of the minor, or

(c)of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

Chapter III (ss. 2O to 42) prescribes duties, rights and liabilities of, guardians. Sections 20-23 (General provisions) do not concern us. Section 20 provides for the fiduciary relationship of guardian towards his wards and S. 22 provides for remuneration of guardians appointed or declared by the Court. Sections 24 to 256 deal with "'Guardian of the person". Under s. 24 the guardian is bound, inter alia, to look to his ward's support, health and education. Section 25 which is of importance for our purpose provides for "Title of Guardian to custody of Ward" and reads

"25. Title of guardian to custody of ward :

(1)If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion ,that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882.

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

Sections 27 to 37 deal with "Guardian's Property" and Sections 38 to 48 deal with""Termination of Guardianship". Chapter IV (ss. 43 to 51) is the last chapter dealing with supplementary provisions.

Now it is clear from the language of S. 25 that it is attracted only if a ward leaves or is removed from the custody of a guardian of his person and the Count is empowered to make an order for,the return of the ward to his guardian if it is of opinion that it will be for the, welfare of the, ward to return to the

custody of his guardian. The Court is entrusted with a judicial discretion to order return of the Ward to the custody of his guardian, if it forms an opinion that such return is for the ward's welfare. The use of the words "ward" and "guardian" leave little doubt that it is the guardian who, having the care of the person of his ward, has be-In deprived of the same and is in the capacity of guardian entitled to the custody of such ward, that can seek the assistance of the Court for the return of his ward to his custody. The guardian contemplated by this section includes every kind of guardian known to law. It is not disputed that, as already noticed, the Court dealing with the proceedings for judicial separation under the Indian Divorce Act, (4 of 1869) had made certain orders with respect to the custody, maintenance and education of the three children of the parties. Section 41 of the Divorce Act empowers the Court to make interim orders with respect to the minor children and also to make proper provision to that effect in the decree : s. 42 empowers the Court to make similar orders upon application (by petition) even after the decree. This section expressly embodies the legislative recognition of the ,fundamental rule that the Court as representing the State is vested with the power as also the duty and responsibility of making suitable orders for the custody, maintenance and education of the minor children to suit the changed conditions and circumstances. It is, however, noteworthy that under Indian Divorce Act the sons of Indian fathers cease to be; minors on attaining the age of 16 years and their daughters cease to be minors on attaining the age of 13 years : s. 3(5).

The Court under the Divorce Act would thus be incompetent now to make any order under ss. 41 and 42 with respect to the elder son and the daughter in the present case. According to the respondent husband under these circumstances he cannot approach the Court under the Divorce, Act for relief with respect to the custody of these children and now that those children have ceased to be minors under that Act, the orders made by that Court have also. lost their vitality On this reasoning the husband claimed the right to invoke S. 25 of the Guardians and Wards Act : in case this section is not applicable, then the husband contended, that his application (O.P. 270 of 1970) should be, treated to be an application under S. 19 of the Guardians and Wards Act or under any other competent section of that Act so that he could Let the custody of his children, denied to him by the wife. The label on the application, he argued, should be treated as a matter of mere form and, therefore, immaterial. The appellant's counsel on the other hand contended that the proper procedure for the husband to adopt was to apply under s.7 of the Guardians and Wards Act. Such an application, if made, would have been tried in accordance with the provisions of that Act. The counsel added that ss. 7 and 17 of that Act also postulate welfare of ,the minor in the circumstances of the case, as the basic and primary consideration for the Court to keep in view when appointing or declaring a guardian. The welfare of the minors in the present case, according to the wife, would be best served it they remain in her custody.

In our opinion, S. 25 of the Guardians and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian ,to properly look after the ward's health, maintenance and ,education, this section demands reasonably liberal interpretation so as to effectuate that object.

Hyper-technicalities should not be allowed to deprive the guardian the necessary assistance from the Court in effectively discharging his duties and obligations towards his ward so as to promote the latter's welfare. If the ,Court under the Divorce Act cannot make any order with respect to the custody of Ajit alias Andrew and Maya alias Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under s. 19 during his life-time,

if the Court does not consider him unfit, then, the only provision to which the father can have resort for his children's custody is S. 25. Without, therefore, laying down exhaustively the circumstances in which s. 25 can be invoked, 'in our opinion, on the facts and circumstances of this case the husband's application under S. 25 was competent with respect to the two elder children. The Court entitled to consider all the disputed questions of fact or law properly raised before it relating to these two children. With respect to Mahesh alias Thomas. however, the Court under the Divorce Act is at present empowered to make suitable orders relating to his custody, maintenance and education. It is, herefore, somewhat difficult to impute to the legislature an intention to set up, another parallel Court to deal with the question of the custody of a minor which is within the power of a competent Court under the Divorce Act. We are unable to accede to the respondent's suggestion that his application should be considered to have been preferred for appointing or declaring him as a guardian. But whether the respondent's prayer for custody of the minor children be, considered under the Guardians and Wards Act or under the Indian Divorce Act, as observed by Maharajan J., with which observation we entirely agree, "the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents" It was not disputed that under the Indian Divorce Act this is the controlling consideration. The Court's power under s.25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom-if ever-identical. The contention that if the husband is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly may at times be somewhat misleading. It does not take full notice of the real core of the statutory purpose. In our opinion, the dominant consideration in making orders under s.25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. From this point of view, in case of conflict or dispute between the mother and the father about the custody of (their children, the approach has to be somewhat different from that adopted by the Letters Patent Bench of the High Court in this case.

There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under s.25 merely because there is no defect in his personal character and he has attachment for his children which every normal parent has. These are the only two aspects pressed before us, apart from the stress laid by the husband on the allegations of immorality against the wife which, in our firm opinion, he was not at all justified in contending. Such allegations, in view of earlier decisions, had to be completely ignored in considering the question of custody of the children in the present case. The father's fitness from the point of view just mentioned cannot over-ride considerations of the welfare of the minor children. No doubt, the father has been presumed by the statute ,generally to be better fitted to look after the children-being normally the earning member and head of the family-but the Court has in each-case

to see primarily to the welfare of the children in determining the question of their custody, in the background of .all the relevant facts having a bearing on their health, maintenance and education.

The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they got their due share of affection and care from both the parents in their normal parental home.

Where, however, family dissolution due to some unavoidable circumstances becomes necessary the Court has to come to a judicial decision on the question of the welfare of the children on a full consideration of all the relevant circumstances. Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and who in addition because of her profession and financial resources, may be in a posit-ion to guarantee better health, education and maintenance for them. The children are not mere chattels; nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives.of their children, has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute 'between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us have erred in reversing him on grounds which we are unable to appreciate.

At the bar reference was made to a number of decided cases on 'the question of the right of, father to No appointed or declared as guardian and to be granted custody of his minor children under s. 25 read with S. 19 of the Guardians and Wards Act. Those decisions were mostly decided on their own peculiar facts. We have, therefore not considered it necessary to deal with them. To the extent, however, they go against the view we have taken of s. 25 ,of the Guardians and Wards Act, they must be held to be wrongly, decided. The respondent's contention that the Court under the Divorce Act had granted custody of the two younger children to the wife on the ground of their being of tender age, no longer holds good and that, therefore, their custody must be handed over to him appears to us to be misconceived. The age of the daughter at present is such that she must need the constant company of ,I grown-up female in the house genuinely interested in her welfare. Her mother is in the circumstances the best company for her. The daughter would need her mother's advice and guidance on several matters of importance. It has not been suggested at the bar that any grown-up woman closely related to Maya alias Mary would be available in the husband's house for such motherly advice and guidance. But this apart, even from the point of view of her education, in our opinion, her custody with the wife would be far more beneficial than her custody with the husband. The youngest son would also' in our opinion, be much better looked after by his mother than by his father who will have to work hard to take a mark in his profession.

He has quite clearly neglected his profession and we have no doubt that if he devotes himself' wholeheartedly to it he is sure to find his place fairly high tip in the legal profession.

The appellant's argument based on estoppel and on the orders made by the court under the Indian Divorce Act with respect to the custody of the children did not appeal to us. All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made

in the existing circumstances. With the changed conditions and Circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based, on consent decrees cited at the bar. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation.

We accordingly allow the appeal with respect to the custody of the two younger children and setting aside the judgment of the Letters Patnet Bench in this respect, restore that of the learned single Judge who, in our view, had correctly exercised his discretion under s. 25 of the Guardians and Wards Act, The directions given by him with respect to access of the parties to their children are also restored. As regards alimony, no doubt. the Letters Patent Bench was, in our opinion, not quite right in withholding payment of the alimony already fallen due and in arrears. But in view of the fact that the financial position of the wife is far superior to that of the husband who according to his own submission. has yet to establish himself in his profession, we do not consider it just and proper to interfere with that order under Art. 136 of the Constitution. With respect to the alimony, therefore, the appeal fails and is dismissed. We also direct that the parties should bear their own costs throughout. ,

Before concluding we must also express our earnest hope, as was done by the learned single Judge, that the two spouses would at least for the sake of happiness of their own offspring if for no other reason, forget the past and turn a new leaf in their family life, so that they can provide to their children a happy, domestic home, to which their children must be considered to be justly entitled. The requirement of indispensable tolerance and mental understanding in matrimonial life is its basic foundation. The two spouses before us who are both educated and cultured and who come from highly respectable families must realise that reasonable wear and tear and normal jars and shocks of ordinary married life has to be put up with in the larger interests of their own happiness and of the healthy, normal growth and development of their offspring, whom destiny has entrusted to their joint parental care. Incompatibility of tamprament has to be endeavored to be disciplined into compatibility and not to be magnified by abnormal impluses or impulsive desires and passions. The husband is not disentitled to a house and a housewife, even though the wife has achieved the status of an economically emancipated woman; similarly the wife is not a domestic slave, but a responsible partner in discharging their joint, parental obligation in promoting the welfare of their children and in sharing the pleasure of their children's company. 'Both parents have, therefore, to cooperate and work harmoniously for their children who should feel proud of their parents and of their home, bearing in mind that their children have a right to expect from their parents such a home.

Appeal allowed in part.

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MOHD. AHMED KHAN VS SHAH BANO BEGUM

Equivalent citations: 1985 AIR 945, 1985 SCR (3) 844
Date of Judgment : 23/04/1985

(1985) 2 SCC 556

Mohd. Ahmed Khan
Vs.
Shah Bano Begum and Ors.

Bench: Hon'ble Mr. Justice Y.V. Chandrachud (CJ), Hon'ble Mr. Justice D.A. Desai, Hon'ble Mr. Justice O.Chinappa Reddy, Hon'ble Mr. Justice E.S. Venkataramiah & Hon'ble Mr. Justice Rangnath Misra

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 103 of 1981.

Fact of the case:

An application was made under Sec125 in regards to maintenance granted to a wife who is unable to maintain herself. Wife includes a women who has been divorced or has obtained divorce and not remarried.

The Appellant was a advocate by Profession married to Respondent in 1932. They begot 3 sons and 2 daughters out of the Marriage.

In 1975 the appellant drove the respondent out of the home. In 1978 respondent filed a petition under sec125 of Crpc, in JMFC Indore for maintenance.

In 1978 the appellant divorced the respondent by irrevocable Talak and took up the defence that since she is no more a wife he has no obligation to provide maintenance to her as he has already paid Rs.200 per month for 2 years in a manner of Dower during the period of Iddat.

In 1979 the Magistrate directed to pay a sum of Rs.25 per month to the respondent by way of maintenance.

The High Court of Madhya Pradesh enhanced the amount to Rs.179.20 per month.

The Husband made a special writ petition to Supreme Court.

It was held that sec125 of the code is truly secular in character. It was enacted to provide quick and summary remedy to the class of persons who are unable to maintain themselves.

Irrespective of the person being of any religion sec 125 is applicable because it is a part of Criminal Procedure Court and not Civil Laws.

Neglect by a person of sufficient means to not give maintenance to any dependents leads to invoking of 125.

The rights conferred by sec125 can be exercised irrespective of Personal Law of the Parties.

In this case held : Husband Liabilities to provide maintenance doesn't get limited into the boundation of time period of Iddat but as long as the wife is unable to maintain herself or remarried even though Iddat period is over.

From the Judgment and Order dated 1. 7. 1980 of the Madhya Pradesh High Court in Crl. Revision No. 320 of 1979.

P. Govindan Nair, Ashok Mahajan, Mrs. Kriplani, Ms. Sangeeta and S.K Gambhir for the Appellant.

Danial Latifi Nafess Ahmad Siddiqui, S.N. Singh and T.N.Singh for the Respondents.

Mohd. Yunus Salim and Shakeel Ahmed for Muslim Personal Law Board.

S.T. Desai and S.A. Syed for the Intervener Jamat- UlemaHind.

JUDGMENT

The Judgment of the Court was delivered by **CHANDRACHUD,C.J.** This appeal does not involve any question of constitutional importance but, that is not to say that it does not involve any question of importance. Some questions which arise under the ordinary civil and criminal law are of a far-reaching significance to large segments of society which have been traditionally subjected to unjust treatment. Women are one such segment. ' Nastree swatantramarhati" said Manu, the Law giver: The woman does not deserve independence. And, it is alleged that the 'fatal point in Islam is the 'degradation of woman'(l). To the Prophet is ascribed the statement, hopefully wrongly, that 'Woman was made from a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly.

This appeal, arising out of an appellation filed by a divorced Muslim woman for maintenance under section 125 of the Code of Criminal Procedure, raises a straightforward issue which is of common interest not only to Muslim women, not only to women generally but, to all those who, aspiring to create an equal society of men and women, lure themselves into the belief that mankind has achieved a remarkable degree of progress in that direction. The appellant, who is an advocate by profession, was married to the respondent in 1932. Three sons and two daughters were born of that marriage In 1975, the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under section 125 of the Code in the court of the learned Judicial Magistrate (First Class), Indore asking for maintenance at the rate of Rs 500 per month. On November 6, 1978 the appellant divorced the respondent by an irrevocable talaq. His defence to the respondent's petition for maintenance was that she had ceased to be his wife by reason of the divorce granted by him, to provide that he was therefore under no obligation maintenance for her, that he had already paid maintenance to her at the rate of Rs. 200 per month for about two years and that, he had deposited a sum of Rs. 3000 in the court by way of dower during the period the of iddat. In August, 1979 the learned Magistrate directed appellant to pay a princely sum of Rs. 25 per month to the respondent by way of maintenance. It may be mentioned that the respondent had alleged that the appellant earns a professional income of about Rs. 60,000 per year. In July, 1980, in a revisional application filed by the respondent, the High Court of Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month. The husband is before us by special leave.

Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife ? Undoubtedly, the Muslim husband enjoys the privilege of being (1) 'Selections from Kuran'-Edward William Lane 1843, Reprint 1982, page xc (Introduction) able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all. But, is the only price of that privilege the dole of a pittance during the period of iddat ? And, is the

law so ruthless in its inequality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of iddat, the mere fact that he has paid something, no matter how little, absolves him for ever from the duty of paying adequately so as to enable her to keep her body and soul together ? Then again, is there any provision in the Muslim Personal Law under which a sum is payable to the wife 'on divorce' ? These are some of the important, though agonising, questions which arise for our decision.

The question as to whether section 125 of the Code applies to Muslims also is concluded by two decisions of this Court which are reported in Bai Tahira v. Ali Hussain Fidalli Chothia(1) andFazlunbi v. K. Khader Vali.(2) These decisions took the view that the divorced Muslim wife is entitled to apply for maintenance under section 125. But, a Bench consisting of our learned Brethren, Murtaza Fazal Ali and A. Varadarajan, JJ. were inclined to the view that those cases are not correctly decided. Therefore, they referred this appeal to a larger Bench by an order dated February 3, 1981, which reads thus:

"As this case involves substantial questions of law of far-reaching consequences, we feel that the decisions of this Court in Bai Tahira v. Ali Hussain Fidaalli Chothia & Anrand Fuzlunbi v. K. Khader Vnli & Anr. require reconsideration because, in our opinion, they are not only in direct contravention of the plain and an unambiguous language of s. 127(3)(b) of the Code of Criminal Procedure, 1973 which far from overriding the Muslim Law on the subject protects and applies the same in case where a wife has been divorced by the husband and the dower specified has been paid and the period of iddat has been observed. The decision also appear to us to be against the fundamental concept of divorce by the husband and its consequences (1) 1979 (2) SCR 75 (2) 1980 (3)SCR 1127 under the Muslim law which has been expressly protected bys. 2 of the Muslim Personal Law (Shariat) Application Act, 1937-an Act which was not noticed by the aforesaid decisions. We, therefore, direct that the matter may be placed before the Honorable Chief Justice for being heard by a larger Bench consisting of more than three Judges. "

Section 125 of the Code of Criminal Procedure which deals with the right of maintenance reads thus: "Order for maintenance of wives, children and parents

125. (1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself,

(b) ...

(c) ...

(d) ...

a Magistrate of the first class may, upon proof of such neglecter refusal, order such person to make a monthly allowance for the maintenance of his wife .. at such monthly rate not exceeding five hundred rupees in the whole as such Magistrate think fit Explanation-For the purposes of this Chapter,-

(a).....

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

(2) ..... .

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

Provided.....

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

Explanation-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him."

Section 127(3)(b), on which the appellant has built up the edifice of his defence reads thus:

"Alteration in allowance

127. (1).....

(2).....

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from her husband, the Magistrate shall, if he is satisfied that-

(a).....

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the Sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,-

(i) in the case where such sum was paid before such order, from the date on which such order was made.

(ii) in any other case, from the date of expiry of the period, if any, for Which maintenance has been actually paid by the husband to the woman."

Under section 125(1)(a), a person who, having sufficient means, neglects or refuses to maintain his wife who is unable to maintain herself, can be asked by the court to pay a monthly maintenance to her at a rate not exceeding Five Hundred rupees. By clause (b) of the Explanation to section 125(1), 'wife' includes a divorced woman who has not remarried. These provisions are too clear and precise to admit of any doubt or refinement. The religion professed by a spouse or by the spouses has no place in the scheme of these provisions. Whether the spouses are Hindus or Muslims, Christians or Parsis, pagans or heathens, is wholly irrelevant in the application of these provisions. The reason for this is axiomatic, in the sense that section 125 is a part of the Code of Criminal Procedure, not of the Civil Laws which define and govern The rights and obligations of the parties belonging to particular, religions, like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent ? Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the

applicability of section 125. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion. True, that they do not supplant the personal law of the parties but, equally the religion professed by the parties or the state of the personal law by which they are governed, cannot have any repercussion on the applicability of such laws unless, within the framework of the Constitution, their application is restricted to a defined category of religious groups or classes. The liability imposed by section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion. Clause (b) of the Explanation to section 125(1), which defines 'wife' as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope. Section 125 is truly secular in character.

Sir James FitzJames Stephen who piloted the Code of Criminal Procedure, 1872 as a Legal Member of the Viceroy's Council, described the precursor of Chapter IX of the Code in whichsection 125 occurs, as 'a mode of preventing vagrancy or at least of preventing its consequences. In Jagir kaur v. Jaswont Singh,(1) Subba Rao, J. speaking for the Court said that Chapter XXXVI of the Code of 1898 which contained section 488, corresponding to section 125, "intends to serve a social purpose". In Nanak Chand v. Shri Chandra Kishore Agarwala.(2) Sikri, J., while pointing out that the scope of the Hindu Adoptions and Maintenance Act, 1956 and that of section 488 was different, said that section 488 was "applicable to all persons belonging to all religions and has no relationship with the personal law of the parties".

Under section 488 of the Code of 1898, the wife's right to maintenance depended upon the continuance of her married status. Therefore, that. right could be defeated by the husband by divorcing her unilaterally as under the Muslim Personal Law, or by obtaining a decree of divorce against her under the other systems of law. It was in order to remove this hardship that the Joint Committee recommended that the benefit of the provisions regarding maintenance should be, extended to a divorced woman, so long as she has not remarried after the divorce. That is the genesis of clause (b) of the Explanation to section 125(1), which provides that 'wife' includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. Even in the absence of this provision, the courts had held under the Code of 1&98 that the provisions regarding maintenance were independent of the personal law governing the parties. The induction of the definition of 'wife, so as to include a divorced woman lends even greater weight to that (1) 1964 (2) SCR 73, 84.

(2) 1970 (l) S CR 565.

conclusion. 'Wife' means a wife as defined, irrespective of the religion professed by her or by her husband. Therefor, a divorced Muslim woman, so long as she has not remarried, is a 'wife' for the purpose of section 125. The statutory right available to her under that section is unaffected by the provisions of the personal law applicable to her.

The conclusion that the right conferred by section 125 can be exercised irrespective of the personal law of the parties is fortified, especially in regard to Muslims, by the provision contained in the Explanation to the second proviso to section 125(3) of the Code. That proviso says that if the husband offers to maintain his wife on condition that she should live with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her, and may make an order of maintenance not with standing the offer of the husband, if he is satisfied that there is a just ground for passing such an order. According to the Explanation to the proviso:

"If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him."

It is too well-known that "A Mahomedan may have as many as four wives at the same time but not more. If he marries a fifth wife when he has already four, the marriage is not void, but merely irregular". (See Mulla's Mahomedan Law,18th Edition, paragraph 25S, page 285, quoting Baillie's Digest of Moohummudan Law; and Ameer Ali's Mahomedan Law, 5th Edition, Vol. II, page 280). The explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage, leave alone 3 or 4 other marriages. It shows, unmistakably, that section 125overrides the personal law, if is any there conflict between the two.

The whole of this discussion as to whether the right conferred by section 125 prevails over the personal law of the parties, has proceeded on the assumption that there is a conflict between the provisions of that section and those of the Muslim Personal Law. The argument that by reason of section 2 of the Shariat Act, XXVI of 1937, the rule of decision in matters relating, inter alia, to maintenance "shall be the Muslim Personal Law" also proceeds upon a similar assumption. We embarked upon the decision of the question of priority between the Code and the Muslim Personal Law on the assumption that there was a conflict between the two because, in so far as it lies in our power, we wanted to set at rest, once for all, the question whether section 125 would prevail over the personal law of the parties, in cases where they are in conflict.

The next logical step to take is to examine the question, on which considerable argument has been advanced before us, whether there is any conflict between the provisions of section 125 and those of the Muslim Personal Law on the liability of the Muslim husband to provide for the maintenance of his divorced wife.

The contention of the husband and of the interveners who support him is that, under the Muslim Personal Law, the liability of the husband to maintain a divorced wife is limited to the period of iddat. In support of this proposition, they rely upon the statement of law on the point contained in certain text books. In Mulla's Mahomedan Law (18th Edition, para 279, page 301), there is a statement to the effect that, "After divorce, the wife is entitled to maintenance during the period of iddat". At page 302, the learned author says: -

'Where an order is made for the maintenance of a wife under section 488 of the Criminal Procedure Code and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of iddat. The result is that a Mahomedan may defeat an order made against him under section 488 by divorcing his wife immediately after the order is made. His obligation to maintain his wife will cease in that case on the completion of her iddat,"

Tyabji's Muslim law (4th Edition, para 304, pages 268-

269). contains the statement that:

"On the expiration of the iddat after talaq, the wife's right to maintenance ceases, whether based on the Muslim Law, or on an order under the Criminal Procedure Code-"

According to Dr Paras Diwan:

"When a marriage is dissolved by divorce the wife is entitled to maintenance during the period of iddat.... On the expiration of the period of iddat, the wife is not entitled to any maintenance under any

circumstances. Muslim Law does not recognise any obligation on the part of a man to maintain a wife whom he had divorced."

(Muslim Law in Modern India, 1982 Edition, page 130) These statements in the text book are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. One must have regard to the entire conspectus of the Muslim Personal Law in order to determine the extent both, in quantum and induration, of the husband's liability to provide for the maintenance of an indigent wife who has been divorced by him. Under that law, the husband is bound to pay Mahr to the wife as a mark of respect to her. True, that he may settle any amount he likes by way of dower upon his wife, which cannot be less than 10 Dir hams, which is equivalent to three or four rupees (Mulla's Mahomedan Law, 18th Edition, para 286, page 308). But, one must have regard to the realities of life Mahr is a mark of respect to the wife. The sum settled by way of Mahr is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. But these provisions of the Muslim Personal Law do not countenance cases in which the wife is unable to maintain herself after the divorce. We consider it not only incorrect but unjust, to extend the scope of the statements extracted above to cases in which a divorced wife is unable to maintain herself. We are of the opinton that the application of those statements of law must be restricted to that class of cases, in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. We are not concerned here with the broad and general question whether a husband is liable to maintain his wife, which includes a divorced wife, in all circumstances and at all events. That is not the subject matter of section 125. That section deals with cases in which, a person who is possessed of sufficient means neglects or refuses to maintain, amongst others, his wife who is unable to maintain herself. Since the Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of iddat, does not contemplate or countenance the situation envisaged by section 125, it would be wrong to hold that the Muslim husband, according to his personal law, is not under all obligation to provide maintenance, beyond the period of iddat, to his divorced wife who is unable to maintain herself. The argument of the appellant that, according to the Muslim Personal Law, his liability to provide for the maintenance of his divorced wife is limited to the period of iddat, despite the fact she is unable to maintain herself, has therefore to be rejected. The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

There can be no greater authority on this question than the Holy Quran, "The Quran, the Sacred Book of Islam, comprises in its 114 Suras or chapters, the total of revelations believed to have been communicated to Prophet Muhammed, as a final expression of God's will". (The Quran- Interpreted by Arthur J. Arberry). Verses (Aiyats) 241 and 242 . of the Quran show that according to the Prophet, there is an obligation on Muslim husbands to provide for their divorced wives. The Arabic version of those Aiyats and their English translation are reproduced below:

Arabic version	English version
Ayat No. 241	For divorced women
WA LIL MOTALLAQATAY	Maintenance (should be

MATA UN	Provided)
BIL MAAROOFAY	On a reasonable (Scale)
HAQQAN	This is a duty
ALAL MUTTAQEENA	On the righteous.

KAZALEKA YUBAIYYANULLAHO Thus doth God LAKUM AYATEHEE LA ALLAKUM Make clear His Signs TAQELOON To you: in order that ye may understand.

(See 'The Holy Quran' by Yusuf Ali, Page 96). The correctness of the translation of these Aiyats is not in dispute except that, the contention of the appellant is that the word 'Mata' in Aiyat No. 241 means 'provision' and not 'maintenance'. That is a distinction without a difference. Nor are we impressed by the shuffling plea of the All India Muslim Personal Law Board that, in Aiyat 241, the exhortation is to the' Mutta Queena', that is, to the more pious and the more God-fearing, not to the general run of the Muslims, the 'Muslminin'. In Aiyat 242, the Quran says: "It is expected that you will use your commonsense".

The English version of the two Aiyats in Muhammad Zafrullah Khan's 'The Quran' (page 38) reads thus:

"For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus does Allah make His commandments clear to you that you may understand."

The translation of Aiyats 240 to 242 in 'The Meaning of the Quran' (Vol. I, published by the Board of Islamic Publications, Delhi) reads thus .

"240-241.

Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year's maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way; Allah is All Powerful, All-wise. Likewise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God-fearing people.

242. A Thus Allah makes clear His commandments for you: It is expected that you will use your commonsense." In "The Running Commentary of The Holy Quran" (1964 Edition) by Dr. Allamah Khadim Rahmani Nuri, Aiyat No. 241 is translated thus:

"241 And for the divorced woman (also) a provision (should be made) with fairness (in addition to her dower); (This is) a duty (incumbent) on the reverent."

In "The Meaning of the Glorious Quran, Text and Explanatory Translation", by Marmaduke Pickthall, (Taj Company Ltd.,karachi), Aiyat 241 is translated thus:

'-241.

For divorced women a provision in kindness: A duty for those who ward off (evil)."

Finally, in "The Quran Interpreted" by Arthur J.

Arberry. Aiyat 241 is translated thus:

"241.

There shall be for divorced women provision honourable-an obligation on the god fearing." So God makes clear His signs for you: Happily you will understand."

Dr. K.R. Nuri in his book quoted above: 'The Running Commentary of the Holy Quran", says in the preface:

"Belief in Islam does not mean mere confession of the existence of something. It really means the translation of the faith into action. Words without deeds carry no meaning in Islam. Therefore the term "believe and do good" has been used like a phrase all over the Quran. Belief in something means that man should inculcate the qualities or carry out the promptings or guidance of that thing in his action. Belief in Allah means that besides acknowledging the existence of the Author of the Universe, we are to show obedience to His commandments..."

These Aiyats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Quran. As observed by Mr. M. Hidayatullah in his introduction to Mulla's Mahomedan Law, the Quran is Al- furqan' that is one showing truth from falsehood and right from wrong.

The second plank of the appellant's argument is that the respondent's application under section 125 is liable to be dismissed be cause of the provision contained in section 127 (3) (b). That section provides, to the extent material, that the Magistrate shall cancel the order of maintenance, if the wife is divorced by the husband and, she has received "the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce". That raises the question as to whether, under the Muslim Personal law, any sum is payable to the wife 'on divorce'. We do not have to grope in the dark and speculate as to which kind of a sum this can be because, the only argument advanced before us on behalf of the appellant and by the interveners supporting him, is that Mahr is the amount payable by the husband to the wife on divorce. We find it impossible to accept this argument.

In Mulla's principles of Mahomedan Law (18th Edition, page 308), Mahr or Dower is defined in paragraph 285 as "a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage." Dr. Paras Diwan in his book, "Muslim Law in Modern India" (1982 Edition, page 60), criticises this definition on the ground that Mahr is not payable "in consideration of marriage" but is an obligation imposed by law on the husband as a mark of respect for the wife, as is evident from the fact that non-specification of Mahr at the time of marriage does not affect the validity of the marriage. We need not enter into this controversy and indeed, Mulla`s book itself contains the further statement at page 308 that the word 'consideration' is not used in the sense in which it is used in the Contract Act and that under the Mohammedan Law, Dower is an obligation imposed upon the husband as a mark of respect for the wife. We are concerned to find is whether Mahr is an amount payable by the husband to the wife on divorce. Some confusion is caused by the fact that, under the Muslim Personal Law, the amount of Mahr is usually split into two parts, one of which is called "prompt", which is payable on demand, and the other is called "deferred ", which is payable on the dissolution of the marriage by death or by divorce. But, the tact that deferred Mahr is payable at the time of the dissolution of marriage, cannot justify the conclusion that it is payable 'on divorce'. Even assuming that, in a given case, the entire amount of Mahr is of the deferred variety payable on the dissolution of marriage by divorce, it cannot be said that it is an amount which is payable on divorce. Divorce may be a convenient or identifiable point of time at which the deferred amount has to be paid by the husband to the wife. But, the payment of the amount is not occasioned by the divorce, which is what is meant by the expression 'on divorce', which occurs in section 127 (3) (b) of the Code. If Mahr is

an amount which the wife is entitled to receive from the husband hl consideration of the marriage, that is the very opposite of the amount being payable in consideration of divorce. Divorce dissolves the Marriage. Therefore no amount which is payable in consideration of the marriage can possibly be described as an amount payable in consideration of divorce. The alternative premise that Mahr is an obligation imposed upon the husband as a mark of respect for the wife, is wholly detrimental to the stance that it is an amount payable to the wife on divorce.A man may marry a woman for love, looks, learning or nothing at all. And. he may settle a sum upon her as a mark of respect for her. But he does not divorce her as a mark of respect. Therefore, a sum payable to the wife out of respect cannot be a sum payable 'on divorce'.

In an appeal from a Full Bench decision of the Allahabad High Court, the Privy Council in Hamira Bibi v. Zubaide Bibi(1) sum-(1) 43 1. A. 294. med up the nature and character of Mahr in these words:

"Dower is an essential incident under the Muslim Law to the status of marriage; to such an extent that is so that when it is unspecified at the time the marriage is contracted, the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one of which is called "prompt" payable before the wife can be called upon to enter the conjugal domicil; the other " deferred", payable on the dissolution of the contract by the death of either of the parties or by divorce." (p. 300-301) This statement of law was adopted in another decision of the Privy Council in Syed Sabir Husain v. Farzand Hasan.(1) It is not quite appropriate and seems invidious to describe any particular Bench of a court as "strong" but, we cannot resist the temptation of mentioning that Mr. Syed Ameer Ali was a party to the decision in Hamira Bibi while Sir Shadi Lal was a party to the decision in Syed Sabir Husain. These decisions show that the payment of dower may be deferred to a future date as, for example, death or divorce. But, that does not mean that the payment of the deferred dower is occasioned by these events.

It is contended on behalf of the appellant that the proceedings of the Rajya Sabha dated December 18, 1973 (volume 86, column 186), when the bill which led to the Code of 1973 was on the anvil, would show that the intention of the Parliament was to leave the provisions of the Muslim Personal Law untouched. In this behalf, reliance is placed on the following statement made by Shri Ram Niwas Mirdha, the then Minister of State, Home Affairs:

"Dr. Vyas very learnedly made certain observations that a divorced wife under the Muslim law deserves to be treated justly and she should get what is her equitable or legal due. Well, I will not go into this, but say that we would not like to interfere with the customary law of the Muslims through the Criminal Procedure Code. If there is (1) 65 I.A. 119, 127 a demand for change in the Muslim Personal Law, it should actually come from the Muslim Community itself and we should wait for the Muslim public opinion on these matters to crystalise before we try to change this customary right or make changes in their personal law. Above all, this is hardly, the place where we could do so. But as I tried to explain, the provision in the Bill is an advance over the previous situation. Divorced women have been included and brought within the admit of clause 125, but a limitation is being imposed by this amendment to clause 127, namely, that the maintenance orders would ceases to operate after the amounts due to her under the personal law are paid to her. This is a healthy compromise between wh lt has been termed a conservative interpretation of law or a concession to conservative public opinion and liberal approach to the problem. We have made an advance and not tried to transgress what are the personal rights of Muslim women. So this, I think, should satisfy Hon. Members that whatever advance we have made is in the right direction and it should be welcomed."

lt does appear from this speech that the Government did not desire to interfere with the personal law of the Muslim through the Criminal Procedure Code. It wanted the Muslim community to take the lead and the Muslim public opinion to crystalise on the reforms in their personal law. However, we do not concerned with the question whether the Government did not desire to bring about changes in the Muslim Personal Law by enacting sections 125 and 127 of the Code. As we have said earlier and, as admitted by the Minister, the Government did introduce such a change by defining the expression 'wife' to include a divorced wife. It also introduced another significant change by providing that the fact that the husband has contracted marriage with another woman is a just ground for the wife's refusal to live with him. The provision contained in section 127 (3) (b) may have been introduces because of the misconception that dower is an amount payable "on divorce". But, that cannot convert an amount payable as a mark of respect for the wife into an amount payable on divorce.

It must follow from this discussion, unavoidably a little too long, that the judgments of this Court in Bai Tahira (Krishna Iyer J., Tulzapurkar J. and Pathak J.) and Fazlunbi (Krishna Iyer, J.,) one of us, Chinnappa Reddy J. and A. P. Sen J.) are correct. Justice Krishna Iyer who spoke for the Court in both these cases, relied greatly on the teleological and schematic method of interpretation so as to advance the purpose of the law. These constructional techniques have their own importance in the interpretation of statutes meant to ameliorate the conditions of suffering sections of the society. We have attempted to show that taking the language of the statute as one finds it, there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under section 125 and that, Mahr is not a sum which, under the Muslim Personal Law, is payable on divorce.

Though Bai Tahira was correctly decided, we would like, respectfully, to draw attention to an error which has crept in the judgement There is a statement at page 80 of the report, in the context of section 127 (3) (b), that "payment of Mahr money, as a customary discharge, is within the cognizance of that provision". We have taken the view that Mahr, not being payable on divorce, does not fall within the meaning of that provision.

It is a matter of deep regret that some of the interveners who supported the appellant, took up an extreme position by displaying an unwarranted zeal to defeat the right to maintenance of women who are unable to maintain themselves. The written submissions of the All India Muslim Personal Law Board have gone to the length of asserting that it is irrelevant to inquire as to how a Muslim divorce should maintain herself. The facile answer of the Board is (that the Personal Law has devised the system of Mahr to meet the requirements of women and if a woman is indigent, she must look to her relations, including nephew and cousins, to support her. This is a most unreasonable view of law as well as life. We appreciate that Begum Temur Jehan, a social worker who has been working in association with the Delhi City Women's Association for the uplift of Muslim women, intervened to support Mr. Daniel Latifi who appeared on behalf of the wife It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country.A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law.A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so.A counsel in the case whispered, somewhat

audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal Laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

Dr. Tahir Mahmood in his book 'Muslim Personal Law' (1977 Edition, pages 200-202), has made a powerful plea for framing a uniform Civil Code for all citizens of India. He says: "In pursuance of the goal of secularism, the State must stop administering religion based personal laws". He wants the lead to come from the majority community but, we should have thought that, lead or no lead, the State must act. It would be useful to quote the appeal made by the author to the Muslim community:

"Instead of wasting their energies in exerting theological and political pressure in order to secure an "immunity" for their traditional personal law from the state` legislative jurisdiction, the Muslim will do well to begin exploring and demonstrating how the true Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the common civil code of India."

At a Seminar held on October 18, 1980 under the auspices of the Department of Islamic and Comparative Law, Indian Institute of Islamic Studies New Delhi? he also made an appeal to theMuslim community to display by their conduct a correct understanding of Islamic concepts on marriage and divorce (See Islam and Comparative Law Quarterly, April-June, 1981, page 146).

Before we conclude, we would like to draw attention to the Report of the Commission on marriage and Family Laws, which was appointed by the Government of Pakistan by a Resolution dated August 4, 1955. The answer of the Commission to Question No.5 (page 1215 of the Report) is that "a large number of middle-aged women who are being divorced without rhyme or reason should not be thrown on the streets without a roof over their heads and without any means of sustaining themselves and their children."

The Report concludes thus:

"In the words of Allama Iqbal, "the question which is likely to confront Muslim countries in the near future, is whether the law of Islam is capable of evolution-a question which will require great intellectual effort, and is sure to he answered in the affirmative "

For these reasons, we dismiss the appeal and confirm the judgment of the High Court. The appellant will pay the costs of the appeal to respondent 1, which we quantify at rupees ten thousand. It is needless to add that it would be open to the respondent to make an application under section 127 (1) of the Code for increasing the allowance of maintenance granted to her on proof of a change in the circumstances as envisaged by that section.

S.R. .Appeal dismissed

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LANDMARK JUDGMENTS ON

ADOPTION

STEPHANIE JOAN BECKER VERSUS STATE AND ORS.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 1053 of 2013

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

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

RANJAN GOGOI, J.

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.

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

New Delhi,

February 08, 2013.

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

(Arising out of S.L.P (C) No.9412 of 2003)

Appeal (Civil) 6492 of 2005

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

Date of Judgment: 24/10/2005

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

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

ARIJIT PASAYAT, J.

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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SHABNAM HASHMI VERSUS UNION OF INDIA & ORS.

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 470 OF 2005

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

Bench : Hon'ble Mr. Justice P. Sathasivam, Hon'ble Mr. Justice Ranjan Gogoi & Hon'ble Mr. Justice Shiva Kirti Singh

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

RANJAN GOGOI, J.

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

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

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

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

1 (1984) 2 SCC 244

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

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

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

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

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

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

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

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

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

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

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

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

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

NEW DELHI,

FEBRUARY 19, 2014.

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

LAKSHMI KANT PANDEY VERSUS UNION OF INDIA

Supreme Court of India
1984 AIR 469

1984 SCR (2) 795

Lakshmi Kant Pandey
vs
Union Of India

Decided on 6 February, 1984
Bench : Hon'ble Mr. Justice P.N. Bhagwati, Hon'ble Mr. Justice R.S. Pathak, Hon'ble Mr. Justice Amarendra Nath Sen

CITATION:

1984 AIR 469 1984 SCR (2) 795

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

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

(1)Every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is some time called 'inter- country adoption' should be acceptable. (2) Such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents.

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

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

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

The petitioner, an advocate of the Supreme Court addressed a letter in public interest to the Court, complaining of malpractices indulged in by social organisation and voluntary agencies engaged in the work of offering Indian Children in adoption to foreign parents, the petitioner alleged that not only Indian Children of tender age are under the guise of adoption "exposed to the long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the shelter and Relief Houses, they in course of

time become beggars or prostitutes for want of proper care from their alleged foster parents." The petitioner, accordingly, sought relief restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian Children by Foreign parents. Being a public interest litigation, the letter was treated as a writ petition.

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

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

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

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

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

2:3. The High Courts of Bombay, Delhi and Gujarat have laid down by Rules and Instructions certain procedure when a foreigner makes an application for adoption under the Guardian and Wards Act including issuing of a notice to the Indian Council of Social Welfare and other officially recognised social welfare agencies with a view to assist the court in properly

and carefully scrutinising the applications of the foreign parents for determining whether it will be in the interest of the child and promotive of its welfare, to be adopted by the foreign parents making the application or in other words, whether such adoption will provide moral and material security to the child with an opportunity to grow into the full stature of its personality in an atmosphere of love and affection and warmth of a family health and home. This Procedure is eminently desirable and it can help considerably to reduce, if notice imitate, the possibility of the child being adopted by unsuitable or undesirable parents or being placed in a family where it may be neglected, maltreated or exploited by the adoptive parents.

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

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

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

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

Every application of a foreigner for taking a child in adoption must be accompanied by a home study report and the social or child welfare agency sponsor in such application should also send along with it a recent photograph of the family, a marriage certificate of the foreigner and his or her spouse as also a declaration concerning their health

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

3:2. The Government of India shall prepare a list of social or child welfare agencies licensed or recognised for inter-country adoption by the Government of each foreign country where children from India are taken in adoption and this list shall be prepared after getting the

necessary information from the government of each such foreign country and the Indian Diplomatic Mission in that foreign country. Such lists shall be supplied by the Government of India to the various High Courts in India as also to the social or child welfare agencies operation in India in the area of inter-country adoption under licence or recognition from the Government of India.

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

3:4. It should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India or the Government of the State in which it is operating. Since an application for appointment as guardian can be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter country adoption, and in that event it must send without any undue delay the

name and must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in intercountry adoption. The Indian Council of Social Welfare and the Indian Council for Child Welfare are clearly two social or child welfare agencies operating at the national level and recognised by the Government of India. But apart from these two recognised social or child welfare agencies functioning at the national level, there are other social or child welfare agencies engaged in child care and welfare and if they have good standing and reputation and are doing commendable work in the are of child care and welfare they should also be recognised by the Government of India or the Government of the State for the purpose of inter-country adoptions. But before taking a decision to recognise any particular social or child welfare agency for the purpose of inter country adoptions the Government of India or the Government of a State would do well to examine whether the social or child welfare agency has proper staff with professional social work experience, because otherwise it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family. The Government of India or the Government of a State recognising any social or child welfare agency for inter-country adoptions must insist as a condition of recognition that the social or child welfare agency shall maintain proper accounts which shall be audited by a chartered accountant at the end of every year and it shall not charge to the foreigner wishing to adopt a child any amount in excess of that actually in cured by way of legal or other expenses in connection with the application for appointment of guardian including such reasonable remuneration or honorarium for the work done and trouble taken in processing, filing and pursuing the application as may be fixed by the Court.

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

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

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

(3) Physical, intellectual and emotional development.

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

(5) Recent photograph.

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

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

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

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

Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hardship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. For the same reasons, notice of the application for guardianship should also not be published in any newspaper. If the court is satisfied, after giving notice of the application to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of its branches for scrutiny of the application, that it will be for the welfare of the child to be give in adoption to the foreigner making the application

for guardianship, it will only then make an order appointing the foreigner as guardian of the child and permitting him to remove the child to his own country with a view to eventual adoption. The Court will introduce the following conditions in the order, namely:

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

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

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

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

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

3:9. If a child is to be given in inter-country adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Children above the age of 3 years may also be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 to 7 years may be able to assimilate themselves in the new surroundings

without any difficulty. Even children above the age of seven years may be given in inter-country adoption but their wishes may be ascertained if they are in a position to indicate any preference.

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

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

JUDGMENT

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

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

FOR THE RESPONDENTS:

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

Miss Kamini Jaiswal for Indian Council of Social Welfare.

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

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

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

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

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

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

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

Parijot Sinha for society for International Child Welfare.

Kailash Vasdev for Bhavishys.

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

The Indian Council of Social Welfare was the first to file its written submissions in response to the notice issued by the Court and its written submission filed on 30th September, 1982 not only carried considerable useful material bearing on the question of adoption of Indian children by foreign parents but also contained various suggestions and recommendations for consideration by the Court in formulating principles and norms for permitting such adoptions and laying down the procedure for that purpose. We shall have occasion to refer to this large material placed before us as also to discuss the various suggestions and recommendations made in the written submission by the Indian Council of Social Welfare when we take up for consideration the various issues arising in the writ petition. Suffice it to state for the present that the written submission of the Indian Council of Social Welfare is a well thought out document dealing comprehensively with various aspects of the problem in its manifold dimensions. When the writ petition reached hearing before the Court on 12th October, 1982 the only written submission filed was that the Indian Council of Social Welfare and neither the Union of India nor the Indian Council of Child Welfare had made any response to the notice issued by the Court. But there was a telegram received from a Swedish Organisation called `Barnen Framfoer Allt Adoptioner" intimating to the Court that this Organisation desired to participate in the hearing of the writ petition and to present proper material before the Court. S.O.S, Children's Villages of India also appeared through their counsel Mrs. Urmila Kapoor and applied for being allowed to intervene at the hearing of the writ petition so that they could made their submissions on the question of adoption of Indian Children by foreign parents. Since S.O.S, Children's Villages of India is admittedly an organisation concerned with welfare of children, the Court, by an Order dated 12th October, 1982, allowed them to intervene and to make their submissions before the Court. The Court also by the same Order directed that the Registry may address a communication to Barnen Framfoer Allt Adoptioner informing them about the adjourned date of hearing of the writ petition and stating that if they wished to present

any material and make their submissions, they could do so by filing an affidavit before the adjourned date of hearing. The Court also directed the Union of India to furnish before the next hearing of the writ petition the names of "any Indian Institutions or Organisations other than the Indian Council of Social Welfare and the Indian Council of Child Welfare, which are engaged or involved in offering Indian children for adoption by foreign parents" and observed that if the Union of India does not have this information, they should gather the requisite information so far as it is possible for them to do so and to make it available to the Court. The Court also issued a similar direction to the Indian Council of Child Welfare, Indian Council of Social Welfare and S.O.S. Children's Villages of India. There was also a further direction given in the same Order to the Union of India, the Indian Council of Child Welfare, the Indian Council of Social Welfare and the S.O.S. Children's Villages of India "to supply to the Court information in regard to the names and particulars of any foreign agencies which are engaged in the work of finding Indian children for adoption for foreign parents". The writ petition was adjourned to 9th November, 1982 for enabling the parties to carry out these directions.

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

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

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

referred to as a provisional adoption order) authorising the applicant to remove the child for the purpose aforesaid and giving to the applicant the care and custody of the child pending his adoption as aforesaid:

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

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

The Writ Petition thereafter came up for hearing on 9th November, 1982 when several applications were made by various institutions and organisations for intervention at the hearing of the writ petition. Since the questions arising in the writ petition were of national importance, the Court thought that it would be desirable to have assistance from whatever legitimate source it might come and accordingly, by an order dated 9th November, 1982, the Court granted permission to eight specified institutions or organisations to file affidavits or statements placing relevant material before the Court in regard to the question of adoption of Indian children by foreign parents and directed that such affidavits

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

It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a "supremely important national asset" and the future well being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fulness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique mental immaturity and incapacity to look-after themselves. That is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they ave to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution. Clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goal-oriented perambulatory introduction:

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

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

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

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

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

PRINCIPLE 6: The Child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of

his parents, and in any case in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

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

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

Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents. The practice of adoption has been prevalent in Hindu Society for centuries and it is recognised by Hindu Law, but in a large number of other countries it is of comparatively recent origin while in the muslim countries it is totally unknown. Amongst Hindus, it is not merely ancient Hindu Law which recognises the practice of adoption but it has also been legislatively recognised in the Hindu Adoption and Maintenance Act, 1956. The Adoption of Children Bill 1972 sought to provide for a uniform law of adoption applicable to all communities including the muslims but, as pointed out above, it was dropped owing to the strong opposition of the muslim community. The Adoption of Children Bill, 1980 is now pending in Parliament and if enacted, it will provide a uniform law of adoption applicable to all communities in India excluding the muslim community. Now when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country, because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socioeconomic conditions prevailing in the country, it might have to lead the life of a destitute, half clad, half-hungry and suffering from malnutrition and illness. Paul Harrison a free-lance journalist working for several U.N. Agencies including the International Year of the Child Secretariat points out that most third world children suffer "because of their country's lack of resources for development as well as pronounced inequalities in the way available resources are distributed" and they face a situation of absolute material deprivation. He proceeds to say that for quite a large number of children in the rural areas, "poverty and lack of education of their parents, combined with little or no access to essential services of health, sanitation and education, prevent the realisation of their full human potential making them more likely to grow up uneducated, unskilled and unproductive" and

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

But while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country. The Economic and Social Council as also the Commission for Social Development have therefore tried to evolve social and legal principles for the protection and welfare of children given in inter-country adoption. The Economic and Social Council by its Resolution 1925 LVIII requested the Secretary General of the United Nations to convene a group of Experts with relevant experts with relevant experience of family and child welfare with the following mandate:

"(a) To prepare a draft declaration of social and legal principles relating to adoption and foster placement of children nationally and internationally, and to review and appraise the recommendations

and guidelines incorporated in the report of the Secretary General and the relevant material submitted by Governments already available to the Secretary General and the regional commissions.

(b) To draft guidelines for the use of Governments in the implementation of the above principles, as well as suggestions for improving procedures within the context of their social development-including family and child welfare-programmes."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.9. If the parents state a preference for the religious up-bringing of the child, these wishes shall be respected as far as possible, but the best interest of the child will be the paramount consideration. 2.10. If the parents are not known, the appropriate authority or agency, in whose care the child has been placed, shall endeavour to trace the parents and ensure that the above services are provided, before taking any action in relation to adoption of the child.

The Child:

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

3.2. A child-study report shall be prepared by professional workers (or experienced personnel who are supervised by such qualified workers) of an appropriate authority or agency, to provide

information which will form a basis for the selection of prospective adopters for the child, assist with the child's need to know about his original family at the appropriate time, and help the adoptive parents understand the child and have relevant information about him/her.

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

3.3.1. Identifying information, supported where possible by documents.

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

3.3.3. Physical, intellectual and emotional development.

3.3.4. Health report.

3.3.5. Recent photograph.

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

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

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

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

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

Adoptive Parents:

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

4.4. A family study report shall be prepared by professional worker (or experienced personnel who are supervised by such qualified workers) to indicate the basis on which the applicants were accepted as prospective adopters. It should include an assessment of the parents' capacity to parent a particular type of child and provide relevant in formation for other authorities such as Courts.

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

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

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

4.5.4. Health.

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

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

4.5.9. Support available from relatives, friends, community.

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

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

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

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

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

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

5.6. XX XX XX XX

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

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

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

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

Adoption Services and Communities:

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

6.2. XX XX XX XX

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

Status of the Child:

7.1. Family:

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

7.2. Name:

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

7.3. Nationality:

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

7.4. XX XX XX XX

7.5. Immigration:

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

Now it would be convenient at this stage to set out the procedure which is at present being followed for giving a child in adoption to foreign parents. Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, resort is had to the provisions of the Guardians & Wards Act 1890 for the purpose of facilitating such adoption. This Act is an old statute enacted for the purpose of providing for appointment of guardian of the person or property of a minor. Section 4 sub-section (5) clause (a) defines the "court" to mean the district court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be a guardian and the expression "district court" is defined in sub-section (4) of section 4 to have the same meaning as assigned to it in the Code of Civil Procedure and includes a High Court in the exercise of its ordinary original civil jurisdiction. Section 7 sub-section (1) provides that where the court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both or declaring a person to be such a guardian, the court may make an order accordingly and, according to section 8, such an order shall not be

made except on the application of one of four categories of persons specified in clauses (a) to (d), one of them being "the person desirous of being the guardian of the minor" and the other being "any relative or friend of the minor". Sub section (1) of section 9 declares that if the 'application' is with respect to the guardianship of the person of the minor-and that is the kind of application which is availed of for the purpose of intercountry adoption-it shall be made to the district court having jurisdiction in the place where the minor ordinarily resides. Then follows section 11, sub- section (1) which prescribes that if the court is satisfied that there is ground for proceeding on the application, it shall fix a date for the hearing thereof and cause notice of the application and of the date fixed for the hearing to be served on the parents of the minor if they are residing in any State to which the Act extends, the person if any named in the petition as having the custody or possession of the person of the minor, the person proposed in the application to be appointed guardian and any other person to whom, in the opinion of the court, special notice of the application should be given. Section 17 provides that in appointing guardian of a minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor and in considering what will be for the welfare of the minor, the court shall have regard to the age sex, and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. The last material section is section 26 which provides that a guardian of the person of a minor appointed by the court shall not, without the leave of the court by which he was appointed, remove the ward from the limits of its jurisdiction, except for such purposes as may be prescribed and the leave to be granted by the court may be special or general.

These are the relevant provisions of the Guardians and Wards Act 1890 which have a bearing on the procedure which is at present being followed for the purpose of carrying through inter-country adoption. The foreign parent makes an application to the court for being appointed guardian of the person of the child whom he wishes to take in adoption and for leave of the court to take the child with him to his country on being appointed such guardian. The procedure to be followed by the court in disposing of such application is laid down by three High Courts in the country with a view to protecting the interest and safeguarding the welfare of the child, but so far as the rest of the High Courts are concerned, they do not seem to have taken any steps so far in that direction. Since most of the applications by foreign parents wishing to take a child in adoption in the State of Maharashtra are made on the original side of the High Court of Bombay that High Court has issued a notification dated 10th May 1972 incorporating Rule 361-B in Chapter XX of the Rules of the High Court of Bombay (Original Side) 1957 an this newly added Rule provides inter alia as follows:

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

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

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

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

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

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

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

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

The object of giving notice to the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other independent, reputed and publicly or officially recognised social welfare agency is obviously to ensure that the application of foreign parents for guardianship of the child with a view to its eventual adoption is properly and carefully scrutinised and evaluated by an expert body having experience in the area of child welfare with a view to assisting the Court in coming to the conclusion whether it will be in the interest of the child, promotive of its welfare, to be adopted by the foreign parents making the application or in other words, whether such adoption will provide moral and material security to the child with an opportunity to grow into the full stature of its personality in an atmosphere of love and affection and warmth of a family hearth and home. This procedure which has been evolved by the High Courts of Bombay,

Delhi and Gujarat is, in our opinion, eminently desirable and it can help considerably to reduce, if not eliminate, the possibility of the child being adopted by unsuitable or undesirable parents or being placed in a family where it may be neglected, maltreated or exploited by the adoptive parents. We would strongly commend this procedure for acceptance by every court in the country which has to deal with an application by a foreign parent for appointment of himself as guardian of a child with a view to its eventual adoption We shall discuss this matter a little more in detail when we proceed to consider what principles and norms should be laid down for inter-country adoption, but, in the meanwhile, proceeding further with the narration of the procedure followed by the courts in Bombay, Delhi and Gujarat, we may point out that when notice is issued by the court, the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other recognised social welfare agency to which notice is issued, prepares what may conveniently be described as a child study report and submits it to the Court for its consideration. What are the different aspects relating to the child in respect of which the child study report should give information is a matter which we shall presently discuss, but suffice it to state for the time being that the child study report should contain legal and social data in regard to the child as also an assessment of its behavioural pattern and its intellectual, emotional and physical development. The Indian Council of Social Welfare has evolved a standardised form of the child study report and it has been annexed as Ex. 'C' to the reply filed in answer to the notice issued by the Court. Ordinarily an adoption proposal from a foreign parent is sponsored by a social or child welfare agency recognised or licensed by the Government of the country in which the foreign parents resides and the application of the foreign parent for appointment as guardian of the child is accompanied by a home study report prepared by such social or child welfare agency. The home study report contains an assessment of the fitness and suitability of the foreign parent for taking the child in adoption based on his antecedents, family background, financial condition, psychological and emotional adaptability and the capacity to look after the child after adoption despite racial, national and cultural differences. The Indian Council of Social Welfare has set out in annexure 'B' to the reply filed by it, guidelines for the preparation of the home study report in regard to the foreign parent wishing to take a child in adoption, and it is obvious from these guidlines which we shall discuss a little later, that the home study report is intended to provide social and legal facts in regard to the foreign parent with a view to assisting the court in arriving at a proper determination of the question whether it will be in the interest of the child to be given in adoption to such foreign parent. The court thus has in most cases where an application is made by a foreign parent for being appointed guardian of a child in the courts in Bombay, Delhi and Gujarat, the child study report as well as the home study report together with other relevant material in order to enable it to decide whether it will be for the welfare of the child to be allowed to be adopted by the foreign parents and if on a consideration of these reports and material, the court comes to the conclusion that it will be for the welfare of the child, the court makes an order appointing the foreign parent as guardian of the child with liberty to him to take the child to his own country with a view to its eventual adoption. Since adoption in a foreign country is bound to take some time and till then the child would continue to be under the guardianship of the foreign parent by virtue of the order made by the court, the foreign parent as guardian would continue to be accountable to the court for the welfare of the child and the court therefore takes a bond from him with or without surety or sureties in such sum as may be thought for ensuring its production if and when required by the court. The foreign parent then takes the child to his own country either personally or through an escort and the child is then

adopted by the foreign parent according to the law of his country and on such adoption, the child acquires the same status as a natural born child with the same rights of inheritance and succession as also the same nationality as the foreign parent adopting it. This is broadly the procedure which is followed in the courts in Bombay, Delhi and Gujarat and there can be no doubt that, by and large, this procedure tends to ensure the welfare of the child, but even so, there are several aspects of procedure and detail which need to be considered in order to make sure that the child is placed in the right family where it will be able to grow into full maturity of its personality with moral and material security and in an atmosphere of love and warmth and it would not be subjected to neglect, maltreatment or exploitation. Now one thing is certain that in the absence of a law providing for adoption of an Indian child by a foreign parent, the only way in which such adoption can be effectuated is by making it in accordance with the law of the country in which the foreign parent resides. But in order to enable such adoption to be made in the country of the foreign parent, it would be necessary for the foreign parent to take the child to his own country where the procedure for making the adoption in accordance with the law of that country can be followed. However, the child which is an Indian national cannot be allowed to be removed out of India by the foreign parent unless the foreign parent is appointed guardian of the person of the child by the Court and is permitted by the Court to take the child to his own country under the provisions of the Guardians and Wards Act 1890. Today, therefore, as the law stands, the only way in which a foreign parents can take an Indian child in adoption is by making an application to the Court in which the child ordinarily resides for being appointed guardian of the person of the child with leave to remove the child out of India and take it to his own country for the purpose of adopting it in accordance with the law of his country. We are definitely of the view that such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents. It has been the experience of a large number of social welfare agencies working in the area of adoption that, by and large, Indian parents are not enthusiastic about taking a stranger child in adoption and even if they decide to take such child in adoption, they prefer to adopt a boy rather than a girl and they are wholly averse to adopting a handicapped child, with the result that the majority of abandoned, destitute or orphan girls and handicapped children have very little possibility of finding adoptive parents within the country and their future lies only in adoption by foreign parents. But at the same time it is necessary to bear in mind that by reason of the unavailability of children in the developed countries for adoption, there is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organisations or individuals activising themselves in the field of inter- country adoption with a view to trafficking in children and sometimes it may also happen that the immediate prospect of transporting the child from neglect and abandonment to material comfort and security by placing it with a foreigner may lead to other relevant factors such as the intangible needs of the child, its emotional and psychological requirements and possible difficulty of its assimilation and integration in a foreign family with a different racial and cultural background, being under-emphasized, if not ignored. It is therefore necessary to evolve normative and procedural safeguards for ensuring that the child goes into the right family which would provide it warmth and affection of family life and help it to grow and develop physically, emotionally, intellectually and spiritually. These safeguards we now proceed to examine.

We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents

would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare. Let us first consider what are the requirements which should be insisted upon so far ar a foreigner whishing to take a child in adoption is concerned In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.

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

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

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

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

and such information shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secretary, Ministry of Social Welfare, Government of India. The Government of India shall prepare a list of social or child welfare agencies licensed or recognised for inter- country adoption by the government of each foreign country where children from India are taken in adoption and this list shall be prepared after getting the necessary information from the government of each such foreign country and the Indian Diplomatic Mission in that foreign country. We may point out that the Swedish Embassy has in Annexure II to the affidavit filed on its behalf by Ulf Waltre, given names of seven Swedish organisations or agencies which are authorised by the National Board for Inter-Country Adoption functioning under the Swedish Ministry of Social Affairs to "mediate" applications for adoption by Swedish nationals and the Indian Council of Social Welfare has also in the reply filed by it in answer to the writ petition given a list of government recognised organisations or agencies dealing in inter-country adoption in foreign countries. It should not therefore be difficult for the Government of India to prepare a list of social or child welfare agencies licensed or recognised for intercountry adoption by the Government in various foreign countries. We direct the Government of India to prepare such list within six months from today and copies of such list shall be supplied by the Government of India to the various High Courts in India as also to the social or child welfare agencies operating in India in the area of inter-country adoption under licence or recognition from the Government of India. We may of course make it clear that application of foreigners for appointment of themselves as guardians of children in India with a view to their eventual adoption shall not be held up until such list is prepared by the Government of India but they shall be processed and disposed of in the light of the principles and norms laid down in this judgment.

We then proceed to consider the position in regard to biological parents of the child proposed to be taken in adoption. What are the safeguards which are required to be provided in so far as biological parents are concerned ? We may make it clear at the outset that when we talk about biological parents, we mean both parents if they are together of the mother or the father if either is alone. Now it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the Institution or centre or Home for Child Care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoptions including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back. It would be most unfair if after a child is approved by a foreigner and expenses are incurred by him for the purpose of maintenance of the child and some times on medical assistance and even hospitalisation for the

child, the biological parents were once again to be consulted for giving them a locus penitential to reconsider their decision. But in order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the Institution or Centre or Home for Child Care or social or child welfare agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background, health and development. If the biological parents state a preference for the religious upbringing of the child, their wish should as far as possible be respected, but ultimately the interest of the child alone should be the sole guiding factor and the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents. This procedure can and must be followed where the biological parents are known and they relinquish the child for adoption to an Institution or Centre or Home for Child Care or hospital or social or child welfare agency. But where the child is an orphan, destitute or abandoned child and its parents are not known, the Institution or Centre or Home for Child Care or hospital or social or child welfare agency in whose care the child has come, must try to trace the biological parents of the child and if the biological parents can be traced and it is found that they do not want to take back the child, then the same procedure as outlined above should as far as possible be followed. But if for any reason the biological parents cannot be traced, then there can be no question of taking their consent or consulting them. It may also be pointed out that the biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of the child of within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

We may now turn to consider the safeguards which should be observed in so far as the child proposed to be taken in adoption is concerned. It was generally agreed by all parties appearing before the Court, whether as interveners or otherwise, that it should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India or the Government of the State in which it is operating, or to put it differently in the language used by the Indian Council of Social Welfare in the reply filed by it in answer to the writ petition, "all private adoptions conducted by unauthorised individuals or agencies should be stopped". The Indian Council of Social Welfare and the Indian Council for Child Welfare are clearly two social or child welfare agencies operating at the national level and recognised by the Government of India, as appears clearly from the letter dated 23rd August, 1980 addressed by the Deputy Secretary to the Government of India to the Secretary, Government of Kerela, Law Department, Annexure 'F' to the submissions filed by the Indian Council for Child Welfare in response to the writ petition. But apart from these two recognised social or child welfare agencies functioning at the national level, there are other social or child welfare agencies engaged in child care and welfare and if they have good standing and reputation and are doing commendable work in the area of child care and welfare, there is

no reason why they should not be recognised by the Government of India or the Government of a State for the purpose of inter-country adoptions. We would direct the Government of India to consider and decide within a period of three months from today whether any of the institutions or agencies which have appeared as interveners in the present writ petition are engaged in child care and welfare and if so, whether they deserve to be recognised for inter- country adoptions. Of course it would be open to the Government of India or the Government of a State suo motu or on an application made to it to recognise any other social or child welfare agency for the purpose of inter-country adoptions, provided such social or child welfare agency enjoys good reputation and is known for its work in the field of child care and welfare. We would suggest that before taking a decision to recognise any particular social or child welfare agency for the purpose of intercountry adoptions, the Government of India or the Government of a State would do well to examine whether the social or child welfare agency has proper staff with professional social work experience, because otherwise it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family. It would also be desirable not to recognise an organisation or agency which has been set up only for the purpose of placing children in adoption: it is only an organisation or agency which is engaged in the work of child care and welfare which should be regarded as eligible for recognition, since inter-country adoption must be looked upon not as an independent activity by itself, but as part of child welfare programme so that it may not tend to degenerate into trading. The Government of India or the Government of a State recognising any social or child welfare agency for inter-country adoptions must insist as a condition of recognition that the social or child welfare agency shall maintain proper accounts which shall be audited by a chartered accountant at the end of every year and it shall not charge to the foreigner wishing to adopt a child any amount in excess of that actually incurred by way of legal or other expenses in connection with the application for appointment of guardian including such reasonable remuneration or honorarium for the work done and trouble taken in processing, filing and pursuing the application as may be fixed by the Court.

Situations may frequently arise where a child may be in the care of a child welfare institution or centre or social or child welfare agency which has not been recognised by the Government. Since an application for appointment as guardian can, according to the principles and norms laid down by us, be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter-country adoption, and in that event it must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in inter-country adoption. Every recognised social or child welfare agency must maintain a register in which the names and particulars of all children proposed to be given in inter-country adoption through it must be entered and in regard to each such child, the recognised social or child welfare agency must prepare a child study report through a professional social worker giving all relevant information in regard to the child so as to help the foreigner to come to a decision whether or not to adopt the child and to understand the child, if he decides to adopt it as also to assist the court in coming to a decision whether it will be for the welfare of the child to be given in adoption to the foreigner wishing to adopt it. The child study report should contain as far as possible information in regard to the following matters:

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

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

(3) Physical, intellectual and emotional development.

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

(5) Recent photograph.

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

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

The government of India should, with the assistance of the Government of the States, prepare a list of recognised social or child welfare agencies with their names, addresses and other particulars and send such list to the appropriate department of the Government of each foreign country where Indian children are ordinarily taken in adoption so that the social or child welfare agencies licensed or recognised by the Government of such foreign country for intercountry adoptions, would know which social or child welfare agency in India they should approach for processing an application of its national for taking an Indian child in adoption. Such list shall also be sent by the Government of India to each High Court with a request to forward it to the district courts within its jurisdiction so that the High Courts and the district courts in the country would know which are the recognised social or child welfare agencies entitled to process an application for appointment of a foreigner as guardian. Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centres which are active in inter-country adoptions. Such Central Adoption Resource Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward them to one or the other of the recognised social or child welfare agencies in the country. Every social or child welfare agency taking children under its care can then be required to send to such Central Adoption Resource Agency the names and particulars of children under its care who are available for adoption and the names and particulars of such children can be entered in a register to be maintained by such Central Adoption Resource Agency. But until such Central Adoption Resource Agency is set up, an application of a foreigner for taking an Indian child in adoption must be routed through a recognised social or child welfare agency. Now before any such application from a foreigner is considered, every effort must be made by the recognised social or child welfare agency to find placement for the child by adoption in an Indian family. Whenever any Indian family approaches a recognised social or child welfare agency for taking a child in adoption, all facilities must be provided by such social or child welfare agency to the Indian family to have a look at the children available with it for adopt on and if the Indian family wants to see the child study report in respect of any particular child, child study report must also be made available to the Indian family in order to enable the Indian family to decide whether they would take the child in adoption. It is only if no Indian family comes forward to take a child in adoption within a maximum period of two months that the child may be regarded as available for inter-country

adoption, subject only to one exception, namely, that if the child is handicapped or is in bad state of health needing urgent medical attention, which is not possible for the social or child welfare agency looking after the child to provide, the recognised social or child welfare agency need not wait for a period of two months and it can and must take immediate steps for the purpose of giving such child in inter-country adoption. The recognised social or child welfare agency should, on receiving an application of a foreigner for adoption through a licensed or recognised social or child welfare agency in a foreign country, consider which child would be suitable for being given in adoption to the foreigner and would fit into the environment of his family and community and send the photograph and child study report of such child to the foreigner for the purpose of obtaining his approval to the adoption of such child. The practice of accepting a general approval of the foreigner to adopt any child should not be allowed, because it is possible that if the foreigner has not seen the photograph of the child and has not studied the child study report and a child is selected for him by the recognised social or child welfare agency in India on the basis of his general approval, he may on the arrival of the child in his country find that he does not like the child or that the child is not suitable in which event the interest of the child would be seriously prejudiced. The recognised social or child welfare agency must therefore insist upon approval of a specific known child and once that approval is obtained, the recognised social or child welfare agency should immediately without any undue delay proceed to make an application for appointment of the foreigner as guardian of the child. Such application would have to be made in the court within whose jurisdiction the child ordinarily resides and it must be accompanied by copies of the home study report, the child study report and other certificates and documents forwarded by the social or child welfare agency sponsoring the application of the foreigner for taking the child in adoption.

Before we proceed to consider what procedure should be followed by the court in dealing with an application for appointment of a foreigner as guardian of a child, we may deal with a point of doubt which was raised before us, namely, whether the social or child welfare agency which is looking after the child should be entitled to receive from the foreigner wishing to take the child in adoption any amount in respect of maintenance of the child or its medical expenses. We were told that there are instances where large amounts are demanded by so called social or child welfare agencies or individuals in consideration of giving a child in adoption and often this is done under the label of maintenance charges and medical expenses supposed to have been incurred for the child. This is a pernicious practice which is really nothing short of trafficking in children and it is absolutely necessary to put an end to it by introducing adequate safeguards. There can be no doubt that if an application of a foreigner for taking a child in adoption is required to be routed through a recognised social or child welfare agency and the necessary steps for the purpose of securing appointment of the foreigner as guardian of the child have also to be taken only through a recognised social or child welfare agency, the possibility of any so called social or child welfare agency or individual trafficking in children by demanding exorbitant amounts from prospective adoptive parents under the guise of maintenance charges and medical expenses or otherwise, would be almost eliminated. But, at the same time, it would not be fair to suggest that the social or child welfare agency which is looking after the child should not be entitled to receive any amount from the prospective adoptive parent, when maintenance and medical expenses in connection with the child are actually incurred by such social or child welfare agency. Many of the social or child welfare agencies running homes for children have little financial resources of their own and have to depend largely on voluntary donations and

therefore if any maintenance or medical expenses are incurred by them on a child, there is no reason why they should not be entitled to receive reimbursement of such maintenance and medical expenses from the foreigner taking the child in adoption. We would therefore direct that the social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate not exceeding Rs. 60 per day (this outer limit being subject to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to its new home as also medical expenses including hospitalisation charges, if any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent through the recognised social or child welfare agency which has processed the application for guardianship and payment in respect of such claim shall not be received directly by the social or child welfare agency making the claim but shall be paid only through the recognised social or child welfare agency. This procedure will to a large extent eliminate trafficking in children for money or benefits in kind and we would therefore direct that this procedure shall be followed in the future. But while giving this direction, we may make it clear that what we have said should not be interpreted as in any way preventing a foreigner from making voluntary donation to any social or child welfare agency but no such donation from a prospective adoptive parent shall be received until after the child has reached the country of its prospective adoptive parent.

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

We may also at this stage refer to one other question that was raised before us, namely, whether a child under the care of a social or child welfare agency or hospital or orphanage in one State can be brought to another State by a social or child welfare agency for the purpose of being given in adoption and an application for appointment of a guardian of such child can be made in the court of the latter State. This question was debated before us in view of the judgment given by Justice Lentin of the Bombay High Court of 22nd July, 1982 in Miscellaneous Petition No. 178 of

1982 and other allied petitions. We agree with Justice Lentin that the practice of social or child welfare agencies or individuals going to different States for the purpose of collecting children for being given in inter-country adoption is likely to lead to considerable abuse, because it is possible that such social or child welfare agencies or individuals may, by offering monetary inducement, persuade indigent parents to part with their children and then give the children to foreigners in adoption by demanding a higher price, which the foreigners in their anxiety to secure a child for adoption may be willing to pay. But we do not think that if a child is relinquished by its biological parents or is an orphan or destitute or abandoned child in its parent State, there should be any objection to a social or child welfare agency taking the child to another State, even if the object be to give it in adoption, provided there are sufficient safeguards to ensure that such social or child welfare agency does not indulge in any malpractice. Since we are directing that every application of a foreigner for taking a child in adoption shall be routed only through a recognised social or child welfare agency and an application for appointment of the foreigner as guardian of the child shall be made to the court only through such recognised social or child welfare agency, there would hardly be any scope for a social or child welfare agency or individual who brings a child from another State for the purpose of being given in adoption to indulge in trafficking and such a possibility would be reduced to almost nil.

Moreover before proposing a child for adoption, the recognised social or child welfare agency must satisfy itself that the child has either been voluntarily relinquished by its biological parents without monetary inducement or is an orphan or destitute or abandoned child and for this purpose, the recognised social or child welfare agency may require the agency or individual who has the care and custody of the child to state on oath as to how he came by the child and may also, if it thinks fit, verify such statement, by directly enquiring from the biological parents or from the child care centre or hospital or orphanage from which the child is taken. This will considerably reduce the possibility of abuse while at the same time facilitating placement of children deprived of family love and care in smaller towns and rural areas. We do not see any reason why in cases of this kind where a child relinquished by its biological parents or an orphan or destitute or abandoned child is brought by an agency or individual from one State to another, it should not be possible to apply for guardianship of the child in the court of the latter State, because the child not having any permanent place of residence, would then be ordinarily resident in the place where it is in the care and custody of such agency or individual. But quite apart from such cases, we are of the view that in all cases where a child is proposed to be given in adoption, enquiries regarding biological parents, whether they are traceable or not and if traceable, whether they have voluntarily relinquished the child and if not, whether they wish to take the child back, should be completed before the child is offered for adoption and thereafter no attempt should be made to trace or contact the biological parents. This would obviate the possibility of an ugly and unpleasant situation of biological parents coming forward to claim the child after it has been given to a foreigner in adoption. It is also necessary while considering placement of a child in adoption to bear in mind that brothers and sisters or children who have been brought up as siblings should not be separated except for special reasons and as soon as a decision to give a child in adoption to a foreigner is finalised, the recognised social or child welfare agency must if the child has reached the age of understanding, take steps to ensure that the child is given proper orientation and is prepared for going to its new home in a new country so that the assimilation of the child to the new environment is facilitated.

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

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

Lastly, we come to the procedure to be followed by the court when an application for guardianship of a child is made to it. Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, we are definitely of the view that no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hard ship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. The possibility also cannot be ruled out that if the biological parents know who are the adoptive parents they may try to extort money from the adoptive parents. It is therefore absolutely essential that the biological parents should not have any opportunity of knowing who are the adoptive parents taking the child in adoption and therefore notice of the application for guardianship should not be given to the biological parents. We would direct that for the same reasons notice of the application for guardianship should also not be published in any newspaper. Section 11 of the Act empowers the court to serve notice of the application for guardianship on any other person to whom, in the opinion of the court, special notice of the application should be given and in exercise of this power the court should, before entertaining an application for guardianship, give notice to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of

its branches for scrutiny of the application with a view to ensuring that it will be for the welfare of the child to be given in adoption to the foreigner making the application for guardianship. The Indian Council of Social Welfare of the Indian Council of Child Welfare to which notice is issued by the court would have to scrutinise the application for guardianship made on behalf of the foreigner wishing to take the child in adoption and after examining the home study report, the child study report as also documents and certificates forwarded by the sponsoring social or child welfare agency and making necessary enquiries, it must make its representation to the court so that the court may be able to satisfy itself whether the principles and norms as also the procedure laid down by us in this judgment have been observed and followed, whether the foreigner will be a suitable adoptive parent for the child and the child will be able to integrate and assimilate itself in the family and community of the foreigner and will be able to get warmth and affection of family life as also moral and material stability and security and whether it will be in the interest of the child to be taken in adoption by the foreigner. If the court is satisfied, then and then only it will make an order appointing the foreigner as guardian of the child and permitting him to remove the child to his own country with a view to eventual adoption. The court will also introduce a condition in the order that the foreigner who is appointed guardian shall make proper provision by way of deposit or bond or otherwise to enable the child to be repatriated to India should it become necessary for and reason. We may point out that such a provision is to be found in clause 24 of the Adoption of Children Bill No. 208 of 1980 and in fact the practice of taking a bond from the foreigner who is appointed guardian of the child is being followed by the courts in Delhi as a result of practice instructions issued by the High Court of Delhi. The order will also include a condition that the foreigner who is appointed guardian shall submit to the Court as also to the Social or Child Welfare Agency processing the application for guardianship, progress reports of the child along with a recent photograph quarterly during the first two years and half yearly for the next three years. The court may also while making the order permit the social or child welfare agency which has taken care of the child pending its selection for adoption to receive such amount as the Court thinks fit from the foreigner who is appointed guardian of such child. The order appointing guardian shall carry, attached to it, a photograph of the child duly counter- signed by an officer of the court. This entire procedure shall be completed by the court expeditiously and as far as possible within a period of two months from the date of filing of the application for guardianship of the child. The proceedings on the application for guardianship should be held by the Court in camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship the entire proceedings including the papers and documents should be sealed. When an order appointing guardian of a child is made by the court, immediate intimation of the same shall be given to the Ministry of Social Welfare, Government of India as also to the Ministry of Social Welfare of the Government of the State in which the court is situate and copies of such order shall also be forwarded to the two respective ministries of Social Welfare. The Ministry of Social Welfare, Government of India shall maintain a register containing names and other particulars of the children in respect of whom orders for appointment of guardian have been made as also names, addresses and other particulars of the prospective adoptive parents who have been appointed such guardians and who have been permitted to take away the children for the purpose of adoption. The Government of India will also send to the Indian Embassy or High Commission in the country of the prospective adoptive parents from time to time the names, addresses and other particulars of such prospective adoptive parents together with particulars

of the children taken by them and requesting the Embassy or High Commission to maintain an unobtrusive watch over the welfare and progress of such children in order to safeguard against any possible maltreatment, exploitation or use for ulterior purposes and to immediately report any instance of maltreatment, negligence or exploitation to the Government of India for suitable action.

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

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

These are the principles and norms which must be observed and the procedure which must be followed in giving a child in adoption to foreign parents. If these principles and norms are observed and this procedure is followed, we have no doubt that the abuses to which inter-country adoptions, if allowed without any safeguards, may lend themselves would be considerably reduced, if not eliminated and the welfare of the child would be protected and it would be able to find a new home where it can grow in an atmosphere of warmth and affection of family life with full opportunities for physical intellectual and spiritual development. We may point out that the adoption of children by foreign parents need not wait until social or child welfare agencies are recognised by the Government as directed in this order, but pending recognition of social or child welfare agencies for the purpose of inter-country adoptions, which interregnum, we hope, will not last for a period of more than two months, any social or child welfare agency having the care and custody of a child may be permitted to process an application of a foreigner, but barring this departure the rest of the procedure laid down by us shall be followed wholly and the principles and norms enunciated by us in this Judgment shall be observed in giving a child in inter-country adoption.

The writ petition shall stand disposed of in these terms. Copies of this order shall be sent immediately to the Ministry of Social Welfare of the Government of India and the Ministry of

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

ANNEXURE-'A'

1. Source of Referral.
2. Number of single and joint interviews.
3. Personality of husband and wife.
4. Health details such as clinical tests, heart condition, past illnesses etc. (medical certificates required, sterility certificate required, if applicable),
5. Social status and family background.
6. Nature and Adjustment with occupation.
7. Relationship with community.
8. Description of home.
9. Accommodation for the child.
10. Schooling facilities.
11. Amenities in the home.
12. Standard of living as it appears in the home.
13. Type of neighbourhood.
14. Current relationship between husband and wife.
15. (a) Current relationship between parents and children (if any children).
    (b) Development of already adopted children (if any) and their acceptance of the child to be adopted.
16. Current relationship between the couple and the members of each other's families.
17. If the wife is working, will she be able to give up the job ?
18. If she cannot leave the job, what arrangements will she make to look after the child ?
19. Is adoption considered because of sterility of one of the maritial partners ?
20. If not, can they eventually have children of their own ?
21. If a child is born to them, how will they treat the adopted child ?
22. If the couple already has children how will these children react to an adopted child ?
23. Important social and psychological experiences which have had a bearing on their desire to adopt a child.
24. Reasons for wanting to adopt an Indian child.

25. Attitude of grand-parents and relatives towards the adoption.
26. Attitude of relatives, friends, community and neighbourhood towards adoption of an Indian child.
27. Anticipated plans for the adopted child.
28. Can the child be adopted according to the adoption law in the adoptive parents country ? Have they obtained the necessary permission to adopt ? (Statement of permission required.)
29. Do the adoptive parents know any one who adopted a child from their own country or another country ? Who are they ? From where did they fail to get a child from that source ?
30. Did the couple apply for a child from any other source ? If yes, which source ?
31. What type of child is the couple interested in ? (sex, age, and for what reasons.)
32. Worker's recommendation concerning the family and the type of child which would best fit into this home.
33. Name and address of the agency conducting the home study. Name of social worker, qualification of social worker.
34. Name of agency responsible for post placement, supervision and follow up.

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LANDMARK JUDGMENTS ON

CUSTODY OF CHILD
&
VISITATION RIGHTS

SURYA VADANAN VERSUS STATE OF TAMIL NADU & ORS.

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 395 OF 2015

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

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

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

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

Madan B. Lokur, J.

1. Leave granted.

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

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

The facts

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

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

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

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

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

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

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

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

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

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

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

Proceedings in the U.K.

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

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

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

"IT IS ORDERED THAT:

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

2. The Respondent mother shall :

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

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

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

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

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

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

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

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

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

a. The Foreign and Commonwealth Office;

b. The British High Commission, New Delhi;

c. The Indian High Commission, London

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

8. Costs reserved.

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

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

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

"IT IS ORDERED THAT :

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

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

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

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

A penal notice is attached to this paragraph.

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

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

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

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

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

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

a. The Foreign and Commonwealth Office;

b. The British High Commission, New Delhi;

c. The Indian High Commission, London;

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

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

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

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

11. Costs reserved.

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

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

Proceedings in the High Court

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

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

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

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

Important decisions of this court

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

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

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

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

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

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

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

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

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

On the merits of the case, this Court observed:

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

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

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

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

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

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

9 Surinder Kaur Sandhu v. Harbax Singh Sandhu

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) Ruchi Majoo v. Sanjeev Majoo

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

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

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

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

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

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

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

23 Surinder Kaur Sandhu v. Harbax Singh Sandhu

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

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

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

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

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

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

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

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

(5) Arathi Bandi v. Bandi Jagadrakshaka Rao

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

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

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

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

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

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

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

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

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

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

Discussion of the law

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

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

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

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

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

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

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

32 Shilpa Aggarwal v. Aviral Mittal

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion on facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

73. Accordingly, we direct as follows:-

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

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

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

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

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

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

(Madan B. Lokur)
(Uday Umesh Lalit)

New Delhi; February 27, 2015

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MOHAN KUMAR RAYANA VERSUS KOMAL MOHAN RAYANA

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

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

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

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

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

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

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

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

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

JUDGMENT

Altamas Kabir, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New Delhi

Dated:06.04.2010.

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

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRL.) NO.112/2007

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

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

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

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

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

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

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

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

JUDGMENT

R.M. LODHA, J.

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

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

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

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

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

"ORDERED, the parties shall share joint legal and physical custody of the minor child; and it is further

ORDERED, that commencing during August 2007, Adithya shall reside in Allen, Texas; and it is further

ORDERED, that the parties acknowledge that it is the intention of the parties to reside within the same community. As such, it is the mother's current intention to relocate to Texas, within a forty (40) mile radius of the father's residence. If the mother does relocate to a forty (40) mile radius of the father's residence (which shall be within a twenty (20) mile radius from the child's school),, the parties shall equally share physical custody of Adithya. The parties shall alternate physical custody on a weekly basis, with the exchange being on Friday, at the end of the School day, or at the time when school would ordinarily let out in the event that there is no school on Friday;

ORDERED, that in the event that the mother does not relocate within forty (40) miles from the father's residence located in Allen, Texas (and within twenty (20) miles of Adithya's school), the mother shall have custodial time with the minor child, as follows:

A. On Alternating weekends from Friday, at the end of the school day until Monday, prior to the beginning of school, commencing during the first week of September, 2007. Such periods of custodial time shall take place within forty (40) miles from the father's residence located in Allen, Texas. In the event that there is no school on the Friday of the mother's weekend, she shall have custodial time with the child beginning at 7.00 a.m. on Friday morning, and, in the event

that there is no school on Monday of the mother's custodial weekend, she shall have custodial time until 5.00 p.m. on Monday, and

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

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

D. During the following holidays:

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

ii) Mother's Day;

iii) Hindu Festival of Diwali and Deepavali;

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

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

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

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

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

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

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

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

6. On June 28, 2007 respondent no.6 brought minor Adithya to India informing the petitioner that she would be residing with her parents in Chennai. On August 08, 2007, the petitioner filed the

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

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

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

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

"…At the moment my feeling is very strong that, even assuming in the father's favour that there is nothing in his character or habits which would render him unfitted to have the custody of the child, the welfare of the child requires, in all the circumstances as they exist, that he should remain in England for the time being In the present case the position is that nearly two years ago, when the child was already in England, an interlocutory order was made by the Divorce Court in Belgium giving the custody of the child to the father I do not know how far, if at all, the matter was considered on the footing of what was best for the child at that time, or whether it was regarded as a matter of course that the father, being the guardian by the common law of Belgium and the applicant in the divorce proceedings and the only parent in Belgium, should be given the custody. I cannot regard that order as rendering it in any way improper or contrary to the comity of nations if I now consider, when the boy has been in this country for nearly two years, what is in the best interests of the boy. I do not think it would be right for the Court, exercising its jurisdiction over a ward who is in this country, although he is a Belgian national, blindly to follow the order made in Belgium on October 5, 1937. I think the present

1 {1940} Ch. 54

case differs from Nugent v. Vetzera {FN10}, the case that was before Page Wood V.-C., and it is to be observed that even in that case, and in the special circumstances of that case, the Vice-Chancellor guarded himself against anything like abdication of the control of this Court over its wards. It does not appear what the Vice-Chancellor's view would have been if there had been evidence, for example, that it would be most detrimental to the health and well-being of the children if they were removed from England and sent to Austria ……..I ought to give due weight to any views formed by the Courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this Court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the Courts of any other country.".……

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

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

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

he observed that no case had been referred to which established the proposition that, where the facts were such as he found them to exist in the case, the salient features of which have been stated, a parent by the simple expedient of taking the child with him across the border into Ontario for the sole purpose of avoiding obedience to the judgment of the court, whose jurisdiction he himself invoked, becomes "entitled as of right to have the whole question retried in our courts and to have them reach a anew and independent judgment as to what is best for the infant". and it is, in effect, because he held that the father had no such right that the judge allowed the appeal of the mother, and that the Supreme Court made the order already referred to. But with great respect to the judge, this was not the question which had to be determined. It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give

2 {1951} A.C. 352

effect to the foreign judgment without further inquiry. But it is the negation of the proposition, from which every judgment in this case has proceeded, namely, that the infant's welfare is the paramount consideration, to say that where the trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, though in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case. It may be that, if the matter comes before the court of Ontario within a very short time of the foreign judgment and there is no new circumstance to be considered, the weight may be so great that such an order as the Supreme Court made in this case could be justified. But if so, it would be not because the court of Ontario, having assumed jurisdiction, then abdicated it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant.

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

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

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

"It has always been the practice of this court to ensure that a parent should not gain advantage by the use of fraud or force in relation to the kidnapping of children from the care of the other spouse, save perhaps where there is some quite overwhelming reason in the children's interest why the status quo should not be restored by the court before deciding further issues. In the present case I am concerned with three young children, two of whom are girls and the youngest is aged only three. It is a particularly wicked thing to snatch such children from the care of a mother, and, in saying that, I have in mind not merely the mother's position but the harm that can be done to the children. No affidavit of the husband tendering either his regrets or any vestige of excuse for his action has been proffered. Further, as I have already mentioned, when first I asked Mr. Syms what was the nature of the case which he might wish to make, if so minded, for depriving these children of a mother's care, he only spoke of her association with a certain man and never suggested that she had in any way whatsoever failed to look after the children properly."

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

3 {1957} 1. W.L.R. 261
4 {1965} Ch.217

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

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

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

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

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

Willmer L.J. went on to hold:

> *"The judge took the view (and I think it was the right view) that in a case such as the present it was not necessary to go into all the disputed questions between the parents, but that he ought to send these boys back to their own country to be dealt with by the*

5 (1966) 1 W.L.R. 381 = (1966) 1 All.E.R. 886

court of their own country, provided that he was satisfied (as he was satisfied, having seen the father himself, and having had the benefit of the view expressed on behalf of the Official Solicitor) that they would come to no harm if the father took them back to the United States; and that this was so, even though it might subsequently turn out, after all the merits of the case had been thoroughly thrashed out in the court in New York, that it would perhaps be better after all for the boys to reside in England and see little or nothing of their father."

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

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

14. In re. L (minors)[6], the Court of Appeal was concerned with the custody of the foreign children who were removed from foreign jurisdiction by one parent. That was a case where a German national domiciled and resident in Germany married an English woman. Their matrimonial home was Germany and the two children were born out of the wedlock and brought up in Germany. The lady became unhappy in her married life and in August, 1972, she brought her children to England with an intention of permanently establishing herself and the children in England. She obtained residential employment in the school in England and the children were accommodated at the school. The children not having returned to Germany, the father came to England to find them. On October 25, 1972, the mother issued an originating summons making them wards of court. The trial judge found that the children should be brought up by their mother and treating the case as a 'kidnapping' class of case, approached the matter by observing that in such a case where the children were foreign children, who had moved in a foreign home, their life should continue in what were their natural surroundings, unless it appeared to the court that it would be harmful to the children if they were returned. He concluded that in view of the arrangements which their father could make for them, the children would not be harmed by being returned. He, accordingly, ordered that they be returned to Germany and that they remain in their father's custody until further order. The mother appealed, contending that in every case the welfare of the child was the first and paramount consideration and that the welfare of the children would be best served by staying with their mother in England. Buckley, LJ in his

6 (1974) 1 All ER 913

detailed consideration of the matter, wherein he referred to the aforenoticed decisions and few other decisions as well, held as follows :

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

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

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

7 (1984) 3 SCC 698

petition against which the wife appealed before this Court. Y.V. Chandrachud, C.J. (as he then was) speaking for the Court held thus :

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

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

> *"9. In Re H. (infants) [(1966) 1 All ER 886] the Court of Appeal in England had occasion to consider a somewhat similar question. That case concerned the abduction to England of two minor boys who were American citizens. The father was a naturalborn American citizen and the mother, though of Scottish origin, had been resident for 20 years in the United States of America. They were divorced in 1953 by a decree in Mexico, which embodied provisions entrusting the custody of the two boys to the mother with liberal access to the father. By an amendment made in that order in December 1964, a provision was incorporated that the boys should reside at all times in the State of New York and should at all times be under the control and jurisdiction of the State of New York. In March 1965, the mother removed the boys to England, without having obtained the approval of the New York court, and without having consulted the father; she purchased a house in England with the intention of remaining there permanently and of cutting off all contacts with the father. She ignored an order made in June 1965, by the Supreme Court of New York State to return the boys there. On a motion*

8 (1987) 1 SCC 42

on notice given by the father in the Chancery Division of the Court in England, the trial Judge Cross, J. directed that since the children were American children and the American court was the proper court to decide the issue of custody, and as it was the duty of courts in all countries to see that a parent doing wrong by removing children out of their country did not gain any advantage by his or her wrongdoing, the court without going into the merits of the question as to where and with whom the children should live, would order that the children should go back to America. In the appeal filed against the said judgment in the Court of Appeal, Willmer, L.J. while dismissing the appeal extracted with approval the following passage from the judgment of Cross, J. [(1965) 3 All ER at p. 912. (Ed. : Source of the second quoted para could not be traced.)]:

"The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing. The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. This substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a Judge should, as I see it, pay regard to the orders of the proper foreign court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child."

10. With respect we are in complete agreement with the aforesaid enunciation of the principles of law to be applied by the courts in situations such as this."

18. In the case of Dhanwanti Joshi v. Madhav Unde[9], this Court was again concerned with the matter relating to removal of a child from one country to another contrary to custody order of the court from where the child was removed. This court considered English decisions, inter alia, McKee v. McKee[2] and H. (infants), re.[5] and also noticed the decision of this Court in Mrs. Elizabeth Dinshaw[8] and observed as follows :

"28. The leading case in this behalf is the one rendered by the Privy Council in 1951, in McKee v. McKee [(1951) AC 352]. In that case, the parties, who were American citizens, were married in USA in 1933 and lived there till December 1946. But they had separated in December 1940. On 17-12-1941, a decree of divorce was passed in USA and custody of the child was given to the father and later varied in favour of the mother. At that stage, the father took away the child to Canada. In habeas corpus proceedings by the mother, though initially the decisions of lower courts went against her, the Supreme Court of Canada gave her custody but the said Court held that the father could not have the question of custody retried in Canada once the question was adjudicated in favour of the mother in the USA earlier. On appeal to the Privy Council, Lord Simonds held that in proceedings relating to custody before the Canadian Court, the welfare and happiness of the infant was of paramount consideration and the order of a foreign court in USA as to his custody can be given due weight in the circumstances of the case, but such an order of a foreign court was only one of the facts which must be taken into consideration. It was further held that it was the duty of the Canadian Court to form an independent judgment on the merits of the matter in regard to the welfare of the child. The order of the foreign court in US would yield to the welfare of the child. "Comity of courts demanded not its enforcement, but its grave consideration". This case arising from Canada which lays down the law for Canada

9 (1998) 1 SCC 112

and U.K. has been consistently followed in latter cases. This view was reiterated by the House of Lords in J v. C (1970 AC 668). This is the law also in USA (see 24 American Jurisprudence, para 1001) and Australia. (See Khamis v. Khamis [(1978) 4 Fam LR 410 (Full Court) (Aus)].

29. However, there is an apparent contradiction between the above view and the one expressed in H. (infants), Re[(1966) 1 All ER 886] and in E. (an infant), Re [(1967) 1 All ER 881] to the effect that the court in the country to which the child is removed will send back the child to the country from which the child has been removed. This apparent conflict was explained and resolved by the Court of Appeal in 1974 in L. (minors) (wardship : jurisdiction), Re [(1974) 1 All ER 913, CA] and in R. (minors) (wardship : jurisdiction), Re [(1981) 2 FLR 416 (CA)]. It was held by the Court of Appeal in L., Re [(1974) 1 All ER 913, CA] that the view in McKee v. McKee [1951 A.C. 352 : (1951) All ER 942] is still the correct view and that the limited question which arose in the latter decisions was whether the court in the country to which the child was removed could conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of (a) a summary inquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child. In the case of (b) an elaborate inquiry, the court could go into the merits as to where the permanent welfare lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances. The crucial question as to whether the Court (in the country to which the child is removed) would exercise the summary or elaborate procedure is to be determined according to the child's welfare. The summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land and removed to another country where, maybe, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, — for these are all acts which could psychologically disturb the child. Again the summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country on the expectation that an early decision in the native country could be in the interests of the child before the child could develop roots in the country to which he had been removed. Alternatively, the said court might think of conducting an elaborate inquiry on merits and have regard to the other facts of the case and the time that has lapsed after the removal of the child and consider if it would be in the interests of the child not to have it returned to the country from which it had been removed. In that event, the unauthorised removal of the child from the native country would not come in the way of the court in the country to which the child has been removed, to ignore the removal and independently consider whether the sending back of the child to its native country would be in the paramount interests of the child. (See Rayden & Jackson, 15th Edn., 1988, pp. 1477-79; Bromley, Family law, 7th Edn., 1987.) In R. (minors) (wardship : jurisdiction), Re [(1981) 2 FLR 416 (CA)] it has been firmly held that the concept of forum conveniens has no place in wardship jurisdiction.

30. We may here state that this Court in Elizabeth Dinshaw v. Arvand M. Dinshaw [(1987) 1 SCC 42 : 1987 SCC (Crl.) 13] while dealing with a child removed by the father from USA contrary to the custody orders of the US Court directed that the child be sent back to USA to the mother not only because of the principle of comity but also because, on facts, — which were independently

considered — it was in the interests of the child to be sent back to the native State. There the removal of the child by the father and the mother's application in India were within six months. In that context, this Court referred to H. (infants), Re which case, as pointed out by us above has been explained in L. Re as a case where the Court thought it fit to exercise its summary jurisdiction in the interests of the child. Be that as it may, the general principles laid down in McKee v. McKee and J v. C and the distinction between summary and elaborate inquiries as stated in L. (infants), Re are today well settled in UK, Canada, Australia and the USA. The same principles apply in our country. Therefore nothing precludes the Indian courts from considering the question on merits, having regard to the delay from 1984 — even assuming that the earlier orders passed in India do not operate as constructive res judicata."

However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the child to United States of America on the ground that its removal from USA in 1984 was contrary to orders of U.S. Courts. It was also held that whenever a question arises before a court pertaining to the custody of a minor child, matter is to be decided not on considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest of the minor.

19. In the case of Sarita Sharma v. Sushil Sharma[10], this Court was seized with a matter where the mother had removed the children from U.S.A. despite the order of the American Court. It was held :

> *"6. Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from U.S.A. despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in U.S.A. respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have American citizenship and there is a possibility that in U.S.A they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them, one is a female child. She is aged about 5 years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the mother. Here in India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder then the daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the habeas corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires*

10 (2000) 3 SCC 14

a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of the mother returning to U.S.A. in the interest of the children. Therefore, we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A. with the children would epend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the Court in U.S.A. the circumstances under which she had left U.S.A. with the children without taking permission of the Court. There is a possibility that both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights."

20. While dealing with a case of custody of a child removed by a parent from one country to another in contravention to the orders of the court where the parties had set up their matrimonial home, the court in the country to which child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the Court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interest of the child. The indication given in McKee v. McKee[2] that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interest of the child has been explained in re. L (minors)6 and the said view has been approved by this Court in Dhanwanti Joshi[9]. Similar view taken by the Court of Appeal in re. H5 has been approved by this Court in Elizabeth Dinshaw[8].

21. Do the facts and circumstances of the present case warrant an elaborate enquiry into the question of custody of minor Adithya and should the parties be relegated to the said procedure before appropriate forum in this country in this regard? In our judgment, this is not required. Admittedly, Adithya is an American citizen, born and brought up in United States of America. He has spent his initial years there. The natural habitat of Adithya is in United States of America. As a matter of fact, keeping in view the welfare and happiness of the child and in his best interest, the parties have obtained series of consent orders concerning his custody/parenting rights, maintenance etc. from the competent courts of jurisdiction in America. Initially, on April 18, 2005, a consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court whereunder the court granted joint custody of

the child to the petitioner and respondent no. 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. In a separation agreement entered into between the parties on July 28, 2005, the consent order dated April 18, 2005 regarding custody of minor son Adithya continued. In September 8, 2005 order whereby the marriage between the petitioner and respondent no. 6 was dissolved by the New York State Supreme Court, again the child custody order dated April 18, 2005 was incorporated. Then the petitioner and respondent no. 6 agreed for modification of the custody order and, accordingly, the Family Court of the State of New York on June 18, 2007 ordered that the parties shall share joint legal and physical custody of the minor Adithya and, in this regard, a comprehensive arrangement in respect of the custody of the child has been made. The fact that all orders concerning the custody of the minor child Adithya have been passed by American courts by consent of the parties shows that the objections raised by respondent no. 6 in counter affidavit about deprivation of basic rights of the child by the petitioner in the past; failure of petitioner to give medication to the child; denial of education to the minor child; deprivation of stable environment to the minor child; and child abuse are hollow and without any substance. The objection raised by the respondent no. 6 in the counter affidavit that the American courts which passed the order/decree had no jurisdiction and being inconsistent to Indian laws cannot be executed in India also prima facie does not seem to have any merit since despite the fact that the respondent no. 6 has been staying in India for more than two years, she has not pursued any legal proceeding for the sole custody of the minor Adithya or for declaration that the orders passed by the American courts concerning the custody of minor child Adithya are null and void and without jurisdiction. Rather it transpires from the counter affidavit that initially respondent no. 6 initiated the proceedings under Guardianship and Wards Act but later on withdrew the same. The facts and circumstances noticed above leave no manner of doubt that merely because the child has been brought to India by respondent no. 6, the custody issue concerning minor child Adithya does not deserve to be gone into by the courts in India and it would be in accord with principles of comity as well as on facts to return the child back to the United States of America from where he has been removed and enable the parties to establish the case before the courts in the native State of the child, i.e. United States of America for modification of the existing custody orders. There is nothing on record which may even remotely suggest that it would be harmful for the child to be returned to his native country.

22. It is true that child Adithya has been in India for almost two years since he was removed by the mother—respondent no. 6 —contrary to the custody orders of the U.S. court passed by consent of the parties. It is also true that one of the factors to be kept in mind in exercise of summary jurisdiction in the interest of child is that application for custody/return of the child is made promptly and quickly after the child has been removed. This is so because any delay may result in child developing roots in the country to which he has been removed. From the counter affidavit that has been filed by respondent no. 6, it is apparent that in last two years child Adithya did not have education at one place. He has moved from one school to another. He was admitted in school at Dehradun by respondent no. 6 but then removed within few months. In the month of June, 2009, the child has been admitted in some school at Chennai. As a matter of fact, the minor child Adithya and respondent no. 6 could not be traced and their whereabouts could not be found for more than two years since the notice was issued by this Court. The respondent no. 6 and the child has been moving from one State to another. The parents of respondent no. 6 have filed an affidavit before this Court denying any knowledge or awareness of the whereabouts of respondent no. 6 and minor child Adithya ever since they left in September,

2007. In these circumstances, there has been no occasion for the child developing roots in this country. Moreover, the present habeas corpus petition has been filed by the petitioner promptly and without any delay, but since the respondent no. 6 has been moving from one State to another and her whereabouts were not known, the notice could not be served and child could not be produced for more than two years.

23. In a case such as the present one, we are satisfied that return of minor Adithya to United States of America, for the time being, from where he has been removed and brought here would be in the best interest of the child and also such order is justified in view of the assurances given by the petitioner that he would bear all the traveling expenses and make living arrangements for respondent no. 6 in the United Sates of America till the necessary orders are passed by the competent court; that the petitioner would comply with the custody/parenting rights as per consent order dated June 18, 2007 till such time as the competent court in United States of America takes a further decision; that the petitioner will request that the warrants against respondent no. 6 be dropped; that the petitioner will not file or pursue any criminal charges for violation by respondent no. 6 of the consent order in the United States of America and that if any application is filed by respondent no. 6 in the competent court in United States of America, the petitioner shall cooperate in expeditious hearing of such application. The petitioner has also stated that he has obtained confirmation from Martha Hunt Elementary School, Murphy, Texas, 75094, that minor son Adithya will be admitted to school forthwith.

24. The learned Senior Counsel for respondent no. 6 sought to raise an objection regarding the maintainability of habeas corpus petition under Article 32 of the Constitution before this Court but we are not persuaded to accept the same. Suffice it to say that in the peculiar facts and circumstances of the case which have already been noticed above and the order that we intend to pass, invocation of jurisdiction of this Court under Article 32 cannot be said to be inappropriate.

25. We record our appreciation for the work done by the concerned officers/officials of CBI in tracing the minor child Adithya and producing him in less than two months of the order passed by this Court, although, the Police Officers and Officials of different States failed in tracing the child Adithya and respondent no. 6 for more than two years. But for the earnest efforts on the part of the CBI authorities, it would not have been possible for this Court to hear and decide this habeas corpus petition involving the sensitive issue concerning a child of seven years who is a foreign national.

26. In the result and for the reasons stated, we pass the following order :

(i) The respondent no. 6 shall act as per the consent order dated June 18, 2007 passed by the Family Court of the State of New York till such time any further order is passed on the petition that may be moved by the parties henceforth and, accordingly, she will take the child Adithya of her own to the United States of America within fifteen days from today and report to that court.

(ii) The petitioner shall bear all the traveling expenses of the respondent no. 6 and minor child Adithya and make arrangements for the residence of respondent no. 6 in the United States of America till further orders are passed by the competent court.

(iii) The petitioner shall request the authorities that the warrants against respondent no. 6 be dropped. He shall not file or pursue any criminal charges for violation by respondent no. 6 of the consent order in the United States of America.

(iv) The respondent no. 6 shall furnish her address and contact number in India to the CBI authorities and also inform them in advance the date and flight details of her departure along with child Adithya for United States of America.

(v) In the event of respondent no. 6 not taking the child Adithya of her own to United States of America within fifteen days from today, child Adithya with his passport shall be restored to the custody of the petitioner to be taken to United States of America. The child will be a ward of the concerned court that passed the consent order dated June 18, 2007. It will be open to respondent no. 6 to move that court for a review of the custody of the child, if so advised.

(vi) The parties shall bear their own costs.

Tarun Chatterjee, J.
R. M. Lodha, J.
Dr. B.S. Chauhan, J.

New Delhi

November 17, 2009.

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SHEILA B. DAS VERSUS P.R. SUGASREE

DATE OF JUDGMENT: 17/02/2006
Bench : Hon'ble Mr. Justice B.P. Singh & Hon'ble Mr. Justice Altamas Kabir

Appeal (Civil) 6626 of 2004

Petitioner: Sheila B. Das
Vs.
Respondent: P.r. Sugasree

The appellant, who appeared in person, urged that both the Family Court and the High Court had erred in law in removing the minor child from the custody of the mother to the father's custody, having particular regard to the fact that the minor girl was still of tender age and had attained the age when a mother's care and counseling was paramount for the health and well-being of the minor girl child. The appellant submitted that the minor child would soon attain puberty when she would need the guidance and instructions of a woman to enable her to deal with both physical and emotional changes which take place during such period. Apart from the above, the appellant, who, as stated hereinbefore, is a doctor by profession, claimed to be in a better position to take care of the needs of the minor in comparison to the respondent who, it was alleged, had little time at his disposal to look after the needs of the minor child.

We, therefore, feel that the interest of the minor will be best served if she remains with the respondent but with sufficient access to the appellant to visit the minor at frequent intervals but so as not to disturb and disrupt her normal studies and other activities.

Ordered :

1. The respondent shall make arrangements for Ritwika to continue her studies in her present school and to ensure that she is able to take part in extra-curricular activities as well.

2. The respondent shall meet all the expenses of the minor towards her education, health, care, food and clothing and in the event the appellant also wishes to contribute towards the upbringing of the child, the respondent shall not create any obstruction to and/or prevent the appellant from also making such contribution.

3. The appellant will be at liberty to visit the minor child either in the respondent's house or in the premises of a mutual friend as may be agreed upon on every second Sunday of the month. To enable the appellant to meet the child, the respondent shall ensure the child's presence either in his house or in the house of the mutual friend agreed upon at 10.00 A.M. The appellant will be entitled to take the child out with her for the day, and to bring her back to the respondent's house or the premises of the mutual friend within 7.00 P.M. in the evening.

4. In the event the appellant shifts her residence to the same city where the minor child will be staying, the appellant will, in addition to the above, be entitled to meet the minor on every second Saturday of the month, and, if the child is willing, the appellant will also be entitled to keep the

child with her overnight on such Saturday and return her to the respondent's custody by the following Sunday evening at 7.00 P.M.

5. The appellant, upon prior intimation to the respondent, will also be entitled to meet the minor at her school once a week after school hours for about an hour.

6. The appellant will also be entitled to the custody of the minor for 10 consecutive days during the summer vacation on dates to be mutually settled between the parties.

7. The aforesaid arrangement will continue for the present, but the parties will be at liberty to approach the Family Court at Thrissur for fresh directions should the same become necessary on account of changed circumstances.

JUDGMENT

ALTAMAS KABIR,J.

The appellant, who is a paediatrician by profession, was married to the respondent, who is a lawyer by profession, on 29th March, 1989, at Thrissur in Kerala under the provisions of the Special Marriage Act. A girl child, Ritwika, was born of the said marriage on 20th June, 1993.

As will appear from the materials on record, the appellant, for whatever reason, left her matrimonial home at Thrissur on 26th February, 2000, alongwith the child and went to Calicut without informing the respondent.

Subsequently, on coming to learn that the appellant was staying at Calicut, the respondent moved an application in the High Court at Kerala for a writ in the nature of Habeas Corpus, which appears to have been disposed of on 24th March, 2000 upon an undertaking given by the appellant to bring the child to Thrissur.

On 24th March, 2000, the respondent, alleging that the minor child had been wrongfully removed from his custody by the appellant, filed an application before the Family Court at Thrissur under Sections 7 and 25 of the Guardians and Wards Act, 1890, and also Section 6 of the Hindu Minority and Guardianship Act, 1956, which came to be numbered as OP 193 of 2000 and OP 239 of 2000.

Before taking up the said two applications for disposal, the learned Judge of the Family Court at Thrissur took up the respondent's application for interim custody of the minor child and on 27th April, 2000 interviewed the minor child in order to elucidate her views with regard to the respondent's prayer for interim custody. No order was made at that time on the respondent's application for interim custody. On 20th March, 2001, the learned Judge of the Family Court at Thrissur took up the two applications filed by the respondent under Sections 7 and 25 of the Guardians and Wards Act and under Section 6 of the Hindu Minority and Guardianship Act for final disposal. While disposing of the matter the learned Judge had occasion to interview the minor child once again before delivering judgment and ultimately by his order of even date the learned Judge of the Family Court at Thrissur allowed the applicati16ons filed by the respondent by passing the following order:-

> *"1. The respondent is directed to give custody of the child to the petitioner the father of the child, the natural guardian immediately after closing of the schools for summer vacation.*
>
> *2. The father shall take steps to continue the study of the minor child in CSM Central School Edaserry and steps to restore all the facilities to the minor child to enjoy her extra curricular activities and studies also.*

3. The respondent mother is at liberty to visit the child either at the home of the petitioner or at school at any time.

4. If the mother respondent shifts her residence to a place within 10 kms. radius of the school where the child is studying the child can reside with the mother for not less than three days in a week. The petitioner father shall not, object to taking of the child by the mother to her own house in such condition.

5. The father the petitioner shall meet all the expenses for the education, food and cloths etc. of the minor child and the mother of her own accord contribute to the same anything for the child and the father should not prohibit the mother from giving the child anything for her comfort and pleasant living.

6. If the mother the respondent fails to stay within 10 kms. radius of the CSM central School, Edasserry however she is entitled to get custody of the child for 2 days in any of the weekend in a month and 10 days during the Summer vacation and 2 days during the Onam hoilidays excluding the Thiruvonam day.

7. This arrangement for custody is made on the basis of the prime consideration for the welfare of the minor child and in case there is any change in the situation or circumstance affecting the welfare of the minor child, both of the parties are at liberty to approach this court for fresh directions on the basis of the changed circumstance.

OP 239/2000 is partly allowed prohibiting the respondent husband by a permanent injunction from removing or taking forcefully the "B" schedule articles mentioned in the plant. The parties in both these cases are to suffer their costs."

Being dissatisfied with the order of the Family Court, the appellant herein filed an appeal in the High Court of Kerala, being M.F.A.No.365/01, wherein by an order dated 21st May, 2001, the order of the Family Court was stayed. The respondent thereupon filed an application before the High Court for review of the said order and in the pending proceedings, a direction was given by the High Court to the Family Court at Calicut to interview the minor child. The report of the Family Court was duly filed before the High Court on 5th July, 2001.

From the said report, a copy of which has been included in the paperbook, it is evident that the minor child preferred to stay with her father and ultimately by its order dated 25th July, 2001 the High Court vacated the stay granted by it on 21st May, 2001.

On the application of the appellant herein, one Dr. S.D. Singh, Psychiatrist, was also appointed by the High Court on 14th September, 2001, to interview the appellant and the respondent in order to make a psychological evaluation and to submit a report. On such report being filed, the High Court by its order dated 31st May, 2002, granted custody of the minor child to the respondent till the disposal of the appeal.

Soon thereafter, in June 2002, the respondent filed an application for divorce before the Family Court at Thrissur. While the same was pending, the appellant filed a Special Leave Petition being S.L.P.(C)\005 C.C.No.6954/2002 against the order of the High Court granting custody of the minor child to the respondent till the disposal of the appeal. The said Special Leave Petition was dismissed on 9th September, 2002. The appeal filed by the appellant before the High Court against the order of the learned Judge of the Family Court allowing the respondent's application under Sections 7 and 25 of the Guardians and Wards Act, being M.F.A. No.365/01, was also dismissed on 16th June, 2003.

Immediately, thereafter, on 28th June, 2003, the Family Court granted divorce to the parties. Being aggrieved by the dismissal of her appeal, being M.F.A.No.365/01, the appellant herein filed the instant Special Leave Petition, being SLP) No.18961/2003, which after admission was renumbered as Civil Appeal No.6626/2004. On 20th July, 2004, the appellant herein filed a petition in the pending Special Leave Petition for interim visitation rights in respect of her minor child for the months of August and September, 2004. After considering the submissions made by the appellant, who was appearing in person, and the learned counsel for the respondent, this Court passed the following order:-

> *"This petition has been filed by the mother of minor girl-Ritwika, aged about 12 years, challenging the impugned order of the High Court dated 16th June, 2003. By the impugned order the High Court confirmed the order of the Family Court holding that it is in the best interest of the child that she be in the custody of the father. The High Court, however, permitted the petitioner to visit the child at the house of the father once in a month, that is, first Sunday of every month and spend the whole day with the child there with a further stipulation that she will not be removed from the father's house. The petitioner and the respondent have not been living together since February, 2000. The divorce between them took place by order dated 26th June, 2003. On question of interim custody, in terms of the order dated 30th April, 2003, the Family Court Trichur, was directed to make an order regarding the visitation rights of the petitioner for the months of May, June and July, 2004 so that the petitioner may meet her daughter at the place of some neutral person and, if necessary, in the presence of a family counsellor or such other person deemed just, fit and proper by the Family Court. The Family Court was directed to fix any two days, in months of May, June and July of 2004, considering the convenience of the parties, when the petitioner may be in a position to spend entire day with her child. Pursuant to the above said order the Family Court had fixed two days in the months of May, June and July, 2004 so that the petitioner could meet her daughter on those days. The Family Court directed that the said meeting shall take place in the room of family counsellor in Court precincts. According to the petitioner the said arrangement was not satisfactory, so much so that ultimately she made a request to the Family Court that instead of meeting her daughter in the room of the family counsellor, the earlier arrangement of meeting her at father's house was may be restored. The Family Court, however, did not modify the order having regard to the orders passed by this Court on 30th April, 2004. It is, however, not necessary at this stage to delve any further on this aspect.*
>
> *Ritwika is studying in 7th class in a school in Trichur. Having heard petitioner-in-person and learned counsel for the respondent and on perusal of record, we are of the view that without prejudice to parties' rights and contentions in Special Leave Petition, some interim order for visitation rights of the petitioner for the months of August and September, 2004 deserves to be passed. Accordingly, we direct as under:*
>
> *(1)The petitioner can visit the house of the respondent at Trichur on every Sunday commencing from 1st August, 2004 and be with Ritwika from 10.00 a.m. to 5.00 p.m. During the stay of the petitioner at the house of the respondent, only the widowed sister of the respondent can remain present. The respondent shall not remain present in the house during the said period. It would be open to the petitioner to take Ritwika for outing, subject to the condition that Ritwika readily agrees for it. We also hope that*

when at the house of the respondent, the petitioner would be properly looked after, insofar as, normal facilities and courtesies are concerned;

(2) We are informed that the school in which Ritwika is studying shall be closed for 7 days in the month of August, 2004 during Onam festival. It would be open to the petitioner to take the child for outing during those holidays for a period of three days. After the expiry of three days, it will be the responsibility of the petitioner to leave the child at the house of the respondent.

The arrangement about meeting on every Sunday would also continue in the month of September, 2004.

List the matter on 5th October, 2004"

The question relating to the appellant's visitation rights pending decision of the Special Leave Petition came up for consideration before this Court again on 5th October, 2004, when on a reference to its earlier order dated 20th July, 2004, this Court further directed that the appellant would be at liberty to move appropriate applications in M.F.A.No.365/01, which had been decided by the High Court on 16th June, 2003, and the High Court on hearing the parties or their counsel would pass such orders as it considered appropriate in respect of the interim custody of Ritwika during the Christmas Holidays. It was also clarified that till the matter was finally decided by this Court, it would be open to the appellant to make similar applications before the High Court which would have to be considered on its own merits, since it was felt that the High Court would be in a better position to consider the local conditions and pass interim orders including conditions, if any, required to be placed on the parties.

As mentioned hereinbefore, on leave being granted, the Special Leave Petition was renumbered as Civil Appeal No.6626/04, which has been taken up by us for final hearing and disposal.

The appellant, who appeared in person, urged that both the Family Court and the High Court had erred in law in removing the minor child from the custody of the mother to the father's custody, having particular regard to the fact that the minor girl was still of tender age and had attained the age when a mother's care and counseling was paramount for the health and well-being of the minor girl child. The appellant submitted that the minor child would soon attain puberty when she would need the guidance and instructions of a woman to enable her to deal with both physical and emotional changes which take place during such period.

Apart from the above, the appellant, who, as stated hereinbefore, is a doctor by profession, claimed to be in a better position to take care of the needs of the minor in comparison to the respondent who, it was alleged, had little time at his disposal to look after the needs of the minor child.

From the evidence adduced on behalf of the parties, the appellant tried to point out that from morning till late at night, the respondent was busy in court with his own work and activities which left the minor child completely alone and uncared for. According to the appellant, the respondent who had a farm house some distance away from Thrissur, spent his week- ends and even a major part of the week days in the said farm house. The appellant urged, that as a mother, she knew what was best for the child and being a professional person herself she was in a position to provide the minor not only with all such comforts as were necessary for her proper and complete upbringing, but also with a good education and to create in her an interest in extracurricular activities such as music and dancing. The appellant strongly urged that the respondent had never had any concern for the minor child since her birth and till the time when the appellant left with her for Calicut. The appellant contended that for 7

years after the birth of the minor child, the appellant had single-handedly brought up the minor since the respondent was too preoccupied with other activities to even notice her.

According to the appellant, the minor child was extremely happy to be with her till the respondent began to claim custody of the minor and soon after obtaining such custody, he was able to influence the minor to such an extent that she even went to the extent of informing the learned Judge of the Family Court that she preferred to stay with her father.

On this aspect of the matter, the appellant urged that the minor had been exposed by the respondent to what she termed as "Parental Alienation Syndrome". She urged that such a phenomenon was noticeable in parents who had been separated and who are bent upon poisoning the mind of their minor children against the other party. According to the appellant, there could otherwise be no other explanation as to why even after being with the appellant for 7 years, the minor child had expressed a preference to be with her father after she was placed in his custody. The appellant laid stress on her submissions that not only till the age of 8 years, when custody of the minor child was given to him, but even thereafter the respondent had all along been an absentee father taking little or no interest in the affairs and upbringing of the minor child. According to the appellant, in view of the peculiar habits of the respondent, the minor child was left on her own much of the time, which was neither desirable nor healthy for a growing adolescent girl child.

Urging that she had the best interest of the minor child at heart, the appellant submitted that although under the provisions of Hindu Law by which the parties were governed, the father is accepted as the natural guardian of a minor, there were several instances where the courts had accepted the mother as the natural guardian of a minor in preference to the father even when he was available. Referring to Section 6 of the Hindu Minority and Guardianship Act, 1956, which provides that the natural guardian of a Hindu minor in the case of a boy or an unmarried girl is the father and after him the mother; provided that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother, the appellant submitted that the aforesaid provision had recognized the mother also as the natural guardian of a minor. It was urged that in various cases the Courts had considered the said provision and had opined that there could be cases where in spite of the father being available, the mother should be treated to be the natural guardian of a minor having regard to the incapacity of the father to act as the natural guardian of such minor.

In support of her aforesaid submission, the appellant referred to and relied on the decision of this Court in Hoshie Shavaksha Dolikuka vs. Thirty Hoshie Dolikuka, reported in AIR 1984 SC 410, wherein having found the father of the minor to be disinterested in the child's welfare this Court held that the father was not entitled to the custody of the child.

The appellant also referred to and relied on a Division Bench decision of the Kerala High Court in the case of Kurian C. Jose vs. Meena Jose, reported in 1992 (1) KLT 818, wherein having regard to the fact that the father was living with a concubine who was none else than the youngest sister of the mother, it was held that the father was not entitled to act as the guardian of the minor. On a consideration of the provisions of Section 17 (3) of the Guardians and Wards Act, 1890, it was also held that a minor's preference need not necessarily be decisive but is only one of the factors to be taken into consideration by the court while considering the question of custody.

Reference was also made to another decision of this Court in the case of Kumar V. Jahgirdar vs. Chethana Ramatheertha, (2004) 2 SCC 688, wherein in consideration of the interest of the minor child, the mother, who had re-married, was given custody of the female child who was on the advent

of puberty, on the ground that at such an age a female child primarily requires a mother's care and attention. The Court was of the view that the absence of female company in the house of the father was a relevant factor in deciding the grant of custody of the minor female child. The appellant urged that the courts in the aforesaid cases had considered the welfare of the minor to be of paramount importance in deciding the question of grant of custody. The appellant urged that notwithstanding the fact that the minor child had expressed before the learned Judge of the Family Court that she preferred to be with the father, keeping in mind the fact that the welfare of the minor was of paramount importance, the court should seriously consider whether the minor child should be deprived of her mother's company during her period of adolescence when she requires her mother's counselling and guidance. The appellant submitted that while the respondent had indulged Ritwika so as to win over her affection, the appellant had tried to instill in her mind a sense of discipline which had obviously caused a certain amount of resentment in Ritwika. The appellant submitted that the court should look behind the curtain to see what was best for the minor girl child at this very crucial period of her growing up In support of her aforesaid submission, the appellant referred to and relied on a decision of the Bombay High Court in the case of Saraswatibai Shripad Ved vs. Shripad Vasanji Ved, AIR 1941 Bombay 103, wherein in a similar application under the Guardians and Wards Act, it was held that since the minor's interest is the paramount consideration, the mother was preferable to the father as a guardian. The appellant emphasized the observation made in the judgment that if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years notwithstanding the fact that the father remains as the natural guardian of the minor.

A similar view was expressed by this Court in the case of Rosy Jacob vs. Jacob A. Chakramakkal, AIR 1973 SC 2090, wherein in the facts and circumstance of the case, the custody of the daughter (even though she was more than 13 years of age) and that of the youngest minor son, was considered to be more beneficial with the wife rather than with the husband. The appellant submitted that during the child's growing years, she had from out of her own professional income, provided her with amenities which a growing child needs, including admission and tuition fees for the child's schooling in a good school and for extracurricular activities. The appellant submitted that she had made fixed deposits for the benefit of the minor and had even taken out life insurance policies where the minor child had been made the nominee. The appellant submitted that apart from the above, she had also made various financial investments for the benefit of the minor so that the minor child would not be wanting in anything if she was allowed to remain with the appellant. The appellant submitted that although she had been granted visitation rights by the different interim orders, since she was residing in Calicut and the respondent was residing in Thrissur, she was unable to remain in contact with her minor daughter on account of the distance between Calicut and Thrissur. In fact, the appellant complained of the fact that on several occasions when she had gone to meet her minor child at the residence of the respondent, she had not been allowed to meet the child or to spend sufficient time with her. The appellant submitted that the interest of the minor child would be best served if her custody was given to the appellant.

The claim of custody of the minor child made by the appellant was very strongly resisted by the respondent who denied all the various allegations levelled against him regarding his alleged apathy towards the minor and her development. It was submitted on his behalf that till the age of 7 years, the child had been living with both the parents, and was well cared for and looked after during this period. The minor child was suddenly and surreptitiously removed from the respondent's custody by

the appellant who left her matrimonial home on 26th February, 2000 without informing the appellant who had gone out of Thrissur on his professional work. It was submitted that only after coming to learn that the appellant had removed the child to Calicut that the respondent was compelled to file a Habeas Corpus Petition in the Kerala High Court which ended upon an undertaking given by the appellant to bring the minor child to Thrissur. It was only thereafter that the respondent was compelled to file the application under Sections 7 and 25 of the Guardians and Wards Act and under Section 6 of the Hindu Minority and Guardianship Act,1956.

According to the respondent, even though the appellant had forcibly removed the minor to Calicut, thereby depriving the respondent of the minor child's company, the said minor during her interview by the learned Judge of the Family Court at Thrissur made her preference to be with the father known to the learned Judge.

On behalf of the respondent, it was also submitted that keeping in mind the fact that the girl child was attaining the age of puberty, the respondent had arranged with his elder sister, who was a retired headmistress of a school, to come and stay with him and to attend to the minor's needs during her growing years when she required the guidance and counselling of a woman. It was submitted that the said aspect of the matter was duly considered by the Family Court as well as by the High Court on the basis of an affidavit filed by the respondent's sister expressing her willingness to stay with the respondent to look after the minor child. In addition to the above, it was submitted on behalf of the respondent that the Court had found on evidence that he had sufficient finances to look after and provide for all the needs of the minor child. In any event, what was of paramount importance was the welfare of the minor and the court had also taken into consideration the preference expressed by the minor in terms of Section 17 (3) of the Guardians and Wards Act, 1890. On behalf of the respondent it was submitted that the respondent was quite alive to the fact that the minor child should not be deprived of her mother's company and that for the said purpose, the appellant was welcome to visit the minor child either at the respondent's house or in some neutral place and to even keep the child with her on specified days if she was ready and willing to stay with the appellant. What was sought to be emphasized on behalf of the respondent was that in the interest of the child she should be allowed to remain with him since he was better equipped to look after the minor, besides being her natural guardian and also having regard to the wishes of the minor herself.

Having regard to the complexities of the situation in which we have been called upon to balance the emotional confrontation of the parents of the minor child and the welfare of the minor, we have given anxious thought to what would be in the best interest of the minor. We have ourselves spoken to the minor girl, without either of the parents being present, in order to ascertain her preference in the matter. The child who is a little more than 12 years of age is highly intelligent, having consistently done extremely well in her studies in school, and we were convinced that despite the tussle between her parents, she would be in a position to make an intelligent choice with regard to her custody. From our discussion with the minor, we have been able to gather that though she has no animosity as such towards her mother, she would prefer to be with the father with whom she felt more comfortable. The minor child also informed us that she had established a very good relationship with her paternal aunt who was now staying in her father's house and she was able to relate to her aunt in matters which would concern a growing girl during her period of adolescence.

We have also considered the various decisions cited by the appellant which were all rendered in the special facts of each case. In the said cases the father on account of specific considerations was not considered to be suitable to act as the guardian of the minor. The said decisions were rendered by the

Courts keeping in view the fact that the paramount consideration in such cases was the interest and well-being of the minor. In this case, we see no reason to consider the respondent ineligible to look after the minor. In fact, after having obtained custody of the minor child, the respondent does not appear to have neglected the minor or to look after all her needs. The child appears to be happy in the respondent's company and has also been doing consistently well in school. The respondent appears to be financially stable and is not also disqualified in any way from being the guardian of the minor child. No allegation, other than his purported apathy towards the minor, has been levelled against the respondent by the appellant. Such an allegation is not borne out from the materials before us and is not sufficient to make the respondent ineligible to act as the guardian of the minor.

We, therefore, feel that the interest of the minor will be best served if she remains with the respondent but with sufficient access to the appellant to visit the minor at frequent intervals but so as not to disturb and disrupt her normal studies and other activities. We, accordingly dispose of this appeal by retaining the order passed by the learned Judge of the Family Court at Thrissur on 20.3.2001 while disposing of O.P.No.193/2000 filed by the respondent herein under Sections 7 and 25 of the Guardians and Wards Act, 1890 with the following modifications:-

1. The respondent shall make arrangements for Ritwika to continue her studies in her present school and to ensure that she is able to take part in extra-curricular activities as well.

2. The respondent shall meet all the expenses of the minor towards her education, health, care, food and clothing and in the event the appellant also wishes to contribute towards the upbringing of the child, the respondent shall not create any obstruction to and/or prevent the appellant from also making such contribution.

3. The appellant will be at liberty to visit the minor child either in the respondent's house or in the premises of a mutual friend as may be agreed upon on every second Sunday of the month. To enable the appellant to meet the child, the respondent shall ensure the child's presence either in his house or in the house of the mutual friend agreed upon at 10.00 A.M. The appellant will be entitled to take the child out with her for the day, and to bring her back to the respondent's house or the premises of the mutual friend within 7.00 P.M. in the evening.

4. In the event the appellant shifts her residence to the same city where the minor child will be staying, the appellant will, in addition to the above, be entitled to meet the minor on every second Saturday of the month, and, if the child is willing, the appellant will also be entitled to keep the child with her overnight on such Saturday and return her to the respondent's custody by the following Sunday evening at 7.00 P.M.

5. The appellant, upon prior intimation to the respondent, will also be entitled to meet the minor at her school once a week after school hours for about an hour.

6. The appellant will also be entitled to the custody of the minor for 10 consecutive days during the summer vacation on dates to be mutually settled between the parties.

7. The aforesaid arrangement will continue for the present, but the parties will be at liberty to approach the Family Court at Thrissur for fresh directions should the same become necessary on account of changed circumstances.

The parties will each bear their own costs.

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LANDMARK JUDGMENTS ON

CONVERSION
&
RECONVERSION

KAILASH SONKAR VS SMT. MAYA DEVI

Equivalent citations: 1984 AIR 600, 1984 SCR (2) 176

(2003) 8 SCC 204

Kailash Sonkar
Vs.
Smt. Maya Devi

Date of Judgment : 16/12/1983
Bench : Hon'ble Mr. Justice Syed Murtaza Fazalali, Hon'ble Mr. Justice R.B. Misra & Hon'ble Mr. Justice M.P. Thakkar

Hindu law-Whether a Hindu on conversion to another religion loses she original caste. Convertee loses caste unless new religion accepts caste system and permits convertee to retain his original caste and family laws.

During conversion original caste remains under eclipse-Ecliyse Disappears on reconversion to original religion. On reconversion to old religion-Whether the original caste revives-Factors which determine revival of original caste.

The main test for determining the revival of the original caste on reconversion should be a genuine intention of the reconvert to abjure his new religion and completely dissociate himself from it. It may be added here that this does not mean that the reconversion should be only a ruse or a pretext or a cover to gain mundane worldly benefits so that the reconversion becomes merely a show for achieving a particular purpose whereas the real intention may be shrouded in mystery. The reconvert must exhibit a clear and genuine intention to go back to his old fold and adopt the customs and practices of the said fold without any protest from members of his erstwhile caste.

When a person is converted to Christianity or some other religion the original caste remains under eclipse and as soon as during his/her life-time the person is reconverted to the original religion the eclipse disappears and the caste automatically revives.

JUDGMENT

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3118 of 1981.

From the Judgment and Order dated the 25th September, 1981 of the Madhya Pradesh High Court in Election Petition No 2 of 1980.

U.R. Lalit and A.K. Sanghi for the Appellant. G.B. Pai and Vineet Kumar for the Respondent. The Judgment of the Court was delivered by FAZAL ALI. J. By our Order dated October 20, 1983, we had dismissed the appeal. We now proceed to give our reasons for the same.

The victory of our long drawn struggle for freedom from the British Yoke came to us after one and a half century of perpetual and constant efforts soaked in cold blood and dipped in supreme sacrifice. The historical midnight of August 15, 1947, which ushered in a new era, was merely a completion of a phase and not the end of an epoch but only the beginning of the end.

Soon thereafter the wise wizards and the founding fathers of our Constitution set out to devote their wholehearted attention to devise ways, and means to give to our sub-continent a solid and comprehensive Constitution which may solve multifarious and manifold difficulties, fulfil the burning needs of the nation and sort out complex and complicated problems which arose after our hardwon freedom which must have baffled our leaders. There was the question of achieving a secular democracy, the largest in the world, based on a socialist pattern which would taken care of all sorts and kinds of people having different cultures, languages and religions; to confer and guarantee fundamental rights of citizens through mandatory provisions, to lay down directive principles of State Policy which were to be the guiding spirit of the Constitution, the question of achieving agrarian reforms by displacing the old British bureaucratic system and substituting a new order, the issue of reconciling the irreconcilable and various other thorny and tricky matters. One of the important objectives to be translated into action was to take special care of the backward classes, members of the scheduled castes and tribes by bringing them to the fore through pragmatic reforms and providing adequate opportunities for their amelioration and development, education, employment and the like.

As Mahatma Gandhi, father of the nation, said "India lives in villages" and so do the backward classes, hence the primary task was to take constructive steps in order to boost up these classes by giving them adequate concessions, opportunities, facilities and representation in the services and, last but not the least, in the electorate so that their voices and views, grievances and needs in the Parliament and State legislatures in the country may be heard, felt and fulfilled.

In this election appeal which has been filed against the Judgment dated October 25, 1981 of the High Court of Madhya Pradesh, we are really concerned with the last aspect mentioned above. Despite odds and ends our Constitution has made exhaustive provisions for difficult to say, for this is really a herculean task and one cannot expect miracles to be performed within a span of three decades which in the history of nations, is not a very long period. The knotty and difficult, puzzling and intricate issue with which we are faced is, to put it shortly, 'what happens if a member of a scheduled caste or tribe leaves his present fold (Hinduism) and embraces Christianity or Islam or any other religion'-does this amount to a complete loss of the original caste to which he belonged for ever and, if so, it he or his children choose to abjure the new religion and get reconverted to the old religion after performing the necessary rites and ceremonies, could the original caste revive ? The serious question posed here arose and has formed the subject-matter of a large catena of decisions starting from the year 1861, traversing a period of about a century and a half, and culminating in a decision of this Court in the case ofG.M. Arumugam v. S. Rajagopal & Ors.(1) The Constitution has tried to solve the problem to a great extent by the Constitution (Scheduled Castes) Order 1950 (hereinafter referred to as the '1950 Order') issued under Art. 341, which lays down a list of various castes prevailing in the country and the norms to determine the same. This Order has been amended from time to time. In our opinion, despite a genuine attempt to solve the problem the provisions do not provide a complete answer to the judicial interpretation by this Court which lays down the law of the land. It is true that the controversy has been narrowed down to the minimum by the decision in Arumuga's case (supra) still there are some vital question which remain unanswered.

Before dealing with the cases on the subject and starting the chapter of the issues involved in this case, it may be germane to give a short history of the nature, character, origin and background of the controversy. To begin with, the caste system actually came into existence since the dawn of the civilized races in this country, viz., Dravidian followed by Aryan civilization which through Hinduism divided by castes into three clear-cut sub- divisions which started by virtue of the occupational

pursuits followed by the various classes. The priests and the scholars were known as the Bhrahmanas and looked after religious ceremonies, education, etc. This Class was supposed to be the highest Class or atleast respected and regarded as such. Then came the Kshatriyas who were the people engaged in fighting wars and ruling and administering the States. Thirdly, there were the Vaisayas who carried on the occupation of trade and commerce. The Sudras were added as the fourth Class after fusion of the pre-Dravidian with the Dravidian and Aryan civilizations which formed the basic fabric of Hinduism and the Hindu society. This Class was treated as a little inferior and suffered from certain disabilities.

In fact, it seems to us that our large sub-continent was inhabited by a very large variety of peoples and races- indigenous and outsiders-consisting of Scythians, Yavanas, Kirathas, Kambhojas and Persians and others who came to India in ancient times and got mixed up with the old inhabitants of the country and thus completely lost their identity. It appears to us that all these races entered the wide and broad fold of Hinduism, which is not only a religion but also a way or poetry of life, a philosophy, an exhaustive and ethical code of living which adapts-itself to all forms and cultures. In view of this complex intermingling of various kinds of people, as time went by, castes started multiplying, and in this process the avocations and occupations followed by members of such castes from generation to generation were labelled as a separate class to which the people practising various professions belonged and this institution had come to stay. The origin, therefore of the fundamental basis of the castes has now disappeared and given rise to individualism and separa-

tism as a result of which it was duly recognised by all schools of Hindu thought that birth alone would determine the caste and this principle would have to continue unless the concept of caste is banished for ever. In other words, it is now well settled-whether one accepts it or not-that caste is the result of birth and not of choice or volition. Without traversing on any controversial issue and coming back to the origin of the caste system, we would like to refer to the most authoritative pronouncements ordained by Lord Krishna in Shree Bhagvadgita which would demonstrate that the division of castes was made purely on the basis of inherent qualities and avocations of a person and hence the question of superiority between one or the other lay not on the nature of the caste but on their actions and deeds. This would be illustrated by a reference to the actual text of Shri Bhagvadgita as compiled by F. Max Muller in his book entitled 'Sacred Books of the East (Vol. VIII)' and we would like to extract some passages and injunctions of Lord Krishna illustrating the vices and virtues of men where castes also figure. In Shloka 13, Chapter 4 of Bhagvada Geeta, Lord Krishna clearly proclaimed that "Four Varnas, viz., Brahmanas, Kshtriyas, Vaisyas and Sudras were created by him on the basis of inherent qualities and avocations of a particular individual". (Translated into English from the original text in Hindi).

Further said Lord Krishna to the son of Kunti thus:

"Whatever you do, O'Son of Kunti: Whatever you eat, whatever sacrifices you make, whatever you give, whatever-penance you, do that as offered to me...I am alike to all beings; to me none is hateful, none dear. But those who worship me with devotion (dwell) in me, and I too in them. Even if a very ill-conducted man worships me, not worshiping any one else, he must certainly be deemed to be good, for he has well resolved.. (You may) affirm, O son of Kunti: that my devotee is never ruined. For, O son of Pritha: even those who are of sinful birth, women, Vaisyas; and Sudras likewise, resorting to me, attain the supreme goal. What then (need be said of) holy Brahmanas and royal saints who are (my) devotees ?"

These passages clearly go to confirm the true philosophy of Mahatma Gandhi that the Sudras or the members of the scheduled castes are Harijans and he condemned untouchability and the habit of looking down upon the scheduled caste people merely because they belonged to the Sudra caste. Further, Lord Krishna goes on to ordain as follows:

"The duties of Brahmanas, Kshatriyas and Vaisyas, and of Sudras, too, O terror of your foes ! are distingushed according to the qualities born of nature. Tranquility, restraint of the senses, penance, purity, forgiveness, straight forwardness, also knowledge, experience, and belief (in a future world), this is the natural duty of Brahmanas. Valour, glory, courage, dexterity, not a slinking away from battle gifts, exercise of lordly power, this is the natural duty of Kshatriyas. Agriculture, tending cattle, trade, (this) is the natural duty of Vaisyas. And the natural duty of Sudras, too, consists in service. (Every) man intent on his own respective duties obtains perfection....Worshipping, by (the performance of) his own duty, him from whom all things proceed, and by whom all this is permeated, a man obtains perfection." In another chapter, Vidura is quoted as saying thus: "I am born of a Sudra womb, and do not like to say more than what (I have said'). But the intelligence of that youth, I believe to be eternal. He who has come of a Brahamana womb, even though he may proclaim a great mystery, does not thereby become liable to the censure of the gods. Therefore do I say this to you."

In view of the revealed injunctions in the Shree Bhagavadgita Mahatma Gandhi's dream that all distinctions of castes and creed must disappear and man must be known by his action, to whatever caste he may belong, has been realised to some extent and necessary provisions to this effect have been made in the Constitution in order to safeguard the interests of the backward classes and members of the members of the scheduled castes and scheduled tribes and perhaps, let us hope, a day comes when the distinction between caste and creed disappears completely.

One of the most puzzling question that arises in this case is:

'Is membership in a caste or tribe to be determined solely by birth or by allegiance or by the opinion of its members or of the neighbourhood? Does one lose his caste on conversion or by ex-communication ?

The decisions to which we would we would refer hereafter have thrown flood of light on these questions and the generally accepted view seems to be the one which has been laid down in Charlotte Abraham and Daniel Vincent Abraham v. Francis Abraham(1) where the Privy Council observed thus:

"It is plain that no rule as to such use and enjoyment, which the ancestors may voluntarily have imposed on themselves, could be of compulsory obligation on a descendant of theirs; acquiring his own wealth. If a Hindoo in an undivided family may keep his own sole acquisitions separate, as he undoubtedly may, a fortiori a Christian may do the same ....If the spirit of an adopted religion improves those who become converts to it, and they reject, from conscience, customs to which their first converted ancestors adhered, must the abandoned usages be treated by assort of fictio Juris as still the enduring customs of the family."

So far as this Court is concerned, these questions were clearly answered in Chaturbhuj Vithaldas Jasani v. Moreshwar Parashram & Ors.,(2) (hereinafter referred to as 'Jasani's, case' where a triple test was laid down thus:

"Looked at from the secular point of view, there are three factors which have to be considered: (1) the reactions of the old body, (2) the intentions of the individual himself and (3) the rules of the new order. If the old order is tolerant of the new faith and sees no reason to outcaste or ex-communicate

the convert and the individual himself desires and intends to retain his old social and political ties, the conversion is only nominal for all practical purposes and when we have to consider the legal and political rights of the old body the views of the new faith hardly matter...On the other hand, if the convert has shown by his conduct and dealings that his break from the old order is so complete and final that he no longer regards himself as a member of the old body and there is reconversion and readmittance to the old fold, it would be wrong to hold that he can nevertheless claim temporal privileges and political advanta-

ges which are special to the old order.... The only modification here is that it is not only his choice which must be taken into account but also the views of the body whose religious tenets he has renounced, because here the right we are considering is the right of the old body, the right conferred on it as a special privilege to send a member of its own fold to Parliament."

The observations cited above give the general test that can be applied in judging the question as to when a Hindu on conversion loses his caste. Although the test laid down by this case is fully supported by the original text of Hindu Law, it does not in so many words answer the other side of the picture, viz., if a Hindu after conversion to another religion is reconverted to his original fold, could his caste revive ? In fact, the case cited above was not a case of conversion from one religion to another religion or from one sect to another sect. By and large, the test laid down in that case can be usefully applied with alterations and modifications to suit the facts of a particular case in judging the question whether on conversion the caste is completely lost.

The next case which throws some light on the question is S. Rajagopal v. C.M. Armugam Ors.(1) In this case what had happened was that the appellant (before the Supreme Court) had filed his nomination papers for a constituency reserved for members of the scheduled caste mentioned under the 1950 Order but he was defeated by respondent No. 1 of that case, whose petition succeeded. The contention in the petition was that the appellant was not a Hindu but a Christian and therefore not qualified to be a candidate for a constituency reserved for scheduled caste. The High Court found as a fact that the appellant had become a Christian in 1949 and his later reconversion to Hinduism remained unproved. This Courts agreeing with the High Court dismissed the appeal. One important feature of this case may be noted which would at once distinguish this case from the facts of the present case. The question as to whether a Christian on being reconverted to Hinduism would get back his caste did not arise at all in that case because on the facts found, reconversion was not proved. Therefore, the question of caste being acquired or being revived on reconversion to Hinduism did not fall for determination and was left open. Even so, considering Jasani's case and a number of other texts, Bhargava, J. made the following observations:

"Considering the question of entry into the caste, Krishnaswami Ayyangar, J., held that, in matters affecting the well-being or composition of a caste, the caste itself is the supreme judge. It was on this principle that a reconvert to Hinduism could become a member of the caste, if the caste itself as the supreme judge accepted him as a full member of it."

While holding that if a person is reconverted to Hinduism and the community of the caste to which he originally belonged accepts him, his caste would revive; nevertheless the question was left open. Rajagopal's case (supra) merely reiterates what was held in Jasani's case and does not go any further.

In our opinion, there is one aspect which does not appear to have been dealt with by any of the cases discussed by us. Suppose, A, a member of the scheduled caste, is converted to Christianity and marries a Christian girl and a daughter is born to him who, according to the tenets of Christian religion, is

baptised and educated. After she has attained the age of discretion she decides of her own volition to re-embrace Hinduism, should in such a case revival of the caste depend on the views of the members of the community of the caste concerned or would it automatically revive on her reconversion if the same is genuine and followed by the necessary rites and ceremonies ? In other words, is it not open for B (the daughter) to say that because she was born of Christian parents their religion cannot be thrust on her when after attaining the age of discretion and gaining some knowledge of the world affairs, she decides to revert to her old religion. It was not her fault that she was born of Christian parents and baptised at a time when she was still a minor and knew nothing about the religion. Therefore, should the revival of the caste depend on the whim or will of the members of the community of her original caste or she would lose her caste for ever merely because fortunately or unfortunately she was born in a Christian family ? With due respect, our confirmed opinion is that although the views of the members of the community would be an important factor, their views should not be allowed to a complete loss of the caste to which B belonged. Indeed, if too much stress is laid on the views of the members of the community the same may lead to dangerous exploitation. Perhaps, this factor was present in the mind of Bhagwati, J., who delivered the leading judgment in a later decision of this Court in G.M. Arumugam v. S. Rajagopal & Ors.(1) where, speaking for the Court, he made the following observations:

"It is sufficient to state that originally there were only four main castes, but gradually castes and sub-castes multiplied as the social fabric expanded with the absorption of different groups of people belonging to various cults and professing different religious faiths. The caste system in its early stages was quite elastic but in course of time it gradually hardened into a rigid framework based upon heredity.....But that immediately raises the question; what is a caste. When we speak of a caste, we do not mean to refer in this context to the four primary castes, but to the multiplicity of castes and sub-castes which disfigure the Indian social scene.....A caste is more a social combination than a religious group.

But from that it does not necessarily follow as an invariable rule that whenever a person renounces Hinduism and embraces another religious faith, he automatically ceases to be a member of the caste in which he was born and to which he belonged prior to his conversion.. . If the structure of the caste is such that its member must necessarily belong to Hindu religion, out of the caste, because no non- Hindu can be in the caste according to its rules and regulations. Where, on the other hand, having regard to its structure, as it has evolved over the years, a caste may consist not only of persons professing Hindu- religion but also persons professing some other religion as well, conversion from Hinduism to that other religion may not involve loss of caste, because even persons professing such other religion can be members of the caste..... This is indeed not an infrequent phenomenon in South India where, in some of the castes, even after conversion to Christianity, a person is regarded as continuing to belong to the caste.

There are castes, particularly in South India, where this consequence does not follow on conversion, since such castes comprise both Hindus and Christians.

These weighty observations support the view that after reconversion the caste will normally revive. On the question whether the caste will revive if the members of the community accepts the reconvert, the Judges are silent. Although Bhagwati, J. held that prima facie on conversion to Christianity the respondent would not cease to belong to the Adi Dravida caste, yet he refrained from expressing any final opinion on the point.

In a recent decent decision of this Court S. Ambalagan v. B. Devarajan & Ors.(1) (which was also an election case), a three-Judge Bench reiterated the principles enunciated by Arumugan's case (supra) and observed thus:

"Unless the practice of the caste makes it necessary no expiatory rites need be performed and, ordinarily, he regains his caste unless the community does not accept him.....The practice of caste however irrational it may appear to our reason and however repugnant it may appear to our moral and social sense, is so deep-rooted in the Indian people that its mark does not seem to disappear on conversion to a different religion. If it disappears, it disappears only to reappear on reconversion..... In fact, this process goes on continuously in India and generation by generation lost sheep appear to return to the castefold and are once again assimilated in that fold. This appears to be particularly so in the case of members of the Scheduled Castes, who embrace other religions in their quest for liberation, but return to their old religion on finding that their disabilities have clung to them with great tenacity.

(Emphasis ours) The facts of this case appears to be on all fours with the facts of the present case.

A number of High Courts have also taken a view similar to the one taken in Arumugam's case of 1976 (supra) basing mainly their decisions on the leading case of Jasani. In the case of Goona Durgaprasada Rao & Anr. v. Goona Sudarsanaswami & Ors.,(2) a Division Bench of the Madras High Court observed thus:

"It is hardly right for the Court to erect a barrier which the autonomy of the caste does not see fit to do, simply because in some other caste or some other community it might be considered proper that an expiatory ceremony should be performed. That a Hindu having renounced Hinduism once can revert to it scarcely admits of doubt.

A Similar view was expressed in G. Michael v. S.

Venkateswaran(1) which may be extracted thus:

"A member of one of the castes or sub-castes when he is converted to Islam ceases to be a member of any caste. He becomes just a Mussalman find his place in Muslim society is not determined by the caste to which he belonged before his conversion. Learned counsel also conceded that generally this is so even when there has been a conversion to Christianity. But he said that there were several cases in which a member of one of the lower castes who has been converted to Christianity has continued not only to consider himself as still being a member of the caste, but has also been considered so by other members of the caste who had not been converted.....But these are all cases of exception and the general rule is conversion operates as an expulsion from the caste; in other words a convert ceases to have any caste.

Thus, it was clearly hinted that in some cases even converts to Christianity could retain their original caste. In the case of Dippala Suri Dora v. V.V. Giri(2) a Division Bench of the Andhra Pradesh High Court made the following observations:

"Even if they come within the fold of Hinduism, question would arise whether they have formed separate sect among themselves, or they would belong to the 4th class, or to the twice-born class..... In order to prove that he ceased to be a member of that tribe, there should be first of all, evidence of intention, the reactions of the old body and that of the new body. Viewed in the light of these observations, the evidence discussed above, in our opinion, falls short of the test.

This case merely lays down the triple test enunciated in Jasani's case. To the same effect are the decisions in the cases of Wilson Reade v. C.S. Booth & Ors.,(1) and B Shyamsunder v. Shankar Deo Vedalankar & Ors.(2) On a careful consideration of the authorities referred to above and the principles enunciated by them, the position that emerges may be stated thus:

It is true that caste to which a Hindu belongs is essentially determined by birth and if a Hindu is converted to Christianity or any other religion which does not recognise caste, the conversion amounts to a loss of the said caste.

The question that arises for consideration is whether the loss of the caste is absolute, irrevocable so as not to revive under any circumstances ? In considering this question the courts have gone into the history of the caste system and have formulated the following guiding principles to determine this question:-

(a) Where a person belonging to a scheduled caste is converted to Christianity or Islam, the same involves loss of the caste unless the religion to which he is converted is liberal enough to permit the convertee to retain his caste or the family laws by which he was originally governed. There are a number of cases where members belonging to a particular caste having been converted to Christianity or even to Islam retain their caste or family laws and despite the new Order they were permitted to be governed by their old laws. But this can happen only if the new religion is liberal and tolerant enough to permit such a course of action. Where the new religion however does not at all accept or believe in the caste system, the loss of the caste would be final and complete. In a large area of South and some of the North-Eastern States it is not unusual to find persons converted to Christianity retaining their original caste without violating the tenets of the new Order which is done as a matter of common practice existing from times immemorial. In such a category of cases, it is obvious that even if a person abjures his old religion and is converted to a new one, there is no loss of caste. Moreover, it is a common feature of many converts to a new religion to believe or have faith in the Saints belonging to other religions. For instance a number of Hindus have faith in the Muslim Saints, Dargahs, Imam-

badas which becomes a part of their lives and some Hindus even adopt muslim names after the Saints but this does not mean that they have discarded the old Order and got themselves converted to Islam

(b) In all other cases, conversion to Christianity or Islam or any other religion which does not accept the caste system and insists on relinquishing the caste, there is a loss of caste on conversion.

The other important question which is to be answered and which is really the controversy in the present case is if after a person is converted to a new religion - in the instant case, Christianity - does his caste revive if he is reconverted to his old religion and, if so, under what circumstances ? As indicated above, starting from the Privy Council to the present-day, authorities of the High Courts and this Court have laid down certain norms and conditions under which a caste could revive. These conditions are as follows:-

(1) where the convertee exhibits by his actions and behaviour his clear intention of abjuring the new religion on his own volition without any persuasion and is not motivated by any benefit or gain, (2) where the community of the old order to which the convertee originally belonged is gracious enough to admit him to the original caste either expressly or by necessary intendment, and (3) Rules of the new Order in permitting the convertee to join the new caste.

Unless the aforesaid conditions are fulfilled to the loss of caste on conversion is complete and cannot be revived. In our opinion having regard to the present set-up and the circumstances prevailing in

our modern society, it will be difficult to insist on the second condition, viz., the insistence on the members of the community of the caste to admit the convertee on reconversion to the original faith because such a course of action may lead to dangerous consequences and ill-conceived exploitation. The curse and cancer of untouchability despite thirty years of social reforms still persist and no quarter should be given to further persecution of the members of the scheduled castes who, as we often find, are subjected to all kinds of indignities insults and are looked down upon as slaves or vassals, meant merely to serve the members of the higher caste. In the case of Ganpat v. Returning Officer & Ors (1) this Court speaking through Alagiriswami, J. highlighted this particular aspect in the following words:

"The monstrous curse of untouchability has got to be eradicated. It has got to be eradicated not merely by making constitutional provisions or laws but also by eradicating it from the minds and hearts of men. For that it is even more important that members of communities who are untouchable should assert their self-respect and fight for their dignity than that members of the other communities should forget about it.

In our opinion, the main test should be a genuine intention of the reconvert to abjure his new religion and completely dissociate himself from it. We must hasten to add here that this does not mean that the reconversion should be only a ruse or a pretext or a cover to gain mundane worldly benefits so that the reconversion becomes merely a show for achieving a particular purpose whereas the real intention may be shrouded in mystery. The reconvert must exhibit a clear and genuine intention to go back to his old fold and adopt the customs and practices of the said fold without any protest from members of his erstwhile caste. In order to judge this factor, it is not necessary that there should be a direct or conclusive proof of the expression of the views of the community of the erstwhile caste and it would be sufficient compliance of this condition if no exception or protest is lodged by the community members, in which case the caste would revive on the reconversion of the person to his old religion.

Another aspect which one must not forget is that when a child is born neither has he any religion nor is he capable of choosing one until he reaches the age of discretion and acquires proper understanding of the situation. Hence, the mere fact that the parents of a child, who were Christians, would in ordinary course get the usual baptism certificate and perform other ceremonies without the child knowing that is being done but after the child has grown up and becomes fully mature and able to decide his future he ought not to be bound by what his parents may have done. Therefore, in such cases, it is the intention of the convertee which would determine the revival of the caste. If by his clear and conclusive conduct the person reconverts to his old faith and abjures the new religion in unequivocal terms, his caste automatically revives.

Another dominant factor to determine the revival of the caste of a convert from Christianity to his old religion would be that in cases of election to the State Assemblies or the Parliament where under the Presidential Order a particular constituency is reserved for a member of the scheduled caste or tribe and the electorate gives a majority verdict in his favour, then this would be doubtless proof positive of the fact that his community has accepted him back to his old fold and this would result in a revival of the original caste to which the said candidate belonged.

In our opinion, when a person is converted to Christianity or some other religion the original caste remains under eclipse and as soon as during his/her life- time the person is reconverted to the original religion the eclipse disappears and the caste automatically revives. Whether or not the revial of the caste depends on the will and discretion of the members of the community of the caste is a question on which we refrain from giving any opinion because in the instant case, there is overwhelming evidence

to show that the respondent was accepted by the community of her original katia caste. Even so, if the fact of the acceptance by the members of the community is made a condition precedent to the revival of the caste, it would lead to grave consequences and unnecessary exploitation, sometimes motivated by political considerations. Of course, if apart from the oral views of the community there is any recognised documentary proof of a custom or code of conduct or rule of law binding on a particular caste, it may be necessary to insist on the consent of the members of the community, otherwise in normal circumstances the caste would revive by applying the principles of doctrine of eclipse. We might pause here to add a rider to what we have said, i.e., where it appears that the person reconverted to the old religion had been converted to Christianity since several generations, it may be difficult to apply the doctrine of eclipse to the revival of caste. However, that question does not arise here.

Coming now to the facts and evidence of the present case the position may be briefly stated as follows:

The appellant, an M.A., LL.B. from Jabalpur University had contested election from the Madhya Pradesh Vidhan Sabha (hereinafter referred to as 'Vidhan Sabha) from Legislative Assembly constituency No. 195 in the general election of 1977 as a Janata Party Candidate which was reserved for Scheduled Caste under Art. 332 of the Constitution being item No. 30 of Part IX-Madhya Pradesh of the 1950 Order. He was declared elected defeating his nearest rival candidate, one Ramprasad Choudhary, a Congress candidate. The Vidhan Sabha was, however, dissolved in February 1980 after which general elections for all the constituencies were to be held afresh, as notified in the Gazette, in the month of May 1980. The last date for filing nomination papers was 2.5.1980, the date of scrutiny was 3.5.80 and the polling took place on 31.5.80. The results were declared on 2.6.80. In this election, the appellant submitted his nomination papers as an Independent candidate from constituency No. 195 (Jabalpur East) and was opposed by Smt. Maya Devi Shalwar (hereinafter referred to as 'Maya Devi') who filed her nomination papers as a Congress (I) candidate. She described herself as belonging to the scheduled caste 'Katia' which is mentioned at serial No. 29 of Part IX-Madhya Pradesh of the 1950 Order. In view of the short and narrow compass of this appeal we are not concerned with other candidates.

It may be mentioned that originally the caste 'Katia' was not included in the list of scheduled castes till the year 1977 but by the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976 (Act No. 108 of 1976) the schedule was amended and replaced by a new Schedule in which Katia caste was included as a scheduled caste and shown at serial No.29.

It appears that at the time of the scrutiny of the nomination papers of Maya Devi, several persons raised objection that she, being a Christian by birth, could not be treated as a member of the scheduled caste and therefore her declaration as a scheduled caste candidate was false which merited dismissal of her nomination papers. The case of Maya Devi was that she was a member of the scheduled caste by birth and her husband, Jai Prakash Shalwar, also belonged to the Katia caste. She denied that she was a Christian by birth and averred that her father's name was not John Wesley as alleged by the appellant. Her plea found favour with the Returning Officer who accepted her nomination papers. After the poll, Maya Devi received majority of votes, having secured 16,770 votes, and was declared elected, and the appellant lost the election.

It was further alleged by the appellant that Maya Devi after being born a Christian was baptised according to Christian rites and her mother's name was Elizabeth. The appellant also averred that Maya Devi's marriage with Jai Prakash Shalwar was not a recognised form of marriage and, therefore, not valid. A number of other pleas were also taken by the appellant in his petition but Mr. U.R. Lalit, appearing on his behalf, confined his arguments to two important questions:

(1) whether Maya Devi having been born of Christian parents lost the katia caste to which she or her ancestors originally belonged ? and (2) that after being baptised she continued to be a Christian and was shown as such in various documents.

In this view of the matter it was contended that even if she married Jai Prakash Shalwar who belonged to Katia caste, her caste could not revive because caste is determined not by marriage but by birth.

In proof of his pleas, the appellant adduced both oral and documentary evidence. The allegations made by him were denied by the respondent who categorically stated that she was never a Christian nor was she born a Christian. She also averred that even her father or mother were not Christians. On the other hand, she always remained a member of the Katia caste and was accepted as such by the members of that community because her marriage with Jai Prakash Shalwar was performed according to Hindu rites of Aryasamaj seet and was attended by a number of members of her caste and due publicity was given to the marriage.

Both the parties have adduced evidence in support of their cases. One important fact which may be noted here is that the father of the respondent John Wesley who according to Maya Devi was. John Wesley singh, in spite of being cited as a witness did not enter the witness box to throw light on the origin of the religion of the respondent and a huge capital has been made of the non-appearance possible circumstance to discredit the case of the respondent.

It is true that the father of the respondent was not examined as a witness but having regard to the nature of the documents produced by the parties the mere fact that John Wesley was not examined as a witness is not sufficient to throw the case of the respondent aboard. It is also true that the respondent was ill-advised to deny the entire case of the appellant by making an averment that she was not born of Christian parents at all. We would, therefore, take it as established that the respondent was undoubtedly born of Christian parents. That by itself does not advance the case of the appellant any further because if it is proved that she was voluntarily reconverted to Hinduism then according to the law referred to us and applied to the facts of the present case on reconversion her original caste would automatically revive. We would give a brief summary of the nature of the evidence produced by the parties on this limited question.

To begin with the appellant has relied on the birth certificate (Ex. P-21) which shows that a female child was born to John Wesley's wife on 4.6.1947. It is also clearly mentioned therein that John Wesley was a Christian. This was followed by a baptism certificate which shows that she was baptised according to the religious ceremonies of the Christians. The appellant also produced a Church membership certificate to show that Maya Isabella John Wesley (respondent) was baptised and admitted as a member of the City Methodist Church in Southern Asia at Jabalpur, Madhya Pradesh. The school transfer certificate dated 6.6.1956 shows that Maya Isabella John Wesley was a Christian and remained a student of Peeli Kothi Girls Primary School, Jabalpur from 1.7.1952 to 30.4.1956, and her date of birth in this certificate has been shown as 4.6.1947 which fully tallies with her birth certificate. In view of the overwhelming evidence referred to above, it is not necessary for us to consider the oral and documentary evidence which conclusively proves-(1) that the parents of the respondent were Christians and (2) that after her birth she got baptised and remained a Christian, and therefore it cannot be denied that the respondent was born a Christian and in this view of the matter the moment she entered the fold of Christianity, her original caste was completely lost. The respondent in her anxiety to succeed has overstated her case by wrongly alleging that she was never born of Christian parents or that her parents were not

Christians, a fact which is completely falsified by the oral and documentary evidence produced by the appellant.

Accepting, therefore, the evidence led by the appellant, the vital question for determination in this case remains as to whether or not the respondent was voluntarily reconverted to Hinduism and thereupon her caste revived. There is clear and unimpeachable evidence to show that the respondent had reconverted herself to Hinduism voluntarily and with full publicity, making no secret of this fact. A letter appearing at page 22 of the Paperbook shows that she accepted Hindu religion with all its customs and rites voluntarily. The relevant part of the letter reads thus:

I am prepared to own Hindu religion with all sincerity and to follow all its customs and rites. Today, on 6.11.76 I am fully major. Hence the above decision is of my own wherein no external interference exists."

Immediately thereafter she was married to one Jai Prakash Shalwar and the marriage certificate dated 14.11.76 fully corroborates this fact (page 24 of the Paperbook). The Marriage certificate states that the marriage of Maya Devi with Jai Prakash was performed on 6.11.76 in Arya Samaj Gorakhpur according to vedic rites. Another certificate issued by the Secretary of the Arya Samaj, Gorakhpur is also to the same effect. The aforesaid documents are amply corroborated by the oral evidence led by the respondent.

The evidence of Darshanlal Dharmak deserves special mention because this witness was a prominent member and President of the Katia community for the last two-and-a half years. The witness goes on to state that the marriage was celebrated in the presence of 80 persons of his community, including elderly people and his presence at the marriage clearly indicates that the community had fully accepted the respondent back to her caste. The marriage was followed by a reception 3-4 days later which was attended by this witness also and at that time nobody raised any objection about Maya as not belonging to the Katia community. The witness further states that he had gone to the house of the respondent and that members of the community had come to celebrate the birthday of her child.

It would appear from the evidence of Bhaiyalal Nag, another witness produced by the respondent, that there was a Katia Samaj Sanstha in Madhya Pradesh which was registered under theSocieties Registration Act and the witness was the Vice-President of this organisation. He states that Jai Prakash was known to him and belonged to his caste and that he was married to Maya Devi. He further states that no objection was raised in the Organisation about this marriage. He further stated that Maya Devi had been attending number of marriages in his caste. He makes a very stark statement which is fully supported by the Abhinandan Patra and his statement may be extracted thus:

"We mentioned her in this Abhinandan Patra as belonging to Katia caste as we were proud as she was the first M.L.A. in our caste.

Ex. D-1A is the Abhinandan Patra given to Maya Devi some time in the year 1977-78, i.e. 3 years before the elections. Furthermore, there is the evidence of Keshav Prasad Pathak which is rather important. His evidence shows that a joint application was made by the respondent and her husband regarding their consent to the marriage. He further stated that before the parties are married, if either of them is not a Hindu then he is first converted to Hinduism (Shudhikaran) by religious rites performed in accordance with the Arya Samaj rites. He proves the applications given by the respondent and her husband (Ex. P-8 and 9). He has further stated that the marriage ceremony is usually performed before the members of the Executive Committee of the Arya Samaj. He further defines the term 'Shudhikaran

to mean "Convert non-Hindu to Hinduism. He goes on to say that the marriage was celebrated at the Arya Samaj according to vedic ceremony which included Sapta-padi and Havan.

The appellant himself in his statement admitted that in Jabalpur there are five-six thousands people of katia caste. He further admitted that he did not make any enquiries about the parents or the place of residence of Elizabeth, mother of the respondent. He further admits at page 87 of the Paperbook that in 1978 he was taken by Shri Dharmak as Chief Guest in the Conference of Katia Samaj. A suggestion was made to him that he was present when the Katia community honoured the respondent on her victory in the election. Reading in between the lines of his evidence it is clear that he was fully aware that the respondent had been reconverted to Hinduism and had been accepted by the Katia community.

On a full and complete appraisal of the oral and documentary evidence, the following conclusions are inevitable:

(1) That the respondent was born of Christian parents and was educated in various schools or institutions where she-was known as a Christian, (2) that 3-4 years before the election, the respondent was reconverted to Hinduism and married Jai Prakash Shalwar, a member of the katia caste, and also performed the Shudhikaran ceremony, (3) that she was not only accepted but also welcomed by the important members, including the President and Vice-President, of the community, (4) there is no evidence to show that there was any bar under the Christian religion which could have prevented her from reconverting herself to Hinduism.

(5) that there was no evidence to show that even her parents had been Christians from generation to generation.

In these circumstances, therefore, this case fulfils the conditions required for being reconverted to Hinduism from Christianity in order to revive the original caste.

Under cl. (3) of the 1950 Order only two conditions are required for being eligible for election to a reserved constituency-

(a) that the candidate should not profess a religion different from the Hindu or the Sikh religion, and

(b) that the candidate is a member of scheduled caste as shown in the schedules.

In the instant case, it is not disputed that the Katia caste is mentioned as a scheduled caste in part IX of the 1950 Order and shown at serial Number 29.

Having regard to the circumstances discussed above, it cannot be said that at the time when the respondent filed her nomination papers, she was not a member of the Katia caste.

For the reasons given above, the judgment of the High Court is affirmed and the appeal is dismissed but in the circumstances without any order as to costs.

H.S.K. Appeal dismissed

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LANDMARK JUDGMENTS ON

STRIDHAN

SMT. RASHMI KUMAR VS MAHESH KUMAR BHADA

(1997) 2 SCC 397

Smt. Rashmi Kumar
Vs.
Mahesh Kumar Bhada

Date of Judgment : 18/12/1996
Bench : Hon'ble Mr. Justice K. Ramaswamy, Hon'ble Mr. Justice S.B. Majumudar & Hon'ble Mr. Justice G.T. Nanavati

Held that the possession of Saudayika or stridhana of a Hindu married female during coverture is absolutely clear and unambiguous. She is the absolute owner of her stridhana property and can deal with it in any manner she likes. She may spend the whole of it or give it away at her own pleasure by gift or will without any reference to her husband. Ordinarily, the husband has no right or interest in it with the sole exception that in times of extreme distress, as in famine, illness or the like, the husband can utilise it but he is morally bound to restore it or its value when he is able to do so. This right is purely personal to the husband and the property so received by him in marriage cannot be proceeded against even in execution of a decree for debt passed against the husband. If in spite of demands for return of the articles, the husband refuses to return them to the wife, it amounts to an offence of criminal breach of trust. The stridhana property is not a joint property of the wife and the husband. Section 27 of the Hindu Marriage Act merely provides another remedy of suit to recover from the husband or the persons to whom the stridhana property was entrusted. The mere factum of the husband and the wife living together does not entitle either of them to commit a breach of criminal law and if one does, then he or she will be liable for all the consequences of such breach. By mere living in matrimonial home the stridhana does not become joint property of the spouses. It is also not a partnership property between the wife and the husband. The concept of partnership is alien to the stridhana property under the personal law. Therefore, entrustment of stridhana, without creating any right in the husband except, putting the articles in the possession, does not entitle him to use the same to the detriment of his wife without her consent. The husband has no justification for not returning the said articles as and when demanded by the wife; nor can he burden her with loss of business by using the said properties which were never intended by her while entrusting possession of the stridhana. The husband being only a custodian of the stridhana of his wife, cannot be said to be in joint possession thereof and does not acquire a joint interest in the property. It was, therefore, concluded that the custody or entrustment of the stridhana with the husband does not amount to partnership in any sense of the term nor does the stridhana becomes a joint property.

JUDGMENT

K. Ramaswamy, J.

This appeal has been placed before this Bench pursuant to an order date 19.4.1995 passed by a two Judge Bench in the following terms:

"A decade has gone by since Pratibha Rai vs. Suraj Kumar & Anr, [(1985) 2 SCC 370] - a decision by a majority of 2:1 has governed the scene. Having regard to its wider ramifications and its actual working in the last decade, we are of the view that a fresh look to the ratio in that case is necessary. We, therefore, order that this case be placed before a three-judge Bench."

This appeal by special leave arises from the Judgment of the Allahabad High Court dated June 19, 1992 in Criminal Miscl. Case No.44 of 1992. The admitted facts are that the appellant was married to the respondent on July 7, 1973 at Lucknow according to the Hindu rites and rituals. The parties have three children from the wedlock. It is not in dispute that there was estrangement in the marital relationship between the husband and the wife. It is the case of the appellant that she was treated with cruelty and was driven out of the marital home along with the three children. She was constrained to lay proceedings under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. The appellant was given jewellery, i.e., gold and silver ornaments and other household goods enumerated in Annexures I and II and also cash by her parents, brothers and other relatives at different ceremonies prior to her marriage and after the marriage at the time of bidai (farewell). She claims that all these articles constituted her stridhana properties and were kept in the custody of the respondent-husband. The respondent has asked the appellant to entrust for safe custody all the jewellery and cash mentioned in Annexure I, to his father with the promise that on her demand whenever made, they would be returned. Accordingly, she had entrusted them to the appellant at Lucknow in the presence of three named witnesses. Similarly, the household goods mentioned in Annexure-II were entrusted by the parents of the appellant to the respondent at the time of farewell in the presence of three named witnesses. They lived together in Delhi in her in-laws house. The appellant alleged in the complaint that she was treated with cruelty in the matrimonial home and ultimately on July 24/25, 1978 she and the children were thrown out from the matrimonial home at duress and at the peril of their lives. Accordingly, she was driven out from the matrimonial home without getting an opportunity to take with her Stridhana properties enumerated in Annexures I and II.

She filed an application under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. Even thereafter she went to Cochin where at the respondent- husband was working, on October 9, 1986 and requested him to restitute her into the conjugal society along with the children. he promised that he would do it provided she withdrew her application for restitution of conjugal rights. He also promised to return the jewellery and other valuables mentioned in Annexures I and II entrusted to him. Even after her withdrawing the application, on October 21, 1986, he did not take her into the conjugal society. Therefore, she was again constrained to file second application on November 18, 1986 for restitution of conjugal rights. She also filed application under Section 125 of the Code of Criminal Procedure, 1973 (for short, the "Code") for maintenance. Since these attempts proved unsuccessful, she made a demand on December 5, 1987 to return the jewellery as detailed in Annexure I and household goods mentioned in Annexure II but the respondent flatly refused to return her stridhana properties. Consequently, she filed a private complaint on September 10, 1990.

After recording her statement under Section 200 of the Code, the learned Magistrate took cognizance of the offence and issued process to the respondent. While the respondent appeared in the Court, he filed an application under Section 482 of the Code in the High Court to quash the proceedings. As stated earlier, the High Court in the impugned Order has quashed the proceedings on two grounds, viz., (i) the appellant did not make out any case in the complaint and

(ii) it is barred by limitation. On the ground of limitation, the learned Judge came to the conclusion that in October 1986 the appellant had made a demand for return of the jewellery and gold but the

respondent did not return the same. Therefore, it furnished a cause of action. Since complaint was laid in September 1990, it was clearly barred by limitation the period prescribed being three years.

Smt. Indira Jaising, Learned senior counsel for the appellant, contended that the ratio in Pratibha Rani V/s. Suraj Kumar & Anr. [(1985) 2 SCC 370] has stood the test of time for more than a decade though therein there was difference of opinion between the majority and the minority on certain aspects of the matter. The decision has never been doubted by any other Bench. The said ration is based on the personal law as elaborately discussed in the judgment. Therefore, it requires reiteration. Shri Rajinder Singh, learned senior counsel for the respondent, on the other hand, sought to support the present reference to the three Judge Bench on the basis of the conduct of the appellant. He also contends that a clear demand for return of the stridhana properties was made in October 1986 when the respondent had refused to return the same. Since the complaint came to be filed only in September 1990, i.e., after a delay of 11 months from the expiry of prescribed limitation, it is time barred. Since no application for condonation of delay was filed, the High Court was enjoined to dismiss the complaint as being barred by limitation. Smt. Indira Jaisingh contended that the offence punishable under Section 406, Indian Penal Code [for short, the "IPC"] is a continuing offence and hence cause of action arose every day subsequent to the refusal and, therefore, the complaint was not barred by limitation. Shri Rajinder Singh further contended that the respondent has always been willing to transfer his flat in Bombay in the name of his daughters. He also states that he has been paying every month maintenance allowance in respect of the children. Even if the articles which the appellant is claiming is mentioned, the respondent is prepared to deposit the same in a fixed account in the name of his daughters. This conduct on the part of the respondent would militate against the conduct of the appellant who intends to harass the respondent by filing endless complaints. These circumstances would go to indicate that there are no justifiable reasons for interference with the order of the High Court. At this juncture, it is relevant to not that several attempts made by this Court to have the dispute settled amicably between the parties, could not bear any fruit of success. Therefore, we are not inclined to undertake the exercise once over.

The question that has arisen for consideration is: whether the ratio in Pratibha Rani's case does not hold good any more? That case also related to a complaint filed under Section 406, IPC for breach of trust by the respondent- husband on his refusing to return stridhana property, viz., jewellery, wearing apparels etc. The question that had arisen for consideration was whether the stridhana property was exclusive property of the appellant-wife or was a joint property owned and held by both the spouses? Though all the three learned Judges concurred on the point of entrustment of the jewellery and wearing apparels to be stridhana, the majority view was that the stridhana property was the exclusive property of the appellant-wife and that, therefore, the failure to return the property in the custody of the husband to the wife constitutes breach of trust defined under Section 405, IPC. Therefore, the offence of breach of trust punishable underSection 406 was made out, as per the averments contained in the complaint. The minority view was that the property entrusted to the husband after the marriage is joining property of the wife and the husband. The essential requirement for constituting an offence defined under Section 405, IPC in relation to stridhana property, is that there should be a specific separate agreement between the parties, whereby the property of the wife or the husband, as the case may be, is entrusted. In the absence of such a separate agreement for specific entrustment, it would not be possible to draw an inference of entrustment of custody or dominion over the property of one spouse to the other and/or his or her close relations so as to attract the stringent provisions ofSection 406, IPC; otherwise there would be disastrous effects and consequences on the peace and harmony

which ought to prevail in matrimonial homes. The appropriate remedy would appear to be by way of a civil suit for recovery of the stridhana property.

Fazal Ali, J., speaking for himself and Sabyasachi Mukherjee, J., as he then was, held that the possession of Saudayika or stridhana of a Hindu married female during coverture is absolutely clear and unambiguous. She is the absolute owner of her stridhana property and can deal with it in any manner she likes. She may spend the whole of it or give it away at her own pleasure by gift or will without any reference to her husband. Ordinarily, the husband has no right or interest in it with the sole exception that in times of extreme distress, as in famine, illness or the like, the husband can utilise it but he is morally bound to restore it or its value when he is able to do so. This right is purely personal to the husband and the property so received by him in marriage cannot be proceeded against even in execution of a decree for debt passed against the husband. If in spite of demands for return of the articles, the husband refuses to return them to the wife, it amounts to an offence of criminal breach of trust. The stridhana property is not a joint property of the wife and the husband. Section 27 of the Hindu Marriage Act merely provides another remedy of suit to recover from the husband or the persons to whom the stridhana property was entrusted. The mere factum of the husband and the wife living together does not entitle either of them to commit a breach of criminal law and if one does, then he or she will be liable for all the consequences of such breach. By mere living in matrimonial home the stridhana does not become joint property of the spouses. It is also not a partnership property between the wife and the husband. The concept of partnership is alien to the stridhana property under the personal law. Therefore, entrustment of stridhana, without creating any right in the husband except, putting the articles in the possession, does not entitle him to use the same to the detriment of his wife without her consent. The husband has no justification for not returning the said articles as and when demanded by the wife; nor can he burden her with loss of business by using the said properties which were never intended by her while entrusting possession of the stridhana. The husband being only a custodian of the stridhana of his wife, cannot be said to be in joint possession thereof and does not acquire a joint interest in the property. It was, therefore, concluded that the custody or entrustment of the stridhana with the husband does not amount to partnership in any sense of the term nor does the stridhana becomes a joint property. It was held in para 60 of the judgment that taking all the allegations made in the complaint, by no stretch of imagination it could be said that they do not prima facie amount to an offence of criminal breach of trust against the respondent. Thus there could be no room for doubt that all the facts stated in the complaint constitute an offence under Section 406, IPC and the appellant could not be denied the right to prove her case at the trial by pre-empting it at the very inception by the order passed by the High Court. Accordingly, it was quashed. Direction was given to proceed with the trial from the stage at which stay was granted by this Court. The only difference of point was whether there should be special agreement of entrustment. Varadarajan, J. elaborately dealt with the special agreement and had held that in view of the fact that wife and husband have dominion over the wife's property jointly, proof of special agreement of entrustment is an essential ingredient.

In Mayne's Hindu Law & Usage [13th Edn.] edited by Justice Alladi Kuppuswami, former Chief Justice of Andhra Pradesh High Court, in paragraph 644 at page 877 it is stated that "Katyayana indicates a cross-classification of stridhana [Vivadachintamani vide p.259; Jha HLS II, 529-31; Apararka, 21 MLJ (Jour.) 428. He further states: "that which is obtained by a married woman or by a maiden, in the house of her husband or of her father, from her brother (from her husband) or from her parents, is stridhana [Vide: Katyayna cited in Mit., II, xi, 5; Smritichandrika, IX, ii,4-5; V. May., IV, x, 8 etc.]. Under the caption "Yautaka and ayautake", it is stated that "Yautaka is that which is given at the nuptial fire... It

includes all gifts made during the marriage ceremonies. Ayautaka is gift made before or after marriage. Saudayika includes both Yautaka and Ayautaka and received from strangers. It is defined to be gifts from affectionate kindered". In support thereof, he relied on Venkatareddy v. Hanumant [(1993) 57 Bom 85] and Muthukaruppa v. Sellathammal [(1916) 39 Mad. 298 at 300 and see para No.10] At page 881, in paragraph 650, sub-para (4), it is stated that "So also gifts or grants to her by strangers, whether made during coverture or when she is a widow, will be her stridhana" [Vide Salemma v. Lutchmana [(1998) 21 Mad 100]. In paragraph 652 on page 882, it is stated that "the absolute dominion of a woman over her saudayika property was admitted from the earliest times". Katyayana declares: "The independence of women who have received the saudayika wealth is desirable (in regard to it), for it was given (by their kindered) for their maintenance out of affection. The power of women over saudayika at all times is absolute both in respect of gift and sale, according to their pleasure, even in (the case of) immovables". The Smiritichandrika would confine saudayika to yautaka or the like, received by a woman from her own parents or persons connected with them, in the house of either her father or her husband, from the time of her betrothment to the completion of the ceremony to be performed on the occasion of her entering her lord's house. But his view has not been followed. The texts of Katyayana and Vyasa have been explained by other commentators as including gifts received by her from her husband, and from others after her marriage. The decisions of the courts have taken the same view. Provided the gift is made by her husband or her parents or by relatives either of her husband or of parents, it is immaterial whether it is made before marriage, at marriage or after marriage. It is equally her saudayika. In other words, saudayika means all gifts and bequests from relations but not gifts and bequests from strangers. Saudayika of all sorts are absolutely at a woman's own disposal. She may spend, sell, devise or give it away at her own pleasure. In support of that conclusion, footnote No.6 cites several decisions including Venkata Rama v. Venkata Suriya [(1880) 2 Mad 333] and Muthukaruppa v. Sellathammal [(1916) 39 Mad 298] etc. It is stated thereafter that her husband can neither control her in her dealings with it, nor use it himself. But he may take it in case of extreme distress, as in a famine, or for some indispensable duty, or during illness, or while a creditor keeps him in prison. Even then he would appear to be under at least a moral obligation to restore the value of the property when able to do so. What he has taken without necessity, he is bound to repay with interest. This right to take the wife's property is purely a personal one in the husband. If he does not choose to avail himself of it, his creditors cannot proceed against her properties. The word `take' in the text of Yajanavalkya means `taking' and `using'. Hence if the husband taking his wife's property in the exceptional circumstances mentioned in the text does not actually use it, the wife still remains its owner and the husband's creditors have no claim against the property.

A woman's power of disposal, independent of her husband's control, is not confined to saudavika but extends to other properties as well. Devala says: "A women's maintenance (vritti), ornaments, perquisites (sulka), gains (labha), are her stridhana. She herself has the exclusive right to enjoy it. Her husband has no right to use it except in distress...". In "N.R. Raghavachariar's "Hindu law - Principles and Precedents" [8th Edn.] edited by Prof. S. Venkataraman, one of the renowned Professors of Hindu law para 468 deals with "Definition of Stridhana". In para 469 dealing with "Sources of acquisition" it is stated that the sources of acquisition of property in a women's possession are: gifts before marriage, wedding gifts, gifts subsequent to marriage etc. Para 470 deals with "Gifts to a maiden". Para 471 deals with "Wedding gifts" and it is stated therein that properties gifted at the time of marriage to the bride, whether by relations or strangers, either Adhiyagni or Adhyavahanika, are the bride's stridhana. In para 481 at page 426, it is stated that ornaments presented to the bride by her husband or father constitute her Stridhana property. In para 487 dealing with "powers during coverture" it is stated that

saudayika meaning the gift of affectionate kindered, includes both Yautaka or gifts received at the time of marriage as well as its negative Ayautaka. In respect of such property, whether given by gift or will she is the absolute owner and can deal with it in any way she likes. She may spend, sell or give it away at her own pleasure.

It is thus clear that the properties gifted to her before the marriage, at the time of marriage or at the time of giving farewell or thereafter are her stridhana properties. It is her absolute property with all rights to dispose at her own pleasure. He has no control over her stridhana property. Husband may use it during the time of his distress but nonetheless he has a moral obligation to restore the same or its value to his wife. Therefore, stridhana property does not become a joint property of the wife and the husband and the husband has no title or independent dominion over the property as owner thereof.

In this backdrop, the question that arises for consideration is: whether the fact of a wife's having been driven out from the matrimonial home without taking along with her stridhana properties, amount to entrustment with the husband within the meaning of Section 405, IPC? Section 405defines "Criminal breach of trust thus:

"405. Criminal breach of trust. -

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharge, or of any legal contract, express or implied, which he has made touching the <??> of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

It is not necessary to refer to the Explanations to the said section for the purpose of this case. Hence they are omitted.

Thus when the wife entrusts her stridhana property with the dominion over that property to her husband or any other member of the family and the husband or such other member of the family dishonestly misappropriates or converts to his own use that property or wilfully suffers any other person to do so, he commits criminal breach of trust. The essential ingredients for establishing an offence of criminal breach of trust as defined in Section 405 and punishable under Section 406,IPC with sentence for a period upto three years or with fine or with both, are: [i] entrusting any person with property or with any dominion over property; [ii] the person entrusted dishonestly misappropriating or converting to his own use that property; or dishonestly using or disposing of that property or wilfully suffering any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract made touching the discharge of such trust. The expression "entrustment" carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Entrustment is not necessarily a term of law. It may have different implications in different contexts. In its most general significance, all its imports is handing over the possession for some purpose which may not imply the conferment of any proprietary right therein. The ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. In Pratibha Rani's case, the majority has extensively considered the words "entrustment" of and "dominion" over the property. All the case law in that behalf was exhaustively considered obviating the necessity to tread once over the same. In order to establish entrustment of dominion over the property, both the majority and minority relied on in particular the judgment of this Court in Velji Raghavji Patel v. State of Maharashtra [(1965) 2

SCR 492] wherein it was held that in order to establish entrustment of dominion over the property to an accused person, mere existence of that person's dominion over the property is not enough. It must be further shown that his dominion was the result of entrustment. The question therein pertained to the entrustment with the dominion over the partnership property by one partner to the other. It was held that the prosecution must establish that the dominion over the assets or particular assets of the partnership was by a special agreement between the parties. The property of the partnership being a partnership asset, every partner has a right o or a dominion over it. It was held that special agreement was necessary to constitute an offence of criminal breach of trust defined under Section 405, IPS. In view of the finding that stridhana property is the exclusive property of the wife on proof that she entrusted the property or dominion over the stridhana property to her husband or any other member of the family, there is no need to establish any further special agreement to establish that the property was given to the husband or other member of the family. It is always a question of fact in each case as to how property came to be entrusted to the husband or any other member of the family by the wife when she left the matrimonial home or was driven out therefrom. No absolute or fixed rule of universal application can be laid down in that behalf. It requires to be established by the complainant or the prosecution, depending upon the facts and circumstances of the case, as to how and in what manner the entrustment of the stridhana property or dominion over her stridhana came to be made to the husband or any other member of the family or the accused person, as the case may be. We are in respectful agreement with the majority view in Pratibha Rani's case and consequently requires no reconsideration.

The next question is; whether the appellant has made out any prima facie case of entrustment in that behalf? A reading of the complaint clearly indicates that her parents entrusted the property to the respondent at the time of her farewell from her parents house in Lucknow. They lived together in matrimonial home in Deli. Three children were born from the wedlock and during that period she had retained the custody of the property. When she left the matrimonial home she had not taken the property with her. She has specifically averred that when she went in October 1978 to Cochin requesting the respondent-husband to take her into matrimonial home along with the children, he promised to take her in the conjugal society and also that he would return the jewellery to her subject to the condition that she should withdraw her application filed underSection 9 of the Hindu Marriage Act for restitution of conjugal rights and accordingly she had withdrawn the application. The learned Single Judge failed to correctly appreciate her evidence recorded under Section 200 of the Code that she made a demand for return of the jewellery and household goods. On the other hand, a fair reading of it would indicate that when she met the respondent in Cochin and requested to take her and children to home he promised to do so on her withdrawing the case for restitution of conjugal rights. Threat the husband promised to return them but he did not keep up his promise. The sequences that followed were that she filed another case for restitution of conjugal rights and an application for maintenance and thereafter she filed the complaint under Section 406, IPC. A fair reading of the averments would clearly indicate that a prima facie case of entrustment of the jewellery and the household goods had been made out. The learned Judge was not right in jumping to the conclusion that the averments made by the respondent in the counter-affidavit disclosed that no entrustment was made of the jewellery, cash and household goods and other movables enumerated in Annexures I and II details of which are not material for our purpose. In the light of the above, we are of the view that a prima facie case of entrustment had been made out by the appellant as the stridhana properties were not returned to her by the husband. Obviously, therefore, the learned Magistrate, having taken cognizance of the offence, had issued process for appearance of the respondent. It is fairly settled legal position that at

the time of taking cognisance of the offence, the Court has to consider only the averments made in the complaint or in the charge-sheet filed under Section 173, as the case may be. It was held in State of Bihar v. Rajendra Agrawalla [(1996) 8 SCC 164] that it is not open for the Court to sift or appreciate the evidence at that stage with reference to the material and come to the conclusion that no prima facie case is made out for proceeding further in the matter. It is equally settled law that it is open to the Court, before issuing the process, to record the evidence and on consideration of the averments made in the complaint and the evidence thus adduced, it is required to find out whether an offence has been made out. On finding that such an offence has been made out and after taking cognizance thereof, process would be issued to the respondent to take further steps in the matters. If it is a charge-sheet filed under Section 173 of the Code, the facts stated by the prosecution in the charge-sheet, on the basis of the evidence collected during investigation, would disclose the offence for which cognisance would be taken by the court to proceed further in the matter. Thus it is not the province of the court at that stage to embark upon and sift the evidence to come to the conclusion whether offence has been made out or not. The learned Judge, therefore, was clearly in error in attempting to sift the evidence with reference to the averments made by the respondent in the counter-affidavit to find out whether or not offence punishable under Section 406, IPC had been made out.

The next question that needs to be answered is: whether the complaint filed by the appellant in September 1990 is time barred? Section 468 of the Code prescribes period of limitation. Under sub-section (3) thereof, the period of limitation shall be three years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years, Since the offence alleged to have been committed by the respondent is punishable under Section 406, viz., criminal breach of trust, and the punishment of imprisonment which may extend to three years or with fine or with both, the complaint is required to be filed within three years from date of the commission of the offence. It is seen that the appellant has averred in paragraphs 21 and 22 of the complaint that she demanded from the respondent return of jewellery detailed in Annexure I and household goods mentioned in Annexure II on December 5, 1987 and the respondent flatly refused to return the stridhana of the complainant-wife. In paragraph 22 of the complaint, it is stated that the complainant was forced to leave the matrimonial home in the manner described and the stridhana mentioned in Annexures I and II belonging to the complainant was entrusted to the respondent-accused which he refused to return to the complainant. Thus she has averred that the respondent "has illegally, dishonestly and mala fidely retained and converted it to his own use which is clearly a criminal breach of trust in respect of the aforesaid property". The complaint was admittedly filed on September 10, 1990 meaning within three years from the date of the demand and refusal by the respondent. The learned Judge relied upon her evidence recorded under Section 200 of the Code. The learned counsel for the respondent read out the text of the evidence to establish that the appellant had demanded in October 1986 for return of the jewellery and that the respondent refused to do the same. Thus it constitutes refusal from which date the limitation period began to run and the complaint have been filed in September 1990, is time barred, i.e., beyond three years. That view of the learned Judge is clearly based on the evidence torn of the context without reference to the specific averments made in the complaint and the evidence recorded under section 200 of the Code. As stated earlier, the sequence in which the averments came to be made was the voluntary promise of the respondent and his failure to abide by the promise. It is incongruous to comprehend the demand for return of jewellery etc, at the stage when she was persuading him to take her into matrimonial home. Accordingly, we hold that the complaint was filed within the limitation.

The question, therefore, whether it is a continuing offence and limitation began to run everyday loses its relevance, in view of the above finding. The decisions cited in support thereof, viz., Vanka Radhamanohari (Smt.) v. Vanka Venkata Reddy & Ors. [(1993) 3 SCC 4] and Balram Singh vs. Sukhwant Kaur [(1992) Crl. L.J. 792 F.B. (P&H)] hence need not be considered. It is well settled legal position that the High Court should sparingly and cautiously exercise the power underSection 482 of the Code to prevent miscarriage of justice. In State of Himachal Pradesh v. Shri Pirthi Chand & Anr. [JT 1995 (9) 411] two of us [K. Ramaswamy and S.B. Majmudar, JJ.] composing the Bench and in State of U.P. Vs. O.P. Sharma [(1996) 7 SCC 70], a three- Judge Bench of this Court, reviewed the entire care law on the exercise of power by the High Court under Section 482 of the Code to quash the complaint or the charge-sheet or the First Information Report and held that the High Court would be loath and circumspect to exercise its extraordinary power under Section 482 of the Code or under Article 226 of the Constitution. The Court would consider whether the exercise of the power would advance the cause of justice or it would tantamount to abuse of the process of the Court. Social stability and order require to be regulated by proceeding against the offender as it is an offence against the society as a whole. This cardinal principle should always be kept in mind before embarking upon the exercise of the inherent power vested in the Court. Same view was taken in State of Haryana & Ors. v. Bhajan lal & Ors. [(1992) Supp. 1 SCC 355] and G.L. Didwania & Anr. v. Income Tax Officer & Anr. [(1995) Supp. SCC 25] etc. Considered from this perspective, we hold that the High Court was wholly wrong in quashing the complaint/proceedings, under Section 432 of the Code. The appeal is accordingly allowed. The judgment of the High Court is set aside. We make it clear that all the observations in the judgment on merits are only to find out prima facie case whether the High Court would be justified in the exercise of its power under Section 482. The trial Court will have to decide the case on its own merits in the light of the evidence that may be led at the trial without being influenced in any manner by our observations made hereinabove. The trial Court is directed to proceed from the stage the complaint was pending at the time of quashing, to take further steps in accordance with law.

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"A family is a place where minds come in contact with one another. If these minds love one another the home will be as beautiful as a flower garden. But if these minds get out of harmony with one another it is like a storm that plays havoc with the garden."

GAUTAM BUDDHA

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