॥ आ नो भद्राः क्रतवो यन्तु विश्वतः ॥

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

RIG VEDA

COMPILATION OF LANDMARK JUDGMENTS OF HIGH COURTS OF INDIA ON FAMILY MATTERS

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.

Hon'ble Mr. Justice Dipak Misra

Shamima Farooqui V. Shahid Khan, (2015) 5 Supreme Court Cases 705

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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.

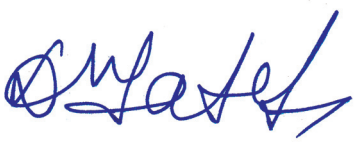
His Lordship Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India has said about the role and responsibilities of Family Court's Judge in ***Bhuwan Mohan Singh Vs. Meena {(2015) 6 SCC 353}*** and I quote- ***"The Family Judge is expected to be sensitive to the issues, for he is dealing with 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 High Courts on the topics- Alimony and Maintenance, Divorce, Custody of Children & Visitation Rights, Adoption and Duty of Family Court 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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ALIMONY & MAINTENANCE

SIDHARTH VS SMT. KANTA BAI

Madhya Pradesh High Court

AIR 2007 MP 59

Date of Judgment : 14th November, 2006
Equivalent citations: AIR 2007 MP 59

Sidharth
vs
Smt. Kanta Bai

Bench: Hon'ble Mr. Justice Dipak Misra, Hon'ble Mr. Justice S Sinho

Hindu Marriage Act 1955 sec 23,24 - The maintenance and the entitlement under section 24 of the Act can be made available even in a proceeding pertaining to setting aside of an ex-parte decree and restoration of the main suit. -- 'any relief that has been used in Section 23 (2) would not cover an incidental and ancillary relief during the proceeding as that has to be construed in broader canvass and would include only substantive relief and further if there is non-compliance of the same, it would amount to an irregularity and not an illegality and such irregularity is rectifiable at the appellate stage and would not render the judgment or an order a nullity.

ORDER

Dipak Misra, J.

1. Invoking the extra-ordinary and inherent jurisdiction of this Court under Article 227 of the Constitution of India the petitioner has called in question the defensibility and tenability of the orders dated 24-1-2004 and 13-8-2006 passed by the learned IInd Additional District Judge, Chhindwara in Civil Suit No. 81-A/04, Annexure P-5, and prayed for issue of writ of certiorari for quashment of the same. The writ petition was placed before the learned Single Judge for grant of necessitous relief on the substratum that the learned IInd Additional District Judge, Chhindwara has erroneously directed the petitioner-husband to pay a sum of Rs. 1,000/- by way of interim maintenance from the date of their order and Rs. 1000/- towards litigation expenses and to pay expenses of each hearing day on the basis of application preferred under Section 24 of the Hindu Marriage Act, 1955 (for brevity, 'the Act'). It is worth mentioning that the second order dated 13-8-2005, was an application for review of the original order, which had faced rejection.

2. Before the learned Single Judge, it was contended by the husband-petitioner that the Court below has fallen into grave error by allowing interim maintenance and litigation expenses without making any endeavour for reconciliation at the first instance as contemplated under Section 23(2) of the Act which is mandatory in nature and hence, the order passed by him is nothing less than a sanctuary of errors. To bolster the aforesaid submission, reliance was placed on the decision rendered by a learned Single Judge of this Court in the case of Kesavrao v. Tihalibai 2003(1) M.P.H.T. 5 (NOC), wherein it had been held that the provisions enshrined

under Section 23(2) of the Act are mandatory. Learned Single Judge hearing the writ petition was prima facie of the view that Section 23(2) would not get attracted for grant of maintenance pendente lite and expenses of proceedings and an order passed under Section 24 of the Act does not tantamount to grant of any relief to either of the spouses inasmuch as such a grant fundamentally is an arrangement. Being of this view, learned Single Judge recommended for reconsideration of the view expressed in the decision rendered in the case of Kesav Rao (supra). That is how the matter has been placed before us.

3. At the very outset, it is seemly to state that prior to the law laid down in the case of Kesav Rao (supra), another learned Single Judge in the case of Jagdish Chandra Kulshrcstha v. Pramod Kumari 1993 MFJR 455 had expressed the opinion that the language employed in Section 23(2) makes it mandatory and order granting interim maintenance passed without first making an effort of reconciliation is unsustainable. A Division Bench of this Court had the occasion to consider the provision contained in Sections 23(2) and 24 in the case of Dharmendra Kumar Ramswaroop Sharma v. Pushpadevi w/o Dharmendra Kumar 1995 MPLJ 555, whereby the Division Bench overruled the decision rendered in the case of Jagdish Chandra Kulshrestha (supra), and came to hold that the Court is not disabled from attempting reconciliation before passing an order under Section 24 if it appears to the Court that the position of the parties is such that it would be appropriate to attempt reconciliation at that stage, but, the failure of the Court to make an attempt to bring about the reconciliation of the parties before passing an order underSection 24 of the Act does not make the order illegal. The Division Bench further expressed the opinion that the failure to observe the said requirement is an irregularity and not an illegality, for the provision engrafted under Section 23(2) is neither mandatory nor absolute.

4. Mr. P.K. Asati, learned Counsel for the petitioner has submitted that the decision rendered in the case of Dharmendra Kumar (supra), requires reconsideration by Larger Bench inasmuch as the Division Bench while expressing the opinion that the order would not be illegal but an irregular one, has really not appreciated the language employed in the statute and the manner of enjoinment inherent therein has placed an artificial meaning by taking recourse to interpretative method which is impermissible. Learned Counsel has submitted that the marriage has its own sacrosanctity and if reconciliation is not tried to be achieved and an application under Section 24of the Act is entertained, the possibility of reconciliation would be marginalized, and in fact, it would frustrate the object of the provision engrafted under Section 23(2) of the Act. It is urged by Mr. Asati that the terms 'any' and 'first instance' employed in Section 23(2) have to be strictly construed and there is no room to escape from the interpretation in 'stricto sensu'. It is his further submission that if an application under Section 24 of the Act is entertain and allowed the beneficiary, either of the spouses, would indulge in subterfuges to procrastinate the proceeding which is contrary to the spirit of the enactment. Learned Counsel contended that a Judge who decides matrimonial issues has a different role than the authority who has been empowered to bring in conciliation under the Industrial Disputes Act, 1947, for the first enactment deals with a sensitive human problem, a concern of a sensitized collective whereas the second statute basically deals with the industrial disputes. Therefore, submitted Mr. Asati, primary steps with regard to the reconciliation have to be given paramountacy prior to determination of maintenance and litigation expenses. It is his further submission that the Parliament in its wisdom has used the word 'shall' and there being no ambiguity, it has to be treated mandatory for all purposes. It is propounded by him that it will be an anathema to the concept of term 'relief as used in Section

23(2) if it is treated or regarded as an arrangement as that can never be the intention of the Legislature.

5. Mr. Alok Aradhe, learned amicus curiae, assisting the Court submitted that if the anatomy of the Act is scanned in proper perspective, it would be luminescent that two categories of reliefs are permissible, namely, substantive reliefs and incidental or ancillary reliefs. The reliefs which are envisaged under Sections 9, 10, 11 and 13 are substantive or primary reliefs and the relief granted under Section 24 would fall in the second category. Submission of learned friend of the Court is that Sections 23(2) and 24 have to be read harmoniously keeping in view the purpose of legislation, the text and the context, and unless such harmonious and purposive construction is placed on both the provisions it would defeat the object of the statute. Mr. Aradhe further contended that the terms used in the provision 'shall' and 'any', per se, would not make the provision mandatory in the absence of any concomitant consequences prescribed therein. It is proponed by him that the word 'any' in all circumstances does not include all and can be read in restricted manner depending on the context, the subject-matter of the statute and the purpose behind the legislation. Learned Counsel further submitted that Section 24 has its own purpose and it is an enabling provision to empower either of the spouses to survive and contest the litigation and unless there is conferral of benefit of economic ability to contest, is deserving, there would be mockery of justice and a proceeding under the Act seeking substantial relief would be an apology for real adjudication and the conception of fairness of adjudication especially in the backdrop nature of the Us involved shall pale into insignificance and reach an abysmal state. It is urged by him that purposive construction and harmonious reading of both the provisions should be the warrant to subserve the cause of justice and achieve the intent of the Legislature. Learned friend of the Court has invited our attention to many citations to which we shall refer to them at the appropriate stage.

6. Section 23 deals with the decree in proceedings. Section 23(2) reads as under:

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:

Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in Clause (ii), Clause (iii), Clause (iv), Clause (v), Clause (vi) or Clause (vii), of Sub-section (1) of Section 13.

7. Section 24 deals with the maintenance pendente lite and expenses of proceedings. We reproduce the said provision:

24. Maintenance pendente lite and expenses of proceeding. - Where in any proceeding under this Act, it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, or the respondent to pay to the petitioner 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:

Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.

8. On a reading of Section 24, it is manifest that the Court has a duty to scrutinize if any of the spouses has no independent income sufficient for her or his support and the necessary expenses of the proceedings, on being satisfied it may direct payment of expenses of the proceedings, and such monthly sum during the proceeding, regard being had to the own income of the parties as it may seem reasonable to do.

9. Submission of Mr. Aradhe is that though the words used are 'any relief which may apparently include a relief under Section 24, yet it should not be so understood, for the purposes are different and in any case both the provisions must be allowed to harmoniously co-exist to serve the purpose. In this regard, he has commended us to the decisions rendered in the cases of Raj Krushna Bose v. Binod Kanungo and Ors. , Anwar Hasan Khan v. Mohd. Shaft and Ors. , Commissioner of Income Tax v. Hindustan Bulk Carriers , Calcutta Gujrali Education Society and Anr. v. Calcutta Municipal Corporation. and Ors. .

10. In the case of Raj Krushna Bose (supra), S.R. Das, J. (as his lordship then was) speaking for the Constitution Bench expressed the view that when there is head on clash between the two provisions in a statute, it is the duty of the Court to construe provisions which appear to be in conflict to avoid the conflict.

11. In the case of Anwar Hasan (supra), their fordships have held as under:

8. It is settled that for interpreting a particular provision of an Act, the import and effect of the meaning of the words and phrase used in the statute have to be gathered from the text, the nature of the subject-matter and the purpose and intention of the statute. It is a cardinal principle of construction of a statute that effort should be made in construing its provisions by avoiding a conflict and adopting a harmonious construction. The statute or rules made thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved. The well known principle of harmonious construction is that effect should be given to all the provisions and a construction that reduces one of the provisions to a "dead letter" is not harmonious construction. With respect to law relating to interpretation of statutes this Court in Union of India v. Filip Tiaga De Gama of Vedem Vasco De Gama, held : SCC p. 284, Para 16

16. The paramount object in statutory interpretation is to discover what the legislature intended. This intention is primarily to be ascertained from the text of enactment in question. That does not mean the text is to be construed merely as a piece of prose, without reference to its nature or purpose. A statute is neither a literary text nor a divine revelation. 'Words are certainly not crystals, transparent and unchanged' as Mr. Justice Holmes has wisely and properly warned. (Towne v. Eisner) learned Hand, J., was equally emphatic when he said : Statutes should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them. Lenigh Valley Coal Co. v. Yensavage

12. In the case of Hindustan Bulk Carriers (supra), Arijit Pasayat, J., speaking for the Bench has expressed the opinion as under:

14. A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim ut res magis valeat quam pereat, i.e., a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. [Sec : Broom's Legal Maxims (10th Edn.), p. 361, Craies on Statutes (7th Edn.), p. 95 and Maxwell on Statutes (11th Edn.), p. 22.]

15. A statute is designed to be workable and the interpretation thereof by a Court should be a secure that object unless crucial omission or clear direction makes that end unattainable. (See : Whitney v. IRC, AC at p. 52 referred to in CIT v. S. Teja Singh and Gursahai Saigal v. CIT.)

16. The Courts will have to reject that construction which will defeat the plain intention of the legislation even though there may be some inexactitude in the language used. (See Salmon v. Duncombe, AC at p. 364, Curtis v. Stovin, referred to in S. Teja Singh case).

17. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result. (See Nokes v. Dancaster Amalgamated Collieries referred to in pye v. Minister for Lands for NSW). The principles indicated in the said cases were reiterated by this Court in Mohan Kumar Singhania v. Union of India.

13. In the case of Calcutta Gujarati Education Society (supra), their Lordships while dealing with the concept of rule of reading down a provision of law observed that it is a rule of harmonious construction in a different name. It is resorted to smoothen crudities and ironing out the creases found in a statute to make it workable. It is further ruled therein that the said principle is to be used keeping in view the scheme of the statute and to fulfill its purposes.

14. Submission of Mr. Aradhe is that both the provisions have to harmonised to avoid a head on clash and also to achieve the purposive effect of the legislation. Incrementing the aforesaid submission, learned Counsel has submitted that the language employed in both the provisions are not such which ostracize harmonization. It is urged by him that the word, 'any' should not be allowed to govern and cover all spectrums or kinds of reliefs. Learned Counsel has also submitted that Section 23 deals with decree in proceedings and the relief granted under Section 24 is not a decree.

15. First we shall refer to the use of term 'any' and how the Apex Court has dealt with such a term. In the case of Shri Balganeshan Metals v. Shanmugham Chetty , while interpreting the term 'any' the Apex Court in Paragraph 18 has stated thus:

18. In construing Section 10(3)(c) it is pertinent to note that the words used are "any tenant" and not "a tenant" who can be called upon to vacate the portion in his occupation. The word "any" has the following meaning:

some : one of many; an indefinite number. One indiscriminately of whatever kind or quantity.

Word "any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject-matter of the statute.

It is often synonymous with "either", "every" or "all". Its generality may be restricted by the context; (Black's Law Dictionary; 5th Edn.) From the aforesaid it is clear as day that the meaning of 'any' would depend upon context.

16. The term 'shall' submitted by Mr. Asati has to be regarded as the command of the statute. It needs no special emphasis to state that the word 'shall' does not always mean 'shall' or imperative. It may at time convey the sense of 'may'. In this regard, we may fruitfully refer to the decision rendered in the case of Administrator, Municipal Committee Charkhi Dadri and Anr. v. Ramji Bagla and Ors. , wherein it has been held that the absence of provisions for consequence in case of non-compliance with the requirements would indicate directory nature despite the use of word 'shall'. Mr. Aradhe has invited our attention to a three Judge decision of the Apex Court in the case of Owners and Parties Interested in M.V. "Vali Pero" v. Fernandeo Lopez and Ors. , wherein, it has been held as under:

21. It would suffice to refer only to the decision in Ganesh Prasad Sah Kesari v. Lakhsmi Narayan Gupta . The word 'shall' was used therein in connection with the Court's power to strike off the defence against ejectment in a suit for eviction of tenant in case of default in payment of rent. This Court construed the word "shall" in that context as directory and not mandatory since such a construction would advance the purpose of enactment and prevent miscarriage of justice. In taking this view, this Court was impressed by the fact that the default attracting the drastic consequence of striking out defence may be only formal or technical and unless the provisions was treated as directory, it would render the Court powerless even where striking out the defence may result in miscarriage of justice. We may refer to a passage from Crawford on 'Statutory Construction ' which was quoted with approval in Govindlal Chagganlal Patel v. Agricultural Produce Market Committee, Godhra, and relied on its decision. The quotation is as under (at p. 267 of AIR):

The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern and these are to be ascertained, not only from the phraseology of the provisions, but also while considering its nature, its design and the consequences which would follow from construing it the one way or the other.

17. In the case of Salem Advocate Bar Association, T.N. v. Union of India , in Paragraph 20, it has been ruled thus:

20. The use of the word "shall" in Order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules of procedure are the handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

18. In this regard, we may profitably refer to the decision rendered in the case Kailash v. Nanhku and Ors. , wherein their fordships have laid down the dictum that merely because a provision of law is couched in negative language implying a mandatory character, the same is not without exceptions. The Courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted hold the same to be directory though worded in the negative form.

19. In view of the aforesaid pronouncement of law it is to be seen whether Section 23(2) can ever be regarded as mandatory in absolute terms. In this regard, it would be apposite to notice certain decisions which relate to the concept of maintenance pendente lite and expenses under Section 24 of the Act. This Court in W.P. No. 2480 of 2005, decided on 22-6-2005 Smt. Janki Bai v. Prem Narayan Kushwaha has expressed the view as under:

13. In the case of Amarjeet Kaur v. Harbhajan Singh and Anr. , their fordships while dealing with the order of the High Court where a condition was imposed while granting maintenance and litigation expenses directed the Court below to order for conducting the DNA test of the male child which is in custody of the petitioner with the further rider that if the test goes against, the petitioner therein, should not be entitled to get any maintenance pendente lite for herself, but would get maintenance for the girl child which was fixed at Rs. 1,000/- per month. In that context, it was contended before the Apex Court that in the matter of grant of maintenance, there is no impediment for the Court to impose a condition of the nature and no exception could be taken to the course adopted by the High Court. Their fordships in Paragraph 8 held as under:

8. Section 24 of the Hindu Marriage Act, 1955 empowers the Court in any proceeding under the Act, if it appears to the Court that either the wile or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of any one of them order the of her party to pay to the petitioner the expenses of the proceeding and monthly maintenance as may seem to be reasonable during the proceeding, having regard to also the income of both the petitioner and the respondent. Once the High Court, in this case, has come to the conclusion that the appellant wife herein has to be provided with the litigation expenses and monthly maintenance, it is beyond comprehension as to how, de horn the criterian laid down in the statutory provision itself, the Court could have thought of imposing an extraneous condition, with a default clause which is likely to defeat the very claim which has been sustained by the Court itself. Considerations as to the ultimate outcome of the main proceeding after regular trial would be wholly alien to assess the need or necessity for awarding interim maintenance, as long as the marriage, the dissolution of which has been sought, cannot be disputed, and the marital relationship of husband and wife subsisted. As noticed earlier, the relevant statutory consideration being only that either of the parties, who was the petitioner in the application under Section 24 of the Act, has no independent income sufficient for her or his support for the grant of interim maintenance, the same has to be granted and the discretion thereafter left with the Court. In our view, is only with reference to reasonableness of the amount that could be awarded and not to impose any condition, which has self-defeating consequence. Therefore, we are unable to approve of the course adopted by the learned Single Judge, in this case.

From the aforesaid pronouncement, it is evincible that their Lordships while scanning the basic requirement of Section 24 of the Act have laid down that the relevant statutory consideration

being only that either of the parties who was the petitioner in the application under Section 24 of the Act has no independent income sufficient for her or his support for grant of interim maintenance, the same has to be granted and the discretion therefore left with the Court is only with reference to the reasonableness of the amount that would be awarded and not to impose any condition which has sell-defeating consequence. It is worth noting here that in Paragraph 9 of the said judgment their Lordships dealt with the condition imposed, i.e., conducting a DNA test and expressed no opinion on the legality and propriety of the Court undertaking consideration at the appropriate stage. Their Lordships only confined to the limited aspect to the stage of awarding interim maintenance. It may look that imposition of a condition while granting maintenance allowance can affect the provision thereof distinguishing but a pregnance one, which their Lordships have categorically and unequivocally expressed the opinion with regard to the requirement of statutory conditions. Their Lordships have used the words "the relevant statutory conditions being only" and in view of the aforesaid, I am disposed to think that no of her condition can be read into the provision to be added as a futuristic conditional one or a conviction. Their Lordships have restricted the discretion to quantum, not to entitlement if the conditions precedent are proved. The submission made by the learned Counsel for the respondent that the conduct is a relevant fact and has to be taken into consideration is de hors the provision, as Section 25 has been couched in a different language than Section 24. Scction' 25 uses the phraseology"... conduct of the parties and of her circumstances of the case". Such wordings are absent in the provision and in the absence of the same, it would be encroaching in the field of legislation to add the said concepts to it on the basis that the Court has a discretion, more so, when the Apex Court has expressed the view with regard to the limited discretion the Court has. In view of the constricted and restricted discretion on, the broader expanse that has been built up and the edifice that is sought to be pyramided by the learned Counsel for the respondent have no legs to stand upon and bound to collapse.

20. This Court in the case of Dr. Suresh Kumar Verma v. Smt. Hemalata Verma 2001(1) M.P.H.T. 384, after placing reliance on the decisions rendered in the cases of Dawaraka Prasad v. Krishna Devi 1986 JLJ 179, Yogini Tiwari (Smt.) v. Basant Kumar Tiwari 1996(1) MPWN 155, Smt. Dipli Ghosh v. Swapan Kumar Ghosh and Madan Lal v. Meena , expressed the view in Paragraph 6 as under:

6. After bestowing my anxious consideration to the submissions raised by Mr. J.L. Mishra, I am of the considered view that the language used in Section 24 of the Act has to be construed in a purposive manner so that, the purpose of the Legislature is achieved. It cannot be said that the Legislature while using the words any proceeding under this Act' intended to confine it only to the substantive proceedings. The. purpose of the aforesaid provision is to provide financial assistance to the indigent spouses during their indigency. There is nothing under Section 24 of the Act to suggest that there is prohibition against matrimonial Courts from granting maintenance allowance when the main petition is not pending. If such an interpretation is allowed it will only affect the interest of the spouse who is not in a position to maintain himself or herself. A narrower interpretation would frustrate the purpose of the provision.

21. Be it noted, in the aforesaid case, the cavil was that after the husband obtained an ex parts decree, non-applicant-wife filed an application under Order 9 Rule 13 of the Code for setting aside the ex parte decree for divorce along with the application under Section 5 of the Limitation Act. While the proceeding was pending, an application under Section 24 of the Act was filed

for grant of maintenance allowance and litigation expenses, the same was entertained by the learned Trial Judge and this Court refused to decline to interfere in the civil revision.

22. Mr. Aradhe has invited our attention to the decision in Bhuvaneshwar Prasad Shanna v. Dropta Bai 1963 MPLJ 346, wherein the learned Chief Justice expressed the opinion that the object of Section 24 is clearly to enable the indigent spouse, who has no independent income sufficient for her or his support and for meeting the necessary expenses of the proceeding, to conduct her or his defence in the proceeding. The basis of an order under Section 24 is that the spouse applying under Section 24 is without means. Thus, the emphasis was laid on the enabling facet of provision.

23. Mr. Aradhe has also submitted that certain High Courts have held the provision not to be mandatory. It is worth noting them. In the case of Leelawati v. Ram Sewak , it has been held as under:

The provisions of Section 23(ii) are not absolute. While imposing a duty on the Court to make every endeavour to bring about reconciliation between the parties, a discretion is left to the Court. The duty of the Court is qualified and conditional by the phrase "in every case...with the nature and circumstances of the case". A decree for restitution of conjugal rights is a command issued by the Court which imposes an obligation on the respondent spouse to the case in which the decree is passed, to go and live with the of her spouse and perform marital obligation and when a party bound by such a decree chooses not to perform his or her part of the obligation, it gives either party a right to apply for dissolution of marriage. In a situation like this it would be a rare case where any reconciliation between the parties can be brought about by the Court where a petition for divorce is pending.

24. In the case of Raj Rani v. Harbans Singh Chhabra , a Division Bench has expressed the view that even when no attempt has been made to bring about a reconciliation between the parties under Section 23(2) of the Act, a decree of judicial separation passed by the Court below would not become invalid inasmuch as endeavour can be made by the Appellate Court. Be it noted, Their Lordships accepted the view expressed in the case of Jivubai v. Ningappa Adriashappa Yadwad AIR 1963 Mysore 3.

25. Submission of Mr. Asati is that the wife can procrastinate the proceeding after obtaining interim maintenance and litigation expenses. Mr. Aradhe, learned friend of the Court would submit that such a facet cannot be taken aid of to interpret the statutory provision. The purpose of Section 24 as has been held by many Courts submits Mr. Aradhe, is to enable either of the spouses to put forth a defence. In the case of Dharmendra Kumar (supra), the Division Bench after referring to the various provisions in Paragraphs 7 to 9 expressed the view as under:

7. The scheme and the provisions of the Act would indicate that the dominant legislation purpose underlying the Act is to bring about certain desirable reforms in the Hindu Law relating to marriage. The provisions reflect the concern of the legislature to promote and preserve the institution of marriage and at the same time liberalise the scope for securing matrimonial reliefs. The legislature while providing for matrimonial reliefs, has taken care to ensure that the marital tie is not impulsive or indiscriminately severed. The Matrimonial Court has been invested with manifold powers, duties and functions which are necessary to effectuate the legislative purpose. The legislature has also shown concern to ensure that the forensic fight should be between equals since any fight between unequals is likely to lead to a distorted or unfair verdict. This is sought to be achieved by Section 24 providing for maintenance pendente lite and expenses of litigation.

8. The order which the Court passes under Section 24 is not an order granting relief in the matrimonial cause. It is an order incidental to the matrimonial cause. The order for permanent alimony and maintenance under Section 25, order for custody under Section 26, and for disposal under Section 27 are also not substantive orders in the matrimonial cause; they are incidental orders in the cause.

9. The right of a party which is effectuated by the Court under Section 24 cannot, except for serious and cogent reasons, be allowed to be frustrated. A proceeding under Section 24 is of a summary nature and the scope of the enquiry is limited. The end sought to be achieved is the removal of the disability of the party without sufficient income. The purpose of Section 24 will be frustrated by any unreasonable postponement of the decision party dragging on the reconciliation attempt. If the spouses are unequal in the economic sense, the inequality may itself stand in the way of reconciliation. Reconciliation shall also be based on mutuality, mutual respect and dignity. The party who has no adequate means may feel compelled to agree to a reconciliation which may not be based on mutual respect and dignity. The legislative purpose is not to compel the spouses to come together at any cost. Even to achieve such reconciliation, certain degree of balance between the parties at least in the economic sense is necessary.

26. Thus, the view expressed by the Division Bench deals with the basic facet of Section 24. Be it placed on record, the Division Bench has concurred with the view expressed by the Mysore, Allahabad and Madras High Courts.

27. Dwelling upon various aspects, we proceed to slate our conclusions as follows:

(i) Section 24 of the Act fundamentally deals with an ancillary or incidentally relief and is an enabling provision to empower cither of the spouses to put forth the defenses in the main proceeding.

(ii) Section 23(2) and Section 24 co-exist in harmony and in fact if the context and subject matter are appreciated in proper perspective, there is no anomaly in between the two provisions.

(iii) Section 23(2) is not mandatory and does not operate in absolute terms.

(iv) Any order passed without compliance under Section 23(2) as has been held in the case of Dharmendra Kumar (supra) would be an irregular and not in illegality.

(v) An order under Section 24 can always to be passed without taking steps for bringing out reconciliation under Section 23(2) of the Act for the timing to make efforts for reconciliation is in the discretion of the Court.

(vi) Grant of pendente lite maintenance under Section 24 of the Act is not to be construed in a narrow compass as the Court has jurisdiction to pass the order arises at the stage of institution of proceedings and continues till the proceeding is concluded.

(vii) The maintenance and the entitlement under Section 24 of the Act can be made available even in a proceeding pertaining to setting aside of an ex parte decree and restoration of the main suit.

(viii) The judgment delivered in the case of Kesav Rao (supra) does not lay down the correct law and any judgment following the said decision should be deemed not to have lay down the law correctly.

(ix) 'Any relief' that has been used in Section 23(2) would not cover an incidental and ancillary relief during the proceeding as that has to be construed in broader canvass and would

include only substantive relief and further if there is non compliance of the same, it would amount to an irregularity and not an illegality and such irregularity is rectifiable at the appellate stage and would not render the judgment or an order a nullity.

(x) As we have concurred with the view rendered in the case of Dharmendra Kumar (supra), there is no need to refer the matter to a Larger Bench.

27. Before we part with the case, we must record our unreserved appreciation for the assistance rendered by Mr. Alok Aradhe, learned amicus curiae.

28. Let the matter be placed before the learned Single Judge for disposal of the writ petition in accordance with law.

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PATEL DHARAMSHI PREMJI VS BAI SAKAR KANJI

Gujarat High Court

AIR 1968 Guj 150

Date of Judgment : 13th April, 1967
Equivalent citations: AIR 1968 Guj 150, (1967) GLR 888

Patel Dharamshi Premji
vs
Bai Sakar Kanji

Bench: Hon'ble Mr. Justice P Bhagwati, Hon'ble Mr. Justice A Nakshi

Sec. 25 of the Hindu Marriage Act 1955 - The question is whether a husband or wife can apply to the Court for permanent alimony under sec. 25 after the passing of a decree for divorce. --- in fixing the amount of permanent alimony the lower appellate Court was not entitled to take into consideration the amount of maintenance which would be necessary for the purpose of meeting the needs and requirements of the son and in doing so the lower appellate Court clearly took into account an extraneous or irrelevant factor. This is not to say that the respondent would not be entitled to claim maintenance for the minor son from the appellant but the needs and requirements of the son could not be taken into account in determining what should be the amount of permanent alimony to be awarded to the respondent.

JUDGMENT

Bhagwati, J.

(1) This appeal raises a short but interesting question of construction of Section 25 of the Hindu Marriage Act, 1955. The question is whether a husband or wife can apply to the Court for permanent alimony under Section 25 after the passing of a decree for divorce. There is a decision of Raju J in Gunvantray v. Bai Prabha, AIR 1963 Guj 242 where the view has been taken that such an application cannot be made as the decree for divorce puts an end to the relationship of husband and wife and thereafter an application made to the Court cannot be said to be an application by the husband or the wife as required by Section 25. The validity of this view is questioned in the present Second Appeal. The question raised is a pure question of law depending on the construction of Section 25, but it is necessary to state briefly a few facts giving rise to the appeals as they are relevant to the alternative contention urged on behalf of the appellant.

(2) The appellant and the respondent were married according to Hindu writs and one son was born of this marriage. The appellant and the respondent, however, soon fell out and the respondent left the appellant and went away to her father's house. The appellant thereupon filed a petition against the respondent under Section 9 for restitution of conjugal rights. The respondents resisted the petition on the ground that she was treated with cruelty when she was living with the appellant and she was, therefore, entitled to stay away from the appellant. The respondent, failed to establish cruelty by cogent evidence and a decree for restitution of conjugal rights was, therefore, passed against her by the Court on 28th February 1958. The respondent did not comply with the

decree for a period of two years and the result was a petition for divorce by the appellant against the respondent. There was little defence to this petition and a decree for divorce was ultimately passed in the petition on 23rd February 1961 dissolving the marriage between the appellant and the respondent. The respondent thereafter preferred Civil Miscellaneous Application No. 26 of 1961 under Section 25 claiming permanent alimony at the rate of Rs. 75 per month from the appellant. The application was opposed by the appellant and one of the grounds of opposition was that the application was not tenable as the respondent was the erring spouse and it was by reason of the refusal of the respondent to carry out the decree for restitution of conjugal rights that a decree for divorce had to be obtained against her. The trial Court in view of the express language of Section 25 rejected this ground and after considering all the facts and circumstances of the case awarded a sum of Rs. 20 per month as and by way of permanent alimony to the respondent. There were two appeals against this order, one by the appellant and the other by the respondent. The lower appellate Court dismissed the appeal, of the appellant and allowed the appeal of the respondent in part by increasing the amount of permanent alimony to Rs. 28 per month. The appellant thereupon preferred the present Second Appeal in this Court.

(3) Before we proceed to examined the merits of the appeal, it will be convenient to first dispose of the cross-objections filed on behalf of the respondent against the order of the lower appellate Court. The respondent claims by the cross-objections that a larger amount should have been allowed to her by way of permanent alimony. But, it is now well settled by a decision of this Court in Umiyaben v. Ambalal, (1965) 6 Guj LR 714 : (AIR 1966 Guj 139) that the right of second appeal conferred by Section 28 is limited to the grounds set out in section 100 of the Code of Civil Procedure and can, therefore, be exercised only on questions of law and not on questions of fact. What should be the quantum of the amount of permanent alimony on a consideration of the factors set out in Section 25 is essentially a question of fact and no Second Appeal can lie to challenge the determination of the amount of permanent alimony made by the lower appellate Court unless the complaint be that the lower appellate Court has failed to take into account any factors set out in Section 25 or taken into account any extraneous or irrelevant factors. The cross-objections do not allege any such defect in the determination of the lower appellate Court and they must, therefore, be rejected as incompetent.

(4) Turning to the appeal there were two contentions urged by Mr. Vakharia on behalf of the appellant in support of the appeal. Of the two contentions the first was a more serious one, supported as it was by the decision of Raju J. In AIR 1963 Guj 242 (supra). The contention was that the application for permanent alimony made by the respondent was not maintainable underSection 25 as it was made after the passing of the decree for divorce so that at the date of the application the respondent was not the wife. The contention proceeded on the assumption that the Court can make an order for permanent alimony under Section 25 only on the application of a person who is a husband and wife at the date of the application and since the relationship of husband and wife is severed by a decree for divorce, no application for permanent alimony can be made under Section 25 after passing of a decree for divorce. This assumption is wholly unwarranted it is based on a misconstruction of Section 25. Section 25 as its marginal note indicates alimony and maintenance by one spouse to the other and it says:

"25. (1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains

unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the Court to be just, and any such payment may be secured. If necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary modify or rescind any such order in such manner as the court may deem just (3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste or, if such party is the husband, that he had sexual intercourse with any woman outside wedlock, it shall rescind the order"

The order contemplated by the Section can be made by any Court exercising jurisdiction under the Act either "at the time of passing any decree or at any time subsequent thereto." It is now settled by the decision of this Court in Harilal v. Lilavati, AIR 1961 Guj 202 that the words " any decree" are sufficiently wide to include any decree passed by the Court under any of the earlier provisions of the Act and that every comprehend "any decree for restitution of conjugal rights, judicial separation, dissolution marriage by divorce or annulment of marriage on the ground that it was void or voidable." In the course of the arguments in this case an attempt was made to limit the applicability of Section 25 to cases where a decree for divorce or annulment of marriage is passed by the Court by relying on the words "while the applicant remains unmarried", but the Division Bench held that these words did not have the effect of limiting the applicability of Section. The Section, according to the Division Bench, applied in all cases whenever a decree was passed under any of the earlier provisions of the Act, the operation of the words "while the applicant remains unmarried" being confined only in those cases where a party was in a position to contract a marriage by reason of the marriage bond being dissolved or declared null and void by the Court. The words "any decree" therefore, clearly and indubitably apply to a decree for divorce passed by the Court in the exercise of jurisdiction under the Act. Now as the exercising jurisdiction under the Act can make an order under Section 25 at the time of passing any decree or at any time subsequent thereto and, therefore, it would seem that the Court exercising jurisdiction in relation to a petition for divorce can make an order under the Section either at the time of passing the decree for divorce or at anytime subsequent to the passing of the decree for divorce. The plain indisputable effect of the words "at the time of passing any decree or at any time subsequent thereto" is that even after the passing of the decree or divorce, the Court can make an order under Section 25. But, contended Mr. Vakharia, this effect is to obliterated by the following words, namely, "on application made to it for the purpose by either the wife or the husband." These words, according to Mr. Vakharia, impose a limitation o the power of the Court to make an order for permanent alimony by providing that such an order can be made only on an application made by the husband or the wife. The application by the husband or the wife, said Mr. Vakharia, is a condition precedent to the exercise of the jurisdiction of the Court to make an order for permanent alimony and the party making the application must, therefore, be the husband or the wife at the date of the application in former to invest the Court with jurisdiction to make the order. Where an application is made after the passing of a decree divorce, the party making the application, contended Mr. Vakharia, would no longer be a husband or wife and, therefore, no application for permanent alimony can be maintained under Section 25 after the

passing of decree for divorce. This contention derives support from the decision of Raju J. In AIR 1963 Guj 242 (supra), but we do not think this contention is well-founded. It rests on too literal an emphasis on the words "wife" and "husband" and ignores the context in which these words are used and the object and purpose of the enactment of the section. If the Section is read as a whole keeping in mind the reason for the enactment of the provision and the object and purpose intended to be effectuated, the conclusion in our view, is inescapable that an application for permanent alimony can be made even after the passing of a decree for divorce. The section does not required that the party making the application must be husband or wife at the date of the application. The words "wife" and "husband" are used to denote the parties in the main proceeding in which the decree is passed by the Court. Our reasons for saying so are as follows.

(5) Though Section 25 does not use the expression "permanent alimony" in any part of the enactment, the marginal note to the section clearly shows that the Section is intended to deal with permanent alimony. The concept of "permanent alimony" is not an indigenous concept grown on our soil as we did not have any law of divorce amongst Hindu in this country. But when the Act was enacted providing inter alia for divorce amongst Hindus, the concept of "permanent alimony" was borrowed by the draftsmen of the Act from England. The history of the development of the law relating to permanent alimony in England so far as it is necessary for the purpose of deciding the present question may be found in the following passage in the book of Sir Dinshah Mulla on Hindu Law. Thirteenth Edition at page 735:

"Permanent alimony is the expression used under English law in the context of provision ordered to be made by the Court for a wife on her petition for judicial separation being granted. Behind the relevant statutory enactments in England is a historic development of law. Before the first divorce Act in England a wife could only obtain from the Ecclesiastical Court divorce a monsa at thiro (judicial separation) and the allowance allotted to her was named permanent alimony which was as a general rule one-third of the husband's Income. The operation of the rule was extended and the same principle was applied in cases decided under the successive Divorce acts in England when relief by way of dissolution of marriage by divorce was granted to the wife. At one stage the view was taken that the wife who claimed maintenance after a decree of divorce in her favour would have pecuniary interest in seeking such relief and that would not accord with the policy of law. That view was discountenanced and it was ruled that the principles on which the Ecclesiastical Courts awarded permanent alimony in case of judicial separation should be applicable to cases where relief by way of divorce or nullity of marriage was granted although in cases under the latter category she ceased to be the wife or was declared not to have been the wife of the other party and relinquished her character as wife and the name of the husband."

In England a wife is entitled to a permanent alimony from the husband where a decree is passed granting relief by way of judicial separation, divorce or nullity of marriage. Such a decree may be passed in favour of the husband or the wife. That is not material to the question of permanent alimony, whether the decree be passed in favour of the husband or the wife the wife can ask for permanent alimony from the husband. The reason for awarding permanent alimony to the wife seems to be that if the marriage bond which was at one time regarded as indissoluble is to be allowed to be sere in the larger interests of society, the same considerations of public interest and social welfare also required that the wife should not be thrown on the street but should be provided for in order that she may not be compelled to adopt a disreputable way of life. The provision for permanent alimony is, therefore, really incidental to the granting of a decree

or judicial separation, divorce or annulment of marriage and that also appears to be clearly the position if we look at the language of Section 25. Section 25 contemplates the making of a provision for permanent alimony at the time of passing the decree or at anytime subsequent thereto and it is, therefore, evident that the provision for permanent alimony is something which follows upon the decree granting substantive relief and is incidental to it. It was also so observed by a S. T. Desai C J., as he then was and my brother Bakshi J. In a decision given on 28th November 1960 in First Appeal No. 178 of 1960 (Guj) where it was said:

"We are of the opinion that the rule laid down in Section 25 relates only to ancillary relief which is incidental to substantive relief that ma be granted by the Court, though of course the incidental relief may be given to either party".

The last words of these observations point out what is peculiar feature introduced in the law of divorce by Section 25. In England, as pointed out above, the right to claim permanent alimony is conferred only on the wife but under Section 25 either spouse is entitled to claim permanent alimony from the other. But that apart, what is significant to note is that the relief of permanent alimony is a relief incidental to the granting of the substantive relief by the Court in the main proceeding. It is an incidental relief claimed in the main proceeding, though an application is necessary for claiming it. The application is an application, in the main proceeding for claiming an incidental relief consequent upon the granting of the substantive relief by the Court. This is abundantly clear on principle but there is also authority in support of it. Dealing with a case under S. 37 of the Divorce Act which contains a provision for making of an order for permanent alimony, Sir John Beaumont observed in J. G. Khambatta v. M.C. Khambatta, AIR 1941 Bombay 17;

"Under Section 37, Divorce Act, the Court can make an order for permanent alimony on making the decree absolute, although usually the order is made after the date. But if the circumstances justify it, the Court can make the order at once on making the decree absolute, and it is quite wrong to suppose that a petition presented afterwards is not a petition in the suit."

If the question of construction of Section 25 is approached in the context of this background, much of the difficulty which appears to beset the path of construction would disappear. Where the Court is exercising jurisdiction under the Act in relation to a proceeding before it one party would be the husband and the other party would be the wife and either the husband or wife would be claiming substantive relief against the other spouse. When, therefore, the Legislature provided in Section 25 for the making of an application for the incidental relief of permanent alimony, the Legislature spoke of such application as an application to be made by the wife or the husband. The words "wife" and "husband" were used by the Legislature for he purpose of describing the parties in the main proceeding. It was by reference to the position occupied by the parties in the main proceeding that the Legislature described them as "wife" and "husband". The nomenclature which described them in the main proceeding was used by the Legislature when providing for making an application for interim relief in the main proceeding. It is not possible to believe that the Legislature could have ever intended that the relationship of husband and wife should be subsisting between the parties at the date when the application for permanent alimony is made. That would be putting a too narrow and constricted interpretation on the words used by the Legislature. The legislative intent is sufficiently clear from the language used in Section 25sub-section (1) but even if there were any doubt about it, it is completely laid at rest by the language of the provision enacted in Section 25 sub-section (3). That sub-section lays down the

circumstances in which an order for permanent alimony already made can be rescinded and says that if the Court is satisfied that the party in whose favour an order has been made under Section 25 has remarried or, if such party is the wife that she has not remained chaste, or if such party is the husband, that he has had sexual intercourse, with any woman outside wedlock, it shall rescind the order. The words "if such party is the wife" and similarly the words "if such party is the husband" when amplified would read 'if the party in whose favour the order is made is the husband." These words, in the context of the statutory provision enacted in sub-section clearly show that the words 'wife" and "husband" are used as descriptive of the parties in the main proceeding and they are not intended to convey that the party in whose favour the order is made must be the wife or the husband at the date when the condition for rescission of the order is fulfilled for at any rate when the order is made. Such a construction would be absurd and the entire Section would be rendered meaningless on such a construction. There is, therefore, no doubt in our minds that when Section 25 sub-section (1) talks of an application by the wife or the husband, it does not mean that the party making the application must be the wife or the husband at the date of the making of the application. All that the sub-section requires is that an application must be made by the wife or the husband who is a party to the main proceeding if she or he wants the incidental relief of permanent alimony and such an application may be made in the main proceeding either before or at the time of passing the decree granting substantive relief or at any time subsequent to the passing of such decree.

(6) It is said that the consequences of a suggested construction do not alter the meaning of the statute but they certainly held to fix its meaning and let us, therefore, contemplate the consequences of the construction suggested on behalf of the appellant. If that construction were correct, the result would be that the Court would have power to grant permanent alimony if the husband or the wife makes an application a few minutes prior to the passing of the decree of divorce or annulment of marriage and such an order would grant permanent alimony to the husband or the wife which would continue right from the date of the decree upto the date the husband or the wife dies or remarries but if the husband or the wife makes an application a few minutes after the passing of the decree, the Court would have no power to make an order for permanent alimony. It is difficult to imagine as to why Legislature should have considered it a matter of such importance that an application for permanent alimony should be made prior to the passing of the decree for divorce or annulment of the marriage so that an application should not be maintainable after the passing of the decree. The relief of permanent alimony being an incidental relief, it should not be a matter of any consequence whether the application for it is made prior to the passing of the decree or subsequent to it. As a matter of fact the relief of permanent alimony being a relief incidental to the granting of substantive relief, it would be more consonant with reason that in application or such incidental relief should be maintainable after the passing of a decree granting the substantive relief. In England it has always been the law that an application for permanent alimony can be made after the passing of a decree for divorce or annulment of marriage. Section 19 of the Matrimonial Causes Act, 1950, contains an express provision saying that an order granting permanent alimony may be made by the Court "on pronouncing a decree nisi for divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute." These words which we have quoted here were not in the corresponding Section 190 (1) of the Judicature (Consolidation) Act, 1925, which was the previous law on the subject but even so the Courts had consistently taken the view that an application for permanent alimony can be made by a party subsequent to the passing of the

decree for divorce or annulment of the marriage and on such application the Court can make an order granting permanent alimony. When the Legislature imported the concept of permanent alimony from England and actually extended the scope and ambit of the provision relating to permanent alimony be providing, unlike England, that even a husband should be eligible for receiving, permanent alimony, it would be extremely difficult for us to believe that the Legislature intended to take away the right to apply for permanent alimony after the passing of the decree for divorce or annulment of marriage which the wife possessed under the English law. As a matter of fact when we turn to Section 37 of the Special Marriage Act, 1954, we find that even that Section contemplates making of an application by the husband or the wife after the passing of the decree for divorce or annulment of marriage. There is therefore, no reason why we should place a narrow and limited construction on the words used in Section 25 by emphasising unduly and without reference to the context the words "husband" and "wife" used in the Section. We are, therefore, of the view that the application by the respondent for permanent alimony under Section 25 was maintainable notwithstanding the fact that it was made after the passing of the decree for divorce.

(7) That takes us to me next contention urged by Mr. Vakharia on behalf of the appellant. That contention is directed against the merits of the order pased by the lower appellate Court fixing the amount of permanent alimony at Rs. 28 per month. There were two limbs of the contention: one was that the lower appellate Court ought not to have awarded any permanent alimony to the respondent since the respondent was the erring spouse and it was by reason of the refusal of the respondent to comply with the decree for restitution of conjugal rights that the appellant was constrained to obtain a decree for divorce against her and the second was that in even the lower appellate Court was in error in increasing the amount of permanent alimony from Rs. 20/- per month to Rs. 28 per month by taking into account the needs and requirements of the son. The first limb of the contention is clearly unsustainable since it is now well-settled that even an erring spouse can be awarded permanent alimony when a decree for judicial separation or divorce is passed against her. There is no rule which says that there a decree for judicial separation or divorce is passed against a wife on the ground that she is guilty of a matrimonial offence. She should not be entitled to receive any permanent alimony from the husband. In England in Sydenham v. Sydenham and Illingworth, (1949) 2 All ER 196, speaking of the English statute, Denning, L. J. said sufficiently clearly so as to leave no scope for doubt:--

"There is nothing in the statute to say that a wife against whom a decree has been made cannot be awarded maintenance, and there is nothing it about discretion being exercised in favour of one side for the other or about a compassionate allowance. All it says it that on a decree of divorce the Court may award maintenance to the wife. This includes a guilty wife as well as an innocent one, but in awarding maintenance the Court must have regard of course, to the conduct of the parties. . . . . ' These observation of Denning, L. J. Were quoted with approval by Hidson, L. J. In Clear v. Clear, (1958) 2 All ER 353, and after quoting them, the learned Lord Justice said:-

"As it stands now, the record of the court shows that the wife has committed adultery. It shows that the she has by that action at any rate forfeited her common Law right to be maintained, becuase her adultery was not condoned or connived at, and that she could not get any maintenance in a court of summary jurisdiction. It is only by virtue of divorce legislation that she is enabled to get maintenance at all, and in such cases the court will consider whether she ought to have maintenance."

What has been said in these passages in regard to the English statute applies with equal force of our Act. On a parity of reasoning we hold that under Section 25 permanent alimony can be granted even to an erring spouse and the mere fact that the respondent did not comply with the decree for restitution of conjugal rights and that was the cause for passing of a decree against her cannot by itself disentitle her to claim permanent alimony under the Section. The fact that the she was the guilty spouse, guilty in the sense that she did not comply with the decree for restitution of conjugal rights would certainly be a relevant factor to be taken into account in assessing the conduct of the parties but that, we find from the judgment of the lower appellate Court, has been taken into account in determining the amount of permanent alimony. The lower appellate Court, however, seems to have committed an error in taking into account the needs and requirements of the son in determining the amount of permanent alimony to be awarded to the respondent. We do not think that in fixing the amount of permanent alimony the lower appellate Court was entitled to take into consideration the amount of maintenance which would be necessary for the purpose of meeting the needs and requirements of the son and in doing so, the lower appellate Court clearly took into account an extraneous or irrelevant factor. This is not to say that the respondent would not be entitled to claim maintenance for the minor son from the appellant but the needs and requirements of the son could not be taken into account of permanent alimony to be awarded to the respondent. The order of the lower appellate Court increasing the amount of permanent alimony from Rs. 20 to Rs. 28 per month was, therefore, vitiated by an error of law. The order of the lower appellate Court would consequently have to be set aside and the order of the trial Court restored.

(8) We, therefore, allow the appeal in part and modify the order of the lower appellate Court by directing that permanent alimony be awarded to the respondent at the rate of Rupees 20 per month instead of Rs. 28 per month. The appellant will pay the costs of the appeal to the respondent. The Cross-objections will be dismissed. There will be no order as to costs of the cross-objections.

(9) Appeal partly allowed; cross-objection dismissed.

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SANJAY KUMAR VS BHATERI

Punjab-Haryana High Court

2013 Supreme (P & H) 339

Date of Judgment : 3rd April, 2013
FAO No. M- 187 of 2012

Sanjay Kumar ---Appellant
versus
Bhateri ---Respondent

Bench: Hon'ble Mr. Justice Rajive Bhalla, Hon'ble Mrs. Justice Rekha Mittal

Hindu Marriage Act, 1955, Ss.24 & 9—Maintenance—Decree of Restitution of conjugal rights—Mere grant of a decree for restitution of conjugal rights in favour of a husband and disobedience by wife cannot create a legal bar to claim maintenance by a destitute wife who has no income to maintain herself.

Disobedience of a decree for restitution of conjugal rights is not a ground in terms of Section 24 of the HMA to deny a claim for maintenance to a party who otherwise satisfy the ingredients of the said provision.

Present: Mr. A.S.Syan, Advocate for the appellant

Mr. Ashish Yadav, Advocate, for the respondent.

JUDGMENT

REKHA MITTAL, J.

The present appeal lays challenge to the judgment and decree dated 11.2.2012 passed by the Additional District Judge, Narnaul, whereby the petition filed by respondent-wife, Bhateri for dissolution of marriage of the parties under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as "the HMA") has been allowed and the marriage of the parties is dissolved by a decree of divorce.

The facts relevant for disposal of the present appeal are that the parties entered into wedlock on 1.5.2001. As per averments of the petitioner-wife (respondent herein), she stayed in her matrimonial home for two days after marriage but the marriage was not consummated. She was maltreated by her husband and he never shared bed with her. She came back to her parental house and narrated her story. She was sent back to the matrimonial home after persuasion that the things may improve. During her stay in the matrimonial house, the respondent (appellant herein) never treated her as a wife. The appellant had not been coming to the house for many nights and if he came back to the house at night time, he came in a drunken condition and abused her. All efforts made by the respondent to make him understand, proved futile as he proclaimed that he had many girls in his life and in case the respondent wanted, she would be sent to his friends for sexual relationship. The respondent, on enquiry learnt that the appellant is a man of loose character and indulges in bad habits of drinking alcohol, consuming intoxicants and roams around here and there. She was given beatings by the appellant after consuming alcohol. She stayed in the matrimonial home for more than four years but the appellant did not mend

his ways or cohabit with the respondent. She was turned out of the matrimonial home in June 2005 and since then she is living at her parental place.

The appellant filed reply, controverting the allegations of the petition and in turn, raised the plea that the respondent was given proper treatment during her stay with him. She told the appellant that she did not want to stay in the village and they should shift to a city. As he was unemployed and did not have any experience of city life, he could not accede to the illegal demand of the respondent. The respondent left the matrimonial home without any valid reason and took away jewellry and other articles of her Istridhan. She refused to come back to the matrimonial home despite his best efforts. He filed a petition under Section 9 of the HMA for restitution of conjugal rights which was decided in his favour without any contest by the respondent-wife but she did not return. All other material averments of the petition have been denied with a prayer for dismissal of the petition with costs.

The controversy between the parties led to framing of following issues by the learned trial Court:-

1. Whether the petitioner is entitled to get dissolved her marriage by way of a decree of divorce under Section 13 (1) A of Hindu Marriage Act on the grounds as mentioned in the petition? OPP.
2. Whether the petition is not maintainable? OPR
3. Whether the petitioner has no cause of action and locus standi to file and maintain the present petition? OPR
4. Relief The petitioner herself appeared in the witness box and examined Ramchander PW-2 and Raghubir Singh Lambardar PW-3.

The appellant-husband did not lead any evidence as his defence was struck off for want of payment of interim maintenance allowed to the respondent-wife under Section 24 of the HMA.

Counsel for the appellant submits that the respondent-wife has raised vague and general allegations which do not constitute cruelty of the kind and severity as to become basis for grant of divorce. It is further argued that the appellant wanted to live with the respondent but she left the matrimonial home as she could not adjust there being well educated and found it difficult to stay in a village. It is further argued that the appellant filed a petition for restitution of conjugal rights which was allowed by the Court but even thereafter the respondent did not resume conjugal rights. The respondent herself is a guilty spouse for depriving the appellant of his conjugal rights, therefore, the respondent cannot be allowed to take advantage of her own wrong. The last submission made by counsel is that as the respondent did not resume cohabitation after the decree of conjugal rights, she is not entitled to get any maintenance during her stay away from the matrimonial home and the order passed by the trial Court granting maintenance allowance and striking off defence for failure to pay maintenance, are illegal and liable to be set aside and the matter needs adjudication afresh after providing an opportunity to the appellant, to lead evidence.

Counsel for the respondent submits that the appellant has not challenged the version of the respondent-wife, reiterated in her affidavit filed by way of examination-in-chief, which amounts to an admission by the appellant. It is further argued that the appellant husband is guilty of causing mental cruelty to the respondent-wife who, failed to consummate the marriage and to permit the respondent-wife to enjoy conjugal rights. It is further argued that the learned trial Court, on a correct and detailed appreciation of the pleadings and evidence adduced has rightly held in favour of the respondent thus, the judgment and decree passed by the trial Court is liable to be affirmed.

We have heard counsel for the parties and perused the records of the trial Court.

Before we proceed to appreciate the merits of the case, it is necessary to recapitulate the legal position in respect of, what type of cruelty can form the basis for dissolution of marriage. Cruelty and the degree of cruelty necessary to constitute a matrimonial offence has not been defined under the HMA, may be for the reason that no comprehensive definition may cover all cases. However, there is no quarrel with the settled position of law that cruelty includes both physical and mental. Equally true is that unlike in the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is a matter of inference to be drawn from the cumulative effect of facts and circumstances of each case and not from an isolated instance. However, it can be said as a principle of law that cruelty contemplated is conduct of such type that the aggrieved spouse cannot reasonably be expected to live with the other spouse. Cruelty may consist of a single act or conduct of the guilty spouse or it may consist of a series of acts. The existence of cruelty depends not on the magnitude of acts or conduct but on consequence they produce on the other party. Theharm apprehended may be mental suffering for pain of mind may be more severe than bodily pain.

On an analysis of the pleadings, the respondent staked her claim for seeking divorce inter alia alleging, (i) the appellant-husband did not develop/maintain physical relationship and the marriage was not consummated, (ii) she was subject to maltreatment and beatings as and when the husband came back to the house at night in a drunken condition.

The respondent, in her statement on oath, asserted her plea set out in the petition by way of an affidavit tendered in chief examination. She was subject to cross examination by opposite counsel. However, during her cross examination, there is no challenge to her testimony to the effect that there was no sexual relationship between the parties and their marriage remained unconsummated during her stay in the matrimonial home for a period of about four years. The inability and failure of the appellant to assail her version in this regard is deemed to be an admission of the appellant.

A normal and healthy sexual relation is one of the basic ingredients of a happy and harmonious marriage. Willful or intentional denial of sexual relation by a spouse, in our considered opinion, amounts to mental cruelty, particularly when parties are young and newly married. As the appellant-husband did not allow the respondent- wife to enjoy her conjugal rights and satisfy her biological need, the respondent-wife has suffered mental trauma which constitutes mental cruelty and can form the basis for divorce.

It has been proved on record that two sisters of the respondent, younger to her, namely Kiran and Saroj are married to real brothers of the appellant and they are leading a happy married life. It is difficult to believe that had the respondent been happy, there could be any reason for her to complain much less to seek divorce knowing fully well that her other sisters are enjoying their matrimony.

The appellant-husband neither could challenge the correctness of the averments brought forth by the respondent-wife nor lead any evidence in affirmative to controvert the allegations of the petition or testimony of the respondent. The defence of the appellant was struck off by the trial Court as he failed to pay maintenance allowance in compliance with an order passed under Section 24 of the HMA. There is no material on record which can create even a slightest doubt in the version set out by the respondent or to impeach her credibility and veracity. The duly sworn testimony of the respondent remains altogether unchallenged and unrebutted. Her statement finds corroboration from the witnesses examined by her and even their testimony, on material points, has not been challenged during cross examination. The learned trial Court has rightly relied upon the evidence adduced by the

respondent to record a finding that the appellant is a guilty spouse for subjecting his wife to mental cruelty which can validly constitute a ground for divorce.

To be fair, counsel for the appellant has made a faint attempt to argue that as the appellant-husband obtained a decree of restitution of conjugal rights and the respondent-wife did not resume cohabitation after the decree, she was not entitled to get any maintenance allowance, therefore, the order with regard to payment of maintenance is null and void and the order striking off defence of the appellant on account of his failure to pay maintenance allowance, is liable to be set aside and thereafter the case is liable to be remanded to the trial Court for adjudication afresh after providing an opportunity to lead evidence by the appellant.

The respondent during her examination has admitted that the appellant-husband filed a petition seeking restitution of conjugal rights and the same was allowed ex parte on 28.4.2011. A photo copy of order dated 28.4.2011 is mark "A". There is neither any plea nor any evidence on record to prove that the appellant ever informed his wife of the ex parte decree much less called upon her to resume cohabitation. This apart, the appellant-husband, did not challenge the order, allowing the application of the respondent granting her maintenance pendente lite. As the husband did not challenge the order of maintenance allowed to his wife, he cannot be heard to say that either he was not liable to pay maintenance or his defence was wrongly struck off. The appellant-husband also did not challenge the order striking off his defence. Even otherwise, the mere grant of a decree for restitution of conjugal rights in favour of a husband cannot create a legal bar to claim maintenance by a destitute wife who has no income to maintain herself. We would hasten to add that disobedience of a decree for restitution of conjugal rights is not a ground in terms of Section 24 of the HMA to deny a claim for maintenance to a party who otherwise satisfy the ingredients of the said provision. Reference in this context can be made to a judgment of this Court in Shyama vs. Sanjay Chopra 2000(1) RCR (Civil) 126. In this view of the matter, the contention of counsel is untenable. We find no reason to interfere in the judgment and decree passed by the trial Court.

In view of what has been discussed hereinabove, finding no merit in this appeal, the same is accordingly dismissed. No order as to costs.

(REKHA MITTAL) JUDGE (RAJIVE BHALLA) JUDGE

April 3rd, 2013 PARAMJIT

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VIJAY KUMAR VS STATE OF PUNJAB AND OTHERS

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

2013 Supreme (P & H) 303

LPA No.2149 of 2011 (O&M)
Decided on 22 March, 2013

Vijay Kumar ...Appellant
Versus
State of Punjab and others ...Respondents

Bench: Hon'ble Mr. Justice A.K.Sikri, Chief Justice & Hon'ble Mr. Justice Rakesh Kumar Jain

Hindu Marriage Act, 1955, S.24--Maintenance--Criminal Procedure Code, 1973, S.125.--Benevolent order passsed in the spirit for the welfere of wife and children cannot be quashed on the ground of absence of express rule. Employer of the husband, (Director General of Police) passed an order that 50% of the salary of the employee would be deducted and would be given to his destitute wife and two children--Contention that there are no rules to pass such an order, not relied on. Held; Having regard to spirit behind such provisions, there is hardly any ground to quash such a benevolent order--Husband has to take care only of his father where as wife has to take of herself and her two children--Order upheld.

Present: Mr. Manu K. Bhandari, Advocate, for the appellant.

Mr. P.S.Bajwa, Addl. A.G., Punjab.

Mr. Ramandeep Partap Singh, Advocate, for respondent No.5.

JUDGMENT

A.K.Sikri, C.J. (Oral) The destitute wife of the appellant herein, who is taking care of 2 minor school going children as well, made a request to the respondents authorities, where the appellant is employed, to direct the appellant to pay maintenance from the salary drawn by the appellant. The Director General of Police, Punjab, passed an order directing payment of 50% salary of the appellant directly to his wife and two minor school going children. The appellant challenged this order by filing writ petition which is disposed of by the learned Single Judge, with the following observations:-

"[3] The social security concept envisaged by the Legislature through Sections 24 of the Hindu Marriage Act, 1955 or 125 of the Code of Criminal Procedure, are LPA No.2149 of 2011 (O&M) [2] ***** not only for the sustenance of a victim-spouse but also to boost the morale of such victim with enough strength to fight the unequal legal battle waged by the dominating spouse. These provisions are like 'life-saving drug(s)' for providing urgent and timely assistance and the legislative intentment behind these provisions cannot be derailed by giving them effect as a 'posthumous' award on the victim. [4] It would be useful at this stage to reproduce a part of the complaint made by respondent No.5 (wife) against the petitioner which reads as follows:-

"....I again appeared before the SSP Bhullar Sahab on 26th and I told sir that he had asked PPS Varinder Pal Singh, who had further deputed the SHO Kharar to take action but the position has remained

same. In the month of May, I again appeared before SSP Sahab. Sir, I and my children have not been given justice and we are penniless. I am taking ration from my neighbours in order to survive. Sir, I am an diabetic and on every day, two injections are given to me...."

(emphasis applied) [5] The petitioner has made selective disclosures and has not averred as to whether or not there exists an order of a Court of competent jurisdiction granting interim or final maintenance to his wife and children or did he ever pay even a penny to them? It appears that when the petitioner brought his wife and children virtually to the brink of starvation to compel her to come to terms like grant of divorce and the subordinate courts as well did not come to her rescue that the hapless wife and children knocked at the doors of the State Authorities. The real question to be determined in these proceedings is: was it not the duty of a welfare State and its authorities to resort to the remedial means to help the victims.

[6] Having regard to all the attending facts and LPA No.2149 of 2011 (O&M) [3] ***** circumstances, I am of the considered view that wherever an alleged victimizer ex-facie holds a dominating position and the justice delivery system fails to provide timely assistance, the State authorities are equally obligated in deference to their commitment contained in Chapter IV-A of the Constitution to provide adhoc or interim measures of sustenance to the victim(s) subject to the approval of such action by the Court of Competent jurisdiction. [7] The survival of the petitioner's wife and minor children, therefore, could not have been put to stake on the hyper technical plea that they must get an 'order of maintenance' from the Court of law. The petitioner's wife and their minor children are entitled to be maintained well even if allegations of 'cruelty' or 'desertion' are proved and a decree of divorce is passed in petitioner's favour. The school going minor children need not await a judicial verdict in this regard. The impugned order dated 4.6.2010 being an interim measure to provide social security to the petitioner's wife and their minor children, thus, calls for no interference and that too in exercise of discriminatory jurisdiction under Article 226 of the Constitution.

[8] There is no compulsion for a writ Court to set aside every illegal action unless it is found to be palpably violative of the Constitutional provisions. A writ Court can, in the light of the peculiar facts and circumstances of a case, can appropriately mould the relief. The impugned order though lacks procedural modalities yet has the back up of substantive law. It is also rescued by the expanded meaning given to Article 21 of the Constitution. It holds the pitch on equitable considerations as well. Why then a writ Court guided by equitable considerations set aside the same? The writ petition is accordingly dismissed. [9] Invoking the extra-ordinary jurisdiction, the Additional District Judge, SAS Nagar Mohali, before whom the divorce petition is pending, is directed to suo-moto LPA No.2149 of 2011 (O&M) [4] ***** and/or on an application by the petitioner's wife to determine the interim alimony which shall not be less than the aid given to her under the impugned order. The learned Court, in that event, is further directed to adjust the amount deducted in terms of the order dated 4.6.2010 passed by the Director General of Police, Punjab towards interim maintenance determined under Section 24 of the Hindu Marriage Act, till the decision of the divorce petition. This, however, shall not preclude the learned Additional District Judge to enhance the interim maintenance if the petitioner's wife and their minor children are entitled to so. Similarly, after the decision of the divorce petition, the order dated 4.6.2010 passed by the Director General of Police, Punjab, shall be treated as a part of the order passed by the Judicial Magistrate under Section 125 of the Code of Criminal Procedure or of the District judge under Section 25 of the Hindu Marriage Act, 1955. [10] Disposed of accordingly."

The counsel for the appellant had argued before the learned Single Judge, which is the submission before us as well, that there are no Rules authorizing the Director General of Police to pass such an

order. This contention is brushed aside by the learned Single Judge observing that the social security concept envisaged by the Legislature through Sections 24 of the Hindu Marriage Act, 1955 or 125 of the Code of Criminal Procedure, are not only for the sustenance of a victim-spouse but also to boost the morale of such victim with enough strength to fight the unequal legal battle waged by the dominating spouse.

Having regard to the spirit behind the aforesaid provisions, once such an order is passed by the Director General of Police providing immediate sustenance to the destitute wife and the 2 minor children, the LPA No.2149 of 2011 (O&M) [5] ***** learned Single Judge rightly refused to interfere with the same. The remedy under Article 226 of the Constitution of India is discretionary in nature. There is hardly any ground to exercise that discretion in favour of the appellant and quash such a benevolent order which was passed by the Director General of Police in order to do substantial justice in the matter.

It is also a matter of record that the other member in the family of the appellant is his father who is residing with the appellant and is being maintained by him. As against two persons, namely, the appellant and his father, the maintenance sought by the wife is for herself and two minor children, i.e. for 3 persons. These two minor children are school going children as well and, therefore, wife has to incur expenditure on the education of these children as well. Taking into account the totality of circumstances, direction of making 50% payment of the salary to the appellant's wife and two minor school going children is perfectly justified. On the basis of aforesaid admitted position appearing on record, this is a matter which hardly needs adjudication to find out the quantum of maintenance which is to be provided to the appellant's wife and two minor school going children.

At this stage, learned counsel for the appellant also submits that the deduction of 50% payment, which is made from the appellant's salary for payment of amount to the appellant's wife and his two minor school going children, is 50% of the gross salary drawn by the appellant and not 50% of the net salary.

In order to find out the impact thereof, we had directed the official respondents to place on record the salary sheet of the appellant.

The official respondents has produced the same. As per the pay slip of the appellant for the month of January 2012, the total gross salary of the appellant is `34,375/-. Out of this, certain statutory deductions are made. The appellant is also contributing a sum of `2,000/- towards GPF which amount will ultimately go to the appellant. However, from the salary, income tax is also being deducted. That amount should be adjusted while calculating 50% of the amount payable to the appellant's wife.

We, thus, direct the official respondents to deduct amount of income tax paid by the appellant from the total salary drawn and the figure which would arrive at after deducting the income tax, 50% thereof shall be paid to the appellant's wife and his two minor school going children.

Subject to this clarification, this appeal is dismissed.

(A.K.Sikri) Chief Justice
(Rakesh Kumar Jain) Judge

March 22, 2013

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SMT. YAMUNABAI ANANTRAO ADHAV VERSUS ANANTRAO SHIVRAM ADHAV AND OTHERS

Bombay High Court

1983 CrLJ 259; 1982 MhLJ 871; 1982 Supreme (Mah) 136;

Equivalent citations: (1982) 84 BOMLR 298
Decided on 22 April, 1982
Bench: Hon'ble Mr. Justice B Gadgil, Hon'ble Mr. Justice D Rege, Hon'ble Mr. Justice M Chandurkar

Criminal Procedure Code (2 of 1974), S. 125 and Hindu Marriage Act (22 of 1955), Ss. 5(1)(i) and 11 — Woman entering into a form of marriage with person who already has a wife living — Such woman by entering into a form of marriage which is void is not a wife contemplated by section 125 — Consequently maintenance cannot be claimed by her under section 125.

JUDGMENT

Rege, J.

1. This Criminal Revision Application has come up before this Full Bench on a Reference by the Division Bench (Dharmadhikari and Puranik, JJ.) since on the question involved in this application, it disagreed with the view taken by this Court in its decision by earlier Division Bench (Shah and Kanade, JJ.) in the case of Bajirao v. Tolanbai (1979 Mah LJ 693) : (1980 Cri LJ 473) and thought the same required reconsideration.

2. The question involved, shortly, was :- Whether a Hindu woman, whose marriage was null and void under section 11 of the Hindu Marriage Act, 1955, by reason of contravention of Section 5(i)of the said Act, viz. the person with whom she had undergone a marriage had a wife living at the time of the said marriage, was entitled to claim maintenance under section 125 of Code of Criminal Procedure from such a person on the basis that she was his wife.

3. Few basic facts, not in dispute are :- The marriage of the petitioner - Yamunabai - with the respondent No. 1 was performed on 16-6-1974 after undergoing necessary rites under the Hindu law, which was the personal law of the parties. The said marriage was also registered as required under the Hindu Marriage Act, 1955. However, at the time when the said marriage was performed, respondent's first wife Lilabai was alive and the said marriage between them was subsisting. The petitioner stayed with the respondent No. 1 for a week and thereafter stayed at 1st respondent's house at his village with his first wife Lilabai and her mother. She alleged ill-treatment and left the respondent's house. She then made an application to the Magistrate undersection 125 of the Code of Criminal Procedure (hereinafter for the sake of brevity referred to as 'the Code') for maintenance being application No. 157 of 1976. The Magistrate dismissed the said application on the ground that she was not a wife of the respondent as her marriage with the respondent was null and void under section 11 read with Section 5(i) of the Hindu Marriage Act. A revision application to the Sessions Court against the said order of the Metropolitan Magistrate was also dismissed by the learned Additional Sessions Judge relying on the aforementioned decision of

this Court in Bajirao's case (1980 Cri LJ 437). Against the said order of the Additional Sessions Judge, the present Revision Application has been filed.

4. Initially this application came before Padhye, J. who in view of the said decision in Bajirao's case referred it to the Division Bench. The Division Bench (Dharmadhikari and Puranik JJ.), by its referring order has referred the matter to this Full Bench as it disagreed with the view taken by this Court earlier in Bajirao's case (1980 Cri LJ 473).

5. As mentioned above, a Division Bench of this Court in its decision in the case of Bajirao v. Tolanbai, (1979 Mah LJ 693) : (1980 Cri LJ 473) on almost similar facts had taken the view that in such circumstances a Hindu woman was not a legally wedded wife, as her marriage with the respondent was null and void and therefore, cannot claim maintenance under section 125 of the Cr.P. Code on the basis that she was a 'wife'.

6. The reference order shows that the said Division Bench disagreed with the above view earlier taken by the Court in Bajirao's case (1980 Cri LJ 473) because of the object of the Section 125 of the Code, as mentioned by the Supreme Court in its decision in the case of Bhagwan Dutt v. Kamala Devi and in the case of Bai Tahira v. Ali Hussain F. Chothia and certain observations of the Supreme Court in the case of Zohra Khatoon v. Md. Ibrahim to the effect that.

   "While enacting Section 125 of Code there was distinct departure from the old Code and the present Code had widened the definition of the term 'wife' and to some extent overruled the present law of the parties so far as proceedings for maintenance under section 125 of the Code were concerned."

   The said Division Bench, therefore, appears to have felt that the term 'wife' as appearing inSection 125 of the Code should be broadly construed and not merely restricted to a 'legally wedded wife' and for purpose of claiming maintenance, it should be treated as sufficient if she proves that her marriage was solemnised after following the ceremonies prescribed under the personal law and she has been treated as a wife by the person from whom maintenance was claimed and they were living as husband and wife and were being treated by the public as such.

7. The basic question before us, therefore, is whether the term 'wife' used in Section 125 of the Code was to mean only a legally wedded wife, as held by this Court earlier in Bajirao's case or whether it was to be given an extended meaning, as suggested in the Referring Order ?

8. In fact, the only contention of the learned Counsel for the petitioner before us was that looking to the object of Section 125 of the Code, which was to prevent vagrancy, the term 'wife' in Section 125 of the Code should be given a wider or extended meaning so as to include therein not only a 'de jure' or legally wedded wife, but also a 'de facto' wife such as in this case where all the marriage rites prescribed under Hindu Law, by which the parties were governed, were performed, the marriage was registered and the parties had lived as husband and wife, though for one week only after the marriage. The very same contention which was also raised before the Division Bench in Bajirao's case (1980 Cri LJ 473) was negatived by the court.

9. Before dealing with the said contention, the position in law, as arising under Section 125 of the Code and certain provisions of Hindu Marriage Act, which was the personal law governing the parties in this case, be stated :

10. Section 125 of the Code, 1973, in relation to which the present question arises, empowers the Magistrates in certain circumstances stated therein to order maintenance, not exceeding Rs.

500/- p.m., to wives, legitimate or illegitimate children or parents, who are unable to maintain themselves. The said provisions of Section 125 are couched in the same language as Section 488of the old Code of 1898 with a difference of substance only in two matters. They are :-

(1) Section 125, apart from making provision for wives and children, created a new category of persons viz. parents as being entitled to maintenance under the Code, which was not there undersection 488 of the old Code, and;

(2) Under explanation Clause (b) to Section 125(1) 'a divorced woman' on certain conditions was specifically included in the term 'wife' while under Sec. 488 of the old Code a 'divorced woman' was not entitled to maintenance."

11. The object of the provisions of Section 488 of the old Code, corresponding to Section 125 of the present Code was well stated by the Supreme Court in its decision in the case of Bhagwan Dutt v. Smt. Kamladevi as under :-

"Sections 488, 489 and 490 constitute a family. They have been grouped together under Chapter XXXVI of the Code of 1898 under the caption 'of the maintenance of wives and children'. This Chapter in the words of Sir James Fitzstephen provides a mode of preventing vagrancy or at least, preventing its consequences. These provisions are intended to fulfil a social purpose. Their object is to compel a man to perform the moral obligation which he owes to the society in respect of his wife and children by providing a simple, speedy, but limited relief. They week to ensure that neglected wife and children are not left beggered and destituted on scrap heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence. Thus Section 488is not intended to provide for a full and final determination of status and personal rights of the parties. The jurisdiction conferred by the section on the Magistrate is more in the nature of a preventive rather than a remedial jurisdiction. It is certainly not punitive. As pointed out in Thompson's case 6 N.W.P. 205, the scope of Chapter XXXVI is limited and the Magistrate cannot, except as thereunder provided, usurp the jurisdiction in matrimonial disputes possessed by the Civil Courts Sub-section (2) of S. 489 expressly makes the orders passed under Chapter XXXVI of the Code subject to any final adjudication that may be made by a Civil Court between the parties regarding their status and Civil rights."

Above observations restrict the object of Section 488 to the protection of only wives and children.

12. While dealing with the scope of Section 488 the Supreme Court in its decision in the case of Mst. Zohra Khatoon v. Md. Ibrahim with which we will have an occasion to deal later, has in terms pointed out :-

"A perusal of Section 488 would clearly reveal that it carves out an independent sphere of its own and is a general law providing a summary machinery for determining the maintenance to be awarded by the Magistrate under the circumstances mentioned in the Section. The provisions may not be inconsistent with other parallel Acts in so far as maintenance is concerned, but the Section undoubtedly excludes to some extent the application of any other Act. At the same time, it cannot be said that the personal law of the parties is completely excluded for all purposes. For instance, where the validity of marriage or mode of divorce or cessation of marriage under the personal law of the parties is concerned that would have to be determined according to the said personal law. Thus, the exclusion by Section 488 extends only to the quantum of maintenance and the circumstances under which it could be granted."

13. The object of Section 125 of the present Code, which corresponds to Section 488 of the old Code, equally remains the same and the said observations of the Supreme Court, though relating to the provisions for maintenance, inter alia, of wives under section 488 of the old Code would apply with equal force to the provisions for maintenance of wives under S. 125.

14. With that, we may at this stage also refer to certain relevant provisions of Hindu Law relating to marriages, which in this case is the personal law of marriages governing the parties. Till the coming into force of Hindu Marriage Act, 1955, the Hindu Law of Marriages was not codified and in respect of marriages, as in other cases, Hindus were governed by their personal law as to be found in Shastras and customs. However, whatever might have been the personal law of Hindus in respect of marriages prior to codification of such law under the Hindu Marriage Act, 1955, on and from coming into force of the said Act on 18-5-1955, the provisions of the said Act only and no other law constituted their personal law relating to marriages and any question regarding the personal law of Hindus, relating to marriages was to be determined only with reference to the provisions of the said Act and no other.

15. The said Act provides conditions for the solemnization of marriage (S. 5). The ceremonies for the solemnization of marriage (Sec. 6) and the registration thereof. It also provides for circumstances under which the parties to the marriages could obtain decree for judicial separation (S. 10) and divorce (S. 13) and cases in which marriage is null and void (S. 11) which may be so declared by a decree of nullity and cases in which it was voidable (S. 12) where it was required to be annulled also by a decree of nullity. It also, inter alia, under section 25 provides for the grant of permanent alimony or maintenance on application to a husband or wife, as the case may be, at the time of passing any decree or subsequent thereto.

16. In this case, we are particularly concerned with Section 5(i) providing for one of the conditions of marriage and Section 11 providing for the consequences of the contravention of the condition.

17. Section 5(i) provides :-

"A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled:-

(i) neither party has a spouse living at the time of marriage :

Section 11 of the Act provides, inter alia, that any marriage after the commencement of the Act shall be null and void if it contravened inter alia the said condition under section 5(i) ".

18. In this case, there is no dispute that the marriage solemnized between the petitioner and the respondent No. 1 had contravened the provisions of Section 5(i), for at the time of the said marriage the first respondent had a wife Lilabai living and the said marriage between them was subsisting. The result, therefore, was that by reason of Section 11 of the said Act marriage between the petitioner and the 1st respondent was null and void. The consequences of such a marriage being null and void or 'voidipso jure' was that although the marriage was solemnized by performing necessary ceremonies and was registered the same was in law rendered nugatory as if not having taken place at all and consequently the parties to the same did not get a legal status of husband and wife. Accordingly, in such a case the woman cannot be considered to be a legally wedded wife of the man. The fact that Section 11 provides for filing of a petition by either party to have the marriage declared null and void by a decree of nullity did not make the marriage valid till the decree was passed as was the case in voidable marriages under S. 12 of

the Act as in such a case obtaining of a decree of nullity was not a condition precedent for the marriage being null and void.

19. The said position is also clear from the provisions of Sections 16 and 17 of the Act. Section 16seeks to protect children of the marriage which was null and void under section 11 of the Act, though illegitimate, as if they were legitimate, by giving them a limited right of inheritance only to their parents' property. While Section 17 of the Act provides that such a marriage in contravention of Section 5(i) of the Act was void and the provisions of Sections 494 and 495 of Indian Penal Code relating to an offence of bigamy were to apply. In view of the said provisions of the Hindu Marriage Act, it is quite clear that in this case the petitioner's marriage to the first respondent, being admittedly in contravention of S. 5(i) of the Act, was null and void undersection 11 of the Act and, therefore, the petitioner could not be considered to be a legally wedded wife, of the respondent.

20. The only controversy, therefore, that survived was as regards the import of the term 'wife' inSection 125(1) of the Code.

21. As mentioned above, a Division Bench of the Court has earlier in its decision in Bajirao's case (1979 Mah LJ 693) : (1980 Cri LJ 473) held that the term 'wife' in Section 125 only meant a legally wedded wife. In doing so the Court observed :-

"A woman whose marriage is invalid, cannot get the status of a wife and, therefore, if the marriage of the parties is void by reason of contravention of Section 5(i), (iv) and (v) of the Hindu Marriage Act, the woman is not competent to apply for maintenance under section 125, Criminal Procedure Code, which merely speaks of a 'wife'. The second wife whose marriage is void in view of Section 5(i) of the Hindu Marriage Act, cannot thus apply for maintenance under section 125 of the Code. The meaning of 'wife' cannot be extended to the case of a void marriage. In the absence of a clear intention in the provisions itself and having regard to the background in which the provisions of Section 125 Cr.P.C. 1973, were enacted, a woman cannot claim maintenance under the section unless she proves that she is the legally wedded wife of defendant against whom she brings the action."

22. It is the correctness of this view that is challenged before us both under the Referring Order and by the learned counsel for the petitioner.

23. It may be pointed out at this stage that the same view of the term 'wife' as appearing inSection 488 of the old Code has been taken by other High Courts viz., by Mysore High Court in the case of Smt. Savithriamma v. V. N. Ramnarasimhaiah (1963) 1 Cri LJ 131 by Patna High Court in Bansidhar Jha v. Chhabi Chatterjee , by the Allahabad High Court in Naurang Singh Chuni Singh v. Sapla Devi and by Gujarat High Court in Bai Bhanbai Mavji v. Kanbi K. Devraj even when the provisions of Hindu Marriage Act, 1955 were in force. A similar view on this aspect was also taken by this court (Masodkar J.) in the case of Smt. Rajeshbai v. Smt Shantabai though we are not concerned in this case with the correctness of the other findings of the Court therein.

24. Under the provisions of Section 488 of the old Code, corresponding to S. 125 of the new Code a Magistrate can make an order of maintenance only in favour of wives, legitimate or illegitimate children or parent and no other. Therefore, before determining the application made to him on the basis that the applicant was 'wife' of the respondent, the Magistrate was required first to ascertain whether the applicant was a wife of the respondent and in case of dispute, record

a finding. A plain dictionary meaning of the term 'wife' was either 'a married woman' or a 'a woman who is tied to a man in wedlock'. No woman could give herself a status of a 'wife' of another unless she was legally and validly married to the other.

25. As pointed out by the Supreme Court in aforecited decision in Zohra Khatoon's case in application under S. 488 of the old Code or Section 125 of the new Code consideration of the personal law of the parties as to the validity of marriage was not excluded and, therefore, the Magistrate exercising powers under S. 125 will have to determine whether the marriage of the woman-applicant to the respondent was valid in accordance with her personal law to give her a status of a wife.

26. In this case the personal law of the parties regarding marriages was as laid down in Hindu Marriage Act, 1955 Since, admittedly, at the time of marriage between the parties one of the conditions for the validity of the marriages, as contained in Section 5(i) of the Act was contravened or not complied with, the said marriage was, under section 11 of the Act, null and void, as if it had not taken place. In the absence of such a legal and valid marriage, a mere fact that the parties had lived together, as husband and wife to the knowledge of the public or otherwise, as contended by the learned counsel for the petitioner and suggested in the Referring Order, could not confer on such a woman a status of a 'wife', however, otherwise one may term such a woman. The fact of the parties having lived together as husband and wife for a long time would be relevant to raise only a presumption in law of they being husband and wife. However, even such presumption itself was rebuttable on proof of marriage being invalid. That question, however, would not arise in this case. On the facts, therefore, the petitioner could not be considered to be the 'wife' of the respondent to claim maintenance under section 125.

27. This position in law was supported also by the other provisions in the section itself. Firstly, while specifically providing for both legitimate and illegitimate children it restricts the Magistrate's power to make order for maintenance in favour of a 'wife' only and does not extend it in favour of any other woman though not legally and validly married to the respondent. Secondly, explanation (b) to Section 125(1) expressly, includes in the terms 'wife' appearing in the section, also a divorced woman. A divorced woman cannot exist unless initially she was legally wedded wife, for under the provisions of Hindu Marriage Act by which the parties in this case are governed or under any other personal law a question of divorce either by a decree or otherwise would not arise unless initially the marriage was legal and valid. The question of a divorced woman would never arise in cases where the decree of nullity is passed for either the marriage being null and void or voidable. This specific inclusion of a divorced woman in the term 'wife' which was not there before, would clearly show that the term 'wife' would only mean legally wedded wife.

28. On the plain reading of Section 125 of the Code, therefore, in this case the petitioner's marriage with the respondent No. 1 being admittedly null and void under section 11 of the Hindu Marriage Act, 1955, who was not his legally wedded wife, with the result that the petitioner cannot be termed as a 'wife' of the respondent No. 1 to entitle her to an order of maintenance under said Section 125.

29. In spite of this position in law, the learned counsel for the petitioner has contended that the term 'wife' appearing in Section 125(1) of the Code should be given a wider import and should be read to include not only a legally wedded wife, but also a de facto wife i.e. a woman who had

undergone the necessary ceremonies of marriage as required under the personal law governing the parties, was treated by the husband as such and had lived together as such husband and wife to the knowledge of the public.

30. This contention he has sought to support on two counts. Firstly, he has relied on the provisions of Section 25 of the Hindu Marriage Act, 1955, which according to him provides for maintenance even to a party to the marriage which was null and void on a decree of nullity, declaring the marriage as null and void being passed only on the basis that they were husband and wife.

31. This Court in Bajirao's case (1980 Cri LJ 473) while negativing the said contention, had observed provisions as follows :-

"While construing provisions of Section 125 of Criminal Procedure Code, it is not proper to introduce the concept arising out of provisions of Section 15(1), Hindu Marriage Act. WhileSection 25(1) is intended for parties who are Hindus, Section 125 Criminal Procedure Code is secular in character and applies to persons belonging to all religions. The jurisdiction contemplated by Section 25(1) Hindu Marriage Act and of Section 125, Criminal Procedure Codeare distinct and specified. It is not possible to assign different meaning to the word 'wife' for persons belonging to different religion or governed by different personal laws. An extended meaning cannot, therefore, be given to the word 'wife' in Section 125, Criminal Procedure, Code, on the basis of Section 25(1) Hindu Marriage Act."

32. To support his contention that a woman under a null and void marriage was entitled to maintenance, the learned counsel for the petitioner has relied on the decision of this Court, (Kania J.) in the case of Govindrao Ramji v. Anandibai Govindrao where it was held that Section 25(1) conferred a right of maintenance and the term 'wife and husband' used in the section would include within their scope a woman and a man professing Hindu faith who have gone through a ceremony of marriage which would in law have conferred the status of husband and wife but for the provisions of Section 11 read with Section 5(i) making the marriage null and void. The learned counsel for the respondent has pointed out that the Division Bench of the Madras High Court in its decision in the case of A. P. K. Narayanswami Reddiar v. Padmanabhan had taken a contrary view and the decision of our Court in Govindrai's case would require reconsideration. We do not think it necessary to consider that question in this case and would proceed on the footing that the position on law under section 25(1) of the Hindu Marriage Act was as stated in that decision.

33. However, even the decision as it is cannot help the appellant-petitioner. The said decision firstly shows that the conclusion of the court that even a party to a null and void marriage undersection 11 of the Hindu Marriage Act 1955 was entitled to maintenance under section 25 of the said Act was mainly based on the wording of the section which in its part gave discretion to the Court to award maintenance at the time of passing any decree which would also include a decree of nullity declaring marriage null and void under S. 11. The Court there thought of giving liberal construction to the words 'husband and wife' appearing therein as it found that the said words were used in a loose sense and the wording of the section was not happy as even in other cases where decree for divorce or annullment of marriage in the case of voidable marriage was passed, after such decree was passed the parties could not be termed as 'husband and wife'. However, it was evident from the following observations of the Court at page 27 of the report that while

holding so the Court was aware that the parties to such a null and void marriage did not have a lawful status of husband and wife. The observations were :-

"In other words, in my view, the word 'wife' and 'husband' in sub-section (1) of Section 25 of the Act would include within their scope a woman and man professing the Hindu faith who have gone through a ceremony of marriage which would in law have conferred the status of wife or husband on them but for the provisions of Section 11 read with Clauses (i), (iv) and (v) of Section 5 of the Act."

34. But even otherwise, it is clear that the provisions of Section 125 of the Code being of a secular nature applicable to persons of all communities in India independently of the civil liability of the husband under his personal law to maintain his wife, it interpretation cannot be based or controlled by importing therein the concept of maintenance under the personal law as applicable to a particular community only. The Supreme Court in the aforecited case of Bhagwan Dutt v. Kamala Devi while dealing with the provisions of Section 488 vis-a-vis Section 23 of the Hindu Adoptions and Maintenance Act, 1956, had observed at page 87 (of AIR) :-

"The scope of the two laws is different Section 488 provides for a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal laws of the parties."

35. The Supreme Court in Zohra Khatoon's case had also pointed out that Section 488 carved out an independent sphere of its own and is a general law providing a summary machinery in determining maintenance to be awarded and although the said provisions may not be inconsistent with the other parallel Acts providing for maintenance, the section excludes to some extent application of other Acts in the matter of quantum and circumstances under which it could be granted.

36. Even, if therefore, the provisions of Section 25(1) of the Act which was a personal law applicable to Hindus only were to create a right of maintenance also in favour of a woman who was a party to a null and void marriage, such right of her, if any, shall have to be restricted to the provisions under the said Act only. The Magistrate dealing with the application for maintenance by a woman under S. 125 of the Code on the basis of she being a wife of the respondent, was not required to ascertain whether she was otherwise entitled to maintenance under any other Act. There was also nothing in that section to hold that the law conferred on such a woman a status of a 'wife'. Further, as pointed out by the Supreme Court in the aforecited decisions, the scope ofSection 488 of the old Code or S. 125 of the present Code, which were of a secular nature, providing maintenance for wives, being quite different from that of any other Act, which would include Section 25 of the Hindu Marriage Act, the said provisions would exclude the application of any other Act and cannot be interpreted with reference to Section 25 of the Hindu Marriage Act which was only a personal law of Hindus.

37. The learned counsel for the petitioner has further sought to support his said contention by relying on three decision of the Supreme Court, viz :-

1. Bai Tahira v. Ali Hussain Chathia .
2. Fuzlunbi v. K. Khader Vali .
3. Zohra Khatoon v. Md. Ibrahim .

In fact, the first two decisions viz. in Rai Tahira's case and in Bai Fuzlunbi's case, have no relevance whatsoever to the point at issue. The only question at issue in both the said decisions was as to the interpretation of the provisions of sub-section (2) and sub-section 3(b) of Section 127 of the Cr.P.C. empowering the Magistrate to cancel the order of maintenance already made under section 125 in favour of a woman who was divorced, particularly when, as mentioned in sub-section 3(b) she had either before or after the order received the whole of the sum which under any customary or personal law applicable to the parties was payable on such a divorce.

38. No question as to the meaning to be given to the term 'wife' in S. 125(1) arose for determination in those decisions. The Court held that the said provisions of S. 127(3)(b) must be so interpreted that the amount received by a woman on or before divorce under personal law under section 127(3)(b) must be such as to amount to reasonable substitute for the amount payable as maintenance under section 125 of the Code. The purpose of payment under customary or personal law must be to obviate destitution and the scheme of Section 127(3)(b) was to recognise such substitution. It, therefore, observed :-

"The proposition, therefore, is that no husband can claim under section 127(3)(b) absolution from his obligation under section 125 towards a divorced wife except on proof of payment of the sum stipulated by customary or personal law whose quantum in more or less sufficient to do duty for maintenance allowance."

39. Since no question as to the meaning to be given to the term 'wife' in Section 125(1) arose for determination in those decision, it is, not necessary to deal with the said two decisions any further.

40. The third decision in Zohra Khatoon's case , observations wherein are relied upon, both by the learned counsel for the appellant as well as in the Referring Order in support of the contention that the term 'wife' in Section 125 of the Code should be given a broad meaning may be dealt with in some detail.

41. In that case, where the parties were Muslims, the question was as regards the interpretation of Clause (b) of explanation to sub-section (1) of Section 125 of the Code which read as follows :-

Explanation :-

"For the purpose of this Chapter. -

(a) x x x

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

There the appellant, a Muslim lady, was married to the respondent. On the plea that she was ill-treated by the respondent, she filed an application before a Magistrate under section 125 of the Code, for maintenance for herself and her child. The Magistrate allowed her application and fixed maintenance for her and the child, holding that she was neglected by the respondent-husband without any reasonable or probable cause. The Magistrate negatived the respondent's contention that since the appellant wife had filed a suit against him for dissolution of marriage which was decreed by the Civil Court and since she was living separately, she had ceased to be his wife and was, therefore, not entitled to maintenance under section 125 or Section 127 of the Code. In the revision application against the said order filed by the respondent-husband, the

High Court set aside the order of the Magistrate. The High Court interpreted the said Clause (b) of the Explanation as covering a divorce proceedings from the husband only i.e. if the divorce was given unilaterally by the husband or was obtained by the wife from the husband, and did not cover divorce in the case before the Court since it was obtained at the instance of the wife in a suit filed by her for dissolution of marriage under Dissolution of Muslim Marriage Act, 1939. The High Court, therefore, held that in that case applicant woman did not come under clause (b) of the Explanation and was not entitled to maintenance under Section 125 of the Code. Therefore, in that case the Supreme Court was only concerned with the question of interpretation of clause (b) of the Explanation to Section 125(1) and the correctness of the narrow interpretation put by the High Court on the said explanation. For dealing with the said only question, the Court firstly dealt with the position in law in relation to S. 488 of the said old Code, which has been set out above where the said clause (b) of the Explanation did not exist.

42. The Court further considered whether under the said provisions of S. 488 of the old Code the Magistrate was competent to award maintenance if under the personal law of the Mohmedans the wife had been validly divorced and had completed the period of Iddat ? On review of the decision, the Court found that although the Mohmedan wife had a right to be awarded maintenance by the Magistrate under S. 488 of the Code, the said right ceased to exist if she was divorced by her husband and had observed Iddat, as the right under Section 488, which was a statutory right, so far as it related to wives, contemplated existence of conjugal relation as a condition precedent to an order of maintenance.

43. In the background of the said position in law regarding maintenance of wife under section 488 of the Code, prior to the introduction of the said Explanation (b) of Section 125(1) by including 'divorced woman' in the term wife, the only question the court proceeded to consider, was as to how for the Code of 1973 by introducing the said explanation made a departure from the previous Code and from the personal law of the parties i.e. Mohammedan Law, in the position of woman after divorce. The Court was, therefore, only considering the effect of clause (b) of the Explanation on the rights of a woman who was divorced i.e. of a woman who was initially a legally wedded wife but had ceased to be so by reason of divorce. It was not concerned there with the rights of any other woman.

44. Only in that regard that Court, while considering the interpretation of the said clause (b) of the Explanation, observed at page 1248 of the report :-

"Cl. (b) had made distinct departure from the earlier Code, in that it had widened the definition of wife and to some extent overruled the personal law of the parties, so far as the proceedings for maintenance under section 125 are concerned. Under Clause (b) wife continues to be a wife within the meaning of the provisions of the Code even though she has been divorced by her husband or otherwise obtained a divorce and has not remarried."

45. On the basis of the said observations of the Court, the learned counsel for the petitioner-appellant has contended that it was permissible to give to the term 'wife' in Section 125(1) a still wider connotation so as to include therein not only a divorced woman, as specifically mentioned in the Explanation, but also a woman who although not a legally wedded wife under the personal law governing her had undergone marriage ceremony and lived with the man as husband and wife.

46. In our view, the said observations of the Supreme Court cannot be read out of context, as suggested by the learned counsel, as indicating that the term wife could also mean and include

even a woman who was not legally wedded and therefore not a wife. The observations were to be read as restricted to the wording of Clause (b) including in the term 'wife' a 'divorced woman'. The Court made the said observations as it found that before the said explanation was introduced neither the Mohammedan Law by which the parties were governed, nor Section 488 permitted maintenance on the cessation of conjugal relations on divorce, and to that extent only explanation made departure from the earlier law. On the other hand, the fact that under Clause (b) of the Explanation a divorced woman was specifically included in the term 'wife' to give her a right of maintenance, would show that the term 'wife' would mean only a legally wedded wife, but for which there would not exist a divorced woman. In our view, therefore, there was nothing in the above quoted observations of the Supreme Court to support the said contention of the learned counsel for the appellant.

47. It was further contended by the learned counsel for the appellant and suggested in Referring Order that since Explanation (b) contains inclusive definition of wife, there was no reason why it should not be extended to other cases. Firstly, the said explanation does not seek to give any definition of the term 'wife'. It seeks to include specifically in the term 'wife' a divorced woman, who, but for the said mention could not have been entitled to maintenance under section 125 of the Code. As pointed out by the Supreme Court in the Bhagwan Dutt's case (AIR 1975 SC 85) the object of the section is to provide a summary remedy for the protection of wives, children and parents. The jurisdiction of the Magistrate under the said provisions extends to making an order of maintenance in favour of only those persons mentioned in the section viz. wives, children legitimate and illegitimate and parents, and no other persons falling outside the said categories.

48. The learned counsel for the appellant has further relied on a decision of the Gauhati High Court in the case of Boli Narayan Pawye v. Sidheswari Morang (1981 Cri LJ 764) which appears to take a similar view as propounded by the appellant. The Court there relying only on the aforecited two decision of the Supreme Court in Bai Tahira's case and in Fuzlunbi's case and on the basis that a void marriage was one which required declaration of the Court to be so and did not disentitle a woman to get maintenance in the absence of final declaration to the effect from a competent Court, observed at page 676 (of Cri LJ) :-

"A woman who comes in the life of a man gives herself to the man, takes the family life of the man and the man uses her as such, recognises her as his wife, must come within the fold of the term wife, absence of ceremonial marriage notwithstanding. Acceptance of a woman as a wife, declaration of the status directly or indirectly and acceptance of status by the woman are enough to bring her within the provisions of S. 125."

49. Firstly, the said observation of the Court are obiter and were not relevant as on the facts the Court had held that the marriage between the parties though performed in a customary manner, was valid. If the marriage was once held to be valid in law, the woman could get a status of a wife and on the other things existing would be entitled to claim maintenance under S. 125. Secondly, as we have pointed out above, two decisions of the Supreme Court in Bai Tahira's case and in Fuzlunbi's case relying on which the Court had made the said observations do not anywhere deal with the question of extended meaning to be given to the term 'wife', as suggested by the Gauhati High Court. However, at the same time the Court does not appear to have considered the decision of the Supreme Court in Zohra Khatoon's case cited above. Thirdly, the view of the Court appears to have been based more on a rebuttable presumption that may arise by reason

of a long and continuous cohabitation between the parties as husband and wife, that they were presumed to be husband and wife. But even that presumption was rebuttable, by the proof that in law the marriage solemnized between the parties was illegal or void. Further according to us the said observations are based on misconception of law that void marriage like voidable marriage was valid till it was so declared by a competent Court. For all these reasons, with respect, we are unable to agree with the view taken by the single Judge of the Gauhati High Court in the aforesaid decision.

50. In our view, therefore, contention of the learned counsel for the appellant cannot be accepted. The view taken by this Court in Bajirao's case (1979 MLJ 693) : (180 Cri LJ 473) appears to be correct. The term 'wife' appearing in Section 125(1) of the Code means only a legally wedded wife. In the result, the appeal stands dismissed. The orders of the lower courts are confirmed. However, under the circumstances of the case respondent No. 1 is directed to pay to the petitioner costs of proceedings fixed at Rs. 1000/-.

51. Appeal dismissed.

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BHAUSAHEB @ SANDU S/O RAGHUJI VERSUS LEELABAI W/O BHAUSAHEB MAGAR

Bombay High Court
Equivalent citations: AIR 2004 Bom 283, II (2004) DMC 321, 2003 (4) MhLj 1019

2004 AIR (Bom) 283; 2003 4 MhLJ 1019; 2003 Supreme (Mah) 729;

Bhausaheb @ Sandu S/o Raghuji
vs.
Leelabai W/o Bhausaheb Magar

Bench: Hon'ble Mr. Justice N Dabholkar, Hon'ble Mr. Justice A Naik, Hon'ble Mr. Justice N Patil
Decided on 7 July, 2003

Civil Procedure Code, 1908 - Section 113 - Maintenance to wife. - Hindu Marriage Act, 1955- Section 25 - Maintenance - Claimed by "illegitimate wife" - Can- not be granted - Claim not maintainable - An illegitimate wife has no right for permanent alimony - In absence of recognition of her status in Act, she cannot be entertained for grant of relief - - It is fundamental principle of law that in order to claim a relief from the Court of law, there must be a legal right based on a legal status. When the status of a woman as "wife" is not recognized by provisions of the Act, which confers the right for permanent alimony, she cannot be entertained for grant of relief in the absence of recognition of her status by the Act.

JUDGMENT

N. V. Dabholkar, J.

1. While considering Family Court Appeal No. 12/2003, Bhausaheb v. Leelabai, a Division Bench of this High Court (Coram : B. H. Marlapalle and V. G. Munshi, JJ), felt satisfied that issue raised by the appellant - husband requires consideration by a larger bench of this Court. Hence, after passing an elaborate order on 17-2-2003, the Division Bench directed the Additional Registrar (Judicial) to place the matter before the Hon'ble the Chief Justice for appropriate orders, under Rule 7 of Chapter I of the Bombay High Court Appellate Side Rules, 1960, for a reference to a larger bench. The Hon'ble the Chief Justice, on the matter being placed before his Lordship, was pleased to constitute a full bench and that is how the present reference was heard and is being disposed of by this full bench.

2. Brief factual matrix of the litigation should be stated herein so as to appreciate how the point of controversy under reference arose and was referred.

   Petition No. C-39/2001 was filed by Leelabai against appellant Bhausaheb for maintenance undersection 25 of Hindu Marriage Act, 1955 (Hereinafter referred as HM Act for the sake of brevity). The same was decided on 30-11-2002 by Principal Judge, Family Court, Aurangabad, who was pleased to allow the petition and award maintenance @ Rs. 1,000/- p.m. in favour of Leelabai from the date of petition. Appellant - Bhausaheb has taken a stand before Family Court of total denial of solemnization of marriage on 16-12-1997 and in the alternative, he also claimed that he was already having a spouse living on 16-12-1997 and therefore, alleged marriage with

Leelabai on that day, cannot be said to be a valid marriage. Thus, contending that marriage, if any, between him and Leelabai, was void marriage in the light of section 5(i) read with section 11 of HM Act and therefore, she was not entitled for maintenance under section 25 of the said Act.

3. Eventually, this was not the first round of litigation of the parties. Earlier, Leelabai had approached Family Court by filing Petition No. A-165/1996 against one Narayan Ahire for dissolution of marriage and obtained an ex-parte decree on 6-1-1997. The marriage between Leelabai and Narayan Ahire (presumably, her first husband) stood dissolved by the said decision. Leelabai married appellant Bhausaheb thereafter on 16-12-1997. After some days since this marriage, she had filed prosecution against Bhausaheb under sections 498A, 323, 504, 506 of IP Code. Simultaneously, she had filed an application under section 125 of Criminal Procedure Code, 1973 before the Family Court, registered as Petition No. E-331/1999 for maintenance. The said petition was dismissed on 25-3-2000 by the Family Court observing that she was not legally wedded wife of Bhausaheb.

   In the meanwhile, Leelabai had also filed Petition No. B-7/2000 before the Family Court, seeking a declaration that marriage between herself and Bhausaheb is valid marriage and Madhuri is their legitimate daughter. Along with that petition, she had filed Petition No. E-525/2000, seeking maintenance for daughter. These two petitions were decided on 29-11-2001. Petition, seeking declaration regarding validity of the marriage, was dismissed, again by observing that Leelabai was not a legally wedded wife of Bhausaheb. The child, Madhuri. however, was granted maintenance @Rs. 500/- p.m. On the backdrop of the above legal battles, Leelabai filed Petition No. C-39/2001 under section 25 of HM Act for permanent alimony which is allowed by the Family Court, as narrated hereinabove and hence, the First Appeal by Bhausaheb.

4. The Division Bench of this Court, while considering the Family Court Appeal for admission, has taken a note that learned Judge of the Family Court has placed reliance upon decisions of this High Court in the matters of Shantaram Patil v. Dagubai (DB), 1987 Mh.L.J. 179 and Krishnakant Vyas v. Reena (SJ) , and the argument of learned counsel for Bhausaheb based upon a decision of full bench of Andhra Pradesh High Court in the matter of Abbayolla M. Subba Reddy v. Padmamma AIR 1999 AP 19, was rejected by the trial Court. Although reliance was also placed on the decision of Chand Dhavan v. Jawaharlal, , the Division Bench was of the view that decision of the Apex Court in this matter has not specifically dealt with abovesaid issue i.e. conflict of views taken by Bombay High Court in the judgments relied upon by Family Court while awarding maintenance in favour of Leelabai and the view taken by full bench of Andhra Pradesh High Court that section 25 should not be construed in such a manner as to hold that notwithstanding the nullity of the marriage, wife retains her status for the purpose of applying for alimony or maintenance.

   Naturally, by virtue of reference, we are required to resolve the controversy and record a finding as to which, out of two view points, is the correct legal position.

5. Heard Advocate Shri R. K. Barlota representing the appellant -Bhausaheb and Advocate Shri S. L. Jondhale, representing respondent in Family Court Appeal No. 12/2003.

6. In fact, view taken by Bombay High Court, in the recent judgment of Krishnakant v. Reena(supra) and prior to that in the matter of Shantaram v. Dagubai (supra), which was relied upon by the learned Judge of the Family Court, was not the view recorded for the first time. It appears that

Bombay High Court has been consistently taking such a view right from the matter ofGovindrao v. Anandibai, 1997 Mh.LJ. 144, which was a decision in Appeal No. 93/1976, decided on 24-3-1976. In that matter, Anandibai had married Govindrao on 24-5-1959 when respondent No. 2 (first wife of Govindrao) was still alive and marriage between Govindrao and respondent No. 2 was still subsisting. It was claimed that in March, 1963, appellant and respondent No. 2 drove away Anandibai. On 11-12-1972, Anandibai filed a petition in the Court of CJSD, Kolhapur for a declaration that marriage between herself and Govindrao was null and void and also praying for maintenance @ Rs. 150/- p.m. The learned Civil Judge held marriage to be null and void as contravening the provision of section 5(i) of HM Act and while granting a decree for declaration of nullity of the marriage, allowed permanent alimony @ Rs. 125/- in favour of Anandibai. The Appeal before the District Court, by Govindrao was also dismissed and therefore, Govindrao had approached this Court.

It was contended on behalf of appellant that the words "wife" and "husband", used in Sub-section (1) of section 25 of HM Act, must be construed in their strict dictionary sense and so construed would mean only a legally wedded Hindu wife and legally wedded Hindu husband. It was, thus, submitted that ceremony of marriage gone through between appellant and respondent No. 1 was null and void ab initio, which never created relationship of 'husband' and 'wife' in the legal sense and therefore, provision of section 25 cannot be invoked. While rejecting the arguments, it was observed by the Court (Coram : M. H. Kania, J., as His Lordship then was):--

"At the first blush, this submission, undoubtedly, appears little attractive. But a closer analysis of the provisions of sub-section (1) of section 25 shows the fallacy thereof. In the first place, the opening part of this subsection shows that the discretion given to the Court of awarding maintenance at the time of passing any decree and one of the decrees which the Court can pass under the said Act is a decree of nullity under section 11 thereof. Hence, if the strict interpretation propounded by Mr. Pendse were to be given to the words "Wife" and "Husband", the scope of the expression on "any decree" used in this sub-section would have to be artificially cut down so as to exclude from its scope a decree for nullity passed under section 11 of the Act."

It was further observed :--

"Secondly, it must be remembered that Hindu Marriage Act, 1955, is a piece of social welfare legislation. One of the admitted aims of this legislation was to better the lot of women in Hindu society, which it was felt by legislature needed amelioration. It was with this end in view that certain rights were conferred on Hindu Women by the Hindu Marriage Act as well as certain other measures, like the Act of 1956."

Hence, it was expressed that while construing such a piece of legislation, it would not be right to adopt a narrow approach, but a liberal and progressive approach, keeping in mind that it was the liberal and progressive approach of the legislature which lead to the enactment being passed. It was further observed that it could not have been the intention of the legislature that even in a case where a Hindu woman has been duped into contracting a bigamous marriage with a Hindu male without knowing that there was already a subsisting marriage to which he was a party, even then, she should be deprived of her right to claim maintenance on obtaining decree for nullity.

In the light, of these observations, Anandibai, who had cohabited with Govindrao along with his first wife for a period of six years until she was driven out, was held not disentitled for permanent alimony.

7. In case of Rajeshbai v. Shantabai, , Shantabai had filed a suit seeking relief of injunction against defendants (brothers of Sadashiv) restraining them from disturbing her possession and enjoyment of the properties and alternatively also seeking possession of the properties which would be found to be not in her possession. The reliefs were so claimed on the basis that plaintiff Shantabai was the lawfully married wife of deceased Sadashiv and upon his death was entitled to inherit all his properties. Defendant Nos. 1 and 2 - Dagdu and Mahadu were brothers of Sadashiv. It was common defence of the appellants that as per the caste custom applicable to the parties, the plaintiff was divorced by Sadashiv during his lifetime and thereafter, Sadashiv had taken Rajeshbai, appellant No. 1, as his wife, who was till his death residing with him as his lawful wife. Shantabai, being therefore divorced wife, was not entitled to any share of properties of Sadashiv.

After trying the contentious question, trial Court held that custom of divorce was not established, there was no divorce given by Sadashiv to Shantabai and therefore, though Rajeshbai went through form of Hindu marriage, her marriage was void and as a result of this, it was plaintiff Shantabai who was the legally married wife and after death of Sadashiv, being his widow, was entitled to succeed to the interest and all properties of Sadashiv. The trial Court, finding that properties were in possession of defendants, decreed the suit in favour of Shantabai.

During the course of hearing of the appeal, Civil Application was filed by the appellants counsel raising alternative plea. In defence as far as Rajeshbai was concerned, to the effect that though in any case upon the finding that Rajeshbai having gone through the form of marriage and her marriage because of law being declared null and void and for no fault, on her part, she would be entitled to relief of maintenance against the estate of her husband Sadashiv. Naturally, in the appeal, an additional issue was raised whether upon the finding that the marriage between Sadashiv and Rajeshbai was void, as the earlier marriage between Sadashiv and Shantabai, was subsisting, Rajeshbai would or would not be entitled to the maintenance from the estate of Sadashiv. Relying upon the judgment in the matter of Govindrao (supra), decree for possession of the properties in favour of Shantabai was confirmed, subject to condition that upon deposit of Rs. 20,000/- to be paid in lump sum in full and final settlement of claim of Rajeshbai, the plaintiff would be entitled to recover possession of the properties. It was observed in para 41 :--

"Relying upon pari materia provisions of section 25 of the Hindu Marriage Act and relying on the inherent powers of the Court to make orders so as to meet the ends of justice, I think, an appropriate order for maintenance in favour of Rajeshbai can be made, though it has to be concluded that in her appeal on other aspects, she cannot but fail."

It may be noted here that Shantabai had come out with an offer to pay Rs. 20,000/- exclusively in full and final settlement of claims for maintenance of Rajeshbai.

While following the decision in the case of Govindrao (supra) with approval, as authority for the proposition that the term "wife" is a juridical term, so also, the term "widow", it was observed in para No. 30 :--

"In the context of the given law, the meaning thereof has to be gathered keeping the object of law in view. Primarily, therefore, it would not be permissible to include in the term "wife" or "widow", that relationship which is not recognized by law. However, it is implicit in the judgment of this Court in Govindrao's case (supra) that there can be class of persons who, as I propose to call, are "illegitimate wives or widows" who can be the subject of benefaction of law

of maintenance, notwithstanding that eventually their legal status is annulled. Undoubtedly, a female spouse united by marriage enters upon a status and is conferred with immediate as well as inchoate rights attached to such status by virtue of her marriage and that is because of the gift and conferment of law. When that status is shaken and found to have no sanction, it does not follow that even the inchoate rights of such person are totally eclipsed. As distinct from succession or inheritance, the right of maintenance can be treated to be a separate one, the first, two arising upon the natural or civil death of the husband, while the latter always available during the lifetime and even depending upon the contingent conditions after the death of the husband. Maintenance thus is a personal right. In its character it can be treated to be a secular right recognized by almost all the systems of personal laws in various degrees and under varying conditions. Though, therefore, for the purpose of the Succession Act and the Maintenance Act the terms "wife and widow" would have a restricted articulate legal meaning, that by itself would not be the position when the matter arises for the purpose of providing the measures of sustenance on considerations of justice and fair play involved and basic to all human and social relations."

8. In the matter of Shantaram v. Dagubai, 1987 Mh.LJ. 179, a Division Bench of this High Court relied upon the view taken by Single Judges in the earlier matters of Rajeshbai v. Shantabai as also Govindrao v. Anandibai with approval and held that section 25 of Hindu Marriage Act confers upon a woman whose marriage is void or is declared to be void, a right of maintenance against her husband.

   Special Civil Suit No. 30/1979, that was contested before Civil Judge (S.D.), Dhule, in the reported matter, was a suit filed by Dagubai for herself and her three children begotten from Tukaram against Leelabai and Shantaram, second wife of Tukaram and son born to them, for a declaration that defendants were not L.Rs. of Tukaram and that they had no right, title or interest in the properties of Tukaram. Since defendants were in possession of the properties, decree for possession was also prayed for. Defendants contested the suit contending that Dagubai, was divorced by Tukaram as per custom in the community before marrying second time with Leelabai and, therefore, marriage between Tukaram and Leelabai was a valid marriage. Trial Judge held that there was no divorce between Tukaram and Dagubai, Tukaram's marriage with Leelabai was void under the provisions of section 11 read with section 5(i) of Hindu Marriage Act.

9. Krishnakant Vyas v. Mrs. Reena Vyas, (by Single Judge) is a recent decision of Bombay High Court wherein the view taken and ratio laid down in all above three matters referred earlier was followed, even in preference to view taken in the matter of Yamunabai v. Anantrao, . In this matter, wife had filed Petition No. A-2082/1996 in the Family Court at Bombay under section 11of Hindu Marriage Act for declaration that marriage between her and petitioner before High Court (Krishnakant) was void on the ground that petitioner was already married and his first wife was living at the time of second marriage and hence second marriage was a nullity. She also filed maintenance petition under section 18 of Hindu Adoption and Maintenance Act, 1956, claiming maintenance for herself and minor daughter. In addition, she took out interim motion claiming interim maintenance at Rs. 25,000/- and Rs. 10,000/- respectively for herself and daughter. This application was resisted by Krishnakant mainly on the ground that even according to respondent herself, marriage was nullity and, therefore, she was not entitled to claim interim maintenance. In fact, he had also denied factum of marriage, although accepted

paternity of the daughter. Family Court had awarded interim maintenance of Rs. 5,000/- and Rs. 2500/- per month to Mrs. Reena and the daughter.

While confirming the award of interim maintenance by following the view taken by Bombay High Court in earlier matters of similar nature i.e. in the cases of Govindrao, Rajeshbai and Shantaram (supra), Single Judge expressed agreement with the law laid down in those matters. It was observed :

'The Court has also power in such proceedings to make an order of permanent alimony or maintenance under Section 25 of the Act. The Act confers wide powers on the matrimonial Court so as to regulate matrimonial relationship between the parties and such powers are to be exercised by the Court even in a case of alleged or proved bigamous marriage. In enacting Section 24 a special provision is made for ordering interim maintenance and the expenses of litigation to be provided for the contesting husband or wife if he or she had no independent sufficient income. /, therefore, see no reason why the words "wife" or "husband" used in Section 24 should not be interpreted so as to include a man and woman who have gone through a ceremony of a Hindu marriage which would have been valid but for the provisions of Section 11 read with clause (i) ofSection 5 of the Hindu Marriage Act. These words have been used as convenient term to refer the parties who have gone through a ceremony of marriage whether or not that marriage is valid or subsisting, just as the word "marriage" has been used in the Act to include a purported marriage which is void ab initio."

As observed in para 15 of the judgment, so far as the ratio laid down in the matter of Yamunabai v. Anantrao, brother Judge was of the view that only point involved in that case was whether a Hindu woman, who is married after coming into force of the Hindu Marriage Act to Hindu male having a living lawfully wedded wife, can maintain an application for maintenance under section 125 of the Code of Criminal Procedure, 1973. It was also observed that the Supreme Court decision mainly turns on interpretation of section 125 of the Code of Criminal Procedure and is not of any assistance in deciding the question as to the right of the second wife to claim interim alimony under Hindu Marriage Act or Hindu Adoption and Maintenance Act.

10. Contra view taken by a Full Bench of Andhra Pradesh High Court in the matter of Abbayolla M. Subba Reddy v. Padmamma reported at AIR 1999 A. P. 19 was relied upon by the lawyer of the husband before the Family Court, as also while making his submissions before us. The decision was upon a reference by a Single Judge of Andhra Pradesh High Court to a Larger Bench after having disagreed with the view expressed earlier by another Single Judge of the said High Court that Hindu "wife" contemplated by section 18 of the Maintenance Act means a Hindu wife whose marriage is solemnized, though void under the Hindu Marriage Act, she is entitled to claim maintenance from the husband.

Padmamma had filed O. S. No. 139/1987 before Principal Subordinate Judge, Chittor in forma pauperis claiming maintenance at the rate of Rs. 1,000,/-per month as also cost of gold chain and other ornaments gifted to her by her father at the time of marriage. It was contended that she was married according to Hindu rites and customs on 1-7-1984, the marriage was also registered before the Sub Registrar, Palamaner, on 7-11-1984 and after consummation of the marriage in the plaintiff's parents' house, she was taken by the appellant to his village where she came to know that appellant was already married to one Parvathamma, who begot two daughters through him and the said two daughters were already married and Parvathamma was

residing in the appellant's house in the village. It was also her case that during negotiations for her marriage, the appellant did not inform the respondent and her parents that he was already married and his first wife was living and that she was made to believe as if it was his (appellants) first marriage. Full Bench of Andhra Pradesh High Court found itself in agreement with the view taken by Bombay High Court in the matter of Bajirao v. Tolanbai (D. B.), 1979 Mh.LJ. 693 and it was of the view that decision of the Supreme Court in the matter of Yamunabai v. Anantrao, applied with full force to the case at hands arising under the Hindu Marriage Act. While saying so, following observations of the Supreme Court were quoted and followed by the Full Bench of Andhra Pradesh High Court.

"Section 5(i) of Hindu Marriage Act lays down, for a lawful marriage, the necessary condition is that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. The plea that the marriage should not be treated as void because such a marriage was earlier recognized in law and customs cannot be accepted. By reason of the overriding effect of the Act as mentioned in section 4, no aid can be taken of the earlier Hindu Law or any custom or usage as a part of that Law inconsistent with any provision of the Act, such a marriage also cannot be said to be voidable by reference to section 12. So far as section 12 is concerned, it is confined to other categories of marriage, and it is not applicable to one solemnized in violation of section 5(i) of the Act."

Further observations by the Supreme Court in para 3 were as under :--

"It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child."

Ultimately in para 6, Supreme Court concluded as follows:

"The attempt to exclude altogether the personal law applicable to the parties from consideration also has to be repelled. The section has been enacted in the interest of wife and one who intends to take benefit under sub-section (l)(a) has to establish the necessary condition, namely that she is the wife of the person concerned. This issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes her status or relationship with reference to the personal law that an application for maintenance can be maintained."

In reply to the argument that Yamunabai was not informed about respondent's marriage with Leelabai when she married the respondent and who treated her as his wife and, therefore, her prayer for maintenance should be allowed, it was observed that appellant cannot rely upon the principle of estoppel so as to defeat the provisions of the Act. It was the intention of the legislature, which was relevant and not the attitude of the parties.

11. It may usefully be referred here that decision of the Supreme Court in the matter of Yamunabai confirmed the decision of a Full Bench of Bombay High Court in the same matter, which was considered by the Full Bench on a reference by a Division Bench, which disagreed with the view taken in the matter of Bajirao v. Tolanbai, 1979 Mh.LJ. 693 and the question involved was:--

"Whether a Hindu woman whose marriage was null and void under section 11 of the Hindu Marriage Act, 1955, by reason of contravention of section 5(i) of the said Act, viz. the person with whom she had undergone a marriage had a wife living at the time of said marriage, was

entitled to claim maintenance under section 125 of the Code of Criminal Procedure from such a person on the basis that she was his wife?"

In the case of Yamunabai, her marriage with Anantrao was solemnized on 16-6-1974 after undergoing necessary rites under Hindu Law. The said marriage was registered as required under the Act. However, at the time the said marriage was performed, Anantrao's first wife Leelabai was alive and the said marriage between them was still subsisting. Yamunabai stayed with Anantrao for a week and thereafter stayed at his house at his village with the first wife Leelabai and her mother. She alleged ill-treatment and left respondents house and then filed application undersection 125, Criminal Procedure Code for maintenance. The Magistrate dismissed the application on the ground that she was not wife of the respondent as her marriage with respondent was null and void under section 11 read with 5(i) of Hindu Marriage Act. A revision application against the said decision of Metropolitan Magistrate was also dismissed by Additional Sessions Judge, relying upon the case of Bajirao v. Tolanbai. Matter, which initially came up before Single Judge, was referred to a Division Bench and the Division Bench in turn, by its referring order, had referred it to Full Bench having disagreed with the view taken by earlier Division Bench in Bajirao's case.

Cases of Rajeshbai v. Shantabai as also Govindrao v. Anandibai were referred by the Full Bench.

While dealing with the case of Govindrao, Full Bench was of the view that it was not necessary to consider that question in the case before the Full Bench and it was desirable to proceed on the footing that the position in law under section 25(1) of the Hindu Marriage Act was as stated in the decision of Govindrao. As observed by the Full Bench, decision in the matter of Govindrao concluding that even a party to a null and void marriage under section 11 of Hindu Marriage Act, 1955, was entitled to maintenance under section 25 of the said Act, was mainly based on the wording of that section, which in its first part gave discretion to the Court to award maintenance at the time of passing any decree, which would also include a decree of nullity declaring marriage null and void under section 11.

12. Decision in the matter of Bajirao v. Tolanbai, 1979 MH.L.J. 693 was also a case under section 125 of Criminal Procedure Code, 1973, and the Division Bench refused to go into the question of construction of section 25(1) of Hindu Marriage Act.

13. Decisions of Bombay High Court in the four matters being the matters under section 25 of Hindu Marriage Act, as also the decision of Full Bench of Andhra Pradesh High Court, and the contra view of the Bombay High Court in the matters of Bajirao v. Tolanbai, as also Yamunabai v. Anantrao, as confirmed by the Supreme Court being the view in the matter under section 125Criminal Procedure Code, question that is required to be considered is :

"Whether section 25 of Hindu Marriage is required to be construed liberally so as to include "illegitimate wife" for grant of permanent alimony under the said provision or it would entitle only wife, who establishes to be "legally wedded wife" for maintenance?"

In brief, we are required to define "wife" as used in section 25 of Hindu Marriage Act.

14. Section 25(1) of Hindu Marriage Act reads as follows, which is quoted in analyzed form for convenient consideration :

"25. Permanent alimony and maintenance. -- (1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto on application

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

It was because of use of the expression "any decree" and in the view of the matter that the provision is social welfare legislation, Kania, J. was inclined to take a view that section 25 of Hindu Marriage Act was required to be considered liberally so as to cover within its sweep even 'illegitimate wife'.

Upon taking into consideration the scheme of the Act and the categories of decrees that can be passed by Civil Courts, while dealing with the applications under Hindu Marriage Act, it can be visualized as to why the expression "any decree" might have been used by the legislature insection 25 of the Act.

Section 9 empowers the Court on an application by either spouse : to pass a decree for restitution of conjugal rights against the respondent who, without reasonable excuse, has withdrawn from the society of the applicant spouse. By virtue of section 10, either spouse can seek a decree for judicial separation (in stead of divorce) on any of the grounds specified in sub-section (1) ofsection 13, which are available as grounds for seeking a decree of divorce. In addition, a wife can seek a decree for judicial separation also on the grounds available under sub-section (2) of section 13. A decree regarding nullity of marriages, which are null and void in view of clauses (i), (iv) and (v) of section 5, can be obtained by either spouse under section 11 of the Act. Even the marriages, which are voidable or not consummated can be annulled by either spouse by presenting an application under section 12 of the Act. Section 13(1) enables either spouse to obtain a decree for divorce on the grounds, prescribed therein. Lastly, section 13(B) enables the parties to a marriage to obtain a decree for divorce by mutual consent by a joint petition to the Court.

Generally speaking, three kinds of decrees can be obtained, namely, restitution of conjugal rights, judicial separation and divorce, and almost all of those can be prayed for by either spouse, except those under section 13(2), which remedy is available to the wife alone and section 13(B), where both the spouses are required to approach the Court together.

Use of phrase "any decree" and even sections 11 and 12 referring to the wedlock as "marriage", although apparently either void or voidable, were the reasons why it was held that the Court has wide powers to entertain and grant an application for maintenance by a wife, who has gone through all rites of a Hindu marriage, which is otherwise valid but for provision of section 5(i) of the Act. Basically, the use of expression "any decree" must be viewed to have been used, having regard to various kinds of decrees, which could be passed at the behest of either spouse. But, it cannot be stretched to construe section 25(1) in such a manner that expression "any decree" would be read as "every decree". The section as quoted in analytical form has indications that the wide powers indicated by the expression "any decree" are not so unbridled, as to be considered as "every decree" and the controls over the powers are evident in the opening part as well as the terminal part. Section begins with the phrase "Court may" and not with the phrase "Court shall".

On taking into consideration the terminal part of the section, Court is required to give due thought, not only to the incomes of both parties, but it is also required to take into consideration the conduct of the parties and other circumstances of the case.

15. For example, let us consider application praying for a decree for restitution of conjugal rights. In case, the application is by wife and the Court is satisfied of husband having withdrawn from her society without reasonable cause, while granting a decree for restitution, the Court may also grant a decree for alimony for the period during which the husband had withdrawn himself from the society of wife and till the time he restitutes the conjugal rights. The question to be addressed to ourselves is whether the Court would be justified in granting alimony, if it rejects similar application of the wife by disbelieving her contention that the husband had withdrawn from her society without reasonable cause. To consider an extreme case, if the husband had approached the Court, after believing his contention that the wife has withdrawn from his society without reasonable cause, will the Court be in a position to grant permanent alimony in favour of the wife, who has so withdrawn from the society of the husband without reasonable cause, while granting a decree for restitution of conjugal rights in favour of the husband and who may refuse to obey the decree for restitution? The answer is in the negative. Otherwise, the husband, in spite of having obtained a decree for restitution of conjugal rights, may be deprived of the fruits of the same and simultaneously would be required to pay alimony to the wife, who has withdrawn from his society without reasonable cause.

    Hypothetical illustrations can be considered in the matters of other types of decrees. Would it be just on the part of the Court to grant alimony to the Respondent-wife, if the husband secures a decree for judicial separation under section 10, by establishing valid grounds as prescribed undersection 13(1) for the purpose? Would it be proper for the Court to grant permanent alimony to the wife, if husband obtains a decree of nullity by establishing the fact that the marriage is voidable at his instance, either because of being in contravention of clause (ii) of section 5, or because Respondent-wife was, at the time of marriage, pregnant by some person other than the petitioner and to the ignorance of the petitioner? It may not be inappropriate to visualize that a decree for divorce is obtained by the husband by establishing the wife to be guilty of any of the ground provided in section 13(1), (1-a) and (1-b), may not accompany with an order for permanent alimony in favour of the wife being divorced.

16. Taking into consideration above illustrations, it can be said that expression "any decree" cannot be construed to read in so much liberal and expanded form that it would interpret "every decree". The terminal part, which requires the Court to take into consideration the conduct of the parties, as also other circumstances of the case, also controls the discretion conferred upon the Court by the expression "Court may" and "any decree", and what can be 'other circumstances' of the case is indicated by hypothetical illustrations hereinabove.

    If in the light of discussion above, there can be cases of denial of maintenance to "legally wedded wife", it is difficult to accept as correct, liberal construction of section 25 so as to entitle "illegitimate wife" to maintenance.

17. That the provision is a welfare legislation, was also one of the reasons why it was felt thatsection 25 ought to be construed liberally and in favour of the wife. It may be taken into consideration that section 25 is not only for the welfare of the wife. In distinction with the provision, such as, section 125 of the Code of Civil Procedure which enables the wife alone to secure maintenance

from the husband, section 25 enables also a husband, who does not have sufficient income to secure maintenance from the wife having sufficient resources. Viewed from this angle, the section does not appear to have a distinct tilt in favour of wife so as to enable even "Illegitimate wife", to claim maintenance as was felt by this High Court, while deciding earlier matters.

18. The decision in the matter of Yamunabai, , although was considering the aspect "wife" for the purpose of section 125 of Code of Criminal Procedure, 1973, which is also a benevolent provision, provides an answer to the approach of Bombay High Court in the earlier matters, by referring tosection 16 of Hindu Marriage Act. By virtue of section 16(1)(2), legitimacy of children born out of void or voidable marriages is protected, irrespective of the fact if they are born before or after commencement of the Marriage Laws (Amendment) Act, 1976 and irrespective of whether or not a decree of nullity is granted in respect of the marriage. By virtue of subsection (3), even right of such children to the property of the parents is protected, while divesting them of right in or to the property of any other person.

As observed by Apex Court in paragraph 3, while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of void marriage, it has not extended the same protection to the mother of such child. Such a protection is not extended even to a limited purpose, such as, maintenance to the "illegitimate wife".

19. The term "wife" is not defined by Hindu Marriage Act. It is neither defined by Hindu Adoption and Maintenance Act, 1956, nor by section 125 of the Code of Criminal Procedure, 1973, although the said section by its explanation includes a divorced woman within the expression "wife". The General Clauses Act also does not provide definition of "wife".

In view of absence of definition of the word "wife", while confirming the decision of" full bench of this High Court in the matter of Yamunabai v. Anantrao , the Hon'ble Apex Court observed in para No. 4 as under:

"The word is not defined in the Code except indicating in the Explanation 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, subject to the Explanation (b), which is not relevant in the present context."

Further, in para 6, the Supreme Court has disapproved an attempt to exclude altogether the personal law applicable to the parties. No doubt, provision of section 125 of Criminal Procedure Code, 1973, is secular in its nature, in the sense that the same applies to applicant - wife from all religions and even after taking into consideration the observations in the matter of Mohd. Ahmed Khan v. Shah Bano, , the Apex Court was disinclined to exclude altogether personal law applicable to the parties from consideration for the purpose of definition of "wife".

Since HM Act, as also, Hindu Adoption and Maintenance Act do not define term "wife", we are unable to find any reason to ignore the provisions contained within HM Act, 1955, which enable the courts to determine whether a particular woman is "wife" of the respondent or not. We are referring to section 5 read with sections 11 and 12 of the said Act. If the Act within its scheme lays down the provisions which take away the character of "wife", claimed by a woman, in spite of having gone through rites according to Hindu religion for a valid solemnization of the marriage, in the absence of any express provision, protecting the status of "illegitimate wife" and

declaring her to be "wife" may be by legal fiction as in the cases of children born out of null and void wedlock, we see no reason to keep these provisions expelled from the consideration while determining the status of the applicant in the petition for permanent alimony.

If we take into consideration section 125 of Criminal Procedure Code, 1973, and section 25(1) of HM Act, it can be seen that : the provisions are similar, if not, congruent : in sum and substance so far as the application of petition of a wife. The Hon'ble Apex Court in Yamunabai's case, for the purpose of determining entitlement of "wife" to maintenance, while considering the same under a special legislation, did not approve altogether exclusion of personal law applicable to the parties. There is no reason why the personal law or provisions from the personal law contained within it, relating to the marital status, should be excluded for the purpose of application under section 25 of HM Act.

20. It could have been argued that a petition seeking declaration of nullity of marriage is also a petition affecting the marital status and since the petition under section 25 of HM Act can be filed at the time of or any time after the decision of petitions under sections 9 to 13(B) of HM Act, thereby, affecting marital status, Court is competent to pass a decree for permanent alimony even at the time of or any time after the decision regarding nullity of a marriage and therefore, section 25 is required to be construed liberally.

In para 3 of Yamunbai's case, the Supreme Court observes as follows :-- "The marriages covered by Section 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a Court in a proceeding specifically commenced for the purpose."

It is evident that a petition challenging the nullity of the marriage by virtue of section 5(1) is, in fact, a petition seeking a declaration regarding nullity of marriage, the same being void ipso jure. It is not a petition affecting the marital status in strict sense and therefore, it is difficult to accept such a possible contention that petition seeking declaration regarding nullity of marriage as void under section 5(i) is also a petition affecting the marital status and therefore, empowering the Court to entertain application under section 25 favourably.

A petition seeking annulment of the marriage, on the ground of same being voidable at the instance of petitioner, may be a petition affecting the marital status, because till the time declaration of nullity is sought by either spouse at whose instance the marriage is voidable, the relationship would be a valid marriage in the eye of law. The Court may be in a position to consider the application for permanent alimony while declaring the nullity of a voidable marriage but not while declaring nullity of marriage void ipso jure.

In the matter of Yamunabai, Hon'ble Apex Court also repelled an attempt to bring marriage which is void under section 5(i) at par with the marriage which is voidable under section 12.

21. For the reasons discussed above, we are of the view that observations of full bench of this High Court in Yamunabai's case, as confirmed by the Hon'ble Apex Court, although discussed in the matter of section 125 of Criminal Procedure Code, 1973, ought to apply with full force, even to the petition of similar nature under personal law of the parties. We are in respectful disagreement with view of Shah, J. in the matter of Krishnakant (supra) to that extent.

It is fundamental principle of law that in order to claim a relief from the Court of law, there must be a legal right based on a legal status. When the status of a woman as "wife" is not recognized by provisions of the Act, which confers the right for permanent alimony, she cannot be entertained for grant of relief in the absence of recognition of her status by the Act.

22. If the construction of word "wife" is not accepted uniformly, for the purpose of same remedy provided in special legislation (section 125 of Criminal Procedure Code, 1973) and personal law, anomalous position may occur. A woman who has been denied maintenance in a petition undersection 125 of Criminal Procedure Code, 1973, for the reason that she is not "legally wedded wife" would successfully pray and obtain permanent alimony in total disregard of earlier judicial pronouncement, as also, provisions regarding legitimacy of marriage as contained in personal law.

23. Even while considering section to be a "welfare legislation", it cannot be ignored that such a liberal construction, although may benefit the second wives, who are drawn into the form of marriage by keeping them ignorant about illegitimacy of the same, may encourage bigamous marriages with full knowledge and in spite of existence of a legislation in the field, preventing bigamous marriages.

24. For the reasons discussed above, with due respect, it is held that the decisions of the Bombay High Court, upholding right of maintenance to "illegitimate wife" (or "faithful mistress") by liberal construction of word "wife" as contained in section 25 of HM Act, cannot be said to be a good law and are required to be overruled to that extent.

The reference is answered accordingly.

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KADIA HARILAL PURSHOTTAM VERSUS KADIA LILAVATI GOKALDAS

Bombay High Court
Equivalent citations: AIR 1961 Guj 202, (1961) GLR 536

AIR 2004 Bom 283, 2003 (4) MhLJ 1019

Kadia Harilal Purshottam
vs
Kadia Lilavati Gokaldas

Decided on 1 February, 1961
Bench: Hon'ble Mr. Justice K Desai, Hon'ble Mr. Justice V Raju

Hindu Marriage Act -sec 25- any order for permanent alimony under sec. 25 after dismissing the appellants petition for restitution of conjugal rights is not sustained. The section is only applicable where a Court has passed a substantive decree granting any of the reliefs provided for in secs. 9 10, 11, 12, 13 and 14 and that it is applicable where the Court has dismissed a petition seeking any one of the aforesaid reliefs. The Court before it can exercise the powers granted under sec. 25 must pass a decree that the section vests the court with wide discretion in the matter of making orders for the maintenance and support of one spouse by the other where it passes any decree for restitution of conjugal rights, judicial separation, dissolution of marriage by divorce or annulment of the marriage on the ground that it was void or voidable.

JUDGMENT

Desai, C.J.

1. This appeal raises important questions relating to the construction of some of the provisions of the Hindu Marriage Act, 1955, a piece of legislation, which is not noted for artistic or accurate draftsmanship. The appellant in this case fiied a petition in the Court of the District Judge, Halar, for restitution of conjugal rights against the respondent. On 3lst January, 1957, the said petition was dismissed. From the order of dismissal, an appeal was filed in the High Court. That appeal was dismissed. On 11th April, 1957, the respondent made an application purporting to do so under the provisions contained in Section 25 of the Hindu Marriage Act, 1955, for permanent alimony. That application was heard by the learned District Judge, Halar, who passed an order awarding a sum of Rs. 40/- per month as and by way of permanent alimony to the respondent from the date of the application, The appellant has filed this appeal from that order.

2. Mr. Chhaya, the learned advocate for the respondent, has raised a preliminary objection as regards the maintainability of this appeal. He contends that no appeal lies against the order made as 'aforesaid on the application of the respondent. The provisions relating to appeals are to be found in Section 28 of the Hindu Marriage Act, 1955. That section runs as under:

   "All decrees and orders made by the court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the court made in the exercise of its original civil Jurisdiction are enforced, and may be appealed from under any law for the time being in force."

Mr. Chhaya contends that the order granting Rs. 40/- per month by way of permanent alimony is an order within the meaning of this section. He urges that an appeal can lie from such order only if such appeal is provided under any law for the time being in force. According to his submission, the law referred to in this connection is the Code of Civil Procedure, 1908. He says that the provisions of the Code relating to appeals are to be found in Sections 96 and 101 and Order 43 Rule 1- Section 96 provides for appeals from original decrees. Section 104 and Order 43, Rule 1 provide for appeals from orders, He argues that the provisions of Section 104 and Order 43 Rule 1 are inapplicable to the order in question passed by the District Judge, Halar. Section 104 in terms provides that an appeal shall lie from the orders therein mentioned and that save as otherwise expressly provided in the body of the Code or by any law for the time being in force, from no other orders. An order granting permanent alimony is not one of the orders specified in Section 104. Order 43 Rule 1, provides for an appeal from the orders therein mentioned. An order awarding permanent allmony is not one of the orders mentioned in Order 43. He relied upon the definition of the term "decree" given in the Civil Procedure Code in order to show that the Order in question does not amount to a decree. Section 2, Sub-section (2) provides that unless there is anything repugnant in the subject or context, the term "decree' means the formal express ion of an adjudication which, so far as regards the Court ex-pressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144, but is not to include any adjudication from which an appeal lies as an appeal from an order, or any order of dismissal for default. The expression "order" has been defined in Section 2, subsection (14) to mean the formal expression of any decision of a Civil Court which is not a decree. He argues that the order passed by the District Judge, Halar, awarding permanent alimony does not amount to a decree within the meaning of Section 2, Sub-section (2) of the Civil Procedure Code.' He says that this order was passed on an application that was made after the suit for restitution of conjugal rights was disposed of. He submits that the order made is an order within the meaning of Section 2, Sub-section (14), and as no appeal is provided from such an order under the provisions of the Code of Civil Procedure, no appeal lies therefrom and that the appeal that is filed is incompetent in law. He relies upon a decision of a single Judge of the Bombay High Court reported inPrithyirajsinghji Mansinghji v. Bai Shivprabha Kumari, 62 Bom LR 47: (AIR 1960 Bom 315). In that case it was held that the words "may be appealed from under any law for the time being in force" refer to the appeals provided for under the Code of Civil Procedure. It was there held thatSection 28 of the Hindu Marriage Act, 1955, did not provide any appeal against every order made by a Court In proceedings under the Act, 'but against only Such of them as fall within the definition of the term 'decree' as defined in Section 2, Sub-section (2) of the Civil Procedure Code, 1908, or with legard to which an appeal is provided under the Code. In that case, the contention that the words "under any law for the time being in force" were applicable merely to the procedure in cases where an appeal lay, was negatived. He also relied upon a decision of the Andhra High Court reported in B. Saraswalhi v. B. Krishna Murlhy, AIR 1960 Andh Pra 30. In that case, a Division Bench of that Court held that Section 28 by itself did not confer any right of appeal and that the words "may be appealed from under any law for the time being in force" conveyed the idea that an appeal could be filed against decrees and orders if there was provision therefor under any law and that one had to fall back on the Civil Procedure Code in this connection. In that case the Court was dealing with an appeal from an

order refusing to grant interim maintenance under Section 24 of the Hindu Marriage Act. The Court held that such an order under Section 24 did not fall within the ambit either of Section 104 or Order 43 and that no appeal lay therefrom.

3. The argument advanced before us by Mr. Chhaya proceeds on the footing that the expression "decrees" and "orders" appearing in Section 28 mean decrees and orders as defined in the Civil Procedure Code, 1908, Section 2(2) of the Code of Civil Procedure, 1908, in express terms lays down that the expression "decree" when used in the said Code means "the formal expression of an adjudication which as far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final".

Order 4 Rule 1 of the Code of Civil Procedure provides that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. In Sir Dinshah Mulla's Code of Civil Procedure, 12th Edition, at page 6 under the head "In the Suit" are set Out various proceedings which arc not instituted by presenting a plaint with the result that the orders made therein do not constitute decrees within, the meaning of the Code. No proceeding under the Act has to be instituted by presenting a plaint and the expression 'decree* as defined in Section 2, Sub-section (2) of the Code will not cover an adjudication in proceedings instituted under theHindu Marriage Act, 1955. The expressions "decrees" and "orders" appearing in Sec-28 of theHindu Marriage Act, 1955, have to be read and understood in the light of the other provisions of the Act itself. Section 28 follows upon Sections 9, 10, 11, 12, 13 and 14 which refer respectively to a decree for restitution of conjugal rights, a decree for judicial separation, a decree of nullity of marriage for contravention of the provisions of Clauses (i), (iv) and (v) of Section 5, a decree of nullity of marriage on the grounds set out in Section 12, and a decree of divorce. Sections 24, 25and 26 provide for orders. Under Section 24, provision is made for orders for maintenance pendente lite and for expenses of the proceedings. Section 25 deals with orders for permanent maintenance. Section 26 deals with orders in connection with the custody, maintenance and education of minor children. When Section 28 refers to appeals from decrees and orders, it refers to decrees mentioned in the sections referred to hy me above and the orders mentioned in the sections referred to above. The right of appeal is a statutory right. In order that a party may have a right of appeal, that right has to be conferred by legislation. If the words used in Section 28"may be appealed from under any law for the time being in force" mean that an appeal would only lie in these cases where some other law lays down that such appeal can be preferred, then the result would be that we would have to look to the provisions of the Civil Procedure Code in order to consider whether any appeal is provided under the Code in respect of decrees and orders passed under the Hindu Marriage Act, 1955. No other, law is pointed out which confers any right of appeal. As we have already indicated above, the Civil Procedure Code provides for appeals from decrees as defined in Section 2, Sub-section (2) of the Code of Civil Procedure. The decrees passed under Sections 9, 10, 11, 12, 13 and 14 of the Hindu Marriage Act, 1955, do not come within the definition of "decrees" under the Code of Civil Procedure. The orders passed underSections 24, 25 and 26 of the Hindu Marriage Act are not orders falling within Section 104 and Order 43 Rule 1 of the Code of Civil Procedure. If this interpretation is accepted, the result would be that there would not be any decree or any order under any of the aforesaid sections which would be appealable. This could not possibly be the intention of the legislature. The section is intended to deal inter alia with the subject of appeals from decrees and

orders passed under the Act. If there was no law under which an appeal would lie from any decree or Order passed under the Act, the provision in that connection would be futile and devoid of meaning. By this Act the legislature has conferred special rights and has provided special remedies. The Courts before which such proceedings could be taken and the way in which such proceedings may be initiated have been laid down in the Act. It would be reasonable to assume that when the legislature was considering the question of appeals from decrees and orders passed under the Act it would provide by the Act itself for such appeals. In the absence of any other legislation providing for appeals from both decrees and orders passed under the Act, there would be greater reason for the legislature to provide for it by the Act itself. In our view, on a true construction of Section 28 the right of appeal from all decrees and orders is conferred by Section 28 itself. No doubt, the language of the section is not very happy. The words "may be appealed from under any law for the time being in force" are capable of bearing the meaning which Mr. Chhaya desires us to give. If we give such a meaning to those words, the provisions relating to appeal are liable to be rendered nugatory. That could not possibly be the intention of the legislature. It could not be the intention of the legislature to confer a right of appeal against decrees and orders passed under the Hindu Marriage Act, 1955 by reference to the provisions of the Code of Civil Procedure. There is in fact no provision in the Code or in any other law under which any appeal could be filed from any orders passed under the Hindu Marriage Act, 1955. It seems to us that the legislature intendent to confer a right of appeal by the provisions of Section 28 itself by using the words "All decrees and orders made by the Court in any proceeding under this Act..... may be appealed from.....", and that the intention of the legislature was not to refer parties to any other enactment for the purpose of ascertaining whether the decrees or orders passed under the Act were appealable or not- Having regard to the language used by the legislature which, we are painfully conscious is not very apt, some meaning has to be given to the words "under any law for the time being in force". Those words, on a true construction of the Act, are intended to provide for the forum before which the appeal is to be preferred. They may well relate to the procedure in connection with the appeals which may be filed under Section 28. We are supported in this conclusion by a decision of the Calcutta High Court reported in the case of Sobhana v. Amar Kanta, AIR 1959 Cal 455. A Division Bench of the Calcutta High Court in that case has held that the Act has made definite provisions in Section 28 for appeals. In that case they had to choose between two rival constructions that could be placed upon the provisions of Section 28. One was that by - that section the legislature had provided that an appeal would lie against all decrees and orders made by the Court in any proceeding under the Act and that the forum and other matters in connection with the hearing of the appeal would be decided in accordance with the laws that may be in force for the time being. The other construction was that this section did not say anything positive itself as regards appealability of the decrees and orders but merely said that if an appeal lay against decrees and orders made in any proceeding under the Act under some Jaw that may be in force at the time, then an appeal would lie and not otherwise. They preterred to adopt the first construction. We are in respectful agreement with that conclusion. If the Code of Civil Procedure in fact provided for appeals against decrees and orders passed under the Act, then there was no necessity for the legislature to once again provide that appeals from decrees and orders would lie under such law. The fact that decrees and orders passed by a Court under the Hindu Marriage Act, 1955, cannot be regarded as decrees and orders passed by the Court in the exercise of its original civil jurisdiction is evident from the very language used in Section 28. It says that all decrees and orders made by the Court in any

proceeding under the Act shall be enforced in the like manner as the decrees and orders of the Court made in the exercise of the original civil jurisdiction are enforced. The Calcutta High Court has observed that the words "under any law for the time being in force" in connection with appeals deal with the manner in which appeals have to be filed and deal with the forum before which the appeals may be instituted. A similar view has been taken by the High Court of Madhya Pradesh in a decision reported in Rukhmenibai v. Kishanlal Ramlal, AIR 1959 Madhya Pra 187. Justice Shrivastava in that case observes thatSection 28 has been enacted with the intention of giving a right of appeal. He further observes that if the right of appeal was to be inferred from the provisions of any other law, the section so far as it relates to appeal would be meaningless and some of the words in the section would be superfluous. He adds that it cannot be expected that a right of appeal from orders which are passed under the specific provisions of the Act should be provided for in any other law. He took the view that looking to the language or the section, the intention was to give a right of appeal in the case of every order passed under the Act and to leave the forum and procedure of the appeal to be determined by the relevant law for the time being in force.

4. In our view, the order passed by the learned District Judge granting permanent alimony is an order appealable under Section 28, and the preliminary objection taken by Mr. Chhaya must fail.

5. In view of what we have staled above it is not necessary to consider the alternative argument that if the proceeding under the Act could be regarded as a suit, the order in question is liable to be considered as a "decree" within the meaning of Section 2(2) of the Code of Civil Procedure and is appealable as a decree.

6. Mr. Nanavaty who appeals for the appellant contends that the learned District Judge was not entitled to pass any order for permanent alimony under Section 25 after dismissing the appellant's petition for restitution of conjugal rights. He argues that the section is only applicable where a Court has passed a substantive decree granting any of the reliefs provided for in Sections 9, 10, 11, 12, 13 and 14 and that it is inapplicable where the Court has dismissed a petition seeking any one of the aforesaid reliefs. Section 25 runs as under;

"25(1). Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immoveable property of the respondent.

(2) If the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under Sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just., (3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order".

It is urged by Mr. Nanavaty that the words "any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto" indicate that the Court, before it can exercise the powers granted under Section 25, must pass a decree. He urges that an order of dismissal of an application under Sections 9, 10, 11, 12, 13 and 14 could in no sense be regarded as the passing of a decree. The aforesaid sections provide for decrees of various kinds giving the reliefs therein provided. In our view, the words "at the time of passing any decree or at any time subsequent thereto" mean at the time of passing any decree of the kind referred to under the afore-j said sections and not at the time of dismissing the, petition for any of the reliefs provided in the said' sections or any time subsequent thereto. Mr. Chhaya placed some emphasis upon the words "any. decree" and urged that the expression "any decree" would include an order of dismissal. In our view, the passing of an Order of dismissal of a petition could not be regarded as the passing of a decree within the meaning of this section. The word "any' which precedes the word "decree" has been used having regard to the various kinds of decrees which may be passed under the provisions of the Act. A decree may be a decree for restitution of conjugal rights. It may be a decree for judicial separation.

It may be a decree of nullity of marriage. It may be a decree of divorce. At the time of passing any such decrees or at any time subsequent thereto, orders can be made as provided in the section.

Our attention has been, drawn to a passage appear ing at page 896 in Sir Dinsha Mullah's well-known treatise on the Principles of Hindu Law. It is there stated as under.:

"The words 'at the time of passing any decree or any time subsequent thereto' indicate that an order for permanent alimony or maintenance in favour of the wife or the husband can only be made when a decree is passed granting any substantive relief under the Act and not where the main petition itself is dismissed."

A reference is made in support of this proposition to a decision of the Madras High Court reported in Devasahayam v. Devamony, ILR 46 Mad 133 : (AIR -1823- Mad 211). That was a case which arose under the provisions of section 37 of the Indian Divorce Act; 1869. That section provides as under:

"The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved; or on any decree of judicial separation obtained by the wife, and the District Judge may, if he thinks fit; on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, etc."

The language of section 37 of the Divorce Act, 1869, is materially, different from the language used by legislature in section 25 of the Hindu Marriage Act, .1955, and the decision of the Madras High Court cannot afford any. guidance in construing the language used by the legislature insection 25 of the Hindu Marriage Act, 1955. In our view, toe language used by the legislature insection 25 is such that the", power thereby conferred could only be exercised "at the time of passing of any of the decrees referred to in the earlier provisions of the Act or any time subsequent thereto. We are supported in this conclusion by an unreported decision of Chief Justice Section T. Desai and Justice Bakshi given on 28th November 1960 in First Appeal No. 178 of 1960 (Cuj). In that case it has been laid down that Section 25 relates only to an ancillary relief which is incidental to the substantive relief that may be granted by the Court, though the incidental relief may be given

to other/party. In this view of the matter, the " learned District Judge of Helar was not entitled to pass any order for permanent alimony in favour of the respondent in view of the fact that the petition made by the appellant for restitution of conjugal rights had been dismissed.

7. There is one more ground which has been urged by Mr. Nanavaty, challenging the validity of the decision given by the learned District Judge.' He says that the right to make an order underSection 25 is, having regard to the language used in that section, confined only, to those cases where a decree has been passed by the Court dissolving a marriage. He says that, section 25 lays down that the Court may order, that the respondent to an ...application for permanent., alimony or maintenance should, while, the, applicant to the application remains un-married pay to the applicant for her or his maintenance and support such monthly or periodical sum for a term not exceeding the life of the applicant. He says that the words "while the applicant remains unmarried" indicate the period during which the amount of alimony or maintenance is required to, be paid and indicate the condition subject to which such alimony and maintenance is required to be paid. He urges that when a Court passes a decree for restitution of conjugal rights, the marriage between the parties remains intact and is not dissolved, and no question of the applicant, under section 25 remaining unmarried could possibly arise. He further urges that where a decree is passed for judicial separation, the marital bond still remains undissolved and the question of the applicant remaining unmarried would not arise, If we were to accept, the contention urged by Mr. Nanavaty the result would be that the powers of the Court conferred under section 25 would be very limited. The Hindu Marriage Act, 1955, is an act intended to amend and codify the law relating to marriage among Hindus. Section 25 is preceded by section 24. It deals with maintenance pendente lite and deals with expenses of proceedings. That section runs as follows:

"24.--Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceedings, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding and monthly during the proceeding such slim as, 'having regard to' the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable."

This section is applicable to proceedings not merely for obtaining a decree for the dissolution of marriage or a decree of nullity, of marriage, but is equally applicable to proceedings for obtaining a decree for restitution of conjugal rights and a decree for judicial separation. If the court is empowered under section 24 to grant, interim maintenance during the pendency of such proceedings, it would be somewhat difficult to accept the contention that the legislature intended that section 25 should only be confined to cases where a decree for divorce is passed. Section 25 is followed by section 26. It lays down as under :

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

This section embraces within its abmit provisions for maintenance of children during the continuation of the proceedings before the Court and after they have ended. If We are to interpretSection 25 in the manner suggested the result would be that there would be a lacuna in the Act. The marginal note to the section speaks of "permanent alimony and maintenance". In connection with the concept of permanent alimony it is stated in Sir Dinshah Mulla's book on Hindu Law, 12th Edition, at page 894 as under:

"Permanent alimony is the expression used under English law in the context of provisions ordered to be made by the Court for a wife on her petition for judicial separation being granted. Behind the relevant statutory enactment in England is a historic development of law. Before the first Divorce Act in England a wife could only obtain from the Ecclesiastical Court divorce a mensa it there (judicial separation) and the allowance allotted to her was named permanent alimony which was as a general rule one-third of the husband's income. The operation of the rule was extended and the same principle was applied in cases decided under the successive Divorce Acts in England when relief by way of dissolution of marriage by divorce was granted to the wife. At one stage the view was taken that the wife who claimed maintenance after a decree of divorce in her favour would have pecuniary interest in seeking such relief & that would not accord with the policy of law. That view was discountenanced and it was ruled that the principles on which the Ecclesiastical Courts awarded permanent alimony in case of judicial separation should be applicable to cases where relief by way of divorce or nullity of marriage was granted although in cases under the latter category she ceased to be the wife or was declared not to have been the wife of the other party and relinquished ber character as wife and the name of the husband."

In our view, whilst enacting Section 25 the legislature did not intend to restrict the ordinary provisions relating to permanent alimony and maintenance in connection with proceedings for judicial separation, divorce and nullity of marriage, but to extend the same and make the provisions applicable both in favour of the wife as well as the husband. No doubt, the words used by the legislature "while the applicant remains unmarried" suggest the construction sought to be placed by Mr. Nanavnty. We have, however, to consider the paramount intention of the legislature. In Maxwell on Interpretation of Statutes, at page 229 it has been observed as follows:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual, meaning to particular words, by altering their collocation, or by rejecting them altogether under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus, made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not fee reduced to a nullity by the draftman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used." The Courts have always, been extremely, reluctant to substitute words in a statute or add words to it. A Court would do so where there is a repugnancy to good sense. The Hindu Marriage Act, 1955, cannot be regarded as a work of art. It is not noted for good drafting. It contains several provisions which present difficulties while interpreting the same. The words used in some sections are far from happy and

difficulties are experienced in gathering the true meaning of the legislature. There is however one thing clear that the main object and intention of the enactment was to amend and codify the law relating to marriage among Hindus. The intention was not to restrict the powers of the Court in granting permanent alimony and maintenance to an extremely limited class of cases, namely where the Court had passed a decree for divorce or of nullity of marriage. The words used in section are "at the time of passing any decree." The words "any decree" would not have been used if it was the intention of the legislature to restrict the operation of the section only to cases where a decree for divorce or of nullity of marriage was passed. The power was intended to be exercised at the time of the passing of any of the decrees referred to in the earlier provisions of the Act or at any time subsequent thereto. The legislature however has inserted the words "while the applicant remains unmarried." The legislature could only have intended to make those words applicable in those cases where a party was in a position to contract a marriage. Those words could not, with any propriety, be used in respect of those cases where the marriage bond remains unsevered. The legislature, in enacting Section 25, has even sought to go beyond the ordinary provisions of law relating to alimony end maintenance as applicable to other communities. It has sought to provide permanent alimony and maintenance even for a husband. When the legislature was seeking to extend the provisions relating to permanent alimony and maintenance so as even to make a husband eligible for receiving permanent alimony and maintenance, it would be extremely difficult for us to hold that the legislature intended to take away from a Court dealing with matrimonial matters the power to provide permanent alimony to a wife when passing a decree for judicial separation in her favour. It is our irresistible conviction that the legislature could not have intended to take away such a right. It would be more correct to hold that these words have appeared in section 25 in the form in which they appear due to unskilfulness in drafting, and that it would not be proper for us to confine the Operation of the section to cases where a decree for divorce or of nullity has been passed. To us it appears that the construction sought to be put by Mr. Nanavaty upon the section, though it is within the language and grammar of it, is repugnant to good sense. We would confine the operation of the words "while the applicant remains unmarried" to those cases where the applicant is in a position to contract a lawful marriage. In such cases the order must be made conditional, its operation being dependent upon the applicant remaining unmarried. We derive support for the conclusion to which we have arrived at from the. Commentaries made on this section in The Principles of Hindu Law, by Shri Dinshah Mulla, 12th Edition at page 893. It is there stated that the section vests the court with wide discretion in the matter of making orders for the maintenance and support of one spouse by the other where it passes any decree for restitution of conjugal rights, judicial separation, dissolution of marriage by divorce or annulment of the marriage on the ground that it was void or voidable.

8. In the result, the appeal succeeds and the order passed by the learned District Judge awarding permanent alimony and costs is set aside. As regards costs, in view of the fact that the respondent is the wife of the appellant and that the appellant has failed in his petition for restitution of conjugal rights and would ordinarily have to maintain his wife, we consider it fair that there should be no order as regards costs throughout.

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BAJIRAO RAGHOBA TAMBRE VS TOLANBAI (MISS) D/O BHAGWAN TOGE

Equivalent citations: 1980 CriLJ 473

Bajirao Raghoba Tambre
vs
Tolanbai (Miss) D/O Bhagwan Toge

Decided on 1 March, 1979
Bench: Hon'ble Mr. Justice P Shah & Hon'ble Mr. Justice M Kanade

Criminal Procedure Code (2 of 1974), S. 125 and Hindu Marriage Act (22 of 1955), Ss. 5(1)(i) and 11 — "whether the second wife whose marriage is void in view of the provisions of sections 5 and 11 of the Hindu Marriage Act, 1955 (Act No. 25 of 1955) is entitled to apply for maintenance under section 125 of the Code of Criminal Procedure, 1973". Unless and until the complaint (respondent No. 1 herein) proves that she is the legally wedded wife of the petitioner, the Magistrate will have no jurisdiction to pass an order of maintenance in her favour.

JUDGMENT

P.S. Shah, J.

1. This petition file d by the petitioner husband under Articles 226 and 227 of the Constitution of India and also under section 462 of the Code of Criminal Procedure, 1973, raises a question of some importance. The question that arises for consideration is "whether the second wife whose marriage is void in view of the provisions of sections 5 and 11 of the Hindu Marriage Act, 1955 (Act No. 25 of 1955) is entitled to apply for maintenance under section 125 of the Code of Criminal Procedure, 1973".

2. The facts which are no longer in dispute before us are in a narrow compass. The petitioner is married to one Dwarkabai on July 4, 1961. During the subsistence of this marriage, the petitioner married the respondent No. 1 Tolanbai on September 5, 1966. On September 1, 1975. Tolanbai filed an application under section 125 of the Code alleging inter alia that the petitioner beat her and drove her out of the house and, therefore, she has been staying with her parents who are poor, and she has no means of livelihood. She claimed an amount of Rs. 500/- per month by way of maintenance. Apart from denying the allegations of the respondent, the petitioner contended in the trial Court that his marriage with the respondent even if proved was null and void and did not confer a status of the wife on her because this marriage was admittedly solemnised when his first wife Dwarkabai was living.

3. The trial Court held that the petitioner's marriage with Dwarkabai had taken place in the year 1961 while his marriage with the respondent had taken place in the year 1966. It also held that having regard to the fact that the necessary ceremonies for solemnisation of the marriage according to customary Hindu Law having been gone into, she must be deemed to be a legally wedded wife for the purposes of section 125 of the Code. On merits the trial Court accepted the case of the respondent and awarded maintenance at the rate of Rs. 60/- p.m. Aggrieved by this decision, both the petitioner and the respondent filed revision applications in the Sessions Court which came to be dismissed with the result that the order or maintenance passed by the

trial Court was maintained. The petitioner has, therefore, preferred this present challenging the order of the courts below.

4. Mr. Sawant, the learned Counsel appearing for the petitioner husband raised only one contention. He submitted that the marriage of the respondent with the petitioner is null and void in view of the provisions of section 5 read with section 11 of the Hindu Marriage Act, and such a marriage, therefore, cannot confer the status of wife on the respondent which would entitle her to make an application for maintenance under section 125 of the Code of Criminal Procedure. He submitted that in order that a woman may be entitled to claim maintenance under the said provisions, she must satisfy the conditions laid down in that section, one of the conditions being that she is the wife of the person against whom maintenance is claimed. According to him, the word "wife" in section 125 must mean, and has all along been construed to mean under section 488 of the old Code of Criminal Procedure, "a legally wedded wife", and as such a woman whose marriage contravenes the provisions of section 5 read with section 11 of the Hindu Marriage Act being void cannot claim the status of a wife. The mere fact that the necessary ceremonies of a marriage under the customary Hindu Law have been gone into cannot confer on her the status of "a legally wedded wife' which is a condition precedent for claiming maintenance under section 125 of the Code.

5. On the other hand, Mr. Gavneker, the learned Counsel appearing for the respondent sought to repeal these arguments of Mr. Sawant by contending that the provisions of section 125 should be liberally construed having regard to the social changes as well as the changes in the personal law of the party since independence. He submitted that although under the provisions of section 488of the old Code which is in pari materia with the provisions of section 125 of the new Code, it has been consistently held that in order to be entitled to claim maintenance under section 488, the applicant must establish that she is the legally wedded wife. Such a narrow construction of the provisions will no longer be permissible having regard to the progressive measures to ameliorate the conditions of married women under the Hindu Marriage Act, 1955, and the Hindu Adoption and Maintenance Act, 1956, and the extension of rights of maintenance to additional categories of persons who did not have such a right under the old sections 488 of the Code. He submitted that it must be assumed that the Parliament did taken into consideration the changes in the personal law while enacting the provisions of section 125 of the new Code. According to him, the provisions contained in the Hindu Marriage Act for alimony even to such a wife must be presumed to have been taken note of while enacting section 125 of the Code. He further submitted that section 125of the Code confers a statutory right on every wife irrespective of her marriage being legal or void and there is no valid reason restrict its application only to a legally wedded wife. It was submitted that the provisions of section 125 were a piece of beneficial and social legislation which must be liberally construed in the context of the social changes and the intention of the legislature to confer additional rights on woman and children. The Counsel further submitted that all that the respondent had to establish in this case is whether the marriage was performed by going through the necessary ceremonies as per the customary Hindu Law, and, once that is established, it would not make any difference whether her marriage with the petitioner contravenes the provisions ofsections 5 & 11 of the Hindu Marriage Act. Lastly he submitted that in any event, having regard to the fact of this case, this Court should not exercise its discretionary powers under Article 227 of the Constitution.

6. It is not disputed before us that the requisite ceremonies for a valid marriage under the personal law of the parties have been gone into in this case, although the marriage is null and void by reason of the provisions of sections 5 and 11 of the Hindu Marriage Act, 1955. This Actwas passed with the object of amending and modifying the law relating to marriages among Hindus. Under the customary law, there was no restriction for a male Hindu to marry more than one women. This right of the Hindu husband under the customary Hindu Law was curtailed for the first time in the then Bombay Province by enacting the Bombay Prevention of Hindu Bigamous Marriage Act, 1946, provisions whereof declared bigamy to be illegal. Under the provisions of the said Act and other similar laws enacted by other Provincial Legislatures, a second marriage by a Hindu person during the life time of the spouse was declared illegal and going through such a marriage was made penal. Consistent with the object of codifying the marriage laws amongst Hindus, all these State laws were repealed by the Hindu Marriage Act, 1955. Section 5 of the Hindu Marriage Act provides for the conditions for solemnisation of marriage between any two Hindus. Section 11 declares that a marriage solemnised after the commencement of the Act shall be null and void if it contravenes any of conditions specified in Clause (i), (iv) and (v) of section 5. One of the conditions for a marriage as required by section 5 is that neither party has a spouse living at the time of the marriage, and this is condition No. (i) insection 5. Section 11 also gives a remedy to either party to the marriage to file a petition for a declaration by a decree of nullity of marriage on any one of the said three conditions of section 5being shown to the have been contravened. Obviously, the second marriage in such circumstances being void, it cannot create a legal status of husband and wife between the parties. It is true thatsection 11 also gives a right to the parties to the marriage to file a petition for a declaration of nullity by a decree of the Court , but the filing of the petition or passing the decree is not a condition precedent for putting an end to the marriage. What ultimately is declared on such a petition is nothing but the status of the party as on the date of the marriage, and therefore, the marriage does not continue to remain valid until a decree is passed. What is null and void cannot be deemed to be in existence for any purposes whatsoever. Under the circumstances, if a marriage is solemnised in contravention of any of the said three conditions referred to in section 5(i), the woman cannot get the status of the wife nor the male gets the status of a husband qua her. The second marriage does not continue to be valid till the passing of the decree for a nullity. The position is also clear from the fact that bigamy is made penal by section 17 of the Hindu Marriage Act which provides that any marriage between two Hindu solemnised after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living and the provisions of sections 494 and 495 of the Indian Penal Code shall apply accordingly. The position is made further clear from the anxiety of the legislature to protect children of such a marriage by providing in section 16 that not withstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, 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. However, the rights of such a child are somewhat curtailed in the matter of inheritance to the property, because sub-section (3) ofsection 16 says that a child of such a marriage would not be entitled to any rights in or to the property of any person other than the parents. Having regard to all these provisions, the marriage of the petitioner with the respondent was void ab initio and the respondent could not get the status of a legally wedded wife inspite of the solemnisation of

the marriage under the Hindu Law having gone into. Indeed, Mr. Gavnekar did not dispute this legal position. He, however, contended that the provisions of section 25 of the Hindu Marriage Act conferred a right of maintenance on the second wife and the word "wife" in section 125 of the Code of Criminal Procedure will have to be given a wider meaning as including a Hindu wife whose marriage may be otherwise void.

7. Before adverting to the consideration of section 125 of the new Code it would be of relevance to consider the legal position as it obtained prior to the enactment of the new code of 1973. Section 488 of the old Criminal Procedure Code inter alia provided that if any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the Magistrate could make an order against such a person to make monthly allowance for the maintenance of his wife or such child. Thus a right was conferred on the wife or a legitimate or illegitimate child to claim maintenance, and the husband or the father as the case may be could be directed to pay an amount of maintenance not exceeding a particular limit as mentioned is the section. The object of the provisions of section 488 had been aptly described as a provision for preventing vagrancy or at least of preventing its consequences. The object of maintenance proceedings was not treated as a mode of punishing husband or parent for his past neglect but to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves. The provisions of section 125 are also intended to achieve the same object. In short, the provisions of section 488 or of section 125 of the new Code have been enacted with the object of enabling the discarded wives, helpless and desisted children to secure some relief for their maintenance and livelihood. While section 488 restricted its operation to wives and children whether legitimate of illegitimate section 125 has brought into its fold the parents who are unable to maintain themselves. It has been the consistent view taken as seen from the catena of decisions under section 488 so far as claim for maintenance by a wife against her husband is concerned that it must be shown that the complainant is the wife of the defendant. Only a legally married woman was held to be entitled to maintenance. It was held that merely because a woman has lived with a man as his wife for 12 years or more and has also borne him a chile she was held not entitled to claim maintenance under section 488. Section 488 applied only to the abandoned wife and not to the abandoned mistress, however faithful she may have been to her paramour, and however badly she may have been treated by him. In other words, the condition precedent for claiming a right of maintenance under that section was the proof of relationship of husband and wife and there could be no such relationship unless it is shown that the complainant is a legally wedded wife of the defendant. Conversely, it was also held that once it is established that the complainant is the legally wedded wife, the fact that the personal law did not provide for such a maintenance was no bar to pass an order for maintenance under this section. For instance, a mutta wife was held entitled to maintenance under this section though she may be entitled under the Mohammedan Law. As long back as in the year 1891, this Court held in (In Re: Gulabdas Bhaidas), 16 Bom. 269, that before a Magistrate makes an order undersection 488 of the Code of Criminal Procedure, be must find that the complainant is the wife of the person from whom she claims maintenance, and that he has either neglected or refused to maintain her. A similar interpretation was also made by the Madras High Court in (A.T. Lakshmi Ambalam s. Andiammal) A.I.R. 1938 Madras 66. The Court held that only legally wedded women were entitled to maintenance under section 488; and in case of a dispute, the Magistrate must record a definite finding that the complainant is the wife of the person ordered to pay the maintenance, because the provisions were that only wives were entitled to

maintenance. Same interpretation was put on the word " wife" in section 488 in the case of Pwa Me v. San Hla, 16 Cri.L.J. 39. It was held that under section 488, a woman cannot be granted maintenance order against a man unless she proves herself to be his legal wife according to his personal law.

8. Section 488 remained on the statute book till the enactment of the new Code of 1973. It was in the year 1955 that a Union Legislation was enacted prohibiting bigamy and rendering a marriage null and void if such a marriage takes place when a spouse is living at the time of the marriage. It would be significant that in spite of the Hindu Marriage Act coming into force in the year 1956, no attempt was made to amend the provisions of section 488 to include the case of a woman whose marriage is void by reason of the provisions of sections 5 and 11 of the Hindu Marriage Act. The question as to whether a woman who has entered into a Marriage Act. The question as to whether a woman who has entered into a marriage with a person in contravention of the provisions ofsections 5 and 11 can apply for maintenance under section 488 arose for consideration of different High Courts.

9. In Savithramma v. Ramanarasimhalah, 1963(1) Cri.L.J. 131 the Court held that the complainant who was not a legally wedded wife or a lawful wife was not entitled to claim maintenance under section 488. The Court observed in para 5 as under,---

"The scope of section 488 of the Criminal Procedure Code is rather restricted. Its object is to prevent vagrancy of wife or of the legitimate or illegitimate children. It affords speedy remedy for the aggrieved party. But it does not determine the legal rights as a Civil Court does. Otherwise, it would usurp the jurisdiction of Matrimonial Court. What the section provides for is the maintenance to wife or her legitimate or illegitimate children. If the intention of the legislature was that provision is to be made for even the illegitimate wife just as in the case of children where the expression "legitimate" or "illegitimate" is used, similar expression would have been employed. That has not been done thereby indicating that the term "wife" includes only the legitimate wife and excludes any illegitimate one."

10. Even after the enactment of the Prevention of Bigamous Marriages Act and the Hindu Marriage Act of 1955, where the second wife (so called, because her marriage was null and void had applied for maintenance under section 488, it has been consistently held that she could not claim the status of a wife and was, therefore, not entitled to make an application for maintenance. Such a view on the interpretation of section 488 has been taken in (1) A.P.K. Narayanaswami Reddiar v. Padmanabhan, ; (2) Banshidhar Jha v. Chhabi Chatterjee, and Baj Bhanbal Mavji v. Kanbi Karshan Devraj, . It would, therefore, be clear that it has been consistently held, notwithstanding the enactment of the Hindu Marriage Act of 1955, that it is only a legally wedded wife who can maintain an action under section 488 of the old Code. If the marriage is not proved to be a valid marriage, whether under the personal law or being in contravention of the provisions of the Hindu Marriage Act, or such other laws, no application under section 488 by such an 'illegitimate' wife shall be held to be maintainable. It is significant to note that in spite of this consistent and long standing judicial interpretation of the word "wife" in section 488, the Legislature in its wisdom did not think it necessary to widen the scope of the provisions of section 488 while enacting the provisions of section 125 in the new Code. Undoubtedly, some more categories of persons have been specifically added in section 125, but as for as the wife is concerned, the only addition is that of a divorced wife. The case of divorced wife is obviously different, because till divorce, she continues to be a legally wedded wife. A woman whose marriage is void cannot get the legal

status of a wife and, therefore, if the marriage is void by reason of contravention of section 5 read with section 11 of the Hindu Marriage Act, she is not competent to make an application under section 125 of the Code. That provision merely speak of a " wife "and its meaning cannot be extended to the case of a void marriage.

11. It is well settled principle of construction of a statutory provision that if an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, and passed with the same purpose, and for the same object, the safe and well known rule of construction is to assume that the legislature when using well-known words upon which there have been well-known decisions use those words in the sense which the decisions have attached to them. (See Maxwell on the Interpretation of statutes, Twelfth Edition, Page 71). It is true that this principle is not "a canon of construction of absolute obligation.", but merely "a presumption that Parliament intended that the language used by it in the subsequent statute should be given the meaning which in the meantime has been judicially attributed to it." There is nothing in the provisions of section 125 which would indicate that the Legislature intended to depart from the scope of the earlier section 488 so far as the rights of the wife to claim maintenance is concerned. There is no reason for us to assume that the Legislature intended to enlarge the scope of the original provisions so far as a wife is concerned, particularly when the courts even after the enactment of the Hindu Marriage Act without any exception took the view that it is only a legally wedded wife that can avail of the remedy under section 488. In this context, we may usefully refer to the observations of the Supreme Court in the Commissioner of Sales Tax, U.P. v. Person Tools & Plants, Kanpur, . The Court observed in para 12 as under :

"If the legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a causes omissus in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation by analogy or implication, something what it thinks to be a general principle of justice and equity. 'To do so' at p. 65 in Prem Nath L. Ganesh v. Prem Nath, , per Tekchand J.) ' would be entrenching upon the preserves of Legislature", the primary function of a Court of law being jus dicere and not jus dare. "

12. According to the Concise Oxford Dictionary, "wife" means married woman esp. in relation to her husband". It is not possible to hold that even if the marriage is null and void and prohibited by law, she should still be considered as the wife. If such an interpretation of the word "wife" were to be accepted, it could as well be extended to cases where the necessary ceremonies under the personal law are not gone into, and what is pressed into service is a long co-habitation as husband and wife. Even a concubine or any woman living with the paramour and treating herself to be his wife could claim to be his wife for the purposes of section 125. For a valid marriage which alone can confer the state of a wife not only the ceremonies under the personal law must be gone into, but also must conform to the statutory requirements such as section 5 and 11 of the Hindu Marriage Act. Just as under the personal law, the ceremonies is a condition precedent for a valid marriage, similarly, the marriage should not contravene any of the conditions under the statutory provisions. In the absence of any clear indication in the provisions itself and having regard to the background in which the said provisions of section 125 were enacted, we do not think that a woman can claim maintenance unless she proves that she is a legally wedded wife of the defendant against whom she maintains an action.

13. Strong reliance was placed by Mr. Ganvekar on the provisions of section 25 of the Hindu Marriage Act, which according to him, must be borne in mind while interpreting the provisions ofsection 125 of the Code. Section 25 of the Hindu Marriage Act confers jurisdiction on the Court to grant permanent alimony and maintenance to a wife or a husband, and this jurisdiction could be exercised by the Court either at the time of passing the decree or at any time subsequent thereto. It was, therefore, contended that even a woman whose marriage is declared to be null and void under section 11 of that Act is entitled to get alimony and maintenance. This provision of law, according to the Counsel, clearly indicates that there was a clear departure from the personal law as it stood prior to the Hindu Marriage Act and the legislature intended to confer a statutory right of maintenance and alimony even in cases where the marriage contravenes the conditions prescribed in section 5 and is declared to be null and void under section 11. Reliance was placed on a decision of a Single Judge of this Court in Govindrao Ranoji v. Anandibai Govindrao, 79 Bom.L.R. 73. The Court held that section 25(1) not only provides for a remedy but it also confers a right; and the words " wife" and " husband" used in section 25(1) of the Hindu Marriage Act include within their scope a woman and man professing the Hindu faith who have gone through a ceremony of marriage which would, in law, have conferred the status of a wife or husband on them but for the provisions of section 11 read with Clauses (i), (iv) and (v) of section 5 of the Act. On this decision, it was urged by the Counsel that there is no reason why the same meaning should not be given to the word " wife" in section 125 of the Code as has been given to the same word in section 25(1), of the Act of 1955. The Counsel also pointed out that a similar view on the interpretation of the word " wife" in section 25(1) has been expressed Dayal Singh v. Bhajan Kaur, ; and Arya Kumar v. Ila, . However, it appears that a contrary view has been taken by a Division Bench of the Madras High Court in A.P.K. Narayanaswami Reddiar v. Padmanabhan, . The Madras High Court has held that section 25 cannot be construed in such a manner as to hold that notwithstanding the nullity of the marriage, the wife retains her status for purposes of applying for alimony and maintenance; and the proper construction of section 25 would be that where a Marriage is admittedly a nullity, the section will have no application. They, however, held that where the question of nullity is in issue and is contentious, the Court has to proceed on the assumption until the contrary is proved, that the applicant is the wife. Mr. Sawant submitted that the view taken by Kania, J. in 79 Bom.L.R. 73, requires reconsideration. We do not, however, think it necessary to go into that question because in our view, even if we were to accept the correctness of the view taken by Kania, J. on the true construction of section 25(1), it will not have any hearing on the interpretation of the word " wife" in section 125 of the Code. We would therefore, proceed on the basis that the woman whose marriage is void by reason of section 5 read with section 11 of the Act is entitled to claim alimony in view of the provisions of section 25. In the first place, section 25(1) confers a statutory right on the wife and the husband and confers a jurisdiction on the Court to pass an order of maintenance or alimony in proceedings contemplated under the Act at any time after the decree is passed in such a proceeding. In order, therefore, that the wife or the husband could claim such a right, the conditions of section 25(1)will have to be satisfied. There must be a matrimonial petition filed under the Act; then in such a petition, a decree must be passed by the Court. It is only when a decree is passed that a right accrues to the wife or the husband or confers a jurisdiction on the Court to grant alimony, Till then, such a right does not take place. It is, therefore, difficult to accept the contention that the personal law regarding the maintenance of a woman who is not legally wedded wife stands changed by the provisions of section 25(1). In any case, the jurisdiction

contemplated undersection 25(1). In any case, the jurisdiction contemplated under section 25(1) under the Hindu Marriage Act and section 125 of the new Code are distinct and specific. While section 25(1) is intended for parties who are Hindus, section 125 is secular in character in the sense that it applies to persons belonging to all religions. It would, therefore, be not proper to introduce a concept arising out of the provisions of section 25(1) of the Hindu Marriage Act while construing the provisions of section 125 of the Code. The condition precedent for the applicability of section 125(1) is that the complainant must be the wife of the person against whom the maintenance is claimed. A wife, as we have mentioned above, must mean a legally wedded wife. A wife whose marriage is in contravention of sections 5 and 11 cannot under any circumstances be treated as a legally wedded wife. The provisions of sections 5 and 11 are explicit and admit of no ambiguity. The marriage in contravention of conditions laid down in sections 5 and 11 is no marriage at all in the eye of law, because section 11 clearly states that it is null and void. Merely because section 11permits the presentation of a petition for a decree of nullity on grounds of breach of conditions laid down in section 5, it cannot mean that till such a declaration is made by the Court and a decree is passed to that effect, she continues to be the legally wedded wife. That the legislature has made a clear distinction between void and voidable marriages is seen from the various proceedings contemplated by the Hindu Marriage Act. While section 11 in terms says that the 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.Section 12 postulates that certain marriages voidable. Under sub-section (1) of section 12, any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the grounds, viz. (a) that the marriage has not been consummated owing to the importance of the respondent; or (b) that the marriage is in contravention of the condition specified in Clause (ii) of section 5; (c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required undersection 5, the consent of such guardian was obtained by force, or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner. It would, therefore, be clear that till the annulment by a decree, the marriage continues to be valid. Being a voidable marriage, a party to the marriage must exercise its option to get it annulled by a decree. Section 11, however, stands on a different footing. The marriage is ipso facto null and void although a petition can be filed by either party to the marriage. The decree passed in proceedings under section 11 is a declaration of nullity while a decree contemplated under section 12 is a decree of annulment which means that the marriage continues to be valid till it is annulled or nullified by a decree. Same is the position with regard to the provisions of section 13 relating to proceedings for divorce. It is only on a decree of divorce that the marriage is dissolved. Till then the parties to the marriage continue to be locked in a legal marital relationship. Section 125 has taken note of such provisions regarding divorce in Hindu Marriage Act which applies to the case of Hindus and other enactment and personal laws relating to divorce and has provided for granting maintenance even to a divorced wife. Provisions of section 125 are not restricted to Hindus alone but apply to persons belonging to all communities and religions. It is not possible to assign different meaning to the word " wife" for persons belonging to different communities or religions or governed by different personal laws. To construe the word "wife" as including a woman whose marriage is void and illegal would lead to anomalous

results, because the same extended meaning will have to be given to the word in the case of woman of all religions and communities. This does not seem to be the intention of the Legislature because it could have expressed such an intention clearly particularly having regard to the long standing judicial interpretation of the word "wife" in section 488 of the old Code. We do not think that the interpretation of section 25(1) of the Hindu Marriage Act can be of assistance in construingsection 125 of the Code. We have no hesitation in concluding that the marriage of the respondent with the petitioner which admittedly contravenes conditions in Clause (i), of section 5 is null and void in its inception and it does not confer the status of a legally wedded wife to enable her to make an application under section 125.

14. It would be useful to refer to the observations of the Supreme Court regarding the scope ofsection 488 in relation to section 23 of the Hindu Adoptions and Maintenance Act. In Bhagwan Dutt v. Kamala Devi, , the Supreme Court observed---

"The question there resolves itself into the issue whether there is anything in sections 488 which is consistent with section 23 or any other provisions of the Act ? This matter is no longer res integra. In Nanak Chand v. Chandra Kishore Agarwal, this Court held that there is no inconsistency between Act 78 of 1956 and section 488, Criminal Procedure Code. Both could stand together. The Act of 1956 is an Act to amend and codify the law relating to adoption and maintenance among Hindus. The law substantially similar before when it was never, suggested that there was any inconsistency with section 488, Criminal P.C. The scope of the laws is different. Section 488, provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties."

The above observations would indicate that it would not be proper to give an extend meaning to the word "wife" in section 125 on the basis of the provisions of section 25 of the Hindu Marriage Act.

15. It was urged by Mr. Gavnekar that the narrow construction put on the word "wife" in section 125 would injustice and grave hardship and led to manifest contradictions particularly in view of the attempts of the Legislature to improve the lot of discarded married women and the well known fact most such women are helpless do not have any source of income. He contended that it would be permissible to modify the meaning given to the word "wife" by judicial decisions, while interpreting the provisions of section 488 of the old Code. In support of his contention, he relied on the following passage on page 218 of Maxwell on the Interpretation of Statues :---

"Where the language of a Statue, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structures of the sentence."

We do not think that the principle can be of any assistance in this case, particularly having regard to the secular character of the provisions and the plain grammatical meaning of the word coupled with the long standing judicial interpretation put by the courts on the word "wife" in section 488. On the other hand, if the wider meaning as suggested by the learned Counsel is given, it is likely to lead to manifest contradictions and absurdities, because the same extended meaning will have to be given in the case of parties governed by other religions and personal laws.

16. The argument of Mr. Gavnekar is solely based on the provisions of section 25(1) of the Hindu Marriage Act. We have indicated above that the scope of section 25(1) is entirely different. The maintenance or alimony can, if at all, be awarded only on satisfaction of the conditions laid down in that section, and on a termination of the proceeding by a decree passed under the Act. Section 125 of the Code which applies to persons of all religions and which has no relationship with the personal law of the parties cannot be constructed by reference to section 25 of the Hindu Marriage Act.

17. We are also unable to accept the contention of Mr. Gavnekar that we should not exercise the discretionary powers under Articles 226 and 227 of the Constitution having regard to the facts of this case. The question raised is a pure question of law goes to the root of the matter. Unless and until the complaint (respondent No. 1 herein) proves that she is the legally wedded wife of the petitioner, the Magistrate will have no jurisdiction to pass an order of maintenance in her favour. It is an admitted fact this is case that the marriage of the respondent is in contravention of the condition (i) in section 5 and is therefore, null and void as provided in section 11 of the Hindu Marriage Act. There is thus a clear error on the face of the record which requires to be rectified. This is a fit case where the powers under Article 277 of the Constitution must be exercised as, in our view refusal to exercise these powers would result in totally ignoring the mandatory provisions of law and maintaining an order which on the face of it is illegal and without jurisdiction. As indicated above, swe have not finally decided the question about the correctness or otherwise of the view taken by Kania, J. In Govindrao Ranoji v. Anandibai Govindrao, 79 Bom.L.R. 73, referred to above, regarding the interpretation of section 25(1). The remedy undersection 125 being a summary remedy, the respondent would be at liberty to take any other action if advised and if available to her any other provisions of law for seeking maintenance from the petitioner.

18. In the result, the petition must succeed.

19. The petition is allowed; the impugned order dated October 11, 1977 passed by the Judicial Magistrate, First Class, Barsi, and the order dated August 23, 1978, passed by the Sessions Judge, Sholapur, dismissing the revision application of the petitioner, are quashed and set aside, and the respondent No. 1's application for maintenance stands rejected. Rule made absolute. No order as to cost.

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LANDMARK JUDGMENTS ON

DIVORCE

KASUBAI W/O BHAGWAN WANJARI VERSUS BHAGWAN BHAGAJI WANJARI

Nagpur High Court

1955 SCC Online MP 8 : AIR 1955 Nag 210

Kasubai w/o Bhagwan Wanjari ... Plaintiff Appellant;
Versus
Bhagwan Bhagaji Wanjari ... Defendant Respondent.

Bench: Hon'ble Mr. Justice Hidayatullah, C.J,
Hon'ble Mr. Justice Kaushalendra Rao and Hon'ble Mr. Justice Sen
Second Appeal No. 335 of 1949
Decided on January 11, 1955

Hindu Marriage Act 1955 sec 13 (1) -joint petition, both for restitution and divorce-- no any legal prohibition under the provisions of the Act for filing a petition by a spouse for restitution or in the alternative, for a decree of divorce on the ground of desertion. The husband has frankly come forward with a case that he was willing at the time of filing of the petition to receive her back in the marital home and in the alternative, if she still continued to refuse, she should be held guilty of a matrimonial offence of desertion and the marriage be dissolved.

JUDGMENT

The Judgment of the Court was delivered by

HIDAYATULLAH, C.J.:- I have had the advantage of reading the judgment proposed to be delivered by my brother Rao, J. This reference to a Full Bench was considered necessary because the view I expressed on behalf of the Divisional Bench in - 'Mt. Sukhribai v. Pohkalsingh', AIR 1950 Nag 33 (A) was not accepted in some High Courts in India. My brother has stated the facts of the present case, and Ineed not repeat them. The question that arises is whether under Section 2(4) of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 (19 of 1946), a wife is entitled to separate residence and maintenance by reason only of a second marriage by husband, effected before the Act came into force.

2. In the decision of this Court above referred to, it was held that S. 2(4) was not declaratory but remedial. The sub-section was interpreted prospectively to apply to cases where the husband effected a second marriage after the Act. Ialso pointed out that the sub-section in terms was prospective, the words 'if he marries again' being words of futurity.

3. The view of this Court was accepted by a Divisional Bench of the Bombay High Court, but it was dissented from in Madras, Orissa and Vindhya Pradesh. My brother's judgment contains references to these cases. It was held in them that cl. (4) of S. 2 was descriptive of the condition of the husband as a twice-married man and applied to all cases irrespective of when the second marriage was performed, provided that the claim for maintenance was confined to a period after the Act came into force. I have reconsidered the question carefully, and with all due respect, cannot agree with the dissenting opinion. The tense of the verb 'marries' has little to do with the grammatical meaning to be given to the phrase. Due to the

subordinating conjunction 'if', the form of the verb has undergone a change, but the future time is clearly indicated. I gave examples on the earlier occasion to demonstrate that the words 'if he marries again' were words of futurity.

4. The sub-section must of course be given a meaning and not tried on rules of grammar. The true meaning is not dependent upon how a particular word is to be passed. The intention of the Legislature and the meaning of the sub-section are easily perceived when one compares the following groups of phrases:

   (a) if he drinks, and

   (b) if he drinks again

   or

   (a) if he marries again and

   (b) if he has married again.

5. Suppose a will ran: 'to my daughter half the estate, but nothing if she marries again'. The condition of the daughter at the death of the testator must be taken into account, but the dis entitling marriage would be a marriage after the date of the will. It the daughter was already a twice-married lady she would not forfeit if she did not marry again after the will. Igive this example merely to show that the grammatical meaning is not entirely dependent on the form of the verb. Iam thus not persuaded to change my view that the words 'if he marries again' are words of futurity.

6. The second objection is that the sub-section is not remedial but declaratory of the law existing in India. Panigrahi C.J. deduces this by referring to certain cases. But cases of concubines and cruelty are on a different footing. Since there was no statute (the Code of Criminal Procedure did not touch this matter) and case-law rather than establish a practice of separate residence and maintenance, established the contrary, cl. (4) of S. 2 of the Act was not declaratory but remedial. It is hire that Ramaswami, J. has opined that Smriti Chandrika and Apararka's Commentary on Yajnavalkya in particular, and the texts and commentators generally, show that on supersession, the superseded wife was released from her duty and obligation to live with her husband, and she had to be supported irrespective of whether she lived in her husband's house or with her parents. He thus holds that the law is declaratory and not remedial.

7. My brother Rao has, in his exhaustive treatment of the subject, exposed the inaccuracy involved in this dictum and I should have contented myself with his reply to this critisicm. It seems to me to be unnecessary to go expansively into original texts to establish so late in the day that the rulings based on Colebrooke, Strange and Mayne were wrong because an original text was wrongly translated by Colebrooke, or even to establish the contrary. But since Ramaswami, J.'s dictum is based on a reading of the original texts and authorities, it has become necessary to refer to them. No doubt, the Legislature is an ideal person and does not make mistakes and in construing Acts of Legislature it must be assumed that the Legislature has informed itself as to the state of the law on any subject as to which it undertakes to legislate'. There is here nothing, except the language of the enactment to show that the Legislature did not start with the law as expounded by the Courts making up this lacuna which it found.

8. The preamble does not recite the words such as "Whereas doubts have arisen" etc. In my opinion, the Legislature was providing a new remedy and creating a new right and to interpret the sub-section as declaratory with the case-law consistently accepting Colebrooke's translation is rather to attribute an intention to the Leqislature based on the fruits of one's own researches.

9. My reason for writing a separate judgment, with that of my brother before me, which is as weighty as it is convincing, is because Iam of opinion that Ramaswami, J. has carried his reasoning further than Apararka and Devannabhatta and has used the texts as stepping stones and not as halting places. I give my reasons below.

10. Marriage according to Hindu Shastras and sages, was a sacrament, the husband's duty to support the wife while she was faithful being enjoined (Manu IX, 95). The marriage was the spiritual fusion of two persons and was indissoluble.

    Neither by sale or repudiation was the wife released from tier husband (Manu IX, 46) nor was the wife to seek to separate herself from her husband (Manu V, 149). The wifely duty was obedience to the husband {Manu V, 151) and this even if the husband was destitute of virtue or seeking pleasure elsewhere or devoid of good qualities {Manu V, 154.) It was the duty of both spouses to constantly exert themselves so that they might not be disunited {Manu IX, 102), because the three Vargas: Dharma, 'Artha' and 'Kama' prosper when the husband and the wife are in harmony (Yajnavalkya I, 74).

11. The harmony so strongly enjoined was, however, likely to be disturbed by the wife, or by the husband, or disharmony could be the result of certion expectations from the marriage. The texts on the subject are scattered, and it is not easy to piece together what was the consequence. Even, so one thing was certain. The duties laid on the wife were to live with her husband, to be faithful and obedient to him, to be competent and sweet-speaking, and lastly, to bear male children. The duty of the husband was to maintain the wife, and if he did not, there was chastisement by the King.

12. Yet, throughout all this, the husband had a right to marry again. Though there did not appear to be any clear circumscribing of this privilege, except perhaps when the wife was sickly and her consent was made a condition precedent (Manu IX, 82), there were indications when a second marriage was regarded as proper and when it was not. Corrective measures were recommended to improve the first wife in given circumstances (Manu IX, 77, 78), but her supersession was permitted in some other. Thus a barren wife could be superseded in the eighth year, she whose children {all) died, in the tenth, she who bore only daughters, in the eleventh, but she who was quarrelsome, immediately.

13. A wife who drank spirituous liquor, was of bad conduct, rebellious, diseased, mischievous or wasteful, could at any time be superseded. The shrew had the worst treatment at Manu's hands, though Yajnavalkya reduced the rigour of Manu's text, (Yaj. I, 73).

14. Now the duties of the husband and the wife respectively may be noticed. To the husband the injunction was to maintain her:

    "Although superseded, she should be maintained; otherwise great sin will be caused; (Yaj. 1, 74).

"He who abandons an obedient, attentive, son-bearing and sweet-speaking wife should be compelled to give a third of his property. If poor, he should be ordered to maintain her. (Yaj. I, 76).

"To a woman, whose husband marries a second wife, let him give an equal sum for supersession, provided no separate property has been bestowed on her but if any have been, let him allot half." (Yaj. II, 149).

15. The last two which were distinguishable on the score of improper and proper supersession, are not now enforceable in our Courts. It is to the first that Apararka added, 'living in the husband's house or her parents'. The question which naturally arises is who was to choose where the superseded wife should live, or in other words, whether the wife could choose which place it was to be.

16. There is no clear guidance in the matter, and if the answer is taken from Manu IX, 83, it is.

"On being superseded, if a wife, in anger should go away from the house, she shall be either immediately confined, or cast off in the presence in the family."

17. Devannabhatta's explanation is:

"The Thyaga in her Kula means handing her over to her parental relations. Though she is handed over to her parental relations, the husband himself is to provide for her maintenance by proper arrangement for that purpose."

18. Medhatithi's commentary is:

"For the wife going off in anger caused by the supersession, - the present text lays down two optional alternatives in the shape of confinement or divorce. It would not be right in such a case for either the mother-in-law or the father-in-law and other relations to console her and appease her anger by means of presents of food and clothing, or by sweet words etc.

'Confinement' consists of in placing her in charge of guards.

'"Divorce', 'casting off' has already been explained as consisting in dropping intercourse with her and avoiding her bed,

"Family-Relations, on the woman's fathers side, as also those of the husbands's own side."- (Ganganath Jlia- Manu Smriti, Voi.-V, page 70).

19. It is to be noted that even the parents of the husband were not to interfere and the erring wife was to be left to the wrath of her husband. Whether she was to be corrected with a rope, a punishment for wives described in Manu VIII, 299, or was merely to be confined by being bound with the ropes or handed over to the attendants, is hardly to much purpose. The Hindu Law deprecated such chastisement, and now there is the Penal Code. The 'casting off' was of doubtful import. The difference here was whether 'thyaga' should be taken to the equal of a judicial separation 'a mensa et thoro' or as a mere abstention from intercourse a punishment sufficient in itself (NaradaI, 203) . Colebrooke and the Indian Courts accepted the former interpretation, while the other view is now suggested by a comparison with other texts and commentaries.

20. In this connection reference is made to the treatment to be given to an adulterous wife. Manu's text (XI, 177) was that she should be confined to one apartment, and compelled

to perform the penance prescribed for males for the same dereliction of duty towards the wife. The confinement according to Kulluka and Sulapani was to avoid recurrence and the penance because according to Vishnu, Vasisnia and Brihaspati, she could thus become pure. 'Casting off' perhaps in its literal sense was only when the lapse was in the company or a lower caste or certain persons named.

21. Yet there were authorities to show that an unchaste wife would be forsaken or abandoned by the husband and turned out of the house without maintenance if the husband so desired (Yaj. II, 142): (See also Mayukha, Mandlik's Translation, p. 102). Even here, abandonment was explained as deprivation from conjugal rights and religious ceremonies and not as expulsion (Yaj. I, 72). It is thus suggested that Manu IX, 83, went no further than this mid the wife was released from her obligation to live with her husband and was yet to be maintained by him.

22. Though it is correct to say that the husband who sent his wife away or abandoned her was bound to maintain her wherever she lived (a marriage being for ever), it did not mean that the wife was herself released from her duty to live with her husband when she was required so to do by him. In Yajnavalkya II, 142, Vijnaneswara makes a distinction between an unchaste woman and one who was refractory. Both could be expelled, but the latter was to be maintained. Not so the wife no went away on her own. Not only could the husband compel her to do so by his own efforts (Manu IX, 83) but the King could also be asked to intervene to punish the recalcitrant, wife.

"If a wife, proud of the greatness of her relatives or (her own) excellence, violates the duty which she owes to her lord, the king shall cause her to be devoured by dogs in a place frequented by many." (Manu VIII, 371).

23. Vishnu also said that the king should put to death a wife who had been derelict in her duty to her husband (Vishnu V, 18).

24. It cannot thus be said that the texts released the superseded wife from her obligation to obey her husband or to live with him. Perhaps, if the husband were made or outcaste, or impotent or afflicted with loathsome disease or cruel, the wife could stay away and the husband could neither cast her oil nor deprive her of her property (Manu IX, 79); but that is as far as the texts went in releasing the wife from her duty. Even without supersession the husband could abandon her in one case:

"For one year let a husband bear with a wife who hates him; but alter (the lapse of) a year let Iam deprive her of her property and cease to cohabit with her." (Manu IX, 77).

25. Here too the commentators add that she should be maintained.

26. It would appear, however, that when the husband was enjoined to maintain the wife and not to cast her adrift, the reason was that he was still the husband, but this obligation was dependent an wifely duty. The casting off in the presence of the family could really be a declaration in the nature of a judicial separation 'a mensa et thoro' & not an expression of a desire merely to sever conjugal relations. After such a declaration and the handing back of the wife to her family, the husband's duty to maintain her might have been moral; but it is a wide jump to parallel such a case to that of a wife who left the husband on her own, or to equate this maintenance to a claim for permanent alimony. The texts do not speak of this and the commentaries of Apararka and Devannabhatta can only be regarded as preceptive showing the husband his

moral duty even in the face of provocation by the wife and shed light on how the stern law was sought to be tempered by humanity. These commentaries cannot, however, be regarded as rules of compulsion enforceable against the husband.

27. Apararka added the gloss to the text of Yajnavalkya and pointed out that whether the superseded wile was to reside with the husband or with the parents, she was to be maintained. The question of the wife's wishes did not enter there. Devennabhatta added the gloss to Manu's text, but he made a mention of 'handing over' of the wife by the husband as opposed to her going off in spite of his desire that she should stay. If the husband Landed over the wife (whatever her faults) in spite of his right to restrain her going, his moral duty was to maintain her. But nowhere do the texts or the commentators say that on the husband's second marriage the first wife was instantly released from her duties and obligations, including her duty to live in his protection and under his roof. If this were said it would efface the very rubric of this part of the law and undo the entire scheme of a Hindu marriage according to Dharma Shastras.

28. The gist of the case is that whether 'thyaga' meant cessation of intercourse and 'was different from 'Moksha' (freedom), the technical divorce', the wife continued to be a wife after 'thyaga' and there remained still the right of the husband to determine where the wife should live. Ido not think we are required to decide what the authority of Apararka and Devamiabhatta is on this part of the case. Their comments can only be regarded as preceptive and directory. The Indian Courts adopted the rule that the wife could not decide to stay away if the husband married again in the application of the law relating to restitution of conjugal rights and maintenance to the wives, and Icannot say that they erred in shaping the law as they did or that they departed from the core of pure Hindu Law. The law being thus settled, the Legislature must be deemed to have given a new remedy to the wife.

29. In this view of the matter, I regret Icannot (and I say it respectfully) accept the reasoning of Ramaswami, J. that cl. (4) of S. 2 of the Act is declaratory. My brother Rao has shown the state of the law in India and Ineed not cover the same ground. Iagree with my brother Rao that the earlier decision of this Court is correct and this appeal is dismissed with costs.

R. KAUSHALENDRA RAo, J.:- This second appeal raises the question whether a Hindu wife is entitled to separate maintenance solely on the ground that her husband has taken a second wife when the second marriage took place prior to Act 19 of 1946.

30. The facts giving rise to the question may briefly be stated. The appellant is the first wife (hereinafter called the wife) of the respondent. The wife lived with her husband for a few months. After that she went to reside with her father. The wile alleged that the husband had beaten her often and ill-treated her and ultimately drove her out of the house. He married a second wife and on her death he married another. The wife complained that it was not possible for her to live with her husband. The husband denied ill-treatment by him. According to him the wife's father took her away from the husband's house and would not send her back though the husband had gone to the father-in-law's place several times to bring her back. The father-in-law desired that the husband should become a 'gharjawa' (similar to an illatom son-in-law) and to this the husband would not agree.

31. Since the wife would not come to reside with her husband, he married a second wife who subsequently died. Later he tried again to bring the wife but the father-in-law would not send

her. According to the husband, he was all along and even now willing to maintain the wife and treat her well at his house.

32. Both the Courts disbelieved the story that the wife had been ill-treated or that she had been driven out of the house. The trial Court found that the wife would not be endangered if she lived with her husband. Though the appeal Court did not specifically find on the point, nothing contrary to the finding of the first Court was urged before us. According to the appeal Court, the father of the wife being a very rich man did not want to part with her, his only child, and on that account the wife had been living away from her husband. The appeal Court further found that the wife gave her consent to the second marriage and the husband married a third time when the wife had been living away from him and would not return.

33. The second and third marriages took place prior to 1943. Further, the learned appeal judge found that the husband had not deserted the wife. It was not suggested at any stage of the case that the offer of the husband to receive and maintain the wife was not genuine or 'bona fide'. On the findings binding on me in a second appeal the wife must be held to insist on her right to separate residence and maintenance only because of the husband taking another wife.

34. The question then is whether the wife is justified in refusing to live with her husband because of his having married another wife and claim separate maintenance. The wife invokes clause (4) of Section 2 of the Hindu Married Women's Rights to Separate Residence and Maintenance Act, 1946 (Act 19 of 1946). If the Act applies, the wife would be en-entitled to claim separate maintenance under the Act without proof of anything more than her husband having another wife. But according to a previous decision of the Division Bench in AIR 1950 Nag 33 (A), cl. (4) of S. 2 can only be invoked in a case where the husband takes another wife after the Act came into force. The question however comes before the Full Bench for further consideration of that decision on the ground that there has been a divergence of judicial opinion.

35. The view taken in 'Sukhribai v. Pohkalsingh (A)' (supra) was approved by a division Bench of the Bombay High Court in - 'Laxmibai v. Wamanrao', AIR 1953 Bom 342 (B). In the Madras High Court varying views have been expressed. The view expressed in - 'Sidda Setty v. Muniamma', AIR 1953 Mad 712 (C) is in accord with that taken in this Court. On the other hand, in - 'Lakshmi Amma/ v. Narayanaswami', AIR 1950 Mad 321 (D), followed in - 'Baijnath v. Hiraman', AIR 1951 Vindh-P 10 (E) and - 'Nagendramma v. Ramakotayya', AIR 1954 Mad 713 (F) the view was expressed that the words "marries again" are only descriptive of the person as a twice married man at the date when the wife's claim for separate maintenance is made under the Act and do not exclude a husband who had taken a second wife before the Act from its operation. Similar is the view expressed by Panigrahi C.J. in- 'Anjani Dei v. Krishna Chandra', AIR 1954 Orissa 117 (G).

36. The Act of 1946 concedes to a Hindu married woman the right to separate residence and maintenance from her husband on one or more of the following grounds, namely,

(1) if he is suffering from any loathsome disease not contracted from her;

(2) if he is guilty of such cruelty towards her as renders it unsafe or undesirable, for her to live with him;

(3) if he is guilty of desertion, that is to say, of abandoning her without her consent or against her wish;

(4) if he marries again;

(5) if he ceases to be a Hindu by conversion to another religion;

(6) if he keeps a concubine in the house or habitually resides with a concubine; (7) for any other justifiable cause.

37. Even prior to the Act, support could be found in judicial decisions or dicta for the rules enacted in cis. (1), (2), (3), (5), (6) and (7) of S. 2 as given below:

Clause (1)- 'Bai Prem Kuvar v. Bhika Kallianji', 5 Bom HCR (AC) 209 (H); - 'Yamunabai v. Narayan Moreshvar', 1 Bom 164 at p. 173 (I) and - 'Shinappaya v. Rajamma', AIR 1922 Mad 399 (J).

Clause (2)- 'Sitabai v. Ramchandrarao', 12 Bom LR 373 at p. 377 (K); - 'Mutangini Dasi v. Jogendia Chunder', 19 Cal 84 at p. 91 (L) and - 'Babu Ram v. Mt. Kokla', AIR 1924 All 391 at p. 392 (M).

Clause (3) - 'Ude Singh v. Mst. Daulat Kaur', AIR 1935 Lah 386 at pp. 387, 388 (N); - 'Appibai v. Khimji Cooverji', AIR 1936 Bom 138 at p. 148 (0); 'Venkatapathi v. Puttamma', AIR 1936 Mad 609 at p. 611 (P) and - 'Seethayyamma v. Venkataramana', AIR 1940 Mad 906 at p. 907 (Q) .

Clause (4) - ....

Clause (5) - 'Mansha Devi v. Jiwan Mal, 6 All 617 at p. 621 (R), see also - 'Muchoo v. Arzoon Sahoo', 5 Suth WR 235 at p. 236 (S); - 'Jamna Devi v. Mul Raj', 49 Pun Re 1907 p. 205 (T).

Clause (6) -'Lalla Gobind Pershad v. Dowlut Butee', 14 Suth WR 451 (1) (U); -'Moo/a v. Nandu', 4 NWP 109 (V); -'Dular Kceri v. Dwarkanath Misser", 32 Cal 234 at p. 239 (W).

Clause (7) - See -'Ganga v. Mt. Dhanno', AIR 1920 Lah 45 (X). The clause being residuary, the decisions prior to the Act could not have been exhaustive of what constituted a "justifiable cause."

38. The facts found in some of the above cases might have attracted more than one ground, frequently ground No. (7), but the cases can be classified broadly as above. It is however necessary to mention that in the circumstances specified in cis. (5) and (6) support could also be found for the contrary view because of the decisions or the dicta or their implications in the following cases:

Clause (5) - 'Pakkiam v. Chelliah Piilai' , AIR 1924 Mad 18 (FB) (Y); -'In re, the wife of P. Streenevassa', Norton's Leading Cases on Hindu Law p. 13 (Z). Trevelyan, Hindu Family Law (1908) p. 66.

Clause (6) - 'Gantapa/li Appa/amma v. Gantapal/i Yel/ayya', 20 Mad. 470 at pp. 474-75 (FB) (Z1).

39. But no decision given prior to the Act is cited at the bar to support the rule enacted in cl. (4) that a second marriage of the husband 'per se' entitled a Hindu wife to separate residence and maintenance. The legislature can therefore be said to have approved the grounds on

which separate maintenance used to be decreed before the Act, removed whatever doubts there might have been in cases based on grounds covered by cis. (5) and (6), provided a new ground in cl. (4) and further provided a residuary ground in cl. (7).

40. According to Panigrahi C.J.:-

"The very fact that a husband transfers his affections to another woman, 'whether married or not', is a justifying reason for not compelling the first wife to live with her husband. The Hindu Women's Right to Separate Residence and Maintenance Act, 1946, merely gave statutory recognition to the dicta of Judges who had on several occasions applied this principle to the facts of individual cases." (underlining here into'???' is by me) AIR 1954 Orissa 117 at p. 123 (G).

41. It does not appear that the attention of the learned Chief Justice was drawn to the implications of the text of Manu (Max Muller Chap. V, 154)ill. That apart, if I may say with the utmost respect to the learned Chief Justice, the distinction between the husband keeping an unmarried woman and his taking a second wife is missed. While there was support in the decisions or dicta even prior to the Act for granting separate maintenance because keeping a concubine amounted to misconduct on the part of the husband justifying the wife to live apart from him and claim maintenance (Cases under cl. (6) above), I am not aware of any decision prior to the Act which has gone so far as the learned Chief Justice in placing a second wife on a par with a concubine and in effect regarding second marriage as in itself misconduct.

42. Even in the case of the husband keeping a concubine support could be found, as I have already shown (see cl. (6) above), for the view that in sell did not entitled the wife to separate maintenance. Before the Act no decision is, however, found in support of the proposition that the second marriage or the husband by itself justified the wife to live apart from him and claim separate maintenance. Not one of the ten cases referred to by the learned Chief Justice (AIR 1954 Orissa 117 (C) at pages 122-123) can sustain the latter proposition. Indeed, an agreement by a Hindu not to marry a second wife was regarded as not enforceable being against the policy of Hindu law. See - 'Sitaram v. Mt. Aheeree Heerahnee', 11 Beng LR 129 at p. 135 (Z2).

43. Mohapatra, J. did not think it necessary to give any opinion whether S. 2(4) applied also to cases where the husband had married for the second time before the Act. The decision in the case actually turned on the finding of abandonment and cruelty. Further, in that case, unlike in the one before us, the husband himself admitted that he was "not going to have anything more to do" with his first wife (P. 30).

44. The very elaborate examination by Ramaswami, J. (paras. 27 to 45) in AIR 1954 Mad 713 (F) does not bring to light a single decision prior to the Act in support of the claim for separate maintenance founded as here on nothing else but the second marriage of the husband. It may be observed that the actual decision in AIR 1954 Mad 713 (F) turned on the finding that there was cruel conduct on the part of the husband rendering it impossible for the wife to live with her husband (para. 48). li does not appear that in that case, unlike in the one now before us or on the previous occasion in 'Sukhribai v. Pohkalsingh', (A)' (supra), the husband was willing to receive the first wife and maintain her with him.

45. Subba Rao, J. (as he then was) reserved his opinion on the question whether the first wife was entitled to maintenance by reason of the second marriage alone and whether such marriage in itself affcided a sufficient ground for awarding maintenance to the first wife. In his Lordship's view, on the finding that the wife was abandoned by her husband, she was entitled to maintenance for the period before the Act also.

46. It is not doubted by Ramaswami, J. and is not disputed before us that the first duty of a Hindu wife is to live with her husband wherever he may choose to reside. This is a positive rule of Hindu Law enforceable by the Court and not a mere moral precept. See - 'Binda v. Kaunsili', 13 All 128 (Z3) and - 'Tekait Mon Mohini v. Basanta Kumar', 28 Cal 751 (Z4). The rule is grounded on two causes: first, gift by the parents, & secondly, the troth plighted by the husband at the time of marriage. It is needless for me to travel the ground so fully covered by Mahmood, J. in 'Binda v. Kaunsilia (Z3)' (supra) and by Ghose, J. in 'Tekait Mon Mohini v. Basanta Kumar (Z4)' (supra). Suffice it to quote two of the many texts on the point: Manu:

"In childhood must a female be dependent on her father, in youth on her husband, her lord being dead, on her son..... A woman must never seek independence. Never let her wish to separate herself from her father, her husband or her sons, for by a separation from them, she exposes both families to contempt."- (See Co/ebrooke's Digest of Hindu Law, Vol. II, p. 137, Edn. 1874). Vasistha:

"The abode of faithful wives, who are found of home and truly rigid and who have subdued their passions, shall be the same with that of their lords; but the mansions of shakals are assigned to disloyal wives."- (Colebrooke, Vol. II, p. 148).

47. So rigidly did the Courts enforce the marital dominion of a Hindu husband over his wife that they declined to give effect to any agreement in derogation of his right to insist on the wife residing with him: 'Tekait Man Mohini v. Basant Kumar' (Z4) (supra) and -'Krishna Aiyar v. Balammal', 34 Mad 398 at p. 401 (Z5). On the other hand, the husband's direction that the wife should live in the family house was enforceable even after his death and the widow could not reside separately and claim maintenance without establishing a just cause: See -'Girianna Murkundi Naik v. Honama', 15 Bom 236 (Z6) and - 'Jamuna Kunwar v. Arjun Singh', AIR 1941 All 43 at p. 47 (Z7).

48. Prior to the Act, the Courts invariably adhered to the proposition that so long as the husband was willing to receive the wife, the latter could not insist on separate maintenance without a justifying cause. In the absence of a justifying cause the wife could not forsake her husband and refuse to live with him. If she could not lawfully insist on residing separately from her husband, she could not claim separate maintenance. 'Padmanabiah v. Moonammah', (1856-58) Madras Sudder Udalut 138 (Z8); - 'Kul/yanessuree Debee v. Dwarkanath Sarmah', 6 Suth WR 115 (Z9) - 'Sidlingapa v. Sidava', 2 Bom 634 {Z10); - 'Shripat Sheshadri v. Radhabai', 1881 Bom PJ 163 (Z11) and - 'Surampalli Bangaramma v. Surampalli Brambaze', 31 Mad 338 {Z12). In - 'Sm. Rajluky Dabee v. Bhootnath Mookerjee', 4 Cal WN 488 {Z13) the Full Bench went so far as to refuse to give effect to a voluntary arrangement under which the husband had agreed to provide maintenance to his wife residing separately from him in the absence of a cause justifying her to so reside.

49. As far back as 1870 Sir Barnes Peacock speaking for the Judicial Committee pointed out:

"A wife of course cannot leave her husband's house when she chooses, and require him to provide maintenance for her elsewhere; but the case of a widow is different." ('Rajah Pirthee Singh v. Ranee Raj Kower', lA Sup Vol 203 at p. 210 (PC) (Z14)) .

SO. In - 'Naganna Naidu v. Rajya Lakshmi Devi', AIR 1928 PC 187 (Z15) their Lordships of the Privy Council denied the right to maintenance of a wife while living apart from her husband after consenting to her supersession.

51. The question therefore is whether prior to the Act of 1946 a Hindu wife could claim to live apart from her husband solely on the ground that he had taken a second wife. The Court had to consider this question in four classes of cases:

(i) in suits by the husband for restitution of conjugal rights against the first wife even after taking a second,

(ii) in claims for separate maintenance by the wife,

(iii) in suits for making the husband liable in respect of a debt contracted by the wife while residing separately from her husband, and

(iv) in claims for maintenance under the Code of Criminal Procedure when the husband was willing to maintain her and the wife refused to live with the husband.

52. The first class of cases is illustrated by - 'Jeebo Dhon Banyah v. Mt. Sundhoo', 17 Suth WR 522 (Z16); - 'Moti/a/ v. Bai Chanchal', 4 Born LR 107 (Z17) and - 'Mt. Kishan Dei v. Mangal Sen", AIR 1935 All 927 (Z18), in which the Court ruled that a wife could not plead the second marriage of her husband as a defence to his claim for restitution of conjugal rights. In the following cases though the actual decision turned on another point, the Court proceeded on the same view as to the law governing this class of cases: 13 All 126 at pp. 137, 164 (Z3) and - 'Dular Koer v. Dwarka Nath Misser', 34 Cal 971 at p. 984 (Z19).

53. In the last cited case Asutosh Mookerjee, J. observed:

"No doubt, there is authority for the proposition that the mere fact of marrying a second wife and the consequent unkindness to the first wife, is not by itself sufficient to disentitle a Hindu husband from claiming restitution of conjugal rights: 17 Suth WR 522 (Z16), - 'Sitanath v. Haimabutty", 24 Suth WR 377 (Z20). There is also authority for the proposition that conjugal infidelity on the part of a Hindu husband is not by itself sufficient to bar his claim for restitution of conjugal rights: - 'Jogendronundini v. Hurry Doss', 5 Cal 500 (Z21) and - 'Baigi v. Sheonarayan', 8 All 78 (Z22)."

54. Since question is whether supersession 'per se' entitled the wife to separate residence, there is, I say with due respect, no warrant for the view of Ramaswami, J. that the judge-made law prior to 1946 excused co-habitation in the case of a superseded first wife.

55. In the second class of cases in which the claim for separate maintenance was the very question considered and decided in the negative, the decision was founded on the absence of any right in a Hindu wife to insist on separate residence: - 'Sree Raja Row Boochee Tummiah v. Sree Raja Row Venkata Nee/adry Rao', 1 Mad SDA 366 (Z23) : 24 Suth WR 377 (Z20); (Sir Richard Garth C.J. and Markby, J.) - 'Adli v. Person', 11 All U 161 (Z24); - 'Yesubai Sadashiv v. Sadashiv Ganesh', AIR 1915 Born 277 (Z25); - 'Seenayya v. Mangamma', AIR 1927 Mad 1159 at p. 1161(Z26);- ' Vellayammal v. Ramaswami Naicken', 1934 Mad WN 825 (Z27) and -

'Saraswati Kuer v. Sheoratan', AIR 1934 Pat 99 at pp. 100, 103 and 104 (Z28). Though the actual decision in AIR 1935 Lah 386 (N) turned on proof of abandonment and desertion by the husband, the Court accepted the view that the second marriage of the husband was not a sufficient reason under the Hindu law to sustain a claim for separate maintenance by a wife voluntarily departing from her husband's house. It may be mentioned that the decision in the first cited case was affirmed on appeal to the Privy Council. Counsel for the appellant could not support the, appeal: Vide - 'Venkata Ni/adry Row v. Enoogoonty Sooriah' , 4 Moo Ind App (Sup) 137 at p. 140 (Z29) and - ' Boochee Tummiah v. Venkata Neeladry Row', 4 Moo Ind App (Sup) 953 (Z30). The point of interest to note that the dispute as to separate maintenance was not between humble persons but between the Raja and the Rani of Pittapore.

56. The third class of cases is illustrated by the decisions in - 'Virasami Chetti v. Appasawmi Chetti', 1 Mad HCR 375 (Z31) and - ' Nathubhaibailal v. Javher Rani' , 1 Born 121 (Z32) (Sir Michael Westropp C.J. and Nanabhai Haridas, J .) In the first case Scotland C.J. observed:

"According to Hindu law and usage, it seems clear that whatever may be thought of the morality of the step amongst Hindus, polygamy is permitted, and that it is competent to a Hindu to have several wives. How many wives, as Sir T. Strange observes in his Hindu Law, Vol. 1, p. 56, it is competent for him to have at one and the same time, does not distinctly appear. The prohibition which is to be found directed against a plurality of wives save under certain justifying circumstances, such as the first wife's infidelity, bad temper, barrenness, or production only of daughters, appears to be treated, like so many other rules of Hindu Law, as merely directory and not imperative. If, then, in the present case it was permitted to the defendant to supersede his first wife by taking another wife to live with him - and this was her sole reason for refusing to live with him - his doing so did not, according to Hindu law, justify his first wife in separating herself and remaining apart from him of her own free will, and could not without more give her implied authority as his agent to bind him for debts incurred for necessaries."

57. Coming to the fourth class of cases, it is true that the question of maintenance under the Code of Criminal Procedure is decided on different considerations and summarily. But, in view of the proviso to Sub-s. (3) of S. 488 and the corresponding provisions in the earlier Codes, if the husband had offered to maintain his wife on condition of her living with him and she refused to live with him, the magistrate was bound to enquire into any grounds of refusal stated by her. So the question was material even under the Code of Criminal Procedure whether a Hindu Wife could refuse to live with her husband and insist upon separate maintenance merely on the ground that her husband had married a second time. If the personal law of the wife regarded her refusal to live with her husband justified because of supersession, the Courts could not have held to the contrary under the statute as they did uniformly: - 'Arumugam v. Tulukanam', 7 Mad 187 (Z33); -

'Pullamma v. Thatalingam', AIR 1945 Mad 44 (Z34); - 'Sukrulla Fakir v. Fatma', AIR 1924 Nag 297 (Z35); - 'Damodar Das v. M. Rani', 21 Pun Re Cr. 1873 (Z36); - 'Kirpal Singh v. Mt. Sand', AIR 1927 Lah 168 (Z37) and - 'Reg v. Purushotam', 1887 Rat Un Cr C 7 (Z38)

58. Between the first and the second Punjab decisions above cited, there are five more of the same view with which it is needless to encumber this judgment.

59. The Mahomedan wife was also placed in the same position because under her personal law the husband can take more than one wife: - 'Ramzan v. Mt. Sahib Bibi', AIR 1929 Lah 56 (Z39).

60. It is thus clear that in all the four classes of cases whenever prior to the Act of 1946 the question arose whether the Hindu wife was justified in residing separately from her husband solely on the ground of the second marriage of the husband, the Courts refused to recognize such a right and consequently negatived the claim to separate maintenance.

61. But Ramaswami, J. is of the view that the decisions prior to the Act proceeded on an incorrect understanding of the text of Manu (IX-83) and a wrong translation of the gloss of Culluka Bhatta on the text. In summing up his examination of the texts and commentaries Ramaswami, J. observed:

"The reference in Colebrook's version of Kulluka's commentary (see item 1) to chastisement is unsupported by the original or any other authorities. The reference to = (Rakshipurusha), protecting attendants Ofrlfi)qf;%F\: till the anger subsides, the statement of Madhava that Thyaga referred to mean the sending of the woman to her relations and the statement of the Smritlii Chandrika and Apararka that the woman must be maintained by the husband though living with her parents, show that Colebrooke's version which Strange and Mayne followed, is a complete distortion of the law of Smrithis."

"It is also noteworthy in this connection that the Viramitrodaya has connected Manu IX, 83 with. Yagnavalkya I, 74 which lays down that the superseded wife is entitled to maintenance and is understood by Aparka to give her as claim to maintenance against the husband, whether living with him or with her parents."

62. The learned Judge concluded.

"If the texts are correctly understood, Hindu-Law recognises that in certain cases, including supersession by second marriage, the husband and wife should be executed from cohabitation viz. when on the part of the husband he is unable to restrain or persuade the superseded wife to continue cohabitation without stultifying her former position in the house-hold and on the part of the wife when the conduct of the husband towards her is such that in the words of Sir S. Subramania Iyer, J. she cannot live with him consistently with her self-respect and her position as a wife in the house-hold."

63. The point made by Ramaswami, J. is that the text only authorizes protective restraint over the wife till her anger subsides and subjects the husband to piovide her maintenance whether living with him or with her parents. If this be the correct view, the husband cannot insist on the wife staying with him alter 'adhivedanna'.

64. The fact, however, remains that the gloss put by Apararka or Smriti Chandrika was not noticed in the earlier decisions or acted upon by the Courts. But is the interpretation put by Apararka or Smriti Chandrika upon the text the only possible or acceptable interpretation of the text? If Apararka and Smrit Chandrika had already been acted upon, it may not be possible to raise such a question. But when the original text is open to an equally authoritative interpretation which has been acted upon uniformly, there is no warrant for saying after all these years that there has been a distortion of the texts and the Courts were in error for about a century and a quarter. If tomorrow the Hindu Code entitles the daughter to share

the partimony along with the sons, one might with as much reason assert that such had always been the Hindu-law by reference to the ancient texts of Manu (Max Mullen Chap. IX-118 and 130ill; but that the commentators and the Courts have distorted them.

65. However that may be, is the text of Manu. (IX-83)ill to be construed as giving the husband only the right to place protective restraint with a view to finally sending her away to her parents' house? It would be dogmatic to make that assertion. The text gives the husband two alternative courses of action. The husband could either restrain the superseded wife, that is, he could insist upon her staying with him, or in the alternative, abandon her and send her away to her family. Tvledhatithi's Bhashya on the text supports this view rather than the one expressed by Ramaswami, J. Verse LXXXIII

66. ON BEING SUPERSEDED, IF A WIFE, IN ANGER, SHOULD GO AWAY FROM THE HOUSE, SHE SHALL BE EITHER IMMEDIATELY CONFINED, OR CAST OFF IN THE PRESENCE OF THE FAMILY.-{83) Bhashyaill

67. For the wife going off in anger, caused by the supersession, the present text lays down two optional alternatives (iJ) \ftJ in the shape of confinement or 'divorce'.

68. 'Confinement' consists in placing her in the charge of guards.

69. 'Divorce', 'casting off' has already been explained as consisting in dropping intercourse with her and avoiding her bed.

70. 'Family' - Relations on the woman's father's side, as also those on the husband's own side. (83)." (Manu Smriti, Ganganath Jha, Vol. V (1926), p. 70).

71. The crux of the matter is not whether the word r was correctly translated and whether HI has been properly understood, but whether the husband has under the text two courses of action open to him or only one. If confinement is only a preliminary to culminate in casting off the 'adhivinna'.and handing her over to her parents, the former ceases to be an alternative to the latter which according to Medhatithi it is.

72. Supersession is not synonymous with desertion. Every case of supersession need not involve abandonment or expulsion. Adhivedana, according to Mitakshara and Subodhini, only means the taking of a second wife during the life time of the first. It does not imply that the first wife is actually forsaken or that her place is taken by the second in respect of any matter except perhaps the husband's affection. Though Vijnaneswara used supersession as synonymous with desertion, the accepted view is that expressed in Mitakshara and Subodhini, supported as it is by Sulapani and followed by Jagan-natha. (Setlur, Chap. 11 Sec. XIII-35, Marriage and Stridhana, T.L.L., 3rd edition, p. 137).

73. The view that 'Adhivedana' is not synonymous with desertion accords with the concepts upon which the Hindu marriage is founded. Marriage, according to that law, is an essential sacrament. It is a holy union for the performance of religious duties. 'Patni' is for the fulfilment of dharma. On marriage, the Hindu woman becomes a 'Sahadharmacharini'. The first marriage is accorded a distinctive significance of its own. Precedence is given to the first wife by the ancient text writers, Manu, Yajnavalkya, Vishnu, Catyayana and Dacsha in performing acts of religion though the younger wife may be clearer to the husband.

"Dacsha: The first is the wife married from a sense of duty; the second promotes sensual gratification; sensible, not moral effects proceed from her.

2. The first wife is called the wife whom acts of duty concern, provided she be faultless; but if she be faulty, there is no offence in employing another wife endued with excellent qualities." (Co/ebrooke, 4th Edn., Vol. II, p. 126).

74. Dacsha's utterance has not become a mere platitude devoid of legal significance but is the foundation of the rule that an adoption though later in time by the senior widow (the Adhivinna during the lifetime of her husband) prevails over an earlier adoption by the junior widow even though the husband might have authorized both his wives to make the adoption: See - 'Rakhmabai v. Radhabai' , 5 Born HCR (AC) 181 (Z40) and - 'Chukkamma v. Punnamma', AIR 1915 Mad 775 (Z41).

75. The Act itself does not consider second marriage as synonymous with desertion which is separately dealt with in Cl. (3). Quite apart from religious or legal theory, in practice also Adhivedana need not always result in forsaking the first wife. It was not so unusual for a Hindu husband to desire that ' Adhivedana ' should not result in 'Sambhogasyaiva Parithyagah'. It is one thing to say that if the wife departs in anger the husband may forsake the wife and send her away to her parents, in which case he has to maintain her there, and it is a quite different thing to say that the husband in every case is bound to abandon her. If he does not desire 'Parithyagah', I fail to see how it can be regarded as entitling the wife to desert and forsake her husband because of 'Adhivedana'.

76. 'Adhivedana' in the absence of actual abandonment, expulsion or desertion by the husband did not and could not dissolve the wife's obligation to live with her husband. In such a case so long as the husband did not disentitle himself by his own misconduct to insist on his wife residing with him the wife could not claim maintenance without fulfilling her own obligation. In brief, the husband's duty to maintain the wife and her marital duty to obey him were reciprocal obligations.

77. The distinction between the wife herself going away voluntarily from her husband's house to reside elsewhere and her being sent away by the husband was noticed very early in the last century and maintained by the decisions throughout the years preceding the Act (See the three cases mentioned in Macnaghten's Hindu Law, 3rd Edn. Vol. II, pp. 109-10 and the 'Rani of Pittapore's Case (supra).

78. It is a cardinal rule of the Hindu jurispurdeuce that clear proof of usage outweighs the written text of the law. The question therefore is not so much as to whether a disputed doctrine is fairly deducible from the earliest authorities but whether it has been received and sanctioned by usage. Iam quite alive to the rule that evidence is not required to show that people have regulated their lives by the interpretation put by a recognized commentator. But the point here is that the lives of people were regulated during the century and a quarter prior to the Act not by the interpretation now noticed but by something contrary to it.

79. The restrictions to which the doctrine of supersession itself is subject in the original tests have not been enforced by the Courts so as to render a second marriage in contravention of such restrictions invalid. See - 'Thapita Peter v. Thapita Lakshmi", 17 Mad 235 at p. 240 (FB) (Z42), in 1823, Sir Thomas Strange stated the law as under:

"A wile superseded, under whatever circumstances must be provided for; a benefit that is consttued by the Pundits as rendering it imperative upon her to continue to reside in the house with her husband his fickleness not absolving her from her nuptial obligation." (Elements of Hindu Law, 1825), Vol. 1, p. 53).

80. That statement cannot by any means be said to be without support in view of Medhatithi's ??? on the relevant text and in any case must have been rounded on the prevailing usage. I may observe that the technical sense in Hindu law of 'abandonment' does not appear to have been unknown to Strange (vide Vol 2, page 32). The Courts in dealing with the present question acted in conformity with the law as stated by Strange which seems to have accorded with the dominant usages of the Hindus for more than a dozen decades before the Act. Otherwise, uniformity was unlikely in the course of decisions in the different Courts of India. It was not only 'judges like Scotland C.J. and Bittlestone].' who, as was sought to be impressed upon the Court by the learned counsel in - 'Nagendnunma v. Kamakotayya {F) (supra), had acted in accordance with that view, but also learned judges, Nanabhai Haridas, Mahammod, Sir Asulosh Mookerjee and in one sense Sir Cooroodas Bauerjee (Marriage and Stridhana, T.L.L., 3rd Edn., pp. 123, 136 and 153) and Sir Subramania Ayyar too, who had sanctioned or countenanced that view.

81. The reference by Ramaswami, J. to the words of Sir Subramania Ayyar, J. turn out from their context, if I may say with respect, is apt to give a wrong impression. The reference presumably - Isay presumably because Kamaswarni, J. dues not refer to the case - was to the observations made in '20 Mad 470 at pp. 474-475 (Zl). That case was under Section 488 of the Cr PC and Subramania Ayyar, J., observed:

"If that community (as is the case with Hindus) does not completely disapprove of concubinage and tolerates it so far as to give kept woman some status una rights- ('Yashvant Rav v. Kashi Bai, 12 Bom 26 (Z43)), the fact that the husband keeps a concubine ought not by itself entitle the wile to claim separate maintenance. The question in each case will be whether the conduct of the husband is such as the wile consistently with self-respect and due regard to her position as wile, can live in the house of the husband."

82. It may be of interest to note that both Colebrooke and Ellis expressed themselves to the contrary (vide Strange Elements or Hindu Law, 1825-Vol. 2 page 39). But the view of Sir Subramania Ayyar was shared by the other three members of the Full Bench. Reference was made to an earlier pronouncement by Sir Charles Turner C.J. to a similar effect in Criminal Revn. Case No. 547 of 1684 (Mad) (Z44). So, according to the view of the Full Bench, the mere fact that a Hindu husband Kept a concubine, let alone his lawfully taking a second wile, ought not by itself have entitled the wire to separate maintenance. It does not appear that the view of the Full Bench was ever dissented from in the Madras High Court, though that Court did on one occasion recognize the right of a Christian wife to refuse to accept an offer by the husband to take her back while keeping a mistress in his house: - 'Joseph Henry Robert v. Alice Kama/am Robert', 1937 Mad WN 984 (Z45).

83. The view of the Full Bench may shock modern sensibilities. But the question is whether such views in the earlier decisions are to be taken as truly reflecting the law and usage prior to the Act or, I say respectfully, the view propounded by Ramaswami, J. alter the Act. According to the learned judge, there was re orientation in the case in on the point

from 1936 onwards in Madras and other States. In that year Pandrang Row and Menon, JJ. considered it necessary to dispel by an emphatic and unmistakable pronouncement the motion that a husband could chastise his wile: 'In re Subbia Goundan', AIR 1936 Mad 788 (Z46). But so late as 1944 the Madras High Court refused to lecoguise the husband's second marriage by itself as a justification for wife's refusal to go back to her husband and insist on maintenance: - 'Pul/amma v. Thatalingam', (Z34) (supra).

84. Whatever might have been the gradual liberalisation of the law from the early 19th century onwards about what constitutes cruelty by the husband or justilicable cause entitling the wife to five impart from him and claim maintenance, the Courts consistently stopped short of laying down the unqualified proposition now enacted in Cl. (4) of S. 2. It is however pointed out that precedents "are only stepping stones and not halting places". But at times they are apt to become inconveniently the latter without a change in the fundamental doctrine to accord with the altering social concepts and beliefs. The doctrine that ruled in the Courts for about a century and a quarter before the Act was 'Adhivedana' was the husband's right and not his misconduct. So until the Legislature intervened it was indeed a difficult, nay, an impossible step, for the Courts to take and say that supersession alone justified the Hindu wife to live apart from her husband contrary to his wish and claim separate maintenance, unless they were prepared to upset the ruling doctrine itself and reverse its ramifications in more than one province of the law. Therefore, prior to the Act, solely on the ground of 'Adhivedana' the wile could neither defeat a suit by the husband for restitution of conjugal rights, nor, much less, win a claim for separate maintenance.

85. So far as Cl. (4) is concerned, neither the learned Editor of Wayne's Hindu Law, nor Viswanatha Sastri, J., lends support to the view of Ramaswami, J., "..... this 1946 legislation only declared and put beyond doubt what was already the judge made law.":

"Mayne (11th Edn.) page 820,'

"Before this Act, the circumstances of a man taking another wife, even without any justified cause did not by itself entitle her to leave his home, so long as her husband was willing to keep her there."

86. 'Viswanatha Sastri, J.'

"The judge-made law may be summed up as follows:

"..... The mere fact of husband taking a second wife without any justifying cause and against the wishes of the first wife, does not by itself entitle the wire to separate maintenance if the husband is willing to keep her in his house.

"The Act was designed to remedy the mischief created by a state of the law which permitted a man to marry as often as he liked but denied to the superseded wife separate maintenance." 'AIR 1950 Mad 321at pp. 323, 324 (D).

87. But I find it difficult, with due respect, to subscribe to the view of Viswanatha Sastri, J. that the words, "if he marries again" are merely descriptive of the position of the husband as a twice married man at the date when the wife's claim for separate maintenance is made under the Act..... Such a construction not only disregards the grammatical sense but also distorts the language used as already shown by my Lord in - 'Sukhri Bai v. Pohkalsingh' ,

(A) (supra). A glance at the wording of Section 10 of the Divorce Act (IV of 1869) makes the point clear.

88. The reliance by Viswanatha Sastri, J. upon the construction placed by the Judicial Committee on the expression "dying intestate" is not quite apposite. In - 'Duni Chand v. Mt. Anar Kali' , AIR 1946 P.C. 173 (Z47), their Lordships rejected the contention that the words "dying intestate" occurring in the preamble of Act II of 1929 connoted the future tense and accepted the view ' of the Lahore High Court in - 'Shakuntala Devi v. Kaushalya Devi', AIR 1936 Lah 124 (Z48) that the expression had no reference, and was not intended to have any reference, to the time of the death of a Hindu male, but were only a description of the status of the deceased. But the operative provision in S. 2 of that Act was held by their Lordships to govern only successions opening after the Act had come into operation.

89. Panigrahi C.J. points to the use of the present tense in Cl. (4). But the present indefinite is used not only as a substitute for the past tense in what is familiar as the historic present but also for the future tense when futurity is indicated by the context as in the examples given by my Lord on the previous occasion or in the sentence, "If he goes (will go) to Madras again, Iwill meet him there." So the crucial words in S. 2,". A Hindu married woman shall be entitled to separate residence and maintenance from her husband.....if he marries again" are conditional and prospective and not descriptive or retrospective. "If he marries again" has therefore to be construed as "if he marries again after the Act". The answer to the question whether the other clauses are also only prospective is neither necessary nor decisive because, as I have already shown, decisions could be found even prior to the Act in support of the rules enacted by them. That apart, the maxim against retrospective construction comes in whenever we reach the line at which the words of the statute cease to be plain and there is no rule that a statute must in its entirety be construed either as prospective or retrospective.

90. On a point of construction which turns on the words used, decisions under other statutes cannot be conclusive except to illustrate the principles applicable to the case. It is pertinent to make a pointed reference to - 'Lane v. Lane', (1896) P. 133 (Z49) and to what Lopes L.J. said in - 'Bourke v. Nutt, 1894-1 QB 725 at pp. 736-37 (Z50) referred by my Lord on the previous occasion and to one more decision in support of the same view which is - 'Turnbull v. Forman', (1885) 15 QBD 234 (Z51).

91. According to Lopes L.J. for the rule against retrospective construction to apply the statute "need not be penal in the sense of punishment." It is sufficient if it "creates a new obligation, or imposes a new duty, or attached a new disability in respect of transactions already past ...."

92. In - 'Turnbull v. Forman', (Z51) (supra), the Court of Appeal negatived the contention that Sub-section (4) of Section 1 of the Married Women's Property Act, 1882, which provided,

"every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all seperate property which she may thereafter acquire."

93. Governed a promissory note made by her before the passing of the Act. The Master of the Rolls observed, ".....unless the language used is clear to the contrary, an enactment affecting rights must be construed prospectively only and not retrospectively so as to affect rights acquired before the Act passed. Sub-Section 4 of Section 1 of the Married Women's Property

Act, 1882, clearly affects rights. It gives to the woman a greater right than he would have had before the Act. The case of - 'Pike v. Fitzgibbon', (1881) 17 Ch D 454 (Z52), shows what rights were given by such a contract as against the married woman's property before the Act, and the sub section clearly extends the rights given by such a contract. The rule, therefore, applies that, unless the words are clear, the enactment is not to be construed retrospectively."

94. The old and well-known saying with regard to new laws that you are not by a new law to affect for the worse the position in which a man already finds himself at the time of its enactment is deeply rooted in good sense and strict justice. So the question is not as posed by Viswanatha Sastri, J. whether there is any reason why the Legislature should have made an invidious distinction between wives superseded by a second marriage of the husband before the Act and those who are superseded by a second marriage after the Act but whether the Legislature has evinced the necessary intention by using the appropriate words to bring the former class under the purview of the Act. That is the accepted canon of construction, quite apart form the reason that the Legislature advisedly did not choose to impose on the husband an obligation to which the act complained of did not subject him when it was done. Unless one is prepared to ignore the normal rule of construction - I see no warrant for such a course in the words used - it would be a bad precedent for statutory construction to hold that a defence available to a person when he did the act complained of has been taken away retrospectively by subsequent alteration of the law.

95. Giving my earnest consideration to the views ex pressed in the Madras and Orissa High Courts, Iam not persuaded to depart from the decision in, - ' Sukhribai v. Pohkalsingh', (A) (supra) that Cl. (4); is not declaratory. There is no room for saying that the Legislature intervened to uphold one of the two conflicting views on the question because the conflict has arisen after, not prior to the Act. It may not be inappropriate to conclude the discussion of the question with what John Stuart Mill said in another context:

"It often happens that the universal belief of one age of mankind - a belief from which no one was, nor, without an extraordinary effort of genius and courage, could at that time be free - becomes to a subsequent age so palpable an absurdity, that the only difficulty then is to imagine how such a thing can ever have appeared credible."

96. Ihold on the findings that the wife voluntarily went away from her husband and is not justified in living apart from him merely because the husband married again when he was and is willing to receive and maintain her with him. She cannot invoke Cl. (4) which is not declaratory of the pie-ex isting law in respect of supersession prior to the Act. In the result, Iwould affirm the decree below and dismiss the appeal with costs.

SEN, J.:- I agree.

97. Appeal dismissed.

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DAGDU S/O CHOTU PATHAN, LATUR VS RAHIMBI DAGDU PATHAN, ASHABI

Bombay High Court

2003 (1) BomCR 740

Date of Judgment : 2nd May, 2002
Equivalent citations: 2003 BomCR Cri, (2002) 3 BOMLR 50, II (2002) DMC 315, 2002 (3) MhLj 602

Dagdu S/O Chotu Pathan, Latur
vs
Rahimbi Dagdu Pathan, Ashabi

Bench: Hon'ble Mr. Justice B Marlapalle & Hon'ble Mr. Justice N Dabholkar

Mohammdan Law- Plea of Divorce and effective Talaq , requirements--Talaq must be for reasonable cause and after attempts of reconcilliation by arbitrators Talaq given at an earlier occasion either in his written statement or in his oral depositions, he is required to prove the factum of the same by leading evidence before the court, if disputed by the wife.

JUDGMENT

Marlapalle, J.

1. The Petitioner was married to the Respondent No. 1 Rahimbi; and they begot three children from the approached the Judicial Magistrate, First Class at Latur by an application under section 125 of the Criminal Procedure Code for maintenance for herself and for the three children claiming that the Petitioner neglected her and the children after he married one Khamrunbee from whom also he begot children. He neglected the applicants and refused to maintain them during the last three years before she approached the learned Magistrate.

2. On receipt of summons, the Petitioner appeared before the Magistrate and filed a written statement opposing the claim made by the Applicants i.e. the present Respondent Nos. 1 to 4. He claimed that he had given Divorce (Talaq) to the Respondent No. 1 on 24th February, 1996 in the presence of Qazi and two witnesses and thereafter he had performed the second marriage with Khamrunbee. He also stated that one of the witnesses was a Muslim whereas the other one was a Hindu. He, therefore, prayed that the application filed under section 125 of the Criminal Procedure Code be dismissed. This plea was rejected by the learned 2nd Joint Judicial Magistrate First Class at Latur vide his judgment and order dated 21st November, 1998 and the maintenance application filed by the Respondent Nos. 1 to 4 came to be allowed. The learned Magistrate held that the fact of Talaq must be proved and it cannot be accepted by the Court merely on pleadings in the written statement. In this regard, the learned Magistrate relied upon a judgment of this Court [Single Judge] in the case of "Mehtabbi W/o Shaikh Sikandar V/s Shaikh Sikandar" [1995 (3) Bombay C.R. 433]. This order, passed by the learned Magistrate, has been impugned in the instant Petition.

3. When this petition came up for hearing alongwith Criminal Writ Petition No. 308 of 1999 before the learned Single Judge (Vagyani, J.) on 7th February, 2001 it was noted that a Division Bench

of this Court [A.V.Savant & T.K.Chandrashekhara Dass,JJ.] in the case of "Jaitunbi Mubarak Shaikh V/s Mubarak Fakruddin Shaikh" [1993 (3) Mh.L.J. 964] had held that the view taken by the learned Single Judge in the case of Mehtabbi (supra) was not a good law and when a plea of Talaq is taken in the written statement filed before the Court, the wife is deemed to have been divorced from the date such a statement was made in the written statement though the husband takes the plea of Talaq on any date earlier to the filing of such a written statement and was not required to prove the factum of divorce by leading evidence before the Court.

4. However, it appears that another Single Bench of this Court at Nagpur had also made a reference to decide the controversy as arising in view of two different judgments of the Single Benches viz.

"Chandbi Ex W/o Bandesha Mujawar V/s Bandesha S/o Balwant Mujawar" on one hand and "Shaikh Mobin S/o Shaikh Chand V/s State of Maharashtra" [1996 (1) Mh.L.J. 810] on the other hand and, therefore, a reference came to be made to a Division Bench at Nagpur, in the case of "Saira Bano W/o Mohd. Aslam V/s Mohd. Aslam Ghulam Mustafa Khan" [1999 (3) Mh.L.J. 718] though similar reference was already answered by the Division Bench at Mumbai [A.V.Savant and T.K.Chandrashekhara Dass, JJ.) in the judgment dated 22nd April, 1999 the said opinion was not placed before the Nagpur Bench which decided the said reference [1999 (3) Mh.L.J. 718] on 28th September, 1999. The Division Bench at Nagpur [G.D.Patil and A.B.Palkar, JJ.), without referring to the view of the earlier Division Bench in Jaitunbi Mubaraks case (supra) held that the factum of divorce (Talaq) as stated in the written statement was required tobe proved and, therefore, the law laid down in the case of Mehtabbi (supra) and Shaikh Mobin (supra) was correct and the view taken in Chandbis case (supra) was erroneous. The learned Single Judge of this Bench (Vagyani, J.) noted the controversy between the views taken by two Division Benches in the case of Jaitunbi (supra) and Sairabanu (supra) and, therefore, directed the office to place the petition before the learned Chief Justice for His Lordships consideration to make a reference to the Full Bench to resolve the controversy. Accordingly, the learned Chief Justice was pleased to make a reference and constitute a Full Bench by order dated 15th March, 2002. This petition has thus been placed before us for answering the reference so as to settle the controversy.

5. In the case of Jaitunbi (supra) the wife had moved an application under section 125 of the Criminal Procedure Code and the maintenance amount came tobe fixed at Rs.60/- per month by order dated 26th June, June, 1981 passed by the learned Magistrate.

Subsequently, the wife filed maintenance application No. 297 of 1986 under section 127 of the Code for enhancement of the maintenance amount. In reply to this application the husband filed his written statement on 1st November, 1987 and contended, inter alia, that he had already given Talaq to the claimant on 29th October, 1987 and, therefore, in view of the provisions of The Muslim Womens (Protection of Rights on Divorce) Act, 1986 the application filed in the Magistrates Court was not maintainable. The Division Bench framed four issues for consideration and the first two issues are relevant in deciding this reference and, therefore, they are reproduced, as under:

[i] In proceedings for maintenance instituted by a Muslim wife, if a Muslim husband takes a plea in his written statement that his marriage had been dissolved at an earlier date in the

Talaq form, even assuming that the fact of such dissolution at an earlier date is not proved, whether the filing of the written statement containing such a plea of divorce in the Talaq form amounts to the dissolution of marriage under the Muslim Personal Law from the date on which such a statement was made.

[ii] Whether the law laid down by this Court in Chandbi Ex Wife of Bandesha Mujawar V/s Bandesha S/o Balwant Mujawar still holds good or whether it requires reconsideration in view of the two contrary decisions of this Court in (a) Mehtabbi W/o Sk. Sikandar V/s Shaikh Sikandar S/o Sk. Mohd. reported in 1995 (3) BCR 433 and (b) Shaikh Mobin S/o Shaikh Chand V/s State of Maharashtra reported in 1996 (1) Mh.L.J. 810.

6. In reply to the first issue the Division Bench held that the pronouncement by a husband in his written statement that he has divorced his wife earlier though such a fact is not proved..... would operate as a divorce in the Talaq form at least from the date of filing of the written statement and such a contention made in the written statement would operate as an acknowledgment of a divorce by him and a declaration of divorce from the date on which the statement was made. In reply to the second issue the Division Bench held that the view taken in Chandbis case did not require reconsideration and the view taken subsequently in Mehtabbis case and Shaikh Mobins case was over ruled.

7. In the case of Sairabanu (supra) the application for maintenance under section 125 of the Code was allowed by the learned Judicial Magistrate First Class at Akot and, therefore, Criminal Revision Application No. 164 of 1995 was filed challenging the said order. While resisting wives claim the husband made a statement in the witness box that he had divorced his wife and had sent Talaqnama to her by registered post which she refused to accept. The envelope containing the Talaqnama with the postal endorsement "refused" was produced before the learned Magistrate who found that the factum of the husbands having given divorce to the wife was not proved, the plea of divorce was not taken in the written statement by the husband but such a plea was taken for the first time by oral depositions in the witness box. The Division Bench at Nagpur framed the following five issues:

(1) Whether in case of parties governed by Mahomedan Law, it is sufficient for a husband to resist claim of his wife for maintenance beyond the period of Iddat merely by making an averment in the Written Statement or in any application filed in the Court contending that he has given her the divorce?

(2) Whether even without pleading divorce, the husband can resist successfully the claim of his wife for maintenance by making a statement in the witness box to the effect that he has divorced her?

(3) Whether such mere assertion either in the pleading or in the witness box amounts to an acknowledgment of divorce given earlier by the husband and he is not required to prove to have given divorce in accordance with Mahomedan Law sometime prior to date of such an assertion?

(4) Whether even otherwise such assertion either in the pleadings or in the witness box or in some application filed in Court by the husband by itself amounts to divorce in accordance with Mahomedan Law from the date of such assertion if not from an earlier date?

(5) Whether even if it is found that the statement regarding divorce given earlier is found to be false, still the statement in the Court proceedings can be taken as acknowledgment of divorce or even otherwise a fresh declaration of divorce?

The Division Bench held that (a) pleadings is formal allegation by the parties of their respective claims and defences to provide a notice of what is to be expected at the trial and proof is establishment of fact by leading evidence, (b) there is no authority to the proposition that mere allegation in the pleading by itself should be taken either tobe a proof of the fact alleged or even otherwise tobe independently as a declaration of existence of cessation of legal relationship between the parties; (c) pleadings in Courts of proceedings or any statement made in the witness box or in any application is for the purpose of making out a case of parties and evidence is led for supporting the case already pleaded; (d) the forum of judicial proceedings cannot be used for declaring existence or cessation of legal relationship between the parties and, therefore, mere contention in the written statement or in any application or in plaint by itself cannot be accepted tobe either an acknowledgment of divorce already given specially even without deciding upon the validity and legality of the earlier divorce. It can never be said mean a fresh declaration of divorce from the date of such assertion or even from the date stated in the proceedings; (e) the Court proceedings should be confined to the assertion of facts by parties and to the proof of facts so asserted or alleged and not for any other purpose specially for acknowledgment of declaration of divorce. The rights and interest of the parties cannot be jeopardized by a unilateral statement made during the course of proceedings by other party either orally or in writing.

The Division Bench, therefore, over ruled the view taken in Chandbis case (supra) and accepted the view taken in Mehtabbis case and Shaikh Mobins case (supra) as the correct law without referring to the view taken by the Division Bench in the Case of Jaitunbi (supra).

8. So as to assist us in resolving the controversy under reference we had appointed Shri Gulam Mustafa and Shri Khader as Amicus Curiae and Shri Khader argued for the Petitioner whereas Shri Gulam Mustafa opposed the Petition. Both the amicus curiae are well known for their scholarship in Muslim Personal Law and we have heard them at length in addition to the learned counsel for the respective parties.

9. The Mahomedan Law has mainly four different sources. The Holy Qur-an is the primary source and it represents the Gods will communicated to the Prophet through angel Gabriel. The second source is Ahadis and Sunni. It is claimed that after the death of Prophet the story of occurrences concerning the Prophet given by eye witness are known as Ahadis which means a tradition or precept and Sunnas is the practice of the Prophet. The third source is Ijmaa which consists of new problems faced after the death of Prophet and decisions thereon by the concerned jurists. The fourth source is Qiyas which, in brief, is a process of deduction by which law of text is applied to cases which though not covered by the language are covered by the reason of text which is technically called as Illiat or effective cause.

10. There are three different schools of thought in regard to the Mahomedan society and those are Sunnis, Shias and Mustahids.

11. The All India Muslim Personal Law Board has published a Compendium of Islamic Laws and Part-II therein deals with the law of divorce. The preliminary note on "Divorce in Islam", reads thus:

"Marriage is a blessing, and when this relationship is established it is meant to subsist and be lasting. It is through this relationship that God grants children.

Divorce terminates marital relationship and leads to several problems in the family.

Divorce in itself is, therefore, an undesirable act. However, it is also true that if there is no temperamental compatibility between the parties, or the man feels that he cannot as husband fulfil the womans rights, or because of mutual difference of nature Gods limits cannot be maintained, keeping the marriage intact in such situations or to compel the parties by legal restrictions to continue in the marital bond may be more harmful for the society. The Shariat, therefore, regards divorce as permissible although it is an undesirable act.

Thus, uncontrolled use of divorce without regard to the restrictions established by the Shariat is a sin.

Similarly, imposing such restrictions on the right of divorce due to which the man is compelled not to divorce the wife despite his feeling that he cannot live a happy life with her is also not lawful.

The decision whether a man can live a happy life with his wife or not and whether divorce is necessary or not relates to the sentiments of the husband. The decision in this regard can, therefore, be taken by the husband himself. If the man is sure that he cannot have cohabitation as per rules, e.g., if he is impotent, or cannot fulfil marital obligations, or any other such situation is there, it will be necessary for him to pronounce a divorce. To divorce the wife without reason only to harm her, or revengefully due to the non-fulfilment of his unlawful demands by the wife or her guardians, and to divorce her in violation of the procedure prescribed by the Shariat, is haram (absolutely prohibited)."

12. The Holy Quran (English translation to the meanings and commentary ..... and edited by the Presidency of Islamik Research IFTA was also placed before us by Shri Gulam Mustafa and our attention to the following provisions on divorce, was invited:

225.Allah will not Call you to account For thoughtlessness In your oaths, But for the intention In your hearts, 252 And He is Oft-forgiving Most Forbearing.

226.For those who take An oath for abstention From their wives, A waiting for four months Is ordained;

If then they return, Allah is Oft-forgiving, Most Merciful.

227.But if their intention Is firm for divorce, Allah heareth And knoweth all things 253

228.Divorced women Shall wait concerning themselves For three monthly periods.

And it is not lawful for them To hide what Allah hath created in their wombs, If they have faith In Allah and the Last Day.

And their husbands Have the better right To take them back In that period, if They wish for reconciliation. 254 And women shall have rights Similar to the rights Against them, according To what is equitable;

But men have a degree Over them 255 And Allah is Exalted in Power, Wise.

SECTION 29.

229.A Divorce is only 256 Permissible twice, after that, The parties should either hold Together on equitable terms, Or separate with kindness. 257 It is not lawful for you, (Men), to take back Any of your gifts (from your wives), Except when both parties Fear that they would be Unable to keep the limits Ordained by Allah 258 If ye (judges) do indeed Fear that they would be Unable to keep the limits Ordained by Allah, There is no blame on either Of them if she give Something for her freedom These are the limits Ordained by Allah;

So do not transgress them If any do transgress The limits ordained by Allah, Such persons wrong (Themselves as well as others). 229

230.So if a husband Divorces his wife (irrevocably), 260 He cannot, after that, Re-marry her until After she has married Another husband and he has divorced her.

In that case there is No blame on either of them If they re-unite, provided They feel that they Can keep the limits Ordained by Allah.

Such are the limits Ordained by Allah, Which He makes plain To those who know

231.When ye divorce 261 Women, and they (are about to) fulfil The term of their (Iddat), Either take them back On equitable terms Or set them free On equitable terms:

But do not take them back To injure them, (or) to take Undue advantage; 262 If any one does that, he wrongs his own soul.

Do not treat Allahs Signs As a jest, 263 But solemnly rehearse 264 Allahs favours on you, And the fact that He Sent down to you The Book And Wisdom, For your instructions.

And fear Allah, And know that Allah Is well acquainted With all things.

SECTION 30

232.When ye divorce Women, and they fulfil The term of their (Iddat), Do not prevent them 265 From marrying Their (former) husbands, If they mutually agree On equitable terms.

This instruction Is for all amongst you, Who believe in Allah And the Last Day.

That is (the course Making for) most virtue And purity amongst you.

And Allah knows, And ye know not.

SECTION 31

236.There is no blame on you If ye divorce women Before consummation Or the fixation of their dower;

But bestow on them (A suitable gift), The wealthy According to his means, And the poor According to his means;-

A gift of a reasonable amount Is due from those Who wish to do the right thing.

SECTION 39

282. O ye who believe! When ye deal with each other, In transactions involving Future obligations In a fixed period of time, Reduce them to writing 329 Let a scribe write down Faithfully as

between The parties: let not the scribe Refuse to write: as Allah 330 Has taught him, So let him write.

Let him who incurs The liability dictate, But let him fear Allah His Lord And not diminish Aught of what he owes, If the party liable Is mentally deficient, Or weak, or unable Himself to dictate, Let his guardian Dictate faithfully, And get two witnesses, Out of your own men. 332 And if there are not two men, Then a man and two women, Such as ye choose, For witnesses, So that if one of them errs, The other can remind her.

The witnesses Should not refuse When they are called on (For evidence).

Disdain not to reduce To writing (your contract) For a future period, Whether it be small Or big; it is juster In the sight of Allah, More suitable as evidence, And more convenient To prevent doubts Among yourselves But if it be a transaction Which ye carry out on the spot among yourselves, There is no blame on you If ye reduce it not To writing.

But take witnesses Whenever ye make A commercial contract;

And let neither scribe Nor witness suffer harm.

If ye do (such harm), It would be wickedness In you. So fear Allah;

For it is Allah That teaches you.

And Allah is well acquainted.

With all things. 333 [Sura II, Verses 225 to 232, 236, 282]

35.If ye fear a breach.

Between them twain, Appoint (two) arbiters, One from his family, And the other from hers; 549 If they seek to set things aright, Allah will cause Their reconciliation:

For Allah hath full knowledge, And is acquainted With all things.

128.If a wife fears Cruelty or desertion On her husbands part, There is no blame on them If they arrange An amicable settlement Between themselves;

And such settlement is best;

Even though mens souls Are swayed by greed. 638 But if ye do good And practise self-restraint, Allah is well-acquainted With all that ye do.

129.Ye are never able To do justice Between wives Even if it is Your ardent desire:

But turn not away (From a woman) altogether, So as to leave her (as it were) Hanging (in the air). 639 If ye come to a friendly Understanding, and practise Self-restraint, Allah is Oft-forgiving, Most Merciful.

130.But if they separate Allah will provide abundance For each of them for His All-reaching bounty:

For Allah is He That careth for all And is Wise.

[Sura IV, Verses 35, 128 to 130]

1. O Prophet!5503 When ye Do divorce women, 5504 Divorce them at their Prescribed periods, 5505 And count (accurately) Their prescribed periods:

And fear Allah your Lord: 5506 And turn them not out Of their houses, nor shall They (themselves) leave, 5507 Except in case they are Guilty of some open lewdness, Those are limits Set by Allah: and any Who transgresses the limits Of Allah, does verily Wrong his (own) soul:

Thou knowest not if Perchance Allah will Being about thereafter Some new situation. 5508

2. Thus when they fulfil Their term appointed, Either take them back On equitable terms 5509 Or part with them On equitable terms;

And take for witness Two persons from among you, Endued with justice, And establish the evidence 5510 For the sake of Allah. Such Is the admonition given To him who believes In Allah and the Last Day.

4. Such of your women As have passed the age Of monthly courses, for them The prescribed period, if ye Have any doubts, is Three months, and for those Who have no courses (It is the same):5513 For those who are pregnant, Their period is until They deliver their burdens:

And for those who Fear Allah, He will make things easy for them. 5514 [Sura : 65 verses 1, 2 and 4]

13. Chapter-XVI in Mullas Principles of Mahomedan Law deals with the subject "divorce" andsection 307 gives three forms of divorce viz. (1) by the husband at his will, without the intervention of a Court; (2) by mutual consent of the husband and wife, without the intervention of a Court; (3) by a judicial decree at the suit of the husband or wife. When the divorce proceeds from the husband, it is called Talak, when it is effected by mutual consent, it is called Khula or Mubaraat, whereas the third form of divorce by way of decree at the suit of the husband or wife is called as Faskh. The first form of divorce is called as "Talaq", the second one as "Khula". Talak literally means to remove a restriction or to put an end to the marriage with immediate or deferred effect by using any of the special words meant for it, whether those words are used by the husband himself or by his representative, or by the Qazi who in certain situations is regarded by the Shariat as the husbands deputy and is empowered to pronounce a divorce on his behalf without his consent. A Talak may be effected (1) orally (by spoken words) or (2) by a written document called a Talaknama.

In the oral form of Talak there are three different modes of Talak viz. (a) Talak Ahsan which consists of a single pronouncement of divorce made during tuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of Iddat; (b) Talak Hasan which consists of three pronouncements made during successive tuhrs, no intercourse taking place during any of the three tuhrs (the first pronouncement should be made during a tuhr, the second during the next tuhr, and the third during the succeeding tuhr), and (c) Talak-ul-biddat or Talak-i-badai. This form consists of (i) three pronouncements made during a single tuhr either in one sentence, e.g., "I divorce thee thrice, - or in separate sentences e.g., "I divorce thee, I divorce thee, I divorce thee" or (ii) a single pronouncement made during a tuhr clearly indicating an intention irrevocably to dissolve the marriage e.g. "I divorce thee irrevocably". A Talak in Ahsan mode becomes irrevocable and complete on the expiration of the period of Iddat, whereas a Talak in Hasan mode becomes irrevocable and complete on the third pronouncement, irrespective of the Iddat; whereas a Talak in badai mode becomes irrevocable immediately it is pronounced,

irrespective of the Iddat. Until a Talak becomes irrevocable, the husband has the option to revoke it which may be done either expressly, or implied as by resuming sexual intercourse. To utter by mouth any of the special words implying Talaq is of the essence in a Talaq. Just thinking of Talaq or silently deciding on it will not result into Talaq.

Talak in writing is a written mode of Talak reduced in a Talaknama which may only be the record of the fact of an oral Talak or it may be the deed by which the divorce is effected. The deed may be effected in the presence of a Qazi or the wives father or of two witnesses. In the absence of words showing a different intention, a divorce in writing operates as an irrevocable divorce (Talak-i-bain) and takes effect immediately on its execution. Talak by a delegation is permissible and it is called as Talak by Tafweez.

14. Written Talaq may have several forms and some of them are (a) Kitabat-e-mustabinah (legible writing), It is of two kinds -- Mustabinah Marsumah (formal legible writing and Mustabinah Ghair Marsumah (informal legible writing). Kitabat-e-mustabinah Marsumah which is a formal divorce-deed or letter which is written with a title and the addressees name. Section 5 in Chapter-II of Part-II of the Compendium of Islamik Laws deals with conditions for effectiveness of Talaq let us refer to these provisions.

"Section 5

(a) The man pronouncing a Talaq should be sane and adult and should have pronounced the Talaq while he was awake and conscious. Therefore, a Talaq pronounced by a person who is a minor, insane, imbecile, overwhelmed, delirious, unconscious or asleep, will not be effective.

(b) For the effectiveness of Talaq it is, in principle, necessary that the man pronouncing it should be in his senses.

This demands that a Talaq pronounced in an inebriated condition should not be effective. However, if a person has unlawfully consumed an intoxicant by his own liking and habit, his Talaq will become effective by way of punishment. But if a person has consumed any intoxicant as a treatment, or under compulsion or strong pressure, or in ignorance, and pronounces Talaq in that state, it will not be effective.

(c) If a person consumes something which in fact is not intoxicating but because of its unsuitability for his system he gets inebriated, a Talaq pronounced in such condition will not be effective.

(d) It is also necessary that in the sentence used for Talaq the divorce must have been related to the wife, either expressly or by necessary implication.

(e) It is further necessary that the woman divorced should be a proper object of Talaq, i.e., she must be either married to the man or observing for him "Iddat" of a revocable or irrevocable Talaq other than a triple Talaq.

Section 6 states that if a person under compulsion or duress pronounces a Talaq it will be valid if it is verbal, but not otherwise. Section 11 in Chapter-III speaks of proper and improper Talaq and the first form is in section 11 whereas the second form is in section 12, which read as under:

"PROPER AND IMPROPER TALAQ Section 11:

There are two conditions for Talaq-e-sunnat [proper Talaq] first, in a consummated marriage the wife should not be divorced during menstruation and the Talaq should be pronounced in a tuhr (period following one menstruation and preceding the next) before having coitus in it. Second, if the marriage has been consummated, only one revocable divorce should be pronounced in any single tuhr. If a man pronounces a single revocable Talaq in a single tuhr and keeps away from the woman till her "Iddat is over, this will be Talaq-e-ahsan (better divorce). If a single revocable Talaq is pronounced before coitus in a new tuhr till three talaqs are over, this will be Talaq-e-hasan (good divorce). Similarly, in a non-consummated marriage pronouncing a single Talaq even though when the wife is in menstruation will be Talaq-e-hasan.

Pronouncing three Talaqs in three months on a minor or a woman past menopause is also Talaq-e-hasan.

Section 12 Talaq-e-bidat [improper Talaq] includes: in a consummated marriage divorcing the wife during menstruation, or divorcing her in a tuhr after coitus, or pronouncing an irrevocable divorce, or pronouncing more than one Talaq in a single tuhr - and in an unconsummated marriage pronouncing together more than one Talaq, or pronouncing more than one Talaq in a single month on a minor or woman past menopause." It is also necessary to refer to the rules of revocable and irrevocable Talaq and they are in sections 17, 18, 19 and 20 and they read, as under:

"Section 17:

In a revocable Talaq the husband can take back the wife during "Iddat" without her consent and without a remarriage; but after the expiry of "Iddat" she will become irrevocably divorced and can be lawfully taken back only by a fresh marriage.

Section 18:

Revocation may be either by conduct -- e.g., if the husband has had coitus, kissing and caresses with the wife --- or by spoken words, e.g. if the husband says that he has taken back his wife and informs her of the same. Revocation by words is preferable in the presence of witnesses (two men or a man and two women).

Section 19:

An irrevocable Talaq, whether express or implied, (words of implication are explained hereinafter) is of two kinds: bainunat-e-khafifah (minor separation) and bainunat-e-ghalizah (major separation).

Less than three Talaqs effect bainunat-e-khafifah, otherwise there will be bainunat-e-ghalizah.

Section 20:

In bainunat-e-khafifah though the wife goes out of the marital bond but the parties may by mutual consent remarry during or after the "Iddat". In bainunat-e-ghalizah remarriage is possible only where after the expiry of "Iddat" the woman has married another man who has either died or divorced her and the "Iddat" of death or divorce has expired."

Section 23:

For proposal and acceptance it is necessary to utter such words which seem to signify immediate establishment of relationship between the parties, whether those words affirm this meaning literally or by implication or usage and whether the language is Arbic or non-Arabic -- as Nikah (marriage), Zawaj (matrimony), Biyah (marriage), Hiba (gift), Baksh dena (giving away) Malik bana dena (make master), etc. On the contrary, if words like Ariyat (lease) or Ijara (rent) are used, there will be no marriage.

Section 24:

To establish a marriage it is also necessary that no such words are mentioned in the proposal and acceptance which signify that the marriage is for a fixed period.

Section 30:

The parents and offspring of the groom and the bride can also be witnesses to the marriage, but it is better to have others as witnesses.

Explanation:

If ascendants or descendants act as witnesses, the marriage will be established but their evidence will not be admissible to prove the marriage in a court and, therefore, it is better to have others as witnesses.

15. The term "Iddat" literally means numeration and it may be described as the period during which it is incumbent upon any woman whose marriage has been dissolved to remain in seclusion and to abstain from marrying another husband. The abstinence is imposed to ascertain whether she is pregnant by the husband so as to avoid conclusion of the parentage. The Act of 1986 has defined the term "Iddat Period" in section 2 (b) and it means in the case of a divorced woman (1) 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.

Iddat of a divorced woman, if she menstruates is three complete menstrual courses and if she does not due to young or old-age it is three lunar months. If the divorced woman is pregnant her Iddat period is till the end of pregnancy. If the Iddat does not begin on the first day of the month, 30 days will be counted for each month and in that case total days of Iddat will be 130 in the case of death and 90 in the case of divorce/dissolution of marriage and mutual repudiation (Mutarakat).

16. Under the Mahomedan Law the Qazi was chiefly a judicial officer and may be said to have duties corresponded to the present day judge or magistrate.

In addition, however, to his functions under the Mahomedan Law, the Qazi in this country, before the advent of the British Rule, appears to have performed certain other duties partly of secular and partly of religious nature. On the advent of British Rule, judges and magistrates took the place of Qazis who, in his judicial capacity, disappeared. However, the office of the Qazi was not abolished even in the British regime. By certain regulations passed from time to time the appointment of Qaki-ul-Kuzzat and Qazis by the State was provided for and the performance of non-judicial duties was recognised by law. The duties of the Qazi, under these

regulations, comprised some functions like celebrating marriages and presiding at divorces as well as performing various rites and ceremonies.

Under these circumstances it appeared no longer necessary that the Government should appoint these officers. Qazis Act, 1864 was formulated and some provisions therein raised certain difficulties and, therefore, the Qazis Act, 1880 came tobe enacted specifying the limited duties of a Qazi.

17. Under the Wakf Act, 1954 as well as the amended Wakf Act, 1995 there is a provision for granting certificate of divorce and the divorce is registered at the office of Qazahat. The certificate is in the prescribed form and it contains the columns for (1) reason of Talaq/ Khula (Divorce), (2) date of divorce/ Talak/ Khula, (3) names of witnesses with fathers name, ages, residences and occupations, signature of divorcer, (4) certificate of Qazi or presiding officer of the Court, (5) name of wife with fathers name, age, residence and occupation etc.

18. Having considered the relevant provisions, as applicable to Talaq under the Muslim Personal Law, let us now go to the views of eminent Muslim Scholars/ Jurists in that regard.

(a) Maulana Mohammad Ali in his commentary on the Holy Quran has stated:

"Divorce is one of the institutions in Islam regarding which much misconception prevails, so much so that even the Islamic Law, as administered in the Courts, is not free from these misconceptions."

"Some Muslim jurists and scholars point out that from the very beginning of the recognition of the principle of unilateral divorce, forces had been at work which has restricted and limited its free and unnecessary use."

On the meaning and scope of Sura IV verse 35 of the Holy Quran the said author has commented as under: "This verse lays down the procedure to be adopted when a case for divorce arises.

It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should the divorce case be made too public. The Judge is required to appoint two arbitrators, one belonging to the wives family and the other to the husbands. These two arbitrators will find out the facts but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed. But the final decision rests with the Judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam."

"From what has been said above, it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce."

"Divorce is thus discouraged:

If you hate them i.e. (your wives) it may be that you dislike a thing while Allah has placed abundant good in it."

"And if you fear: breach between the two (i.e. the husband and the wife), then appoint a judge from his people and a judge from her people; if they both desire agreement. Allah will effect harmony between them.

"The principle of divorce spoken of in the Holy Quran and which in fact includes to a greater or less extent all causes, is the decision no longer to live together as husband and wife. In fact, marriage itself is nothing but an agreement to live together as husband and wife and when either of the parties finds him or herself unable to agree to such a life, divorce must follow. It is not, of course, meant that every disagreement between them would lead to divorce; it is only the disagreement to live any more as husband and wife."

"The "Shiqaq" or breach of the marriage agreement may also arise from the conduct of either party; for instance, if either of them misconducts himself or herself, or either of them is consistently cruel to the other, or, as may sometimes happen there is incompatibility of temperament to such an extent that they cannot live together in marital agreement."

"The "Shiqaq" in these cases is more express, but still it will depend upon the parties whether they can pull on or not.

Divorce must always follow when one of the parties finds it impossible to continue the marriage agreement and is compelled to break it off. At first sight it may look like giving too much latitude to the parties to allow them to end the marriage contract thus, even if there is no reason except incompatibility of temperament, but this much is certain that if there is such disagreement that the husband and the wife cannot pull together, it is better for themselves, for their offspring and for society in general that they should be separated than that they should be compelled to live together. No home is worth the name wherein instead of peace there is wrangling; and marriage is meaningless if there is no spark of love left between the husband and the wife. It is an error to suppose that such latitude tends to destroy the stability of marriage, because marriage is entered into as a permanent and sacred relation based on love between a man and a woman, and divorce is only a remedy when marriage fails to fulfil its object."

"Though the Holy Quran speaks of the divorce being pronounced by the husband, yet a limitation is placed upon the exercise of this right."

"It will be seen that in all disputes between the husband and the wife, which it is feared will lead to a breach, two judges are to be appointed from the respective people of the two parties. These judges are required first to try to reconcile the parties to each other, failing which divorce is to be effected. Therefore, though it is the husband who pronounces the divorce, he is as much bound by the decision of the Judges, as is the wife. This shows that the husband cannot repudiate the marriage at will. The case must first be referred to two judges and their decision is binding.

... ... The Holy Prophet is reported to have interfered and disallowed a divorce pronounced by a husband, restoring the marital relations (Bu.68:2). It was no doubt matter of procedure, but it shows that the authority constituted by law has the right to interfere in matters of divorce.: "Divorce may be given orally, or in writing, but it must take place in the presence of witnesses."

(b) Ameer Alis Treaties on Mahomedan Law inter alia states, as under:

"The Prophet pronounced Talaq to be most detestable thing before the Almighty God of all permitted things."

"If Talaq is given without any reason it is stupidity and ingratitude to God."

"The author of the Multeks (Ibrahim Halebi) is more concise. He says - "The law gives to the man primarily the power of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy, but in the absence of serious reasons, no Musalman can justify a divorce either in the eyes of the religion or the law. If he abandons his wife or put her away from simple caprice, he draws upon himself the divine anger, for "the curse of God", said the Prophet," rests on him who repudiates his wife capriciously."

(c) Abdullah Yusuf Ali, commenting on the subject of "Talaq" has observed:

"Islam tried to maintain the married state as far as possible, especially where children are concerned, but it is against the restriction of the liberty of man and women in such vitally important matters as love and family life. It will check hasty action as far as possible and leave the door to reconciliation open at many stages. Even after divorce a suggestion of reconciliation is made, subject to certain precautions ...

... against thoughtless action. A period of waiting (Iddat) For three monthly courses it prescribed, in order to see if the marriage conditionally dissolved, is likely to result in issue. But this is not necessary where the divorced woman is a virgin. It is definitely declared that women and men shall have similar rights against each other."

"Where divorce for mutual incompatibility is allowed, there is danger that the parties might act hastily, then repent, and again wish to separate. To prevent such capricious action repeatedly, a limit is prescribed. Two divorces (with a reconciliation between) are allowed. After that the parties must unitedly make up their minds, either to dissolve their union permanently, or to live honourable lives together in mutual love and forbearance to hold together on equitable terms, neither party worrying the other nor grumbling nor evading the duties and responsibilities of marriage."

"All the prohibitions and limits prescribed here are in the interest of good and honourable lives for both sides, and in the interests of a clean and honourable social life, without public or private scandals. ... ..."

"If the man takes back his wife after two divorces, he must do so only on equitable terms, i.e. he must not put pressure on the woman to prejudice her rights in any way, and they must live clean and honourable lives, respecting each others personalities."

"The termination of a marriage bond is a most serious matter for family and social life. As every lawful device is approved which can equitably bring back those who have lived together, provided only there is mutual love and they can live on honourable terms with each other. If these conditions are fulfilled, it is no right for outsiders to prevent or binder re-union. They may be swayed by property or other considerations."

"An excellent plan for settling family disputes, without too much publicity or mud-throwing, or resort to the chicaneries of the law. The Latin countries recognise this plan in their legal system. It is a pity that Muslims do not resort to it universally, as they should.

The arbiters from each family would know the idiosyncracies of both parties, and would be able, with Gods help, effect a real reconciliation."

18. Now, let us go to the enunciations on the subject of "Talaq" as made by different High Courts. In ILR 5, Rangoon 18, their Lordships of the Privy Council observed:

"According to that law (the Muslim Law), a husband can effect a divorce whenever he desires."

In the case of Sarabai V/s Rabiabai" [ILR 30 Bombay 537] regarding the cause of divorce mere whim is sufficient, it was observed that it is good in law though bad in theology.

In ILR 33 Madras 22 a Division Bench of the Madras High Court [Munro and Abdur Rahim, JJ.] held: "No doubt as arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Quran and in the reported saying of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husbands conduct would in no way affect the legal validity of a divorce duly effected by the husband."

In the case of "Ahmad Kasim Molla V/s Khatun Bibi" [ILR 59 Calcutta 833] the Court held: "From that point there are a number of authorities and I have carefully considered this point as dealt with in the very early authorities to see whether I am in agreement with the more recent decisions of the Courts. I regret that I have to come to the conclusion that as the law stands at present, any Mahomedan may divorce his wife at his mere whim and caprice."

In the case of "Asmat Ullah V/s Khatun-Unnissa" it has been held that if an acknowledgment of Talaq is made by a husband, Talaq will be held to take effect at least from the date upon which the acknowledgment is made.

In the case of "Wahab Ali V/s Qamro Bi" [AIR 1951 Hyderabad 117] it was held that where the husband stated in his written statement to the application under section 488 that he had already divorced his wife and the Court came to the conclusion that the divorce pleaded was not proved, even then, such a statement in the written statement itself operated as an expression of divorce by the husband from that moment.

In the case of Chandbi V/s Balwant Mujawar (supra) it was held (a) that though the husband failed to prove the divorce which he alleged had taken place 30 years ago, he did divorce the wife as from the date on which he filed the written statement viz. 6th April, 1959; (b) even where a divorce is given orally to a wife who has passed the age for periods of menstruation, the condition that oral declaration of divorce, should be made between two periods of Tuhr would not be applicable, because it would be physically impossible to have any such periods between which such a declaration could be made.

In the case of Enamul Haque V/s Bibi Taimunnisa it was held that although the factum of divorce was not proved by the husband, the wife was liable to be saddled with the knowledge of divorce from the date of filing of the written statement and, therefore, the divorce would be final when the wife is informed of it.

In the case of Mohammad Ali V/s Fareedunnissa Begum it was held that on the wives demand of maintenance, if husband issues a notice that she had been divorced on the date of marriage itself in spite of wives denial of divorce, such a notice will operate as a declaration of divorce from its date.

In the case of "Saiyid Rashid Ahmad and another V/s Mt. Anisa Khatun and others" [AIR 1932 Privy Council 25" the Appellants case was that on 13th of September, 1905 Ghiyas Uddin pronounced triple Talaq in the presence of witnesses though in the absence of the wife (Anisa Khatun) received Rs.1,000/- of prompt dower for which a registered receipt was produced and there was also a Talaqnama or deed of divorce dated 17th September, 1905 which narrated the divorce and which alleged to have been given to Anisa Khatun. The wife had denied the factum of divorce and, in any event, she challenged its validity and effect. The Courts below had given a concurrent finding that Ghiyas Uddin had pronounced the triple Talaq of divorce and that the date of divorce was genuine. This finding was not disturbed by the Privy Council which further held that

(a) in the Biddat form the divorce advanced become irrevocable irrespective of the Iddat; (b) it is not necessary that the wife should be present when the Talaq is pronounced and though her right to alimony may continue until she is informed of the divorce; (c) the pronouncement of the triple Talaq by Ghiyas Uddin constituted an immediately effective divorce and its validity and effectiveness would not be affected by Ghiyas Uddins mental mental intention that it should not be a genuine divorce, as such a view is contrary to all authority.

In the case of "A. Yusuf Rawther V/s Sowramma"

Krishna Ayer, J. (as His Lordship then was) observed:

"The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute. ... ...Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arbis. The soul of culture - law is largerly the formalised and enforceable expression of a communities culture norms cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions ..... Indeed a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce. ..."

"It is a popular fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage. The whole Quran expressly forbids a man to seek pretext for divorcing his wife, so long as she remains faithful and obedient to him. "If they (namely women) obey you then do not seek a way against them" (Quran IV: 34).

In the case of "Sri Jiauddin Ahmed V/s Mrs. Anwara Begum" [(1981) GLR 358] Baharul Islam, J. (as His Lordship then was) dealt with a case of seeking maintenance by the wife under section 125of the Code and in the written statement the husband, though admitted the marriage, had stated that he had pronounced Talaq on 10th October, 1976 and the same was registered at Qazis office on 12th October, 1976 at Dihrugarh. He also stated that the wife was paid all sums payable under the Mahomedan Law on the day of divorce. The first point that was considered by the

learned Judge was whether there had been a valid Talaq of the wife by the husband under the Muslim law. The learned Judge recorded his opinion in the following words:

"14.The modern trend of thinking is to put restrictions on the caprice and whim of the husband to give Talaq to his wife at any time without giving any reason whatsoever.

This trend is in accordance with the Quranic injunction noticed above, namely, that normally there should be avoidance of divorce and if the relationship between the husband and the wife becomes strained, two persons - one from each of the parties should be chosen as arbiters who will attempt to effect reconciliation between the husband and the wife; and if that is not possible the Talaq may be effect. In other words, an attempt at reconciliation by two relations - one each of the parties, is an essential condition precedent to "Talaq"." ...

"16.In the instant case the petitioner merely alleged in his written statement before the Magistrate that he had pronounced Talaq to the opposite party; but he did not examine himself, nor has he adduced any evidence worth the name to prove "Talaq".

There is no proof of Talaq, or its registration. Registration of marriage and divorce under the Assam Muslim Marriages and Divorces Registration Act, 1935 is voluntary, and unilateral. Mere registration of divorce (or marriage) even if proved, will not render valid divorce which is otherwise invalid under Muslim Law.

"... ... In my view the correct law of Talaq as ordained by the Holy Quran is that Talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wives family the other from the husbands. If the attempts fail, Talaq may be effected.

In support of the above view, the learned Judge also relied upon the view expressed by Krishna Ayer, J. in the case of A. Yusuf Rawther (supra).

An identical issue again came tobe referred to the Division Bench of the Gauhati High Court in the case of "Must. Rukia Khatun V/s Abdul Khalique Laskar" [(1981) 1 G.L.R. 375] and again Baharul Islam, C.J. (as His Lordship then was), speaking for the Division Bench reiterated and confirmed the view he had taken in the case of Jainuddin Ahmed (supra).

In the case of Rukia Khatun (supra) an application for maintenance was filed under section 125 of the Criminal Procedure Code, 1973 and in opposing the same, though the husband admitted the marriage, but took a plea that he had divorced the Applicant on 12th April, 1972 by executing a Talaqnama and had paid the dower money to her. When the application came up before the learned Single Judge the decision in the case of Jiauddin Ahmed was relied upon but the husband prayed for reconsideration of the issue again by a larger bench and, therefore, the reference was made to the Division Bench. In addition to the views expressed in Jiauddin Ahmeds case (Supra) Baharul Islam, C.J., speaking for the Division Bench, added the following views:

"The first point to be decided, is whether the opposite party divorced the Petitioner. The equivalent of the word "divorce" is "Talaq" in Muslim law. What is valid "Talaq" in Muslim law was considered by one of us (Baharul Islam, J., as he then was) sitting singly in Criminal Revision No. 199/77 (supra). The word "Talaq" carries the literal significance of "freeing" or "the undoing of knot". "Talaq" means divorce of a woman by her husband. Under the Muslim law marriage is a civil contract.

Yet the rights and responsibilities consequent upon it are of such importance to the welfare of the society that a high degree of sanctity is attached to it. But inspite of the sacredness of the character of the marriagetic, Islam recognises the necessity in exceptional circumstances of keeping the way open for its dissolution."

The learned Judge quoted the words in Sura IV Verse 35 from the Holy Quran and observed: "From the verse quoted above, it appears that there is a condition precedent which must be complied with before the Talaq is effected. The condition precedent is when the relationship between the husband and the wife is strained and the husband intends to give "Talaq" to his wife he must choose an arbiter from his side and the wife an arbiter from her side, and the arbiters must attempt at reconciliation, with a time gap so that the passions of the parties may calm down and reconciliation may be possible. If ultimately conciliation is not possible, the husband will be entitled to give "Talaq". The "Talaq" must be for good cause and must not be at the mere desire, sweet will, whim and caprice of the husband. It must not be secret."

In para 11 of the said judgment, the Division Bench sumed up its final opinion as follows: "11. In our opinion the correct law of "Talaq" as ordained by Holy Quran is: (i) that "Talaq" must be for a reasonable cause; and (ii) that it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the another by the husband from his. If their attempts fail, "Talaq" may be effected.... ..."

The Division Bench disagreed with the law laid down by the Calcutta High Court in ILR 59 Calcutta 33 and this Court in ILR 30 Bombay 537.

19. Again the Gauhati High Court (Division Bench), in the case of "Zeenat Fatema Rashid V/s Md. Iqbal Anwar" [1993 (2) Crimes 853] was called upon to deal with a similar issue. The wife had filed an application under section 125 of Cr.P.Code against her husband on 13th August, 1990 for maintenance for herself and her minor child. Husband opposed the claim by filing a written statement and took a defence that he had divorced the claimant on 31st August, 1990 i.e. after she had approached the Family Court. The Court held that there had been a divorce duly effected and claim for maintenance would be determined under section 3 of the 1986 Act. The questions that arose for consideration before the Division Bench were (a) whether there had been a divorce duly effected; (b) whether a Mahomedan husband can divorce his wife at his whim and caprice; (c) whether divorce by Talaq was proved. The Division Bench referred to the earlier enunciations in the case of Sarabai (supra) Asha Bibi (supra) Ahmed Qasim Mulla (supra) Jiauddin Ahmed (supra) and Rukia (supra).

"(a) A Mahomedan husband cannot divorce his wife at his whim and caprice; (b) under the Mahomedan Law marriage, though recorded as a civil contract between a man and a woman, they become husband and wife after the solemnisation of the marriage and their respective rights and obligations are regulated by the rules under relevant law.

This being the position, marriage is the basis for social organisation and foundation of legal rights and obligations. The modern concept of divorce is also that the matrimonial status should be maintained as far as possible; (c) If a Mahomedan husband divorces his wife as at his whim and caprice it would not only be a spiritual offence but it would also affect the divorce and a Mahomedan husband cannot divorce his wife at his whim or caprice, as divorce must be for a reasonable cause and it must be preceded by pre-divorce conference to arrive at a settlement. The husband failed to prove the alleged Talaqnama on the basis of its photostat copy. However,

in the evidence of the husband he had stated that he also made pronouncement of the word "Talaq" three times. There was no evidence or material to corroborate that Talaq was effected orally.

Under the circumstances it is held that the Talaq pleaded has not been proved. There is no evidence that there was a pre-divorce conference and in that view of the matter the husband failed to prove the alleged divorce by "Talaq".

A further plea was taken on behalf of the husband that even if Talaq pleaded was not proved, the husband had stated that the wife had been divorced not only in his written statement but also in his deposition and, therefore, the divorce would be deemed to have been effected from the date of filing of the written statement or from the date of the statement on oath. The Division Bench disagreed with the view taken earlier taken in this regard in the case of "Asmat Ulla V/s Mst Khatun Unnisa, Wahab Ali V/s Qamro Bi, Chand Bi V/s Bandesha, Abdul Shakoor V/s Kulsum, and Mohammad Ali V/s Fareedunnisa for the following reasons:

"Written statement is a pleading.

Pleading is formal allegations by the parties of their respective claims and defences to provide notice of what is tobe expected at trial. Proof is establishment of a fact of evidence or matters before the Court or legal Tribunal. Where the parties are in dispute as regards the material fact, an averment in the pleadings does not constitute evidence as what is stated in the pleading is recital of past event which is required to be proved. Under the Evidence Act if material fact pleaded is not proved, it follows that one Court considers or believe that the fact does not exist.

Therefore, averment in the pleading cannot be used in favour of the maker. This being the position, statement made by the husband in his pleading or deposition that he had divorced his wife is a recital of past event and if Talaq pleaded is not proved such statement shall be of no consequence. In that view of the matter, if statement made by the husband that he had divorced his wife in his pleading or deposition is considered as acknowledgment of divorce by Talaq, it will be against the policy of law and it would also amount to furnishing or providing evidence of Talaq which is against the rule of pleading and proof. That apart, in view of our conclusion above that divorce must be for a reasonable cause and it must be preceded by a pre-divorce conference, if the statement made orally in evidence or in the written statement that the husband has divorced his wife in a proceeding under section 125 of Cr.P.C. will be a valid Talaq from the date of making statement cannot be sustained as it would be contrary to our conclusion.

In the case of "Moti-ur-Rahaman V/s Sabina Khatun and another" [1994 (3) Crimes 236] the wife had filed an application under section 125 before the Magistrate for maintenance. By order dated 15th September, 1990 the said application was allowed. On 3rd May, 1992 the husband filed an application under section 3 and 7 of the 1986 Act before the Magistrate contending that he had given divorce to the wife according to Mahomedan Law on 15th October, 1990 and an affidavit to that effect was sworn. It was also stated that a copy of the declaration was sent to the wife.

This application came to be rejected by order dated 4th September, 1992 which was challenged before the High Court. The learned Judge disagreed with the husband that he had divorced or given Talaq to the claimant wife on 15th October, 1990 and the reasons in support of this view are stated in para 13.

"13.Even though under Section 308 of the Mohammedan Law (vide Mullas principles of Mohammedan Law) any Mohammedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause, a Division Bench of the Gauhati High Court in the decision in Zeenat Fatema Rashid V/s Md. Iqbal Anwar, has held that a Mahomedan husband cannot divorce his wife at his whim or caprice and divorce must be for a reasonable cause and it must be preceded by a pre-divorce conference to arrive at a settlement, with which I fully concur. Though under the aforesaid Section 308 of the Mohammedan Law the husband is not required to assign any cause for the divorce, but there must be a reasonable cause for the same, which should be preceded by a predivorce conference so as to make an endeavour for reconciliation between the parties, if possible. But no reasonable cause has been disclosed by the husband in the relevant proceedings for the alleged divorce. There is neither the nearest and faintest whisper by him that the alleged divorce on 15.10.1990 had been preceded by a pre-divorce conference to arrive at a settlement. That being so, even most charitably, assuming for the sake of argument that the husband had divorced the wife on 15.10.1990, the alleged divorce could not be held to be according to Muslim Law. ... ..."

In the case of "Saleem Basha V/s Mrs. Mumtaz Begam" [1998 Cri.L.J. 4782] S.M.Sidickk, J., speaking for the Madras High Court also took the same view as was taken by the Calcutta High Court in the case of Moti-ur-Rahaman (supra) after referring to the long list of enunciations, as referred to herein above. The husband had taken a plea that he was not liable to pay maintenance for the period subsequent to the divorce on 30th November, 1992 except for the Iddat period and the fact of divorce was communicated to the wife, Jamat and Mutawalli of the Mosque by registered post. The wife filed affidavit in the Court repudiating averments and she claimed that she was not informed of the divorce and the Talaq pronounced by him was a false allegation.

One of the issues framed by the learned Single Judge of the Madras High Court was whether the Talaq pronounced by the husband on 30th November, 1992 divorcing his wife was valid under law.

It was brought to the notice of the Respondent wife about the pronouncement of Talaq by her husband when he filed the petition for cancellation of maintenance on 20th July, 1995 though she was not informed about the pronouncement of Talaq by registered post, which was returned. A presumption was, therefore, drawn that the pronouncement of Talaq was informed to the wife on 30th November, 1992 and on 20th July, 1995. The Talaqnama executed by the husband in the presence of the witnesses (Exhibit P5) was on record. The reasons stated in the Talaqnama for divorce were that the wife had filed a case for maintenance and she insulted the husband and her mother-in-law as well as there were differences of opinion, as a result of which they could not run the family. The Talaqnama did not indicate that any conciliation proceeding was initiated between them at any point of time by any mediator nor it was stated therein that the husband called upon his wife to reform herself and then to run the family amicably. In his oral depositions before the trial Court the husband had stated that he divorced his wife as per Mahomedan Law by pronouncing Talaq in the presence of two witnesses on 30th November, 1992 but he did not give any reason to give Talaq. The learned Judge observed that the correct law of Talaq as ordained by the Holy Quran is that (a) Talaq must be for reasonable cause, (b) it must be preceded by an attempt at reconciliation (by nominees of both the spouses), and (c) Talaq may be effected if the said attempt failed. The learned Judge entirely agreed with the view taken by the Gauhati High Court in the case of Zeenath Fatima Rashid (supra) and by the

Calcutta High Court in the case of Chandbi Ex W/o Bandesha Mujawar (supra) and he held that the Talaq pronounced by the husband on 30th November, 1992 divorcing his wife was not valid under the Mahomedan Law.

20. The issues which we formulate for decision so as to resolve the controversy between the two divergent views of this Court are as under:

(1) Whether a Muslim husband has the right to divorce his wife without reasons and at his mere whim and caprice.

(2) Whether the Muslim Law mandates predivorce reconciliation between the parties.

(3) In proceedings for maintenance instituted by a Muslim wife, if her husband makes a plea in his written statement or in any form before the Court concerned that his marriage was dissolved at an earlier date in the Talaq form, even assuming that the fact of such dissolution at an earlier date is not proved, whether the filing of the written statement containing such a plea or making such a statement in other written form or orally of divorce in the Talaq form amounts to the dissolution of marriage under the Muslim Personal Law from the date on which such a statement was made.

(4) Whether mere assertion either in the pleadings or in the witness box amounts to an acknowledgment of divorce given earlier by the husband and he is not required to prove to have given divorce in accordance with Mahomedan Law sometimes prior to the date of such an assertion.

(5) Whether even otherwise an assertion, either in the pleadings or in the witness box or in some application filed in Court by the husband by itself amounts to divorce in accordance with Mahomedan Law from the date of such assertion if not from an earlier date.

(6) Even if it is found that the statement regarding divorce given earlier was false, can the statement in the Court proceedings, be taken as an acknowledgment of divorce or even otherwise a fresh declaration of divorce.

(7) Whether the husband is required to prove that the Talaq was duly effected/ given.

(8) Whether the husband of a minor or a woman past menopause has the unqualified right to pronounce Talaq at any time either in the Ahsan or Hasan mode.

20A) While dealing with the above formulated issues, we would like to be reminded of the observations made by the Constitution Bench of the Apex Court in the case of "Danial Latifi and another V/s Union of India" in the following words:

"20.In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated, both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs."

21. It is popularly said that a Muslim marriage is nothing but a civil contract and a large section believes that the husband has an absolute freedom to dissolve the marriage without assigning reasons and at his free will. The Holy Quran as well as the other sources of Personal Law teach us

that the process of reaching to the marital tie is certainly a civil contract but once the marriage is solemnised it becomes an institution life long for both husband and the wife and they do not live together by way of a mere contract but in a holy and sacred bond of love, care and mutual respect with equal status to both the partners. It happens, in some cases, that on account of incompatible temperament, extreme divergent upbringings, likes and dislikes or other physical incompatibilities or incapacities, the institution of marriage comes in peril. The Mahomedan Law does recognise the husband tobe on a high pedestal than the wife but that by itself does not mean that he can check-out his wife at his whim and caprice and without assigning any reasons.

Islam recognises the principle of equity between the husband and wife during the subsistence of their marital tie. If the husband and wife are not able to get along as partners or to cohabit with happiness, Islam does not force them to continue in such unhappy and unsettling conditions. However, both the parties are given some chance to reform or mend their ways so as to keep the institution of marriage in-tact and this could be achieved by the process of reconciliation between the parties with the intervention of arbiters.

22. A divorce by the husband is Talaq and it has its oral as well as written forms. The oral form of Talaq can be effected in three modes viz. Talaq-e-Ahsan, Talaq-e-Hasan, Talaq-ul-Biddat or Talaq-e-Badai. The first two forms are conditioned and they are accepted tobe more civilized but while resorting to any of these two forms there are conditions precedent and it is not that the husband is at his free will to resort to any of these modes at any time and without assigning any reasons. If the husband feels that his wife does not care for him, she is incompatible, she does not listen to him, she does not love him, she refuses to cohabit with him, she engages in cruel behaviour, she is unfaithful or for any other reason, he has the right to give Talaq to his wife but by following certain procedure. Firstly, he has to make it known to his wife about any of these reasons and she must be given time to change her behaviour. If by his direct conversation/ persuasions she does not change her behaviour, the husband has to resort to the process of conciliation by informing to her father or any other parental relations. Two arbitrators, one from wife and one from the husband, are required to be appointed and it shall be the duty of the Arbiters to bring in a settlement between the parties so that they live together happily and inspite of these efforts having been made if the discord still persists to an irreparable level there is no alternative but to separate and it is at this stage that the husband has the right to give Talaq to his wife. The stage of conciliation with the intervention of the arbiters is a condition precedent for effecting Talaq either in Ahsan form or Hasan form.

It will be seen that in all disputes between the husband and the wife the judges are tobe appointed from the respective people of the two parties. These judges are required first to try to reconciliate the parties to each other failing which divorce is to be effected. Therefore, though it is the husband, who pronounces the divorce, he is as much bound by the decision of the judges as is the wife. This shows that the husband cannot repudiate the marriage at his will.

The case must be first referred to two judges and their decision is binding. Talaq must be for reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by the arbitrators, one from the wives family and the other from the husbands. If the attempts failed, Talaq may be effected. In other words, an attempt at reconciliation by two relations, one each of the parties, is an essential condition precedent to Talaq.

23. Even if the reconciliation process has been gone through and found to be ineffective or in-vain, the husband has to follow the prescribed procedure for Talaq by Ahsan or Talaq by Hasan mode. Section 11 and 12 of the Compendium deal with proper and improper Talaq whereassection 2 prescribes the conditions governing the essence of Talaq. Even written Talaq in terms ofsection 3 has several forms. Section 5 has set out the conditions for effectiveness of Talaq and it has laid down the situations where the Talaq would not be effective. The Muslim Law, thus, recognises effective/ proper as well as ineffective/ improper Talaq and while exercising the right of Talaq it is imperative that the husbands action of invoking this right meets these requirements. Lest, the Talaq will be ineffective or invalid or improper. The utterances/ pronouncements aimed at Talaq-e-Ahsan or Talaq-e-Hasan are required to be made during a specific period i.e. a Tuhr (period between menstruation) followed by abstinence from sexual intercourse during the period of Iddat. In the later form three pronouncements are required to be made during successive Tuhrs and no intercourse taken place during any of the three Tuhrs.

Thus, the period of Iddat varies from 90 to 130 days.

A Talaq in Ahsan mode becomes irrevocable and complete on the expiration of the period of Iddat, whereas a Talaq in Hasan mode becomes irrevocable and complete on the third pronouncement irrespective of Iddat. Until Talaq becomes irrevocable the husband has the option to revoke it which may be done either expressly or impliedly as by resuming sexual intercourse. In a non-consumated marriage pronouncing a single Talaq even though the wife is in menstruation, will be Talaq-e-Hasan. Pronouncing three Talaqs in three months on a minor or a woman past menopause is also Talaq-e-Hasan. These modes are required tobe followed so as to rule out the possibility that the wife has conceived and if the divorced woman is pregnant, her Iddat period is till the end of pregnancy. The Iddat period, thus, varies in three different forms depending on the physical conditions of the wife and these are three menstruation courses. After the date of divorce if she is subject to menstruation, three lunar months after she is divorced if she is not subject to menstruation and if she is in 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. The pronouncement of Talaq by the husband in the oral form or giving Talaq in writing has to necessarily satisfy all these conditions of pronouncing the Talaq at a particular time and such a Talaq must be valid and effective. It is not that on his sweet will the husband has the unqualified prerogative to exercise this right of pronouncing Talaq. Uncontrolled use of divorce without regard to the restrictions established by the Shariat is a sin. To divorce the wife, without reason, only to harm her or revengeful due to the non-fulfilment of the husbands unlawful demands by the wife or her guardians and to divorce her in violation of the procedure prescribed by the Shariat is Haram (absolutely prohibited).

The Holy Quran expressly forbids a man to seek divorce so long as she remains faithful and obedient to him. However, it is also true that if there is no temperamental compatibility between the parties or the man feels that he cannot, as husband, fulfil the womans rights or because of mutual difference of nature, Gods limits cannot be maintained, keeping the marriage in-tact, in such situation compel the parties by legal restrictions to continue the marital life may be more harmful for the society. It is, thus, clear that the Islam discards divorce in principle and permits it only when it has become altogether impossible for the parties to live together in peace and harmony. Divorce is permissible in Islam only in cases of extreme emergency. Mere registration of divorce, even if proved, will not render valid a divorce which is otherwise invalid under the

Muslim Law. Even if there is any reasonable cause for the divorce yet there must be evidence to show that there was an attempt for a settlement prior to the divorce and when there was no such attempt to arrive at a settlement by mediators, there cannot be a valid divorce under the Islamic Law.

24. However, there is a third form of oral Talaq and that is Bidai. This Talaq-e-Biddat or Bidai (improper Talaq) within the meaning of section 12 of Islamic Laws and it includes in a consummated marriage divorcing the wife during menstruation or divorcing her in a Tuhr after coitus or pronouncing an irrevocable divorce or pronouncing more than one Talaq in single Tuhr and in an unconsummated marriage pronouncing together more than one Talaq or pronouncing more than one Talaq in a single month on a minor or a woman past menopause. Though such a form is prohibited but if person pronounces such a Talaq it will be effective while the man will be guilty of severe sin. Thus, the Talaq-e-Biddat or Bidai form is sinful or may be described as barbaric or is prohibited but if the husband pronounces such a Talaq it would not be unlawful. Mr. R.K.Wilson, in his digest of Anglo-Mahomedan Law (5th Edition) at page 136 stated on the law of divorce in the following words:

"The divorce called Talaq may be either irrevocable (bain) or revocable (rajai). A Talaq-e-bain, while it always operates as an immediate and complete dissolution of the marriage bond differs as to one of its ulterior effects according to the form in which it is pronounced. A Talaq-e-bain may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage either (a) once, followed by abstinence from sexual intercourse for the period called "Iddat" or, (b) three times during successive intervals of puberty i.e. between three successive menstruations, no intercourse taking place during any of the three intervals, or (c) three times at shorter intervals or even in immediate succession, or (d) once, by words showing a clear intention that the divorce shall immediately become irrevocable. The first name of the above method is called as "Ahsan" (best), the second "Hasan" (good), the third and fourth are said to be "Biddat" (sinful) but are nevertheless regarded by Sunni Lawyers as legally valid.

In the case of "Syed Rashid Ahmed and another V/s Anisa Khatun and others" (supra) Ghiyas Uddin had given Talaq on 13th September, 1905 to Anisa Khatun by pronouncing the triple Talaq of divorce in the presence of witnesses. The words of divorce addressed to the wife, though she was not present, were repeated three times by Ghiyas Uddin "I divorce Anisa Khatun forever and render her Haram for me". These words clearly showed an intention to dissolve the marriage. The Privy Council held that there can be no doubt that the method adopted was the fourth, above described, and it was confirmed so by the deed of divorce which stated that the three divorces were given "in the abominable form" i.e. "Biddat". The Privy Council also held that the High Court committed an error in treating the divorce as in the "Ahsan" form instead of "Biddat" form in which the divorce at once becomes irrevocable but irrespective of the Iddat and it is not necessary that the wife should be present when the Talaq is pronounced and her right to alimony may continue until she is informed of the divorce. The Privy Council also held that once the divorce is held proved such facts could not undo its effect. It is, thus, necessary that the factum of divorce is required to be proved and the conditions precedent for such valid or effective divorce are as stated in the Holy Quran, of reconciliation by the arbitrators or by appointing judges and for specific reasons unless the divorce is in the third and fourth form i.e. Biddat or Bidai and Rajazi.

Islam also recognises the husbands right to give Talaq in front of Qazi or the wives father or two witnesses, both of them being man professing Islam or one of them being a man and other two being women all professing Islam and such a Talaq, either in the Ahsan or Hasan form will be irrevocable. Nevertheless, in this form also the conditions for reconciliation and giving reasons for Talaq are required to be followed so that the husband and wife are restrained from an undesirable act of divorce which leads to several problems in the family. If the man is sure that he cannot have cohabitation as per rule, that if he is impotent or cannot fulfil marital obligations or any other such situation exists, it would be necessary for him to pronounce a divorce and in such a situation he may be justified in invoking the Talaq-e-Biddat or Bidai form of Talaq.

25. In the written form of Talaq there is no prescribed format but the conditions for effective or proper Talaq, as are applicable in the oral form of Talaq, are also applicable to the written form of Talaq and the pronouncements of divorce are required tobe communicated to the wife. In the absence of words, showing a different intention, a divorce in writing operates as an irrevocable divorce and takes effect immediately on its execution. Such a Talaq in writing is required to be addressed to the wife and absence of such an address leads to ineffective/ invalid Talaq.

The husband must address to his wife and pronounce the Talaq in writing. If such a pronouncement is not addressed to the wife it becomes ineffective and invalid.

26. The above discussion does indicate that mere pronouncement of Talaq by the husband or merely declaring his intentions or his acts of having pronounced the Talaq is not sufficient and does not meet the requirements of law. In every such exercise of right to Talaq the husband is required to satisfy the preconditions of arbitration for reconciliation and reasons for Talaq. Conveying his intentions to divorce the wife are not adequate to meet the requirements of Talaq in the eyes of law. All the stages of conveying the reasons for divorce, appointment of arbiters, the arbiters resorting to conciliation proceedings so as to bring reconciliation between the parties and the failure of such proceedings or a situation where it was impossible for the marriage to continue, are required to be proved as condition precedent for the husbands right to give Talaq to his wife. It is, thus, not merely the factum of Talaq but the conditions preceding to this stage of giving Talaq are also required to be proved when the wife disputes the factum of Talaq or the effectiveness of Talaq or the legality of Talaq before a Court of law. Mere statement made in writing before the Court, in any form, or in oral depositions regarding the Talaq having been pronounced sometimes in the past is not sufficient to hold that the husband has divorced his wife and such a divorce is in keeping with the dictates of Islam.

It is a fallacious argument that in case of a minor or a woman past menopause, the oral Talaq in the form of Ahsan or Hasan could be pronounced by the husband at any time or at his sweet will as in such cases there is no Iddat. However, the period of Iddat has been specifically defined and even in such cases there is a waiting period of three lunar months even though there is no occurrence of menstruation. The view taken by this Court in the case of Chandbi Ex W/o Bandeshah Mujawar (supra) cannot be accepted as a good law.

27. Pleadings before the Court, though made on oath, either in writing or in oral form, when disputed by the wife, are required to be proved and when it comes to proving all these pleadings the process is governed by the common law viz. the Civil Procedure Code and Evidence Act etc. and mere statement on oath, either in writing or in oral form itself does not prove the factum of divorce as well as valid or effective divorce. If the Talaq pronounced is ineffective or invalid it

is no divorce under the Mahomedan Personal Law. It is also required to be noted, at this stage, that though the husband has the right to divorce his wife, he also has the right to revoke the said pronouncement and take her back, as his wife, provided the divorce has not become irrevocable. This also shows the tolerance of Islam that after having uttered divorce once, the wife is provided an opportunity for reformation/ correction and to take steps accordingly so that the institution of marriage is saved. It is possible that sometimes the husband pronounces Talaq in haste and subsequently repents for it and, therefore, before the Talaq has reached its irrevocable stage, the husband has the right to retrieve himself from such an extreme step and reconciliation with the situation and correct himself.

28. Even in case of irrevocable Talaq in the presence of a Qazi or the wives father or two witnesses the factum of this form of Talaq is required to be proved, if challenged before a competent court in appropriate proceedings. This may involve examining either the Qazi or the father or the witnesses. If there are two witnesses, both of them must be professing Islam. If there is only one male witness and remaining two are women all of them must be professing Islam. Their presence, when the husband pronounced Talaq and his so pronouncing Talaq, are required to be proved if the factum of valid Talaq is questioned by the wife. Mere assertion by the husband, in any form, is not sufficient to hold that he has exercised the right to give Talaq legally and validly.

    If any of the witnesses does not profess Islam, the Talaq given in his/ her presence shall be invalid and inoperative.

29. If the husband has not been able to prove his statement regarding divorce given earlier to making such a statement before the Court, there does not exist a Talaq in the eyes of law and such a statement cannot be taken as a fresh declaration of divorce; as mere declaration of divorce is not sufficient, by itself, for a valid divorce. Even if such statement in writing or made orally before the Court is supported by a Talaknama, which may be a record of the fact of an oral Talaq or may be the deed by which the divorce is effected but that supportive document by itself does not lead to a conclusion that the Talaq was valid, effective and legal. Under the Wakf Act there is also a provision of registration of Talaq and a certificate to that effect is issued by the Qazi. In most of these cases, the Talaknamas are customary and unless the factum of Talaq is proved, these documents in isolation have no sanctity in support of a valid Talaq. Mere existence of this document does not make the Talaq valid or legal and, therefore, it is necessary that the factum of Talaq and the stages it is preceded by, are required to be proved before the Court, if disputed by the wife and mere intentions of the husband while making such a statement before the Court cannot be accepted tobe a valid Talaq from the date such a statement was made before the Court and in any form.

30. Let us consider now specific cases of husband taking the plea of having divorced his wife:

    (a) In the written statement filed before the Court the husband takes a plea of divorce given on some date in the past and files a copy of the Talaqnama and/ or divorce certificate with such a written statement.

    (b) The husband does not say anything about the divorce in the written statement and while in the witness box takes a plea of divorce given on some earlier date and produces in support a copy of the Talaqnama and/ or divorce certificate as issued by the Qazi.

(c) In the written statement the husband takes a plea that he has given divorce to the claimant on any date earlier in the presence of a Qazi or in the presence of the father or in the presence of two or three witnesses professing Islam.

(d) In his written statement the husband takes a plea of divorce given on an earlier date in the presence of two or three witnesses and one of them does not profess Islam.

(e) In the written statement or while in the witness box the husband invokes his right of Talaq under the Ahsan or Hasan form.

(f) In the written statement the husband takes a plea that on a given date he had pronounced the triple Talaq of divorce in the presence of witnesses, though in the absence of the wife, and the words addressed to the wife were repeated three times as follows: "I divorce my wife "Smt." forever and render her Haram for me."

And, in support thereof, copy of the Talaqnama or deed of divorce or certificate of divorce is produced.

31. On the proceedings initiated by the wife before a competent Court the divorce allegedly given by the husband in the first three forms (a) to (c), if disputed about its factum, cannot be valid and operative. Such a divorce will be fictitious and inoperative unless the husband proves his plea of any of these forms of Talaq before the Court by leading evidence. Mere taking such plea, even in a statement on oath, does not by itself operate as a divorce from the date it is so made because there are conditions precedent to such a form of Talaq and it is required to be exercised during a particular period. The husband is required to discharge his burden of proving that he had no physical relationship with the wife during the waiting period and the reasons for exercising such a right are required to be putforth. The factum of conciliation or arbitration is also one of the conditions preceding the process of Talaq in any of these forms namely "Ahsan" and "Hasan".

In the (d) form even if the factum of divorce is proved it cannot be held to be a valid divorce as one of the witnesses does not belong to the Mahomedan religion and as per the Holy Quran it is a condition precedent that both witnesses (men) must profess Islam and in case one witness is a man the other witnesses must be two women and all of them must profess Islam.

Any breach in this regard results into an invalid Talaq as being contrary to the command of the Holy Quran, even though the factum of divorce may be established before the Court.

In the fifth form i.e. (e) it would not be enough for the husband to invoke his right of giving Talaq under the "Ahsan" or "Hasan" form before the Court by way of written statement or while in the witness box and under oath. It is not in each case that the husband and wife (the two litigating parties before the Court) are staying under different roofs and similarly the wife may take a plea that the husband did not observe the condition precedent in that regard.

The burden then falls on the husband to prove these conditions of abstinence from sexual intercourse. In addition, he has to set out before the Court the reasons for such a divorce and whether he had sought the help of arbitrators for reconciliation at any time before the wife approached the Court before he filed his written statement or before he appeared in the witness box to take such a plea of Talaq.

However, in the last contingency the divorce becomes effective and irrevocable forthwith and the wife becomes "Haram" for the husband. If the husband claims to have exercised his right of

divorce in the form of Biddat/ Bidai or Rajai, in the written statement on an earlier occasion the divorce is complete and irrevocable provided the factum of due Talaq given in this form, on an earlier occasion, is duly proved before the Court. The words uttered for giving Talaq in these two forms or in any of them are required to be proved before the Court and mere statement of the husband or the proof in support thereof by way of Talaqnama or deed of divorce or certificate of divorce will not be sufficient to prove the factum of having exercised this power sometimes in the past. This view is inconsonance with the law laid down by the Privy Council in Anisa Khatuns case (supra).

32. We accordingly hold, with profound respect, that the view taken in Jaitunbis case (supra) does not meet the requirements of the Mahomedan Personal Law for a valid and irrevocable divorce. The plea taken by the husband in his written statement that he had given Talaq at an earlier date shall not amount to the dissolution of marriage under the Muslim Personal Law from the date on which such a statement was made unless such a Talaq is duly proved and it is further proved that it was given by following the conditions precedent viz. that of arbitration/ reconciliation and for valid reasons and more so when the mode of divorce alleged to have been given in the "Ahsan" or "Hasan" form. The factum of divorce is required to be proved, including the conditions precedent therefor, by evidence both oral and documentary, when the same is disputed by the wife before a competent Court of law. We agree with the view taken subsequently by a Division Bench of this Court in the case of "Saira Banu" (supra) and further lay down the clarifications, as set out herein above.

We hold that the view taken by the Gauhati High Court in the case of Mast. Rukia Khatun (supra) and Zeenat Fatima Rashid (supra) is more in tune with the ethos of Islamic Personal Law. However, if the husband relies upon the Biddat or Rajai form of Talaq given at an earlier occasion either in his written statement or in his oral depositions, he is required to prove the factum of the same by leading evidence before the Court, if disputed by the wife.

33. We answer the reference in the above opinion and direct the office to place the Petition alongwith the connected matters, if any, before the appropriate Single Bench.

34. We record our appreciations for the able assistance rendered by both the amicus curiae.

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SMT. BHAVNA ADWANI VS MANOHAR ADWANI

Madhya Pradesh High Court

1992 AIR(MP) 105; 1991 Supreme(MP) 248;

Date of Judgment : 8th May, 1991
Equivalent citations: AIR 1992 MP 105, I (1992) DMC 286, 1992 MPLJ 40

Smt. Bhavna Adwani
vs
Manohar Adwani

Bench: Hon'ble Mr. Justice D Dharmadhikari

Hindu Marriage Act 1955 sec 13 (1) Desertion by wife-- whether the wife can be held to be guilty of desertion within the wider meaning of that expression contained in explanation below S. 13 (1) of the Act?--S. 13 (1), even if the wife is guilty of wilful neglect of the husband, she would be guilty of desertion to constitute a ground of divorce.

JUDGMENT

D.M. Dharmaadhikari, J.

1. In this appeal by the wife, under the provisions of Section 28 of the Hindu Marriage Act, 1955 (hereinafter referred as to the Act), the question that needs to be decided is, whether the conduct of the wife, as brought out by evidence on record, amounts to 'wilful neglect' on her part, within the meaning of explanation appended to Section 13(1) of the Act, so as to uphold the decree of divorce under Section 13(1)(ib) of the Act?

2. Parties were married on 27-4-1983 at Raipur. Admittedly, they lived together after marriage at Raipur between 27-4-1983 to 19-6-1983. It is also not disputed that one Murlidhar, brother-in-law of the wife, took her back on 20-6-1983 to Katni for a brief stay with her parents.

3. The case of the husband is that thereafter he made repeated approaches personally, through his relations and also by sending her letters requesting her to come back home, but she persistently expressed her inability to do so. In the course of these attempts to bring the wife back to home, on 29-11-1983, the husband himself went to Katni with his sister, Padma and brother-in-law, Arjundas to bring back the wife ceremoniously, according to the caste-custom. It is admitted that the husband and wife lived at Kanti and cohabited. During this brief stay of the husband, he requested the parents, of the wife to send his wife with him and his relations, who had gone to Katni to bring her, but the parents refused to send her and the wife also did not express any willingness to accompany him back, stating that she had no courage to act against the wishes of her parents. The husband made a second attempt through his uncle Ramesh Adwani, who was sent to persuade the parents of the wife and her to come back to the husband's house. But, again they refused. On 28-8-1984, the wife gave birth to a female child named Varsha, now about three years old. The husband sent a letter on 14-9-1985 (Ex. P/l) to the wife requesting her to come back to him. The wife sent a reply dated 20-9-1985 (Ex. P/2) in which she expressed her desire

to lead a happy married life with him, but again expressed her helplessness, because there was misunderstanding between the husband and her father. The husband sent one more letter on 28-9-1985 (Ex. P/10) and gave her an option that either she should remain at Katni in obedience to the wishes of her father or come back to him, for which, the husband showed his willingness to come up to Bilaspur Station to receive her there for return to Raipur. The wife, however, did not send any reply to the aforesaid letter. The husband then sent a legal notice addressed to the wife (Ex. P/4) calling upon her to return to him within a week of the receipt of the notice or else proceedings for restitution of conjugal rights or in the alternative judicial separation would be filed in the Court of law. he sent a separate legal notice dated 31-8-1986 (Ex. P/6) addressed to the father of the wife and alleged that his wife was being illegally withheld and detained for which the father was stated to be liable for compensation. The repeated attempts made by the husband having failed to persuade the wife to rejoin him, he filed petition under Section 9 of the Act for restitution of conjugal rights and in the alternative, for grant of a decree of divorce under Section 13 of the Act.

4. In her written statement filed in the petition, the wife took a plea that during stay with the husband, his mother used to make dowry demands and used to ill treat her. It is also pleaded by the wife that the husband, during the pendency of the case in the trial Court, has gone through a second marriage and, therefore, cannot the relief either of restitution of conjugal rights or of divorce. The trial Court, by order under appeal dated 30-3-1990, held that the wife was guilty of desertion of the husband for a period of more than two years of the filing of the petition. The trial Court held that the remarriage of the husband was not proved. The trial Court, therefore, granted a decree of divorce against the wife on the ground of desertion.

5. The learned counsel appearing on behalf of the respondent-wife assailed the decree of the trial Court firstly on the ground that the contents of the letters and the legal notice sent by the husband to the wife themselves nullify the case set-up against the wife of her desertion. It was also stated that the letter sent in reply by the wife (Ex. P/2) also does not make out that the wife had deserted the husband. It was stated that the contents of the letter of the wife show that she was very eager to join the husband and, in fact, invited him for a meeting. According to the counsel for the wife, one of the essential ingredients of the matrimonial offence of animus deserendi on the part of the wife is totally absent in this case and, therefore, decree on the ground of desertion could not be passed.

6. The second submission of the learned counsel of the wife was that the husband has failed to prove that the desertion with animus deserendi continued on the part of the wife during the entire statutory period of two years immediately preceding the presentation of the petition. It was stated that animus deserendi, if at all, on her part could be presumed against her from the date of legal notice dated 31-1-1986 and the petition filed on 12-12-1986 was before expiry of two years statutory period, provided under Section 13(1)(ib) of the Act. Lastly, it was submitted on behalf of the wife that there would be no joint petition seeking relief of restitution of conjugal rights or in the alternative, a decree of divorce and the petition was liable to be rejected for misjoinder of causes of action.

7. The learned counsel appearing on behalf of the husband supported the decree passed by the trial Court submitting, inter alia, that the husband made all possible efforts to persuade the wife to come back to him and her continuous conduct in remaining away from husband constituted desertion within the meaning of Section 13(1)(ia) read with the explanation appended

thereunder. It was also stated that the wife had lived separately from the husband for a period of more than two years before filing of the petition and there was no legal prohibition to grant a decree of divorce. The learned counsel for the appellant also submitted that there is nothing in the Act that in a petition for restitution of conjugal rights, an alternative relief of divorce could not be claimed.

8. Having gone through the pleadings of the parties, the documentary and oral evidence on record and the submissions made by the counsel for the parties, I have formed an opinion that this case is an unhappy instance of a happy marriage being ruined because of the timidity of the wife and the tack less handling and ill-advice of the father of the wife.

9. I take up first the question, whether decree of divorce could be passed on the ground of desertion. It is to be noticed that in order to widen the meaning of desertion as a matrimonial offence and to include within it even the case of constructive desertion, explanation was added below Section 13(1) by the Marriage Laws (Amendment) Act, 1976, which reads as under :--

"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."

It is thus clear that now after addition of the above explanation to Section 13(1), even if the wife is guilty of wilful neglect of the husband, she would be guilty of desertion to constitute a ground of divorce. The first question before me is whether there was any reasonable cause for the wife to live away from the husband? It is to be noted that in none of her letters, she ever complained of any ill-treatment for dowry demands by the mother of the husband, much less, by the husband. The case of ill-treatment to the wife for dowry demands came to be stated for the first time in the reply filed in the Court to the petition and in her deposition. So far as her pleadings on the subject of alleged ill-treatment to her is concerned, it may be noticed that the plea is totally vague and bereft of all necessary particulars of ill-treatment. In para 7 of the written statement, only a general statement has been made that the husband and his mother used to repeatedly demand dowry and complain that sufficient dowry was not brought by the wife. In the same paragraph, it was stated that they used to ill-treat her. No details have been given as to when, where and how the demands were made and that was the nature of ill-treatment. In her deposition as N.A.W.-l, she made a general statement that her mother-in-law used to say that she is not beautiful and both her husband and mother-in-law used to ill-treat her for not bringing scooter and more presents in the marriage. In the cross-examination, she was confronted with her letter (Ex. P/2). She admitted that she sent it, but could not give any explanation why she did not complain to the husband of ill-treatment that she received at his house. There is nothing on record to show that she ever complained of ill-treatment by the husband and his family members to her father. Her father Pariamal has been examined as N.A.W. 5. In para 8 of his cross-examination, he admitted that no dowry was settled at the time of marriage. He also admitted that three times the husband approached to him at Katni to take back the wife. His version was that on each occasion, he was willing to send her back, provided she was promised no ill-treatment for dowry demands by the husband and her family members. From the above state of evidence on record, even if the wife and her father are to be believed that there were some dowry demands and some ill-treatment to the wife, it cannot be inferred that the ill-treatment was of such a magnitude that she should

have left the husband's home for all times. It cannot be disputed that normal place of living of the wife after marriage is the husband's home. Heavy burden, therefore, lies on the wife to prove that there was such ill-treatment to her at the husband's place that her living there was impossible. The "reasonable cause" as contemplated by explanation below Section 13(1) should be a cause, which should be sufficiently gave and weighty so as to justify the living of the wife away from the husband. Only because during a brief stay of the wife at her husband's home, there was some taunts or demands of dowry, it cannot be said that they furnished a reasonable cause to the wife to leave the home of the husband and never to return. I, therefore, hold that there did not exist any reasonable cause for the wife to refuse to return to the husband.

10. The second question is whether the wife can be held to be guilty of desertion within the wider meaning of that expression contained in explanation below Section 13(1) of the Act? In other words, whether it could be said, in the background of the facts of the case, that there was any wilful neglect of the petitioner by her constitute constructive desertion? From the evidence on record and the pleadings of the parties, it has to be accepted that, to begin with, when after the marriage and brief stay with her husband at his house, she returned to her parents, there was no intention to desert the husband. It was only a return to the parents as per the custom prevalent in the community. According to the husband, when he personally went with his sister and his brother-in-law on 21-11-1983 to Katni to bring her back, she expressed helplessness due to the wishes of her father. In para 2 of her deposition in the Court, her version is that the husband asked her to accompany, whereupon she replied that she was willing to return with him, but the husband to take any responsibility for likely misbehaviour from his mother. In para 6 of her statement, she admitted that Ramesh Advani, uncle of the husband had gone to Katni for the second time to bring her and she expressed to them that if they were agreeable to take her responsibility, she would return. Her father Panamal, examined as N.A.W.-5, substantially supported her version and stated in para 2 of his deposition that when the husband's relations approached him to take the wife, he expressed his willingness to send her, but he complained that she was ill-treated for dowry and that they should send some responsible person to him again for necessary talks and giving assurance on the subject. The father of the wife also accepted that Ramesh Adwani, uncle of the husband, had also approached him for the purpose and to him also, he expressed that he should take the responsibility that no one should misbehave or ill-treat her, whereupon, the uncle of the husband is said to have refused to take any such responsibility. In the light of the above deposition and version of the wife and her father, it has to be judged whether the conduct of the wife amounts to a wilful neglect on her part so as to constitute desertion? The expression "wilful neglect" used in explanation under Section 13(1) of the Act has been commented by Mulla in Hindu Law, 16th Edition at page 674 and it has been explained thus:--

"…..In the context of matrimonial law wilful neglect would seem to mean that the person is consciously acting in a reprehensible manner in the discharge of its marital obligations or is consciously failing in a reprehensible manner in the discharge of those obligations; and connotes that degree of neglect, which is shown by an abstention from an obvious duty, attended by a knowledge of the likely results of the abstention..... The neglect to become desertion must be such as amounts to forsaking or abandonment of one spouse by the other by a conscious disregard of the duties and obligations of the married state considered as a whole."

11. Understanding the expression "wilful neglect" from the commentary above, it may be seen that in this case, the only excuse offered by the wife not to rejoin her husband was that she wanted the husband or some elderly person in the family to take responsibility that she would not be ill-treated in the marital home. To me, it appears that such an expectation from the husband cannot constitute a good ground or a reasonable ground for the wife to refuse to live with the husband. In marital relationship, there is no question of any responsibility being taken by the spouses of each other or by the elder members of their families. As I have held above, the wife utterly failed to produce any reliable evidence that she was ill-treated in her brief stay with the husband, by the mother. In her romantic letter sent to the husband after their long separation she did not even make a passing reference of having suffered any ill-treatment from him or his relations during her stay. The version of the wife and her father, therefore, neither appears believable nor reasonable. She can, therefore, be held guilty of a wilful neglect in the discharge of her marital obligations towards the husband.

12. Now the stage in considering the objection raised on behalf of the wife that the husband failed to prove desertion on the part of wife for a continuous statutory period of two years. The agreement of the learned counsel for the wife is that the two years period could not be reckoned prior to the service of the legal notice dated 31-1-1986 (Ex. P/4) and non-compliance thereof by the wife.

13. This argument also does not seem to sound. As I have stated above, on 20-6-1983, when she first left the husband's place, there was neither any intention to leave forever, nor was there any act of wilful neglect. According to me, the wife would be guilty of wilful neglect when the husband personally approached her on 29-11-1983 and she refused to return with him, on the pretext that he had refused to take responsibility for the alleged ill-treatment by his mother. The period of desertion can, therefore, be reckoned from 29-11-1983, when she would be deemed to be . guilty of wilful neglect in discharge of her marital obligation. Reckoning period of desertion from the above date, the petition filed on 12-2-1986 was much after the expiry of two years statutory period provided in Section 13(1)(ib) of the Act.

14. The last submission made by the learned counsel for the respondent now needs to be considered that there could be no joint petition, both for restitution and divorce. I do no find any legal prohibition under the provisions of the Act for filing a petition by a spouse for restitution or in the alternative, for a decree of divorce on the ground of desertion. The husband has frankly come forward with a case that he was willing at the time of filing of the petition to receive her back in the marital home and in the alternative, if she still continued to refuse, she should be held guilty of a matrimonial offence of desertion and the marriage be dissolved. Her testimony in the Court and the letter sent by her to her husband do not at all show that she ever made any sincere effort to return to the husband. The learned counsel for the wife submitted that her letter sent to the husband expressing yearning for him and keen desire to meet him, terminated the desertion. This argument does not appear to be correct. As commented by Mulla in Hindu Law at page 677, "desertion may also be terminated by supervening animus revertendi expressed by a genuine offer to return to the deserted spouse or in case of constructive desertion by a bona fide attempt to get back the aggrieved spouse. If a deserting spouse takes advantage of the locus poenitentiae provided by law and goes back to the deserted spouse by a bona fide offer or resuming the matrimonial home with all the implications of marital life before the statutory periods is out or even thereafter before any proceedings for relief have been commenced, desertion conies to an

end and if the deserted spouse unreasonably refuses the offer the entire position would become different and the latter of the former would become the deserter."

15. From the correspondence exchanged between the parties, I find that in her letter, although she expressed her intense desire and keen anxiety to meet the husband, but at the same lime again referred to the misunderstanding that was created between him and her father. Before concluding the letter, she merely expressed a fond hope and invited him to her arms, but did not clearly express any desire to go to him. Her letter was replied by the husband vide Ex. P/16 and he gave her a clear option to either live with the father or return to him. He also expressed his willingness to come up to Bilaspur Station to receive her. No attempt on the part of the wife thereafter to return to the husband was made and it was, therefore, a clear indication that her offers earlier made to meet him were either not genuine or in any case she could not muster sufficient courage to disobey her father, who wanted that the husband should live as Ghar Jamai at Katni, like husband of his other daughters. In my opinion, on the basis of evidence led in the case, it can be safely held that where a wife submits herself meekly to the dictates of her father and has no courage to disobey and leave the parental house to go to the husband, she is guilty of wilful neglect. The husband in this case made all possible efforts to persuade and bring back the wife to his home and even after setting totally frustrated, made last attempt by filing a petition for restitution of conjugal rights, although, in the alternative, he claimed a relief of divorce. As I have said above, this is a tragedy, which has been fallen on the wife due to her own shyness and timidity coupled with the tactless handling of the entire situation by her father, who appears to have given undue importance to the frivolous quarrels and minor irritations, which were caused, in initial period of their married life.

16. At the end, the learned counsel for the wife submitted that the husband has taken another woman from whom he has children and, therefore, her going back to him to now an impossibility. He prayed for fixing a lump-sum amount as a permanent alimony. In this case before me, there is no application for fixing permanent alimony under Section 25 of the Act which, when made, will have to be decision the basis of evidence with regard to the husband's income and the requirement of the wife.

17. So far as the alleged second marriage of the husband is concerned, the trial Court held that the marriage was not proved. In deciding the above controversy, I had tried to remain completely uninfluenced by that fact, because even if the husband has gone through a second marriage during the subsistence of the first, with the present wife, the second marriage would be a nullity in law and has to be overlooked for the purpose of deciding this case.

18. The trial Court, keeping in view the fact that the wife will require some money for her maintenance, has fixed a sum of Rs. 200/-per month, which will be paid by the husband to the wife till her remarriage. The amount of Rs. 200/ - per month appears to me rather on lower side, taking into account the financial status of the parties, as disclosed from the evidence on record. The husband is doing private service and is earning a fixed salary. Keeping in view the fact that his income is likely to increase as also the needs of the wife, I think it proper to increase the monthly maintenance from Rs. 200/- to Rs. 300/- per month.

19. Consequently, with the above slight modification in the amount of maintenance, the appeal fails and is hereby dismissed, but without any order as to costs.

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NIRMALA DEVI VS VED PRAKASH

Himachal Pradesh High Court

1993 AIR(HP) 1; 1992 Supreme(HP) 3;

Date of Judgment : 3rd January, 1992
Equivalent citations: AIR 1993 HP 1, II (1992) DMC 155

Nirmala Devi
vs
Ved Prakash

Bench: Hon'ble Mr. Justice D Gupta, Hon'ble Mr. Justice L S Panta

Hindu Marriage Act 1955- condonation of cruelty --In view of the mandatory requirement of sub-section (1) of section 23 of the Act, it was incumbent for the District Judge to have also considered whether the husband was entitled to a decree for divorce even if the act of cruelty was found to have been proved by him. This in our opinion amounts to taking up a plea that even if the allegation of cruelty, if proved, amounts to husbands condoning the said acts by having filed a petition under section 9 of the Act. Even if it be assumed that condonation is not pleaded as a defence by respondent in a petition seeking a decree for divorce, it is the duty of the Court in view of the provisions of section 23 (1) (b) to find whether the cruelty was condoned.

JUDGMENT

Devinder Gupta, J.

1. The present appeal under Section 28 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act), is against the judgment and decree passed on August 17, 1988, by District Judge, Solan and Sirmaur Districts at Nahan, Camp at Solan, allowing the husband's petition filed underSection 13 of the Act and granting a decree of divorce dissolving the marriage of the parties.

2. On December 20, 1986, a petition under Section 13 of the Act was filed by the husband against the wife for dissolution of marriage by a decree of divorce on the ground of cruelty and desertion. The allegation of the husband was that his marriage with the respondent was solemnised 12/13 years ago. Whereafter, they continued to live happily in village Gohar. After few years, behaviour of the wife became abnormal. She started picking-up quarrels on one pretext or the other and also showing disrespect to the family members. On one occasion, she even went to the extent of levelling false allegation that her father-in-law intended to have illicit relations with her. She also started levelling false allegations of alleged misbehaviour towards her by the husband and other family members and that of not providing necessary amenities and getting hard work from her as also neglecting her. According to the petitioner-husband, these acts on the part of wife, amounted to cruelty. The other ground, which was made the basis for seeking decree of divorce was desertion, for which it was alleged that the wife had deserted the husband (or a continuous period of more than two years immediately preceding the presentation of the petition. Petitioner alleged that in the year 1975, he fell ill and his condition started deteriorating day-by-day. The

respondent wife instead of discharging her marital obligations of looking after him, left his house and she even did not pay a visit to him at Bilaspur hospital where he was under treatment. She thereafter did not come back and declared that she had no intention of doing so. The further allegation of the petitioner was that after the year 1979, the wife-respondent had deserted him. It may, however, be noticed at this stage that in his petition, petitioner had categorically asserted that there had not been any previous proceedings between them under the provisions of the Act, except that the wife had preferred a petition under Section 125 of the Code of Criminal Procedure before Gram Panchayat, Dhudan in which maintenance at the rate of Rs. 100/-per month was awarded in favour of the wife. Petitioner also asserted that there was no undue delay in preferring the petition and that he had not condoned the acts of cruelty of the wife-respondent.

3. The petition was contested by the wife. She admitted having taken out proceedings underSection 125, Cr. P. C. claiming maintenance from the husband since he had failed and neglected to provide any maintenance to her. It was asserted by her that she had been treated with cruelty by the husband and allegations made by him in the petition levelling allegations of cruelty and that of desertion were false and baseless. According to her she had at no point of time refused to join the husband's company. It was due to the act and behaviour of the husband and the other members of the family that she was forced to leave her marital home and live with her parents. She in fact was turned out from the house since the husband-petitioner wanted to get rid of her as she could not bear a child. It was the conduct of husband-petitioner which forced her to move petition before the Gram Panchayat for grant of maintenance. A specific plea was raised by her that the husband had earlier filed a petition under Section 9 of the Act seeking decree for restitution of conjugal rights. After having withdrawn the said petition, now the present petition had been moved which act on the part of the husband itself was sufficient to refuse him any relief. She denied that the husband had not condoned the alleged acts of cruelty on her part.

4. During the course of pendency of proceedings before the district Court, the husband gave up one of the grounds seeking divorce, namely, the desertion and claimed decree only on the ground of cruelty. As such, it is not necessary to advert in details to the ground of desertion and the evidence led on the said plea. The district Court on the basis of evidence came to the conclusion that the wife had made false allegation against her father-in-law in the proceedings pending before the Panchayat, which act on her part was held as an act of cruelty and on the said basis the petition of the husband was allowed by granting decree in his favour and dissolving the marriage by divorce. It is this judgment and decree which is under challenge in this appeal.

5. During the course of hearing, learned counsel for the appellant assailed the judgment and decree under appeal primarily on the ground that the District Judge failed to take note of the mandatory requirement of law, namely, Clause (b) of Sub-section (1) of Section 23 of the Act, due to which the judgment and decree was vitiated. According to Mr. G. C. Gupta, there was a specific plea raised by the wife that the husband had condoned the alleged act which amounted to cruelty and that no decree could have been passed on that basis. The conduct of the husband in having prayed for being granted a decree for restitution of conjugal rights by filing a petition underSection 9 of the Act and thereafter withdrawing the same and filing a fresh petition for divorce itself amounted to condoning the alleged act of cruelty. The other ground on which the impugned judgment and decree was challenged, was the averments made in the application, moved during the pendency of this appeal, under Order 41, Rule 27 of the Code of Civil Procedure seeking permission to

lead additional evidence by placing on record the proceedings of the Gram Panchayat, in order to demonstrate that as a matter of fact no allegation was made by the wife-respondent against her father-in-law in the proceedings launched before the Gram Panchayat. These arguments of the learned counsel for the appellant have been refuted by the learned counsel for the respondent by asserting that there was no condonation of the acts of cruelty and since she in her statement made before the Court had admitted that in the proceedings before the Gram Panchayat she had made allegation against her father-in-law, there was hardly any ground for permitting the appellant-wife to lead additional evidence.

6. Having heard the learned counsel for the parties and having gone through the record, we find that there is much substance in the submissions made on behalf of the appellant and the appeal deserves to be allowed and the petition filed by the husband deserves dismissal.

7. As per the version of the husband, the wife, after about one year of their marriage, started neglecting him. In September 1979, when he fell ill, instead of looking after him, she left for her parental home and declared openly that she would not return back and claim maintenance while residing at her parental home. At the time of the death of the grandfather of the husband, in December 1980, the wife stayed at her marital home for about a fortnight but again left for her parental home and thereafter she filed a petition for maintenance before Gram Panchayat, which ultimately was granted by the Panchayat at the rate of Rs. 100/- per month. When proceedings were pending before the Panchayat, she levelled false allegation that her father-in-law had an eye on her and wanted to have sexual relations with her. According to the husband-petitioner, when he enquired from his father, who is about 75 years of age. about all this, he denied the said allegation. The husband in his statement further asserted that the wife finally left his house in the month of July, 1981 and ever since she has been residing with her parents. During the cross-examination he, however, stated that after she had left his house, she had been occasionally visiting his house and used to leave the house after staying there for 5 to 7 days. Despite the fact that maintenance had been granted to his wife, but he was not in a position to clear the arrears thereof for the last 3/4 years and that proceedings for which were pending before the Chief Judicial Magistrate. The husband during cross-examination admitted that a petition underSection 9 of the Act was filed by him claiming a decree for restitution of conjugal rights as at that stage he wanted his wife to come back to his house but those proceedings were later on withdrawn and the present petition was filed. Besides, examining himself as P.W. 1 he placed reliance upon the statement of P.W. 2, Smt. Damodri Devi, Member Gram Panchayat, in whose presence also the wife is alleged to have made the allegation against her father-in-law.

8. The wife, who appeared as RW1, denied having treated the petitioner with cruelty. According to her she was ready and willing to join the husband's company but as she had been maltreated on earlier occasions, therefore, she wanted an assurance of being treated properly in case she resume the company of her husband. During cross-examination she admitted that in the proceedings before the Gram Panchayat she had made a statement that her father-in-law wanted to have sexual relations with her.

9. None of the parties tried to place on record the statement alleged to have been recorded by the Panchayat in which the wife is alleged to have made the statement. Learned counsel for the appellant prayed for being allowed permission to place on record by way of additional evidence the proceedings of the Panchayat, including the statement of wife, in support of his submission that no such statement was ever made by the wife but from the averments made in

the application and in view of the admission made by the wife during her cross-examination, we are not inclined to grant such permission at this stage of the proceedings, especially when no cogent reason has been assigned as to why a copy of such statement was not produced earlier. The District Judge, on the basis of this evidence came to the conclusion that such a serious allegation about the conduct of husband's father made by the wife in the proceedings before the Panchayat was sufficient to hold the wife guilty of treating the husband with cruelty. We in view of this are not inclined to differ with such finding recorded by the District Judge. However, the question which survives is as to whether merely on such finding the District Judge could have granted the decree as a matter of course. The answer to this question is in the negative.

10. Section 23 of the Act contains some vital clauses of considerable importance and significance regarding power and duty of the Court in the matter of granting any relief recognised under the Act. The language employed in Sub-section (1) of Section 23 clearly shows that Clauses (b) to (e) and later part of Clause (a) lay down certain absolute bars to the making of any relief under the Act. The relevant portion of Section 23 may be extracted as under:--

"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 except in cases where the relief is sought by him on the ground specified in Sub-clause (a), Sub-clause (b) or Sub-clause (c) of Clause (ii) of Section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in Clause (i) of Sub-section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(bb) xxx xxx xxx xxx xxx

xxx xxx xxx xxx xxx

(c) xxx xxx xxx xxx xxx

xxx xxx xxx xxx xxx

(d) xxx xxx xxx xxx xxx

xxx xxx xxx xxx xxx

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the Court shall decree such relief accordingly.

(2) XXX XXX XXX XXX XXX

XXX XXX XXX XXX XXX

11. Reading the aforemention Sub-section (1) with Clause (b), it would be seen that the words contained therein are mandatory in character wherein emphasis laid is that relief in any proceedings under the Act cannot be granted to a petitioner who is in any way taking advantage of his or her own wrong or disability for the purpose of such relief. In such cases, where the ground of the petition is one specified in Clause (i) of Sub-section (1) of Section 13 of the Act, namely, cruelty, the words contained in Sub-section (1) of Section 23 read with Clause (b) emphasis that connivance, condonation, collusion are absolute bars to the granting of relief.

12. In case reference is made to the pleadings, it can be seen that wife in her reply has in clear terms pleaded that the husband is not entitled to any relief from the Court since he had not come to the Court with clean hands and was breathing hot and cold in the same breath. The husband filed a petition under Section 9 of the Act, which was withdrawn and now he has claimed a decree for dissolution of marriage. To the specific averments made in para 8 of the petition that the husband had not condoned the acts of cruelty of the wife, the reply denied the said averments. This in our opinion amounts to taking up a plea that even if the allegation of cruelty, if proved, amounts to husband's condoning the said acts by having filed a petition under Section 9 of the Act. Even if it be assumed that condonation is not pleaded as a defence by respondent in a petition seeking a decree for divorce, as held in Dr. N. G. Dastane v. Mrs. S. Dastane, AIR 1975 SC 1534, it is the duty of the Court in view of the provisions of Section 23(l)(b) to find whether the cruelty was condoned. The learned Judges in their report in para 54 said that:

"……..Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of S.23(l)(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. . . ."

13. In view of the mandatory requirement of Sub-section (1) of Section 23 of the Act, it was incumbent for the District Judge to have also considered whether the husband was entitled to a decree for divorce even if the act of cruelty was found to have been proved by him. From the record, it was not possible to have pin-pointed the exact point when the wife made statement making allegation against her father-in-law. However, it was, during the course of hearing arguments, stated at the bar that the proceedings before the Panchayat commenced in the year 1981 and petition under Section 9 of the Act seeking decree of restitution of conjugal rights was filed after a period of four years of making such allegation. Having waited for four years during which period the wife continued to remain residing at the house of her parents and thereafter, as admitted by the husband in his statement, his act of continuing making efforts to bring the wife to his house and then filing a petition for restitution of conjugal rights amounts to an act which can be termed as an act of forgiveness which conduct of the petitioner will amount to condonation depending upon the facts and circumstances of each case. Condonation has not been defined anywhere. 'Condonation' is a word of technical import, which means and implies wiping of all rights of injured spouse to take matrimonial proceedings. In a sense condonation is reconciliation, namely, the intention to remit the wrong and restore the offending spouse to the original status which in every case deserves to be gathered from the attending circumstances. The forgiveness in order to constitute condonation need not be express. It may be implied by the husband of the wife's conduct and vice versa. Ordinarily, as a general rule, condonation of matrimonial offence deprives the condoning spouse of the right of seeking relief on the offending conduct. When a petition is filed claiming a decree for restitution of conjugal rights, it clearly stipulates that the person seeking relief has no grouse or cause of complaint against the other, spouse and even if there was any cause or complaint, the same has either been condoned or forgiven. The intention being to resume normal cohabitation. As held in Dastane's case (AIR 1975 SC 1534) (supra), matrimonial offence is erased by condonation. In view of clear provisions contained in Clause (b) of Sub-section (1) of Section 23 of the Act, it is always for the person who has approached the

Court to satisfy that the act of cruelty has not been condoned. When such allegations were made by the wife in her reply that the husband petitioner had filed earlier a petition under Section 9 of the Act, it was incumbent for the husband to have led evidence that after the wife left in the year 1981, she never returned and stayed with him as his wife. His statement is quite vague. According to him, after she had left his house, he made all efforts to bring her back. She used to come back from her parental house and stay with him for 7/8 days and then used to leave his house. This part of the statement when read with the remaining part of the statement would show that even after the Panchayat had decreed her claim she had been visiting the husband's house. The conduct, in this case, of the husband in having moved the petition thereafter under Section 9 of the Act would amount to his intention to forgive the offending spouse in having made the statement before the Panchayat which alone was the ground made out which according to the husband was cruelty on the part of the wife. Admittedly, the allegation! was made once and was not repeated thereafter. Due to the parties having lived together even for a short duration of 7/8 days on couple of occasions, as admitted by the husband, after the wife made the allegation amounts to the restoring of the offending -spouse to the original status. By this act and conduct on the part of husband it can reasonably be inferred that the act stood condoned and as such husband was not entitled to the relief claimed.

14. The rules of the Court further require a party to the petition to make specific averments about the previous litigation, under the Act, if any, mentioning the purpose of taking of the same and the result thereof but in the present case the husband deliberately avoided to make any - reference to the previous petition under Section 9 of the Act which he had admittedly taken out and which had been dismissed as withdrawn.

15. In this view of the matter, we are satisfied that because of the condonation of the act of cruelty, the husband was not entitled to a decree for divorce in view of clear provision of Clause (b), Sub-section (1) of Section 23 of the Act.

16. In the result, we allow the appeal and set aside the judgment and decree passed by the learned District Judge and dismiss the petition of the husband for divorce leaving the parties to bear their respective costs.

17. In view of the observations made above, C.M.P. (Main) No. 28 of 1989 is also dismissed.

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USHA RATILAL DAVE VERSUS ARUN B. DAVE

Gujarat High Court

First Appeal No. 1484 of 1981

1983 SCC OnLine Guj 93 : 1984 GLH 333 : (1984) 25 (1) GLR 81
Bench: Hon'ble Mr. Justice V.V Bedarkar
Decided on July 7, 1983 and July 8, 1983

Usha Ratilal Dave … Appellant;
Vs.
Arun B. Dave … Respondent.

HINDU MARRIAGE ACT : S.10, S.13(1), S.23, S.23(1), S.9 --whether a decree of Legal Separation obtained in Illinois (U. S. A.) Court be availed of in Indian Court for dissolution of marriage by a decree of divorce under sec. 13 of the Hindu Marriage Act 1955 when both the spouses are Hindus by Personal Law and married in India according to Hindu rites- -- from this reference to Corpus Juris Secundum it is very clear that the connotation legal separation is akin to judicial separation in our country and therefore it cannot be said that this is not a judicial separation as envisaged by Indian Law ---the order of dissolution of marriage by a decree of divorce passed by the learned trial Judge is quite justified.

JUDGMENT

2. This appeal involves an important question of law—whether a decree of Legal Separation obtained in Illinois (U.S.A) Court be availed of in Indian Court for dissolution of marriage by a decree of divorce under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act"), when both the spouses are Hindus by Personal Law and married in India according to Hindu rites? The respondent-husband filed a petition, being H.M.P No. 143 of 1980, in the City Civil Court, Ahmedabad, for obtaining divorce. The said petition was allowed and the marriage between the parties was dissolved by a decree of divorce dated 25-9-1981 passed by the learned Judge of the City Civil Court, 19th Court, Ahmedabad.

3. It is not in dispute that the parties had married at Ahmedabad on 17-5-1968. By this wedlock they have two daughters Vaishali and Hetal. The husband filed a complaint for divorce in the Circuit Court of Cook County, Illinois County Department, Chancery Divorce Division (U.S.A) alleging that the husband and wife (present appellant) stayed together at Ahmedabad till 30-12-1972, and thereafter the wife deserted the husband without any reason or cause and started living with her parents, and though several attempts were made there was no result. It is the case that the wife resisted the said complaints and made accusation against the husband. The learned Judge of County Court, Illinois, however, after the trial passed a decree for legal separation on 14-3-1979. It is the case that the husband was employed in the Austi Electric Company and he was to get Green Card for obtaining citizenship of U.S.A But the wife wrote letters to the U.S.A Government and Indian Authorities and the husband was forced to leave U.S.A and thus the husband has been deprived of his lucrative job and decent living. It is also an agreed fact that young daughter Hetal is with the wife, but it is an allegation that she left elder

daugher Vaishali with the husband. Then it is the case that the wife deserted the husband on 30-12-1972 and thereafter the parties have never resided together till 14-3-1979, the day on which the decree for legal separation was passed.

4. It should be noted that the husband has come out with a case that in his complaint for divorce, decree for legal separation was passed, meaning thereby, in his favour. In this deposition also the tone is that he filed the suit for divorce but a decree for legal separation was granted. In fact, now it is proved on record that the said decree for legal separation was passed in favour of the wife who demanded maintenance and also claimed that the husband had deserted her and, therefore, the suit of the husband for divorce was negatived and the claim of the wife for legal separation was granted. Anyway, on the strength of that decree for legal separation, the husband filed the aforesaid Hindu Marriage Petition in the City Civil Court, Ahmedabad, for dissolution of marriage by a decree of divorce under Section 13(1-A) of the Act.

5. This petition was opposed by the wife by written statement Ex. 16, claiming that the petition is barred, being res judicata, and that the husband was found to be guilty of desertion by the Court in U.S.A, and the husband's plea for divorce was rejected by that Court. As the husband had not filed any appeal against that decree of the Court in U.S.A, this Indian Court would not sit in appeal. It is specifically mentioned in the written statement that both the parties have submitted together to the jurisdiction of the U.S.A Court and the decree passed is not vitiated on any of the grounds (a) to (f) of Section 13 of the Code of Civil Procedure, 1908.

6. At this stage I would like to mention that though this is the clear averment onbehalf of the wife, during the arguments of this first appeal a different stand is taken, claiming that the American Court had no jurisdiction to entertain the application and pass a decree and, therefore, that decree could not be a ground for getting a divorce in the Indian Court. That aspect shall be considered at an appropriate stage.

7. It is also stated in the written statement Ex. 16, that the husband is not entitled to take advantage of his own wrong. It is claimed that the husband was sponsored by the brother of the wife to go to U.S.A for studies. The husband stayed there upto 1974 and studied in Chicago and got a job there. As the husband did not call the wife, somewhere in March 1976 the wife went to U.S.A with her father at her own costs and went to Chicago with her younger daughter and met the husband. The husband, however, refused to keep them as he had illicit relations with one Miss Jullie. The wife has admitted that the husband had come to Ahmedabad in 1972 and the parties lived together, but denied that she deserted the husband on 30-12-1972 and failed to communicate about the normal day to day affairs or that the wife failed to carry out the marital obligations or that she told the husband that she was not prepared to live with him. It was further asserted that the County Court of Illinois held that the husband had deserted the wife and also held that the wife had conducted herself as a good, faithful and affectionate wife, and the decree passed by the said County Court for legal separation was on the basis of the counterclaim filed by the wife and the claim of the husband for divorce was dismissed. It is specifically admitted that there was no cohabitation between the parties since 30-12-1972 till the date of filing of the Hindu Marriage Petition in the Ahmedabad Court. The wife has asserted that she is willing to go and stay with the husband when the husband abandons the company of Miss Jullie. It is also her case that she has already obtained Green Card and is prepared to call the husband to U.S.A and is prepared to stay with him if he is prepared to give up his connection with Miss Jullie. It is also averred again that the decree for legal separation passed by the American Court is according

to American law and the same is obtained by her (wife). It is also stated that the husband came to India and said Miss Jullie had also come to India: and stayed together in Ahmedabad, and the husband intends to get divorce so as to enable him to marry said Miss Jullie. Then it is the contention that the husband is not entitled to get divorce because the legal separation has been obtained by the wife, and the husband cannot take advantage of his own wrong. It is further averred that the decree passed by the American Court is not the decree for judicial separation under the Act and, therefore, the husband is not entitled to get divorce under Section 13(1-A) of the Act.

8. On these averments the learned Judge framed seven issues. He held that the husband proved that he is entitled to a decree of divorce on the basis of a decree for legal separation passed on 14-3-1979 by the Court in U.S.A, but negatived the contention of the husband that the wife had deserted him without any reasonable cause since 30-12-1972. On the contrary, the learned trial Judge held that the wife proved that husband had deserted her without any reasonable cause. So far as issue regarding res-judicata was concerned, the learned trial Judge held it partly in the affirmative and further held that there is no legal impediment in granting the decree under Section 23 of the Act, and thus granted the relief of dissolution of marriage by decree of divorce in favour of the husband.

9. The learned trial Judge considering the decree of legal separation as a decree of judical separation in the terminology of the Act, observed that he called upon the learned Advocates of both sides to find out and show what is the legal connotation of the words "legal separation" as is being used and interpreted in the Courts in U.S.A, but he was sorry to state that none of the Advocates bothered to find out either from the Corpus Juris Secundum or from any other authorised publication the correct meaning and/or interpretation put on the words "legal separation" by the Courts in U.S.A But thereafter the learned trial Judge considered the provisions of Section 10(2) of the Act and came to the conclusion that "judicial separation" as understood with reference to the Act would mean that under certain circumstances either party to a marriage will be entitled to a decree for judicial separation, and after obtaining the decree that party would no longer be under the obligation to cohabit with the opposite party. He, therefore, considered that the decree passed by the American Court was a decree for judicial separation and hence, under the scheme of Section 13(1-A) of the Act, decree for divorce can be passed. Against this judgment of the Ahmedabad City Civil Court, the wife has come in appeal.

10. The judgment of the trial Court is attacked by Mr. G.N Desai, learned Advocate for the appellant-wife, on various grounds, some of which are as follows:

    (1) The decree of Illinois Court (Ex. 40) is not a decree for judicial separation, as contemplated under Section 10 of the Act.

    (2) The judgment (Ex. 40) pronounced is not by a Court having competent jurisdiction.

    (3) The judgment (Ex. 40) is found on incorrect view of Internatinal Law.

    (4) The judgment (Ex. 40) is founded on refusal to recognise the Hindu Maririage Act applicable to the parties.

    (5) The judgment (Ex. 40) is a foreign judgment and is founded on breach of Section 23 of the Act.

(6) The present decree of the Ahmedabad City Civil Court is passed in contravention of Section 23(1) of the Act.

(7) The decree of legal separation passed by the Illinois Court is not a decree which was sought by the wife, but she claimed mere maintenance, and still however, this said decree is passed by the Ahmedabad City Civil Court and, therefore, it is illegal.

11. Now, so far as the first ground is concerned, it is stated that it is not a decree (Ex. 40) for judicial separation as contemplated by Section 10 of the Act. In order to appreciate this ground it would be worthwhile to refer to the documents pertaining to the proceedings in Illinois Court produced during the trial.

12. Ex. 48 is Complaint for Divorce filed by the husband (Arun B. Dave) in the Circuit Court of Cook County, Illinois County Department Chancery Divorce Division. In that it was claimed that plaintiff Arun B. Dave (the husband) was at that time and for more than one year, continuously and immediately preceding the filing of the said complaint, had been an actual resident of the State of Illinois. Then he has mentioned various grounds about the wife being guilty of extreme and mental cruelty without fault or provocation on the part of the husband, and that the wife refused to communicate with the husband regarding the normal day to day familyaffairs and obligations; she on numerous occasions stayed out late at night, and so many other grounds, and claimed divorce. This complaint for Divorce was filed on23-3-1977.

13. Ex. 49 is Answer to Complaint fop Divorce filed by the wife. It is averred therein that the husband was an illegal alien in the United States and was never accorded a residence status in Illinois or in any other part of the United States. Therein also it has been mentioned in paragraph 4 — that the husband is living in an adulterous state with a woman named Jullie Proken. Then she has denied all the allegations made in the Complaint for Divorce by the husband, and requested that the said complaint be dismissed and the plaintiff (husband) be denied any other relief prayed for in his said Complaint for Divorce.

14. Exhibit 49/1 Counter Suit for Separate Maintenance filed by the wife claiming separate maintenance. Therein the reliefs claimed are for a judgment for separate maintenance including temporary and permanent custody and support and maintenance for herself and her minor children, attorney's fees, Court costs, and further reliefs as that Hon'ble Court may deem just. So, in this Counter Suit there is no mention of legal separation.

15. Exhibit 40 is the Judgment and decree for legal separation passed by the Illinois Court. Therein it has been specifically mentioned:

"THIS CAUSE coming on to be heard upon the contested trial call on the petition for Dissolution of the Marriage of the Petitioner, Arun B. Dave, and the response of the Respondent, Usha A. Dave, and this cause further coining on to be heard upon the petition for a Legal Separation filed by Usha A. Dave and the Response of the Counter-Respondent, Arun B. Dave, and the Court having heard sworn testimony….

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

A. That the Counter-Petitioner's, Usha A. Dave, Counter Petition for Legal Separation is granted and the parties are awarded a legal separation.

B. That the Counter-Petitioner, Usha A. Dave, is a fit and proper person to have the permanent care, custody, control and education of one minor child Hetal, age 5, born to the parties hereto; and that Arun B. Dave is awarded reasonable rights of visitation with the minor child, Hetal.

C. That the question of custody of minor child Vaishali, age, 7 is reserved for further consideration of this Court.

D. That the Counter-Respondent, Arun B. Dave, shall pay to Usha A. Dave as and for child support of the minor child, Hetal, twenty-five per cent (25%) of his net income.

E. That the counter Respondent, Arun B. Dave, shall pay to the Counter-Petitioner, Usha A. Dave, the sum of five per cent (5%) of his net income as and for maintenance.

F. That the petitioner's Arun B. Dave, Petition for Dissolution of Marriage is denied.

G. That the Court hereby retains jurisdiction over the parties hereto and the subject matter hereof for the purpose of enforcing this judgment for Legal Separation and all of the terms and provisions set forth in said judgment for Legal Separation."

16. Both the parties have relied on this document Exhibit 40. Therefore, it is very clear that therein it has been specifically shown that the wife had filed a petition for legal separation. Normally the observations in the judgment should be considered to be true unless they are refuted. The wife has not entered into the witness-box to show that application she had made and on what strength judgment Exhibit 40 for legal separation was passed. It is attempted to be shown that she had merely made a counter statement for maintenance. But the tenor of the judgment clearly shows that she also filed an application for legal separation, because this is what is clearly mentioned in Exhibit 40. It should also be noted that in para 1 of the judgment Exhibit 40 for legal separation the Illinois Court has specifically observed:

"That at the commencement of the within action the petitioner, Arun B. Dave, was domiciled in the State of Illinois and has maintained his domicile for at least 90 days preceding the entry of the within judgment for legal separation."

17. It, therefore, means that according to the husband, residence of one year in U.S.A was necessary for a right to file a complaint there and the Court considered that residence of 90 days was sufficient to get jurisdiction. This I am observing because it will cut short the arguments which are advanced very labouriously before me, on the point of domicile or jurisdiction of Illionois Court.

18. Now, it is true that Exhibit 40 is not a decree for judicial separation under Section 10 of the Act. It is, therefore, argued that we do not know under what circumstances a decree for legal separation would be available in American Court and, therefore, it cannot be said that decree would be equivalent to a decree passed under Section 10 of the Act, and if that is so, that decree would not entitle the husband to file a petition for divorce in Indian Court.

19. Without entering into the details of the enactment it can be said that this is not a decree under Section 10 of the Act. It is, therefore, argued that if the proceedings would have proceeded under Section 10 of the Act, then the American Court would have been required to consider the provisions of Section 23 of the Act, meaning thereby, where a person who has attempted to take a decree was guilty of his own wrong. This argument has absolutely no basis because that decree

is not in favour of the husband, but it is presisely in favour of the wife and she has obtained legal separation.

20. Now, the amended provision, i.e Section 13(1-A) of the Act provides:

"Either party to a marriage, whether solemnised 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."

21. There is no dispute that a period of one year is over. There is also no dispute that there is no resumption of cohabitation between the parties after the passing of the decree. Therefore, this would clearly answer the argument of Mr. Desai. But an argument is advanced by Mr. Desai that the provisions of Section 13(1-A) of the Act would be applicable only when decree for judicial separation is passed under the Act. I am afraid, this argument does not seem to be correct. The legislature was conscious that judicial separation can be obtained under Section 10 of the Act and decree for restitution of conjugal rights can be obtained under Section 9 of the Act. I am referring to conjugal rights because Section 13(1-A) of the Act provides for such a decree for dissolution of marriage by a decree of divorce if there is no restitution of conjugal rights for one year or upwards after the passing of decree for judicial separation in a proceeding to which they were parties. If the legislature intended that this should be the decree under the Act, then it would have mentioned that it should be a decree under Section 10 of the Act. On the contrary, the Legislature has used the words "after the passing of a decree for judicial separation in a proceeding to which they were parties". So, what is necessary is that there should be a decree for judicial separation and that should be in a proceeding to which both were parties.

22. I am supporting this conclusion of mine by the comments made by the learned Author S.V Gupta in his book on "Hindu Law", 3rd (1981) Edition, Volume 2, at page 791 in paragraph 160 under the caption "Fail-lure to resume cohabitation" which is under Section 13(1-A)(i) of the Act. It is specifically stated therein that a decree for judicial separation may be granted under Section 10 of the Act on the grounds mentioned in Section 13 of the Act, but it would appear that a decree for judicial separation to which reference is made in this sub-section (Section 13(1-A) need not be one passed only under the provisions of this Act. If the parties are Hindu within the meaning of this Act any decree for judicial separation between them would appear to be a ground for divorce. I completely agree with this statement of law and, therefore, this ground of attack by Mr. Desai would not be available to him. Therefore, it is not necessary that a decree of judicial separation or even restitution of conjugal rights must only be either under Section 10 or 9 of the Act so as to take recourse to Section 13(1-A)(i) or (ii) of the Act. Therefore, this disposes of grounds (1), (4) and (5) advanced by Mr. Desai.

23. Ground (4) is that judgment (Ex. 40) of Illinois Court is founded on refusal to recognise the Act (Hindu Marriage Act) applicable to the parties. Refusal would arise only when the provisions of the Act are cited before the Court and the Court has refused to recognise the same. On the contrary, the wife was happy to get a decree for legal separation and she had not raised any objection. Therefore, this ground would not be available.

24. I am conscious that these grounds were advanced by Mr. Desai keeping in view the provisions of Section 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") which provides as to when a foreign judgment is not conclusive. It reads:

"13. 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 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."

25. So far as clause (a) of Section 13 of the Code is concerned, I am going to refer to the arguments advanced on the competency of the jurisdiction of Illinois Court to pass a decree, because that is one of the important grounds raised before me. It is not the case that the judgment is not given on merits of the case. On the contrary, it is the wife's case that on merits the husband's complaint for divorce was dismissed and on merits her petition for legal separation was granted. So far as clause (c) is concerned, I have already referred to the argument that there was no question of refusal to recognise the law of India, and it is not shown as to how there is incorrect view of international law. There is also no case that the decision is opposed to rules of natural justice. But I shall consider one argument advanced onthis point when I come to it. Clause (f) is not applicable.

26. Grounds (5) and (6) advanced by Mr. Desai, referred to above also would go away because there is no question of applicability of Section 23 of the Act so far as decree of Illinois Court is concerned. It has been faintly argued that so far as the impugned decree of the trial Court is concerned, there is breach of Section 23(1) of the Act. Without waiting to answer the objection at a later stage, I would say that now Courts in India have specifically observed that so far as decree under Section 13(1-A) of the Act is concerned, provisions of Section 23 of the Act would not be applicable.

27. In Bai Mani v. Jayantilal Dahyabhai, 21 Gujarat Law Reporter 66, a Division Bench of this Court has held that after the amendment in 1964 of the Act, even a defaulting party can ask for dissolution of marriage under Section 13(1-A) of the Acton satisfaction of the conditions prescribed therein. It is also observed that it cannot be a bone of contention between the parties that either of the spouses is under any obligation to resume cohabitation after the decree for judicial separation of restitution of conjugal rights is granted. The only pertinent question, which therefore, arises is whether the continuance on the part of the husband in adulterous course of life by staying with his mistress would amount to such a wrong as to disentitle him to a decree of divorce under Section 23(1)(a) of the Act. In that case a decree for judicial separation was granted in favour of the wife on the ground that the husband had kept a mistress. After the decree

that ground continued and the husband filed a petition for dissolution of marriage by a decree of divorce. At that time the wife had taken a stand that the husband having continued to keep a mistress, he is taking advantage of his own wrong. This argument was negatived by the Division Bench of this Court. But Mr. Desai laid stress on some observations made in that decision —"if after the passing of the previous decree, 'any other facts or circumstances occurred', which, in view of sub-section (1) of Section 23 of the Act, disentitled the spouse from obtaining the relief of dissolution of marriage by a decree of divorce under Section 13(1-A) of the Act, the same can be legitimately taken into consideration and can be given due effect to". Now, the Division Bench considered the decision of this Court in Anil Jayantilal Vyas v.Sudhaben, A.I.R 1979 Gujarat 74 (20 Gujarat Law Reporter 556) wherin it was observed:

"… The conduct which should weigh Section 23(1) cannot have reference to remitting the wrong which led to the decree for judicial separation or restitution of conjugal rights but it must be in the nature of subsequent conduct of the petitioner which may be so reprehensible or repulsive to the conscience of the Court that to grant a decree to such party committing such a wrong would be giving premium for such a wrong." The Division Bench of this Court also reliedon the observatons of the Supreme Court in Dharmendra Kumari v. Usha Kumari, (1977) 4 SCC 12 : A.I.R 1977 Supreme Court 2218, wherein it has been observed:

"… In order to constitute a wrong within the meaning of Section 23(1)(a), the misconduct must be serious enough to justify denial of the relief to which the alleged wrong doer is otherwise entitled to." The Division Bench of this Court also quoted with approval the observations of the Division Bench of the Bombay High Court in Jethabhai Ratanshi Lodaya v. Manabai Jethabhai Lodaya, A.I.R 1975 Bombay 88 which were to the following effect:

"… The ground on which that decree is granted, namely, desertion or cruelty, the materimonial wrong exhausts itself, and it would not be open to the parties to fall back upon it after the Court has pronounced the judgment and determined about the guilt of one of the parties."

28. In view of this, Mr. Desai fairly conceded that he would not rely on anything that happened prior to granting of the decree for legal separation.

But it is his case that in evidence it has been brought on record that the husband has admitted that Miss Jullie had come to India when the present H.M Petition was in progress and had stayed in his house. It is, therefore, his contention that this is a wrong which the husband wants to perpetuate, and as alleged, in order to get married with Miss Jullie he is trying to get divorce from the wife and, therefore, he should not be given benefit of Section 13(1-A)(i) of the Act. Apparently looking, this argument seems to be attractive. But it cannot be forgotten that the claim of the wife before the Illinois Court was also that the husband was believed to be living in adulterous state with a woman named Jullie. Now, on the facts on record here, whether it can be said that in Ahmedabad the husband remained in adulterous state with Miss Jullie merely because she stayed in the house of the husband in Ahmedabad. This would be a debatable matter. No proof is brought on record by the wife to show as to what were the relations of the husband and Miss Jullie here. It is stated at the Bar that at Ahmedabad the husband stays in a joint family and in that joint family even if the beloved of the husband comes and stays, that would not be adulterous relation unless it is shown that they had an occasion to stay separately in seclusion so that they can have relations of husband and wife or as paramours. At any rate, I

am merely concerned as to whether this is subsequent wrong. If it is not, then the provisions of Section 23(1) of the Act cannot be brought into operation.

29. As considered earlier, it was the case of the wife that even prior to granting of decree for legal separation the husband lived an adulterous life. It is true that in the decree (Exhibit 40) for legal separation, that adulterous relation has not been mentined, and grounds for grant of decree for legal separation are also not mentioned. In paragraph 6 of Exhibit 40, it is mentioned that the Counter-Respondent, Arun B. Dave, was quilty of desertion as charged in the Counter-Petition for legal separation without fault or provocation by the Counter-Petitioner Usha A. Dave. Now, this Counter-Petition for legal separation is not before us. If the charge is to be considered from the countersuit for maintenance, then the charge is that the husband is living in adulterous state with one woman named Jullie. Therefore, if that is the basis of the decree for legal separation, then that ground is exhausted and it cannot be a new ground now. Therefore, this ground also would not be available to Mr. Desai.

30. The most important aspect that requires consideration is that judgment (Exhibit 40) is not pronounced by a Court of competent jurisdiction. Now, so far as the competency is concerned, it is apparent from the judgment Exhibit 40 that the Court had jurisdiction. But the case is that the Illinois Court would not have jurisdiction because the husband who filed a petition for divorce or against whom a decree for legal separation was passed, was not a person domiciled in Illinois. It is not disputed that the husband was staying at Chicago, and now it has been fairly admitted by Mr. Desai that Chicago is in Illinois State and, therefore, at the time of the filing of the complaint for divorce in the Court at Illinois, the husband was ordinary resident of Chicago i.e Illinois State i.e Chicago. The husband in his deposition has specifically stated that in 1977 his father went to America and at that time he was staying in Chicago. In paragraph 6 he has stated that he filed an application for divorce in Chicago City in Circuit Court of Cook County, Chancery Division.

    It is true that in the course of his deposition he admitted that he had gone to America on a Student Visa, but that was in 1973. He also stated that when he filed an application for divorce in Illinois Court, he was staying in Chicago, Desplai, which is a county. Therefore, this aspect is not debatable.

31. The submission of Mr. Desai, however, is that should be a domicile under the Internatinal Law or under the Indian Law it would be a private International Law. Therefore, merely because domicile is considered according to Illinois Law, would not be sufficient to give jurisdiction to that Court. Now, on this aspect, there is one important difficulty in the way of Mr. Desai, that so far as the jurisdiction is concerned, both the parties have submitted to the jurisdiction of Illinois Court, and as considered earlier, it has been assertion of the wife that decree for legal separation has been granted by a competent Court. But even otherwise, I shall be considering this argument on the strength of the ruling cited by Mr. Desai and Miss V.P Shah, learned Advocate for the respondent-husband. But in order to consider that aspect of domicile it is submitted by Mr. Desai that mere residence would not be sufficient, but there should be qualitative and quantitative residence, meaning thereby, there should be a sufficient period and also animus. Now, so far as animus is concerned, I would make it very clear that it is the case of the husband that he wanted to obtain a Green Card in America, but the wife through her brother managed in such a way that he was deported from America to India. Therefore, from this, so far as animus is concerned, he made it clear that he wanted to stay in America. Whether at the relevant time he

was domiciled with a particular country or not, will be considered hereafter, and also the effect of the judgment of Illinois Court.

32. It is the submission of Mr. Desai that even assuming for the sake of argument that the judgment of Illinois Court is for legal separation, it would not automatically be a legal separation as envisaged by the Indian law and, therefore, on that very count it is necessary for the husband to obtain judicial separation in India and for that the judgment of Illinois Court would be a relevant piece of evidence.

33. Now, Section 13 of the Code provides that except for six circumstances mentioned therein, a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between the parties under whom they or any of them claim litigating under the same title. It is the submission that under Section 44-A of the Code, only decrees passed by Courts in reciprocating territory can be executed in this country. It is stated at the Bar that Illinois or U.S.A is not a reciprocating territory. Miss V.P Shah raised a faint objection that there is nothing on record to show that it is not a reciprocating territory. But then it should have been shown to me that it is a reciprocating territory. So, it is to be assumed that it is not a reciprocating territory (country) and, therefore, that decree cannot be executed here. Therefore, in terms it is the submission of Mr. Desai that if a decree is passed in a country which is not a reciprocating country, then in order to get any right under that decree separate suit is required to be filed in Indian Court on the strength of that decree, otherwise that decree cannot be executed. It is also in terms his submission that because there is decree for legal separation passed by Illinois Court and even if it is considered for the time being that it is a decree for judicial separation, then also by filing a suit here for divorce on the strength of that decree is nothing but to attempt to execute that decree. I am afraid, this argument cannot be accepted. In fact, on the strength of that decree this Hindu Marriage Petition is filed for dissolution of marriage relying on Indian law, i.e Section 13(1-A) of the Act.

34. In order to support his argument Mr. Desai relied on the decision of the Privy Council in Maqbul Fatima v. Amir Hasan, AIR 1916 Privy Council 136. That decision pertained to a decree passed by a foreign Court (British Indian Court) declaring the title of a person to the properties of the deceased situate within the jurisdiction of that Court. Thereafter, another person instituted a suit against that person in a Native State for recovery of possession of the properties of the deceased situate within the Native State. At that time a suit was filed by the person who obtained earlier decree for a declaration that the judgment of the British Indian Court (Bareilly Court) would operate as res judicata in the Native State viz. Rampur Court, and for a perpetual injunction against the person who filed the suit in Rampur Court from proceeding with the suit therein. The High Court held that as the Courts in British India were not competent to try suits with respect to property situate in Native State, the judgment of the Bareilly Court would not operate as res judicata. The judgment was confirmed by the Privy Council. That judgment of the Privy Council would not be of any help because it does not refer to proprietory right pertaining to properties in a territory which is beyond the jurisdiction of the Court passing the decree. In the instant case, so far as the Illinois Court is concerned, it has jurisdiction to pass a decree for legal separation because that was on the strength of the grievance made by the wife herself and she got a decree in her favour, and now according to Indianlaw if advantage of that decree for legal separation can be taken by the husband also, then it cannot be said that this petition would not lie on the strength of that decree. The husband has filed a competent petition in the Indian Court

relying onthe conclusiveness of the decree of Illinois Court under Section 13(1-A) of the Act. So, even if the argument of Mr. Desai that a decree of a foreign Court would give a cause of action and suit can be filed on the strength of that cause of action in India is considered, then also it can be said that the decree for legal separation has given cause of action to the husband to file a petition for dissolution of marriage by a decree of divorce in the Indian Court and, therefore, he has rightly utilised that cause of action to file this Hindu Marriage Petition.

35. In Mallappa v. Raghavendra, AIR 1938 Bombay 137, the Bombay High Court has held that the only way in which a foreign judgment can be enforced in British India is by bringing action upon it and/or by executing the foreign judgment in certain specified cases under Section 44 of the Code. It is further held that before a foreign judgment can be regarded as having extra-territorial validity at least one of the following conditions must be satisfied: (1) The defendant should be a subject of the foreign country, which involves an obligation to comply with the judgments of the Courts of that country, (2) The defendant was resident in the foreign country at the time when the action was begun against him, (3) The defendant was served with process while temporarily present in the foreign country, (4) The defendant in his character as plaintiff in the foreign action himself selected the forum where the judgment was given against him, (5) The defendant voluntarily appeared,

(6) The defendant had contracted to submit to the jurisdiction of the foreign Court. In the instant case, all these aspects are available. The wife herself submitted to the jurisdiction of Illinois Court and obtained a decree for legal separation in her favour and against the husband. Not only that, but in her written statement Ex. 16 before the trial Court also she has very categorically affirmed that Illinois Court had the jurisdiction. To put it in her own words, she has in para 2 thereof claimed that the petitioner (husband) is found to be guilty of desertion on trial by a competent Court in U.S.A In that very para itself it is submitted that both the parties willingly submitted to the jurisdiction of the said U.S.A Court, and that the said judgment of U.S.A Court is not vitiated on any of the grounds (a) to (f) of Section 13 of the C.P Code. Therefore, all the ingredients mentioned by the Bombay High Court in its aforesaid decision in Mellappa's case are specifically available in the instant case also and, therefore, this ground canvassed by Mr. Desai cannot be accepted.

36. Then reliance was placed on the decision of the Calcutta High Court inGanguli Engineering Ltd. v. Smt. Sushila Bala Dasi AIR 1957 Calcutta 103. Therein it has been observed that the general principle of law is not that any decision by a foreign Court or Tribunal or a foreign quasi-judicial functionary is not enforceable in a country unless such decree or decision is embodied in a decree of the court of that country. Thus, ordinarily no decree or order of adjudication by a Pakistan authority would be binding in India unless such decree or order of adjudication is given additional force by a decree obtained in India by the interested party. In view of these observations, it has been attempted to be argued before me that the husband should have filed a decree for judicial separation first or should have got a decree for judicial separation in this petition and after one year only he can get a right to file a suit for divorce. Now, if this argument is accepted, then the provisions of Section 13 of the Act will be redundant and would be taking away the conclusiveness of the decree of a foreign Court having competent jurisdiction so far as the dispute before it was concerned. It is true that if there is a decree of a foreign Court and execution of that decree is attempted to be made in the Indian Court, then probably the Calcutta decision would have been applicable. But relying on the rights which a party has obtained on the

strength of a foreign judgment a suit is filed here in furtherance of that judgment, and in that Court it cannot be said that such a suit would not lie and decree cannot be passed.

37. In Brijlal Ramjidas v. Govindrarn Gordhandas Seksaria, AIR 1943 Bombay, it has been observed:

"Under Section 13 judgment is not used in the sense of a statement of the Judge's reasons. A foreign judgment means an adjudication by a foreign Court upon the matter before it, and not a statement by a foreign Judge of the reasons for his order… But in order to understand and interpret the decree or order, the Courts have to look at the pleadings of the parties and the reasons of the Judge. Those reasons would not be binding on any question of fact or law, except so far as they show what the judgment actually decides, and whether any of the exceptions to Section 13 applies." I have again to repeat what I have observed earlier, because the aforesaid judgment of the Bombay High Court is cited before me to show that the claim made by the wife was only for maintenance and the decree for legal separation was passed. I have already considered that even though jurisdiction may be a point of law, and it can be agitated and considered in this first appeal also, if that jurisdictional aspect is based on a point of fact, then the submission or admission about the fact would certainly estop the party. I again repeat that there cannot be any estoppel so far as law is concerned, but there would be estoppel so far as fact is concerned. The wife has stated that she has obtained a decree for legal separation. So, now it cannot be said that Illinois Court granted what was not claimed, because that is not the case of the wife in her written statement Ex. 16. What was the pleading and what application was filed by the wife is a question of fact. There was no question put during the cross-examination of the husband that there was no application for legal separation filed by the wife. The wife did not step into the witness-box at all. No document or evidence is produced to show as to on what strength decree for legal separation was granted. Therefore, now it cannot be said that as a matter of fact the wife had not filed application for legal separation. That fact is not asserted nor proved during the trial and, therefore, the decree of legal separtion granted to the wife by the Illinois Court shall have to be taken on its face value and it shall have to be understood that was the prayer and decree was passed in consonance with that prayer. In case of Brijlal Ramjidas (Supra) it is specifically observed:

"What a foreign tribunal has decided a question of fact necessary to determine that decision the jurisdiction of a particular foreign Court it is not open to a British Indian Court to go behind".

38. In the decree of Illinois Court, the Court has considered that it has jurisdiction and that the husband was within the jurisdiction of that Court, and this aspect cannot be gone into by the Indian Court now. Even otherwise, from the very aspect considered by me above, that the husband had an intention to get himself domiciled in America, but for his being deported on the strength of the application made by the wife, animus would be there. I am referring to the world 'animus' because the Advocates of both the parties have, relied on two important decisions of the; Supreme-Court:

39. The first decision of the Supreme Court in Vishwanathan v. Abbul Wajid, A.I.R 1963 Supreme Court 1, relied on, on the contrary says:

"In considering whether a judgment of a foreign Court is conclusive, the Courts in India will not inquire whether conclusions recorded thereby are supported by the evidence, or are otherwise: correct, because the binding character of the judgment may be displaced only by establishing

that the case falls within one or more of the six clauses of Section 13 (of the C.P Code), and not otherwise."

40. In the case, as per the majority judgment, a judgment of a foreign Court to be conclusive between the parties must be a judgment pronounced by a Court of competent jurisdiction; and competence contempated by Section 13 of the Code is in an international sense, and not merely by the law of the foreign State in which the Court delivering judgment functions. Mr. Desai has relied on this aspect. But it should be noted that judgment was given because: there the question involved before the Supreme Court was about the immovable properties situated in a foreign country, and the Indian territory. By no stretch of imagination it can be said that a foreign Court can give a judgment pertaining to immovable properties situated in Indian territory. The Supreme Court also observed:

"Undoubtedly, a Court of a foreign country has jurisdiction to deliver a judgment in rem which may be enforced or recognised in an Indian Court, provided that the subject-matter of the action is property whether moveable or immovable within the foreign country."

41. One thing is definite that so far as the dispute in the instant case is concerned, the judgment given by the Illinois Court is a judgment in personam because it has not given a final judgment pertaining to the status of the parties; that there is no declaration that they are husband and wife nor there is declaration that they have ceased to remain husband and wife, but there is interim order pertaining to legal separation, meaning thereby, it has decided the relationship between the parties so far as their marital liability is concerned, i.e they are granted legal separation-no obligation to cohabit, and as will be considered from the terminology used by English and American Courts, separation only for bed and board. The aforesaid Supreme Court decision in case of Vishwanathan (Supra) refers merely to question pertaining to immovable properties, and that is very clear from the further observations made by the Supreme Court to the following effect:

"… A Court of a foreign country has no juridiction to deliver a judgment capable of enforcement or recognition in another country in any proceeding the subject-matter of which is title to immovable property outside that country. But there is no general rule of private international law that a Court can in no event exercise jurisdiction in relation to persons, matters or property outside jurisdiction."

42. Here is not a case of outside jurisdiction because the parties have submitted to the jurisdiction of Illinois Court. It is held by the Supreme Court:

"An action in personam lies normally where the defendant is personally within the jurisdiction or submits to the jurisdiction or though outside the jurisdiction may be reached by an order the Court." That is exactly what has happened in the instant case. The wife had submitted to the jurisdiction of Illinois Court, and not only that, but also obtained a decree for legal separation in her favour and against the husband. It is further held by the Supreme Court:

"… A person who institutes a suit in a foreign Court and claims a degree in personam cannot after the judgment is pronounced against him, say that the Court had no jurisdiction which he invoked and which the Court exercised, for it is well recognised that a party who is present within or who had submitted to the jurisdiction cannot afterwards question it."

43. Now, this clearly answers the argument advanced by Mr. Desai. The wife obtained a decree for legal separation and now she cannot say that the Court at Illinois had no jurisdiction to pass the decree for legal separation.

44. Another decision of the Supreme Court on which reliance is placed is in case of Smt. Satya v. Teja Singh, AIR 1975 Supreme Court 106. That judgment requires full consideration as both the parties have relied on it. The question posed before the Supreme Court, as mentioned in paragraph 1 of the judgment, was, "Are Indian Courts bound to give recognition to divorce decrees granted by foreign Courts?" Appreciation of facts of that case would be material. Wife's name was Satya. She was married to one Teja Singh according to Hindu rites in India. Teja Singh left for U.S.A for higher studies on 23-1-1959. He stayed in Utah State (U.S.A) for a number of years. On 21-1-1965 the wife moved an application under Section 488 of the Code of Criminal Procedure, 1898. In an answer to that, Teja Singh stated that his marriage with Bai Satya was dissolved on 30-12-1964 by a decree of divorce granted by the Second Judicial District Court of the State of Nevada (U.S.A) and for the County of Washoe, U.S.A That decree was passed exparte because wife — Bai Satya was in India. The Supreme Court held that the question whether a decree of divorce passed by a foreign Court (Nevada State in U.S.A) is entitled to recognition in India must depend principally onthe rules of Private International Law as recognised in India. It was also observed that such a recognition is accorded not as an act of courtesy but on consideration of justice. It is implicit in that process that the foreign law must not offend against our public policy. In that case, it was found on fact that respondent Teja Singh was not even an ordinary resident of Nevada. The facts found were that Teja Singh made a petition that for more than six weeks preceding and domiciled in the County of Washoe, State of Nevada, with the intent to make the State of Nevada his home for an indefinite period of time. This was found to be untrue on facts because he had not stayed in Nevada at all but had gone there for a short period only for the purpose of getting divorce. While considering the facts, in para 39 the Supreme Court made a categorical statement that the decree of divorce obtained by respondent Teja Singh from the Nevada Court was, prima facie, complete answer to appellant Bai Satya's claim for maintenance under Section 488 of the Code of Criminal Procedure. The Supreme Court further considered that if that decree of divorce was procured by fraud was it entitled to recognition here (in India)? That was considered to be the essence of the matter. While considering the facts, it was found that the Nevada Court assumed and exercised jurisdiction to pass the divorce decreeon the basis that respondent Teja Singh was a bona fide resident of and domiciled in Nevada. Domicile being a jurisdictional fact, the decree was open to the collateral attack that the respondent was not a bona fide resident of Nevada, much less was he domiciled in Nevada. The Supreme Court also considered that the recital in the judgment of the Nevada Court that respondent Teja Singh was a bona fide resident of and was domiciled in Nevada was not conclusive and could be contradicted by satisfactory proof. This is what is the collateral effect. The proof in that case was that Teja Singh left India for U.S.A on 23-1-1959. He spent a year in a New York University. He then joined the Utah State University where he studied for his doctrine for 4 years, and in 1964, on the conclusion of his studies he secured a job in Utah. Then he filed a petition for divorce in the Nevada Court on 9-11-1964, and obtained a decree on 30-12-1964. This fact clearly proved that prior to the institution of the divorce proceedings respondent Teja Singh might have stayed, but never lived in Nevada. He made a false representation to the Nevada Court that he was a bona fide resident of Nevada, and having secured the divorce decree, he left Nevada almost immediately thereafter rendering it false again that he had 'the intent to make the

State of Nevada his home for an indefinite period of time'. Thereafter he went to Canada. Then while considering the question of domicile, the Supreme Court considered that the concept of domicile is not uniform throughout the world and just as long residence does not by itself establish domicile, brief residence may not negative it. But residence for a particular purpose fails to answer the qualitative test for the purpose of being accomplished the residence would cease. The residence must answer 'a qualitative as well as a quantitative test, that is, the two elements of factum at animus must concur. In that case, respondent Teja Singh went to Nevada forum-hunting, found a convenient jurisdiction which would easily purvey a divorce to him and left it even before the ink on his domiciliary assertion was dry. It was, therefore, observed that a find judgment of a competent Court in the exercise of matrimonial jurisdiction is conclusive proof that the legal character which it confers or takes away accrued or ceased at the time declared in the judgment for that purpose, but the judgment has to be of a 'competent Court', that is, a Court having jurisdiction over the parties in rem is open to attack on the ground that the Court which gave it had no jurisdiction to do so. While considering decision in R. Vishwanathan v. Abdul Wajid, (AIR 1963 SC 1 at p. 14) (Supra), to which I have already referred, the Supreme Court considered that a judgment of a foreign Court to be conclusive between the parties must be a judgment pronounced by a Court considered that a judgment of a foreign Court of competent jurisdiction and competence contemplated by Section 13 of the Code is in an international sense and not merely by the law of foreign State in which the Court delivery judgment fuctions, and the party attacking the judgment is at liberty to show that the judgment which is relevant under Section 41 of the Indian Evidence Act was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. Therefore, if these aspects are considered, what is the effect of the judgment of Illinois Court onthe facts of that case before the Supreme Court? As considered earlier, the husband in the instant case was a resident of Chicago for a number of years. That quantitative test is answered. The husband wanted to remain there, but for the order of deportation obtained by the wife or her relative. Therefore, the qualitative test at animus was there. So, this is not a case before the Supreme Court where the husband (Teja Singh) had gone to Nevada only for the purpose of obtaining divorce, and left it immediately on getting the divorce.

45. Now, it has been submitted by Mr. Desai that the husband had gone to Illinois only for the purpose of studies and, therefore, it cannot be said to be an intention or animus to make Illinois his permanent place of abode, but as is considered earlier from his deposition and petition, it clearly transpires that he wanted to be an American citizen, but he was deported. The Supreme Court in case of Bai Satya(Supra), also considered that even if the husband (Respondent Teja Singh) had gone for studies, had he been resident of Nevada, for a particular time required by the State of Nevada, then probably that would have been a good ground against the petition under Section 488 of the Code of Criminal Procedure. But on facts, it was found that the assertion of respondent Teja Singh about his residence was merely for the purpose of getting a decree for divorce. Therefore, the argument of Mr. Desai that in order to give jurisdiction to Illinois Court there should be animus also which is lacking in the instant case, has no basis.

46. In Narhari Shivram Slut Narnekar v. Pannalal Umediram, (1976) 3 SCC 203 : A.I.R 1977 Supreme Court 164, the Supreme Court had an occasion to consider what is the effect of a decree of a foreign. Court. In that case the decree of a foreign Court when it was passed, and it was held that the said decree was not a nullity but was valid and executable decree as the defendant had

voluntarily submitted to its jurisdiction by filing written statement. Therefore, this argument about the lack of animus or quantitative or qualitative tests would not be helpful to Mr. Desai.

47. Now, so far as the meaning of "legal separation" is concerned, it has to be considered as to what it is, and whether it is akin to "judicial separation" in Indian Courts. In Corpus Juris Secundum, Volume 27-A, edited by Francis, J. Ludes and Herold, J. Gilbert, at page 16 it has been observed:

"While an action for separate maintenance and a proceeding for divorce are similar in nature, in that the marriage relation constitutes the foundation of the action in each case, they are essentially different in that the latter is one for the dissolution of the marriage relation, while the former is in continuation and affirmance of it and to enforce its obligations.

Divorces are of two distinct types, absolute or a vinculo matrimonii, and limited or a mensa at thoro. An absolute divorce or divorce a vinculo matrimonii sometimes termed simply a divorce, terminates the marriage relation. A limited divorce or divorce a mensa at thoro, sometimes called a legal or judcial separation, suspends the marriage relation and modifies its duties and obligations, leaving the bond in full force."

48. Under the caption 'Judicial Divorces' it has been mentioned that a judicial divorce may be either absolute or limited. At page 16, under note 18, there is mention about 'Action for divorce a mensa at thoro as under:

"Action for divorce a mensa at thoro differs from an action for separate maintenance in that a decree of separation from bed and board sanctions and authorises the refusal of the wife to cohabit with the husband." Same is the connotation of 'judicial separation' under Indian Law that either spouse can refuse to cohabit after a decree for judicial separating is passed. Therefore, from this reference to Corpus Juris Secundum it is very clear that the connotation "legal separation" is akin to "judicial separation" in our country and, threfore, it cannot be said that this is not a judicial separation as envisaged by Indian law.

49. It has been strenuously submitted that apparently, looking to the facts of the case, it transpires that the husband in order to marry Miss Jullie insisted on divorce and if that is granted, probably it would be doing injustice to the wife who unfortunately could not remain present to give evidence during the trial. One cannot ignore the legislative intent in permitting either spouse, meaning thereby, even a defaulting spouse, to take advantage of the decree for judicial separation by filing a petition for divorce. Amended Section 13(1-A) of the Act recognises the modern trend that even in Hindu Society which has always been somewhat conservative the time had come when it was unrealistic to insist on continuing the marriage which had failed and it would be more in the interest of society to dissolve such a marriage than to maintain the farce of a union which had broken down and in spite of the lapse of a certain period of time was beyond redemption. There is also recognition of the fact that the marriage having irretrievably failed it was immaterial to consider as to which of the two parties to the marriage was initially to be blamed. In view of this, any other construction of Section 13(1-A) of the Act would largely negative the beneficial aspects and the reform in the divorce law brought about by the Amendment Act of 1964. For instance, can it be said that a spouse against whom a decree for judicial separation or restitution of conjugal rights had been passed can never invoke Section 13(1-A) of the Act and apply for dissolution of the marriage unless he or she had made efforts for a reconciliation which he or she in all sincerity and truthfulness did not wish to do? If it was to be insisted upon that even after the marriage has practically broken down and an order for judicial separation has been

made, or, for that matter, a decree for restitution of congjugal rights, then the petitioner would have to go throughout the pretence and mechanics of a purported reconciliation, otherwise the Court would not be able to bring to an end an unhappy and ill-started union (see Jethabhai v. Nanabhai, AIR 1975 Bombay 88 paras 106, 107 and 109 at page 105). The aforesaid observations are aptly applicable to the instant case wherein has been argued that after coming to India, the husband never made any attempt to reconcile or call the wife even though she was ready and willing to come and stay with him.

50. Now, the learned trial Judge has held against the husband on various grounds. In view of what I am holding, i.e the husband is entitled to a decree for divorce under Section 31(1-A)(1) of the Act, it is not necessary to consider other aspects. But because Mr. Desai insisted that the husband should get a decree for judicial separation first and then file another suit, Miss V.P Shah learned Advocate for the respondent-husband submitted in the alternative that the husband has made out a case for judicial separation. Here the main insistence is on the evidence of the husband who has stated that the wife did not go to him right from 30-12-1972, and as the wife has not stepped into the witness-box, that should be considered to be fact proved. I am afraid, merely on this ground the court should not ignore other factors which are brought on record. Allegation of the wife was that she went to America but the husband did not respond and she had to stay separately. Her application for maintenance and for legal separation was granted, showing the husband to be the defaulting party. So, now when the husband relies on that decree for legal seperation, he cannot say that ignoring that decree for judicial separation he should be considered to be a faithful husband and the wife should be considered to be an erring wife, and the decree for judicial separation should be passed. From the facts and circumstances of the case I am not prepared to concede to this case of the husband. Apparently it seems that he has no degire to continue the marital relations with the wife. He is keen in getting divorce, whether it is for marrying with Miss Jullie, as alleged by the wife, or for any other purpose, and for that he has made all attempts. Therefore, it cannot be said that the findings of the learned trial Judge against the husband are not justified.

51. In the result, however, I come to the conclusion that the order of dissolution of marriage by a decree of divorce passed by the learned trial Judge is quite justified. The appeal, is, therefore, dismissed. Looking to the peculiar circumstances of the case, there shall be no order as to costs. As the appeal is dismissed, Civil Application No. 3756 of 1981 filed by the wife does not survive, and the ad-interim stay granted therein is vacated. Rule is discharged with no order as to costs.

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LANDMARK JUDGMENTS ON

CUSTODY OF CHILD
&
VISITATION RIGHTS

MR. TUSHAR VISHNU UBALE VS MRS. ARCHANA TUSHAR UBALE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5403 OF 2015

2016 SCC Online Bom 22; (2016) 2 AIR Bom R 2006

Tushar Vishnu Ubale ... Petitioner
Vs.
Archana Tushar Ubale ... Respondent

Decided on 15 January, 2016
Bench: Hon'ble Mrs. Justice Mridula Bhatkar

Shared custody -joint parenting plan.

Parenting Plan is a mutual arrangement of custody and access to which is an outcome of matured parenting.it is advisable that the family Court to invite a Parenting Plan in the cases found suitablethe best wherein the order of shared custody can be passed and implemented without much fights and opposition by the parents.

Ms.Rajani Iyer, Sr.Adv. a/w Yogesh Pawaskar i/b V.S. Kapse for the Petitioner

Mr.U.P. Warunjikar i/b Ms.P.H. Gada for Respondent

ORDER

MRS. MRIDULA BHATKAR, J.

1. The order dated 27.5.2015 passed by the learned Judge of the Family Court, Mumbai, in respect of directing the joint parenting plan by handing over six months custody of the child to each parent is challenged in this appeal.

2. The petitioner/father is a Surgeon and the mother is working as a nurse. They got married on 10.10.2008. It was an intercaste and a love marriage, which was not approved by the parents of the mother. The child Mukta was born on 8.10.2009.

3. Ms.Iyer, the learned Senior Counsel for the Petitioner, submitted that the Court in its order had directed the parents to submit a joint parenting plan. She argued that the adopting joint parenting plan is a voluntary act of the parents. It cannot be directory. However there was a specific direction given by the Court so a joint parenting plan was submitted by both the parents and therefore the learned Judge ought not to have construed that the submission of such joint parenting plan was a consensual act of the parents. She submitted that the correct method was not adopted by the learned trial Judge to take forward the idea of joint parenting plan which is based on the report of the Law Commission submitted on 25.5.2015. It is submitted that the learned Judge has described the Law Commission report which was published on 25.5.2015 as an oven fresh report. However, after going through the Law Commission report, it appears that the learned Judge could not give himself time to deliberate upon it as the order was passed immediately i.e., on 27.5.2015.

4. The learned Senior Counsel pointed out various suggestions of the Law Commission which are mentioned therein and referred to in the order.

In clause 5.8, the Law Commission has stated about crystallisation of the Rules as per the requirement of the child. It has proposed amendments in the Guardians and Wards Act. Then, in Chapter 11A of the Law 2 / 20 wp.5403.2015(R).doc Commission report, parameters are given by the Law Commission in respect of the custody issue of the child. These are also referred to in para 14 of the judgment. She submitted that though these are referred to, they are not properly considered by the learned Judge. She further pointed out paragraphs 106, 107 and 108 and also clauses 3.3.4 and 3.3.5 and in paragraph 3.5, in which the Law Commission has expressed that considering the prevailing distribution of roles assigned to the parents by the Indian society, the idea of shared custody may not be possible and the Court needs to weigh the circumstances accordingly. She pointed out that the learned Judge has straightaway divided the custody for six months between the father and the mother which is not at all good for a healthy upbringing of the child, who is more attached to the father. It is necessary for the Court to consider a degree of comfort of the child which is completely ignored by the learned trial Judge. The Law Commission has expressed that if at all the non-custodial parent relocates himself / herself where the school of the child is situated then it would be the material fact for considering joint custody. In the present case, the learned Senior Counsel submitted that the mother has relocated herself and has started residing at Chembur near the school of the child and the residence of the father. However, the Family Court should have considered what is the duration of the relocation, whether it is on the leave and licence, whether that residence is going to be available to the mother so that the child can 3 / 20 wp.5403.2015(R).doc stay there comfortably with the mother, etc. The suggestions of the parenting plan are required to be read in proper perspective. The Law Commission never intended shifting custody directly by 50% between the parents. While granting the custody, the Court has to consider the element of stability so also the element of inter-spacing with both the parents.

5. She further submitted that the learned Judge has shown concern about making financial provision for the child. However, the arrangement made by the learned Judge is troublesome. As per the order, joint account of the parents is to be opened. The father is going to deposit Rs.10,000/- and the mother will deposit Rs.5,000/- per month and thus, the child will have Rs.15,000/- per month in her account and for withdrawal of the said amount, the parents will have to come to the Court and seek permission of the Court. She submitted that this is not workable. She further pointed out that the learned Judge has directed that in order to take care of the mental and physical health of the child, one mediator, who is a psychiatrist is appointed, so the child is to be referred to the Psychiatrist on the issues of dispute between the parents and the Mediator will have to report ultimately to the Court and seek the advice of the Court. She argued that approaching the Court for each and every decision or action is not feasible for the parties. The order of the access is given, however, if at all there is a default in giving the access, then, the defaulter is directed to pay cost of 4 / 20 wp.5403.2015(R).doc Rs.1,000/-. Such rigid order cannot be passed in a custody issue but to make it workable, some flexibility is required. The father has submitted a parenting plan and mother has also given her parenting plan and as per the parenting plan of the mother, it is suggested that the custody of the child is to be given in alternate week to each parent. She argued that shifting of custody on alternate week is not a good suggestion but enhanced access can be substituted for the same. In respect of staying of the child

in vacations such as Summer, Diwali and Christmas as also on festivals and some special days such as birthdays, can be worked out by consent. She submitted that since June, 2015, till today, the child has stayed with both the parents though the custody has remained with the father and the child is fine and mentally healthy and has the same attachment with the mother.

6. Mr.Warunjikar, supported the order passed by the learned Judge of the Family Court. He read over the relevant paragraphs from the judgments of the Supreme Court. He relied on the judgments in Smt.Anjali Kapoor vs. Rajiv Baijal[1]; Gaurav Nagpal vs. Sumedha Nagpal[2]; Shyamrao Maroti Korwate vs. Deepak Kisanrao Tekam[3] and Vikram Vir Vohra vs. Shalini Bhalla[4].

7. He also relied on the report of the Law Commission. He submitted that the Family Court has relied not only on the Law Commission report but also a draft of the parenting plan which was approved by the High Court and which is put on the website of the Family Court. He further submitted that alongwith the Law Commission and the draft parenting plan approved by the High Court, the learned Judge of the Family Court has also another document for his assistance and that is the report of the marriage Counsellor of the Family Court. The objection raised by the counsel for the petitioner that the learned Judge of the Family Court without interviewing the child has passed the order in respect of parenting plan, is not sustainable because the marriage counsellor has interviewed the child and has submitted the report. So, the learned Judge of the Family Court is fully justified in passing order with the help of guidelines and other suggestions in the report of the Law Commission. He submitted that the order of the appointment of the Mediator is also very innovative method and shows a sound approach of the learned Judge to enable to keep the follow up of the custody. The order passed by the Family Court is to be considered in its totality. Mr.Warunjikar argued that upon such consideration, it would have to be seen whether the welfare of the child is considered properly after weighing of the available resources and prevailing circumstances in the present case. He further submitted that 6 / 20wp.5403.2015(R).doc the child is very happy with the mother and the mother has relocated herself to Chembur. Her mother is also staying with her. So being a nurse, whenever the mother has to go for work, the grandmother attends to the child and due to the order passed by this Court on 7.8.2015 and 1.10.2015, the child could establish rapport with the maternal grandmother and also now is happy in visiting both the parents.

8. In reply, Ms.Iyer, the learned Senior Counsel, submitted that the cases cited by the learned counsel for the respondent are to be considered in the light of their facts. Joint Parenting is different from joint custody. The Court has to consider the meeting of minds of the child and the parents. The Law Commission's report is not only on joint parenting plan but the suggestions are given in respect of changes in Guardian and Wards Act and custody. The Law Commission has laid down a number of aspects which the Judge has to take into account in respect of custody of a child and one of them is the joint parenting plan. However, she pointed out that in Clause no. 3.3.5 of the Law Commission Report, the Law Commission has expressed that they are not in favour of law placing presumption in favour of joint custody. It is necessary to take into account para no. 3.3.1 which speaks of the reasons for adopting the joint custody.

The reason given is of simultaneous association of both the parents with the child.

1 (Civil appeal No.2628 of 2009) decided on 17.4.2009
2 Civil Appeal No.5099 of 207 decided on 19.11.2008
3 Civil Appeal No.2817 of 2008 decided on 14.9.2010
4 Civil Appeal No.2704 of 2010 decided on 25.3.2010 5 / 20 wp.5403.2015(R).doc

9. The 257th report of the Law Commission of India is on guardianship and custody laws in India. The words 'guardianship' and 'custody', needless to say, are two different terms. Chapter III is on the concept of joint custody and in Chapter V, the Law Commission has mentioned and discussed the considerations for deciding child custody cases. These considerations are as follows:

   a. Factors to consider for best interest and standard

   b. Determining the preference of the child

   c. Access to records of the child

   d. Grandparenting Time

   e. Mediation

   f. Relocation

   g. Decision making

   h. Parenting Plan

   i. Visitation

10. These are the recommendations given by the Law Commission and that is not law and is not binding. The intention of the learned Judge of the Family Court to adopt these suggestions and also the High Court rules and chalk out a Parenting Plan is undoubtedly admirable. It shows that he was keen to experiment these new methods and apply to this case.

    However, the learned Judge has used a mathematical formula in deciding 8 / 20wp.5403.2015(R).doc the custody issue, which needs to be modified. The Law Commission wants the Judges working in the Family Court or handling the issues of guardians and wards to refurbish their fixed ideas and to have a makeover in their perceptions. In detail, various aspects are considered in the report.

    On the point of joint custody, in para 3.2.1, it is mentioned that joint custody is not specifically provided for in Indian law. It is necessary to highlight the important observations and suggestions on the point of joint custody in para 3.3.5 which is thus:

    3.3.5 In the legal systems of several Western countries that we have reviewed in this chapter, there is a presumption in favor of joint custody, and sole custody is awarded only in exceptional circumstances. We have already referred to the inequalities in parental roles, responsibilities and expectations that exist in our country. Therefore, we are not in favour of the law placing a presumption in favour of joint custody. As opposed to the case of guardianship, where we have recommended shared and equal guardianship for both parents, in this case, we are of the view that joint custody must be provided as an option that a decision-maker can award, if the decision-maker is convinced that it shall further the welfare of the child. (emphasis added)

11. Thus, shared and equal guardianship is recommended by the Law Commission. However, joint custody is provided as an option. Therefore, the Judges, who are working on the family laws and the issue of custody, should not hold a view that once the Law Commission has given the suggestion of a Parenting Plan, it is binding in all the cases to adopt the same. The parties are not to be compelled to give such plan which 9 / 20 wp.5403.2015(R).doc amounts to illegality. Parenting Plan is an option for both the parties.

12. It is to be kept in mind that the ideas of custody have changed due to economic, social developments. The notions of responsibilities and the roles attributed to men and women cannot remain static throughout. In the last few decades women stepped out and are educated, so also are economically independent. Women cannot be treated as inferior or second guardian in the family. The mother is an equal partner of the father, who shares equal responsibilities in bringing up the child. Earlier, she had no role in taking decisions in the child's education, career or other development. She was supposed to feed the child, take his care physically and fulfill the child's emotional needs. Undoubtedly, all these perceptions and social norms have financial dynamics. Who earns more is a better guardian was the simple rule. However, gradually, the legal world discovered the myth in this rule and the number of factors are found to have a bearing over the custody issue. The divorces are increasing in the society so more and more children are subjected to the trauma of choosing custody.

13. In the custody matter, the child, mother and the father are the main stakeholders and the law repeatedly has emphasised as a settled position that the welfare of the child is the paramount consideration. However, one has to take note that today, the families are nuclear and the couple 10 / 20 wp.5403.2015(R).doc restricts the family to one or two children. The society is becoming complex and the parents have to struggle hard to run the household and give better future to the child. Under these circumstances, alongwith the welfare of the child, it is necessary for the Courts to consider sympathetically the financial, physical, mental stress the parents carry and the emotional plight of the parents while awarding custody. If the parents are psychologically stable, positive and happy, then, they can provide a healthy atmosphere to the child. Usually, the child is not a problem child but the problem lies in the parenting.

14. Not all the parents have sound financial condition. If it is one child then, each one of them showers gifts and love on the child so much that the child becomes selfish and demanding. This is also a warning to the warring parents that they should not try to purchase the love of their child.

    The Judge has to use his/her worldly wisdom to find out at the time of interviewing the child whether child is a victim of the attitude of blackmailing parents emotionally.

15. For spouses, who are stying away from each other and fighting for the child, the word 'custody' connotes inherent crisis of sharing. To get company, love and affection of both the parents means a shared custody.

    A child wants to share his joys and sorrows, failures and success, with its parents simultaneously. Such simultaneous association is required for the 11 / 20 wp.5403.2015(R).doc healthy upbringing of the child. A father and a mother have different responses towards the child's sharing, which is also necessary. The child must get a sense of belonging and social security and he should not feel that he has a broken family and should not develop self pity. The child may become a centre of either curiosity or comments, staring or sympathy from his friends, classmates and relatives. Peer pressure has negative impact on the tender and impressionable mind of the child. In the absence of simultaneous association with both the parents, the child misses completeness of his relationship. Therefore, shared custody may be an option open for the court to offer parents and make them aware of not only their child's needs but also the child's rights. As argued by the learned Counsel for both the sides, the 257th report of the law commission is not only about shared parenting, but these are the recommendations on guardianship and custody laws

in India, wherein under different chapters, the Law Commission has penned down its concept of joint custody, mediation in child custody cases and, also in chapter V, the considerations for deciding the child custody cases. Number of factors are to be taken into account in custody cases in the best interest of the child and parenting plan is one of these considerations.

16. Consent thereto cannot be imposed. The submission of the joint parenting plan or shared custody is required to be suggested by the Court and so also by the Counsellors to the parents. It is necessary to give them 12 / 20 wp.5403.2015(R).doc time to prepare themselves emotionally for such shared custody, which is difficult for the parents to digest initially. It is a matter of an attitudal change. The Law Commission has elaborated the parameters in respect of the child custody but has also expressed that considering the roles attributed to the parents as per our social norms and behavioural patterns, the idea of 50% shared parenting may not be conducive in Indian society in all the cases. The Law Commission has voiced that the seeds of the globally accepted concept of shared custody can be sown and the saplings can be planted in the minds of the parents so that the fruits of the company of both the parents can be enjoyed by a child of the warring parents. The Law Commission has commented on the crystallisation of the roles and number of issues of the child in respect of the child's development. The Judges require to be active and sensitive while deciding issues of custody and access.

17. One of the tests to ascertain a healthy and happy mind of a child is whether the child has love, affection and equal respect towards non-custodial parent or not. If it is found that a child is not willing to go to the non-custodial parent and complains continuously about the other parent, then it can be inferred that the child's mind might be poisoned and the child is tutored. This indicator can be applied to ascertain the healthy upbringing of the child. It is to be remembered that to have access to both the parents is the right of the child which prevails over the privilege of the 13 / 20 wp.5403.2015(R).doc parents to have custody or access. There is no statute granting any legal right upon any parent to have the child's custody in preference to or overriding the other. Therefore, the jurisprudence on the subject is taking into account the welfare of the "child" alone. In most of the cases, egos or incompatibility are the reasons for fights between the parents. They become selfish and the child is put to stake as a pawn by one parent to avenge the other. A person may be a bad husband or a bad wife, but he may not be a bad father or she may not be a bad mother. It is necessary for the fighting parents to understand and to bear in mind that the child loves both, needs both. Justice Roshan Dalvi of this Court in one of the workshops on child custody has defined rhetorically but aptly the word 'FAMILY' as 'Father And Mother I Love You'.

18. Separation is a shock for the child that his family has been destroyed. It gives rise to fear of the future as well as anger in the mind of children and they do not understand who should be blamed. There is a possibility of self blame and a feeling of guilt also. A majority of the children want contact with both the parents on regular basis and if it is denied, then, the children become hostile to the once loved but now non-custodial i.e., absent parent. If a custodial parent speaks badly about the the absent parent, the child tends to identify with that sentiment. Gradually a feeling that I can do without the absent parent develops and this gradual 14 / 20 wp.5403.2015(R). doc parental alienation becomes a part of the child's life and which may lead to social alienation which is in fact a deep trauma and not a healthy or happy circumstance. Alienated children often show contempt and withdraw affection whenever they are in contact with the parent. Physical estrangement adds to emotional alilenation.

19. Thus, Parenting Plan is a mutual arrangement of custody and access which is an outcome of matured parenting. The ideal situation is that joint parenting is a rule and single parenting is an exception. There may be a single mother or a single father left behind due to a blow of destiny, then, the child has no option. However, when both the parents are available, their association with the child cannot be artificially denied only due to fights and hatred and vindictive approach of the parents. Hence, though it is not mandatory that all the parents should adopt a Parenting Plan, it is advisable that the family Court to invite a Parenting Plan in the cases found suitable upon the Law Commission which has taken formal cognisance of the legal right involved in joint parenting. This, of course, may be attuned to circumstances and must account for the special needs of the particular child.

20. It is necessary to buttress that the word used is "parenting plan" and not "custody plan". Custody is a narrow term and parenting is a wider terminology which implies joint responsibility. Hence, it does not only 15 / 20 wp.5403.2015(R).doc contemplate physical handing of the child 50% to one parent and the other 50% to the other parent. A parenting plan must therefore take into account the "parental responsibility" as opposed to "parental rights" which are not statutorily granted. The aforesaid recommendations of the Law Commission must be read in that light. In the case of Smt.Anjali Kapoor vs. Rajiv Baijal (supra), the Supreme Court has referred to the observations of the New Zealand Court in Walker vs. Walker & Harrison reported in 1981 New Ze Recent Law 257, which are as under:

...Welfare is an all encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."

21. Keeping all these relevant factors in the background, the issue in the present case can be determined. The child is 6 years old and she has been staying with the father throughout. The mother is not staying with the father since March 2014. However, she has started residing near the house of the father and near the school of the child. Thus, the dispute between the father and the mother is not old but is fresh and under such circumstances, a possibility of reunion of the parents cannot be denied.

I found both the parents loving and mature. In fact, both the parents want 16 / 20wp.5403.2015(R). doc their family intact and are attached to their child. Reciprocally, the child has also similar feelings for her parents. When I interviewed the child in the Chamber, I found that the child is talkative, fearless and happy. She has no sense of insecurity in mind. The credit goes to both the parents, who though are living separate, did not poison the mind of the child against each other or the members of the family. Therefore, it was easy to grant access for a longer time to the mother, who was not residing in her matrimonial home.

22. The child is used to surroundings, friends and the relatives where she is residing at present. She is also getting familiar with the place where the mother is residing. She mentioned that she has more friends where she is residing at present but she has also got one friend where her mother resides. The father's mother is a very good attendant and is a great support to the child. The mother i.e., the respondent has also expressed her gratitude towards her mother-in-law for

taking care of her daughter. Similarly, her mother has also shifted to her house and is readily looking after the child. Thus, in this case, the child is fortunate to have two caring grandmothers.

23. Considering the totality of the circumstances, I am of the view that the custody of the child shall at present essentially remain with the father because in this case, the child has stayed and has been brought up in the 17 / 20 wp.5403.2015(R).doc house of the father. I found this case as the best wherein the order of shared custody can be passed and implemented without much fights and opposition by the parents. Since about past 7 months, both the parents are having a shared parenthood and more access is given to the mother time to time so that the daughter can get used to her mother's home. The mother is to be given a sufficient period of custody each month during which she would be responsible for the upbringing of the child. The mother shall pick up the child on the first day of each month and have custody of the child continuously for 9 days and on the 10 th day after lunch or the school time drop the child at the father's house. The child shall live with the mother continuously during such period. The mother shall attend to the needs of the child. On the last day of such period, the child shall be sent either directly to the school or to the father. Thereafter, the mother will take the child on the third Wednesday of the month after school hours and will drop the child at the house of the father at around 1/2 pm or after lunch on the third Sunday. Thus, the child will not feel disconnected from the mother and there shall be continuous and simultaneous association with the mother. The child shall have the love, care and company of both the prents she loves for a reasonable stretch of days as also weekends. The school vacations shall, as is usual, be shared equally in this upon mutual arangement and understanding between the parties. Besides absent parent may call the child on phone 18 / 20 wp.5403.2015(R).doc morning and evening and may talk for 5 to 10 minutes. The parents shall have equal say on attending school meetings and on deciding child's education, day schedule, hobby classes without taxing child. The birthday of the child is to be celebrated together in the presence of the parents. In respect of the meeting of the other family members of both the sides and celebrations of important events in the family the both the parents being quite mature, will take the decision accordingly, keeping in mind the best interest of their child. Thus, complete flexibility in taking decisions on such issues is left to both the parents. In the event of dispute, the other party can approach the Court for necessary orders. This arrangement to continue till there is any drastic change of circumstance or dependency of psychological need of the child.

24. The idea of an order saddling costs on a defaulter parent is not correct but upon default compensatory access of the equal period in next access to the other side is to be ordered.

25. The arrangement of payment of Rs.10,000/- and Rs.5,000/- can be continued but there is no need to approach the Court for the purpose of withdrawal of the money. The amount can be withdrawn with the signature of both the parents. It should be a joint account under the joint guardianship, in the name of the child with both the parents as the first 19 / 20wp.5403.2015(R). doc account holder. The amount can be withdrawn with the signature of the both the parents and only for the purpose of her education and maintainance if necessary. I do not think it is necessary to appoint a mediator in this case because I found the child mentally and physically healthy. If at all in future, if unfortunately, the necessity arises, then, the trial Court is always empowered to pass the required order.

26. Writ petition is thus partly allowed.

27. The Writ petition is disposed of in terms of the above order.

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KAMLA DEVI VS STATE OF HIMACHAL PRADESH AND ORS.

Equivalent citations: AIR 1987 HP 34

1986 3 Crimes (HC) 151

Kamla Devi
vs
State of Himachal Pradesh And Ors.

Decided on 24 July, 1986
Bench: Hon'ble Mr. Justice P Desai & Hon'ble Mr. Justice H Thakur

Constitution of India, 1950 - Article 226-Hindu Minority & Guardianship Act., 1956 Section - 6- strained relations between parties twin minor children 5 years old taken away by the father from the house of the parents of the wife where both of them used to reside since after their marriage- Respondent not having independent accommodation of his own- Respondent and the children now living in the house of a friend- writ of Habeas Corpus can be pressed into service for granting the custody of a child to the deserving spouse- custody of children should to be given to the mother.

JUDGMENT

P. Desai, C.J.

1. Yesterday we passed an order allowing the petition but the judgment could not be delivered for want of time. We proceed to do so now.

The factual matrix :

2. The petitioner is the wife of the second respondent (hereinafter referred to as "the : respondent"). The parties were married in the month of February, 1980. After the marriage, the respondent has been living with the petitioner in a house constructed by her parents. Two sons (twins) were born out of . the wedlock in the month of May, 1981. The petitioner alleges that the respondent, Who is a habitual drunkard, has been maltreating her since 1982. Frequent quarrels and cruel beatings have almost become a daily routine.

3. According to the petitioner, the respondent returned home at about 9 a.m. on July 12, 1986. He was under the influence of liquor. He asked for the custody of the children since he wanted to go away with them. When the petitioner refused to oblige, he tried to forcibly snatch away the children. The petitioner thereupon raised an alarm and the respondent went away. On July 13, 1986 at about 9.30 a.m. the respondent once again tried to take away the children along with the belongings. The petitioner alleges that she thereupon locked the house. The respondent reported the matter to the Police who directed her to unlock the premises. The Petitioner was also summoned to the Police Chowki the next day, that is, on July 14, 1986. According to the petitioner, on July 15, 1986, the children were ultimately taken away by the respondent.

4. The petitioner states that both the children are of tender age (5 years) and that it is in their interest and in their welfare that they continue to remain in her custody, especially because the respondent is a habitual drunkard and a highly irresponsible person.

5. The respondent has filed a return refuting the allegations made against him and resisting the petition. It is not disputed that since after the marriage he is residing with the petitioner in the house of her parents. His version is that he was humiliated by the parents of the petitioner on a number of occasions. On July, 12, 1986, he was asked to leave the house. He, therefore, decided to leave the house with his wife and children. The petitioner, however, refused to go with him and he was not even allowed to go into the house to collect his belongings. He thereupon went to the Police Chowki and reported the matter to the Police. On July 14, 1986, he took the children along with him to the house of one of his colleagues who resides in the BBMB quarters. According to the respondent, he has applied for the allotment of Government accommodation which was expected to be allotted very soon. Besides, he had also started constructing a house on the land belonging to the parents of the petitioner which he intends to occupy ho sooner it is completed. The allegations that he is a drunkard and that he is unable to take care of the children have been stoutly denied.

6. The undisputed facts which emerge on an analysis of the rival cases are as follows :

   The relations between the parties have been strained since 1982. The two minor children (twins) are both just 5 years old. They were taken away by the respondent in the middle of this month (July 14 or 15, 1986) from the house of the parents of the petitioner where both of them used to reside since after their marriage. The respondent and the children are now living in the house of a friend since he does not have any independent accommodation of his own and they may have to continue to stay there till he procures suitable accommodation.

   The learned counsel for the respondent has stated that he is employed as a Laboratory attendant and that he is required to attend duty from 9 a.m. to 5 p.m. The question for decision:

7. The question which arises against the aforesaid background is whether, in the exercise of its writ jurisdiction, the Court should order that the custody of the minor children be restored to the petitioner. Whether the Writ of Habeas Corpus can Issue?

8. It is well established that the writ of Habeas Corpus can be pressed into service for granting the custody of a child to the deserving spouse. The following observations in para 13 of the decision inGohar Begum v. Suggi alias Nazma Begum AIR 1960 SC 93 : (1960 Cri LJ 164) clinch the issue:

   "It is further well established in England that in issuing a writ of habeas corpus a court has power in the case of infants to direct its custody to be placed with a certain person. In R. v. Greenhill, (1836) 4 Ad. & El. 624 at P. 640 : 111ER 922 at p. 927 Lord Denman C. J. said :

   'When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody.' See also (1857) 7 El Bl 186 : 119 ER 1217. In Halsbury's Laws of England, Vol. IX, Article 1201 at page 702 it is said :

   'Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas corpus, and the custody awarded to the proper persons.' Section 491 is expressly concerned with directions of the nature of a habeas corpus. The English principles applicable to the issue of a writ of habeas corpus, therefore, apply here. In fact the courts in our country have always exercised the power to direct under S. 491 in a fit case that the custody of an infant be delivered

to the applicant: see Rama Iyer v. Nataraja Iyer, AIR 1948 Mad 294: (48 Cri LJ 369), Zara Bibi v. Abdul Razza, (1910) 12 Bom LR 891 and Subbaswami Goundan v. Kamakshi Ammal, ILR 53 Mad 72 : (AIR 1929 Mad 834). If the courts did not have this power, the remedy under Section 491 would in the case of infants often become infructuous."

These observations made in the context of Section 491 of the Criminal P.C. 1898, apply with equal force in the exercise of the constitutional jurisdiction conferred upon this Court by Article 226 of the Constitution.

9. In the United States of America also it is recognised that Habeas Corpus is a proper legal remedy to obtain the discharge of an infant from a detention that is illegal, and to determine controversies concerning the right to custody of the infant. Habeas Corpus is a proper remedy on the part of one parent to recover a child from the other parent, either before or after the parents are legally separated or divorced. In a proper case the writ may be sued out by a tutor or guardian deprived of the custody of his ward, or by corporations and societies that have, in a legal manner, acquired the right to the custody of children. But one who is not related to the child cannot bring a Habeas Corpus proceeding without averring at least a prima facie legal right to custody. (See : Paras 99 and 118 at pages 249 and 264 of Vol. 39 of the American Jurisprudence, Second Edition).

10. The observations of the Supreme Court in Gohar Begum's case (AIR 1960 SC 93) with regard to, the issue of the writ of Habeas Corpus in child custody cases finds support also from the following statement of law occuring in Vol. 11, Article 1469 at page 779 of Halsbury's laws of England, Fourth (latest) Edition :

"A parent, guardian, or other person who is legally entitled to the custody of a minor can regain that custody when wrongfully deprived of it by means of the writ of habeas corpus."

The Nature and Purpose of the Jurisdiction :

11. It is well established that in issuing the writ of Habeas Corpus in the case of infants, the jurisdiction which the Court exercises is an inherent jursidiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In otherwords, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of, statute. The jurisdiction exercised by the Court rests in such cases on its inherent equitable powers and exerts the force of the State, as parens patriae, for the protection of its infant ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a habeas corpus petition, as applied to infants, is to determine in whose custody the best interests of the child will probably be advanced In a Habeas Corpus proceeding brought by one parent against the other for the custody of their child, the Court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as Parens Patriae, has in promoting the best interests of the child. The following passages at Pages 249, 280 and 281 (Paras 99, 148 and 149) extracted from and the cases cited in footnotes 10, 14 and 19 at pages 280 and 281 of the American Jurisprudence, Vol. 39, Second Edition, make this position clear :

"Where the writ is availed of for the latter purpose (to determine controversies concerning the right to custody of the infant), the proceeding partakes of the incidents of a suit in equity and is considered to be one in rem,' the child being the res ..... The Court, in passing on the writ in

a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. ..... In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. .....

Habeas corpus is a summary proceeding, and, as applied to infants, its primary object is to determine in whose custody the best interests of the child will probably be advanced.

The Considerations Which Must Weigh With the Court in Awarding Actual Custody :

12. The law is well settled that the natural duty of a parent to protect an infant child rests with the parent having actual custody of the child. A person has actual custody of a child if he or she has actual possession of the child's person, whether or not that possession is shared with one or more other persons (See : Halsbury's Laws of England, Fourth Edition, Vol. 24, Articles 504 and 510 at pages 214-217). These factors have relevance in determining the dispute relating to the actual custody of a minor child.

13. As observed earlier, the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other.

14. The general principle governing the award of custody of a minor is succinctly stated in the following words in Halsbury's Laws of England, Fourth Edition, Vol. 24, Article 511 at page 217:

"Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father."

In the American Jurisprudence, Vol. 39, Second Edition, Para 148 at pages 280-281, the same principle is enunciated in the following words:

"..... a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require."

In Foot Note 14 at page 281, the following extracts from two American cases are set-out which also emphasise this point:

"The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for I the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate. Howarth v. Northcott, 152 Conn 460, 208 A 2d and 540, 17 ALR3d 758.

The primary object of habeas corpus, as applied to infants, is to determine in whose custody the best interests of the infant will probably be advanced. Buchanan v. Buchanan, 170 Va 458, 197 SE 426, 116 ALR 688?

15. The Courts in India have also been guided by these considerations in deciding-child custody cases. In Rosy Jacob v. Jacob A. Chakramakkal, AIR 1973 SC 2090, which was a case arising under Section 25 of the Guardians and Wards Act, 1890, the pertinent observations made in this context being relevant are extracted hereinbelow :

"The Court's power ..... 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 and may at times be somewhat misleading..... In our opinion, the dominant consideration in making orders under Section 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 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 Section 25 merely because there is no defect in his personal character and he has attachment for his children - which every normal parent has..... The father's fitness from the point of view just mentioned cannot override 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. ..... 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 position 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."

16. In Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, AIR 1982.SC 1276, the Supreme Court reiterated this view in the following words:

"The principles of law in relation to the custody of a minor appear to be well established. It is well settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. !n dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

17. It is, thus, clear that as between the competing claims of two parents in receipt of the custody of a minor child, the mere fact that the father is not unfit to be the custodian, is not determinative of the issue of its welfare. If the custody of the father cannot promote the welfare equally or better than the custody of the mother, then he cannot claim indefeasible right to the child's custody. Indeed, the "tender years rule" requires that the custody of the children of tender age must be left with the mother. The mother's protection for such children is indispensable. We cannot think of any other protection which will be equal in measure and substance to that of the mother in such circumstances.

18. The following passage occurring in Bailey on Habeas Corpus, Vol. I, page 581, is very much apposite in this context:

"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."

19. An incidental aspect, which is to be borne in mind, may be adverted to. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment (See : Para 148 at page 281 of Vol. 39 of the American Jurisprudence, Second Edition). The writ may, however, issue not only without the privity of the child, but even against his express wishes (See : Para 99 at page 250 of Vol. 39 of the American Jurisprudence, Second Edition). THE NATURE OF ILLEGALITY OF RESTRAINT PROVABLE IN CHILD CUSTODY CASES:

20. In Gohar Begum's case (AIR 1960 SC 93) (supra), it was observed in para 7 that when the respondent had no legal right whatsoever to the custody of the child, the refusal to make over the child to the custody of the person entitled thereto in accordance with law results in an illegal detention of the child within the meaning of Section 491 of the Criminal P.C., 1898 and that, therefore, the writ of Habeas Corpus can legitimately issue. The following observations of Lord Campbell, C. J. in R. v. Clarke, (1857) 7 El. & BL 186 : 119 ER 1217, were quoted with approval:

"But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty."

21. In Halsubury's Laws of England, Vol. 11, Fourth Edition, Article 1469, page 779, the following pertinent observations clearly bring out the aforesaid position :

".....For the purpose of the issue of the writ, the unlawful detention of a minor from the person who is legally entitled to his custody is regarded as equivalent to an unlawful imprisonment of the minor. In applying for the writ it is, therefore, unnecessary to allege that any restraint or force is being used towards the minor by the person in whose custody and control he is for the time being."

22. The following observations in the American Jurisprudence, Vol. 39, Second Edition, at pages 250 and 280 (Paras 99 and 148), highlight the same point and throw light on the nature of inquiry which the court is required to make when moved for a writ of Habeas Corpus in the case of an infant:

"Ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child.

Unlike other cases in which the remedy is available, the writ lies where its subject is a child, notwithstanding that the child is not held in actual physical restraint but remains. with the respondent through natural^ inclination. In the case of infants, an unauthorised absence from legal custody has been treated, at least for the purpose of allowing the writ to issue, as equivalent to imprisonment, and the right to have a child returned to legal custody has been treated as Equivalent to a wish to be free; and proceedings in habeas corpus have so frequently been resorted to in order to determine the right to possession of a minor that the question of physical restraint need be given little if any consideration where a lawful right is asserted to retain possession ... ... and it may issue though the person in whose custody the child is denies that he is restraining or preventing the child from returning to his parents, if it appears that he harbours the child and refuses to permit the parents to exercise parental authority to enforce a return.

Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. ..... Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another."

23. It is, thus, clear that these cases are decided not on the legal right of the child to be relieved from the unlawful imprisonment or detention but on the Court's view of its best interests and welfare. The unlawful detention would be presumed in such cases when the person legally entitled to the custody of the infant is denied the same. It is not required also to allege and prove that any restraint or force is used against the infant.

Whether An Alternative Remedy Is A Bar?

24. In Gohar Begum's case (AIR 1960 SC 93) (supra), the Supreme Court has ruled in no uncertain terms that a remedy under any special statute is distinct from the writ of Habeas Corpus. The following pertinent observations in part 10 of the judgment highlight this point:

"We further see no reason why the appellant should have been asked to proceed under the Guardians and Wards Act for recovering the custody of the child. She had of course the right to do so. But she had also a clear right to an order for the custody of the child under Section 491 of the Code. The fact that she had a right under the Guardians and Wards Act is no justification for denying her the right under Section 491. That is well established as will appear from the cases hereinafter cited."

The cases referred to were both Indian and English cases.

The Legislative Policy Regarding The Custody Of A Child Of Tender Years :

25. The law, which generally lags behind social advances, has haltingly stepped in by enactingSection 6 of the Hindu Minority and Guardianship Act, 1956 and taken a small step in the direction of treating the mother as better suited for custody till the minor attains the age of 5. The relevant portion of Section 6 of the said Act reads as follows :

"The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl - the father, and after him, the mother:

Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother."

The "tender years rule" has thus found statutory recognition and the legislative policy underlying thereto is based not only on the social philosophy but also in realities and points in the direction that the custody of minor children who have not completed the age of 5 years should ordinarily be with the mother irrespective of the fact that the father is the natural guardian of such minors. When moved for a writ of Habeas Corpus and in exercising the general and inherent jurisdiction in a child custody case, the Court is required to bear this legislative prescription in mind while judging the issue as to the welfare of the child.

Findings Against The Factual Backdrop :

26. In the present case, both the children have just attained the age of 5. The parties are Hindus and the "tender years rule", as statutorily recognised, is immediately attracted in their case and it cannot be ignored in judging their welfare. The respondent has no house of his own and stays with the children in the house of a friend. The minor children are thus deprived of the congenial and familiar surroundings of their own home and family. The respondent is employed and his hours of duty from 9 a.m. to 5 p.m. will keep him away from the minor children for the most

part of the day for five days in a weak. There is nothing in the return to show as to in whose custody he leaves the minor children when he goes to work and what arrangement he has made or proposes to make in that regard. Assuming that such arrangement is or will be made, it would be an apologetic substitute for the mother's watchfulness and vigilance over the up-bringing and comfort of the minor offsprings. On the other hand, the petitioner is living with her parents in the house owned by them. She is in a position to devote her full time, care and attention to the minor children. Human nature as it is, her parents are also bound to assist her in looking after them with the affection naturally and normally shown to the grand children by the grand parents. There is not the slightest allegation as to the mental, moral or physical disqualification, if any, of the petitioner to superintend the general welfare of the children. There is also no allegation that she would be unable to support them, but even if there were any, we would not have hesitated to require the respondent to provide the financial support by making an order to that effect in the course of the present proceedings. Even ignoring the allegations made against the respondent and assuming that he is otherwise fit to be entrusted with the custody of the minor children the question of custody has still to be resolved in the context of all the relevant circumstances having a bearing on the minors' welfare including their ordinary comfort, contentment, health and upbringing. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he has no indefeasible right to the children's custody. The mother's protection for the two minor children is, in our opinion, indispensable. We cannot think of any other protection which will be equal in measure and substance to that of the mother.

27. Having given our anxious consideration to all the material circumstances of the case and having unhesitatingly reached the conclusion that the best interests of the minors requires that their custody be given to the petitioner, we have passed the order allowing the petition. We would like to make it clear, however, that the order is of a temporary nature and that it is open to review according to the circumstances that may arise in future and that, under such circumstances, that parties will be at liberty to apply to the court of competent jurisdiction for an appropriate relief. We have been informed by the learned counsel for the petitioner that both the children are being sent to a nursery school. The petitioner will ensure that they continue to attend the nursery school till they attain the age when they can be admitted to a regular school and that as and when they attain such age, they will be admitted to the regular school. We are also of the view that the best interests of the minor children require that they should not be altogether deprived of the paternal affection and company and, therefore, direct that the respondent will be provided access to the minor children by the petitioner at her parents house between 4 p.m. to 6 p.m. on every Saturday. The respondent will not, however, take the children out and will not by an act or omission on his part create any situation which has the direct or indirect effect of disturbing the sense of security and emotional balance of the children and the domestic harmony. These directions and observations are to be read as forming part of the order passed yesterday.

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FRANCIS JOSEPH S/O THOTTAPALLIL JOSEPH VERSUS SHOBHA FRANCIS JOSEPH

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION NO. 7483 of 2014

2014 SCC Online Guj 14853

Francis Joseph S/o Thottapallil Joseph....Petitioner(S)
Versus
Shobha Francis Joseph....Respondent(s)

Bench: Hon'ble Ms. Justice Harsha Devani
Date : 09/12/2014

Custody and visitation right denied to the father where he is short-tempered and abusive as well as morally weak and lacks righteous character and therefore, apart from the overall growth, welfare and development of the child, visiting him is not good for the psychological and emotional well-being of the minor child. In the light of the opinion given by the Psychologist, wherein he has opined that Diya should decide whether she would want to meet her father when he comes to meet her, this court is of the view that at present Diya appears to be very happy with her mother and having regard to the facts and circumstances of the case, the child need not be disturbed and pressurized to meet her father, when she is unwilling to do so.

Appearance:
VIRAL K SHAH, ADVOCATE for the Petitioner
MR INDRAVADAN PARMAR, ADVOCATE for the Respondent

ORAL ORDER

1. This petition under Article 227 of the Constitution of India is directed against the order dated 29.04.2014 passed by the learned Principal Judge, Family Court, Vadodara below Exhibit-1 in Civil Miscellaneous Application No.1 of 2014 whereby, the application filed by the petitioner herein for a direction to the respondent that during Summer, Diwali and Christmas vacations, Diya, the daughter of the petitioner and the respondent, may be permitted to be taken to Goa by the petitioner for 30 days in the summer vacation, 15 days in the Diwali vacation and 7 days in the Christmas vacation. The petitioner also prayed that during the Easter vacations, Diya may be permitted to be taken for a period of 5 days and the petitioner is ready and willing to give an undertaking that on completion of such period, Diya will be returned back to the respondent.

2. The facts stated briefly are that the petitioner and the respondent are husband and wife. The marriage of the petitioner and the respondent was solemnized on 02.05.2004 in Goa and out of the wedlock, a daughter named Diya was born on 18.08.2005, who is presently in the custody of the respondent – mother. The respondent herein filed an application being Miscellaneous Civil Application No.67 of 2011 in the Family Court, at Vadodara for obtaining custody of minor

daughter Diya and to declare her as guardian of minor Diya under section 7 of the Guardian and Wards Act, 1890. It appears that the proceedings travelled upto the Supreme Court and ultimately, the custody of minor Diya was handed over to the respondent on 14.05.2013 in the Family Court, Vadodara and since then, Diya is in the custody of the respondent. It is the case of the petitioner that neither this court nor the Supreme Court has passed any order to the effect that the petitioner cannot meet his minor daughter Diya; however, the respondent is constantly and illegally not permitting petitioner to meet his minor daughter. In the above backdrop, the petitioner filed an application before the Family Court, at Vadodara being Civil Miscellaneous Application No.1 of 2014 seeking the relief noted hereinabove. By the impugned order dated 29.04.2014, the said application has been disposed of as not maintainable and the petitioner has been directed to pay costs of Rs.10,000/- to the respondent. Being aggrieved, the petitioner has filed the present petition.

3. Mr. Viral Shah, learned advocate for the petitioner assailed the impugned order by submitting that the petitioner being the father and natural guardian of the minor child, has natural love and affection for the minor child and would like to see that his relationship with his daughter is maintained. That in the previous proceedings, neither this court nor the Supreme Court has held that the petitioner is not entitled to visitation rights or that the minor daughter should not be permitted to visit the petitioner on occasions. It was, accordingly, submitted that the impugned order passed by the Family Court is required to be quashed and set aside, and the application filed by the petitioner is required to be allowed by directing the respondent to permit the petitioner to take their daughter Diya to Goa during the summer, Diwali, Christmas and Eastern vacations, as prayed for. Alternatively, it was submitted that if the court is not inclined to direct the respondent to permit the petitioner to take his daughter Diya to Goa, the petitioner may be permitted to visit her at Vadodara, if need be, in the presence of any family member of the respondent, so that his relationship with his daughter is maintained.

4. On the other hand, Mr. Indravadan Parmar, learned advocate for the respondent has opposed the petition by submitting that the impugned order passed by the Family Court is just, legal and proper, and does not warrant interference by this court. It was submitted that apart from the fact that wild and unsubstantiated allegations have been made against the respondent and her family members by the petitioner, the petitioner is short-tempered and abusive as well as morally weak and lacks righteous character and therefore, apart from the overall growth, welfare and development of the child, visiting him is not good for the psychological and emotional well-being of the minor child. It was urged that if Diya is compelled or forced to stay with the petitioner, he will once again continue to tutor and tamper with her tender mind, and influence the minor's feeling. According to the learned counsel, the petitioner has no genuine interest or care and concern for the welfare and well-being of his minor daughter and is, therefore, not entitled to any of the reliefs as prayed for in the petition.

5. The record of the case reveals that on 06.06.2014, this court had passed an order in the following terms :

"By an order dated 3rd June 2014 this Court expressed the need for the minor daughter and her parents ie herein parties to be examined by child Psychiatrist/Psychologist. The matter was postponed to enable the parties to suggest the name of the doctor.

Today the petitioner has suggested the names of Dr. Khushnuma Banaji and Dr. Hansal Bhachech and the respondent has suggested the name of doctor Ronak Pandit Psychologist, Kashiba Children Hospital run by the Trust, Jalaram temple Road, Karelibaugh, Vadodara.

Learned counsel for the petitioner requested for the examination by one of the said two doctors at Ahmedabad, while the suggestion on the part of the respondent is that they may be examined by the aforementioned doctor at Baroda. The suggestion of the respondent appears to be reasonable in view of the fact that the respondent and her daughter aged 9 years are resident of Baroda and it will not be convenient to summon them all the way to Ahmedabad for the examination aforesaid.

Under the circumstances, the parties along with the minor will approach Dr. Ronak Pandit and seek her appointment, initially for examination of the minor and thereafter the parents in separate session or as may be desired by the doctor.

Learned counsel for the respondent upon instructions, states that the respondent has no professional relations with Dr. Ronak Pandit in any manner whatsoever. The queries for the doctor as separately framed shall be enclosed in a sealed cover and be dispatched to Dr. Ronak Pandit on the address mentioned in para 1 of the order by registry.

The cover shall be opened only by the doctor. After the examination of the child and parents, the doctor is requested to dispatch the report in a sealed cover to the registry of this High Court."

6. In compliance with the above order, Dr. Ronak Pandit, Psychologist, K. G. Patel Children Hospital, Medical Care Centre Trust, after meeting the petitioner, the respondent and Diya, has addressed a communication dated 5th August, 2014, to the Deputy Registrar of this High Court wherein he has recorded the following conclusions from his interaction with the above three individuals, specially, the petitioner and Diya:

   1. As per the interaction with Diya, by no means found that she has been physically or mentally ill-treated by her father (Mr. Francis) or any of his family members nor has she been sexually abused while her stay with her father Francis Joseph during the years 2011, 2012 and 2103.

   2. Furthermore when asked Diya very clearly stated that she does not want to go back to Goa as she is enjoying her with her mother Ms Shobha. She seemed quite happy and well adjusted. She gave these responses quite maturely and in her fill senses under no one's pressure.

   3. The behaviour of her mother is full of love and affection and Diya is very much happy with her.

   4. Diya did not have any ill-feelings for her father but she does not want to stay with him as she wants to stay with her mother as she missed her mother all these years.

   5. After talking to the father Mr. Francis Joseph, it was found that he seems to be quite concerned about Diya, when she was with him, he has taken care about her well-being, may it be her academics, leisure time activities, outings and picnics.

   6. Taking into consideration the emotional state of Mr. Francis Joseph, he should be allowed visiting rights in presence of any of the family members from the mother side.

7. Let Diya decide upon whether she would want to meet her father when he comes to meet her.

8. Personally, the child should not be deprived of love and affection from both the parents. As Diya may not realize now but after certain years, she may feel the lack of love and affection from the father.

7. In the light of the conclusions arrived at by the Psychologist in the above referred communication, this court had deemed it fit to call the minor child-Diya so as to ascertain as to whether she would want to meet her father when he comes to meet her. Accordingly, Diya was present before this court and the court had interacted with her in the chamber. It was found that Diya, who is about nine years of age, is a smart and intelligent child. She did not appear to be tutored and acted naturally. Upon reference being made to her mother, her face lit up and she was beaming. However, when her father's name was mentioned, the smile vanished and she seemed apprehensive. Upon asking her whether she would be willing to meet her father once in a while, if he comes to visit her, if need be, in the presence of her mother or some other family member, she was reluctant. The court tried to impress upon the child that she should meet her father as he was missing her and that it would be better for her if she kept in touch with him, she firmly stated that she would not like to meet her father.

8. In the light of the opinion given by the Psychologist, wherein he has opined that Diya should decide whether she would want to meet her father when he comes to meet her, this court is of the view that at present Diya appears to be very happy with her mother and having regard to the facts and circumstances of the case, the child need not be disturbed and pressurized to meet her father, when she is unwilling to do so.

9. For the reasons aforesaid, this court does not find any justification for interfering with the impugned order passed by the family court. The petition, therefore, fails and is, accordingly, dismissed. Notice is discharged with no order as to costs.

(HARSHA DEVANI, J.)

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AARTI RANA VERSUS GAURAV RANA AND OTHERS

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.
CMPMO No. 365 of 2015

AIR 2016 HP 11 J1

Aarti Rana. …Petitioner.
Versus
Gaurav Rana and others. …Respondents.

Decided on: 12.10.2015
Bench: Hon'ble Mr. Justice Rajiv Sharma

Hindu Minority and Guardianship Act, 1956 read with sections 25, 7, 8 and 10 of the Guardian and Wards Act, 1890 - since serious allegations have been made by the petitioner wife against respondent , father,of his being drug addict, the Court is of the considered view that the custody of the child should be with the mother.

Whether approved for reporting?[1]

Yes For the Petitioner : Mr. Anjali Soni Verma, Advocate.

For the Respondents : Mr. Sanjeev Bhushan, Sr. Advocate with Mr. Rajesh Kumar, Advocate.

This petition is instituted against the orders dated 18.8.2015 and 24.8.2015 rendered by the Civil Judge (Senior Division), Court No.2, Shimla in case No.6-2 of 2015.

2. "Key facts" necessary for the adjudication of this petition are that marriage between petitioner and respondent No.1 Gaurav Rana was solemnized on 29.1.2007. Two children were born. Son, namely, Yuvraj is approximately 7 years of age and daughter is approximately 5 years of age.

The relations between petitioner and respondent No.1 are strained. Petitioner has taken away the children to her parents' house. Children were admitted in Adarsh Senior Secondary School on 14.8.2015. They are pursuing their studies at Pragpur. Respondents filed a petition under section 6 of the Hindu Minority and Guardianship Act, 1956 read with sections 25, 7, 8 and 10 of the Guardian and Wards Act, 1890 for the custody of minor children before the learned Civil Judge (Senior Division). Application under section 12 of the Guardian and Wards Act, 1890 was also filed. Civil Judge (Senior Division) allowed the application on 18.8.2015 and directed the petitioner to produce the minor son Yuvraj before the court between 10.00 A.M. to 4.00 P.M. on 22.8.2015.

3. Petitioner filed an application under section 151 of the Code of Civil Procedure for recalling/ modification of order and also application for extension of time to produce the child before the trial court. She also filed an application under sections 9 (1) and 3 of the Guardian and Wards Act, 1890 for returning the petition to be presented before the appropriate court. Petitioner was permitted to file the reply and show cause notice was issued to the petitioner why contempt proceedings for deliberate disobedience of order dated 18.8.2015 be not initiated against her. Hence, the present petition.

1 Whether reporters of the local papers may be allowed to see the judgment?

4. Ms. Anjali Soni Verma has vehemently argued that orders dated 18.8.2015 and 24.8.2015 are not in accordance with law. She has also argued that while deciding the custody of child, paramount consideration is the welfare of the child.

5. Mr. Sanjeev Bhushan, learned Senior Advocate has supported the orders dated 18.8.2015 and 24.8.2015.

6. I have heard the learned counsel for the parties and have gone through the record carefully.

7. The marriage between petitioner and respondent No.1 was solemnized on 29.1.2007. Son Yuvraj is 7 years old. He needs constant care and protection by the mother. It has come on record that respondent No.1 is in habit of consuming liquor and taking drugs. He used to go for treatment in habitation centre Panthaghati. Congenial atmosphere is of utmost importance while up-bringing the children. Learned Civil Judge (Senior Division) while ordering the custody of the child to the respondents has opined that Yuvraj was studying in reputed St. Edwards' School, Shimla and annual examinations are to be held in the month of December. He has also opined that respondent No.1 is a businessman having sufficient means to take care of his son Yuvraj. It is reiterated that it is not affluence of the party which is to be taken into consideration, but the existence of congenial atmosphere is also required to be taken into consideration while deciding the custody of the children. In view of this, the court below has erred in law by directing the production of child in the court on 22.8.2015 and rejecting the application for modification of the order and issuing show cause notice to the petitioner for violation of order dated 18.8.2015. There is no inherent contradiction in the reliefs sought for by the petitioner while moving applications for extension of time as well as for compliance of the order.

8. Their Lordships of the Hon'ble Supreme Court in Rosy Jacob vs. Jacob A. Chakramakkal AIR 1973, SC 2090 have held that whether under one Act or the other the primary consideration governing the custody of the children is the welfare of the children and not the right of their parents. Their Lordships have held as under:

[13] 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 hi, person and the Court 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 8 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" leaves little doubt that it is the guardian who, having the care of the person of his ward, has been 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 uncle, the Divorce Act for relief with respect to the custody of these children and now that these 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 get 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 Sections 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 if they remain in her custody.

[16] 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 a 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 make 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 up in the legal profession.

[18] We accordingly allow the appeal with respect to the custody of the two younger children and setting aside the judgment of the Letters Patent Bench in this respect, restore that of the learned single Judge who, in our view, had correctly exercised his discretion under Section 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."

9. Learned Single Judge of Madras High Court in D. Rajaiah vs. Dhanapai and another, AIR 1986 Madras 99 have held that under the Hindu Minority and Guardianship Act, 1956 the welfare of the minor children is paramount consideration and the same cannot be measured in terms of money. Learned Single Judge has held as under:

"[3] Before, I approach the question on facts, I would like to delineate and keep in mind the provisions of law, which should form guidelines in matters like this. The two minor children being Hindu Girls, with regard to natural guardianship as such the provisions of Hindu Minority and Guardianship Act, 1956 (No. 32 of 1956), hereinafter if occasion comes, referred to as Act 32 of 1956, shall first speak. Section 6 of Act 32 of 1956 says that in the case of an unmarried Hindu minor girl, the father and after him, the mother shall be the natural guardian. The mother had gone out of the picture by her demise. The father as such does not suffer any disqualification set forth in the proviso to S. 6 of Act 32 of 1956.

Section 13 of Act 32 of 1956 reads as follows:

13(1) "In the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor."

Section 2 of Act 32 of 1956 says that the provisions of the Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890 (8 of 1890), hereinafter referred to as Act 8 of 1890. Section 17 of Act 8 of 1890, reads as follows:

" 17. Matters to be considered by the Court in appointing guardian. (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and- capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) Omitted by Act III of 1951.

(5) The court shall not appoint or declare any person to be a guardian against his will."

The rule of Hindu law is that no one other than the father and failing him the mother has an absolute right to have the guardianship, over and custody of an unmarried Hindu minor girl. The Hindu Law recognises primarily the father as the legal guardian and custodian of his unmarried minor daughter when he is alive.

Failing the father only the mother comes into the picture and she could assume such guardianship and custody only in such a contingency. But an unmarried Hindu minor girl if she has not completed the age of 5 years shall ordinarily be in the custody of the mother. As stated above, the mother is not in the picture at all. Furthermore, the minors have passed the age of 5. The first minor has completed the age of 12 and is running the 13th year and the second minor has completed the age of 11 and is running the 12th year. Section 6 of Act 32 of 1956 does not make any substantial alteration in the law on the subject and gives legislative sanction to the principle well established already. As such, the father could legitimately claim the right to

have the guardianship over and custody of his unmarried minor girls. In this context, S. 19 of Act 8 of 1890 can also be adverted to, when it countenances, that if the father of the minor is alive, no other guardian can be appointed, unless, in the opinion of the Court, the father is not fit for appointment, The father as natural guardian is primarily entitled to the custody of his minor children unless there are overwhelming circumstances to the contrary. It is true that there is an appreciable difference between custody and guardianship, for guardianship is a more comprehensive and a more valuable right than mere custody. The sole consideration both in the case of guardianship and custody of the minor should be the welfare of the minor. The Court is bound to take into consideration all the facts and circumstances of the case, bearing in mind that the pivotal factor is the benefit and well being of the minor. That the dominant factor for consideration of the Court is the welfare of the child, has found statutory footing both in S. 17(l) of Act 8 of 1890 and S. 13 of Act 32 of 1956, Both the provisions emphasize that the powers of the Court are to be exercised for the welfare of the minor, which should be the paramount consideration. The' rule of Hindu law recognising the father to be the guardian and custodian of his unmarried minor daughters, the maternal grandfather cannot straightway insist that he should be declared or appointed as the guardian and custodian of such minors. The father being primarily entitled to the guardianship over and custody of his unmarried minor daughters, it is for the maternal grandfather, who wants to maintain a contrary position, to demonstrate that there are peculiar and strong circumstances which warrant deprivation of such a parental right of, the father. The father can be deprived of such rights only if the facts and circumstances of the case warrant it. Keeping in mind the above salient principles of law, this Court has to examine the facts of the case to find out as to whether' strong and convincing circumstances have been made out against the father to take away from him the guardianship and the custody annexed to it of his unmarried minor daughters or to deny him the custody of his unmarried minor daughters, maintaining guardianship with him. I am visualising the latter contingency because in the course of arguments advanced on behalf of the maternal grandfather, it was stated that though the guardianship of the father need not be disturbance yet the custody of the two minor children should be permitted to be with the maternal grandfather.

[7] Learned counsel for the maternal grandfather would urge that the fact that the two minor children have remained in the maternal grandparents house from May, 1982 should not be lost sight of and if at this juncture they are to be snatched away from that atmosphere, which would be against their will, it will bring about a trauma in their mind and will not behave well for the interests of the minors. It is true that the paramount consideration that should weigh with the Court is the welfare of the minor children. From the bare fact, for two years and more in the past the two minor children happened to be in the custody of the maternal grandparents, it is not possible to say that such a custody should be continued in preference to the legitimate claims of the father, on the ground of paramount interests of the two minor children. The financial affluence of the maternal grandparents should not be the sole criterion. It is not claimed that the father is a man of no means and he could not maintain and bring up his two minor children comfortably and according to his status. On the other hand, as adverted to earlier, the evidence of the maternal grandfather examined as P.W.1 points out a different position; and makes out that the father will cater to all the comforts of his minor children and bring thin up as good as the maternal grandparents. The coming over of the mother of the two minors for treatment at Madurai, her demise at Madurai and the children coming along with her earlier to that and staying with the maternal grandparents could only be treated as temporary phases, and they

cannot govern as paramount factors with regard to the welfare of the minors. After all, they are the children of the father and when the Court has found that the father has not suffered any disqualification from being a guardian and custodian of his two minor children and nothing has been brought to the notice of the Court that it will not be desirable to leave the guardianship and custody of the two inaner children with the father, the situation that the maternal grandparents would look after the children in a more better and affluent circurnstances is not a relevant factor that should weigh with the Court to deny the legitimate parental right of the father to the guardianship and custody over his two minor children. A proposition that wherever affluence and luxury are prevailing that should be the proper atmosphere for minor children to be brought up, denying the legitimate rights of the parents and lawful guardians, would be a dangerous one. Primarily, the children should be in the custody of their parents, who are their lawful guardians.

They cannot expect a status and upbringing de hors the status of the parents while they are being brought up by them. No one else could be allowed to snatch away the children from the parental household on the ground that they could afford luxury and affluence to the children. The welfare of the minor children is not to be measured only in terms of money and physical comforts. The word "welfare7' must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well-being. The two minor children are girls. Shortly they will come up age and they will have to be married. In our Indian society and in particular Hindu society any body seeking matrimonial alliance will certain give due importance to the girls living with the parent and a situation, where a girl is living away from her parent will be looked at askance, and may draw assertive remarks too."

10. Learned Single Judge of Delhi High Court in Smt. Narinder Kaur vs. Parshotam Singh, AIR 1988 Delhi 359 has held that merely mother is not having any income of her own is no ground to deprive her of the custody of the minor child. Learned Single Judge has further held that court has power to modify order if circumstances so demand during pendency of proceedings. Learned Single Judge has held as under:

"[5] The father also made allegation against the mother that she was of unsound mind. These allegations were also made before Mrs. Kanwal Inder, the then Guardian Judge. She observed in her order that the mother had been appearing before her and making submissions and that there was nothing in her conduct from which it could be inferred that the mother was suffering from any mental disorder disentitling her to the custody of her own child. During the pendency of this appeal on an application (CM 4365/86) Leila Seth, J. in her order dated 26.5.87 also observed that the mother had been attending the proceedings in Court and appeared to be well behaved. Before me also the mother had been appearing on various dates and she appeared to be quite normal. Merely that mother is not having any income of her own is no ground to deprive her of the custody of the minor child. No amount of wealth is substitute for the love, affection and care which a mother can bestow on her infant child. Further merely because the parents of the mother are not affluent people is again no ground to deprive the mother of the custody of the child. If the mother is not having an independent income for her maintenance and that of the child father can certainly be asked to give that maintenance but he cannot use this as a handle to deprive the mother of the custody of the child. I cannot believe the father when he says that the mother did not breast feed the child. It just appears to be his imagination.

[7] It was contended by Ms. Santosh Kaira learned counsel for the appellant that the learned Guardian Judge had no jurisdiction to review his order and also that even assuming if he had

such jurisdiction the case did not fall with any of the clauses under Rule I of Order 47 of the Code of Civil Procedure. She said that her application for grant of interim custody of the child was under Section 151 of the Code. Section 12 of the Act provides that a court may make such order for the temporary custody and protection of a minor as it thinks proper. It is immaterial if the application is labelled under Section 151 of the Code. If the court has power under Section 12 of the Act for grant of temporary custody during the pendency of the proceedings it will have jurisdiction as well to modify that order if the circumstances so demand during the pendency of the proceedings. The Court must be deemed to possess such powers by necessary intendment and it cannot, therefore, be said that the order for interim custody of the child cannot be modified or varied though perhaps the review may not be the proper word but effect remains the same. Then Mr. Mitra learned counsel for the father said that if that be so no appeal could be filed against an order made under Section 12 of the Act. In this connection be referred to Section 47 of the Act. An order under Section 12 is not one of the orders against which an appeal would lie. This submission appears to be correct but then it is a fit case to exercise iurisdiction under Article 227 of the Constitution of India which I do."

11. Leaned Single Judge of Calcutta High Court in Sajjan Sharma vs. Dindayal Sharma, AIR 2008 Calcutta 224 has held that paramount welfare of child is the only criterion which should be considered while deciding application, irrespective of the applicant and his relation with the child. Learned Single Judge has further held that environment and surroundings conducive for child to grow and become a good human being should be guiding factor for deciding application under section 12 of the Guardians and Wards Act, 1890.

12. Their Lordships of the Hon'ble Supreme Court in Gaurav Nagpal vs. Sumedha Nagpal, (2009) 1 SCC 42 have held that paramount consideration of the court in determining the question as to who should be given custody of a minor child, is the welfare of the child and not the rights of the parents. Their Lordships have further held that there should be proper balance between rights of the respective parents and the welfare of the child. Their Lordships have held as under:

29. In Halsbury's Laws of England, Fourth Edition, Vol. page 217 it has been stated;

"Where in any proceedings before any Court the custody or upbringing of a minor is in question, then, in deciding that question, the Court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father." (emphasis supplied)

It has also been stated that if the minor is of any age to exercise a choice, the Court will take his wishes into consideration. (para 534; page 229).

[30] Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ-Court is 'welfare of the child'.

[43] The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of the child' and not rights of the parents under a statute for the time being in force.

[46] In Rosy Jacob Vs. Jacob A. Chakramakkal, 1973 (1) S.C.C. 840, this Court held that object and purpose of 1890 Act is not merely physical custody of the minor but due protection of the

rights of ward's health, maintenance and education. The power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

[47] Again, in Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka, 1982 (2) S.C.C. 544, this Court reiterated that the only consideration of the Court in deciding the question of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the Court. Mature thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.

[50] When the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others."

13. Their Lordships of the Hon'ble Supreme Court in Athar Hussain vs. Syed Siraj Ahmed and others, (2010) 2 SCC 654 have held that in matters of custody the welfare of the children is the sole and single yardstick by which the court shall assess the comparative merit of the parties contesting for the custody. Their Lordships have further held that while deciding the question of interim custody, the court must be guided by the welfare of the children since section 12 of the Guardians and Wards Act, 1890 empowers the court to make any order as it deems proper. Their Lordships have held as under:

30. Reasons are as follows: Section 12 of the Act empowers courts to "make such order for the temporary custody and protection of the person or property of the minor as it thinks proper." In matters of custody, as well settled by judicial precedents, welfare of the children is the sole and single yardstick by which the Court shall assess the comparative merit of the parties contesting for custody. Therefore, while deciding the question of interim custody, we must be guided by the welfare of the children since Section 12 empowers the Court to make any order as it deems proper.

[36] Keeping in mind the paramount consideration of welfare of the children, we are not inclined to disturb their custody which currently rests with their maternal relatives as the scope of this order is limited to determining with which of the contesting parties the minors should stay till the disposal of the application for guardianship.

[37] The appellant placed reliance on the case of R.V. Srinath Prasad v. Nandamuri Jayakrishna, 2001 AIR(SC) 1056. This Court had observed in this decision that custody orders by their nature can never be final; however, before a change is made it must be proved to be in the paramount interest of the children. In that decision, while granting interim custody to the father as against the maternal grandparents, this Court held:

"The Division Bench appears to have lost sight of the factual position that the time of death of their mother the children were left in custody of their paternal grand parents with whom

their father is staying and the attempt of the respondent no.1 was to alter that position before the application filed by them is considered by the Family Court. For this purpose it was very relevant to consider whether leaving the minor children in custody of their father till the Family Court decides the matter would be so detrimental to the interest of the minors that their custody should be changed forthwith. The observations that the father is facing a criminal case, that he mostly resides in USA and that it is alleged that he is having an affair with another lady are, in our view, not sufficient to come to the conclusion that custody of the minors should be changed immediately."

What is important for us to note from these observations is that the Court shall determine whether, in proceedings relating to interim custody, there are sufficient and compelling reasons to persuade the Court to change the custody of the minor children with immediate effect.

[38] Stability and consistency in the affairs and routines of children is also an important consideration as was held by this Court in another decision cited by the learned counsel for the appellant in the case of Mausami Moitra Ganguli v. Jayant Ganguli, 2008 AIR(SC) 2262. This Court held:

"We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression on him."

[39] After taking note of the marked reluctance on part of the boy to live with his mother, the Court further observed:

"Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained."

14. Their Lordships of the Hon'ble Supreme Court in Mohan Kumar Rayana vs. Komal Mohan Rayana, (2010) 5 SCC 657 have held that welfare of the minor is paramount consideration. Their Lordships have further held that though petitioner father was fond of the child and concerned about her welfare and future, but in view of his business commitments not right or even practicable to disturb status quo regarding the child's custody.

15. In the instant case children are with the mother and it would not be proper to disturb the company and surroundings of the children.

16. Their Lordships of the Hon'ble Supreme Court in Ruchi Majoo vs. Sanjeev Majoo, (2011) 6 SCC 479 have laid down the tests for determining jurisdiction under section 9 of the Guardians and Wards Act, 1890 as under:

[24] It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the 'ordinary residence' of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy.

17. Their Lordships of the Hon'ble Supreme Court in Gaytri Bajaj vs. Jiten Bhalla, (2012) 12 SCC 471 have held that the interest and welfare of the minor should be treated as being of paramount consideration. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. Their Lordships have held as under:

[14] It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the 'ordinary residence' of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy.

18. Their Lordships of the Hon'ble Supreme Court in Gaytri Bajaj vs. Jiten Bhalla, (2012) 12 SCC 478 have held as under:

[6] In the aforesaid facts and circumstances, we feel that if the children are forcibly taken away from the father and handed over to the mother, undoubtedly, it will affect their mental condition and it will not be desirable in the interest of their betterment and studies. In such a situation, the better course would be that the mother should first be allowed to make initial contact with the children, build up relationship with them and gradually restore her position as their mother.

[8] In the relevant facts and circumstances of the case, we are convinced that the interest and welfare of the children will be best served if they continue to be in the custody of the father. In our opinion, at present, it is not desirable to disturb the custody with the father. However, we feel that ends of justice would be met by providing visitation rights to the mother. In fact, during the hearing on 12.12.2011, Ms. Indu Malhotra, learned senior counsel for the petitioner-wife represented that if such visitation rights, namely, visiting her children once in a fortnight is ordered that would satisfy the petitioner-wife. Learned senior counsel also represented that if the said method materializes, the petitioner-wife is willing to withdraw all civil and criminal cases filed against the respondent-husband which are pending in various courts.

19. In the present case since serious allegations have been made by the petitioner against respondent N.1 of his being drug addict, the Court is of the considered view that the custody of the child should be with the mother.

20. Accordingly, in view of the analysis and discussion made hereinabove, the petition is allowed. Orders dated 18.8.2015 and 24.8.2015 are set aside. Learned Civil Judge (Senior Division) is directed to conclude the proceedings within six months from today. The parties through their counsel are directed to appear before the trial court on 26.10.2015. Pending application(s), if any, also stands disposed of. No costs.

(Justice Rajiv Sharma),
Judge.

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GIRISH CHANDRA TIWARI VERSUS STATE OF UTTARAKHAND & ORS.

UTTARAKHAND HIGH COURT

2011 (2) UAD 76

2010 Supreme(UK) 751; 2011 2 UAD 76;
Bench: Hon'ble Mr. Justice Tarun Agarwala
Habeas Corpus Petition No. 27 of 2010
Decided on : 25.11.2010

Girish Chandra Tiwari– Petitioner
Vs.
State of Uttarakhand & Ors.– Respondents

Custody of child- Constitution of India — Writ in the nature of habeas corpus by father of the child for production of child from custody of its mother and parties

directed along with the child aged four years to appear before Conciliation Centre for an amicable settlement -no amicable settlement- Wife refusing to go back to husband's - Mother having a preferential right to keep the child in her custody — Writ petition dismissed having been found to be patently misconceived.

भारत का संविधान - पिता द्वारा बच्चे को उसकी माता के अभिरक्षण से न्यायालय में पेश करने हेतु प्रत्यक्षीकरण रिट याचिका - बच्चे को न्यायालय में पेश करने पर पक्षकारों को बच्चे सहित सौहार्दपूर्ण समझौते के लिए कनसीलियेशन सैन्टर (सुलह केन्द्र) के समक्ष पेश होने के निर्देश पर उसके समक्ष पेश होने पर कोई सौहार्दपूर्ण समझौता होना असंभव पाया गया - पत्नी द्वारा पति के साथ जाने से इन्कार करने पर 4 वर्ष की आयु के बच्चे की अभिरक्षा के लिये उसकी माता अधिमानी अधिकारी होने के कारण बच्चे को माता की अभिरक्षा में रहना उचित पाया जाकर रिट याचिका निरस्त की गई। (प्रस्तर 5, 6, 7)

CONSTITUTION OF INDIA :

JUDGMENT

Hon'ble Tarun Agarwala, J.

Heard Smt. Pushpa Joshi, Advocate for the petitioner, Sri G.S. Sandhu, Government Advocate for respondent nos. 1 to 3, Sri Z.U. Siddiquie, Advocate for respondent no. 4 and Sri Sudhir Kumar Chaudhary, Advocate for respondent no. 5.

2. A writ in the nature of habeas corpus has been filed by the father Girish Chandra Tiwari for the production of a minor child Km. Ishika, aged about four years, from the custody of respondent no. 5, his wife Smt. Monika Tiwari.

3. The brief facts as alleged in the petition is that, respondent no. 5 has eloped with respondent no. 4 and is living with this person and has also taken his minor daughter, and consequently, the present writ petition has been filed.

4. Notices were issued to respondent nos. 4 and 5. Respondent no. 5 appeared before the court yesterday along with her daughter and submitted that she has left the home of her husband because of cruelty being inflicted upon her by her husband. The Court adjourned the matter at the instance of the learned counsel for the petitioner to enable the petitioner to also appear before the Court, and accordingly, the matter was posted for today.

5. In the morning, when the case was taken up, the court directed the petitioner, the respondent no. 5 and the daughter to appear before the Conciliation Centre for an amicable settlement. The Conciliation Centre has submitted a report that considering the conduct of the parties, it is not possible to achieve any kind of an amicable settlement. The Conciliation Centre in its report has recorded that respondent no. 5 has filed a suit for divorce before the Family Court at Agra and has also filed another case in a court at Haldwani. On the other hand, the petitioner has also filed an application before the Family Court, Nainital for the custody of the child, which is pending consideration.

6. This Court had asked the respondent no. 5 as to whether she is willing to go back to her husband's home, and she has flatly refused to go back alleging cruelty being inflicted upon her by the petitioner.

7. In the light of the aforesaid, the Court finds that the child, namely, the daughter Km. Ishika was produced by the mother, and that the petitioner also met the child at the Conciliation Centre today. Since respondent no. 5 refuses to go back to her husband's home and contends that she is living independently coupled with the fact that the child is a minor, and consequently, at this stage, the mother has a preferential right to keep the child in her custody. This Court is of the opinion that the writ petition filed at the behest of the petitioner alleging wrongful detention of his daughter by the respondent no. 5, is patently misconceived.

8. Accordingly, the writ petition fails and is dismissed summarily.

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RAJAN JAIRATH V. MRS. MONITA MEHTA

IN THE HIGH COURT OF PUNJAB AND HARYANA

Civil Revision No. 2192 of 2011 (O&M)

2013 1 RCR(Civ) 546; 2012 Supreme(P&H) 1432;
Bench: Hon'ble Mr. Justice A.N. Jindal
{Decided on 05/11/2012}

Rajan Jairath
v.
Mrs. Monita Mehta

Hindu Marriage Act, 1955, S.26--Interim Custody of Child-- Court has also to take care of the wish of the minors. Both parents claiming custody of children--Minors and living with their mother at Chandigarh where as father being Senior Manager in PSU is living at Faridabad--Father would not be in a position to spare enough time to look after the education, health, study and maintenance-- The children being matured enough, had made statements before the Lok Adalat that they are not ready to go with their father. as due to long separation they have lost interest in father-- Custody given to mother and visiting rights to father.

JUDGMENT

Mr. A.N. Jindal, J. (Oral) - This order shall dispose of Civil Revision Nos.2192 of 2011 and 457 of 2012, as common questions of law and facts are involved in both the cases. For reference, facts are taken from Civil Revision No.2192 of 2011.

2. The Civil Judge (Senior Division), Chandigarh, vide order dated 19.01.2011, while deciding the application under Section 26 of the Hindu Marriage Act, 1955 (for brevity 'the Act'), for interim custody of his minor children namely Abhimaniyu Jairath and Sakshi Jairath, partly allowed the same and instead of interim custody, the visitation rights were granted to the petitioner and the petitoner was allowed to meet his children in a month i.e. on every second Saturday of the month for two hours i.e. from 2.00 P.M. to 4.00 P.M. in the Court room itself. The respondent-Monita was also directed to produce the children in the Court for the purpose of meeting on every second Saturday of the month at 2.00 P.M., during the pendency of the case. It was further made clear that if any second Saturday happens to be holiday, then the petitioner would be entitled to meet the children on the next working day of the Court. In fact, the trial Court had allowed the visitation rights to the petitioner to see both the children and not one child.

3. Feeling dissatisfied, the petitioner has filed Civil Revision No.2192 of 2011 for modification of the impugned order by praying that the visitation rights be liberalised by way of allowing the children to stay at his house at Chandigarh and he be permitted to take them to the trips and the interim custody of the minor children be granted to him.

4. Similarly, Monita Mehta-respondent (mother of the minors) has challenged the impugned order by filing Civil Revision No.457 of 2012 for quashing the order. She has stated that the children are

in her custody and the petitioner has not complied with the directions, issued by the guardian Court. It was further submitted that the minor children are neither ready to meet the petitioner nor the petitioner is ready to meet them, therefore, the impugned order should be quashed.

5. After hearing learned counsel for the parties, this Court does not find any merit in the arguments, as advanced by learned counsel for the petitioner. It is not in dispute that Rajan Jairath-petitioner is the father of minor children i.e. Abhimaniyu Jairath and Sakshi Jairath. Said Sakshi Jairath was born on 26.06.2002, whereas Abhumaniyu Jairath was born on 02.04.1997.

The application under Section 9 of the Act is still under adjudication. The minors are living with their mother Monita Mehta at Chandigarh, whereas, petitioner-Rajan Jairath is residing in Flat No.302, Group Housing Society No.8, Sector 21-D, Faridabad. He being a Senior Manager in Central Government Public Sector Undertaking (NHPC Limited) at Faridabad, in all human probabilities, would not be in a position to spare enough time to look after the education, health, study and maintenance. The minors are in the care and custody of their mother and receiving maintenance under Section 125 Cr.P.C., from the petitioner. Both the children are school going and it is very difficult to dislocate them from the place like Chandigarh, where the education facilities are comparatively better than Faridabad, and send them to the place of the petitioner, where none is there to look after them at his back.

6. It may further be observed that the conduct of the petitioner, even after the visitation rights were extended to him, is highlighted from the order dated 02.01.2012 passed by the trial Court on the second application filed by Rajan Jairath-petitioner for extending visitation rights to him. In the said application, he prayed that both the children be allowed to stay with him at his parental house at Chandigarh and also to accompany him during Christmas holidays to Shimla. The said application was taken up in the Lok Adalat, held on 24.12.2011, where the respondent had come present with the children. Both the children refused to go to the place of the petitioner during winter vacations and had stated so, categorically, in the Lok Adalat. These facts reveal that the petitioner had not complied with the directions of the trial Court, which were issued vide order dated 19.01.2011, rather he has started setting terms with the Court. Secondly, due to the long separation from their father-petitioner, they have lost interest in him and the Court has also to take care of the wish of the minors. However, the reunion could be made only, if the married couple settles with each other, which appears to be not possible at this stage. The children being matured enough, had made statements before the Lok Adalat that they are not ready to stay with their father.

7. In these circumstances, it would not be appropriate to entertain any doubt over the legality of the order and also the applications filed by the petitioner for interim custody of the minors time and again, rather he should focus and consider over rehabilitation of the respondent in his house, so that he may have the love and affection of his wife as well as the minors. However, still, in order to safeguard the visitation rights, the petitioner, if so likes, may request the trial Court to call for the children in terms of the order dated 19.01.2011 to have conversation with them. I also have no reasons to differ with visitation rights given by the guardian Court to the petitioner.

8. Consequently, both the petitions are hereby dismissed.

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RAJESHBHAI GOVINDBHAI PUTANWADIA VERSUS ANITABEN RAJESHBHAI PATANWADIA

HIGH COURT OF GUJARAT

Criminal Revision Application No. 650 of 2008

2009 2 GLH 19; 2009 0 Supreme(Guj) 149;
Bench: Hon'ble Mr. Justice H. K. Rathod
Decided On : MARCH 19, 2009

Rajeshbhai Govindbhai Putanwadia
Vs.
Anitaben Rajeshbhai Patanwadia

CRIMINAL PROCEDURE CODE : S.97 issuance of search warrant

Section 97, Cr. P. C. prima facie is not attracted to the facts and circumstances of the case when the child was living with his own father. power exercised u/s 97 of Cr. P. C. to have custody by mother in light of such warrant is totally without jurisdiction. The purely Civil dispute converted in Criminal proceeding while cut short it and obtain order from Court. Such practice adopted by respondent is not legally proper way to have custody of minor children from father. This being Civil dispute must have to be filed before Civil court having jurisdiction and Civil Court can consider it whether custody of minor child may be given to father or mother? this cut short method adopted by respondent is deprecated.

JUDGMENT

H. K. RATHOD, J.

(1) HEARD learned advocate Mr. AR lakhia on behalf of petitioner, learned advocate Mr. D. M. Shah appearing for respondent and learned APP Mr. HM Jani appearing for State.

(2) IN this petition, respondent Anitaben rajeshbhai Palanwadia filed application u/ s 97 of Cr. P. C. obtained search warrant to have custody of minor Anurag aged 4 years and Rahul aged two years from husband. The application is filed on 15/2/2008 before magistrate Court, Baroda.

The Magistrate court has registered Criminal application no. 187/2008 and after considering provision of Section 97 and facts which are pointed out by respondents to Magistrate court that husband has deserted the wife and both minor children are with husband. The wife opponent on 14/2/2008 went to house of husband and request for custody of children but that was rejected.

Therefore, application is filed before Magistrate. The say of respondent is that both minor children are in custody of husband and against their will both are illegally detained by husband in his house. The Magistrate court has considered application and understand real purpose to file such kind of application to have any search warrant u/s 97 of Cr. P. C. The Magistrate Court has rightly come to conclusion that who is required custody of minor children is to be decided by Civil Court and Magistrate court has no power to examine such issue. The Magistrate Court

has also considered that whether mother or father who is entitled for custody of child is to be considered while keeping in mind welfare of such child otherwise individual may having right to have custody of children. Therefore, application is rejected by magistrate Court, Baroda on 19/2/2008 against which Revision application is filed u/s 397 of Cr. P. C. no. 75/2008.

(3) THE Additional Session Judge, baroda has allowed Revision application setting aside order passed by Magistrate court and warrant u/s 97 has been issued by additional Session Judge. The Additional session Judge has given direction to issue search warrant as proposed by applicant and to proceed further with matter in accordance with law.

(4) LEARNED advocate Mr. Lakhia appearing on behalf of petitioner submitted that Revisional Court has committed gross error in issuing warrant u/s 97 with further direction to proceed further with matter in accordance with law. He submitted that under section 97 power can not be exercised by Magistrate Court for giving custody either to mother or father ? The both children are minor and none of said that they illegally detained and there is no such purpose for father to detain both minor children illegally. The wife left house of husband asked for custody from husband which was refused i. e. now this being reaction of mother to file such proceeding before Magistrate Court. Therefore, he submitted that Revisional Court has committed gross error which require interference by this Court.

(5) LEARNED advocate Mr. Shah supported order passed by Revisional Court and submitted that father illegally detained custody of both minor children and deserted mother at the time of demanding custody of children from father, on 14/2/2008 request made by mother has been rejected and no custody is given by father. Therefore, application was preferred before Magistrate court. Therefore, he submitted that revisional Court has rightly exercised power and in response to issue search warrant now respondent is able to get custody of minor children. For that, according to him, Revisional Court has not committed any error which would require interference by this Court.

(6) I have considered submissions made by both learned advocates and I have also perused order passed by Magistrate Court as well as Revisional Court. The Revisional court has committed gross error in coming to conclusion that when husband and wife are disputing about custody of children and when they are minor. Court has to take extreme care in determining dispute, but revisional Court has committed error to extent that without considering whether court has jurisdiction or not? Deciding issue. The Revisional Court has further committed error that welfare of minor children would he safe in custody of mother, therefore. Court should take care that preferably mother should be allowed to retained custody. The said observations are also contrary to law because at the time of considering question of custody of minor children. Court has to consider legal right of father and mother and important aspect is to welfare of child is to be considered at the time of such issue is to be examined by court.

(7) THEREFORE, according lo my opinion. Revisional Court has committed gross error in allowing Revision application while setting aside order passed by Magistrate court and power has been exercised u/s 97 of Cr. P. C. to have custody by mother in light of such warrant is totally without jurisdiction. The purely Civil dispute converted in Criminal proceeding while cut short it and obtain order from Court. Such practice has been adopted by respondent may be based on some advice but legally that is not proper way to have custody of minor children from father. This being Civil dispute must have to be filed before Civil court having jurisdiction and Civil Court

can consider it whether custody of minor child may be given to father or mother? this cut short method adopted by respondent is deprecated.

(8) THE Section 97 of Cr. P. C. suggests as under: "search for persons worngfully confined: if any District Magistrate sub-divisional Magistrate or Magistrate of the first class has reason lo believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue, a search warrant, and the person to whom such warrant is directed may search for the person so confined, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

(9) IN case of Gaurav Nagpal v. Sumedha Nagpal reported in 2009 (1) SCC 42, Apex Court held that - Hindu Minority and Guardian ship Act, 1956 - Sec 13 and 6- thus in case of custody of minor children welfare of child is paramount consideration while determining issue relating to child custody and visitation right of either lather or mother. " the relevant observations made by apex Court is as under:

"the principles in relation lo the custody of a minor child are well settled. The paramount consideration of the court in determining the question as to who should be given custody of a minor child, is the "welfare of the child" and not rights of the present under a statute for the lime being in force or what that parlies 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 have also to be noted. They are equal if not more important than the others. Mature thinking is indeed necessary in such a situation, when the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis. In such matters, human angles are also relevant for deciding the issues. The object and purpose of the 1890 Act is not merely physical custody of the minor but due to protection of the rights of ward's health, maintenance and education. The power and duty of the court under the Act is the welfare of minor.;"

(See: Ramesh v - Smt. Laxmi Bai reported in 1999 Cri. L. J. 5023 para 4 from a perusal of the impugned order of the high Court, it appears to us that though the points which should weigh with a court while determining the question of grant of custody of a minor child have been correctly detailed, the opinion of the High court that the revisional Court could have passed an order of custody in a petition seeking search warrants under section 97, cr. P. C. in the established facts of the case is untenable. Section 97, Cr. P. C. prima facie is not attracted to the facts and circumstances of the case when the child was living his own father. Under the circumstances, we are of the opinion that the orders of the High Court dated 17' July, 1996 and that of the learned Additional sessions Judge dated 91" July, 1996 cannot he sustained and we accordingly set aside the orders of the directions given therein."

(10) IN light of this observations order passed by Re visional Court Additional session Judge in Cr. R. A. 75/2008 dated 18/9/2008 is hereby quash and set aside and rule is made absolute to that extent. (RRP) (Rule made absolute)

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YOGESH KUMAR GUPTA VERSUS M.K. AGARWAL & ANR.

UTTARAKHAND HIGH COURT

2009 (1) UAD 276

2009 AIR(Uchal) 30; 2009 4 RCR(Civ) 653; 2008 Supreme(UK) 453; 2009 1 UAD 276; 2009 1 UC 210; 2008 2 UD 432;

Bench: Hon'ble Mr. Justice Prafulla C. Pant and Hon'ble Mr. Justice B.S. Verma

First Appeal No. 43 of 2003

Decided on : 16.10.2008

Yogesh Kumar Gupta– Appellant

Vs.

M.k. Agarwal & Anr.– Respondents

Guardians and Wards Act, 1890, Sec. 7 — Appointment of guardian, custody of the children --- interest and welfare of the children is the paramount consideration while giving custody of a child or appointing a person as guardian — Held that the circumstances of the case disentitled the father of the children for their custody — the mother of the children had died, father, who had to face trial relating to offences u/s 498A and 304B I.P.C. — Though, acquitted of the charge, the custody need not necessarily be given to him merely for that reason,— Considering the paramount interest of the children and their willingness, it would be just and proper to allow the custody of the children to their maternal grand parents .

गार्जियन एण्ड वार्ड एक्ट, 1890, धारा-7 के तहत नियुक्ति - यह विधि का स्थापित सिद्धान्त है कि बच्चों की अभिरक्षा के लिए जो महत्वपूर्ण है वह उनकी भलाई और उनके अधिकार हैं - जब भी बच्चे की अभिरक्षा दी जाए अथवा अभिभावक के रूप में किसी व्यक्ति की नियुक्ति की जाए तो उनका हित और अधिकार सबसे महत्वपूर्ण व परम विचारणीय है - निर्णय में कहा गया कि केस की परिस्थितियों ने पिता को अपने बच्चों की अभिरक्षा के लिए हकदार नहीं माना - इस कारण से कि बच्चों की माँ का स्वर्गवास हो चुका था जब वे पिता के पास थे जिसे धारा.498.। और 304.B आ पी सी के अन्तर्गत मुकदमें में सुनवाई के लिए भी जाना पड़ता था - यद्यपि वह आरोप से बरी हो चुका था परन्तु केवल इसी कारण से बच्चों की अभिरक्षा उसको दिये जाने की जरूरत नहीं थी - बच्चों के परम हित को ध्यान में रखकर और उनकी इच्छा के अनुसार यह उचित और कानूनी रूप से सही होगा कि बच्चों की अभिरक्षा उनके नाना के हक में स्वीकार की जाए - अतः नाना की दरख्वास्त तदनुसार स्वीकत की गई जबकि पिता का प्रार्थना पत्र निरस्त किया गया। (प्रस्तर 5, 9)

Case referred :

1. Nil Ratan Kundu vs. Abhijit Kundu 2008 AIR SCW 5769.

GUARDIANS AND WARDS ACT : S.7

JUDGMENT

[Per : Hon'ble Prafulla C. Pant, J. (Oral)]

This appeal, preferred under Section 19 of Family Courts Act, 1984, is directed against the judgment and order dated 16.09.2003, passed by Principal Judge, Family Court, Dehradun, in Guardians

and Wards cases No. 5 of 2002 and 8 of 2002, filed by the present appellant and respondent no. 1 respectively, whereby the respondent's petition for custody of his children is allowed and the petition of the maternal grand father of the children has been dismissed.

2. Brief facts of the case are that respondent M.K. Agarwal, got married to Neerja Agarwal (since deceased) on 22.11.1991. out of the wedlock, two children namely Anirudh (son) and Saumya (daughter) were born on 05.09.1992 and 05.04.1995 respectively. On 23.08.1998, Neerja Agarwal died. On the complaint of her parents, a crime No. 575 of 1998, was registered relating to offences punishable under Sections 498A/304B I.P.C. with police Station Kotwali, Dehradun. It appears that M.K. Agarwal (respondent No. 1) stood trial and finally acquitted of the change on 23.05.2001 by Additional District and Sessions Judge, Vth Fast Track Court, Dehradun.

   Meanwhile, the children lived with their maternal grand parents. Shri Yogesh Kumar Gupta (appellant) is maternal grand father of the children. Before acquitted of M.K. Agarwal of the charge framed against him in Sessions Trial No. 27 of 2000, Yogesh Kumar Gupta (present appellant) instituted a case before the District Judge, Dehradun, as Guardianship case No. 14 of 1998, for his appointment as guardian of the children. Also, the respondent filed a case for custody of the children. Both the cases were later transferred to the Court of judge Family Court, Dehradun, where the cases were renumbered as Guardian and ward cases No. 5 of 2002 and 8 of 2002m, which were disposed of vide common impugned order dated 16.09.2003.

3. We have heard learned counsel for the parties and also enquired from the children as to their willingness, and also perused the lower court record.

4. The trial court has allowed the petition of respondent no. 1 on the ground that he is natural guardian and that he has been acquitted during the pendency of the case of charge of offences punishable under Sections 498A and 304B I.P.C.

5. It is settled principle of law that what is important in the matters of custody of the children is their interest and welfare. That is the paramount consideration while giving custody of a child or appointing a person as guardian. In the present case no doubt respondent No. 1 M.K. Agarwal being father is natural guardian of the children but the circumstance of the case are such, which disentitle him of the custody of the children. Particularly for the reason that the mother of the children has died while in the company of respondent no. 1 who had to face trial relating to offences punishable under Sections 498A and 304B I.P.C. Though he has been acquitted of the charge, we are of the view that merely for that reason the custody need not necessarily be given to him.

6. During the pendency of this appeal, we directed the appellant to produce both the children in the court. Ms. Saumya was produced in the court on 17.07.2008. This Court made enquiries from her. She categorically stated that she wants to live with her maternal grand parents and does not want to go with her father. Master Anirudh Agarwal was produced in the court today and he also specifically stated that he is happy with his maternal grand parents and maternal uncle and does not want to go with his father. On none of the dates, the father appeared in person and he was represented through his counsel. Both the children, as told by them are studying in prestigious schools of Dehradun. Though minors, they are grown up children. In the special circumstances of this case, having considered submissions of learned counsel for the parties, we found that the trial court has erred in law in dismissing the application moved by the appellant and allowing the application of respondent no. 1.

7. In a similar case, the Apex court in Nil Ratan Kundu vs. Abhijit Kundu 2008 AIR SCW 5769, while considering the matter relating to the custody of the children, has expressed the view that in such cases, where the father has stood trial relating to a case of dowry harassment, normally wishes of minor children must be ascertained before deciding as to whom the custody should be given. The facts of the present case are similar to the said case.

8. Therefore, considering the paramount interest on the children, their willingness and facts and the circumstances that the children have lost their mother and their father had to stand a trial relating to offences punishable under sections 498A and 304B I.P.C., we are of the view that in the interest of the justice, it will be just and proper to allow the custody of the children with their maternal grand parents and by appointing them as natural guardian. This Court is also conscious of the fact that the children are being given education in good schools by their maternal grand parents.

9. For the reasons, as discussed above, we allow this appeal and set aside the impugned judgment and order dated 16.09.2003, passed by Judge, Family Court, Dehradun. Application of the appellant Yogesh Kumar Gupta, moved before the trial court is hereby allowed and the one instituted by respondent No. 1 is hereby dismissed. However, no order as to Costs.

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LANDMARK JUDGMENTS ON

ADOPTION

MR. MASOOUD HADJIAHMAD & ANR. VERSUS STATE OF UTTARAKHAND & ANR.

UTTARAKHAND HIGH COURT
2008 Supreme(UK) 292; 2009 1 UAD 465; 2008 3 UC 1816; 2008 2 UD 110;

2009 (1) UAD 465

Bench: Hon'ble Mr. Justice Prafulla C. Pant and Hon'ble Mr. Justice Dharam Veer
Writ Petition No. 407 (M/B) of 2008
Decided on : 08.07.2008

Mr. Masooud Hadjiahmad & Anr.– Petitioners
Vs.
State of Uttarakhand & Anr.– Respondents

Juvenile Justice (Care & Protection of Children) Act, 2000 and Juvenile Justice (Care & Protection of Children) Rules, 2007, Rule 33 — Procedure of Adoption — Powers of Court — It was held that after the amendment which came into force on 22.08.2006, the power to give a child on adoption under the Act is given to a court, which earlier vested with Juvenile Justice Board. Rule 33 of Juvenile Justice (Care and Protection of Children) Rules, 2007, which framed under aforesaid Act, provides the procedure of adoption. Sub-rule (5) of Rule 33 of the Rules provides that for the purposes of section 41 of the Act, 'court' implies a civil court, which has jurisdiction in matters of adoption and guardianship and may include the court of the district judge, family courts and city civil court.

किशोर न्याय (बालकों की देखरेख एवं संरक्षण) अधिनियम, 2000 - किशोर न्याय (बालकों की देखरेख एवं संरक्षण) नियम, 2007, नियम 33 - गोद लेने की प्रकिया - प्रयोग न्यायालय की शक्ति - यह अवधारित किया गया कि अन्तर्गत नियम 33(5) नियम 2007 न्यायालय सिविल न्यायालय ही समझी जायेगी जबकि गोद या संरक्षण की कार्यवाही हो, जिसमें जिला जज, परिवार न्यायालय तथा सिटी कोर्ट संलग्न है - यदि वाद मुस्लिम जाति द्वारा प्रस्तुत किया गया है जब भी परिवार न्यायालय अन्तर्गत धारा-7 परिवार न्यायालय अधिनियम, 1984 इन मामलों में क्षेत्रधिकार रखता है। (प्रस्तर 4 और 5)

JUVENILE JUSTICE CARE AND PROTECTION OF CHILDREN ACT : JUVENILE JUSTICE CARE AND PROTECTION OF CHILDREN RULES : R.33

JUDGMENT

Hon'ble Prafulla C. Pant, J. (Oral)

By means of this writ petition, moved under Article 226 read with Article 227 of the Constitution of India, the petitioners have sought writ in the nature of certiorari quashing the order dated 29.02.2008, passed by Civil Judge (Senior Division)/Fast Track Court, Almora, in Suit No. 12 of 2008, whereby said court has directed the plaint be returned to the petitioners for presentation before the competent court.

2. Heard learned counsel for the parties.

3. Brief facts of the case are that the petitioner no. 1 Massoud Hadjiahmad and petitioner no. 2 Mrs. Maheshwari Sharma are husband and wife. They are issue less couple and citizens of Canada. Petitioner No. 2 originally belongs to district Pithoragarh in the State of Uttarakhand.

They moved a petition under the Juvenile Justice (Care and Protection of Children) Act, 2000, for adoption of minor child Palak, who is living in children's home, Almora (Rajkiya Shishu Bal Grah, Karnataka Khola, Almora). On behalf of respondents there is no objection to the adoption sought by the petitioners as the petitioners fulfilled all the required conditions for the adoption of the child.

However, the trial court took the view that under Section 41 of the aforesaid Act, it is the Board (Juvenile Justice Board) which is empowered to give the child in adoption, as such the suit is not cognizable by the Civil Judge (Senior Division)/Fast Track Court, hence the order directing the return of the plaint to the petitioners for presentation before the competent court, was passed.

4. On the face of it, reason mentioned in the impugned order dated 29.02.2008, passed by the trial court is erroneous in law as Section 41 which empowered the Board to give child in adoption has undergone an amendment in the year 2006. Before further discussion, we think it proper to quote the provisions of Section 41 as amended vide Act No. 33 of 2006. Amended Section 41 of Juvenile Justice (Care and Protection of Children) Act, 2000, reads as under :-

"41.Adoption.- (1) The primary responsibility for providing care and protection to children shall be that of his family.

(2) Adoption shall be resorted to for the rehabilitation of the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed.

(3) In keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government, or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a court after satisfying itself regarding the investigations having been carried out as are required for giving such children in adoption.

(4) The State Government shall recognize one or more of its institutions or voluntary organization in each district as specialized adoption agencies in such manner as may be prescribed for the placement of orphan, abandoned or surrendered children for adoption in accordance with the guidelines notified sub-section (3) :

Provided that the children's homes and the institutions run by the State Government or a voluntary organization for children in need of care and protection, who are orphan, abandoned or surrendered, shall ensure that these children are declared free for adoption by the Committee and all such cases shall be referred to the adoption agency in that district for placement of such children in adoption in accordance with the guidelines notified under sub-section (3).

(5) No child shall be offered for adoption –

(a) until two members of the Committee declared the child legally free for placement in the case of abandoned children.

(b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and

(c) without his consent in the case of a child who can understand and express his consent.

(6) The court may allow a child to be given in adoption –

(a) to a person irrespective of Marital status or;

(b) to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters; or

(c) to childless couples."

5. The above quoted provision makes it clear that now after the amendment which came into force on 22.08.2006, the power to give a child on adoption under the Act is given to a court, which earlier vested with Juvenile Justice Board. Rule 33 of Juvenile Justice (Care and Protection of Children) Rules, 2007, which framed under aforesaid Act, provides the procedure of adoption. Sub-rule (5) of Rule 33 of the Rules provides that for the purposes of section 41 of the Act, 'court' implies a civil court, which has jurisdiction in matters of adoption and guardianship and may include the court of the district judge, family courts and city civil court. On behalf of respondents, it is contended before us that Section 41 read with Rule 33 makes it clear that it is only that civil court which has powers of adoption and maintenance, can exercise the power of giving a child in adoption under Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000. In this connection on behalf of respondents our attention is drawn to the provisions of Sections 9, 10 and 11 of the Hindu Adoptions and Maintenance Act, 1956. Clause (ii) of explanation to subsection (5) of Section 9 of said Act provides that 'court' means the city civil Court or a district Court within the local limits of whose jurisdiction the child to be adopted ordinarily resides. Since in the present case both the petitioners are not Hindu as such it cannot be said that the provisions of Hindu Adoptions and Maintenance Act, 1956, is applicable to it. Had both the parties been Hindu, it could be said that this suit would lie before District Judge, but in a suit filed by Muslim for adoption, the said Act cannot be said to be applicable. Apart from this, wherever Family Courts are constituted, Section 7 of Family Court established, as such the jurisdiction of other competent courts is not barred. There is no 'city civil court' designated in the State of Uttarakhand, therefore, in that circumstance court of Civil Judge (Senior Division) being the principal civil court has the power to entertain the suit in question under Section 9 of Code of Civil Procedure, 1908, read with Bengal, Agra, Assam Civil Courts Act, 1887.

6. In these circumstances, for the reasons as discussed above the writ petition deserves to be allowed. The same is allowed. The impugned order dated 29.02.2008, passed by Civil Judge (Senior Division)/Fast Track Court, Almora, is hereby quashed. The said court is directed to decide the petition treating the same under Section 41 of Juvenile Justice (Care and Protection of Chiildren) Act, 2000, as expeditiously as possible. (Stay Application No. 1100 of 2008, also stands disposed of).

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KARAM SINGH & OTHERS VERSUS JAGSIR SINGH & OTHERS

PUNJAB AND HARYANA HIGH COURT

R.S.A. No. 2623 of 1988

2015 1 CivCC 632; 2015 3 RCR(Civ) 45; 2014 Supreme(P&H) 1552;
Bench: Hon'ble Mr. Justice Rajive Bhalla
Decided On : 11.8.2014

Karam Singh & Others – Appellants
Vs.
Jagsir Singh & Others – Respondents

Cases referred :

Smt. Sukho Alias Phool Wati (died) through LRs. vs. Bijendeer and Another, 2010 (5) RCR(Civ) 664

HINDU ADOPTIONS AND MAINTENANCE ACT : S.16.

whether failure by the natural father to append his endorsement, on the adoption deed, at the time of registration, does not raise inference of validity, under Section 16 of the Act.

after enactment of the Hindu Adoptions & Maintenance Act, 1956, a Hindu may give or take a child in adoption only in accordance with provisions of the aforesaid enactment. The Act, however, does not require an adoption deed to be compulsorily registered or postulates that if an adoption deed is not registered the adoption is invalid. Thus, if an adoption deed is reduced into writing and is signed by both sets of parents i.e. parents giving in adoption and parents taking in adoption and the adoption satisfies all statutory requirements set out under the Act, the mere fact that it is not registered or there is a defect in its registration, would not render the adoption deed or the adoption invalid.The fact that an adoption, valid in all other aspects, signed/thumb marked by both sets of parents but is not attested by natural father at the time of registration, may if at all, raise a presumption that the registration is defective but cannot by reference to any provision of the Act, raise an inference that the adoption is invalid

JUDGMENT

RAJIVE BHALLA, J.

1. The appellants challenge judgment and decree dated 1.9.1988, passed by the Additional District Judge, Bathinda, reversing the judgment and decree dated 1.8.1987, passed by the Sub Judge, 1st Class, Bathinda.

2. Counsel for the appellants submits that the only dispute in this case is whether Jagsir Singh is the validly adopted son of Dharam Singh (deceased). The onus to prove the adoption by clear, cogent and reliable evidence lay upon the respondents. After enactment of the Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as the Act) an adoption has to be made by a registered written instrument. The failure of the natural father to appear before the Registrar and endorse the adoption deed, negates the adoption deed and, therefore, does not raise a presumption as to execution of a valid adoption deed as envisaged by Section 16

of the Act. The endorsement before the Sub Registrar by the natural mother of the child alone leaves no ambiguity that the adoption made, without endorsement by the natural father, is illegal and, therefore, does not confer the status of an adopted child upon Jagsir Singh (defendant/ respondent No. 1). It is argued that evidence of so called ceremonies of adoption produced by the respondents was rightly rejected by the trial Court by holding that it is beyond pleadings. The first appellate Court has, however, reversed these findings without assigning any clear and cogent reasons. The adoption deed is even otherwise surrounded by suspicious circumstances and when read alongwith the fact that the father did not make an endorsement, before the Sub Registrar, raises a credible inference that the adoption deed is a fabricated document, prepared with the sole object of depriving the appellants of their inheritance to the estate of Dharam Singh. In support of his arguments, counsel for the appellants relies upon the judgment of this Court in Smt. Sukho Alias Phool Wati (died) through LRs. vs. Bijendeer and Another, PLR Vol. CLIX (2010-3) 71.

3. Counsel for the appellant has framed the following substantial questions of law:-

   1. Whether to raise a presumption of validity of an adoption under Section 16 of the Hindu Adoption and Maintenance Act, is it necessary that the natural father should also sign the document before the Registrar?

   2. Whether the learned Lower Appellate Court has misread oral and documentary evidence on the record?

   3. Whether the judgment and decree of the learned Lower Appellate Court is perverse and liable to be reversed?

      No-one is present on behalf of the respondents.

   4. I have heard counsel for the appellants, perused the impugned judgment as well as judgment recorded by the trial Court and appraised the record.

5. Karam Singh etc. the appellants filed a suit for declaration and permanent injunction, claiming ownership to the estate of Dharam Singh who had passed away issueless and widowless.

   The appellants pleaded that they are natural heirs of Darshan Singh but Jagsir Singh's guardian has produced an adoption deed, dated 21.6.1983 and got a mutation registered in the name of Jagsir Singh. The adoption deed is a fabricated document. The appellants being natural heirs are owners in possession of the disputed property.

6. In response, the defendants/respondents filed a written statement, controverting averments in the plaint, asserting Jagsir Singh's rights as the adopted son of Dharam Singh pursuant to a registered adoption deed dated 21.6.1983 registered before the Sub Registrar, Bathinda and duly signed by the natural father and mother as well as by Dharam Singh and prayed for dismissal of the suit. The trial Court framed the following issues:-

   1. Whether Jagsir Singh was adopted by Dharam Singh as alleged? OPD

   2. Whether the plaintiffs are entitled to the declaration prayed for? OPP

   3. Whether the plaintiffs are entitled to the permanent injunction as prayed for? OPP

   4. Whether the suit of the plaintiffs is not maintainable in the present form? OPD

   5. Whether the defendants are entitled to special costs? OPD

6. Whether the plaintiffs are in possession of the suit property as co-sharers, if so, to what effect? OPP

7. Relief.

7. After parties led evidence, the trial Court decreed the suit by holding that the adoption deed does not confer the status of an adopted son upon Jagsir Singh. The trial Court held that ceremonies of adoption proved by the respondents are beyond pleadings and as Mann Singh natural father of the adopted child, did not endorse the adoption deed, before the Sub Registrar, the presumption of truth attached to a registered adoption deed, by Section 16 of the Act, does not arise. The trial Court thereafter proceeded to hold that the appellants are owners to the extent of 1/6th share, each, in the estate of Dharam Singh.

8. Aggrieved by the aforesaid judgment, defendant/respondent No. 1 Jagsir Singh filed an appeal which was allowed by the Additional District Judge, Bathinda, on 1.9.1988, by setting aside the trial Court judgment, dismissing the suit and affirming the registered adoption deed dated 21.6.1983.

9. The first appellate Court held that the adoption deed was scribed by DW-1 Kulwant Singh Brar, Advocate, attested by witnesses, thumb marked by Dharam Singh, the adopting father, Mann Singh the natural father and Gurnam Kaur the natural mother and was completed as soon as it was scribed. The mere fact that Mann Singh may not have endorsed the adoption deed before the Sub Registrar, is irrelevant as the adoption deed was executed and registered on the same day and, therefore, it may be presumed that Mann Singh was present at the time of registration of the adoption deed. As regards ceremonies of adoption, it was held that it was not necessary for the appellants to plead ceremonies, in the written statement, as evidence has been adduced with respect to ceremonies of adoption.

10. I have heard counsel for the parties, perused the record and the impugned judgment.

11. The adoption deed admittedly bears the thumb impressions of Mann Singh and Gurnam Kaur the natural father and mother and Dharam Singh, the adopting father. The adoption deed Ex.D1 was scribed by DW-1 Kulwant Singh Brar, Advocate, witnessed by DW-3 Kirpal Singh and as referred to above, thumbed marked by DW-4 Mann Singh, the natural father, Gurnam Kaur the natural mother and Dharam Singh, the adopting father. However, at the time of registration, the thumb impression of the natural father was not obtained.

12. The question that has been framed as a substantial question of law is whether failure by the natural father to append his endorsement, on the adoption deed, at the time of registration, does not raise inference of validity, under Section 16 of the Act.

13. After enactment of the Hindu Adoptions & Maintenance Act, 1956, a Hindu may give or take a child in adoption only in accordance with provisions of the aforesaid enactment. The Act is a complete Code, setting out requisites for a valid Hindu adoption namely the capacity of a male/female Hindu to take in adoption, persons capable of giving in adoption and the persons who may be adopted etc. Section 16 of the Act raises a presumption as to validity of an adoption, if the adoption deed signed by the person giving and the person taking in adoption, is registered. The Act, however, does not require an adoption deed to be compulsorily registered or postulates that if an adoption deed is not registered the adoption is invalid. Thus, if an adoption deed is reduced into writing and is signed by both sets of parents i.e. parents giving in adoption and

parents taking in adoption and the adoption satisfies all statutory requirements set out under the Act, the mere fact that it is not registered or there is a defect in its registration, would not render the adoption deed or the adoption invalid. An adoption deed comes into effect the moment it is signed or thumb marked by the natural parents and the adopting parents. The only consequence on nonregistration or a defective registration is that the presumption of truth, raised under Section 16 of the Act shall not arise and, therefore, the adoption and the adoption deed shall have to be proved like an other ordinary fact or document. The fact that an adoption, valid in all other aspects, signed/thumb marked by both sets of parents but is not attested by natural father at the time of registration, may if at all, raise a presumption that the registration is defective but cannot by reference to any provision of the Act, raise an inference that the adoption is invalid. The first question of law is, therefore, answered against the appellants in the above terms.

14. A perusal of the adoption deed reveals that it is signed by the natural father and mother of the child and by the adopting father, Dharam Singh. The adoption does not suffer from any legal defect as to competence of the natural parents to give in adoption or the adopting father to take in adoption. The adoption was proved by examining the scribe, the witnesses and the parents giving in adoption and was duly registered. The natural father-Mann Singh stepped into witness box as DW-4 acknowledged his thumb impressions on the adoption deed and deposed as to all other relevant facts relating to the adoption. The mere fact that the adoption deed does not bear the endorsement of the natural father, at the time of registration, in my considered opinion, does not raise any suspicion as to its execution or as to its legality.

15. The second and third substantial questions of law are general in nature and as it is not pointed out as to which oral and documentary evidence has been misread or as to which finding is perverse, and are, therefore, answered against the appellants.

16. However, it would be appropriate to deal with a contention raised by counsel for the appellants that as the trial Court had discarded evidence regarding ceremonies of adoption for failure to plead such a fact, the first appellate Court could not have reversed this part of the judgment. Even if the respondents had not proved ceremonies of adoption the fact that a written document of adoption was executed and proved, rendered pleadings and proof of ceremonies of adoption, irrelevant, particularly as adoption took place after enactment of the Act.

17. In view of what has been recorded hereinabove in the absence of any error of jurisdiction or of law, discernible in the impugned judgment, the appeal is dismissed but with no order as to costs.

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VARSHA SANJAY SHINDE & ANR VERSUS THE SOCIETY OF FRIENDS, SASSOON HOSPITALS AND OTHERS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9227 OF 2013

2014 5 AIIMR 297; 2013 Supreme (Mah) 2118;

Varsha Sanjay Shinde & Anr. ..... Petitioners.
v/s
The Society of Friends of the Sassoon Hospitals and Others ..... Respondents.

Bench: Hon'ble Mr. Justice V.M. Kanade, Hon'ble Mr. Justice S.C. Gupte

Decided on 18 October, 2013

Mr. Vijay Hiremath for the Petitioners.

Ms. Ankita Singhania with Ms. Kinnari Chheda i/b Rajendra Agarwal for Respondent No.1.

Mr. Raghvendra Kumar for Respondent No.2.

Mrs. Lata Patne i/b Mr. Vinod Joshi for Respondent No.3.

Ms Ushaji Peri for Respondent No.4.

Mr. Jagdish Kishore i/b Vishranti Navale for Respondent Nos. 5 and 6.

ALONGWITH

CIVIL APPLICATION NO.2582 OF 2013 IN WRIT PETITION NO. 9227 OF 2013

Varsha Sanjay Shinde & Anr. ..... Petitioners.
V/s
The Society of Friends of the Sassoon Hospitals and Others ..... Respondents.
And
Federation of Adoption Agencies ..... Applicants.

Mr. Swanand Ganoo i/b Ananth Iyengar for the Applicant.

JUVENILE JUSTICE CARE AND PROTECTION OF CHILDREN ACT : S.41(3)

Adoption of children - sub-section (3) of section 41 of the Juvenile Justice (Care & Protection of Children) Act, 2000 guidelines for in- country and inter-country adoptions:- Only if the child is not accepted by Indian parents and the Adoption Agencies on account of their experience come to the conclusion that the child is not likely to be taken in adoption by Indian parents then, in that case, it should be shown to foreign parents.

JUDGMENT

(Per V.M. Kanade, J.)

1. Grievance of the Petitioners is that Respondent No.1 has shown their inability to give the child - Isha in adoption to them on the ground that intervenors who have filed Civil Application No.2481 of 2013 viz Mrs. Rachel Mathew and her husband Mr. Raj Narayan Mysore who are Overseas Indians residing in USA, have already approved the child, before the child was shown to the Petitioners. Petitioners, therefore, are seeking an appropriate writ, order and direction, directing Respondent No.1 and other Respondents to give the said baby girl Isha in adoption to the Petitioners.

2. Petitioners have challenged the decision of Respondent No.1 of giving the baby girl Isha in adoption to the Intervenors on the ground that the said decision is contrary to the guidelines which have been laid down by the Ministry of Women and Child Development in a Notification issued on 24/6/2011 which laid down the guidelines covering the adoption of children pursuant to powers given by sub-section (3) of section 41 of the Juvenile Justice (Care & Protection of Children) Act, 2000 (hereinafter referred to as "the said Act").

3. Petitioners got married on 17/4/2001 and, unfortunately, were not blessed with becoming parents of their biological child and, therefore, they decided to adopt a child. Petitioners registered their names with Respondent No.1 to adopt a child on 05/09/2012. According to the Petitioners, in May 2013 detailed home study of the Petitioners was done and they were informed by Respondent No.2 to visit Respondent No.1 on 28/7/2013 to select a baby.

   Accordingly, Petitioners visited the premises on 29/07/2013 and saw three babies and decided to adopt a baby Isha and this decision was communicated to Respondent No.1 and also written communication was given on the next day, i.e. on 30/07/2013. Petitioners were informed, however, that baby Isha had been shown to foreign couple and they have decided to adopt her. Respondent No.2 is a State Adoption Resource Agency (hereinafter referred to as "SARA"). Respondent No.1 submitted home study report of the Petitioners dated 16/08/2013 within seven days. A pre- adoption counseling meeting was organized by Respondent No.1 on 30/8/2013. Respondent No.1 sent a list of 13 babies of special needs to Petitioner on 10/9/2013. Petitioner, however, informed that they wanted to adopt a baby girl Isha. Being aggrieved by the decision of Respondent No.1 to give baby Isha to Intervenors viz. Mrs Rachel Mathew and her husband Mr Raj Narayan Mysore, Petitioners have approached this Court.

4. Respondent No.1 is an organization which looks after abandoned children and helps them in giving them in adoption to Indian parents and also is entitled to give children in adoption to foreigners according to the guidelines framed by the Union of India. Respondent No.2 - SARA is a State Agency which works in coordination with Central Adoption Resource Authority (CARA). Respondent No.3 children which (CARA) functions as a Nodal body for adoption of Indian is under an obligation to monitor and regulate in-country and inter-country adoptions. Respondent No.4 is the Adoption Recommendation Committee (ARC) which has to issue recommendation certificate within 15 days after the Home Study Report is placed before it.

5. It has come on record that the Petitioners, initially, were registered with Respondent No.1 in 2008 and a baby girl was shown to them. However, they decided not to take the said girl in adoption. This fact is not mentioned by the Petitioners in their Petition. However, in the affidavit-in-reply filed by Respondent No.1 this fact was disclosed and the Petitioners have admitted about their

registration in 2008 and their refusal to accept the child on personal ground in the same year. All parties have filed their detailed affidavit-in-reply and Respondent No.1, Intervenors in Civil Application No. 2481 of 2013 and Respondent No.3 (CARA) have opposed the submissions made by the learned Counsel appearing on behalf of the Petitioners.

6. The learned Counsel appearing on behalf of the Petitioners firstly submitted that the procedure which is prescribed for in-country adoption has not been followed by Respondent No.1. Secondly, it is contended that preference ought to have been given by Respondent No.1 to Indian adoption, parents first, before offering the child in inter-country Thirdly, it is submitted that Respondent No.1 and other such Adoption Agencies are deliberately not giving preference to Indian parents for giving the child in adoption because the amount which they are entitled to get as per guidelines from Indian parents is only Rs 40,000/- and on the other hand they are entitled to get $ 5000 in the case of inter-country adoption. It is contended that therefore children are given in adoption to foreigners illegally and it is contrary to the guidelines framed by the Central Government. It is fourthly contended that ratio of 80%:20% that is 80 children to be given in adoption to Indian parents and 20 to be given to foreigners is also not being followed. Fifthly, it is submitted that the home study report which is to be given in two months is not given in time and during this period children are shown to foreigners who are permitted to jump the queue. It is contended that the Petitioners were registered in 2012 and the Intervenors were permitted to jump the queue and decision was taken to give the child in adoption by Respondent No.1 to the foreign couple. It is sixthly contended that signatures of the Petitioners were obtained on certain documents, contents of which were not shown to the Petitioners and subsequently Respondent No.1 on the basis of the said documents have tried to contend that the fact that the baby girl was shown to foreign couple prior in point of time to the Petitioner is sought to be created on the basis of the said documents. It is contended that, in fact, Respondent No.1 had never shown the child to foreign couple prior to the Petitioners, as contended. It is seventhly contended that the CARA had given no objection without obtaining the NOC from Adoption Recommendation Committee (ARC). Eightly, it is contended that despite directions given by SARA from time to time, Respondent No.1 and other Adoption Agencies are not showing the children to Indian parents. It is then contended that though there was a list of Indian parents who were registered with Respondent No.1, allegedly after three parents informed Respondent No.1 that they were not interested in the child, without showing the child to other Indian parents, Respondent No.1 had immediately, after refusal by three Indian parents, had shown the child to the foreign couple.

7. On the other hand, the learned Counsel appearing on behalf of Respondent No.1 has vehemently opposed the said submissions. She has stated that baby Isha was born on 15/08/2012 and was declared "legally free for adoption" on 03/04/2012 and was shown to three Indian families who did not accept her due to her health concerns since she was a premature baby. It is submitted that if within 3/4 weeks, child is not taken in adoption by Indian parents, it should be regarded as available for inter-country adoption in view of the guide-lines laid down by the Apex Court in Lakshmi Mysore Family which is Kant Pandey vs. Union of India1. It is then submitted that a foreign couple of Indian origin residing in USA was registered for adoption with the US based adoption agency (AFAA) in March, 2010. The Home Study Report (HSR) was conducted by AFAA and was submitted to CARA in February, 2011, which recommended that the Mysore Family was eligible to adopt the child between 0-4 years. The composite age of the PAPs at the time of registration was below 90 years as per Guideline No. 6(3) of the Guidelines, 2011.

The Screening Committee of CARA under Guideline 29(2) examined prima facie suitability of PAP-Mysore Family and also identified the RIPA, i.e, Respondent No.1 to whom the dossier of the PAP-Mysore Family was to be forwarded. It is submitted that the age criteria was also examined by CARA and, thereafter, Respondent No.1 referred the child to Mysore Family on 15/05/2013 at which point of time the child was already 1 AIR 1986 SC 272 at page 280 rejected by three Indian families. On 17/05/2013, baby Isha was accepted by Mysore Family and all necessary formalities were initiated. The said family visited Isha in India on 24 th and 25th June, 2013. Respondent No.1 submitted the dossier of Mysore Family to Respondent No.2, i.e., SARA for issuing Recommendation Certificate by Respondent No.4, i.e, ARC on 24/05/2013. The contention of the learned Counsel appearing on behalf of Respondent No.1 is that the Recommendation Certificate is to be issued within a period of 15 days as per the Schedule VIII(h) of the Guidelines. today, the said Certificate has not been issued.

Till The grievance of Respondent No.1 is that SARA, contrary to the mandate of the Guidelines, is directing Respondent No.1 to show babies which were already accepted by families to other couples such as the Petitioners. The grievance of Respondent No.1 is that SARA wrote a letter to Respondent No.1 dated 29/07/2013, directing them to show baby Isha to Petitioners. It is submitted that under the Guideline 18(4) and (5), SARA cannot direct RIPA to refer the children to any specific parent as it was done in the present case. It is submitted that by letter dated 24/04/2013, CARA had informed the Maharashtra Stage Agencies that the adoption ratio of 80:20 has been complied with by Respondent No.1.

8. The learned Counsel appearing on behalf of Respondent Interveners, i.e., Mysore Family submitted that the child had been accepted by them much prior to the child being shown to the Petitioners and they are entitled to get the child and the Petitioners are not entitled to seek a writ of mandamus directing the Respondents to give the child in adoption to them. The learned Counsel for the Interveners invited my attention to various provisions of the Guidelines of 2011. It is submitted that role of ARC and SARA is very limited and they are supposed to issue the Recommendation Certificate in any case within two weeks, which had not been done in the present case and that there was conflict between the SARA and CARA that is the State and Central Agency. It is submitted that SARA and ARC were acting beyond their jurisdiction and, as a result, the entire process of adoption was unnecessarily delayed to the detriment of welfare of the child who was kept in the shelter home.

9. The learned Counsel appearing on behalf of ARC vehemently urged that ARC was within its rights to make an investigation and see whether ratio of 80:20 was maintained or not. Various submissions have been made by the learned Counsel appearing on behalf of ARC to show that Respondent No.1 had, in fact, violated the guidelines and had given preference to foreign couples instead of Indian parents. The learned Counsel appearing on behalf of SARA also reiterated the submissions made by the learned Counsel appearing on behalf of ARC and supported the case of the Petitioners.

10. The learned Counsel appearing on behalf of the Interveners viz Federation of Adoption Agencies submitted that number of difficulties are experienced by the Adoption Agencies on account of uncooperative attitude of SARA and ARC. It is submitted that even though Recommendation Certificate has to be issued in any case within two weeks, for months together and some times for more than six months and some times even for one year such Recommendation Certificate is not issued, which results in causing inordinate delay for giving the child either in in-country

adoption to Indian families or in inter-country adoption to foreign couples. It is submitted that this was a result of lack of understanding on the part of SARA and ARC about their role which had to be played by them in the process of adoption. It is submitted that number of Indian as well as Foreign Couples expressed their anguish and displeasure on account of the attitude of SARA and ARC.

11. The learned Counsel appearing on behalf of Respondent No.3 - Central Adoption Resource Authority (CARA) submitted that three affidavits have been filed by Respondent No.3. The first affidavit dated 8/10/2013 is filed in response to the affidavit filed by Respondent No.2 - State Adoption Resource Agency (SARA). The second additional affidavit of the same date is filed in response to the affidavit filed by Respondent No.4 - Adoption Recommendation Committee (ARC) and a third additional affidavit also of the same date is filed in response to the affidavit filed by Respondent No.2 - SARA. In these three affidavits filed by Central Nodal Agency viz CARA it is contended that the Adoption Recommendation Committee (ARC) or the State Adoption Resource Agency (SARA) has failed to comply with para 31(11) of the said Guidelines to expeditiously carry out their assigned responsibilities as provided in the Guidelines. It is further stated that queries raised by ARC are not in accordance with Schedule-X, except the document sought at point 'd.' It is further stated that rejection letters from Indian adoptive parents within country are not required under the Guidelines. It is further stated that requirements under para 3(b) and 8(1) of the Guidelines have been complied with in the proposal for the adoption of the child by Mr. Rajkumar Mysore and Ms. Rachel Mathew since the child has been shown to three Indian families living in India. It is further stated that the proposed adoptive parents are Overseas Citizens of India who share same cultural, racial, linguistic similarities as that of the proposed adoptive child.

12. We have heard the learned Counsel appearing on behalf of the Petitioners as well as the learned Counsel appearing on behalf of Respondents and the learned Counsel for the Interveners.

13. Before we advert to the rival submissions, it would be necessary to give a brief background about the development of law of adoption. The Apex Court in the case of Lakshmi Kant Pandey (supra) took cognizance of the complaint made by the Petitioner in the said case, who had informed the Apex Court that no procedure was laid down in respect of the children who were to be given in adoption and, secondly, the existing Act viz Guardians and Wards Act, 1890 did not have sufficient provisions to ensure the welfare of the children who were given in adoption. The Apex Court in the said landmark judgment, for the first time, laid down the guidelines which were to be followed by various agencies in order to ensure that proper care was exercised before giving the child either in in-country adoption or inter-country adoption. Thereafter, Hague Convention on Inter-country Adoption was signed on 09/01/2003 and ratified on 06/06/2003 and it came into force with effect from 01/10/2003 in India. The Hague Convention envisages compliance of international obligation in terms of protection of children, best interests of the child, inter- country adoption and further observes that inter-country adoption shall be subsidiary to domestic adoption, prevention of financial or other gain in the process of inter-country adoption and cooperation (multilateral & bilateral).

WP-9227/13 WITH CAW 2582. 13 Prior to the adoption of Hague Convention Treaty, the existing Act was changed and the Juvenile Justice (Care and Protection of Children) Act, 2000 was passed and Rules were framed. After sometime, it was realized that the Rules were not adequate and did not envisage various situations which would arise in the process of adoption

and, therefore, the Guidelines of 2006 were framed. In these Guidelines also it was noticed that there were some grey areas and there was a lack of clarity on certain aspects and, therefore, new Guidelines were brought into force dated 24/06/2011. These Guidelines were framed in pursuance of the powers given by sub-section (3) of section 41 of the said Act, 2000 and it was expressly stated that they were in supersession of the Guidelines for in-country Adoption, 2004 and the Guidelines for Adoption from India, 2006. These Guidelines have a statutory force of law in view of the judgment of the Apex Court in the case of Lakshmi Kant Pandey (supra) and, secondly, since they have been framed in pursuance of the power given by sub-section (3) of section 41 of the said Act, 2000. These Guidelines therefore are in addition to the provisions of the Act and Rules and have statutory force.

Perusal of the Guidelines indicates the time frame and the time schedule which has to be adhered to for completion of the adoption process. The scope of power to be exercised by CARA which is the Central Nodal Agency, SARA which is the State Agency and ARC which issues Recommendation Certificate has been enumerated. Perusal of these Guidelines clearly indicate that SARA and ARC play a secondary role and the primary Nodal agency in respect of inter-country adoption is CARA in whose supervision SARA and ARC are supposed to function.

14. It will be necessary to briefly take into consideration the Guidelines governing adoption of children which have come into force with effect from 24/06/2011. The said Guidelines have been framed by the Central Adoption Resource Authority (CARA) to provide for the regulation of adoption of orphan, abandoned or surrendered children. Since these Guidelines have been framed pursuant to the provisions of sub-section (3) of Section 41 of the said Act, 2000 and judgment of the Apex Court in L.K. Pandey vs. Union of India in WP No.1171 of 1982, the UN Convention on the Rights of the Child, 1989 and the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption, 1993, the said Guidelines have statutory force.

In Chapter-I, of the said Guidelines, various terms have been defined in Rule 2. Rule 2(e) defines "AFAA" or "Authorised Foreign Adoption Agency" which is a Foreign Social or Child Welfare Agency that is authorized by CARA for sponsoring the application of Prospective NRI or OCI or PIO or Foreign Adoptive Parents for Adoption of an Indian child.

Rule 2(f) defines "ARC" which means Adoption Recommendation Committee constituted by the State Government. Rule 2(h) defines "CARA" which means the Central Adoption Resource Authority. Rule 2(aa) defines the term Recognised Indian Placement Agency (RIPA) which is an Agency recognized by CARA for placing children in Inter- country adoption. Rule 2(zb) defines "SAA" and it means the Specialised Adoption Agency which includes Recognised Indian Placement Agency (RIPA) and Licensed Adoption Placement Agency (LAPA). Rule 2(zc) defines "SARA" which means State Adoption Resource Agency.

Rule 3 of the said Guidelines lays down fundamental principles governing adoption which reads as under:-

"3. Fundamental principles governing adoption. - The following fundamental principles shall govern adoptions of children from India, namely:-

(a) the child's best interest shall be of prime importance while deciding any placement;

(b) preference shall be given to place the child in adoption within the country;

(c) adoption of children shall be guided by set procedures and in a time bound manner;

(d) no one shall derive any gain, whether financial or otherwise, through adoption."

Rule 7 lays down the procedure for adoption which provides that Prospective Adoptive Parents (PAPs) should register themselves with Government Recognized Adoption Agency. In respect of foreign adoption, PAPs residing abroad can adopt children through CARA and an authorised Agency known as AFAA. After registration, PAPs have to follow the adoption procedure as provided in the said Guidelines as per the details given in CARA's Website.

Rule 8(5) prescribes priorities for rehabilitation of a child and it is mentioned that preference has to be given for placing a child in in-country adoption and the ratio of in-country adoption to inter-country adoption shall be 80:20 of total adoptions processed annually by a RIPA, excluding special needs children.

Rule 8(6) mentions the order of priority which is to be followed in cases of inter-country adoptions, which is as under:-

(i) Non Resident Indian (NRI)

(ii) Overseas Citizen of India (OCI)

(iii) Persons of Indian Origin (PIO)

(iv) Foreign Nationals Chapter II of the said Guidelines lays down the process that has to be followed before adoption. Chapter 3 lays down the guidelines regarding adoption process.

Rule 17 reads as under:-

"17. Adoption authorities and agencies for in-country Adoption. - The authorities or agencies involved in in-country adoption process shall be-

(a) The Court of Competent Jurisdiction who can pass Order for Adoption;

(b) Central Adoption Resource Authority (CARA)

(c) State Adoption Resource Agency (SARA) or Adoption Coordinating Agency (ACA) and

(d) Specialised Adoption Agency (SAA)."

Rule 20 lays down the procedure which has to be followed in respect of Home Study and other requirements.

Sub-rule 2 of Rule 20 states that Home Study of the PAP(s) shall be conducted within a maximum period of two months from the date of acceptance of registration. Rule 21 speaks about Referral and Acceptance. Rule 26 prescribes the procedure for Inter-country Adoption as per the Hague Convention on Inter-country Adoption and prescribes the authorities and agencies involved in Inter-country adoption process. Rule 29 speaks about identification of RIPA by CARA and sub-rule (7) of Rule 29 in terms states that the RIPA shall not entertain any application received directly from any AFAA or CA or PAPs from out of India, for adoption of an Indian child. Rule 31 speaks about power of the State Government to constitute a Committee to be known as the Adoption Recommendation Committee (ARC) to scrutinize and issue a Recommendation Certificate for placement of a child in inter-country adoption.

Rule 31(11) and 31(12) are relevant. The said Rules read as under:-

"31(11) The SARA or ACA, as the case may be, shall ensure that the Recommendation Certificate is issued expeditiously within a period of 15 days from date of receipt of the dossier.

31(12) In case of special needs child, the SARA or the ACA, as the case may be should issue the Recommendation Certificate within a period of 15 days from date of receipt of the dossier."

From the above two Rules, it is clear that SARA or ARC have to issue Recommendation Certificate within a period of 15 days from the receipt of dossier and in case of a special needs child, it has to be issued within 5 days.

Rule 31(15) prescribes that ARC should satisfy itself about the suitability of the PAPs vis-a-vis the child proposed for adoption. Rule 31(16) states that the Committee shall also verify the documents filed by the RIPA and ensure that procedures have been correctly followed by the RIPA. Rule 31(17) lays down that in case, at any stage, SARA or ACA or ARC is not satisfied with the documents produced for obtaining recommendation certificate, it shall conduct appropriate investigation before disposing of the matter.

Rule 32(4) speaks about issuance of No Objection Certificate by CARA.

Chapter IV of the said Guidelines speaks about post adoption process. Chapter V speaks about Recognition and Authorization. Chapter VI speaks about Role and Functions of Authorities. Rule 77 in terms states that CARA shall function as a nodal body on adoption matters in the country and it has to perform the functions which are mentioned in the said Rule. Relevant functions are mentioned in clauses (a), (b) and (c) of the said Rule 77. The role of State Adoption Resource Agency (SARA) has been laid down in Rule 80. Rule 80(1), reads as under:-

"80(1) For the proper implementation of these Guidelines every State Government is required to set up the State Adoption Resource Agency (SARA) to act as a nodal body within the State to coordinate, monitor and develop the work of adoption and non-institutional care in coordination with CARA (Emphasis supplied) Rule 80(2)(d), (g) & (n) read as under:-

"(80)(2) The State Adoption Resource Agency shall perform the following functions:-

(a) .....to (c).....

(d) promote and regulate in-country and inter-country adoptions in coordination with CARA.

(e) .....

(f) .....

(g) facilitate inter-country adoption of children in Specialised Adoption Agencies for whom in-country adoption efforts have failed in accordance with these Guidelines and to ensure their early deinstitutionalisation;

(h) ..... to (m).....

(n) carry out inspections of Specialised Adoption Agencies at least once a year and carry out verifications as stipulated for the inspection team in these Guidelines.

(o) ..... to (w)....."

Rule 98 of the said Guidelines speaks about the role of Authorized Foreign Adoption Agency (AFAA). Rule 107 lays down the administration expenses which are to be incurred by PAPs in the process of adoption. Rule 107 reads as under:-

"107. Adoption Expenses. - The PAPs are required to bear following administration expenses in the process of adoption.-

(a) the registration expenses for PAPs for in- country adoption, is Rs 1,000. In addition to it, they shall be required to pay Rs 5000 for the Home Study Report and post adoption follow-up services.

(b) the PAPs shall be required to contribute towards the Child Care Corpus (CCC), maintained by the agency from where they are adopting the child. This amount shall also cover all expenses incurred to finalize the adoption. However, the adoption agency may decide to waive off or reduce this amount in exceptional cases. The amount to be contributed by PAPs is as under:-

  (i) Amount to be contributed towards CCC in case of in-country adoptions : Rs 40,000/-

  (ii) Amount to be contributed towards CCC in case of Inter-country adoptions : US $ 5000/-

(c) The modalities for payment of the amounts is mentioned in Schedule-XVI attached to the Guidelines.

(d) The PAPs or adoptive parents shall not contribute more than the amount specified in this paragraph and shall also not make any donation, whether in kind or cash to the agency from where they propose to adopt or have adopted a child."

Lastly Rule 108 of the said Guidelines speaks about Relaxation and Interpretation of the Guidelines. Rule 108 reads as under:-

"108. Relaxation and Interpretation of the Guidelines.- (1) These Guidelines are issued having regard to the provisions of the existing law and for the interpretation, the relevant law should be referred to.

In case of ambiguity or any dispute, the power to interpret these Guidelines vests with CARA.

(3) The power to relax any provision of these Guidelines in respect of a case or class or classes or category of cases vests with CARA.

Provided that no relaxation or dispensation shall be given by CARA without recording appropriate reasons for the same."

Rule 107, therefore, in terms speaks about the amounts which have to be contributed towards the Child Care Corpus in respect of in-country adoption which is Rs 40,000/- and amounts to be contributed towards the Child Care Corpus which is US $ 5000/-. Thereafter, Schedules have been given in which further detailed procedure which has to be followed and the Registers that have to be maintained has been stated.

So far as the Adoption Recommendation Committee is concerned, its role and functions are referred to in Rule 31(1) which is to scrutinize and issue a Recommendation Certificate for placement of a child in inter-country adoption.

Rule 31(9) states that the SARA shall receive the dossiers of cases for inter-country adoptions from the RIPA and put up the same before the ARC for issue of Recommendation Certificate. Rule 31(11) speaks about the Recommendation Certificate to be expeditiously issued within a period of 15 days from the date of receipt of the dossier and Rule 31(12) speaks about the Recommendation Certificate to be given within 5 days in case of a special needs child. Rule 31(14) mentions that in case of siblings and older children, ARC has to ensure that there is no waiting Indian PAPs within the region for such child or children. Rule 31(15) speaks about suitability of the PAPs vis-a-vis the child proposed for adoption. Rule 31(16) speaks about verification of the documents filed by the RIPA and ensure that procedures have been correctly followed by the RIPA. Rule 31(18) speaks about issuance of Recommendation Certificate and Guideline 102 states that each dossier for in-country adoption should be scrutinized before issuing the Recommendation Certificate.

15. From the above Guidelines, it is clear that comprehensive Guidelines have been issued and earlier Guidelines of 2004 and 2006 have been repealed and care has been taken to ensure that the said Guidelines are in conformity with the Hague Convention and also as per the law laid down by the Apex Court in Lakhsmi Kant Pandey's case (supra).

16. In the Guidelines, the role and functions of each Agency viz CARA, SARA and other Agencies have been clearly defined. However, from the facts which have come on record, it appears that there is some conflict between SARA, ARC on the on side and CARA on the other. It has to be noted that CARA is ultimately a Central Nodal Adoption Agency particularly in case of inter-country adoptions and both, SARA & ARC have to work in coordination with CARA.

The ultimate authority to issue No Objection Certificate is given to CARA and the ARC is only supposed to scrutinize the various applications in order to ensure that procedure is properly followed.

17. From the three affidavits which have been filed in the present case by CARA, it can be seen that though various letters written from time to time by CARA authorities, neither SARA nor ARC have even bothered to give reply to these letters and have been functioning as if it is a sole authority within the State which is competent to grant the final permission to give children in adoption. It is possible that SARA and ARC authorities may have acted with good intention of ensuring that priorities of in-country and inter- country adoptions which have been laid down in the Rules have been properly followed. However, that does not give these authorities a power to stall the process of adoption and cause unreasonable delay in completion of the adoption process. The purpose behind laying down these Guidelines is to ensure that process of adoption is completed expeditiously and that all these authorities have to ensure and keep in mind welfare of the child. Long term traumatic effects on the child which is brought up in Institutions are quite well known and, therefore, it is necessary to ensure that when the child is brought to the shelter home, it should be given in adoption as quickly as possible. This can be seen from time limit and time frame which is prescribed under the Rules. The ARC is expected to give Recommendation Certificate within 15 days and within 5 days in respect of the children requiring special care. It is not laid down under the Guidelines as to how long the RIPA or Specialized Agency has to wait

after in-country PAPs refused to take the child in adoption and then refer it for inter-country adoption. Therefore, there has to be a proper coordination between SARA and CARA. It has to be noted that CARA is a nodal Agency which refers foreign couple in order of priority referred to in the Rules and only then RIPA can show the child to the foreign couple. In the present case, the contention of the learned Counsel appearing on behalf of the Petitioners that no efforts were made by Respondent No.1 for giving the child in adoption to Indian parents is without any substance. In the affidavit-in-reply filed by Respondent No.1, they have mentioned that the child was shown to three Indian parents before it was shown to the foreign couple. It is distressing to note that after the foreign couple showed their acceptance to adopt the child, in spite of that SARA and ARC Respondent Nos. 2 and 4 respectively had insisted that Respondent No.1 should show the child and other two girls to Indian parents on the same day. This act on the part of SARA and ARC is clearly contrary to the Guidelines and such directions should not be given to RIPA and Specialized Adoption Agencies in future. There is always an inherent danger of all the parents accepting the child simultaneously if they are shown on the same day and same time. Though SARA and ARC have been authorized to scrutinize the documents, they do not have an authority to unnecessarily delay the process of adoption. In the present case, though more than six months have passed, no Recommendation Certificate was issued by the ARC and no explanation has been given by ARC why this could not be done. We, therefore, direct the ARC to scrupulously adhere to the time frame mentioned in the Guidelines and if certain additional documents are called and if it feels that recommendation cannot be given then it should record its reasons for doing so. Large number of complaints have been received by CARA from both, in-country PAPs and also from foreign couples expressing their displeasure over the role played by ARC and by SARA. We hope and expect that, in future, no such complaints are received and process of adoption is not delayed.

18. In the present case, we are sorry to observe that there appears to be a conflict between SARA, ARC on the one hand and the CARA and RIPA on the other hand and this has resulted in creating bottle-neck in the process of adoption. It is possible that SARA and ARC bonafidedly believed that they have power and jurisdiction over CARA Authorities which, unfortunately, is a misconceived perception and have thwarted the smooth functioning of inter-country adoption. Numerous e-mails which have been sent to CARA by dissatisfied parents clearly indicate that both in-country and inter-country parents have shown their immense displeasure over the attitude of ARC and SARA. All the parents have been unanimous that ARC and SARA have acted as stumbling block in this process and have refused to cooperate with the CARA and have not given Recommendatory Letter which they are supposed to give within 15 days. These complaints indicate that ARC and SARA have been asking them to comply with various formalities which are not supposed to be complied by them under the new Guidelines and ARC and SARA have no authority in law to demand this information from the parents. We, therefore, propose to lay down the Guidelines after we deal with the submissions made by the learned Counsel appearing on behalf of the Petitioner and Respondent No.1.

19. In our view, there is no substance in the submissions made by the learned Counsel appearing on behalf of the Petitioners. The documents on record clearly establish that Overseas Indian Couple had already approved the child in May 2013. The child having been approved by them, there was no question of showing this child again to Indian parents. However, SARA and ARC had directed Respondent No.1 to show three children to Indian Couple simultaneously, which is

contrary to the Guidelines of 2011. Even when this child was shown to the Petitioners, they were informed that the child had been already approved by the foreign couple and, therefore, without prejudice to the rights of the Couple which had approved the child, the child was being shown on account of insistence of SARA and ARC. Petitioners have in terms signed the documents, accepting this position. During the course of arguments, initially, it was urged that the said signature was taken in duress since the Petitioners had no other option but to sign the said letter. However, Respondent No.1 has produced on record e-mail records which indicate that this fact was made known to the Petitioners and they had, in terms, accepted this fact which is evident from the contents of the said e-mail letter. The submission made by the learned Counsel appearing on behalf of Respondent No.1, therefore, has to be accepted that SARA and ARC were unnecessarily meddling with the process of adoption and had acted arbitrarily and their conduct was in clear violation of the Guidelines which had been laid down in 2011.

20. In our view once the child had been shown to Overseas Indians and approved by them on 25/05/2013, the child could not have been shown to the Petitioners or to other Indian parents and, therefore, the Petitioners cannot claim any right or priority to get the child in adoption merely because they are Indian parents and that preference should be given to Indian parents over Overseas Indians or foreign couples.

21. The learned Counsel appearing on behalf of the Petitioners has vehemently argued that Respondent No.1 had acted with malafide intention to earn more money by giving children in adoption to foreign couples rather than Indian Couples on account of disparity of the amount received by them from Indian parents and foreign couples. It is also urged that 80:20 ratio has not been followed in respect of in- country and inter-country adoption. It is also urged that combined age of the foreign couple was more than 90 years. Several allegations have been made against Respondent No.1 and 2.

22. We are satisfied that the procedure which is required to be followed by AFAA, CARA and referal by CARA to Respondent No.1 has been scrupulously followed and there is absolutely no infirmity in the said procedure and the present Petition appears to have been filed on account of misconceived notions and on account of suspicion rather than concrete material against Respondent No.1. The material on record indicates that the ratio of 80:20 has been scrupulously followed by Respondent No.1 and 2. The combined age of Overseas Parents on the date of the reference that is in March 2010 was 90 years and on account of No Objection Certificate given by CARA, assuming that as of today age of the said Couple is slightly above 90 years, the said increase in age has been relaxed by CARA on account of the power vested in it to grant relaxation of condition under Rule 108. So far as payment received by Respondent No.1 and other adoption agencies are concerned, these fees have been fixed by Guidelines themselves and that is on account of expenditure involved in in-country and inter-country adoptions. It, therefore, cannot be said that Respondent No.1, atleast in this case, on account of financial gain had given the child Isha in adoption to the Interveners - Mysore Family.

23. We express our displeasure over the manner in which the SARA and ARC have functioned in the present case. Till today, ARC has not given a Letter of Recommendation which has to be given within 15 days and even though more than 6 months have passed the said Letter has not been given. In the peculiar facts and circumstances of the present case, therefore, in our view, it will be deemed that such permission has been granted by ARC. In any case, we direct the ARC to issue a Letter of Recommendation within two weeks from today.

24. In our view, there is no substance in the submissions made by the learned Counsel appearing on behalf of the Petitioners.

25. Petition is dismissed.

26. We direct the CARA to comply with the formalities of adoption within six weeks from today in favour of the Interveners - Mysore Family. We are of the view, however, that Petitioners should not be deprived of getting the child in adoption and we, therefore, direct Respondent No.1 and Interveners - Federation of Adoption Agencies in Civil Application No.2582 of 2013 and CARA to ensure that within six weeks, the Petitioners are shown another child. We direct SARA and ARC to issue Recommendatory Letter on the basis of Home Study Report in favour of the Petitioner. Respondent No.1 or any other Agency through whom the new child is shown to the Petitioners should also complete the Home Study Report within the stipulated period as prescribed under the Rules.

27. Though the main issue involved in the Petition is disposed of, we would like to keep this Petition pending in order to see the compliance of the directions given by this Court to Respondent No.1, CARA, SARA and ARC, firstly in respect of giving the child Isha in adoption to Mysore Family and, secondly, to ensure that the Petitioners also get the child in adoption expeditiously.

28. We propose to lay down the following guidelines for in- country and inter-country adoptions:-

(i) All the concerned Agencies viz RIPA, Specialized Adoption Agencies, SARA, ARC, AFAA to scrupulously follow the Guidelines which have been laid down in 2011.

(ii) RIPA and the Specialized Adoption Agencies are directed to complete the Home Study report within a stipulated time as prescribed under the Rules and the ratio of 80:20 should be adhered to and preference should be given to Indian parents first and if the Indian parents decline to accept the child in adoption only thereafter the child may be shown to foreign parents.

(iii) Though there is no specific number mentioned in the Guidelines as to the number of Indian parents to whom the child should be shown, we are of the view that within a period of 3/4 weeks, the child should be shown to as many Indian parents as possible and, secondly, at a time, the child should be shown only to one parent and not multiple number of parents as has been done in the present case.

(iv) Only if the child is not accepted by Indian parents and the Adoption Agencies on account of their experience come to the conclusion that the child is not likely to be taken in adoption by Indian parents then, in that case, it should be shown to foreign parents.

(v) When the child is shown to the foreign parents, it should be shown in the list of priorities which are mentioned in the said Guidelines viz. Initially it should be shown to NRI then Overseas Indian Parents etc and only thereafter to foreigners.

(vi) ARC should give Recommendatory Letter within five days in respect of the children with special needs and within 15 days in respect of other children. This should be strictly adhered to. Non-compliance of the said Guideline should be strictly viewed and action if necessary may be taken against the concerned Authorities, ARC or SARA who do not

follow the said Schedule. ARC and SARA should work not in conflict but in coordination with CARA, it being the Centralized Nodal Agency.

These are some of the further Guidelines which are laid down by us and which are in consonance with the Rules of 2011.

29. With these directions Petition is disposed. Civil Application No.2582 of 2013 is also disposed of.

30. Matter be placed on board for directions on 18 th November, 2013 for compliance of the directions.

(S.C. GUPTE, J.)
(V.M. KANADE, J.)

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LANDMARK JUDGMENTS ON

ROLE AND DUTIES OF FAMILY COURT

ARWA TAHA SAIFUDDIN VS TAHA MUFADDAL SAIFUDDIN

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8231 OF 2015

2015 SCC Online Bom 6259

Arwa Taha Saifuddin .. Petitioner
vs.
Taha Mufaddal Saifuddin .. Respondent

Bench: Hon'ble Mr. Justice M.S. Sonak
JUDGMENT-WP-8231-32-15
Decided on 23 December, 2015

WITH
CIVIL APPLICATION NO. 2578 OF 2015

Taha Mufaddal Saifuddin .. Applicant
In the matter between
Arwa Taha Saifuddin .. Petitioner
vs.
Taha Mufaddal Saifuddin ig .. Respondent

WITH
WRIT PETITION NO. 8232 OF 2015

Fatema Ibrahim Ezzuddin .. Petitioner
vs.
Ibrahim Qaidjoher Ezzuddin .. Respondent

WITH
CIVIL APPLICATION NO. 2579 OF 2015

Ibrahim Q. Ezzuddin .. Applicant
In the matter between
Fatema I. Ezzuddin .. Petitioner
vs.
Ibrahim Q. Ezzuddin .. Respondent

Custody of child--Duty of the Family Court --upon cumulative consideration of various parameters and the record the Court is required to act in the children's best interests. In the exercise of such delicate jurisdiction, the Court cannot abdicate judicial discretion, either to the wishes of the children or even the reports of Counselors or Welfare Officers. But the ultimate decision has to be made by the Court, in exercise of its judicial discretion. This, no doubt puts a very great responsibility upon the Courts. Therefore, it should be appreciated that it is not possible for the Court, in all situations to deal with what may be ideal for the children, but simply what best can

be done in the circumstances presented. -some reasonable directions in the matter of access and visitation are warranted.

Mr. Haresh Jagtiani, Senior Advocate a/w. Ms Mitali Harish & Ms

Apurva Marwari for the Petitioners in both Petitions.

Mr. R.T. Lalwani i/b Mr. Jignesh Shah for the Respondents in both Petitions and for the Applicants in both Civil Applications.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 11 December 2015 Date of Pronouncing the Judgment : 23 December 2015

JUDGMENT

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is finally disposed of.

2] Considering the nature of the order, which is proposed to be made, as also the commonality of issues involved, it will be appropriate to dispose of these two petitions with a common order.

3] The Petitioners, Arwa and Fatema are sisters. Since last seventeen years, they have been married to Taha and Ibrahim, who are cousins inter se. Arwa and Taha have five children viz.

(i)Sakeenah (16), (ii) Mohammad (15), (iii) Tahir (12), (iv) Mustafa (10) and (v) Murtaza (7). Similarly, Fatema and Ibrahim have four children viz., (i) Khadija (17), (ii) Murtaza (14), (iii) Nisreen (11) and (iv) Husain (7). The children, are great grandchildren of the 52nd Dai-ul-Mutlaq, Syedna Mohammed Burhanuddin, a religious leader of the Dawoodi Bohra Community (a Muslim Sect), who passed away in Mumbai on 17 January 2014. Upon his demise, a dispute has arisen with regard to the claim for the position of 53 rd Dai-ul-Mutlaq. Amongst other matters, a civil suit is pending on the Original Side of this Court between the rival claimants.

4] The rival claimants for the position of 53 rd Dai ul-Mutlaq are Khuzaima Qutubuddin, the father of Arwa and Fatema (maternal grandfather of the children) on one hand and Mufaddal Saifuddin, Taha's father and Ibrahim's uncle (paternal grandfather of the children), on the other. This rift, has virtually split the marital ties between the parties, as Arwa and Fatema have aligned with Qutubuddin and Taha and Ibrahim have aligned with Saifuddin. The rift has split the Dawoodi Bohra Community, as well. In this mega rift, reminiscent of the strife for the Mogul Throne however, the children, all of them, find themselves in a predicament of having to chose between either of their parents, their tender and innocent age, notwithstanding.

5] Their parents have initiated proceedings against each other seeking various reliefs, including their custody and access. The orders impugned in these petitions arise out of Petition No. D-59 of 2014 instituted by Taha against Arwa and Petition No. D-58 of 2014 instituted by Ibrahim against Fatema in the Family Court at Bandra.

The impugned orders are apparently innocuous. The impugned orders defer any decision on the issue of interim custody and access, until the Counselors or Child Welfare of Officers hold counseling sessions with the children and submit reports to the Family Court, which might assist the Family Court in making the difficult, but the necessary decision in the matter.

6] Considering the nature of the impugned orders, learned counsel for the parties were called upon to address me, inter alia, upon the scope and advisability of interference, at this stage. The learned counsel for the parties, together with all other issues, have made their submissions upon such issue, as well.

7] Arwa and Fatema, through Mr. Haresh Jagtiani, learned senior advocate appearing for them, recalled the atrocities and domestic violence allegedly, perpetrated against them by their husbands, which forced them to flee to America with the children and to seek asylum as well as legal custody there. They point out that the California Court, even after ruling that the appropriate legal forum to resolve the dispute would be the Indian Courts and after directing restoration of custody of the children to the fathers, had nevertheless, granted them several reliefs, including custody for seven days in each month as well as unlimited telephonic access.

They bitterly complain that their husbands, in disregard to the directions made by the California Court, have virtually cut off the access to the children. Some of the children have been sent away to Surat and others are kept in virtual seclusion at Mumbai. They point out that no access is being offered, whether telephonic or otherwise. They point out that there is a very serious form of tutoring of the children and it is apprehended that the sessions with Counselors for the interview with the children in this situation, would be merely a farce. They submit that the Family Court ought to have made the orders for restoration of custody at least to the extent of seven days each month, so as to achieve level playing field, before directions were issued to the Counselors, to have interview sessions with the children and make their reports to the Family Court.

8] In opposition, Taha and Ibrahim, through their learned counsel Mr. R.T. Lalwani, were at pains to criticise Arwa and Fatema for having abruptly destroyed marital ties of over seventeen years and their act of abducting the children to America, on the very night of demise of 52nd Dai-ul-Mutlaq , in a bid to defeat the jurisdiction of the Indian Courts. They point out that the action was both premeditated and malicious. The action was in furtherance of installing their father Khuzaima Qutbuddin, as 53 rd Dai-ul-Mutlaq, in preference to Mufaddal Saifuddin. The lives of children were put into peril. There was no regard to physical and emotional security of the children. Rather, the children were exploited by portraying upon social media network that they support the claim of their maternal grandfather, in preference to the claim of their paternal grandfather for the position of 53rd Dai-ul-Mutlaq.

9] Taha and Ibrahim point out that the elder children are admitted into an educational institution in Surat, which apart from offering high quality eduction is an institution founded by the family for religious instruction, which is extremely vital for all round development of the children. Similarly, the younger children school in Mumbai. They point out that the children are rightly embittered by the treachery of their mothers and they do not wish to return to their mothers. They rely upon the decision of the Hon'ble Apex Court in case of Gaytri Bajaj Vs. Jiten Bhalla[1], to submit that in matters of this nature, the wishes of children are paramount and based upon the same custody or access, even for a short duration of time cannot be granted to Arwa and Fatema. They submit that the very institution of these petitions is premature, as the Family Court is yet to make even an interim order on the issue of custody and access.

10] The record indeed indicates that Arwa and Fatema, on the night of demise of the 52nd Dai-ul-Mutlaq fled to America with the children. They eventually applied to the superior Court

1 (2012) 12 SCC 471

of California, Bakersfield C.A. for temporary restraining order pursuant to Domestic Violence Protection Act (DVPA) and for custody and visitation orders relating to the minor children. Taha and Ibrahim contested the proceedings, both, on grounds of jurisdiction and merits. A summary enquiry was held in the matter and finally, the California Court on 26 February 2015, made the following order:

Accordingly, the Court finds that the facts described necessitate the return of the children to the custody of the Respondent forthwith, subject to the stay granted below.

The Court has determined these orders are necessary to protect the minor children and are in the children's best interest. The Court awards joint legal custody to both parents, with sole physical custody to Respondent. Petitioner shall have visitation with the minor children in India up to 48 hours' notice to Respondent. Visitation shall occur in the city of residence of the minor children and may be up to one week in length each thirty days.

Petitioner shall have reasonable telephone or other electronic contact with the minor children and the children shall have unlimited, unmonitored telephone or other electronic contact with the Petitioner.

Section 3424(b) provides that in the event there is no previous child custody order to be enforced under the UCCJEA and a child custody proceeding has not been commenced in a court of a state having original jurisdiction, this Court's child custody determination shall remain in effect until an order is obtained from a court of a state having jurisdiction under the relevant statutes. No evidence was presented that there is such an order. Consequently, the Court's order will remain in effect until a court of a state having jurisdiction under sections 3421 to 3423, inclusive makes orders regarding the minor children.

11] The California Court has held that the California is not the "Home State" of the minor children and the Court's jurisdiction is limited to exercise of temporary, emergency powers under Section 3424 of the Family Code. Arwa's and Fatema's request for DVPA restraining order was denied. However, joint legal custody was awarded to both the parents, with sole physical custody to Taha and Ibrahim. Arwa and Fatema were granted visitation rights in the city of residence of the minor children in India upto one week in length each thirty days. Arwa and Fatema were also granted reasonable telephone or other electronic contacts with the children. The California Court clarified that its order was to remain effective until the Court of the State having jurisdiction under Sections 3421 to 3423, inclusive of the Family Code makes orders regarding the minor children. The parties, upon their return to India, have instituted proceedings in the Family Court at Bandra, which would be the Court of the State, having jurisdiction in the matter. As noted earlier, it is in these proceedings that the impugned orders came to be made.

12] In terms of the California Court's order, Taha and Ibrahim presently have the sole physical custody of the children. However, even though the California Court had awarded joint legal custody to both the parents as well as issued directions in the matter of visitation rights and electronic access, at least presently, the same has been denied by Taha and Ibrahim to Arwa and Fatema. Only in pursuance of orders made by this Court, on about two occasions, Arwa and Fatema could meet the children at the designated venue for couple of hours, in the presence of Counselors.

13] On 3 September 2015, taking note of the circumstance that the counseling process in terms of the impugned order has already commenced, certain directions were issued in furtherance of the same. The venue of session scheduled for 4 September 2015 at the counseling center at Family Court, Bandra was shifted to a more conducive venue suggested by the parties, where the children could be more comfortable and responsive. Directions were issued to Taha and Ibrahim to escort the children to the venue lobby and leave the children to spend about three hours with their mothers, in presence of the Counselors. The Counselors were also requested to submit their reports of the sessions. Similar exercise was directed by the order dated 16 September 2015.

14] Although, visitation and access was not as smooth as it should have been, at least some beginning was made in the matter.

The Counselors reports bear this position out. At this stage, it will not appropriate to make any comments upon the reports, since the Family Court is yet to consider the same. Suffice to indicate that the Counselors have noted that though circumstances and events have affected and influenced the children's views and feelings towards their mothers, bonds exist and therefore, access to the mother should be considered favourably. They have opined that counseling, both, of the children as well as the parents should continue in the interest of paramount welfare of the children. They have opined that though access may not have been smooth, modalities can be worked out to ensure that the access is smooth and meaningful.

They have opined that the access may be at the homes of the parties or at some other conducive venue. If there is no agreed venue, as a last resort, access at children's complex of the Family Court, Bandra may be considered. In the reports, the Counselors Ms Freny Italia, Muskaan Project of Tata Institute of Social Service Sciences, Ms V.S. Athavale and Ms S.B. Jagtap attached to the Family Court, Bandra, have made fairly objective assessment of the interaction and the situation. The Family Court, will no doubt, take into consideration the reports of the Counselors.

15] At the request of Taha and Ibrahim, as contained in Civil Application Nos. 2578 and 2579 of 2015, and at the urging of Mr.Lalwani, the learned counsel for Taha and Ibrahim, I interacted with the children for a couple of hours at the Chambers. The interaction with the children was extremely meaningful and illuminating. They are wonderful children, innocent, loving and at the same time resilient, sensitive and quite understanding. The children were absolutely courteous and made sincere and concerted efforts at teaching me to write Arabic. The children are widely traveled and enthralled me with the tales of their journeys. The elder children explained to me some basic tenets of their religious faith and their pilgrimage to Mecca. The elder boys did create an impression that they were comfortable with the present custodial position, but were, by no means hostile, when the topics swerved to their mothers. The elder boys did appear to be under the influence of their fathers, paternal family members, family customs and the position of the family in the community. They were conscious of the rift between the paternal and maternal families for succession to the position of 53rd Dai-ul-Mutlaq. The smaller children, though reeling under similar influence, were however more receptive to the prospect of interactions with their mothers. Overall, the interactions with the wonderful children, left me with the impression that these children, like perhaps any other children, seem to wonder, as to why they have been placed in such a predicament and why they cannot have a normal childhood, a normal family life, abounding in love and care from both their parents.

16] At this stage, there is obviously no question of going into the rival claims of the parents in the matters of their allegations and contentions against each other. Whatever the merits or otherwise of such rival claims or allegations, the real question is whether and to what extent they ought to impact (at least legally) the immediate issues of custody and access to the children. There is no doubt that the events, as have unfolded themselves, have had a tremendous impact upon the children, who are but innocent, sensitive and intelligent children. Obviously, the children's domestic lives have been shattered by the events. Howsoever, resilient picture they may portray, they obviously yearn for the love, care and emotional security from both their parents. Howsoever bold face or cheerful countenance they may present, they are obviously distraught by the unfortunate events, which are neither of their creation nor over which, they have any control whatsoever.

17] Rigid formality not being the mandate of proceedings under the Family Courts Act, in the course of my interaction with the parents, I did make an earnest plea to the parents and their counsel to attempt to arrive at some settlement, at least upon the limited issues of shared custody and access for the sake and welfare of their children. The parents were called upon to consider whether some common ground could be arrived at, either by themselves or through mediation of some elders from the community, so that the children are spared of all this strife, so that the children are not made to choose between either of their parents. The parents were called upon to consider whether there can be some temporary cessation of hostilities, at least upon issues of shared custody and access to the children. From the facts and circumstances, presented up to now, it is quite doubtful whether either of the parents will be 'winners' in the real sense, in this unfortunate cause, though, quite certainly, the children will surely be the 'losers' in the ultimate run if the parents do not arrive at some workable arrangements on emergent basis. Looking to the age of the children, their predicament, their trauma, not too much of their childhood remains. Both, the parents as well as the children, will never be in a position to retrieve this squandered time, this precious childhood, which is ticking away. There is emergent necessity to distinguish between the personal disputes of the parents and the welfare of the children. There is emergent necessity to distinguish between the disputes to the position of Dai-ul-Mutlaq and the welfare of the children. The linkage of the two issues, is obviously not in the interests of the children. Whatever the unfortunate past, at least for the future, neither of the parents should even attempt to use the children as pawns upon the Chess Board they have chosen to spread out for themselves.

18] To the credit of the parents, as well as the learned counsel appearing for them, it must be noted that they did make attempts, insufficient though, they may appear at the present. They have however, assured me that such attempts will continue. The difficulty mainly lay in the inability on the part of Taha and Ibrahim to let bygones be bygones. The difficulty also lay in the inability of either parties to disassociate the issue of custody and the issue of succession to the position of Dai-ul-Mutlaq. To the parties, succession seemed to be the paramount consideration. In the jurisdiction with which we are concerned, however, the paramount consideration is the welfare of the children. Howsoever difficult this may presently appear, the welfare of the children requires that they are spared of such issues. The children require the unconditional love and security of both their parents, if possible together, and if not possible, separately. Such unconditional love and security, is in fact, their right, which is presently being denied to them. Lord Hausworth in Re, O'Hara2 has quoted what Fitz Gibbon L.J. has said in Re, Thain3 :

" The welfare of the child is no doubt the first and paramount consideration, but it is one amongst several other considerations the most important of which, it seems to me, is that the child should have opportunity of winning the affection of its parent and be brought for that purpose into intimate relation with the parent"

19] The impugned orders have worked themselves out to some extent. At least some sessions with the Counselors have taken place. The Counselors report are on record. At least some ice has broken in the form of some limited access to Arwa and Fatema. The Counselors have unanimously opined that such access should continue. Such access is in the interest of the children. The access, presently, might not have been smooth. But modalities need to be worked out. Confidence building measures are necessary. Above all, genuine cooperation from both the parents is vital. If any compromise on the issue of succession is not feasible, at least 2 (1990)2 IR 232 3 (1926) Ch 676 some working arrangement, some common ground, upon the issue of access and custody of the children, is necessary. For this, there should be no linkage between the issue of succession and the issue of access and custody. Neither parties, in short, should make use of the children as a bargaining point. This is certainly not in the interests of the children. This is in fact, contrary to the interest of the children.

20] The 'welfare of the children' or the 'welfare principle' remains the paramount consideration in this jurisdiction. This will not be achieved by over emphasizing upon allegations and counter allegations leveled by the parents against each other. The Hon'ble Apex Court in the case of Mousami Moitra Ganguli Vs. Jayant Ganguli4, has held that it is the welfare and interests of the child and not the rights of the parents which is the determining factor for deciding the question of custody and the question of welfare of the child has to be considered in the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents. To the same effect, are the observations in paragraph 30 of Sheila B. Das Vs. P.R. Sugasree5.

21] In paragraph 12 of Gaytri Bajaj (supra), the Hon'ble Apex Court has made reference to the exhaustive consideration of the law relating to custody of minors. The same reads thus:

12. The law relating to custody of minors has received an exhaustive consideration of this Court in a series of pronouncements. In Gaurav Nagpal v. Sumedha Nagpal 2009 1 SCC 42 the principles of English and American law in this regard were considered by this Court to hold that the legal position in India is not in any way different. Noticing the judgment of the Bombay High Court in Saraswati Bai Shripad Ved v. Shripad Vasanji Ved- 1941 AIR (Bom) 103; Rosy Jacob v. Jacob A Chakramakkal- 1973 1 SCC 840 and Thirty Hoshie Dolikuka v. Hoshiam Shavdaksha Dolikuka - 1982 2 SCC 544 this Court eventually concluded in paragraph 50 and 51 that:

"50. That when the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousmi Moitra Ganguli's case 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 have also to be noted. They are equal if not more important than the others.

51. The word "welfare" used in section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the

Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases."

22] In Re McGrath (Infants)6, Lindley L.J. , in 1893 observed thus:

"... the welfare of the child is not to be measured by money alone nor by physical comfort only. The word welfare must be taken in its wides sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

23] Similarly, in Walker Vs. Walker and Harrison - noted in (1981) NZ Recent Law 257, Hardy Boys J. observed thus ' "Welfare" is an all-encompassing word. It includes material welfare, both in the sense of an adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place, they are secondary matters. More important are the stability an the security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents.' 24] Whilst there is no ambiguity at all that the welfare principle remains the paramount consideration, the real difficulty arises in its application to a given fact situation. There are several parameters that go into the decision making process for determining where the welfare of the children lies. Parental conduct, material well being of the children, blood ties and kinship, age of the children, their sex, re-marriage of the parents, continuity of care and wishes of the children are some of the relevant parameters. The list is obviously 6 (1893) 1 Ch 143 not exhaustive. A balancing exercise has to be undertaken by the Court in an attempt to reach a decision which might best serve the children's welfare. But as pointed out by Megarry J. in Re F (An Infant), F vs. F7, the problem cannot be solved arithmetically or quantitatively by using some sort of 'points system'.

25] Mr. Lalwani has emphasized upon 'wishes of the children'.

His submissions almost suggested that this parameter is paramount in resolution of disputes of custody and access. He relied upon Gaytri Bajaj (supra), as an authority for the proposition that custody and access to the mother, even for a short duration, ought not to be granted, if the children wish otherwise.

26] The circumstances in the case of Gaytri Bajaj (supra), were slightly different. The children, in the said case, were aged 17 and 11 years. For considerable period, they had lived away from their mother. The mother had filed terms, in the matter of divorce by mutual consent and had given up custody but retained only visitation rights. After period of three years, the mother instituted a suit for setting aside the consent decree and demanding custody of the children. Even the Hon'ble Apex Court, did not outright reject the claim for custody. As is recorded in paragraph '9' of the judgment and order, the Hon'ble Apex Court, keeping in mind the position of 7 (1969) 2 ALL E.R. 766 the mother allowed her to make initial contact with the children and gradually built up a relationship, if possible, so as to arrive at a satisfactory solution to the impasse. Interim arrangements were directed, which included overnight custody with the children. Even the Hon'ble Apex Court, by means of personal interaction with the children, made attempts to bring the issue with regard to custody and visitation rights to the satisfactory conclusion. Only after due consideration of the results of all this, the Hon'ble Apex Court, on the basis of materials

on record, came to the conclusion that the children one of whom was on the verge of attaining majority did not want to go with the mother. It is in these circumstances that the Hon'ble Apex Court observed that the children having expressed their reluctance to go with the mother, even for a short duration of time, there is no option left but to hold that any visitation rights to the mother would be adverse to the interests of the children.

Therefore, Gaytri Bajaj (supra), is not an authority for the proposition that 'wishes of the children' is the only consideration or the paramount consideration. The paramount consideration, in terms of the statute as well as numerous authorities of the Hon'ble Apex Court, including Gaytri Bajaj (supra) remains 'welfare of the children'.

27] Besides, in the matter of custody and access, fact situation is what matters the most and consequently, reliance upon precedents can be mainly for culling out the principles involved. To that extent, the utility of precedents in such jurisdiction is quite limited. Much depends upon the facts and assessment, having regard to a host of parameters in determining where the welfare of the children lies. In Gaytri Bajaj (supra) itself, the Hon'ble Apex Court after taking special notice of its earlier decisions in the cases of Mousami Ganguli (supra) and Shiela Das (supra) has held that cases of custody have to be considered in the facts of each case and the decided cases on the issue may not be appropriate to be considered as binding precedents.

28] The House of Lords in the case of Gillick Vs. West Norfolk and Wisbech Area Health Authority8, has held that wishes of the children who are nearing majority or who can be shown to understand the issues involved should be allowed to determine the question where and in what manner they may live. The Gillick principle (supra), finds statutory expression in Section 17(3) of the Guardian and Wards Act, 1890, which provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference.

29] The 'wishes of the children' is no doubt, one of the relevant parameters to be taken into consideration. However, this is neither the only parameter nor the paramount consideration. Besides, 'wishes of the children' are not to be confused with some pre-prepared statements of the children, as a result of tutoring or perhaps even indoctrination. The 'wishes of the children' are not statements made in the din of battle, under tremendous stress or strain. Before a decision based upon 'wishes of the children' is arrived at, regard must be had to the age and maturity levels of the children, the circumstances in which the children are placed, the children's perception as to their own welfare, possibility of tutoring and indoctrination, dominant position of the custodial parent and other such considerations. Further, it is necessary to create, as far as possible, circumstances conducive to the exercise of intelligent preference by the children.

30] The 'wishes of the children' have to be ascertained in the proper manner and by the proper authority before any decision is based upon them. One of the appropriate ways of ascertaining the 'wishes of the children' will be by means of interviews and interactions with skilled Welfare Officers or Counselors. The traditional view is, however, that the decision must be seen to be taken by parents or the Court, so that the responsibility for the decision does not rest with the children. In the case of Adams Vs. Adams9, Dunn L.J. observed thus:

The children should not be allowed "to feel that they have to take the decision as between the father and the mother, with which of them they shall live. The pressures on children are quite sufficient when the marriage has broken down and one of the parents has left home without

putting on them the additional burden of being made to feel that they have to decide their own future".

31] In matters of custody and access, the Family Court should be conscious that it is not merely enforcing parental rights or determining the rights of the parents. In such proceedings, there are not two parties - the husband and the wife - but also a third party the children. That third party is the most important party in such proceedings. Rigid formal procedures, which invariably inhere civil proceedings before Courts of law, need not come in the way of the Family Courts determining the welfare of the children. In re, K10, Lord Delvin, very aptly observed thus:

"In the jurisdiction parens patriae there are unquestionably some principles of judicial inquiry which are not observed:

It is now realised that proceedings in respect to custody, access etc., of children in a court of law are more administrative in nature than, strictly speaking, judicial.

The procedure cannot, and should not, be that of adversary litigation between two litigants. They are (and should be) no-contentious proceedings. The first step in this direction was taken by the English law in 1958 when the law provided for court welfare officers, who are entrusted with the duty of investigating and reporting in cases concerning children whenever they were required to do so by the court. Thus, the courts in dealing with 9 (1984) FLR 768 10 1963(3) WLR 435 questions of welfare of children no longer depend wholly on the contentious evidence produced by the parties, but can rely on the report of the trained and independent investigators with opportunities of investigating in the natural and real surroundings of the parties. By relying on the report of court's own investigation - the court's investigating officer - rather on the evidence of parties which is more often than not motivated by the idea of serving the interests of the parties, the court acts a real parens patriae and is in a position to find out precisely what is in the welfare of the child in a given case. In this the court remains essentially a judicial court, though the procedure followed is essentially administrative.

32] Therefore, ig upon cumulative consideration of various parameters and the record the Court is required to act in the children's best interests. In the exercise of such delicate jurisdiction, the Court cannot abdicate judicial discretion, either to the wishes of the children or even the reports of Counselors or Welfare Officers.

No doubt, all these are very relevant parameters. But the ultimate decision has to be made by the Court, in exercise of its judicial discretion. This, no doubt puts a very great responsibility upon the Courts. Therefore, it should be appreciated that it is not possible for the Court, in all situations to deal with what may be ideal for the children, but simply what best can be done in the circumstances presented. The typical dilemma faced by the Courts, in such matters is described by Cumming -Bruce L.J. in the case of Clarke-Hunt Vs. Newcombe11, in the following words:

"There was not really a right solution; there were two alternative wrong solutions. The problem for the judge was 11 (1983) 4 FLR 482 to appreciate the factors in each direction and to decide which of the two bad solutions was the least dangerous, having regard to the long-term interests of the children.....' 33] Applying the aforesaid principles and upon cumulative consideration of the aforesaid facts and circumstances, I am of the opinion that the impugned orders need not be set aside. Rather, they need to be supplemented, so that the counseling as directed, proceeds in a better manner and the entire process is rendered more meaningful. Besides, upon prima-facie

consideration of the material on record, inter alia, in the form of Counselors' reports, interaction with the children and their parents, the decision of the California Court, though custody for seven days out of each thirty days to the mothers cannot be considered at this stage, some reasonable directions in the matter of access and visitation are warranted. Whilst the present circumstances do not appear to be appropriate for grant of custody for seven days, there is need to restore and strengthen ties between the children and their mothers.

This process has to be gradual and confidence building measures are therefore, appropriate. Any attempts to severe the maternal ties would not be in the interests of the welfare of the children. After all, the ties of motherhood are too strong for any natural destruction, even if the contentions of Taha and Ibrahim as to the conduct of Arwa and Fatema are to be accepted. The complete denial of access and visitation rights to Arwa and Fatema, in the facts and circumstances of the present case, will not be in the interests of the welfare of the children and their all round development, which, in this jurisdiction remains the paramount consideration.

34] These petitions are therefore, disposed of with the following orders:

A] Between 25 December 2015 and 31 March 2016, the Respondents, in each of these petitions, are directed to grant to the Petitioners access and visitation rights to the children on at least four occasions. The first of such occasion shall be between 25 December 2015 and 31 December 2015. The precise date during this period may be decided by the parties themselves depending upon the academic or other schedules of the children. In case of any difficulty, the Family Court which is seizin of the matters, may make appropriate orders in this regard;

B] The access, as aforesaid, shall be for the entire day, i.e., between 10.00 a.m. and 5.00 p.m., at the Petitioners' apartment at Malbar Hill or any other suitable venue other than the place where the children presently reside alongwith the Respondents. The access shall be under the supervision of at least one Counselor agreed to by the parties and failing such agreement, deputed by the Family Court, which is seizin of the matters;

C] The Respondents to make arrangements to reach the children at the venue of access by 10.00 a.m. and pick up the children by 5.00 p.m. on the same day. However, neither the Respondents nor any persons on their behalf shall remain present at the venue of access during the access/visitation and further they shall not obstruct such access/visitation;

D] The Counselors to file reports of the supervised access before the Family Court, as far as possible within seven days from respective access dates. The Family Court shall be at liberty to furnish copies of such reports to the parties;

E] Upon receipt of four reports from the Counselors by 7 April 2016, the Family Court after afford of opportunity of hearing to the parties and if deemed necessary by interviewing the children, dispose of the motion for interim custody, access and visitation rights, in accordance with law, latest by 30 April 2016;

F] In order to facilitate access/visitation as granted by this order, the Family Court is empowered to make orders/directions from time to time particularly, in the matters of venue, dates etc. The Family Court, will no doubt take into consideration the academic and other schedules of the children, so that they are affected in the minimum. The parties shall be at liberty to apply to the Family Court, in this regard;

G] The observations in this order are prima-facie and the same are not be construed as reflection upon the conduct of the either parties. The Family Court, which is seizin of the matters, is therefore directed to dispose of the motions for interim custody, access and visitation rights based upon the material which may be placed before it and in accordance with law;

H] Rule is disposed of in the aforesaid terms, in both the petitions.

I] The Civil Applications are also disposed of in the aforesaid terms.

J] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)

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WAZID ALI VS SMT. RUBINA BANO AND ORS.

Equivalent citations: AIR 2008 Raj 49

2008 AIR (Raj) 49; 2007 Supreme (Raj) 1422

Wazid Ali
vs
Smt. Rubina Bano And Ors.

Decided on 22 November, 2007
Bench: Hon'ble Mr. Justice R Gandhi

GUARDIANS AND WARDS ACT : S.9

Jurisdiction of court --the Trial Court has the jurisdiction to entertain application filed under sec. 10 of GUARDIANS AND WARDS ACT where the child ordinarily resides within the jurisdiction of the Trial Court .

The living for certain period at certain place cannot be construed to be the ordinary residence of the minor. --place of ordinary residence" means the residence of his natural guardian, the very purpose of using the word "the residence of the minor" in S. 9 would be the natural guardian that . Hence the actual residence of the minor, having regard to the circumstances under which the minor happens to reside at a particular place must be taken into consideration in deciding the place where the minor ordinarily resides.

ORDER

R.C. Gandhi, J.

1. This Revision petition has been preferred against the order dated 9-2-2007 passed in an Application No. 203/2006, by the District and Sessions Judge, Jhunjhunu (hereinafter referred as 'the Trial Court'), whereby application filed by the petitioner under Section 10 of the Guardians and Wards Act, 1890 (hereinafter referred as 'the Act of 1890') has been dismissed observing that the Trial Court has no jurisdiction to entertain the application.
2. The revision petition has been preferred against the impugned order on the ground that the Trial Court has not properly appreciated the facts and the law and came to erroneous conclusions observing that the Trial Court has no jurisdiction whereas it is asserted that the Trial Court has the jurisdiction as the child was ordinarily residing within the jurisdiction of the Trial Court and seeks to set aside the impugned order.
3. Heard learned Counsel for the parties and perused the record.
4. Wazid Ali, petitioner and Smt. Rubina Bano, respondent No. 1 contracted marriage on 26-10-1998. They resided at their matrimonial house at Jhunjhunu. A child, Ayyanali was born out of the wedlock on 14-6-2003. Some misunderstanding developed between the spouses and the relations strained and gradually worsened. The respondent No. 1 left the house of the petitioner along with the child and started living with her parents. Ultimately the petitioner dissolved the marriage on 6-3-2006 by serving Talak upon the respondent No. 1. The child at the time of

the dissolution of the marriage was of 2 years and 8 months and living with his mother. Smt. Hussain Bano, is the mother of the respondent No. 1, Smt. Rubina Bano, who is a permanent resident of Sikar and temporarily living at Bombay with her husband, who is running his business at Bombay. Smt. Rubina Bano, respondent No. 1 contracted another marriage with one Tanveer Ahmed on 20-8-2006. Noticing this development, on 31-8-2006 an application under Section 10of the Act of 1890 was filed by the petitioner for custody of the minor child. The respondents filed the reply to the application presented by the petitioner before the Trial Court stating that the child is living with the maternal grandmother, Smt. Hussain Bano who is looking after the interest and welfare of the child but no plea of jurisdiction of the Court to entertain the application of the petitioner was raised. The Trial Court during the course of the proceedings directed the respondents to cause the appearance of the child In the Court. At that stage, the respondents filed an application stating therein that the Trial Court has no territorial jurisdiction to entertain the application as the child is living at Bombay which is his ordinary residence in terms of Section 10 of the Act of 1890.

5. It is also stated in the bar that on 11-9-2006, before filing objections to the application presented under Section 10 of the Act of 1890 by the petitioner, the respondent Smt. Hussain Bano, maternal grand-mother of the child, having his custody, filed an application under Section 125, Cr.P.C. for grant of maintenance for the child before the Magistrate at Jhunjhunu. The child has been handed over to the respondent No. 3, Smt. Hussain Bano, because of the compulsion of the re-marriage by the respondent No. 1, Smt. Rubina Bano. Smt. Hussain Bano, respondent No. 3 stated in the application that she is living at Sikar and the child is under her care and custody as her daughter has re-married to one Tanveer Ahmed and handed over the child to her for the welfare and nourishment of the child and for that reason the child need maintenance from his father. This application thereafter has been withdrawn by the respondents.

6. Learned Counsel for the respondents has submitted that the question of Jurisdiction has rightly been decided in accordance with law by the learned Trial Court as the Court had no Jurisdiction as the child Is living at Bombay with hia maternal grandmother and not at Jhunjhunu. In rebuttal to the plea of the learned Counsel for the respondents, learned Counsel for the petitioner has drawn the attention of the Court to the Vakalatnamas (power of attorneys) filed before the Trial Court by respondent No. 3 Smt. Hussain Bano as well as before this Court wherein she has shown her permanent residence at Sikar and temporary residence at Bombay.

7. According to the learned Counsel for the petitioner, the Talak has been conveyed by post to the respondent No. 1 Smt. Rubina Bano. The respondent No. 1 on the contrary has filed written Talaknama duly signed by the parties which has been disowned by the learned Counsel for the petitioner. Learned Counsel for the petitioner has also placed on record a document which is framed in the shape of "Ikrarnama/Declaration". It is the statement of the respondent No. 1 only and according to the petitioner it has been received by him by post.

8. Learned Counsel for the respondents has also submitted that the certified copy of the application presented by respondent No. 3 under Section 125, Cr.P.C. is not on the record of the appeal, therefore, it cannot be taken into consideration. He is right in his plea. Unless it is brought on the record, it cannot be appreciated by the Court. However, under the provisions ofEvidence Act, Judicial notice can be taken of the document by the Court as it has not been denied by the respondent that application containing such averments has not been filed by them.

9. The only legal aspect of jurisdiction of the Court to entertain the application has been dealt with by the trial Court and raised before this Court also. The Court has to determine as to whether the Trial Court has the jurisdiction to try the application under Section 10 of the Act of 1890. The Trial Court could have entertained the application, had the petitioner made out that the child was having his ordinary residence within the Jurisdiction of the Trial Court. The ordinary residence could not mean to be living at a place at the time of the presentation of the application but should have been living permanently there.

10. This is a peculiar case where on dissolution of the marriage, the child being of the age of 2 years 8 months was taken by the mother and according to the Principles of Mahomedan Law also the mother has right to retain the custody of the child till the age of 7 years or till re-marriage, On the re-marriage, the mother of the child handed over the child to the maternal grand-mother of the child and not to the father of the child, natural guardian. According to the learned Counsel for the petitioner in terms of Section 256 of the Principles of Mahomedan Law by Sir Dinshah Fardunji Mulla, the mother after the re-marriage is not entitled to retain the custody of the child. For convenience Section 256 is extracted and reads as under:

    256. Right of mother to custody of infant children The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child (c), unless she marries a second husband in which case the custody belong to the father (d).

    Nature and extent of right of hizanat (custody) In Imambandi V. Mutsaddi (e), their Lordships of the Privy Council said: "It is perfectly clear that under the Mahomedan Law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni Law) is the legal guardian.

    It would appear from the passage quoted above that the father is the primary and natural guardian of his minor children, and that the right of custody of the mother and the female relations mentioned in Section 257 below is subject to the supervision of the father which he is entitled to exercise by virtue of his guardianship. If so, the right of hizanat does not carry with it all the powers which a guardian of the person of a minor has under the Guardians and Wards Act, 1890. See note to Section 260, "Father as guardian of his minor children."

11. The mother has deprived herself to retain the custody as she has re-married to second husband. The custody of the minor in such a case belongs to the father, natural guardian and not to the maternal grandmother. Under the Principles of Mahomedan Law, the maternal grand-mother is not entitled to retain the custody of the child.

12. Learned Trial Court has come to the conclusion that the Court at Jhunjhunu has no Jurisdiction as the child is not living within the Jurisdiction of that Court.

13. It Is admitted case of the respondents that the mother of the child has remarried and in the event of re-marriage, the custody of child has been transferred to the maternal grand-mother who lives at Sikar permanently and temporarily at Bombay which is evident from the power of attorneys executed in favour of the advocates filed before the Courts, including this Court, representing Smt. Hussain Bano in whose care and custody the child is. It is to be seen from the facts attending to this case as to whether the ordinary residence of the child could be at Bombay

or Sikar where he is living in the custody of the maternal grand-mother or at Jhunjhunu where his father lives.

14. Learned Counsel for the respondents to make out that the child is living at Bombay has placed on record along with the application before the Trial Court a certificate dated 31-1-2007 issued by Amrut Nagar Resident Welfare Association, certifying that Master Ayyanall is in good and stable condition and attending the school. This certificate is neither from the authority of the Government nor from the School and thus do not have that much evidentiary value. It has also not been proved by the respondents providing opportunity to the petitioner of cross-examine that under what circumstances this certificate came to be issued. Respondents have also placed on record a prescription dated 29-1-2007 issued by the Doctor stating therein that child being minor, is physically fit and not suffering from any disease. This certificate has been issued at Bombay. These certificates could be issued as the maternal grand-mother has been living there temporarily and the child is under her custody. Bombay cannot be said to be ordinary residence of the child for the simple reason that the maternal grandmother of the child has herself stated in the application under Section 125, Cr.P.C. and as recorded in the power of attorneys filed before the Courts that her permanent residence is at Sikar and present residence is at Bombay.

15. Learned Counsel for the respondents has also relied upon the judgment delivered in the case title Pooja Bahadur v. Uday Bahadur , which deals with the custody of the child. In this case, the children were living with the father at Delhi. The mother of the children filed application at Chandigarh for the custody of the children. The mother went up to the Supreme Court and the Supreme Court while disposing of the application observed as under:

    4. The appeal arises out of an appellate order of the High Court of Punjab and Haryana at Chandigarh, taking the view that custody proceedings by the mother would lie in the Guardians and Wards Court at Delhi and not in a Court at Chandigarh. As the minor children are residing with the father at Delhi no fault can be found with that order.

    5. We, therefore, while disposing of this appeal, direct the transfer of custody proceedings from Chandigarh Court to be filed before Guardians and Wards Court, Delhi/District Court, Delhi. The District Court, Delhi shall proceed to deal with this matter at its earliest convenience and may decide the same on its own merits, after hearing the parties in these proceedings.

16. Learned Counsel for the petitioner has also relied upon the judgments in support of his plea. He has submitted that the respondents in their application under Section 125, Cr.P.C. have admitted with regard to the residence of the respondent No. 3 Smt. Hussain Bano at Sikar and this evidence has to be read against them unless they in law come out of this admission. Learned Counsel for the respondents in reply has submitted that since application is not on record, therefore, he cannot be permitted to raise this legal plea. As observed earlier, it is not denied by the respondents that such an application has been filed by them which contains the admission with regard to the permanent residence. Any statement made in incidental, collateral or subsequent proceedings between the parties can be taken into consideration for evidentiary value and if admission is made it can be read against him and in law it operates as estoppel against the party which has made the statement. Besides above, the learned Counsel for the petitioner has relied upon the judgment of the Madras High Court delivered in case title Bhagyalakshmi and Anr. v. K. Narayana Rao . The facts of this case are that out of the wedlock of the parties three children were born. They were living at Komarapalayam situated in District Salem. There were some minor quarrels and misunderstanding between the wife and the husband. The wife

suggested the husband to go to her father's house situated at Village Kote for a brief stay. The husband agreed to her suggestion. She took the children also with her to her father's house. The husband made several efforts to get the wife and the children back to Komarapalayam but he was informed by the wife that she was suffering from ailment and undergoing treatment and refused to come back to her husband's house. When all attempts made by the husband were failed, he filed an application for custody of the children at District Court, Salem. The objection was taken that Court at Salem do not have the jurisdiction as the children are living with the mother at Village Kote which falls under the jurisdiction of another District. Dealing with this case, the Court observed as under:

8. There is yet another point of view from which the question of Jurisdiction may be considered. The objection with reference to the jurisdiction of the District Court at Salem to entertain the petition filed by the respondent was no doubt raised In the counter but it does not appear to have been seriously urged, as otherwise, that would have been dealt with by the Court below. But even otherwise, the appellants had participated in the proceedings and had also given evidence and on a consideration of the evidence that was placed before the Court and taking Into account the welfare of the minors, the Court below had directed the appellants to hand over the custody of the minor children to the respondent. It cannot be said that there has been consequent failure of justice. Section 21, C.P.C. is intended to avoid technicalities based on local or territorial jurisdiction in the upholding of orders of Court. In Shan Harichand Ratanchand v. Virbbal , it has been laid down that Section 21, C.P.C. is a transcendental and curative provision to see that technicalities do not prevail, when there is no failure of justice and that the appellate Court was bound to resort to this curative provision before declaring the order of the District Court to be null and void by upholding the objection about territorial jurisdiction. Even on this ground, the contention of the appellants that the District Court at Salem had no jurisdiction to entertain the application filed by the respondent has to fail.

17. He has also relied upon the judgment delivered in case title Konduparthi Venkateswarlu and Ors. v. Ramavarapu Viroja Nandan and Ors. wherein also the custody of the child was demanded by the husband. The parties lived permanently at Berhampur. A child was born out of the wedlock and stayed at Phulbani with the parents. The mother fell ill and the husband-respondent took his wife and the child to his father-in-law's house at Visakhapatnam and left them for treatment. The mother of the child passed away while the child was retained by the maternal grand parents. The father of the child approached them for handing over the child which was refused. He filed an application under Section 9 of the Guardians and Wards Act before the District Judge, Ganjam. The respondents therein took an objection with regard to the jurisdiction of the Court stating that the child is living at Visakhapatnam, therefore, the District Judge, Visakhapatnam Is having the territorial jurisdiction to entertain the application. The Court while dealing with it observed as under:

5. Mr. Swamy In support of his contention relied upon a decision of the Rajasthan High Court in the case of Smt. Vimla Devi v. Smt. Maya Devi and a decision of the Andhra Pradesh High Court in the case of Harihar Pershad Jaiswal v. Suresh Jaiswal , whereas Mr. Ratho, the learned Counsel for the respondent No. 1 places reliance on the decisions in the cases of Jamuna Prasad v. Mst. Panna ; Bhola Nath v. Sharda Devi AIR 1954 Pat 489 and Sarada Nayar v. Vayankara Amma . The learned Counsel for the parties stated that there is no decision of this Court nor is there any decision of the Supreme Court on the point. The place where the minor ordinarily resides

so as to confer jurisdiction on the concerned District Judge, has to be interpreted in each case depending upon the facts and circumstances of that case. Residence of a minor is a matter of fact. By use of the expression "ordinarily resides" the Legislature obviously meant that it is more than a temporary residence even though such period may be considerable. A temporary residence at a particular place or residence by compulsion at a place, however long, cannot be treated as the place of ordinary residence. Similarly, the words "ordinarily resides" are not identical and cannot have the same meaning as "residence at the time of the application". The purpose for using the expression "where the minor ordinarily resides" is probably to avoid the mischief that a minor may be stealthily removed to a distant place and even if he is forcibly kept there, the application for the minor's custody could be filed within the jurisdiction of the District Court from where he had been removed or in other words, the place where the minor would have continued to remain but for his removal. The learned Judge of the Rajasthan High Court in the case of Smt. Vimla Devi v. Maya Devi , after considering the decisions of the Allahabad, Assam, Gujarat and Punjab High Courts came to the conclusion that since the minor had left her father's place along with her mother since she was only one month old and continued to remain with her mother at Bandikui, it cannot be said that the District Court at Bhilwara where her father was living can have the jurisdiction to entertain an application under the provisions of the Guardians and Wards Act. In other words, it was held that the minor cannot be considered to have ordinarily resided at Bhilwara within the meaning of Section 9 of the Act on the date of the presentation of the application. While taking the aforesaid view, the learned Judge also considered the contrary view expressed in AIR 1954 Saurashtra 13 Jhala Harpalsinh Natwar Sinhji v. Bai Arunakunvar;Chandra Kishore v. Smt. Hemalata Gupta and Sarada Nayar v. Vayankara Amma. The learned single Judge of the Andhra Pradesh High Court in the case of Harihar Pershad Jaiswal v. Suresh Jaiswal also considered the expression "place of ordinarily residence" used in Section 9 of the Act. It was held by the learned Judge that (at p. 18 of AIR):

...It is not the place of residence of the natural guardian that gives the jurisdiction to the Court under Section 9(1) but it is the place of ordinary residence of the minor and the Legislature has designedly used the word "where the minor ordinarily resides.

In the facts and circumstances of that case it was held that the minor's ordinary place of residence could not be at Hyderabad merely because the father who is the natural guardian was residing at Hyderabad. The aforesaid two decisions no doubt support the contention of Mr. Swamy, the learned Counsel for the appellants to a great extent.

6. A Bench of Patna High Court in the case of Bhola Nath v. Sharda Devi AIR 1954 Pat 489. considered Section 9(1) of the Act. Their Lordships held (Para 6):

The question as to ordinary residence of the minor must be decided on the facts of each particular case and generally, the length of residence at a particular place determines the question. The expression "the place where the minor ordinarily resides" means the place where the minor generally resides and would be expected to reside but for special circumstances.

...Generally in the case cited at the Bar, the dispute is between the father and the mother with regard to the custody of the child and in that context, Section 9(1) of the Act has been interpreted depending upon the facts and circumstances of the case. There cannot be any doubt that the father is the legal guardian of a minor child, both under the Hindu law as well as under the Guardians and Wards Act. In all matters under the Guardians and Wards Act, paramount consideration is the interest of the minor. It is the welfare and interest of the minor which

should weigh with the Court in interpreting a particular provision under the Guardians and Wards Act. Normally the minor child would have continued with his father and mother and his permanent residence at Berhampur. It is only by coincidence that the mother fell ill and the father took his wife and son to Visakhapatnam and left them there in his father-in-law's place and on account of sudden death of the mother the minor child remained at Visakhapatnam. In the aforesaid circumstances, I am unable to hold that Visakahpatnam would be considered as the place where the minor ordinarily resides. On the other hand, the minor's place of residence has been temporarily shifted to Visakhapatnam though for quite sometime because of the eventuality that his mother fell seriously ill and had to be shifted to Visakhapatnam. Since the permanent residence of the father and also of the minor child is at Berhampur and they had in the fact remained in Orissa and it is only his father who had taken him along with his mother to Visakhapatnam for the treatment of his mother, the ordinary place of residence of the minor must be held to be at Berhampur and, therefore, the District Judge, Ganjam was right in his conclusion that he has Jurisdiction under Section 9 of the Act to entertain the application for the custody of the child. I do not find any infirmity in the said order so as to be interfered with by this Court. Even the decision of the Rajasthan High Court on which the learned Counsel for the appellants placed strong reliance also lays down that the "place of ordinary residence" has to be decided in that facts and circumstances of each case.

18. Learned Counsel for the petitioner also relied upon the judgment of the Delhi High Court inAmrit Pal Singh v. Jasmit Kaur , whereby the custody of the children was demanded underSections 6 and 25 of the Guardians and Wards Act, 1890. The father of the children took away the children from the mother. She filed an application for interim custody of the children till pendency of the main petition. The children were taken during the proceedings by the father to Guwahati by train. They permanently lived at Rajouri Garden, Delhi. In the application filed by the mother, objection was taken by the father that the Court at Delhi has no Jurisdiction as the children were living with the father at Guwahati. However, during the proceedings he did not press it and admitted the jurisdiction of Delhi High Court. Even in such circumstances the Court dealt with the question of jurisdiction and observed as under:

10. Inherent jurisdiction is something different from territorial jurisdiction. The Guardianship Court in Delhi cannot be said to lack inherent jurisdiction as it is a Court that has power to decide guardianship matters, It cannot be said that the Court at Delhi was incompetent to try the suit of that kind. The objection at the highest can be to its territorial jurisdiction. This does not go to the competence of the Court and can also be waived. It is for the reason that law demands that the objection to territorial jurisdiction of a Court must be raised at the first instance. It is well settled that the objections as to the local jurisdiction of the Court does not stand on the same footing as to the competence of a Court to try a case. Competence of a Court to try a case goes to the very root of the jurisdiction and where it is lacking, it is a case of inherent lack of jurisdiction.

11. On the other hand, an objection as to the local jurisdiction of a Court can be waived and this principle has been given a statutory recognition by an enactment under Section 21 of the Code of, Civil Procedure.

12. In the present case, as already noted the children of the family were taken out of the matrimonial home on 17-9-2003 which to my mind was an act of inter-parental kidnapping and cannot deprive Delhi Courts of the territorial Jurisdiction to entertain a petition.

19. On appreciation of provisions of law and the facts of this case it is seen that the child is under the custody of the maternal grand-mother because of the compelling circumstances. However, for the welfare of the child the custody of the child can be taken by the person who is interested in the welfare of the child. The maternal grand-mother in whose custody the child has been kept is taking care of the child and also filed an application demanding maintenance from the father for the welfare of the child. The respondent No. 3 Smt. Hussain Bano has stated in the Vakalatnamas (power of attorneys) and in her application under Section 125, Cr.P.C. that she permanently lives at Sikar and presently at Bombay. The living for certain period at certain place cannot be construed to be the ordinary residence of the minor. The Andhra Pradesh High Court in the case title Harihar Pershad Jalswal v. Suresh Jaiswal and Ors. , has dealt with the expression "place of ordinary residence" and observed as under:

    If the expression "place of ordinary residence" means the residence of his natural guardian, the very purpose of using the word "the(residence of the minor" in Section 9 would be the natural guardian that given the jurisdiction to the Court under Section 9(1) but it is the place of ordinary residence of the minor and the Legislative has designedly used the word "Where the minor ordinarily resides". Hence the actual residence of the minor, having regard to the circumstances under which the minor happens to reside at a particular place must be taken into consideration in deciding the place where the minor ordinarily resides.

    In the circumstances of the case it must be held that the minor has been living with her mother at Nagpur for some time and at Tumsar in Maharashtra State for some time. Hence the minor's ordinary place of residence cannot be said to be Hyderabad merely because the father who is the natural gaurdian is residing at Hyderabad. (Case law discussed).

    Further, there is no evidence to show that the minor was residing at Hyderabad in 1975 when the application was filed. Assuming it to be so, it can only be said to be a place of temporary residence for the purpose of complying with some conditions imposed by the Magistrate and this temporary residence cannot be deemed as the place of ordinary residence of the minor. In these circumstances, the trial Court was justified in holding that the Court at Hyderabad has no jurisdiction to try the petition and return the same for presentation to the proper Court.

20. The ordinary residence of the minor cannot be said to be at Sikar as the child has been shifted as per compulsion and the circumstances created by the mother of the child. The child would have been handed over to the custody of the father, though perhaps, the mother might have thought in her wisdom that the child with her mother may be more convenient and looked after well unmindful of it that the father is the natural guardian of the child. The plea of the learned Counsel for the respondents that the ordinary residence is at Bombay is not made out as per their own pleadings and the record. Smt. Hussain Bano in whose custody the child is, is resident of Sikar. Since the child has been put under custody of the maternal grand-mother because of the compelling circumstances, therefore, it also cannot be said to be the ordinary residence of the minor. Therefore, under such circumstances, I feel that the District Court, Jhunjhunu from where the child was taken by the mother from the custody of the natural guardian has the jurisdiction to entertain the application as the Jhunjhunu is the ordinary residence of the child.

    For the aforesaid reasons, the order under revision is set aside. The application is remanded back to the District and Sessions Judge, Jhunjhunu for disposal in accordance of law.

21. Revision Petition is allowed. No order as to costs.

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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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