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The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation.

Hon'ble Mr. Justice Kurian Joseph

Transfer Petition (Civil) No. 1278 of 2016

Santhini vs. Vijaya Venketesh

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

"After all the child needs both father and mother."

Hon'ble Mr. Justice Kurian Joseph

(Civil Appeal Nos. 2471-2473 Of 2016

Tatineni Mayuri vs. Edara Baldev)

Compiled by

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

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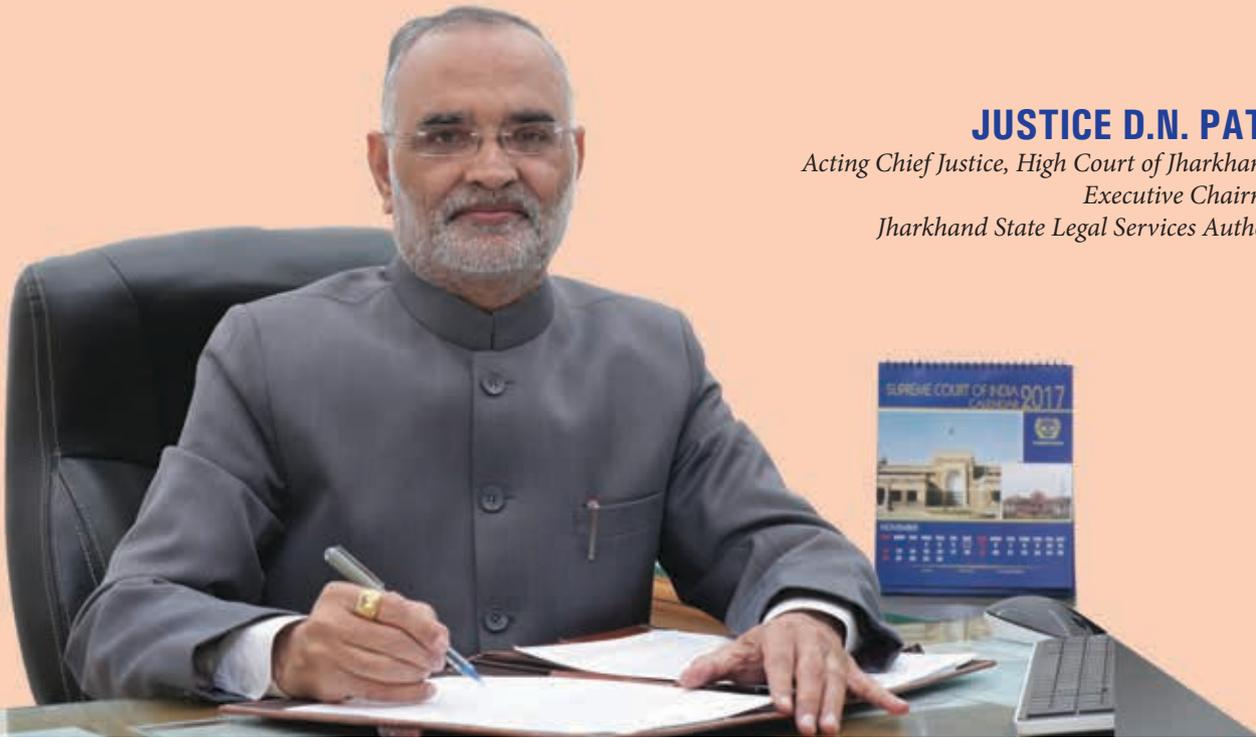
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JUSTICE D.N. PATEL

Acting Chief Justice, High Court of Jharkhand &
Executive Chairman,
Jharkhand State Legal Services Authority

Preface...

“ 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

My Lord Justice Kurian Joseph has said in a land mark judgment (Supreme Court of India, TRANSFER PETITION (CIVIL) NO. 1278 of 2016 SANTHINI Vs VIJAYA VENKETESH) that

“.....The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation. However, reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties. In all these matters, the approaches are different.

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

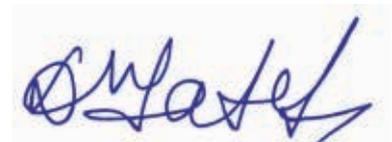
Family Court Act, 1984 is the only Act which requires the services of Counsellors, Doctors, Social Activist, Organisations etc. A Family Court Judge is expected not to have any kind of adversarial attitude . He is not exercising adversarial adjudicatory powers but a participatory reconciliatory powers. His role is that of a mediator, a role of a conciliator and a role of a settler. He has to be a learned man in Law, in Psychology, in History, in sociology and in perception. The atmosphere of Family Court should be friendly and conducive to inspire trust and confidentiality. Family is the foundation of society. The dispute in the family has its impact on the society. Family dispute has many dimension :-

- Maintenance and Alimony
- Custody of Children
- Visitation Rights
- Divorce and Restitution of Conjugal Rights
- Stridhan

These disputes have potentiality to ruin the innocence of child and esteem of elders. Bringing about peace and harmony in Family is no less important than bringing Ganga on earth. The Family Court Judge should act as guardian and he should be specialist of human behaviour. A Family Court Judge is greatest evaluator of social dynamics. A comprehensive concept of the welfare of child involves social security, emotional security and all kind of future a child is going to have. Absence of emotional bond may shatter the child Sensitivity is the need of hour for the Family Court Judges and early disposal of family matters saves the person from unforeseen hardships.

Family as an Institution has saved the Indian civilization in all challenging circumstances. Family disputes are approaching courts in frightening speed. It has to be understood that neither of the spouse is the commodity in possession of the other. A little more sensitivity and alertness of a family Court may reunite the couple. Therefore, family Court Judges need to be trained, sensitized and encouraged to adopt more and more reconciliatory approach.

This work of Jharkhand State Legal Services Authority is an attempt to compile landmark judgments of the Apex Court of India/High Courts of India on the topics-Duty of Family Court, Divorce, Alimony, adoption , custody of children and Stridhan at on place for the family Court Judges, lawyers, social workers and common litigants. Under able leadership and guidance of My Lord Justice Kurian Joseph, Judge, Supreme Court of India and Chairman, Supreme Court Committee for Sensitization of Family Court Matters, we shall definitely be able to achieve our objectives. I assure My Lord that no stone shall be left unturned in fulfilling Your Lordship's dreams and directions.



(Justice D.N. Patel)

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LANDMARK JUDGMENTS ON

ALIMONY & MAINTENANCE

ROMA SINGHA VERSUS HARE KIRSHNA SINGHA

In the High Court of Gauhati

MAT Appeal No. 37 of 2010

(Before Hon'ble Mr. Justice I.A. Ansari and Hon'ble Mrs. Justice Anima Hazarika, JJ.)

Roma Singha ... Appellant;
Versus
Hare Kirshna Singha ... Respondent.

Decided on May 10, 2013

Hindu Marriage Act, 1955, S. 25 — Statutory right of the wife to claim maintenance — Obligation to provide for wife's maintenance and support — Obligation does not come to an end on passing of decree of dissolution of marriage in favour of the husband — Quantum of permanent alimony and permanent maintenance — Court must have regard to the husband's income including the wife's income and property and the conduct of the parties and other circumstances of the case — Amount to be determined as may seem just to the court [Para 8]

Advocates who appeared in the case:

Mr. R.P. Sharma and Ms. R. Devi, for the appellant.

Ms. B. Chaudhury and Mr. B.P. Sinha, for the respondent.

JUDGMENT AND ORDER

Hon'ble Mr. Justice Anima Hazarika :— Challenge in the instant appeal is made under section 28 of the Hindu Marriage Act, 1955 ('the Act') by the wife questioning the legality and validity of the judgment and decree dated 8.9.2010 passed by the Principal Judge, Family Court, Cachar, Silchar in FC (Civil) No. 33 of 2006 decreeing dissolution of marriage between the spouses under section 13 of the Act filed by the respondent herein (husband).

2. Heard Ms. R. Devi, learned counsel appearing for the appellant. Also heard Ms. B. Chowdhury, learned counsel appearing for the respondents. Case of the respondent as pleaded relating to matrimonial offence committed by the appellant herein (wife) in a nutshell is summarized as follows:

The marriage between the spouses was solemnized on 19.4.1999 according to Hindu rites and rituals. After the marriage they lived as husband and wife and out of the said wedlock a male child was born named Harshadheer Singha on 12.5.2000. The allegations brought against the appellant was that after the marriage she used to visit her parent's house frequently and stayed there for about Vi weeks at a stretch on various causes without taking into consideration the hardships faced by the respondent. After the birth of the child, the appellant went to her parent's house on the plea of her post-natal necessities whereof she conveyed her unwillingness to live with the respondent as his wife. However, on persuasion good sense prevailed and she came back to fulfil her marital obligation. It has been further alleged that during January 2001 both the spouse went to attend the marriage of her sister wherefrom she refused to come back and stayed there the parental house) for one (1) month causing inconvenience to him. She did not come back to the residence of the respondent to celebrate Basanti Puja in spite of request. The allegation

would further reveal that when the respondent get fractured injuries in a vehicular accident she did not come back to look after him which culminated a suit for restitution of conjugal rights and during the pendency of the suit, through amicable discussion, the appellant came back to resume conjugal life. Thereafter, the respondent was transferred to Dehradun and both the spouse went to Dehradun, his place of posting, whereof the respondent had undergone gallbladder operation and the appellant instead of looking after him picked up quarrel with him and caused injuries on his person biting with teeth and thereafter, she left Dehradun on 16.10.2005 and conveyed her decision over phone withdrawing herself from the life of the respondent which caused a reasonable apprehension in the mind of the respondent that it would be harmful for him to live with the appellant and conduct of such marital offence would come within the purview of the term cruelty. The husband, therefore, filed a suit being KC (Civil) No. 33 of 2006 before the Principal Judge, Family Court, Cachar, Silchar seeking a decree for dissolution of marriage.

3. The appellant contested the suit by filing the written statement admitting the marriage but denied the allegations as levelled against her contending, inter alia, that the respondent is a womanizer who had married another woman but divorced her and thereafter the respondent married her and is also trying to marry another girl and neglected her and her newly born child due to love affairs with another girl. The respondent had never tried to bring back the appellant and the child to his society and, hence, prayed for dismissal of the suit with costs.
4. The trial proceeded in accordance with law as the reconciliation between the spouses had failed. Upon the pleadings of the parties the following issues were framed:
 1. Whether the suit is maintainable in its present form?
 2. Whether the respondent treated the petitioner with cruelty?
 3. Whether the respondent deserted the petitioner for a continuous period of not less than 2 years?
 4. Whether the petitioner is entitled to get a decree for dissolution of marriage as sought for?
 5. What other relief/reliefs the parties are entitled to?
5. In order to substantiate their respective claims, the appellant had examined herself whereas the respondent has examined three witnesses including himself. Finding that the appellant has caused mental cruelty to the respondent, on a perusal of the entire evidence, both oral and documentary, the trial court passed a decree for dissolution of marriage in favour of the respondent. However, the learned trial court refused to grant permanent alimony and maintenance to the appellant holding that the appellant being a Government employee, she earns sufficient amount from her salary per month. The trial court, on the other hand, directed the respondent to pay a sum of Rupees five thousand only per month for the education and welfare of the minor child Harshadheer Singha. Feeling aggrieved, the present appeal has been filed by the appellant-wife.
6. Heard the learned counsel appearing for the parties. Perused the materials including the evidence available on record. Ms. Devi, learned counsel appearing for the appellant has advanced argument relating to the finding of cruelty meted out to the respondent on which the decree for dissolution of marriage was granted by the learned trial Court. Criticizing the judgment, Ms. Devi has prayed that the same requires interference being perverse. The court, on a query made to the learned counsel appearing for the appellant to issue Nos. 2 and 3 and the finding arrived at by the learned trial court as well as the allegation of the respondent being womanizer, which the appellant has failed to prove, vis-a-vis the evidence of PW 1 and PW 3 which demonstrate otherwise; the counsel switched over to the question of permanent alimony and permanent maintenance. Learned counsel has further submitted that the findings arrived at by the learned trial court that the appellant has sufficient means being a Government employee is not

sufficient ground for not making an order of maintenance where a decree is passed granting substantive relief under the Act. The same, thus, require interference by the appellate court in this appeal.

7. The court gave its anxious thought relating to permanent alimony and permanent maintenance to the appellant which has been denied by the learned trial court. A reading of section 25 of the Act would reveal that the same empowers the court to grant maintenance to the wife which is regarded as a statutory right and the obligation of the respondent to provide for his wife's maintenance and support does not come to an end simply on the passing of a decree in favour of the husband. In arriving at the quantum of permanent alimony and permanent maintenance, the court must have regard to the respondent's, income including the appellant's income and property and the conduct of the parties and other circumstances of the case and the amount may be such as seems to the court to be just.
8. Now in estimating the amount of permanent alimony and permanent maintenance the court has to consider the pleaded facts of the parties and their total gross income. Admittedly, the respondent-husband is serving as Superintendent of Geo-Physicist in Oil and Natural Gas Commission and is getting approximately gross salary of Rs. 60,000 per month whereas the appellant is an employee of Silchar Medical College and Hospital ('SMCH') maternity and serving as a typist. The only son of the spouse is a student of Delhi Public School ('DPS') at Guwahati and the recurring expenditure of day-to-day life at Guwahati and the maintenance for welfare and education of the son as awarded by the learned trial court for Rs. 5,000 is a meagre amount and, therefore, the court seems it fit to enhance the monthly allowance of the son to Rs. 15,000 per month till he attains majority. The court has further considered the permanent maintenance to the wife per month should be Rs. 10,000 having regard to the means of the parties and thereby interfere with the issue No. 5 whereby and whereunder the trial court refused to give permanent alimony and permanent maintenance to the appellant-wife.
9. In the result, the decree for dissolution of marriage between the spouse is affirmed. The respondent-husband is directed to pay Rs. 15,000 only per month to the son for education and welfare till he attains majority and Rs. 10,000 only per month to the appellant-wife as permanent maintenance in order to enable them to lead a decent standard of living.
10. The amount shall be paid from the date of filing of the instant Matrimonial Appeal before this court, i.e., 3.12.2010. It is hereby, made clear that the current amount of Rs. 15,000 and Rs. 10,000 as indicated above shall be paid from 1st June, 2013 and the arrear amount shall be paid within a period of six months from today The parties are left to bear their own costs. 11. Send down the lower court records.

□□□

WOSTON HYNNIEWTA VERSUS KYNTIEW AKOR SUCHIANG

In the High Court of Meghalaya

Crl. Rev.P. No. 3 of 2016

(Before Hon'ble Mr. Justice S.R. Sen)

Shri. Woston Hynniewta, R/o Mawlai Umjaiur, East Khasi Hills District, Shillong, Meghalaya ...Petitioner

Versus

1. Smti. Kyntiew Akor Suchiang, C/o Office of the Principal, District Institute of Education And Training, Nongpoh, Ri-Bhoi District, Meghalaya. R/o Ladthalaboh (Dongmihsngi), Jowai, West Jaintia Hills, Meghalaya ...Opposite Party

2. Office of the Accountant General (A&E), Shillong, Meghalaya

Pro Forma Opp. Party

For the petitioner: Mr. B. Bhattacharjee, Adv.

For the respondents: Mr. S. Jindal, Adv., Mr. R. Deb Nath, CGC.

There is no law or provision that Women's Commission had been empowered to settle the maintenance. Therefore, the question arise that under what authority the Women's Commission determined or settled the maintenance between the parties. In my view, that too is beyond jurisdiction of Women's Commission and Women's Commission in future must restrain themselves from interfering with the matters which are purely within the jurisdiction of the Courts. {Para-6}

Crl. Rev.P. No. 3 of 2016

Decided on September 23, 2016

JUDGMENT AND ORDER (ORAL)

Hon'ble Mr. Justice S.R. Sen :— Heard Mr. B. Bhattacharjee, learned counsel for the petitioner as well as Mr. S. Jindal, learned counsel for the respondent. 2. Brief facts of the case in a nutshell is that:

"The opposite party filed an application under section 125 Cr.P.C, 1973 against the petitioner before the learned court below for grant of maintenance for herself and her two children and the same was registered as C.R. Case No. 1024 (S) of 2015. Before the filing of the said application for grant of maintenance, the opposite party no. 1 was in receipt of maintenance allowance of Rs. 6000/- per month by virtue of an agreement executed between the parties before the Meghalaya State Commission for Women. There also exist a divorce case pending between the petitioner herein and the opposite party no. 1 in the court of Ld. Judge, District Council Court bearing Divorce suit No. 45 of 2013. However, in the present matter the petitioner is assailing the action of taking cognizance of C.R. Case No. 1024 (S) of 2015 under section 125 Cr.P.C. by the learned court of the Judicial Magistrate, Shillong without considering the law of jurisdiction with regard to the litigation between two tribals residing in a tribal areas and by wrong assumption of jurisdiction and issued process to the petitioner vide order 14.03.2016 and passed subsequent orders in blatant disregard to the law without adhering to the constitutional provision of paragraphs 4 and 5 of the Sixth Schedule to the Constitution of India and assumed jurisdiction not vested on it by law. Subsequent to the issuance of the notice by the learned court below, the petitioner entered appearance and filed his show cause in the matter wherein he specifically raised the plea of jurisdiction

on the ground of both the parties being tribal and the District Council Court is the appropriate court to take up the matter. The matter was taken up for hearing on the point of jurisdiction by the learned court below on 28.04.2016 and the learned court below in utter disregard to the settled position of law passed the impugned order dated 02.06.2016 rejecting the plea of jurisdiction of the petitioner. As both the contesting parties in the said application filed by the opposite party before the learned lower court belongs to schedule tribe, the learned lower court could not have entertained the said application. Since the impugned orders dated 14.03.2016 and 02.06.2016 are illegal, the petitioner has approached this Hon'ble Court for preventing miscarriage of justice for want of jurisdiction in the matter. Hence this criminal revision petition."

3. Learned counsel for the petitioner submits that petitioner and respondent both belong to the Khasi Hills Scheduled Tribe, thus, any dispute between two tribals should be tried and determined by the District Council Courts as specifically provided at para 4 and 5 of the Sixth Schedule under the Constitution of India. Learned counsel further contended that respondent choose the District Court as a forum to determine the issues and address her grievances. The same was challenged by the petitioner on the ground that the District Court, Shillong has no jurisdiction as both the parties are tribals. However, the District Court came to the conclusion that since the AG Office is one of the respondent in the maintenance case and the office of the AG is non-tribal, so the matter can be tried and disposed by the District Court. Learned counsel further submits that the view taken by the learned Magistrate, District Court, Shillong is totally wrong and contrary to the provision of law and so it needs to be set aside and necessary order maybe passed to transfer the case to the District Council Court.
4. On the other hand, learned counsel on behalf of the respondent submits that it is an undisputed fact that both the parties are tribals but since AG office has been made as one of the respondent, in such circumstances there is no harm if the case is tried by the District Court as AG is considered as non-tribal. Learned counsel also further contended that though both the parties are tribals but they are residing within the jurisdiction of two District Councils, one in Jowai and one in East Khasi Hills. He also further submits that as per the judgment and order given by the Hon'ble Gauhati High Court, when two parties reside within two District Councils, it is the District Court to decide the matter.
5. After hearing the submission advanced by the learned counsels for the parties, I have perused the impugned order dated 14.03.2016 and 02.06.2016 passed in C.R. Case No. 1024 (S) of 2015. On perusal of the said impugned orders, it is understood that the learned Magistrate has come to the conclusion regarding jurisdiction only on the basis that AG is one of the respondent and is a non-tribal. In my considered view, the concept of the learned Magistrate is totally wrong because the core issue involved in the C.R. Case No. 1024 (S) of 2015 pertains to maintenance and the issue is between the petitioner and the respondent and AG Office has nothing to do with the issue involved in the maintenance case. Office of the AG has been made a party maybe just to direct them to deduct the maintenance from the petitioner's salary which was not necessary. In this instant case, as per the submission advanced by the learned counsels for the parties, it is an admitted fact that the petitioner is still in service in the office of the AG and after decision and determination of the maintenance, the Court could have directed his employer, the AG Office to deduct the maintenance from his salary and to deposit the same in favour of the respondent. Thus, I do not find any logic that merely because AG is one of the respondent, the District Court has the jurisdiction to determine the maintenance between two tribals.
6. On further perusal of the impugned orders, it is also observed that there is some interference from the Women's Commission where they have settled the maintenance of Rs. 6000/-. So far as my knowledge goes there is no law or provision that Women's Commission had been empowered to settle the maintenance. Therefore, the question arise that under what authority the Women's Commission determined or settled the maintenance between the parties. In my view, that too is beyond jurisdiction of Women's Commission and Women's Commission in future must restrain themselves from interfering with the matters which are purely within the jurisdiction of the Courts.

LANDMARK JUDGMENTS ON ALIMONY & MAINTENANCE

Therefore, I find that the impugned orders dated 14.03.2016 and 02.06.2016 are both bad in law. Accordingly, the impugned orders are hereby set aside. Learned Magistrate concerned is directed to remand the case to the District Council, East Khasi Hills to adjudicate the matter independently without being influenced by any order passed by the Women's Commission.

7. Learned CGC, Mr. R. Deb Nath appeared on behalf of the AG and submits that he has nothing to submit in this case.
8. With this observation and direction, the instant petition is allowed and stands disposed of. Registry is directed to send a copy of this judgment and order immediately to the concerned Magistrate.
9. Matter stands disposed of. No order as to cost.

□□□

SHRI LAISRAM NIPAMACHA SINGH VERSUS SMT. KHAIDEM NINGOL SAKHI DEVI AND OTHERS

Manipur High Court

Criminal Revn. Case No. 1 of 1965

(Before Hon'ble Mr. Justice Rajvi Roop Singh)

Shri Laisram Nipamacha Singh ... Petitioner;

Versus

Smt. Khaidem Ningol Sakhi Devi and others ... Opposite Party.

The word 'means'in S. 488 does not signify only visible means) such as real property in the shape of income, revenue, or estate, or a definite employment. It includes the capacity to earn money. If at man is healthy and ablebodied he must be taken to have the means to support his wife or child. Before an order for payment of maintenance allowance can be passed it must be proved that the person to be so ordered has sufficient means within the meaning of this section. In the case of an able-bodied man there is a presumption that he has sufficient means to support his wife or child and the onus is on him to show that by accident, disease or the conditions of the labour market or the like he is not capable of earning anything. This section requires that there should be not only 'means' but 'sufficient' means. Where a person has means but so slender and meager that they can be hardly said to be 'sufficient means' within this section, it would appear reasonable that he should be exempted.

In fixing the rate of maintenance under the Code, the following principle has to be taken into consideration..."No luxury should be allowed; but the necessaries should be provided for according to the status in life of the applicant and the means of the respondent..." The rate of allowance cannot be fixed on the hypothetical and abstract thing known as the capacity to earn money... The capacity to earn money may be taken into consideration in coming to a conclusion with regard to the means of the husband.

against order of Addl. S.J. (I) Manipur

Decided on November 12, 1964 and June 18, 1965

ORDER

1. This revision petition is directed against the order dated 30-1-64 passed by S.D.M., I.W. by which he ordered the petitioner to pay Rs. 20/- to opposite party No. 1 and Rs. 10/- per month to his minor daughter as a maintenance allowance. The material facts are not in disputes and they may be briefly stated as follows:
2. On 14-12-62, the opposite party No. 1 on behalf of herself and 3 minor children opposite party Nos. 2 to 4 presented an application to the S.D.M., I.W. for proceeding under section 488 Cr. P.C. against her husband the petitioner with the contention that she was the legally married wife of the petitioner and after their marriage they lived as husband and wife for some years in the house of the petitioner and during that period she gave birth to these 3 children. While their marriage was in subsistence the petitioner contracted a second marriage and thereafter he started ill treating her without any reason. As she could not tolerate the cruelty and ill treatment of her husband so she left his house with her youngest daughter and began to live with her parents. After sometime the other two respondents also came and joined them. As she had no means to maintain herself and her children, so she approached the petitioner

to maintain them, but he refused to maintain them. The Court, therefore, should order him to pay Rs. 30/- per month to her and Rs. 20/- for each of her children.

3. The petitioner opposed this petition on the ground that owing to a difference between them they had been living separately on mutual consent under a written agreement in which she gave up her right to maintenance for herself and for the daughter whom she took to her paternal house at the time of separation. He further pleaded that out of grace he gave them money and two pots of paddy per month for the maintenance of his wife and daughter. It was also pleaded that he married the second wife for looking after the two sons whom she left with him. Those two sons, however, left his house subsequently to live with her at her instigation. It was also pleaded that he has no means to maintain her and her children, as he is already supporting 4 children by his second wife who are living with him.
4. The learned counsel for the petitioner contended that Shrimati Sakhi Devi, started a case being Criminal Case No. 12 of 1962 under section 488 Cr. P.C. for the maintenance. That case was dismissed on 12-12-62 for default of appearance, therefore she is precluded from making a second application under section 488 Cr. P.C. I am not at all convinced by this argument. There is no provision in the Code which bars a second application under section 488 Cr. P.C. But when an application under this section has been heard and adjudicated upon, it is against the general principle of the rule of 'res judicata' that a subsequent application on the same facts should be entertained. Subject to this principle, a prior application is no bar to a subsequent application if that application was dismissed for default and there was no adjudication on the merits. On the perusal of the records, I find that the previous case was dismissed in default and there was no adjudication on the merits, therefore there is no bar against this application.
5. The learned counsel for the petitioner next contended that the procedure laid down for summons cases is applicable to the hearing of applications under section 488 Cr. P.C. Chapter XIX Cr. P.C., governs such an application and the result of non-appearance of the complainant on that date i.e. 12th December, 1962, was the acquittal of the applicant. Section 403, Criminal P.C. bars a second application on the same facts. I do not accept the contention of the applicant.
6. There is no acquittal in proceedings under section 488 of the Code. There should be a trial of an offence before there can be an acquittal or a conviction. Offence is defined in S. 4(o), Criminal P.C. as follows:
 "Offence' means any act or omission made punishable by any law for the time being in force; it also includes any act in respect of which a complaint may be made under S. 20, Cattle Trespass Act."
7. Neglect to maintain one's wife and children is not an offence within the meaning of S. 4(o) of the Code. A finding of a Magistrate ordering a person to pay a certain amount of money for the maintenance of his wife and children does not amount to a conviction for an offence. The object of the proceedings under S. 488 is to secure maintenance for a woman and her children speedily and to secure that end the machinery is provided in Chap. XXXVI, *ibid*.
8. Even though in recording evidence procedure for summons cases may be adopted that fact alone will not convert the proceedings; under S. 488 into summons cases. In a criminal case a trial cannot proceed in the absence of an accused unless his absence or attendance has been exempted for sufficient reason. In proceedings under S. 488 the Magistrate is competent to hear the case *ex parte* and allow or disallow maintenance. It will thus be clear that the default in maintaining the wife and children is not regarded as an offence as defined in S. 4(o), Criminal P.C. In this view there was no acquittal of the applicant on 12th December, 1962 and S. 403 has clearly no application. Second application was therefore maintainable and the view taken by the two Courts was correct. I am supported in my view by the decisions in *Mehr Khan v. Bakat Bhari*, 29 Cri U 1002 : AIR 1929 Lah 32, *Monmohan Dey v. Surabaia Dasi*, AIR 1920 Cal. 38 : 21 Cri. U 3. In AIR 1920 Cal 38:(21 Cri LJ 3) it was held that where an application for maintenance under S. 488 is dismissed for default without any adjudication being made on the merits, it is open to the complainant to make fresh application under that section.

9. The learned counsel for the petitioner further contended that the parties are living separately for the last 10 years by mutual agreement, therefore the opposite party is not entitled to get maintenance. There is no substance in this contention. The separate living must be the result of a deliberate and express agreement between the parties. A hasty rejoinder to a husband, who in the course of a quarrel was manoeuvrings for a consent from a wife, is not a consent within the meaning of the section. Similarly, living separately under an agreement settled by a panchayat to whom disputes between the husband and wife had been referred is not living separately by mutual consent. "Mutual consent" as used in sub-section (4) means a consent on the part of the husband and wife to live apart, no matter what the circumstances may be. Where a wife refuses to live with the husband on some specific ground such as cruelty, or the fact that he is keeping another wife, it cannot be said that the husband and wife are living apart by mutual consent if the husband does not insist that the wife should live with him. Where a husband is unwilling to allow his wife to live with him, or has taken a second wife, the only course open to such wife would be to live apart and if she, under such circumstances agreed to accept maintenance and live apart, such separate living would not be deemed to be the result of mutual consent. The test therefore should be to find out if the agreement for separate living and payment of maintenance was the outcome of the desire of both parties, independently reached by each of time, or if one of the parties was forced to submit by circumstances to such agreement. Where the wife is not prepared to live in a separate house but insists on living with the husband, but he starts living separate, or where the husband having an option to live with his wife chooses to live separate, it cannot be said that they are living separately by mutual consent. But where, each party finds it impossible to live amicably and comfortably with the other and each party is content that they should live separately, the separate living is by mutual consent. If the Court finds that the husband and wife are living separately by mutual consent, no order can be passed under the section, as the Criminal Court is not intended to be used for creating facilities for separation between husband and wife or for fixing alimony. In the instant case, the petitioner produced the divorce deed Ext. B/I to show that they are living separately by mutual consent. But both the Courts below have held that this is not a genuine document. From the close scrutiny of the evidence I too find that there is not an iota of evidence on the record to show that the petitioner and the opposite party are living separately by mutual agreement. From the record it appears that the petitioner has taken a second wife and since then they are living separately in separate houses.
10. The learned counsel for the petitioner next contended that Shrimati Sakhi Devi was living separately from the petitioner since 1953, and the Cr. P.C. was extended to the Union Territory of Manipur only in the year, 1957, therefore she is not entitled to get maintenance from the year, 1953. This contention is devoid of force as Shrimati Sakhi Devi has claimed maintenance only from the year, 1962.
11. The learned counsel for the petitioner contended that the petitioner has no sufficient means to maintain his first wife and her daughter as he is maintaining a family of six members consisting of himself, his second wife and A children born to them. This argument too is without any substance. The word 'means' in S. 488 does not signify only visible means) such as real property in the shape of income, revenue, or estate, or a definite employment. It includes the capacity to earn money. If at man is healthy and able-bodied he must be taken to have the means to support his wife or child. Before an order for payment of maintenance allowance can be passed it must be proved that the person to be so ordered has sufficient means within the meaning of this section. In the case of an able-bodied man there is a presumption that he has sufficient means to support his wife or child and the onus is on him to show that by accident, disease or the conditions of the labour market or the like he is not capable of earning anything. This section requires that there should be not only 'means' but 'sufficient' means. Where a person has means but so slender and meager that they can be hardly said to be 'sufficient means' within this section, it would appear reasonable that he should be exempted. In the instant case, this is an admitted fact that the petitioner is an able-bodied man and he is gold-smith by profession. From the evidence it is also clear that he gets 50 to 60 pots of paddy from his agricultural land, therefore it is clear that the petitioner has sufficient means to maintain his children and wife.

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12. The learned counsel for the petitioner contended that the amount of maintenance fixed by the Court is excessive so it should be reduced to Rs. 10/- and Rs. 5/- per month. There is no force in this contention. Under the Criminal Procedure Code (Amendment) Act (26 of 1955) the maximum amount of maintenance awardable under this section has been raised from one hundred rupees to five hundred rupees. In fixing the rate of maintenance under the Code, the following principle has to be taken into consideration.

"No luxury should be allowed; but the necessities should be provided for according to the status in life of the applicant and the means of the respondent. The rate of allowance cannot be fixed on the hypothetical and abstract thing known as the capacity to earn money. The capacity to earn money may be taken into consideration in coming to a conclusion with regard to the means of the husband."

13. In the instant case in view of the evidence on the record, I find that the maintenance amount fixed by the learned lower Courts is, in no way, excessive.
14. No other argument was pressed before this Court. In view of the foregoing discussions, I hold that this revision petition is without substance, and hence it is dismissed.

HI/HGP/RGD

15. Revision dismissed.



SONAM TSERING VERSUS KUNZANG SHERAB

Civil Appeal No. 2 of 1978

(Before Hon'ble Mr. Justice Man Mohan Singh Gujral, C.J. and Hon'ble Mr. Justice A.M. Bhattacharjee, J.)

Sonam Tsering ... Appellant;
Versus
Kunzang Sherab ... Respondent.

Decided on August 17, 1981

The Hindu Adoption and Maintenance Act, 1956, has not been extended to Sikkim as yet and cannot, therefore, apply here. Even if that Act was extended to Sikkim, the same would not have applied to the parties before us who are Sikkimese Bhutias and have been declared as "Scheduled Tribes" under Art. 342 read with Art. 366(25) of the Constitution as S. 2(2) of the Act provides that "nothing contained in this Act shall apply to the members of any Scheduled Tribe unless the Central Government, by notification in the Official Gazette, otherwise directs The son can not maintain a suit against the father for the refund of the amount which his mother had spent for his maintenance and for which she advances no claim there is no law where-under a son can acquire any right in the self-acquired properties of the father during the lifetime of the latter. A "right to inherit" can only arise when succession to the properties would open on the death of the father dying intestate and until then it is a mere spes-successionis which can furnish no cause of action,.... The Buddhist Bhutias of Sikkim are not governed by the Hindu Law, Mitakshara or Dayabhaga, but are governed by their own customary laws A coparcener, therefore, while the family remains united, cannot claim a declaration that he is entitled to any particular share in any property. He cannot also claim that he be declared to be entitled to any particular share in the undivided share or interest of another living coparcener, even if the latter be his father, as has been claimed by the plaintiff in this case

Hon'ble Mr. Justice Man Mohan Singh Gujral :— On the allegations that his mother Chungba Bhutiani was the legally wedded wife of the defendant-respondent Kunzang Sherab and that he was born out of this wedlock, Sonam Tsering, appellant filed a suit in the Court of District Judge through his guardian claiming maintenance from his father and also a declaration against him claiming a right over the properties of the respondent, as detailed in the Schedule attached to the plaint. The Suit having been dismissed by the District Judge by Judgment dated 5-8-1978 the plaintiff has filed an appeal challenging the correctness of the findings given by him.

2. The basis of the plaintiff's claim is that his mother had married the respondent in 1951 and thereafter they lived together at Gangtok below the Lai Market. In 1955, his maternal grand father fell suddenly ill and his mother went to her father's house in Yangang to look after him. At that time, Chungba Bhutiani was pregnant and while she was still at Yangang she gave birth to the plaintiff at her parental house. Sometime thereafter she returned to Gangtok but the defendant refused to accept her back and even did not permit her to enter his house. When all efforts to persuade the defendant to take Chungba Bhutiani back into the house failed, she left for her parental home. The parties having separated for good, the defendant remarried in 1956 whereas Chungba Bhutiani remarried sometime in 1959. In 1974, the plaintiff filed the present suit through his next friend claiming maintenance from September, 1967 onwards and a declaration that he was entitled to succeed to the ancestral and self acquired properties of the defendant.

3. The defendant, while contesting the Suit, not only denied his obligations to support the plaintiff but even denied the plaintiff's paternity and his alleged marriage to the plaintiff's mother. Challenge was also posed to the maintainability of the Suit. On the pleadings of the parties, the following issues were framed:
 1. Whether Chungba Bhutiani was married to the defendant as alleged in the plaint?
 2. Whether Sonam Tsering was born to Chungba Bhutiani from the loins of defendant?
 3. If issues 1 and 2 are proved, is the plaintiff entitled to claim any maintenance from the defendant? If so, what amount?
 4. Whether the plaintiff is also entitled to arrears of maintenance as alleged?
 5. Whether the plaintiff can claim inheritance from the defendant? If so, what is his share?
 6. Whether the suit is maintainable as alleged?
 7. Whether the suits suffers from misjoinder of causes of action? If so, its effect.
 8. Whether the suit or any part of it is time-barred?
 9. Relief.

4. Though issue Nos. 6, 7 and 8 were decided against the defendant but as issue Nos. 1 to 5, which were the material issues in this case, were found against the plaintiff, his Suit was dismissed. Being aggrieved, the plaintiff has filed the present appeal and has challenged the findings on all issues found against him. We proceed to deal with the issues separately. Issue No. 1

5. To prove the marriage of the defendant with Chungba Bhutiani, the plaintiff examined the latter as his own witness. According to her, she was married to the defendant in 1951 at Yangang. She was 13 years of age at that time.

The marriage was performed according to Buddhist rites and a number of Lamas including Changey Gyatso had participated in the ceremony. She further added that after the marriage, she was brought to Gangtok and she and her husband lived together in the house of the defendant in Lai Bazar. Her evidence further shows that a few years later, she conceived from the defendant and gave birth to the plaintiff, who was their son. Chungba Bhutiani also explained the circumstances under which she was forced to go to her parent's house, after a few years of her marriage and deposed about the refusal of the defendant to allow her to enter the house when she returned from her father's village.

6. The learned trial Court has not accepted the testimony of this witness but no coherent reasons have been put forth for this conclusion. Emphasis was mainly laid on the fact that all the ceremonies, which were necessary for the marriage, had not been performed according to Chungba Bhutiani and the marriage was, therefore, not considered valid. No doubt, this witness named some of the ceremonies, which were necessary for a valid marriage and she also stated that all the ceremonies had not been performed but while assessing the evidentiary value of her testimony, it would have to be kept in mind that she is wholly illiterate person and at the time of the marriage she was only 13 years of age. Moreover, it has not been explained through the evidence or has not been otherwise established that in all the ceremonies, which have been mentioned in the statement of P.W. 2, the bride takes an active part and would thus be fully aware whether those ceremonies had been appropriately performed or not. To judge whether the marriage had been validly conducted and whether all the ceremonies, which were necessary, had been performed or not, we would have to rely on the testimony of Changey Gyatso, P.W. 2, who was one of the lamas who had performed the marriage. This witness has categorically stated that he had solemnised the marriage of Chungba Bhutiani and Kunzang Sherab. This witness was cross-examined regarding the ceremonies which were necessary for a marriage according to Buddhist rites, but it was not even indirectly suggested to him that the essential ceremonies had not been performed in this case. We, therefore, find no reason to hold that the marriage performed by Changey Gyatso lama and other

lamas had not been validly performed. In fact the statement of this witness that he and other lamas had performed the marriage between Kunzang Sherab and Chungba Bhutiani would imply that a valid marriage according to Buddhist rites with all essential ceremonies had been performed. It would be futile to suspect that so many lamas having gathered for performing a marriage would not take all the necessary steps in that direction. While assessing the testimony of this witness, it will be pertinent to observe that no reason has been brought out in the cross-examination of this witness to doubt his veracity or impartiality. We are, therefore, inclined to accept the testimony of this witness and hold that a valid marriage was performed between Chungba Bhutiani and Kunzang Sherab in 1951-1952. The learned District Judge has also observed that "being a Lama, the deposition of this witness in this regard could be taken as authoritative regarding the validity of a customary marriage." Having accepted this, there was no justification for not relying on his further statement that in this case, a valid marriage had been performed as deposed to by him.

7. P.W. 3, Nimdup Lepcha, has also asserted that he was present at the time of the wedding. He not only seems to be a reliable witness but being a resident of Yangang his presence at the marriage appears to be natural. The only suggestion made to him in order to cast a doubt on his veracity was that he had made a petition to the respondent regarding some Khazana but the respondent did not accept his application. This admission on his part, by itself, highlights that he is a truthful witness, P.W. 4 Chandra Bahadur Basnet, P.W. 5 Tseten Bhutia and P.W. 6 Dorji Tsering have also deposed about the marriage. The testimony of Chandra Bahadur Basnet was discarded by the learned trial Court for the reason that the Khata, in which cash gifts given by the relations were recorded, had not been produced. The relevant Khata must have been in the possession of the father of Chungba Bhutiani who had died long ago and its non-production could have no effect so far as the testimony of Shri Basnet is concerned. In fact, we find no reason to view his evidence with suspicion. Tseten Bhutia, P.W. 5, has stated that the ceremonies of Khachang and Nangchang were performed when the marriage ceremony was fixed. The learned Sessions Judge has found his evidence not reliable for the reason that Chungba Bhutiani had deposed that these ceremonies had not been performed. As observed earlier, it is not clear whether the presence of the girl during these ceremonies was necessary. It would be that Chungba Bhutiani's statement about non-performance of the ceremonies may be due to lack of perception, as she was hardly 13 years old at that time or due to failure of memory. We find no reason for him to testify falsely merely to support the plaintiff. Fault was also found in the testimony of this witness for the reason that he was a close relative of the plaintiff's mother and had been brought up by the plaintiff's grand-father. Being a dose relation of the plaintiff's mother, he was bound to have joined in the wedding and his evidence would, therefore, be relevant. It appears highly unlikely that Chungba Bhutiani and her close relations would falsely set up the marriage between Chungba Bhutiani and Kunzang Sherab merely in order to bolster the claim of the plaintiff for the property.
8. The last witness, whose evidence needs consideration, is Shri Lorji Tsering, who, at one time, was the Minister in the Government of Sikkim. He is a close relation of Chungba Bhutiani, as he is married to her eldest sister. He has testified about the marriage of Chungba Bhutiani with Kunzang Sherab and, according to him the marriage had taken place in 1952-1953. This statement of the witness has been disbelieved for the reason that there is a discrepancy between his statement and that of the plaintiff's mother, inasmuch as her case is that the marriage had taken place in 1951. We are of the view that as he was giving evidence after almost 24 years and the inconsistency could be the result of lapse of memory and would cause no reflection on his credibility.
9. On behalf of the appellant much stress has been laid on the documentary evidence, which consists of certain letters alleged to have been written by Kunzang Sherab either to his father-in-law or to Dorji Tsering, P.W. 6. Kunzang Sherab, defendant had totally denied having written these letters. The plaintiff then produced Assistant Government Examiner of Questioned Documents, P.W. 7, who, after comparing the handwriting and signatures of the respondent's admitted writings, has opined that the questioned

documents are all in the handwriting of the defendant. The learned District Judge has accepted this evidence and has concluded that all the letters were in the handwriting of the defendant. This finding was not challenged before us. Even otherwise, we are satisfied about the correctness of this conclusion.

10. The questioned letters are Exhibits 7, 8, 12, 14 and 15 and all these have been examined by the handwriting expert.
11. To establish that all these letters were addressed to Dorji Tsering or to the defendant's father-in-law, the plaintiff has examined Dorji Tsering, who has not only deposed that all these letters were in the handwriting of the defendant but has also explained to whom these letters were addressed and what was intended to be conveyed in some of these letters. This witness was cross-examined at some length in regard to these documents but no material has been brought out, which would cast even the slightest doubt on the truth of his statement regarding the explanation furnished by him about what was intended to be conveyed through these writings.
12. It would be appropriate at this stage to have a close examination of these documents in order to ascertain as to what extent support was available to the plaintiff's case that Chungba Bhutiani was married to the defendant. The earliest letter in Exhibit P-12, the translation of which is Exhibit P-13, and is dated 5th of November, 1951. This was written from a hostel room at Darjeeling, where he was studying at that time, and is addressed as "My dear Yapla and Chumla". It has been explained by Mr. Tsering that in Sikkimese "Yapla and Chumla" are addressed by persons of good breeding to their father and mother-in-law. Though the contents of the letter are not material but the fact that it was addressed to Chungba Bhutiani's father and mother, who were described as father and mother, is considerably significant and thus helps in establishing the plaintiff's case in so far as it relates to Chungba Bhutiani's marriage to Kunzang Sherab. The next letter in point of time is Exhibit P-15 and is dated 3rd Sept., 1963. This letter was written from Darjeeling to Dorji Tsering, who was described as "brother D". Though mainly, this letter talks about trivial matters but there is also some reference to the family at Yangang. Enquiries have also been made about the health of Dad. It is in the evidence of P.W. 6, Dorji Tsering, that this reference is to the defendant's father-in-law, who was lying ill at that time. We have no reason to doubt this statement.
13. In point of time, the next letter is Exhibit 8, which is in Nepali and its translation is Exhibit 9. This is dated 23rd October, 1953 and is written to "Yapla and Chumla". In this document lot of concern is shown for the health of the father-in-law and he has been requested not to worry too much. There is another letter, Exhibit 10, which is also addressed as "My dear Yapla and Chumla". It only shows that a constant touch is being maintained between Kunzang Sherab and the person who is addressed as "Yapla". Though it is dated 12th of September but the year is not mentioned. Exhibit 16 is a Post Card addressed to Dorji Tsering on 12th October, 54 and is addressed as "Dear brother". The only matter mentioned in this letter is regarding intended purchase of a horse by Dorji Tsering and the negotiation, which Kunzang Sherab was making on his behalf. From the letter, it appears that they were close to each other and it would support the contention that they could be related as is the plaintiff's case. Before we discuss Exhibit 7, which is the most important letter, reference may be made to Exhibit 14, which it, written on 28th October, 1954 and is addressed to Dorjee Tsering, who is described as "dear brother". Again, in this letter, there is mention of the health of Dad and the fact that Kunzana Sherab had received no reply though he had written many letters to him. It is also mentioned in this letter that all the members of Kunzang were intending to boycott him and that he was a ruined man. It is further indicated in this letter, that Kunzang Sherab was completely neglected and there was no one to look after him. An enquiry was also made about "Kaily", who, according Dorji Tsering, was no other person than Chungba Bhutiani and was residing with her parents those days.
14. The most important letter and which needs consideration at some length, is Exhibit P-7. According to Dorji Tsering, the opening words "My dear brother" referred to him. There is no serious challenge to this part of the statement in the cross-examination and there is no reason for us to doubt its veracity. A

number of family matters are discussed in this letter at length and a clear impression is gained that the writer of this letter was a part of the family. The following lines culled out of this letter further support the plaintiff's contention: —

"I did not claim the ring or any ox from F. in-law. If he offers i.e. up to him and if not I am satisfied. As I being merely a son-in-law of Karung I cannot stand as a claimant as you thought of me. But I do not think that we have the right to discuss over the properties of We are not the sons of them but sons-in-law I married her not to get oneself involved in the solution of problem of properties but I married her firstly as my parents wished so, secondly I liked her and love her and thirdly she loves me. Please do not drag me back to the problem from which I want to keep aloof. The above letter is rather a lengthy one and as observed earlier, a careful perusal of it leaves no manner of doubt that Kunzang Sherba was connected with the addressee of this letter by marriage. If it is accepted that this letter was addressed to Dorn Tsering which we have no reason to doubt the only conclusion possible is that Kunzang Sherab was married to Chungba Bhutiani, as it is established that Dorji Tsering was married to the sister of Chungba Bhutiani. The learned Sessions Judge has drawn an inference against the plaintiff from the fact that reference in this letter is to "Kaily", which nomenclature is generally used for the second daughter and not for the third daughter. Dorji Tsering has offered explanation for this that as the second daughter had died Chungba Bhutiani could be addressed as "Kaily". In any case, it is wholly inconceivable that if Kunzang Sherba was married to another sister of Chungba Bhutiani, an entirely false case could have been set up with a view to show that he was in fact married to the plaintiff's mother. This circumstance would have to be taken into account in the light of Kunzang Sherab's statement totally denying to have written these letters or having any relationship with Chungba Bhutiani's family.

15. For the reasons indicated above, we have no doubt that Kunzang Sherab was married to Chungba Bhutiani in about 1951-1952 and to this extent the plaintiff's case is established by preponderance of probabilities. The findings of the trial Court on this issue are, therefore, set aside and this issue is found in favour of the plaintiff.

Issue No. 2

16. In order to establish that the plaintiff was the son of the defendant, it would have to be proved that the plaintiff was born in 1955, as it is the plaintiff's own case that his mother Chungba Bhutiani and Kunzang Sherab had no access to each other after 1955 and that Kunzang Sherab even remarried in 1956. From merely establishing that Chungba Bhutiani had given birth to the plaintiff before she remarried, it would not necessarily follow that he was the son of Kunzang Sherab. No doubt, the plaintiff is entitled to presumption that he was the son of the defendant, as we have found that the marriage between Kunzang Shebra and Chungba Bhutiani has been established but this presumption would stand rebutted if it emerges that his birth had taken place after 1955. We now proceed to examine the oral evidence regarding the plaintiff's birth as there was no documentary evidence which could form a firm basis of a finding about the date of his birth.
17. The oral evidence regarding the birth of the plaintiff consists of the statements of those very witnesses who had deposed about the marriage and though their evidence in that regard was accepted, their testimony regarding the paternity of the plaintiff is open to serious challenge for the reasons hereinafter discussed.
18. The most important piece of evidence in this regard is the statement of the plaintiff's mother Chungba Bhutiani and even her statement is damaging to the plaintiff's case. According to Chungba Bhutiani, she was married at the age of 13 and soon thereafter she came to Gangtok to the house of the defendant, which was located near Lai Bazar. Her statement further is that she lived in defendant's house till she was 20 years of age, when she conceived from the loins of the defendant. In the opening part of her statement, she had categorically stated that she was married in 1951 and the other evidence shows that the marriage had taken place around that time. Viewed in the light of this evidence, it would emerge that the plaintiff was born somewhere in 1958-1959 long after the defendant has ceased to have access

to Chungba Bhutiani. This part of her evidence was sought to be explained on the ground that she may have made a mistake about the period between the marriage and the birth of the son, as she was an illiterate person. Though this witness may have had very little schooling but her memory appears to be fairly good. When she made a statement in 1976, she deposed that she married for the second time seventeen years earlier and this tallies with the plaintiff's case that his mother had remarried in 1959. Consequently, her statement that she conceived after seven years of marriage may not be inaccurate or based on misconception.

19. While examining the evidence of Chungba Bhutiani, it may also be noticed that her version that for some years they lived together near Lai Bazar in Gangtok appears highly doubtful. Her own statement is that during this time the respondent was studying at Darjeeling and even the documentary evidence shows that till at least 1954 the defendant was a student and was living in the hostel at Darjeeling. Chungba Bhutiani's statement that after marriage they lived together at Lai Bazar does not seem to represent the truth. It may also be mentioned that lot of evidence has been produced from Yangang but no witness from Gangtok has been examined to establish the fact that they ever lived together in the town. If for a number of years they had resided in Lai Bazar, there would have been no dearth of witnesses to establish this fact.
20. Another part of Chungba Bhutiani's statement also needs mention at this stage. Her assertion is that a few months before the birth of her son she received the news of her father's illness and after getting permission from her husband she went to look after her father. While she was still at her father's house, she gave birth to the plaintiff. Shortly thereafter, she returned to Gangtok along with the plaintiff but the defendant refused to let her in the house. No reason whatsoever has been advanced for this extremely unnatural conduct of the defendant. If her visit to her father's house was with the husband's permission and was for the purpose of looking after her ailing father, there could possibly be no reason for the defendant to refuse to welcome her in the house, especially when a son had been born to him. The truth of this part of Chungba Bhutiani's statement is highly doubtful as her version is extremely unnatural and highly improbable. On the basis of her evidence, it cannot be held that the plaintiff was born in 1955. In fact, it could be inferred from her evidence that the plaintiff was born somewhere in 1958-1959, and in this connection another relevant factor may be noticed. According to Chungba Bhutiani, in 1976, the plaintiff was studying in 11th class in T.N. Higher Secondary School, Gangtok. If he was born in 1955, he would be 21 years of age at that time. It seems somewhat unlikely that the plaintiff would be studying in 11th class at such an advanced age. On the other hand, it may seem more probable that he was much younger at that time.
21. Besides the statement of the plaintiff's mother, there is also the evidence of Nimdup Lepcha, PW 2, Chandra Bahadur, PW 4, Tseten Bhutia PW 5 and Dorji Tsering, PW 6 regarding the plaintiff's birth. So far as Nimdup Lepcha is concerned, all that he has stated is that Sonam Tsering was the son of the defendant born to Chungba Bhutiani after IV2 years of their marriage. Firstly, he has not stated where the birth had taken place and in any case, his statement that Sonam Tsering was the son of the defendant was not admissible as under Section 50 of the Evidence Act "when the court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct, as to the existence of such relationship, of any person who as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact". So when a Court is to judge the relationship of a person to another, it is only permitted to take into consideration the belief of a person provided it is expressed by conduct in case the witness has special means of knowledge. Section 50 of the Evidence Act requires that opinion expressed by conduct alone or in other words, conduct based on opinion is admissible in evidence. In the present Case, the mere statement of Nimdup Lepcha that Sonam Tsering was the son of the defendant is not based on any conduct as conduct alone can be given in evidence. So far the remaining part of the statement that Sonam was born one and a half years after the marriage, it is too vague to find the basis of any finding as it has not been mentioned as to where the birth had taken place and how the witness

was able to know about it. The statement of Chandra Bahadur that Sonam Tsering is the son of Kunzang Sherab also suffers from the same blemish as that of Nimduo Lepcha on that it falls outside the scope of Section 50 of the Evidence Act.

22. In regard to the birth of the plaintiff, Tseten Bhutia has made the following statement: —
 "Chungba came back to Yangang as a pregnant woman and Sonam Tsering present in Court was born in our village. At the time of return of Chungba, Def, had come with her. After 2-3 months of the birth of the child, Def, came to our village and took back Chungba and his son with him to Gangtok."
23. A bare perusal of the above would show that it is a completely different version than given by the other witnesses and especially Chungba Bhutiani because of this obvious and material contradiction no trust can be placed on his statement regarding the plaintiff's birth. It was nobody's case that the defendant had come along with Chungba Bhutiani when he came to her parental house or he came again after the birth of the son.
24. Lastly we examine the evidence of Dorji Tsering. In this regard he has stated that "Sonam Tsering is the son of the defendant bom from Chungba present in Court. He was born after about 2 years of their marriage". His statement regarding the paternity of Sonam Tsering is again not admissible as the opinion is not based on conduct and the remaining part of his statement that the birth took place two years after the marriage is inconsistent with the statement of Chungba Bhutiani herself and in any case is not of much use to determine the period of birth with any exactitude.
25. If the evidence led by the plaintiff regarding the period of his birth could have been found sufficient to come to a conclusion that he was born during 1955, it could have been established that he was the son of the defendant in view of the presumption available under Section 112 of the Evidence Act but as the evidence stands, the statement of the plaintiff's mother is clearly against this conclusion while that of the other witnesses is too vague, contradictory and based on hearsay, to form a reasonable basis for such a view.
26. At this stage, it would be appropriate to consider the evidence of Shri M.C. Mathur, Principal of the T.N. Higher Secondary School. He produced the Admission Register for the year 1968-1969 in the Court and deposed that at first the date of birth of Sonam Tsering entered in the register was 4-12-1955. This was consequently corrected to 1-2-59 on the basis of an affidavit of one T.D. Tsering produced by Sonam Tsering, plaintiff himself. He stated that the affidavit was directly received by him from Sonam Tsering and was passed on to his office to make necessary corrections in the School Register and consequently, the correction was made in the register showing the entry as it stands now. No doubt, the School Admission Register is a public record maintained by a public servant in the discharge of his official duties and would have furnished a piece of evidence to establish the date of birth of the plaintiff, but in view of the subsequent correction, much evidentiary value cannot be attached to this piece of evidence. It is not known as to on what basis the earlier information was made but as regards the correction, the information was derived from an affidavit which the plaintiff himself had supplied. As the person who has sworn the affidavit has not been examined, it may not be possible to act on the present entry but even the earlier entry is of no probative value, as that entry no longer stands in the register.
27. For the reasons indicated above, we hold that, as the evidence stands, it is not possible to come to a conclusion that the plaintiff was born in 1955. On the other hand, considering the evidence on record the preponderance of probability is that he was born sometime in 1959. As it is the evidence of the plaintiff's own mother that there were separation between her and the defendant after 1955 and he even remarried soon thereafter, it would of necessity follow that presumption under Sec. 112 of the Evidence Act is not available to the plaintiff as the parties to the marriage had no access to each other at any time when the plaintiff could have been begotten. In this view of the matter, we find the issue against the plaintiff and uphold the findings of the learned trial Court.

Issue Nos. 3, 4 & 5.

28. Though in view of the findings on Issue Nos. 1 and 2, it is not necessary to decide these issues, but certain salient features may be noticed which would go to show that even with regard to these issues the plaintiff's claim has no basis. On behalf of the plaintiff, no satisfactory evidence has been led to establish as to by what personal law the parties were governed with regard to maintenance and inheritance. PW 6, Shri Dorji Tsering, is the only witness of the plaintiff who has deposed about this matter and his statement in this regard is wholly unsatisfactory. In examination- in-chief, he stated that they were governed by Hindu Mitakshara Law, but when cross-examined he had to admit that they were governed by their "customary law of inheritance by birth". The matter was not taken any further, and no other evidence was produced to show as to what was the custom in regard to these matters. The evidence led by the defendant, on the other hand, shows that they were governed by customary law and not by Hindu law. The statement of DW 2, Shri Namgay Bhutia, in this regard is that in the matters of succession, inheritance and marriage they were governed by their own customs and not by Hindu law. The parties are admittedly Buddhists of Tibetan origin and no Buddhist text or case law has been placed before us regarding the position of law with regard to inheritance or the obligations of the father to maintain his son.
29. It may also be added that so far as the self acquired property is concerned the plaintiff possibly can have no right during the lifetime of his father. As regards the claim for maintenance, the suit was filed when the plaintiff was almost about to retain majority and all these years according to evidence on record, his mother had been incurring expenses for his upkeep and education. In this situation, it can be plausibly urged that the plaintiff could not claim arrears of maintenance. It may be noticed that the suit has not been filed by his mother against her alleged husband claiming for reimbursement of the expenses incurred by her on bringing up the child. I am consequently of the view that the plaintiff has failed to establish Issues Nos. 3 to 5 and as the evidence stands all these issues will have to be found against the appellant.
30. For the reasons indicated above, I find there is no merit in this appeal and the same is hereby dismissed. The parties are, however, left to bear their own costs.

Bhattacharjee, J.:—

31. I agree that the appeal should be dismissed and accordingly agree with my Lord the Chief Justice in the order proposed. But I have, however, arrived at my conclusion on entirely different grounds and would, therefore, proceed to state them with my reasons.
32. The plaintiff, alleging himself to be son of the defendant born out of lawful wedlock between his mother and the defendant has filed this suit mainly for two reliefs as claimed in the plaint: —
- (1) "a decree in favour of the plaintiff allowing him maintenance allowance as claimed in Schedule 'A' of the plaint";
 - (2) "a decree declaring the right of the plaintiff to inherit the half of the share of the ancestral and self-acquired properties of the defendant as given in Schedule 'B' to this plaint".
33. My Lord has held the marriage between the mother of the plaintiff and the defendant to have been legal and duly proved. But even then My Lord has held that "it is not possible to come to a conclusion that the plaintiff was born in 1955" and "the preponderance of probability is that he was born sometime in 1959" when "the parties to the marriage had no access to each other" and has accordingly decided in the negative the Issue as to whether the plaintiff is the son of the defendant.
34. As the law abhors illegitimacy, the law-Courts must not also bastardise a person unless they cannot but. And, therefore, if a case can be effectively disposed of without declaring the birth or marriage of a person to be illegal or illegitimate, it must be disposed of accordingly. I will, therefore, not go into the question of the legitimacy of the birth of the plaintiff or the marriage of his mother, as, in my view, the appeal and the

suit giving rise to it, can be effectively disposed of on other grounds, even assuming, though not deciding, that the plaintiff is the legitimate son and his mother was the lawful wife of the defendant.

35. The claim for maintenance, as will appear from Schedule "A" to the plaint, is really a claim for past maintenance for the period from September, 1967, up to August, 1973, that is, up to the period of the institution of the suit and the relevant period of limitation under the Sikkim Law being 6 years, the claim, if otherwise maintainable, is not barred by time.
36. The case of the plaintiff, as made out through his mother, figuring as one of his witnesses, is that the amount claimed is what the mother had to and did spend for maintaining the plaintiff. It is not a suit by the mother claiming reimbursement of the amount spent by her for her son from her husband, the alleged father of the son, who refused or neglected to maintain the son. But it is a suit by the son claiming from the father the amount that his mother had spent for him towards his maintenance. I have my doubts as to whether such a claim by the son can at all be actionable at his instance. Undisputedly the son has been properly maintained, brought up and educated by his mother. According to the plaintiff son and also his mother deposing as his witness, the mother was deserted by the father immediately before the birth of the son in 1955 and began to stay with her parents until she remarried in 1959. The long silence on the part of the plaintiff and his mother during this very long period of 18 years by itself would indicate that no difficulty was experienced in respect of the maintenance of the plaintiff, whether he was maintained by her mother or by the maternal grand-parents or by the step-father. Even assuming that the mother, as stated by her in her deposition, spent the amount, one can very easily understand a cause of action in her favour for getting reimbursement of the amount from the father of the son. But it is, to my mind at least, difficult to understand how any cause of action can accrue in favour of the son for a decree for the amount which her mother had spent for her maintenance.
37. Under Section 20 of the Hindu Adoptions and Maintenance Act, 1956, a mother is no less under a legal obligation to maintain her minor son than the father as sub-section (1) thereof provides that "a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children" and sub-section (2) thereof provides that "a legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is minor". It may, therefore, be doubtful as to whether a mother, who has discharged her legal obligation under the Act to maintain her son, can claim from the father a refund of the amount spent by her. It may, however, be argued that because of the expression "father or mother" in sub-section (2) and the expression "mother" occurring after the expression "father" in the alternative, the obligation is firstly on the "father" and then on the mother only in the absence of the father. But assuming, that the father alone, so long he is alive, is obliged to maintain the son, the mother, who had to maintain the son on her own, can claim reimbursement of the sum spent by her towards such maintenance, or that, the father being also equally obliged to maintain the son, the mother, in such a case, can claim contribution from her co-obligee; but the son obviously cannot make any such claim for reimbursement or contribution. Under the Hindu Law, as it stood before the Act, there was no such legal obligation cast on the mother to maintain her legitimate son, and that was in perfect consonance with the spirit of that law with its high-pitched patriarchal bias and prescription of perpetual tutelage for women and was also probably justified because of the abject economic dependence of the Hindu women of those days.
38. Be that as it may, the Hindu Adoption and Maintenance Act, 1956, has not been extended to Sikkim as yet and cannot, therefore, apply here. Even if that Act was extended to Sikkim, the same would not have applied to the parties before us who are Sikkimese Bhutias and have been declared as "Scheduled Tribes" under Art. 342 read with Art. 366(25) of the Constitution as S. 2(2) of the Act provides that "nothing contained in this Act shall apply to the members of any Scheduled Tribe unless the Central Government, by notification in the Official Gazette, otherwise directs".

39. The plaintiff, however, has asserted through his witness P.W. 6 that they are Buddhist and are "governed by Hindu Mitakshara Law". I have my doubts as to whether Sikkimese Bhutias, who are Buddhist by religion, were and are and should be so governed and I would try to explain some of the reasons for my doubts hereinafter. But even assuming, as I have been invited to do by the plaintiff, that they are governed by the Hindu Law, meaning thereby the Hindu Law as it stood before the codifications in 1955-1956, or the Hindu Law sans all legislations, British or Indian, and thus assuming that the father was under a legal obligation to maintain his son, I do not think that the son can maintain a suit against the father for the refund of the amount which his mother had spent for his maintenance and for which she advances no claim.
40. Another aspect of the matter may also be noted. The mother of the plaintiff deposing as P.W. 1 has categorically stated that when her son the plaintiff "was about 8-9-months old, the defendant sent his maternal uncle Khari Bhutia Mandal to ask for the restoration of the child" and that he also told her "that the defendant would give some money out of his salary for the maintenance of the son", but that she "did not agree and so he went back". In *Mallikarjuna Nayudu v. Durga Prasada Nayudu* ((1901) ILR 24 Mad 147), it was urged before the Privy Council that the suit for arrears of maintenance could not be maintained without proof of demand and refusal of maintenance. It was held by the Privy Council (at p. 156) that in order to recover arrears of maintenance, it was not necessary to prove a demand for each year's maintenance and that non-payment of maintenance to a person entitled thereto is prima facie proof of wrongful withholding. It is, therefore, true that in order to recover arrears of maintenance the plaintiff was not to prove demand on his behalf and refusal thereof by the defendant. But if the mother, who was maintaining her son, refused to receive any amount from the father towards maintenance, it might be difficult for her thereafter to recover arrears of maintenance through legal process with effect from an anterior date. Any way, I need not pursue this aspect any further as I have already pointed out that here in this case, the mother who had spent towards the maintenance of her son the plaintiff, is making no claim and I have already held that such a claim by the son at his own instance cannot be actionable.
41. This brings me to the consideration of the other relief claimed by the plaintiff, namely, "a decree declaring the right of the plaintiff to inherit the half of the share of the ancestral and self-acquired properties" of his father the defendant. I know of no law where-under a son can acquire any right in the self-acquired properties of the father during the lifetime of the latter. A "right to inherit" can only arise when succession to the properties would open on the death of the father dying intestate and until then it is a mere spes successionis which can furnish no cause of action. This part of the claim of the plaintiff, therefore, must and can not but be negated.
42. If the plaintiff is a person governed by the "Hindu Mitakshara Law", as asserted by his witness P.W. 6, he can be said to have acquired by birth a coparcenary right in the ancestral properties in the hands of his father. But can it be said the parties here being Sikkimese Bhutia domiciled in Sikkim, which was not a part of India before 1975, were and are governed by Hindu Law prevailing in India? From the evidence on record no such conclusion can be reached because the bald assertion of P.W. 6 in examination-in-chief that "we are governed by Hindu Mitkshara Law" is followed by his own statement in cross-examination that "they are governed by their own customary law of inheritance by birth", while the defendant as D.W. 1 has asserted both in examination-in-Chief and cross-examination that "in the matters of succession and inheritance and marriage, we are governed by customary law of ours and not by Hindu Law" and that "it is incorrect that in matters of succession, inheritance and marriage we are governed by Hindu Law". The evidence of D.W. 2, a Sikkimese Bhutia Buddhist and a Mandal of three villages for 15/16 years, is that "in matters of succession, inheritance and marriages, we are not governed by Hindu Law, but by our own customs". He has also very categorically negated the right by birth of a son in the ancestral properties in the hands of his father by stating that "grandfather's property devolves upon the father and after his death upon his grandson". The evidence on record, therefore, would rather indicate that

the parties are governed by their own custom in matters relating to marriage, succession and the like. In *Ghlmerly Lepcha v. Karma Wangyal* (1978-2 Sikkim LJ 16) it has been observed (at p. 20) as hereunder:

"In India, of which Sikkim has become a part in 1975, there is no law except Hindu Law applicable to the Buddhist and the Buddhists in India have all along been governed by the Hindu Law. But in Sikkim also an impression has grown that the Buddhists in Sikkim also follow principles relating to ancestral property and joint family as are followed by the persons governed by the Mitakshara School of Hindu Law. Whether this was a result of any indigenous development among the Buddhists in Sikkim or was a result of the moulding influence of the Mitakshara School of Hindu Law prevailing in the neighbouring India or was the result of the projection by the Indian Judges presiding over Sikkim Courts of their Indian legal training and conception as to the Buddhists being governed by the Hindu Law, is a different matter, but the impression is very much there". It has, however, been pointed out therein that it was not necessary in that case to decide as to "whether the impression was well-founded or not" because it was found that the plaintiff-petitioner was to fail, whether or not he was governed by the principles of Hindu Law.

43. Great authorities on Hindu Law like Mayne (*Hindu Law and Usage*-Eleventh Edition — page 83), Sarkar-Sastri (*Hindu Law — Seventh Edition*— page 61), Mulla (*Hindu Law—Fourteenth Edition* —page 74) are unanimous that Indian Buddhists are governed by Hindu Law. It may, however, be noted that while Sarkar Sastri has not referred to any case-Laws in support of this view, the case-laws referred to by both Mayne and Mulla do not relate to Buddhists at all. It is, however, not at all difficult to understand as to how and why the Indian Buddhists were and are governed by Hindu Law. The Buddhists in India were within the fold of Hinduism before their adoption of or conversion to the Buddhist religion; Buddhism renounced the Hindu Scriptures, denounced the Hindu religion and renounced their own religion, philosophy and ethics; but at no point of time they evolved or established or developed any sets of civil laws different from those by which they used to regulate their secular activities before and the Hindu Law, therefore, continued to govern them as before in all secular matters.
44. It is now an accepted fact of history that Buddhism migrated to Tibet from India and then made a backward journey to Sikkim along with the Tibetans, who came to be known as Bhutias because of their hailing from "Bhot", the Sanskrit name for Tibet. The Tibetans who started coming to Sikkim in or about the Thirteenth Century (vide, *New Encyclopaedia Britanica — 15th Edition — Volume 16*) and brought Buddhism to Sikkim and could not obviously bring Hindu Law with them, as they never accepted nor were governed by Hindu Law at any point of time. Therefore, what happened in India in the case of the Indian Buddhists, namely rejection of Hindu religion, but retention of Hindu Law, could and did never happen in the case of the Sikkimese or Tibetan Buddhists in Sikkim, for they having never adopted Hinduism, no question of their rejecting the religious portion of it and retaining the secular or legal portion thereof, like the Indian Buddhists, could or did arise. The Tibetan or the Sikkimese Buddhists, therefore, received the Buddhist religion from India but not the Indian Hindu Laws and, therefore, the reasons for the Indian Buddhists being governed or continued to be governed by the Indian Hindu Laws can have no application to the Sikkimese Buddhists. In secular matters, therefore, there is every reason to think that, they were and would be governed by their own laws and the evidence on record, as already noted, also makes such indication. In fact, the "Marriage Customs of the Sikkimese" as described in the *Gazetteer of Sikkim* (H.N. Risley 1973 Reprint Page 55) would leave no manner of doubt that the Sikkimese Bhutias had their own laws and customs relating to marriage, which were polyandrous in nature and could not, therefore, be the law derived from the Hindu Dharmashastras according to which a Hindu woman could never have plurality of husbands and even re-marriage of widows had to be sanctioned by express legislation during the British regime.
45. In the light of the foregoing discussion, therefore, and on the evidence on record in this case, I would be inclined to hold that the Buddhist Bhutias of Sikkim are not governed by the Hindu Law, Mitakshara or Dayabhaga, but are governed by their own customary laws as asserted by the defendant and his witness

and as admitted by the plaintiff's own witness also. And in that case, there being nothing on record to show that the concepts of Apratibandha Daya or Unobstructed Heritage and of the right by birth in ancestral properties, so peculiar to Mitakshara School of Hindu Law, were also accepted tenets of the customary law governing the parties and there being on the other hand, clear evidence of D.W. 2 to the effect that a son would acquire right even in the ancestral properties only on the death of the father, the claim made by the plaintiff is liable to be negated.

46. But as I would presently show, even without deciding this question and even accepting the bald assertion made on the side of the plaintiff that they are governed by "Hindu Mitakshara Law", the plaintiff would not be entitled to the relief claimed.
47. Let me, therefore, assume that the plaintiff is a person governed by the Mitakshara School of Hindu Law and as such has acquired a coparcenary right by birth in the ancestral properties. But even then can he obtain the relief claimed by him, namely, "a decree declaring the right of the plaintiff to inherit half of the share of the ancestral properties of the defendant"? The expression "right to inherit" is obviously an inappropriate expression in respect of a coparcener or coparcenary properties for a coparcener never inherits any coparcenary property or any interest therein. As pointed out by the Privy Council as early as in 1863 in *Katama Natchiar v. Rajah Mootoo Vijaya Raganadha* otherwise known as *Raja of Shivagunga's case* (9, Moo Ind App 539 at p. 611)" according to the principle of Hindu Law, there is a co-parcenaryship between the different members of a united family, and survivorship following upon it-There is community of interest and unity of possession between all the members of the family and upon the death of any one of them the others may well take by survivorship that in which they had during deceased's life-like a common interest and common possession". Coparcener, therefore, even if he is the son, cannot claim any right to inherit", the undivided share or interest of any other coparcener, even if he is the father. A coparcener in a given case may sue to establish his right, if denied, to take by survivorship along with other coparceners, the undivided interest of any deceased coparcener on his death. So, though a coparcener acquires by birth an interest in the coparcenary properties, he cannot, until there is a partition, claim any particular share in any particular property and his right to take by survivorship along with other coparceners the undivided interest of any particular coparcener would only arise on the death of the latter. As the Privy Council pointed out as early as in 1866, in *Appovier v. Rama Subha Aiyan* ((1866) 11, Moo Ind App 75 at p. 89), "according to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remain undivided can predicate of the joint undivided property, that he, that particular member, has a certain definite share". About hundred years thereafter, this legal position as to coparceners and coparcenary properties has again been reiterated by the Supreme Court in *State Bank of India v. Ghamandi Ram* (AIR 1969 SC 1330), where it has been observed (at pp. 1333-1334) that as a result of the collective and conjoint ownership of all the coparceners in a quasi-corporate capacity, they are, until a partition takes effect, entitled to common possession and enjoyment of all the coparcenary properties and can also work out their rights at any time by claiming partition. A coparcener, therefore, while the family remains united, cannot claim a declaration that he is entitled to any particular share in any property. He cannot also claim that he be declared to be entitled to any particular share in the undivided share or interest of another living coparcener, even if the latter be his father, as has been claimed by the plaintiff in this case.
48. For these reasons, I would agree with my Lord the Chief Justice that this appeal be dismissed.

Appeal dismissed.

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PUMA BAHADUR BISTA VERSUS SANTA BISTA AND ANOTHER

(Sikkim High Court)

Criminal Revn. No. 2 of 1982

(Before Hon'ble Mr. Justice A.M. Bhattacharjee, A.C.J.)

Puma Bahadur Bista ... Petitioner;

Versus

Santa Bista and another ... Respondents.

Decided on October 7, 1983

- Revision petitioner has assailed the order on two grounds only, namely. (1) the respondent No. 1, in whose favour the order has been passed, is not and has not been proved to be, the wife of the revision-petitioner and (2) the amount of the maintenance ordered is excessive
- As pointed out by this Court in *Bishnu Kala v. Bishnu Maya*, (AIR 1980 Sikkim 1 at page 12) any such question as to the validity of a Hindu Marriage on the ground of the parties thereto belonging to different castes or sub-castes would not detain any Court for a moment if the parties are domiciled in the other States in India where the Hindu Marriage Validity Act, 1949 was or the Hindu Marriage Act, 1955 is, in force because under S. 3 of the former Act and under S. 29 (1) of the latter Act, which repeals and replaces the former Act, no marriage between Hindus shall be deemed to be invalid or ever to have been invalid by reasons only of the fact that the parties thereto belonged to different castes, sub-castes or sects. The Hindu Marriage Validity Act, 1949 could not and, therefore, did not extend to the then State of Sikkim. The Hindu Marriage Act, 1955 also has not as yet been extended to this State and as it is not the case of any of the parties that they, though residing in Sikkim, are domiciled elsewhere in India where the Hindu Marriage Act, 1955 extends, the marriage in this case would be governed by the provisions of the Hindu Law sans these legislative provisions.
- I do not think that a Magisterial Court under S. 488 is required to go into the question as to the legal validity of a marriage which has been proved to have taken place in fact unless the illegality or invalidity thereof ??? demonstrates itself without any doubt or debate. At least from 1869, when the Privy Council decided *Inderun v. Ramaswamy* (13 Moo Ind App 141 at p. 148), the law appears to be well-settled for more than a century that "if there was a marriage in fact. There was a presumption of there being a marriage in law". In 1911, the Privy Council again declared in *Mouju Lai v. Chandrabati* (ILR (1911) 38 Cal 700 at 707) that to "matters of form and ceremony, the established presumption in favour of marriage undoubtedly applies". In 1947, the Privy Council in *Kashi Nath v. Bhagwan Das* (AIR 1947 PC 168) referred to and reaffirmed what it declared in *Inderun v. Ramaswamy* (supra) in 1869, namely, "when once you get that there was a marriage in fact, there would be a presumption in favour of there being a marriage in law". And, in 1962, the Supreme Court in *Veerappa v. Michael*, (AIR 1963 SC 933) referred to *Mouju Lai v. Chandrabati* (supra) and ruled that "where it is proved that the marriage was performed in fact, the Court will also presume that the necessary ceremonies have been performed". Such presumption of marriage in law arising from the proof of a marriage in fact may not be sufficient to sustain a proceeding for matrimonial reliefs or a prosecution for matrimonial offence; that is, however a different matter not arising for consideration in this case and, therefore, need not detain me. But in a proceeding like the present one under Section 488,

once a marriage in fact is proved to have taken place, the presumption arising therefrom in favour of a marriage in law and of the necessary ceremonies having been performed would be sufficient to entitle the wife of such a marriage to maintain an application under Section 488 unless the marriage on its face is stamped with indisputable illegality and the invalidity thereof stares at the face.

- Keeping this in view and the fact that the Legislature in enacting this S. 488 was mainly concerned with preventing vagrancy and providing the discarded and abandoned wives and children with a speedy relief by way of maintenance through a summary procedure and also the fact that the administration of the provisions of this Section was entrusted to Magistrates who could not be expected to have proper knowledge or training to determine complicated questions relating to the validity of marriages among the Hindus and also the Muslims, the two major communities in the country, it would be difficult to conceive that the Legislature, could require the Magistrate, before ordering maintenance of a Hindu wife whose marriage in fact was established, to go into and decide these difficult questions relating to the legal validity of Hindu marriages in these summary proceedings.
- The finding as to a marriage in fact between the parties in this case is beyond challenge in revision and as there is nothing apparent on its face to clearly demonstrate its illegality or invalidity, the marriage in fact would attract in its favour all the presumptions of its being a marriage in law and would entitle the respondent No. 1 to invoke the provisions of Section 488 of the Code. As to the quantum of maintenance, I have not been able to find any thing on record to persuade me to hold that the amount of Rs. 200/- per month awarded by the learned Judge for the wife of the revision-petitioner, who is earning not less than Rs. 600/- as his monthly salary, is excessive and warrants any interference in revision. It is true that under the provisions of Section 125 of the new Cr. P.C. 1973, which, as noted at the outset, has not yet been extended to the State of Sikkim, a wife, in order to be entitled to any maintenance under that Section, must be one who is "unable to maintain herself" as clearly pointed out in Section 125(1)(a) of the new Code.

ORDER

1. In this revision directed against an order of maintenance passed under S. 488 of the Cri. P.C. 1898, that being the Code still operating in Sikkim. Mr. Bishambhar Sharma, the learned Advocate for the revision-petitioner has assailed the order on two grounds only, namely. (1) the respondent No. 1, in whose favour the order has been passed, is not and has not been proved to be, the wife of the revision-petitioner and (2) the amount of the maintenance ordered is excessive. The learned Sessions Judge, who tried the case, (and be it noted that because of certain provisions of law operating in Sikkim, the Sessions Judge is, as held by this Court in Chandra Bahadur v. Sundermaya, 1983 Cri LJ 323, competent to try and dispose of proceedings under S. 488 of the Code), has on a careful consideration of the evidence adduced before him, both oral and documentary held that the respondent No. 1 was duly married to the revision-petitioner and the monthly salary of the latter who is a police constable, having been found to be not less than Rs. 600/-, the Sessions Judge ordered him to pay maintenance to the respondent No. 1 at the rate of Rs. 200/- per month.
2. I have been taken through the entire evidence on record by Mr. Sharma, the learned Advocate for the petitioner and I have no doubt that in view of the nature of the evidence on record, the finding of the learned Sessions Judge as to the factum of marriage is unassailable at least in revision. All the seven witnesses examined by the respondent No. 1, who was the applicant for maintenance including herself and her father except witness No. 4, clearly testified as to the fact of the marriage between the parties and while one of them, being witness No. 1, was not at all cross-examined the others remained absolutely unshaken in cross-examination, and as pointed out by the learned Judge, there is nothing on record to doubt their veracity or to question their reliability or to disbelieve them on any ground. As against this, the revision-petitioner himself was his sole witness seeking to repudiate the factum of marriage merely

with his bald denial. And though the witness No. 4 for the respondent No. 1, CP. Rai deposed that he had no knowledge about the marriage between the parties, yet he stated further that the revision-petitioner stated to them that as he and the respondent No. 1 belonged to separate castes, he was ready to pay some money to the petitioner as compensation. There is also a document on record written in Nepali which has been signed by witnesses Nos. 1, 2, 3, 5 and 6, all of whom have proved their respective signatures in the document and have referred to the document in their depositions as "a document regarding the marriage" "prepared in the presence of the Panchayats". In the body of the document it appears to have been recorded that the revision-petitioner and the respondent No. 1 have married each other according to their own choice and out of their own will and accord and that the document is in respect of the revision-petitioner taking or making the respondent No. 1 as his wife — "Patni Tulyeko Bishayama". But though the witnesses noted above have proved their respective signatures on the document, the document as a whole has not been proved and there appears to be no evidence as to who wrote the body and the learned Judge also has not marked the document as a whole as a proved Exhibit. No one has also proved the alleged signature of the revision-petitioner on this document and the latter also has not been confronted with; this document or cross-examined, with reference to its contents. The contents of the document, therefore, cannot be taken into consideration and the learned Judge also has not referred to or relied on its contents but has rested his finding on the other evidence on record referred to hereinabove and as already stated on the state of evidence on record the finding arrived at by the learned Judge as to the factum of marriage between the revision-petitioner and the respondent No. 1 cannot call for any interference in revision.

3. Mr. Sharma has however, very strongly argued that the revision-petitioner and the respondent No. 1 having belonged to different castes, there could not be any legal and valid marriage between them and Mr. Sharma has urged that as a woman applying for maintenance under S. 488 of the Code as a wife must, if her marriage is denied by the opposite party, prove that she was legally married to the opposite party, the respondent No. 1 was not entitled to apply for maintenance under this Section because, even assuming the factum of her marriage with the revision-petitioner to have been proved, there could not be any legal and valid marriage between them as they belong to different castes. As pointed out by this Court in *Bishnu Kala v. Bishnu Maya*, (AIR 1980 Sikkim 1 at page 12) any such question as to the validity of a Hindu Marriage on the ground of the parties thereto belonging to different castes or sub-castes would not detain any Court for a moment if the parties are domiciled in the other States in India where the Hindu Marriage Validity Act, 1949 was or the Hindu Marriage Act, 1955 is, in force because under S. 3 of the former Act and under S. 29 (1) of the latter Act, which repeals and replaces the former Act, no marriage between Hindus shall be deemed to be invalid or ever to have been invalid by reasons only of the fact that the parties thereto belonged to different castes, sub-cases or sects. The Hindu Marriage Validity Act, 1949 could not and, therefore, did not extend to the then State of Sikkim. The Hindu Marriage Act, 1955 also has not as yet been extended to this State and as it is not the case of any of the parties that they, though residing in Sikkim, are domiciled elsewhere in India where the Hindu Marriage Act, 1955 extends, the marriage in tlrs case would be governed by the provisions of the Hindu Law sans these legislative provisions.
4. But does the expression "wife" in S. 488 of the Code of Criminal Procedure mean a woman legally married to the opposite party and must a woman applying for maintenance under S. 488 prove that not only there was a marriage in fact between her and the opposite party but also that it was a marriage valid according to the requirements of law? Assuming, as urged by Mr. Sharma and as laid down in a number of decisions, that since the expression "wife" in S. 438 is unqualified while the expression "child" has been qualified by the words "legitimate or legitimate", the expression "wife" in S. 488 would mean only a legally married wife, I do not think that a Magisterial Court under S. 488 is required to go into the question as to the legal validity of a marriage which has been proved to have taken place in fact unless the illegality or invalidity thereof ??? demonstrates itself without any doubt or debate. At least from 1869, when the

Privy Council decided *Inderun v. Ramaswamy* (13 Moo Ind App 141 at p. 148), the law appears to be well-settled for more than a century that "if there was a marriage in fact. There was a presumption of there being a marriage in law". In 1911, the Privy Council again declared in *Mouju Lai v. Chandrabati* (ILR (1911) 38 Cal 700 at 707) that to "matters of form and ceremony, the established presumption in favour of marriage undoubtedly applies". In 1947, the Privy Council in *Kashi Nath v. Bhagwan Das* (AIR 1947 PC 168) referred to and reaffirmed what it declared in *Inderun v. Ramaswamy* (supra) in 1869, namely, "when once you get that there was a marriage in fact, there would be a presumption in favour of there being a marriage in law". And, in 1962, the Supreme Court in *Veerappa v. Michael*, (AIR 1963 SC 933) referred to *Mouju Lai v. Chandrabati* (supra) and ruled that "where it is proved that the marriage was performed in fact, the Court will also presume that the necessary ceremonies have been performed". Such presumption of marriage in law arising from the proof of a marriage in fact may not be sufficient to sustain a proceeding for matrimonial reliefs or a prosecution for matrimonial offence; that is, however a different matter not arising for consideration in this case and, therefore, need not detain me. But in a proceeding like the present one under Section 488, once a marriage in fact is proved to have taken place, the presumption arising therefrom in favour of a marriage in law and of the necessary ceremonies having been performed would be sufficient to entitle the wife of such a marriage to maintain an application under Section 488 unless the marriage on its face is stamped with indisputable illegality and the invalidity thereof stares at the face. It should be noted that at the time when the Cr. P.C. of 1898 was enacted, the Hindu Law of marriage as then administered by the Courts consisted of conflicting and sometimes almost irreconcilable texts of the different Smritis and the Nibandhas and somewhat confusing case-laws, and also of customs and usages very often overriding those laws and there was great divergence of opinions on almost all the important questions like, sagotra marriages, intercaste marriages, limit and extent of the sapinda relationship and prohibited degrees for marriage etc. Keeping this in view and the fact that the Legislature in enacting this S. 488 was mainly concerned with preventing vagrancy and providing the discarded and abandoned wives and children with a speedy relief by way of maintenance through a summary procedure and also the fact that the administration of the provisions of this Section was entrusted to Magistrates who could not be expected to have proper knowledge or training to determine complicated questions relating to the validity of marriages among the Hindus and also the Muslims, the two major communities in the country, it would be difficult to conceive that the Legislature, could require the Magistrate, before ordering maintenance of a Hindu wife whose marriage in fact was established, to go into and decide these difficult questions relating to the legal validity of Hindu marriages in these summary proceedings.

5. In this view of the matter, therefore, granting that in a proceeding under Section 488, where a marriage is denied, the questions relating to the factum of marriage as well as its legal validity can or are to be gone into, I have no doubt that the questions would have to be answered in favour of the respondent No. 1, in this case in view of the nature and the scope of a Magisterial proceeding under Section 488 of the Code where the Legislature has designedly provided for no appeal against the orders passed in summary proceedings under that Section and has subjected these orders to the decisions of competent Civil Courts. As already noted, the argument of Mr. Sharma is that assuming that a marriage in fact between the revision-petitioner and the respondent No. 1 has been proved, this could not be a marriage in law as the parties having belonged to different castes could not legally marry under the Hindu Law as is applicable in Sikkim, where there is no statutory law as in Section 3 of the Hindu Marriage Validity Act, 1949 or Section 29(1) of the Hindu Marriage Act, 1955, validating inter-caste and inter-sub-caste marriages among the Hindus.
6. There is, however, nothing on record to show that the parties in this case belong to two different-castes or sub-castes and the one is higher and the other lower. All that I get is that the surname of the revision-petitioner, that is, the alleged husband, is "Bista" and the maiden surname of the respondent was "Khawas". Mr. Sharma has, however, contended that "Bista" belongs to the "Chhetri" caste which

is a higher caste than the one to which the "Khawas" belongs. To my categorical question as to whether "Bista" and "Khawas" are different castes altogether or are different sects of or different sub-castes under the "Chhetri" caste, Mr. Sharma was frank enough to state that he could not give a categorical answer and candidly conceded that there is nothing on record on this point. Now, if "Bista" and "Khawas" are not altogether different castes, but are different sub-castes under the same caste "Chhetri", then even without the aid of any enactment? like the Hindu Marriage Validity Act, 1949, or the Hindu Marriage Act, 1955, such inter-sub-caste marriage would be valid under the Hindu Law even as it stood before these enactments. The old 1869 decision of the Privy Council in *Inderun v. Ramaswamy* ((1869-70) 13 Moo Ind. App. 141) (supra): is itself an authority for the proposition that inter-sub-caste marriages, as distinguished from inter-caste marriages, were all long regarded to be legally valid. In the much later decision of the Privy Council in *Gopi Krishna v. Mst. Jaggo* (AIR 1936 P.C. 198), which has been relied on by the Privy Council in a yet after decision in *Kashi Nath v. Bhagwan Das*, AIR 1974 PC 168 (supra), Sir Shadi Lai categorically ruled (at 199) that "the Shastras dealing with the Hindu Law of marriage do not contain any injunction forbidding marriages between the persons belonging to different divisions of the same Varna and neither any derided case nor any general principle can be invoked which would warrant such a prohibition."

7. But even if the parties belong to two different castes, then even according to Mr. Sharma, the bridegroom "Bista" was of higher caste and the bride "Khawas" was of lower one. As pointed out by this Court in *Bishnukala v. Bishnumaya* (AIR 1980 Sikkim 1 at p. 12) (supra), under the Shastric Hindu Law, as interpreted by the Courts, marriages between persons belonging to different castes were divided under two heads as "Anuloma" and "Pratiloma", the former being marriage between a male of higher caste and a female of lower caste and the latter being marriage between a male of lower caste and a female of higher caste. It was pointed out that though it was not easy to appreciate the rationale, it was generally held by the Courts that Anuloma marriages were not invalid but the Pratiloma Marriages were. While some of the Smritis, for example, *Vishnu Samhita* (XXIV, 1-4), *Narada Samhita* (XV - XII 5-6) clearly permitted/Anuloma marriages, some later Commentators, for example, *Raghunandana* in his *Udvaha Tattwa* (II, 62), however, prohibited inter-caste marriages altogether. In a Division-Bench decision of the Assam High Court in *Makhana Katani v. Thanesar* (AIR 1956 Assam 11), *Sarjoo Prasad*, C.J., held (at 12) that Anuloma marriages would have been valid under the Hindu Law even without Section 3 of the Hindu Marriage Validity Act, 1949, though I must note that some High Courts took a different view. In *Kashi Nath v. Bhagwan Das* (AIR 1947 PC 168) (supra), the Privy Council, however, described the question as to the validity of inter-caste marriages as "the difficult question". But at any rate, this has not been disputed that even if marriages between persons belonging to different castes were not valid under the Shastric Law, custom and usage could validate the same (see, for example, *Mayne's Hindu Law — 11th Edition* P. 167). Another interesting feature of the earlier Hindu Law was that even if a marriage was invalid, the female party thereto was entitled to maintenance. *Raghavachariar* in his *Hindu Law* (7th Edition — 1980 — Vol. I — Pp. 51, 219) has referred to the Division Bench decision of the Bombay High Court in *Ram Chandra v. Gopai* (ILR (1908) 32 Bom 619) and also a Division Bench decision of the Patna High Court in *Kamani Devi v. Kameshwar Singh*, (AIR 1946 Patna 316) for the proposition that even if the marriage was void as being violative of the rules relating to prohibited degrees or relating to Gotra or Pravara, "the wife is entitled to be maintained by the husband". *Trevelyan* also in his *Hindu Family Law* (1908, p. 40), after pointing out that "a marriage within the prohibited degrees is void", observed further that "the woman is entitled to receive maintenance from the man" and this was referred to with approval by the Patna Division Bench in *Kamani Devi v. Kameshwar Singh* ((supra) at 319). In *Gour's Hindu Code* also (5th Edn. — Vol. I 1974 P. 254) it has been observed that even where the marriage was void as being within the prohibited degree, or being a pratiloma one, the obligation to maintain the wife would remain.
8. This being the position in law on the point relating to inter-caste marriages among the Hindus, which even according to the Privy Council in *Kashi Nath v. Bhagwan Das* (supra, at 168) involved "difficult question",

a Court under Section 488 of the Code, which is solely concerned with providing maintenance to a discarded and deserted wife cannot be required to go into such questions before ordering maintenance. In describing the scope and nature of a proceeding under Section 488 of the Code, Subba Rao, J., speaking for a three-Judge Bench of the Supreme Court in *Jagir Kaur v. Jaswant Singh* (AIR 1963 SC 1521) observed (at 1523-1524) : (1963 (2) Cri LJ 413 at p. 415) that "the proceedings, under this Section are in the nature of civil proceedings, the remedy is a summary one and the person seeking that remedy is ordinarily a helpless person" so "the words should be liberally construed". (Emphasis added). In an earlier decision of the Supreme Court in *Nand Lai v. Kanhaiya Lai* (AIR 1960 SC 882) : (1960 Cri U 1246), the same learned Judge observed (at p. 885): (at p. 1249) that Section 488 "prescribes a summary procedure for compelling a man to maintain his wife and children" and pointed out that "the findings of a Magistrate under this Chapter are not final and the parties can legitimately agitate their rights in a Civil Court." (Emphasis added). In fact, Section 489(2) expressly contemplates cancellation of an order made under Section 488 "in consequence of any decision of a competent Civil Court." In *Bhagwan Datta v. Kamia Devi* (AIR 1975 SC 83 : (1975 Cri U 40), it has again been pointed out by the Supreme Court (at p. 85): (at p. 42) that the provisions of the Section are preventive in nature, providing in mode for preventing vagrancy and are "not intended to provide for a full and final determination of the status and personal rights of the parties" and determinations thereunder are subjected "to any final adjudication that may be made by a Civil Court between the parties regarding their status and civil rights". (Emphasis added). The proceeding being thus a summary one, not intended to determine fully or finally the status and the personal rights of the parties, the remedy being thus a summary one, the order having been made non-appealable but expressly made subject to the decision of a competent Civil Court, a Magisterial Court conducting a summary proceeding under Section 488 with its avowed object to prevent vagrancy cannot be required to go into the question of the legality of an intercaste marriage, a question which even the Privy Council certified to be a "difficult question". In *Jagir Kaur v. Jaswant Singh* (at p. 1524): (at p. 415) (supra), the Supreme Court has ruled that the expressions in Section 488 should be liberally construed, meaning obviously liberally in favour of the wife and the children for whose speedy protection this section was enacted. Thus construed, a "wife in fact" with all legal presumption of being a wife in law operating in her favour should be held to be entitled to invoke this Section, unless the illegality or the invalidity of her marriage is apparent on its face with irresistible clarity and without any scope of any doubt or dispute.

9. I have referred to the observations in the well-known treatises on Hindu Law by Trevelyan, Gour and Raghavachariar and to a Bombay Division Bench decision and also a Patna Division Bench decision to the effect that a wife of a void marriage was also entitled to maintenance under the earlier Hindu Law. Under Section 25 of the Hindu Marriage Act, 1955, a woman whose marriage has been annulled by a decree of nullity on the ground of its being void has been held to be entitled to maintenance, even though the Section uses the expression "wife" and reference in this connection may be made among others to *Sisir Kumar v. Sabita* (AIR 1972 Cal 4), *Dayai Singh v. Bhajan Kaur*, (AIR 1973 Punjab 44), *Govindrao v. Anandibai* (AIR 1976 Bom 433), *Kuldip Chand v. Geeta*, (AIR 1977 Delhi 124). In *Obula Konda v. Fedda Venkata* (AIR 1976 Ahdh Pra 43) it has been held that a "Hindu wife", who is entitled to maintenance under Section 18 of the Hindu Adoptions and Maintenance Act, 1956, would also include a Hindu wife whose marriage is void. If that was the position under the old Hindu Law and that is also the position under the present Hindu Law Codes, then the contention that the expression "wife" in Section 488 of the Code of Criminal Procedure, 1898, and also in Section 125 of the present Code of 1973, should include a "wife" of a void marriage also would require very serious consideration. In fact, K. Lahiri, J., of the Gauhati High Court has, in his very instructive judgment in *Boii Narayan v. Shiddheswari* (1981 Cri U 674), discarded the view that a discarded wife applying under Section 125 of the present Code of 1973 must prove herself to be "legally married" before she can be allowed to invoke that section and the learned Judge appears to have observed that "a marriage may be valid, void or voidable," but "nonetheless it is a marriage" and if it is a marriage, the female party thereto is a wife for the purpose of S. 125. It is, however, not necessary for me in this case to go that far and the learned Additional Advocate-General

appearing for the State, who has drawn my attention to this decision, has not also invited me to go to that extent, his main contention being that a "wife in fact" is good enough for a summary proceeding under Sec. 488, unless the materials on record unmistakably show that such a marriage could never take effect in law and that there is nothing on record to demonstrate such legal impossibility. Lahiri, J., has, however, observed in *Boii Narayan* (at 676) (*supra*) that "absence of mandatory ceremonies may render a marriage void or voidable". With great respect, that does not appear to me to be the position in law at least under the Hindu Marriage Act, 1955, where absence of the mandatory ceremonies is not a ground which would render any marriage void under Section 11 or voidable under Section 12. I would like to think that the absence of such essential ceremonies as referred to in Section 7 of the Hindu Marriage Act may make the marriage "no marriage" at all, but would not make it a void or a voidable marriage and the woman, who is party thereto, may not be even a "wife in fact" for the purpose of Section 483 of the Code of 1898 or Section 125 of the present Code. But these questions really do not arise for consideration in this case and need not be pursued. As I have already held, the finding as to a marriage in fact between the parties in this case is beyond challenge in revision and as there is nothing apparent on its face to clearly demonstrate its illegality or invalidity, the marriage in fact would attract in its favour all the presumptions of its being a marriage in law and would entitle the respondent No. 1 to invoke the provisions of Section 488 of the Code. As to the quantum of maintenance, I have not been able to find any thing on record to persuade me to hold that the amount of Rs. 200/- per month awarded by the learned Judge for the wife of the revision-petitioner, who is earning not less than Rs. 600/- as his monthly salary, is excessive and warrants any interference in revision. It is true that under the provisions of Section 125 of the new Cr. P.C. 1973, which, as noted at the outset, has not yet been extended to the State of Sikkim, a wife, in order to be entitled to any maintenance under that Section, must be one who is "unable to maintain herself" as clearly pointed out in Section 125(1)(a) of the new Code. But as pointed out in *Bhagwan Dutt v. Kamia Devi* (AIR 1975 SC 83 at p. 86) : (1975 Cri U 40 at p. 43), (*supra*) the mere fact that the language of S. 488(1) does not expressly make the inability of a wife to maintain herself a condition precedent to the maintainability of her application under that Section, does not imply that while determining her claim and fixing the amount of maintenance the Court is debarred from taking into consideration the wife's own separate income or means of support. In other words, under the new Section 125, an application by the wife thereunder may not be maintainable unless she proves that she is "unable to maintain herself" while under Section 488 of the Code of 1898, the inability to maintain herself is not a *sine qua non* to the maintainability of an application thereunder, but the Court, nevertheless is entitled to take into consideration the wife's separate income, if any, in determining the amount of maintenance to be awarded. In this case there is no evidence whatsoever that the respondent No. 1 has any separate income and while she has categorically stated that she is staying with her father with great difficulty, there has been no suggestion made to her or to any of her witnesses that she is not unable to maintain herself. That being so the impugned order cannot be challenged on the ground that the question whether the wife has any separate income or not was not specifically considered by the learned Judge. The revision thus fails and is dismissed.

10. Revision dismissed.

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SUBAL DAS VERSUS MOUSUMI SAHA

In the High Court of Tripura at Agartala

CrI. Rev.P. No. 89 of 2016

(Before Hon'ble Mr. Justice S. Talapatra)

Shri Subal Das, son of late Jahar Das, resident of Sachindra Nagar Colony, P.S. Jirania, District: West Tripura ...Petitioner

Versus

1. Smti. Mousumi Saha (Das), wife of Sri. Subal Das, daughter of Sri. Shakti Ranjan Saha, 2. Miss Chadni Das, daughter of Sri. Subal Das, being minor represented by the petitioner No. 1 [as mother] -both are residents of Khudiram Palli, P.O. Amarapur, P.S. Birganj, District: Gomati Tripura ...Respondents

Decided on July 25, 2017,

[Date of Hearing: 02.02.2017]

For the petitioner: Mr. R. Dutta, Advocate

For the respondents: Mr. S. Sarkar, Advocate

Whether mere existence or non-compliance of a decree of restitution of conjugal life by itself would debar the wife from getting an order of maintenance under Section 125(1) of the Cr.P.C?..A wife who refuses to comply the decree of restitution of the conjugal life cannot be deprived of maintenance for that status only having interpreted Section 125 (4). It would be incongruent to assume that a wife against whom a decree for restitution of conjugal rights has been passed is disentitled to move the Magistrate under Section 125(1) of the Cr.P.C. praying for maintenance, while a wife who has been divorced can still move the court. Without taking cognizance of brooding presence of constitutional empathy for women, the judgment of the civil court in respect of the restitution of the conjugal right can be treated only as the relevant evidentiary material, but the conduct of the wife whether there is any sufficient reason for refused by the wife to live with her husband be assessed by the Magistrate and only thereafter whether the wife would be entitled to maintenance or not be decided by the Magistrate. To be candid, the restriction as imposed by Section 125(4) of the Cr.P.C. has been substantially diluted, if not virtually negated.... Whether to achieve the purpose of Section 125(1) of the Cr.P.C being prevention of vagrancy and destitution, the Magistrate is entitled to have a purposive interpretation of Section 125(4) of the Cr.P.C, having regard to the constitutional empathy towards the women and children?...The Magistrate is entitled to embark on a purposive interpretation to achieve the object of 125 of the Cr.P.C. in the light of the discourse below.. The duty of a Judge in our country is to uphold the constitutional principles. When there emerges two alternatives by way of interpretation, the interpretation which supports the constitutional philosophy would be invariable accepted by the Magistrates [Para- 41 42]

JUDGMENT & ORDER

Hon'ble Mr. Justice S. Talapatra :— By means of this petition filed under Section 397 read with Section 401 of the Cr.P.C, the order dated 22.09.2016 delivered in Case No. Misc.08 of 2015 by the Sub-Divisional Magistrate

[SDJM] Amarpur, Gomati has been questioned inasmuch as according to the petitioner, the claim of the respondent No. 1 for monthly maintenance allowance under Section 125(1) of the Cr.P.C. is barred under Section 125(4) of the Cr.P.C. as the respondent No. 1 herein had withdrawn herself from the society of the petitioner along with her daughter without any reasonable excuse or lawful reason.

2. It is no denying fact that by the judgment dated 25.03.2016 delivered in T.S. (RCR) 31 of 2015, the Judge, Family Court, Agartala, West Tripura has clearly declared that the respondent No. 1 being the lawfully married wife of the petitioner had withdrawn herself from the society of the petitioner along with her daughter without any lawful excuse. The said judgment dated 25.03.2016 has not been challenged by the respondent No. 1 and thus the decree of restitution of conjugal rights directing the respondent No. 1 to reconstitute conjugal life with the petitioner has reached its finality.
3. It is not in the pace of controversy that the respondent No. 1 is legally married wife of the petitioner and the respondent No. 2 is their daughter borne in their wedlock. It is not in dispute as well that the respondent No. 1 with her daughter left the matrimonial home for incongenial matrimonial circumstances on 27.09.2014. The petitioner has also acceded that against him the respondent No. 1 had filed the complainant in the police station for beating her mercilessly on unlawful demand. The allegations are no less even against the respondent No. 1. It has been observed in the impugned order dated 22.09.2016 as under:

"From the averments, I also find that many cases has been filed by the Petitioner and which was ultimately withdrawn by way of amicable settlement, thus, it is proved that a mental torture was going on since long and Petitioner has been residing in her parents house though recently it has been ordered by the Ld. Family Court to reside petitioner with OP."

4. Having recorded the evidence, the SDJM has granted maintenance allowance for the respondents herein, who were the petitioners in the petition filed under Section 125 of the Cr.P.C. being case No. Misc.08 of 2005. The said order dated 22.09.2016 whereby the petitioner was directed to pay the respondents a sum of Rs. 5,000/- every month as maintenance allowance has been questioned solely on the premise that since by the judgment dated 26.03.2016 [Exbt.D] the competent civil court has declared that the respondent No. 1 has deserted the petitioner without reasonable excuse and as such the respondent No. 1 is not entitled to have maintenance under Section 125(1) of the Cr.P.C. by operation of Section 125(4) which reads as under:

"No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent." [Emphasis added]

5. Mr. R. Dutta, learned counsel appearing for the petitioner has stated that the respondent No. 1 has left the matrimonial home without any reasonable cause and having being approached several times by the petitioner she refused to reconstitute the conjugal life. The petitioner herein had finally instituted the suit for restitution of conjugal rights being T.S. (RCR) 31 of 2005. The said petition was allowed by this said judgment dated 25.03.2016. According to Mr. Dutta, learned counsel appearing for the petitioner, in view of the provisions of Section 125(4) of the Cr.P.C. and on the face of the definite finding returned by the Judge, Family Court, Agartala, West Tripura by the judgment dated 25.03.2016 that the respondent No. 1 has withdrawn herself from the society of the petitioner, she is not entitled to get any maintenance. Mr. Dutta, learned counsel has further referred to the provisions of Section 125(5) of the Cr.P.C. which authorises the Magistrate to cancel the order of maintenance, if it is found that any wife without any sufficient reason refuses to live with her husband. In the considered view of this court, for purpose of sub-section 5 of the Section 125 of the Cr.P.C, the petitioner ought to have approached the Magistrate to pass the appropriate order if any, as warranted in the circumstances but the petitioner did not approach the Magistrate, he has challenged the order dated 22.09.2016 directly by filing this revision petition on

the ground that the finding of the competent civil court was not considered by the Magistrate while passing the impugned order.

6. Mr. Dutta, learned counsel appearing for the petitioner has referred to the cross-examination of the respondent No. 1 in the proceeding for restitution of conjugal rights to demonstrate that the respondent No. 1 had stated that she could not go to her matrimonial house. To buttress the ground of objection, Mr. Dutta, learned counsel has referred *David Daniel v. Mrs, Chinnamma Daniel* reported in 1973 Cri. L.J. 91, *Teja Singh v. Smt. Chhoto* reported in 1981 Cri. L.J. 1467, *Sayed Jabbar All v. Mst. Saheba Fatima* reported in 2002 Cri.LJ. 1332, *Smt. Sanchita Jain v. Naresh Jain* [judgment and order dated 06.05.2015 in MCRC.2481/10: Madhyapradesh High Court], *Subal Chandra Saha v. Pritikana Saha* reported in (2003) 2 GLR 576 and *Murlidhar Chintaman Waghmare v. Smt. Pratibha Murlidhar Waghmare* reported in 1986 Cri. L.J. 1216.
7. From the other side, Mr. S. Sarkar, learned counsel appearing for the respondents has submitted that literal interpretation would not serve the object sought to be achieved by the provisions of Section 125(1) vis-a-vis Section 125(4) of the Cr.P.C. He has fervently submitted that the brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the cause of derelicts [*Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal* reported in (1978) 4 SCC 70]. He sought for a purposive interpretation and contended that in a proceeding under Section 125 which is discretionary in nature and it is not necessary for the court to ascertain as to wrong or the minute detail of matrimonial discord between husband and wife need not to be gone into. In this regard, he has placed his reliance on *Sunita Kachwaha v. Anil Kachwaha* reported in (2014) 16 SCC 715. In that case the apex court as contended by Mr. Sarkar, learned counsel appearing for the respondents has clearly laid down the province of consideration. The wife must positively aver and prove that she is unable to maintain herself and in addition to that fact that husband has sufficient means to maintain her and he has neglected to maintain her. Having referred a decision of the apex court in *Kaiminiben Hirenbbhai Vyas v. Hirenbbhai Rameshchandra Vyas* reported in (2015) 2 SCC 385. Mr. Sarkar, learned counsel appearing for the respondents has contended that the purpose of the provision is to prevent vagrancy and destitution in society and the court should apply its mind to the option having regard to the facts of the particular case. Thereafter, referring a decision of Madhyapradesh High Court in *Babulal v. Sunita* reported in 1987 Cri.L.J. 525, Mr. Sarkar, learned counsel has further contended that even when the wife does not comply the decree for restitution of conjugal rights she can maintain a petition under Section 125. That apart, Mr. Sarkar, learned counsel has relied some more decisions viz. *Charan Singh v. Jaya Wati* reported in I (1996) DMC 169 [Allahabad High Court], *Sanjay Chopra v. Shyama* reported in II (1999) DMC 382 [Punjab and Haryana High Court], *Haizaz Pashaw v. Guizar Banu* reported in 2002 Cri.L.J. 3282 and *K, Narayan Rao v. Bhagyalakshmi* reported in 1984 Cri.L.J. 276 [Karnataka High Court].
8. Mr. Sarkar, learned counsel appearing for the respondents has finally contended that the apex court in *Mst. Zohara Khatoon v. Mohd. Ibrahim* reported in (1981) 2 SCC 509 : AIR 1981 SC 1243 has observed that Section 488 [corresponding old provision of Section 125] 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 a greater extent, the application of any other Act. Thus, Mr. Sarkar, learned counsel has submitted that the decision in the other proceeding may not be imported in the proceeding under Section 125 of the Cr.P.C.
9. Having considered the contentions raised by the learned counsel for the parties the following pertinent questions have emerged for consideration:

- (i) Whether mere existence or non-compliance of a decree of restitution of conjugal life by itself would debar the wife from getting an order of maintenance under Section 125(1) of the Cr.P.C?
 - (ii) Whether it is the circumstance averred and proved by the petitioner would determine the extent of the application of Section 125(4) of the Cr.P.C? and
 - (iii) Whether to achieve the purpose of Section 125(1) of the Cr.P.C being prevention of vagrancy and destitution, the Magistrate is entitled to have a purposive interpretation of Section 125(4) of the Cr.P.C, having regard to the constitutional empathy towards the women and children?
10. Before this court embarks on appreciating the framed questions, it would be apposite to shed light on the purpose and import of Section 125 of the Cr.P.C. The apex court in *Chaturbhuj v. Sita Bai* reported in (2008) 2 SCC 316, has observed as under:

"The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in *Captain Ramesh Chancier Kaushal v. Mrs. Veena Kaushal* (1978) 4 SCC 70 : AIR (1978) 4 SC 70 falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India, 1950 (in short the 'Constitution'). It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in *Savitaben Somabhai Bhatiya v. State of Gujarat*: (2005) 3 Supreme 636." [Emphasis added]

11. Further, it has been observed in *Chaturbhuj* (supra) that the test is whether the wife is in a position to maintain herself in the way she was used to, in the place of her husband. In *Bhagwan Dutt v. Kamla Devi*, reported in (1975) 2 SCC 386 it was observed that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife should absolutely be destitute before she can apply for maintenance under Section 125(1) of the Cr.P.C. With this view, there cannot be any amount of difference and for that reason perhaps no opinion of difference has been expressed in the subsequent decisions of the apex court. What is fundamentally raised in this case is that while passing the order dated 22.09.2016 in Case No. Misc.08 of 2015, the Judicial Magistrate did not appreciate the judgment dated 25.03.2016 passed in T.S. (RCR) 31 of 2015, whereby the respondent No. 1 was directed to reside with the petitioner. By the said order dated 22.09.2016, the petitioner has been asked to pay Rs. 5,000/- for maintenance of the respondent No. 1 and her daughter.

(I) WHETHER MERE EXISTENCE OR NON-COMPLIANCE OF A DECREE OF RESTITUTION OF CONJUGAL LIFE BY ITSELF WOULD DEBAR THE WIFE FROM GETTING AN ORDER OF MAINTENANCE UNDER SECTION 125(1) OF THE CR.P.C?

12. Mr. Dutta, learned counsel appearing for the petitioner has emphatically submitted that when the respondent No. 1 has been directed by a decree for restituting the conjugal right and it appears to the competent court that such non-compliance was deliberate then the Magistrate shall cancel the order of maintenance that he passed earlier or shall not pass any order of maintenance having due regard to the provisions of Section 125(4) of the Cr.P.C.
13. Kerala High Court in *David Daniel* (supra) has observed that:

"The law as it stands, gives no power to the Court to enforce a decree for restitution of conjugal rights. But a wife with the least moral conscience in her should obey the decree, and join her husband. The respondent evidently is not of such a type. She wants to fight the husband even after her defeat in the Court. Such a wife, I think cannot claim with any grace or justification, separate maintenance from the husband.

A decision in a suit against the wife for restitution of conjugal rights is equivalent to a decision by a competent Civil Court that the wife had no sufficient reason for refusing to live with her husband.

The wife had obtained an order for maintenance under Section 488. Subsequently the husband obtained a decree for restitution of conjugal rights against the wife.

Held that the subsequent decree for restitution of conjugal rights is a binding decision to the effect that the wife had no sufficient ground to refuse to live with the husband and that therefore the previous order for maintenance must be cancelled. *Tarak Nath v. Sneharani* AIR 1949 Cal 87: 49 Cri L_J 757. There the order of maintenance passed was cancelled the moment a decree for restitution of conjugal rights was passed by the Court-Such a wife, I think, cannot the Civil Court. So also in the present case the decree for restitution of conjugal rights must prevail and it is a good answer to the wife's claim for separate maintenance. The order of the learned Magistrate, therefore,, cannot be sustained. Such orders will give the incentive to a refractory and rebellious wife to flout Court's orders and claim maintenance from the husband who derives no benefit from her. The order of the learned Magistrate is hence set aside, and this revision is allowed. If the respondent still thinks that as the marriage subsists, she is entitled in law to get maintenance she may fight out her claim in a Civil Court." [Emphasis added]

14. In *Teja Singh* (supra), the Punjab & Haryana High Court has observed that: "4. Sub-section (4) of Section 125 of the Code of Criminal Procedure, which is in the following terms:

No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

envisages that a wife shall not be entitled to receive any allowance from her husband under Section 125 of the Code of Criminal Procedure inter alia if she refuses to live with her husband.

5. The Civil Court had clearly found that it was she who had deserted her husband that means it was she who had been refusing to live with him. Such being the case by virtue of Sub-section (4) of Section 125 of the Code of Criminal Procedure, she would not be entitled to any allowance.

6. The next question that calls for consideration is as to whether finding in a judgment of Civil Court between the parties would be binding upon the Magistrate trying the petition under Section 125 of the Code of Criminal Procedure. In this regard Sub-section (2) of Section 127 of the Code of Criminal Procedure deserves notice and it reads as under:

Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be vary the same accordingly.

7. A perusal of this sub-section would show that even if an order granting maintenance had been passed in favour of the wife and if thereafter a decision between the parties happens to be rendered by the Civil Court which has a bearing on the question which came up for consideration earlier before the Court dealing with the petition under Section 125 of the Code of Criminal Procedure, it has to give effect to the Civil Court order by cancelling the order granting maintenance, if such is the import of the judgment of the Civil Court." [Emphasis added]

15. Bombay High Court in *Sayyed Jabbar AH* (supra) while appreciating the similar objection, had occasion to observe as under:

"In spite of a decree for conjugal rights, the original applicant without justifiable reason did not join him and on account of this fact, the applicant cannot claim maintenance. It was pointed out by the Punjab and Haryana High Court in Sampuran Singh v. Gurdev Kaur, reported in 1985 Cri.LJ. 1072 that the rule that in the presence of decree for restitution of conjugal rights against the wife, she has no right to claim maintenance has a qualification and that the wife can still claim maintenance in the presence of decree for restitution of conjugal rights against her, if the conduct of the husband is such which obstructs her to obey such a decree and the presence of another women in his house or another wife can be a valid ground for her to remain away from him." [Emphasis added]

16. In Dattatrey v. State of Maharastra reported in 1993 Cri U 2181 by observing that where wife has no justification for withdrawal from the company of her husband, grant of maintenance is liable to be set aside, Bombay High Court has observed as under:

"8. In Mangula Arvind Chavan v. Arvind Shantaram Chavan, 1994 (I) Mh.LR. 617, the husband has sought restitution of conjugal rights, but the wife resisted the demand putting certain conditions. The Civil Court had found that the contention of wife regarding ill-treatment to her was baseless- Restitution of conjugal rights had been ordered in favour of the husband. The wife did not join her husband. It was held that if the wife did not want to cohabit with her husband despite her failure to prove her case for alleged ill-treatment, it could hardly be said that the wife was wrongfully neglected and denied separate maintenance allowance by the husband."

17. Madhya Pradesh High Court in Smt. Sanchita Jain (supra) had occasion to hold as under:

"In such circumstances, the decree passed the trial court in the matter of restitution of conjugal rights had to be followed by the petitioner but till today she is not willing to live with her husband, which shows that she is already weighing in mind to avoid the company of her husband without any reasonable cause. In such circumstances, the decisions cited by the counsel for the petitioner would not render any assistance to him being distinguished on facts of the present case."

18. Gauhati High Court in Subai Chandra Saha (supra) has however observed that the literal construction may not be allowed to interpret Section 125(4) of the Cr.P.C. In that case "living in adultery" had been constructed as under:

"The living together with another man by the wife in the present case appears to be not a stray incident nor a casual one, but having intention of continuing living with another man as husband and wife, they took rent of the house where they in fact started living together as husband and wife."

19. In Subai Chandra Saha (supra) it has been observed further that the ingredients required under Section 125(4) of the Cr.P.C. are to be strictly met and it can be safely held that the wife started living together with another man with a definite intention to continue the same and in fact, they continued living in adultery.

20. In Murlidhar Chintaman Waghmare (supra), the Bombay High Court has enunciated the law by reproducing a decision of the Allahabad High Court in Ram Singh v. State of UP reported in AIR 1963 Allahabad 355, where it had been observed as under:

"The right of maintenance under section 488. Cr.P.C. is a special right given under the Code. The mere fact that similar analogous remedy is available under the Hindu Adoptions and Maintenance Act in a Civil Court, does not take away the jurisdiction of the Magistrate under S. 488. Cr.P.C. to order maintenance to a Hindu wife.

The provisions of S. 488, Cr.P.C. are by no means any text, rule or interpretation of Hindu law or any custom or usage as part of that law; nor are they in any manner repugnant to, or inconsistent with the provisions of the Hindu Adoptions and Maintenance Act. Hence S. 4 of that Act cannot override S. 488, Cr.P.C. There is nothing in the Hindu Adoptions and Maintenance Act to suggest expressly or by

necessary implication that the Act is intended to be a substitute for the provisions of Section 488. Cr.P.C. In fact the provisions of Section 18 of the Act cannot be a substitute for Section 488. Cr.P.C. The latter provision is general and is applicable to a wife, irrespective of her religion, but the former is applicable to the case of Hindus only." [Emphasis added]

21. The plea of Mr. Dutta, learned counsel appearing for the petitioner is clear and it holds out that the order of maintenance be interfered with and set aside as the respondent No. 1 in compliance of the direction given by the civil court in the suit for restitution of conjugal rights has not joined the petitioner. It is a clear demonstration by her conduct that she had deserted the company of the husband forever without any reasonable excuse. Therefore, the rigors of Section 125(4) shall apply and the respondent No. 1 shall be denied the maintenance.
22. From the other side, as stated earlier Mr. S. Sarkar, learned counsel appearing for the respondents has in order to repel the said analogy, asserted that the brooding presence of constitutional empathy for the weaker sections like women and children shall be the very basis of interpretation. Perhaps Mr. Sarkar, learned counsel was keen to argue that the constitutional philosophy cannot be overshadowed by interpretation of a specis law or by providing a literal construction. The interpretation therefore shall be purposive and always to be made to achieve the object. Mr. Sarkar, learned counsel has referred a few decision as indicated above.
23. In Captain Ramesh Chander Kaushal (supra), it has been asserted by the apex court that this provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by Courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the cause the cause of the derelicts.
24. In Sunita Kachwaha (supra), the apex court had occasion to observe how to exercise the discretionary jurisdiction under Section 125 of the Cr.P.C. In Sunita Kachwaha (supra), it was observed as under:

"6. The proceeding under Section 125 Cr.P.C. is summary in nature. In a proceeding under Section 125 Cr.P.C. it is not necessary for the court to ascertain as to who was in wrong and the minute details of the matrimonial dispute between the husband and wife need not be gone into. While so, the High Court was not right in going into the intricacies of dispute between the appellant-wife and the respondent and observing that the appellant-wife on her own left the matrimonial house and therefore she was not entitled to maintenance. Such observation by the High Court overlooks the evidence of appellant-wife and the factual findings, as recorded by the Family Court.
25. It has been further observed that:
 7. Inability to maintain herself is the pre-condition for grant of maintenance to the wife. The wife must positively aver and prove that she is unable to maintain herself, in addition to the fact that her husband has sufficient means to maintain her and that he has neglected to maintain her. In her evidence, the appellant-wife has stated that only due to help of her retired parents and brothers, she is able to maintain herself and her daughters. Where the wife states that she has great hardships in maintaining herself and the daughters, while her husband's economic condition is quite good, the wife would be entitled to maintenance." [Emphasis added]
26. Madhya Pradesh High Court in Babulal (supra) has observed as under:
 - "10. There is no bar Under Section 125 Cr. P.C. to grant of maintenance to a wife against whom a decree for restitution of conjugal rights has been passed. There being no express prohibition, the Supreme Court in the case of Smt. Savitri (1986 Cri LJ 41) (supra) held that interim maintenance

pending final disposal can be granted and observed that it is the duty of the court to interpret the provisions of Chapt. IX of the Code in such a way that the construction placed on them would not defeat the very object of the Legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chap. IX as offering an implied power on the Magistrate to direct the person against whom an application is made Under Section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application.

11. In view of this liberal and the social object, which Section 125 seeks to serve and in absence of any express bar against; entertaining of an application for maintenance of a wife, against whom a decree for restitution of conjugal rights Under Section 9 of the Hindu Marriage Act has been passed it is open to the Magistrate to entertain the application and decide the same, keeping in mind Section 125(3) Second proviso. In fact, such a proviso being there in the Act, supports the view propounded in the case of State of M.P. v. Yeshpal 1964 MPLJ (SN) No. 131 (supra) discussed above.
12. It would be incongruent to assume that a wife against whom a decree for restitution of conjugal rights has been passed is disentitled to move the Magistrate's Court Under Section 125 Cr. P.C. praying for maintenance, while a wife who has been divorced, can still move the Court-In this case the wife was at Indore and the husband filed the suit for restitution of conjugal rights at Burhanpur and obtained an ex parte decree. The wife, as stated by her, in her reply dt. 19-11-84 to the objection preferred by the husband, was sick and confined to bed and had to be hospitalised on 5-1-1984. Placed in such circumstances, even if she wanted, helpless as she was, she could not have been able to contest the suit for want of money and ill health. A decision of the Karnataka High Court in K. Narayan Rao v. Bhagyalakshmi 1984 Cri LJ 276 (supra) was relied by the trial Court. In that case the wife was living in Udipi Taluqa of Karnataka, while the husband who was employed in a Spinning Mill in Salem district Tamil Nadu, obtained a decree for restitution of conjugal rights from the District Judge, Salem. The learned Judge of the Karnataka High Court, relying on a decision of the Supreme Court in Mst. Zohara Khatoon v. Mohd. Ibrahim 1981 Cri LJ 754 (supra) held "that the two proceedings, one Under Section 125 and the other under the respective Personal Law of the spouses operate in different spheres, though in a very limited area they do overlap. Generally they are intended to serve different purposes. The remedy Under Section 125 is purely a discretionary one. It is not so, to that extent, under the Personal Law. The aim and object of this provision (S. 125) and other provisions in Chap. IX of the Code is to help the weaker of the two to obtain assistance of the Court in getting maintenance, Discarded or helpless wives, deserted children and destitute parents can get much relief by invoking Section 125. 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 a marriage or mode of divorce or cessation of marriage under the personal law of a party is concerned, that would have to be determined according to the said personal law. Thus, the exclusion by Section 488(125) extends only to the quantum of the maintenance and the circumstances under which it would be granted." [Emphasis added]

27. In Charan Singh (supra), Allahabad High Court has made a very significant observation having reference to the particular conspectus of fact, which reads as under:

"More than 20 months have since passed but it does not appear that any step has been taken for getting it executed. It may be that decree for restitution of conjugal rights was obtained only with a view to deprive the wife from maintenance allowance to which she may be entitled. It would not be out of place to point out here that the petition for restitution of conjugal rights was filed in the year 1986 while application under Section 125 Cr.P.C. was filed in the year 1985 and from the judgment delivered in proceedings under Section 125 Cr.P.C. It would appear that according to the revisionist, Smt, Jaya Wati left his house

in the month of August, 1985. The Court was however, of the opinion that the revisionist deserted her in the month of August, 1985. No petition for restitution of conjugal rights was filed before the date of the application under Section 125 Cr.P.C." [Emphasis added]

28. In Sanjay Chopra (supra), Punjab & Haryana High Court has indicated to a unique feature vis-a-vis the decree of restitution of conjugal rights and this court has been persuaded by the analogy which reads as under:

"10. Learned Counsel for the respondent, on the other hand, submitted that in case the husband has got an ex parte decree of restitution of conjugal rights, it shall not be binding on the Criminal Court in exercise of its jurisdiction under Section 125, Cr.P.C, unless in the proceedings of restitution of conjugal rights a specific issue had been framed on the point as to whether without any sufficient reason, wife refused to live with the husband and the parties had been given an opportunity to lead evidence and, thereafter, a specific finding is recorded by the Civil Court. He sought to draw support for this submission from a Division Bench judgment of this Court reported as Ravi Kumar v. Santosh Kumari, 1997 (3) RCR (Criminal) 4=11 (1998) DMC 590 (DB). It has been submitted by learned Counsel for the respondent that the husband filed petition for restitution of conjugal rights at Delhi on 12.7.1995, when proceedings under Section 125, Cr.P.C. had been filed by the wife against him on 29.11.1994 and he had appeared before the Court on 16.1.1995. It has been submitted by him that proceedings for restitution of conjugal rights were filed by the husband mala fide with intent to defeat the wife's claim to maintenance. It was held in Jagdish Kumar v. Munish Kumari, 1986 (1) All India Hindu Law Reporter 410, that where husband filed petition for restitution of conjugal rights as counter-blast to the application filed against him under Section 125 of the Code of Criminal Procedure, husband's claim would be viewed as mala fide filed to avoid payment of maintenance to the wife. It has been further submitted that the mere obtaining of the decree for restitution of conjugal rights by the husband will not suggest that the wife has withdrawn from his society without reasonable cause or excuse. Husband is not shown to have called upon the wife through the process of executing the decree that she should be called upon to resume conjugal society. It has been submitted that if the husband had sought the execution of the decree and prayed that the wife be called upon to resume conjugal society with him and the wife had refused to resume conjugal society with him without any plausible cause, it could have been said that the withdrawal from the society of the husband on her part was unjustified and while husband was ready to take the wife to the matrimonial home. Husband, to my mind, has not called upon the wife to resume conjugal society with him after he had obtained the decree of restitution of conjugal rights and therefore, it cannot be said that the wife had withdrawn from his society without reasonable cause or excuse. In the execution proceedings also the wife could urge that her withdrawal from the society of the husband was for sufficient cause or excuse, more particularly when it was an ex parte decree.

11. In my opinion, in the facts and circumstances of the case, the obtaining of the decree for restitution of conjugal rights by the husband would have no effect on the wife's claim to maintenance."

[Emphasis added]

29. In Haizaz Pashaw (supra), the Kerala High Court had occasion to appreciate on the similar question as under:

"Admittedly the petitioner obtained a decree for restitution of conjugal rights against the 1st respondent in M.C. No. 5/96 on the file of the Civil Judge, Madikiri. Ext. D1 is the copy of the judgment in M.C. 5/96. It is gatherable from Ext. D1 that the decree was obtained ex parte. According to me, merely because the petitioner has obtained an ex parte decree for restitution of conjugal rights against the wife, her claim for maintenance cannot be rejected. No doubt, in Hem Raj v. Urmila Devi [1997 (2) Crimes 561] it has been held that once a civil court has considered the matter after contest by both the parties and come to a

conclusion that the wife has without reasonable excuse withdrawn from the society of the husband, it is not open to the Criminal Court to come to a conclusion that the husband has neglected or refused to maintain her. According to me, the decision referred to above is not applicable to the fact of this case. In this case, as stated earlier, the decree for restitution of conjugal rights passed against the wife was obtained ex parte. It is gatherable from the evidence in this case that the wife could not contest the suit for restitution of conjugal rights because she is staying away from the husband and she had no sufficient means even to contest the proceedings. It is in evidence that the wife is now living with her mother at Hidayathnagar and she has no means to contest the proceedings. Under these circumstances it cannot be said that Ext. D1 decree is a bar to the consideration of the petition under Section 125 of the Code of Criminal Procedure."

[Emphasis added]

30. Karnataka High Court in K. Narayan Rao (supra) has observed as under:

"12. It is true that sub-section (4) of Section 125 of the Code says that "no wife shall be entitled to receive an allowance from her husband If, without any sufficient reasons, she refuses to live with" him.

13. The question is: What would be the implication of a decree obtained by one spouse against the other under the personal law governing them in a matrimonial court over a proceeding initiated by the wife against the husband under Section 125 of the Code.

14. The two proceedings, one under Section 125 and the other under the respective personal law of the spouses operate in different spheres, though in a very limited area they do overlap. Generally they are intended to serve different purposes. The remedy under Section 125 is purely a discretionary one. It is not so, to that extent, under the personal law. The aim and object of this provision (Section 125) and other provisions in Chapter IX of the Code is to help the weaker of the two to obtain assistance of the court in getting maintenance. Discarded or helpless wives, deserted children, and destitute parents can get much relief by invoking Section 125. The relative scope of these two types of proceedings, one under Chapter IX of the Code and other under the personal law of the parties, came up for consideration before the Supreme Court in Mst. Zohara Khatoon v. Mohd. Ibrahim, At Para 7 the Court observed as follows:

"It is not necessary to refer to the other provisions of Section 488 of the said Code as the same are not germane for the purpose of deciding this appeal. It may, however, be noted that a provision like clause (b) of the Explanation to Section 125(1) of the 1973 Code was conspicuously absent from Section 488 and has been added by the 1973 Code. We shall deal with the legal effect of this provision a little later. 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 a marriage or mode of divorce or cessation of marriage under the personal law of a party is concerned that would said personal law. Thus, the exclusion by Section 488 extends only to the quantum of the maintenance and the circumstances under which it would be granted"

15. Section 488 of the Code of Criminal Procedure, 1898 corresponds to Section 125 of the Code, and, in fact the latter has some features more beneficial to the wives and aged parents. The observations of the Supreme Court in Mst. Zohara Khatoon's case (1981 Cri LJ 754) make it clear that in matters like "the validity of a marriage or mode of divorce or cessation of marriage under the personal law are concerned", the findings of courts deciding such questions applying the personal law of the parties prevail. If such questions arise in a proceeding initiated in the criminal court under Chapter IX of the Code that court would be bound by those findings. But, if in a proceeding

initiated under Chapter IX of the Code, the question is as to whether the wife, being 'wife' within the meaning assigned to that term in Section 125 of the Code, is at all entitled to maintenance, and, if so, at what rate, the Court (Criminal Court) trying that cause will have exclusive powers to deal with those issues. The findings of civil courts on issues other than those referred to above touching questions such as the wife withdrawing from the society of the husband, desertion on her part or her leading an adulterous life etc., are concerned, the criminal court is not bound by such findings. This is not to say that it should simply neglect the decree, if any, obtained by the husband in the matrimonial court. The Court dealing with the maintenance claim under Section 125 will have to carefully examine and take into consideration such decrees also though as stated above, it is not bound by the findings. It may be difficult to give instances where such decrees or the observations made in such orders, touching questions relevant for consideration under Section 125, will be sufficient to negative the claim of the wife. All that can be said is, as observed by Chief Justice Beaumont in *Fakruddin Shamsuddin v. Bai Jenab*, (AIR 1944 Bom 11): (1944-45 Cri LJ 271), that the Magistrate should not "surrender his own discretion" simply because the husband was armed with a Civil Court decree for restitution of conjugal rights. This question has also been considered by various High Courts. The following observations made by Janaki Amma, J., in *Gopala Pillai v. Padmini Amma*, (1978 Ker LT 485: (1978 Cri LJ NOC 232) may be noted:

"An order for restitution of conjugal rights by itself is not a ground for refusal of maintenance under Section 125 of the Code of Criminal Procedure unless it is made out that the person in whose favour it was made was willing to discharge his obligations as a husband and did not secure the order as a ruse to get rid of the wife in a subsequent proceeding for divorce. It may look obnoxious that a woman against whom an order for restitution of conjugal rights was passed and was divorced following the order should be granted maintenance after divorce by her former husband. But, it has to be borne in mind that the purpose of Section 125 of the Code of Criminal Procedure is to prevent vagrancy and it is the duty of Courts to advance that purpose. There are several grounds on which a husband may obtain a divorce from a wife. Divorce is permissible in a case where the wife is living in adultery; it is also allowed when the wife is suffering from a virulent disease. To direct a person to pay maintenance to his ex-wife in the former case would be revolting to one's sense of justice while to "to deny maintenance in the latter case when the statute provided for it would be unjust. It is not as if Section 125 of the Code of Criminal Procedure enjoins that the courts should award maintenance to all divorced wives. It is for the courts to make an assessment of the situation within the framework of the statute and to see that the object of the statute is served and at the same time there is no abuse of the process of court. The word 'may' in Section 125 (1), Criminal P.C, make it clear that the grant of maintenance even in the case of a wife is a matter of discretion, the discretion being used in a judicial manner, in advancement of the purpose underlying the section. The identical principles will apply in the case of maintenance to a divorced woman".

(Head-Note) Also the following observations of Ramachandra Raju, J. of Andhra Pradesh High Court in *Sayed Ghulam Sajjad v, Parveenpatima* 1981 Cri LJ NOC 2 may be noted:

"A mere decree for restitution of conjugal rights in favour of husband itself does not automatically bar the wife from claiming maintenance under Section 125, though the decree cannot be ignored. The Magistrate has discretion to decide on evidence adduced before him by the parties.

whether the wife is entitled to maintenance despite the fact that husband has got a decree for restitution of conjugal rights. (Case law discussed)".

Some High Courts have also taken a contrary view and reference may be made to *Smt. Geeta Kumari v. Shivacharan Das*, 1975 Cri LJ 137 (Raj) and *S.R. Govindarajan v. Rukmani Govinda-Rajan*, 1980 Mad LJ (Cri) 662.

16. In view of what I have stated above, and, particularly in view of the decision of the Supreme Court in *Mst. Zohara Khatoon's case* f!981 Cri LJ 7541 (supra), the views expressed in *Gopala Pillai's case* (1978 Cri LJ NOC 232 (Ker)), and in *Sayed Ghulam Sajjad's case* (1981 Cri LJ NOC 2 (Andh Pra)) (extracted above) are to be preferred." [Emphasis added]
31. In this context a decision of the Punjab & Haryana High Court in *Ram Piari v. Piara Lai* reported in AIR 1970 P&H 341 may be recalled where another decision of the said High Court in *Surjlt Kaur alias Bibo v. Gurdev Singh* has been referred and hence the relevant part is required to be reproduced. In *Surjit Kaur* (supra), it has been observed as under:
- "A decree for restitution of conjugal rights was granted against her on the finding that she had no reasonable excuse for staying away from her husband. If such a decree was pending, then it appears to me that no Court should grant her relief by way of maintenance, because that would defeat the very object of the decree for the restitution of conjugal rights. If, on the other hand, as is urged by her, the appellant did go and live with the respondent, then also the decree having been complied with, there is no decree pending and, therefore, permanent alimony cannot be granted under Section 25 of the Hindu Marriage Act of 1955/ Now, the language of Section 25 shows that it is within the discretion of the Court to make an order for maintenance irrespective of the nature of the decree which has been passed and with great respect of *Jindra Lai, J.*, I am unable to agree that merely because a decree for restitution of conjugal rights has been passed in favour of the husband against the wife on the ground that she had withdrawn from the society, she should not be granted maintenance. The Court under the law will have to look to all the facts and circumstances and then exercise judicial discretion in the matter both of grant and quantum of maintenance nor can the other view which has been sought to be pressed on certain observations made by *Shamsher Bahadur, J.* in *Surjit Knur's case*, ILR f!964^ 2 Punj 100 be accepted that the Court is bound to grant maintenance under Section 25 irrespective of the entire facts and ci rcu instances."
32. One of the relevant aspects even though has not been emphasized by the learned counsel for the parties, but the said aspect warrants reference and consideration. That aspect is consequence or impact of Section 127(2) of the Cr.P.C. which reads as under:
- "(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order as, as the case may be, vary the same accordingly."
33. The petitioner has made a plain submission that since the competent civil court has passed the decree dated 25.03.2016 directing the respondent No. 1 to reconstitute their conjugal rights that shall by itself would persuade the Magistrate to accept the ground made out under Section 125(4) of the Cr.P.C. for denying the maintenance or for cancelling the order of maintenance as the case may be. The question therefore arises that whether all decisions 'of a competent court' would provide the basis for rejection cancellation or variation of the order of maintenance. In other words, if the judgment or decree is passed by a competent civil court whether that would itself be persuasive to that extent that the Magistrate would without deciding any other issues relevant and related for consideration of granting maintenance deny the same? In this regard fundamental two aspects for granting maintenance has succinctly provided in *Sunita Kachwaha* (supra) that the Magistrate was to consider whether she (the wife) is unable to maintain herself and whether her husband has sufficient means to maintain her. Further, the Magistrate should weigh whether the husband has neglected to maintain her or not. The Magistrate shall not go into ascertain who was in wrong or to go into the minute details of the matrimonial dispute. The Magistrate is not required to go into the intricacies of the dispute.
34. A perusal of Section 125 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 conditions as provided in that Section. The provisions may not be inconsistent with other parallel acts in so far as maintenance is concerned, but the section undoubtedly excludes to a greater

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. Having regard to Section 127(2) of the Cr.P.C, for instance, where the validity of a marriage or mode of divorce or cessation of the marriage under the personal law of a party is concerned that would be governed by the personal law and the determination thereof, for purpose of determining the status can be imported through the window provided by Section 127 (2) of the Cr.P.C.

35. In *Mst. Zohara Khatoon* [1981 CriLJ 754], the apex court has made it clear that the validity of the marriage or mode of divorce or cessation of marriage is concerned under the personal law, the finding of the competent civil courts deciding such questions applying the personal law of the parties shall prevail. If such questions arise in a proceeding initiated in the criminal court under Chapter IX of the Code that court would be bound by those findings. But, if in a proceeding initiated under Chapter IX of the Code, the question as to whether the wife, being 'wife' within the meaning assigned to that term in Section 125 of the Code, is at all entitled to maintenance, and, if so, at what rate, the court (Criminal Court) trying that cause will have exclusive powers to deal with those related issues. The findings of civil courts on issues other than those referred to above touching questions such as the wife withdrawing from the society of the husband, desertion on her part or her leading an adulterous life etc., are concerned, the criminal court is not bound by such finding. This is not to say that it should neglect the decree, if any, obtained by the husband from the matrimonial court. The Court dealing with the maintenance claim under Section 125 will have to carefully examine and take into consideration such finding. It may be difficult to give instances where such decrees or the observations made in such orders, touching the questions relevant for consideration under Section 125, will be sufficient to negative the claim of the wife. But it has to be unambiguously made clear that the Magistrate should not surrender his own discretion. It is his exclusive jurisdiction despite such decree of restitution of conjugal right to assess and ascertain from the facts laid before him whether he would exercise the discretionary jurisdiction by granting maintenance in favour of the wife or not. Thus, the decree for restitution of conjugal rights by itself cannot lead to refusal of the maintenance under Section 125 of the Cr.P.C. If the opposite analogy is accepted then how to explain the provision of law that a 'divorced' wife is entitled to maintenance under Section 125 of the Cr.P.C. A divorced wife never resides or has no reason to reside with a former husband but still she is entitled to maintenance under Section 125(1) of the Cr.P.C. For purpose of Section 125 the word 'wife includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried.
36. In *Rohtash Singh v. Ramendri (Smt.)* reported in (2000) 3 SCC 180, the apex court had occasion to observe as under:
9. On account of the Explanation quoted above, a woman who has been divorced by her husband on account of a decree passed by the Family Court under the Hindu Marriage Act, continues to enjoy the status of a wife for the limited purpose of claiming Maintenance Allowance from her ex-husband. This Court in *Ramesh Chander Kaushal v. Mrs. Veena Kaushal*, (1978) 4 SCC 70 : AIR 1978 SC 1807: (1979 Cri LJ 3), observed as under: —
- "9. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Art. 39. We have no doubt that sections of statutes calling for construction by Courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause - the cause of the derelicts."
37. A wife who refuses to comply the decree of restitution of the conjugal life cannot be deprived of maintenance for that status only having interpreted Section 125 (4). It would be incongruent to assume that a wife against whom a decree for restitution of conjugal rights has been passed is disentitled to move the Magistrate under Section 125(1) of the Cr.P.C. praying for maintenance, while a wife who has been divorced can still

move the court. Without taking cognizance of brooding presence of constitutional empathy for women, the judgment of the civil court in respect of the restitution of the conjugal right can be treated only as the relevant evidentiary material, but the conduct of the wife whether there is any sufficient reason for refused by the wife to live with her husband be assessed by the Magistrate and only thereafter whether the wife would be entitled to maintenance or not be decided by the Magistrate. To be candid, the restriction as imposed by Section 125(4) of the Cr.P.C. has been substantially diluted, if not virtually negated.

38. In *Amar Kanta Sen v. Sovana Sen* reported in AIR 1960 CAL 438, Calcutta High Court held that even an unchaste wife had an absolute right to a starving allowance for her maintenance and this right would be enforceable even where the women had been divorced on the ground of her adultery. This provision is intended to prevent the wife starve and where she has an income of her own, her right to this bare subsistence disappears. A similar view has been taken in *Dr. Hormusji M, Kaiapesi v. Dinbai H, Kalapesi* reported in AIR 1955 Bom 413 (DB), a case under the Parsi Marriage and Divorce Act-Section 30 of which Act may appear to be in pari materia with Section 25 of the Hindu Marriage Act except for the fact that the chastity of the wife besides her unmarried state has been given as the requisite condition entitling her to permanent alimony after passing of any decree under the Act. The Bombay High Court did not throw out the petition for alimony on the ground that the petition had been made by a guilty wife. Having discussed the English case laws they came to the inference that it was never intended that a guilty wife should be thrown out on the streets to starve. Mere existence of an unsatisfied decree for restitution of conjugal life against the wife may not, therefore, seem to disentitle her to maintenance. The contrary view therefore cannot be accepted by this court. A decree for restitution of the conjugal rights against the petitioner as stated earlier may be a circumstance to enable the court judge the conduct of the parties and there is no authority for the proposition that such a decree against the petitioner would be a complete bar to her claim for maintenance. The court under the law will have to look all the facts and circumstances and then exercise judicial discretion in the matter of grant and quantum of maintenance. In *Surjit Kaur's case* [ILR 1964 (2) Punjab 100] it was observed that the court is bound to grant maintenance irrespective of the entire fact and circumstances which according to this court has been reverberated in *Sunita Kachwaha's case*.

39. Therefore, this court would by way of reiteration hold that mere existence or non-compliance of a decree of restitution of the conjugal life by itself would not debar or disentitle the wife within the meaning of Section 125 of the Cr.P.C. from getting an order of maintenance. Hence the plea as raised by Mr. Dutta, learned counsel appearing for the petitioner is negated.

(II) WHETHER IT IS THE CIRCUMSTANCE AVERRED AND PROVED BY THE PETITIONER WOULD DETERMINE THE EXTENT OF THE APPLICATION OF SECTION 125(4) OF THE CR.P.C.?

40. Yes, in view of the discussion made above.

(III) WHETHER TO ACHIEVE THE PURPOSE OF SECTION 125(4) OF THE CR.P.C. BEING PREVENTION OF VAGRANCY AND DESTITUTION, THE MAGISTRATE IS ENTITLED TO HAVE A PURPOSIVE INTERPRETATION OF SECTION 125(4) OF THE CR.P.C. HAVING REGARD TO THE CONSTITUTIONAL EMPATHY TOWARDS THE WOMEN AND CHILDREN?

41. Yes, the Magistrate is entitled to embark on a purposive interpretation to achieve the object of 125 of the Cr.P.C. in the light of the discourse above.

42. The duty of a Judge in our country is to uphold the constitutional principles. When there emerges two alternatives by way of interpretation, the interpretation which supports the constitutional philosophy would be invariably accepted by the Magistrates. What has been observed by the apex court in *Captain Ramesh Chander Kaushal* (supra) should be the guiding principle in respect of the provision relating to social justice. At the cost of repetition, this court would observe that the provision of Section 125 is

a measure of social justice and specially enacted to protect women and children and it falls within the constitutional sweep of Article 15(3) reinforced by Article 39. The statutes calling for construction by courts are not 'petrified print', but vibrant words with social functions to fulfill. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. In *Daniai Latifi v. Union of India* reported in (2001) 7 SCC 740, the apex court has made a dynamic interpretation having regard to the prevailing social conditions. A passage from *Daniai Latifi* (supra) is reproduced hereunder:

"20. In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life - a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in Question." [Emphasis added]

43. This is our constitutional philosophy profoundly embedded in the basic human rights, culture, dignity and decency in life.
44. Despite the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 right to approach the court under Section 125 of the Cr.P.C. cannot be fossilized. Even a Muslim woman after her divorce would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. even after expiry of the period of 'Iddat' as long as she is not remarried. Even though absence of detailed discussion on this aspect in the order dated 22.09.2016 will not make it susceptible to interference by this court.
45. On foraying into the evidence, the Magistrate has observed categorically that the respondent No. 1 failed to bear the violence perpetrated by the petitioner and that was the reason of her leaving the matrimonial home with her daughter. This court does not find any illegality or manifest perversity in such finding. On scrutiny of the judgment dated 25.03.2016, it appears that the said judgment is ex parte. The respondent No. 1 did not even file the written statement. Thus the finding in the said judgment cannot have any primacy over the probative value of the evidence that she led in the maintenance proceeding.
46. Hence this petition stands dismissed. The petitioner is directed to pay the maintenance allowance to the respondents in terms of the said order dated 22.09.2016.
47. The quality of assistance as extended by the learned counsel appearing for the parties deserves commendation and this note records appreciation for them.

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ANJANA DEY (MANDAL) VERSUS SUBAL MANDAL

MAT APP. No. 02 of 2009

(Before Hon'ble Mr. Justice Deepak Gupta, CJ. and Hon'ble Mr. Justice S. Talapatra, J.)

*Smti. Anjana Dey (Mandal), W/o Subal Mandal, D/o Sri Satindra Kumar Dey, Resident of West side of Dhani Sagar, P.O. Radhakishorepur, Udaipur, District-South Tripura Wife-Appellant
Ms. Rajashree Purkayastha, Advocate, Ms. Pratima Ghatak, Advocate.*

Versus

Sri Subal Mandal, S/o Sri Bimal Ch. Mandal, Resident of Surendrapally, Madhyapratapghar, P.S. East Agartala, District-West Tripura Husband-Respondent

Ms. S. Deb (Gupta), Advocate.

And

Crl. Rev. P. No. 67 of 2008

1. Smti. Anjana Dey (Mandal), W/o Sri Subal Mandal, 2. Smti. Sristi Mandal, D/o Subal Mandal. Both of them are permanent Resident of Madhya Pratapgharh, Surendra Pally, P.S. East Agartala, District-West Tripura Presently residing under the C/o Satindra Dey, western side of Dhanisagar, P.S.R.K. Pur, District-South Tripura ...Petitioners Ms. R. Purkayastha, Advocate, Ms. P. Ghatak, Advocate.

Versus

Sri Subal Mandal, S/o Sri Bimal Chandra Mandal, Resident of Surendra Pally, Madhya Pratapghar, P.S. East Agartala, District-West Tripura O.P. Respondent

Ms. S. Deb (Gupta), Advocate.

MAT APP. 02 of 2009 & Crl. Rev. P. 67 of 2008

Decided on December 16, 2013

In case, the parties before a Family Court are unrepresented by counsel, then the Family Court as well as the Counsellor attached with the Family Court must not only try to arrive at a settlement between the parties, but if efforts for such settlement fail, they should also aid and advise the parties as to how they should proceed in the matter;* If legal questions are involved and/or there are issues which are serious in nature, parties should normally be permitted to be represented by counsel. Every request for appointment of counsel shall have to be decided on its own merit, but the Family Judge should follow the principles laid down. In all cases, the parties should be specifically permitted to cross-examine the witnesses.

JUDGMENT & ORDER

Hon'ble Mr. Justice Deepak Gupta :—

We propose to dispose of Matrimonial Appeal No. 02 of 2009 and Criminal Revision Petition No. 67 of 2008 by one common judgment.

2. In view of the decision which we propose to take, it is not necessary to give detailed facts of the case. However, it would be pertinent to mention that Shri Subal Mandal (hereinafter referred to as the husband) filed an application under Section 13(1)(ia) of the Hindu Marriage Act, 1955 for dissolution of marriage between him and the respondent Smti. Anjana Dey (hereinafter referred to as the wife) by grant of a decree for divorce. Admittedly, the parties were married according to Hindu rites on 14-12-2003 and the petition for divorce was filed in January, 2008. The wife had filed a petition for grant of maintenance under Section 125 of the Code of Criminal Procedure for getting maintenance and in this case, she was not awarded any maintenance for herself, but maintenance @ Rs. 800/- per month was granted in favour of her minor child. The divorce petition was allowed and, therefore, the wife has challenged both the orders by means of this petition.
3. We have heard learned counsel for the parties at length and we may state that we are constrained to observe that the procedure followed by the learned Family Court is not proper. We also find that the evidence has not been recorded in accordance with law.
4. Reference may be made to the provisions of the Family Courts Act, 1984. Section 10 lays down the procedure generally to be followed and provides that the Code of Civil Procedure and the Code of Criminal Procedure shall apply subject to the rules framed under the Act. However, the Family Court can always lay down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings.
5. Section 11 of the Act provides that all proceedings are to be held in camera and Section 12 permits the Family Court to take assistance of a medical expert or any other welfare expert.
6. Section 13 reads as follows:

"13. Right to legal representation.— Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner:

Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as *amicus curiae*."
7. It is thus obvious that no party to a suit or proceeding before a Family Court is entitled as a matter of right to be represented by a legal practitioner. However, the Family Court is empowered to seek the assistance of a legal expert as *amicus curiae*.
8. Section 14 of the Act permits the Family Court to receive in evidence certain documents even if they are not relevant or admissible under the Indian Evidence Act.
9. Sections 15 and 16 of the Family Courts Act read as follows:

"15. Record of oral evidence.—In suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record.

16. Evidence of formal character on affidavit.—(1) The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court.

(2) The Family Court may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to the facts contained in his affidavit. "

10. A bare perusal of these provisions shows that though the Family Court may not record the evidence of the witnesses at great length, but a memorandum of substance of the deposition must be recorded and signed both by the witness as well as by the Presiding Judge.
11. Section 16 empowers the Family Court to receive evidence of formal character by way of affidavit. It is obvious that it is only evidence of formal character which can be received by way of affidavit and all other evidence must be recorded orally.
12. One of the main issues which arises for consideration is whether the right to cross-examine witnesses is available to the parties under the Family Courts Act. A perusal of the record of the present case shows that in the divorce case filed by the husband, as many as 6(six) witnesses were examined on behalf of the husband and 8(eight) witnesses on behalf of the wife. If we go through the statements of the witnesses, we find that no opportunity was given to the opposite party to cross-examine the witnesses. On perusal of the statements of the witnesses examined on behalf of the wife, it is apparent that the wife who was not represented by a Counsel had no knowledge as to how a witness has to be examined and the statements of her witnesses are recorded in such a manner which gives the impression that no effort was being made either by the Presiding Officer of the Court or the Counsellor to assist the lady in examining her witnesses. This has, in our opinion, resulted in gross miscarriage of justice.
13. The Family Courts were established with a view to make the procedure less technical and the approach more family oriented. The object was that such matrimonial disputes should be settled by mutual consent of the parties and the effort is towards settlement and not towards adjudication. As pointed out above, lawyers are not permitted to appear.
14. Our experience has been that when lawyers are not permitted to appear, it is the women who suffer more. In Indian society, husbands are normally better educated than the wives. In many cases, especially in the lower strata of society, the women would be illiterate or barely educated whereas the men would be educated and also employed. The men would be also more worldly wise. Therefore, though a man may be in a position to prepare pleadings, lead evidence and examine and cross-examine witnesses in many cases, a woman who may not have even stepped out of her house or village would be overawed by the atmosphere in a Family Court and would be unable to match her husband.
15. It is here that the role of the Counsellor appointed under the Family Courts Act as well as the Presiding Officer of the Court comes in. If the Presiding Officer feels that any party, more specially the woman, is unable to present her case in a proper manner due to the reason of illiteracy or otherwise, it is the duty of the Counsellor and the Family Court to ensure that the woman is given legal aid by providing a legal aid counsel to her. Mechanically following Section 13 and rejecting the prayer for assistance of counsel is not proper. In case, the Family Court feels that a lawyer should not be appointed, then the Counsellor must aid and advise the woman as to how she should deal with the matter.
16. The Bombay High Court in *Leela Mahadeo Joshi v. Dr. Mahadeo Sitaram Joshi*, [AIR 1991 BOMBAY 105], dealing with the provisions of the Family Courts Act held as follows: -
- "17. A strong grievance has been made before us, in several cases, that have come up in appeal, from the Family Courts at Pune and at Bombay that the representation by Advocates is not being permitted and that avoidable situations have arisen because the cases have gone by default and have had to be either remanded by the High Court or entertained in appeal. A perusal of S.13 of the Act indicates that a party to a proceeding before the Family Court shall not be entitled as of right to be represented by a legal practitioner. It is necessary to clarify that S.13 does not prescribe a total bar to representation by a legal practitioner which bar would itself be unconstitutional. The intendment of the Legislature obviously was that the problems or grounds for matrimonial break-down or dispute being essentially of a personal nature, that it may be advisable to adjudicate these issues as far as possible by hearing the parties themselves and seeking assistance from Counsellors. The Section also makes provision for a

situation whereby the Court may seek the assistance of a legal expert as *amicus curiae*. It is a well-known fact that the adjudication of a complicated or highly contested matrimonial dispute in the light of the law and interpretation of provisions by different Courts over a period of time, would require in given cases assistance from a legally trained mind and for this purpose, the Court has been empowered to seek the assistance of a legal expert.

18. We are, however, informed that as far as uneducated and poor persons are concerned that they are being totally handicapped in the conduct of their cases for want of legal assistance. Even as far as persons coming from the educated and professional strata are concerned, the obvious difficulty that is involved, namely the drafting of applications and pleadings in consonance with Court requirements and the ability to conduct an examination-in-chief or a cross-examination are skills which one cannot expect of a lay person. The inevitable result is that the parties are handicapped resulting in a possible miscarriage of justice, not to mention delays and the attendant problem of having to take the matter in appeal to the High Court. This is not something which is within the ability of all the litigants. It would, therefore, be a healthy practice for the Family Court at the scrutiny stage itself, to ascertain as to whether the parties desire to be represented by their lawyers and if such a desire is expressed at this or any subsequent stage of the proceedings, that the permission be granted if the Court is satisfied that the litigant requires such assistance and would be handicapped if the case is not permitted. We are conscious of the fact that an appeal from the Family Court lies to the Division Bench of the High Court and a situation should not arise whereby at the appeal stage when the parties are represented by Advocate, that it is disclosed that the evidence or pleadings have not been in consonance with the legal requirements or that the replies or cross-examination are inadequate. It is too much to expect of lay litigants to be able to study the laws, rules, acquaint themselves with Court procedures and to conduct a trial of their own and at the same time be able to place before the Court the relevant case law.
19. We are fortified in this view by another aspect which is peculiar to matrimonial proceedings, namely, the fact that as far as issues such as custody of children, visiting rights, maintenance, alimony, apportionment of property etc., are concerned that the parties may not be in a position to protect their own interest or that they may not be in a position to visualise future problems or requirements and would, therefore, either give up their rights or not be in a position to agitate or safeguard them. The inevitable consequences would be either undue hardship or future litigation, both of which deserve to be avoided. We are, therefore, inclined to agree with the grievance made before us that the Family Court ought to give due credence to the desire of litigants where legal representation is concerned. In fact, R.37 of the Family Courts (Court) Rules, 1988 reads as follows:

"37. Permission for Representation by a Lawyer: The Court may permit the parties to be represented by a lawyer in Court Such permission may be granted if the case involves complicated questions of law or fact, if the Court is of the view that the party in person will not be in a position to conduct his or her case adequately or for any other reasons. The reason for granting permission shall be recorded in the order. Permission so granted may be revoked by the Court at any stage of the proceedings if the Court considers it just and necessary".

It is, therefore, patently clear that reading S.13 with R.37 that adequate provision has been made for legal representation and in the absence of convincing reasons, such permission ought not to be turned down."
17. We would like to point out that though there is no similar provision like Rule 37 in Tripura, we are of the considered view that the approach of the Court while permitting a party to be represented by a counsel should be in consonance with the judgment of the Bombay High Court with which we totally agree.
18. The constitutional validity of the Family Courts Act was challenged before the Bombay High Court in *Smt. Lata Pimple v. The Union of India*, [AIR 1993 BOMBAY 255] and one of the grounds

raised was that Section 13 of the Act is violative of Articles 19, 21 and 39-A of the Constitution insofar as legal representation is not permitted. While rejecting this argument, the Bombay High Court held that there is no total prohibition of being represented by legal practitioner and rule 37 of the Rules permits a party to be represented by a lawyer in certain circumstances. The guidelines laid down in *Leela Mahadeo Joshi (supra)* were approved.

19. One of us (Talapatra, J) has also considered this aspect while sitting in a Division Bench of the Agartala Bench of the then Gauhati High Court. In the said judgment, it was held as follows:-

"36. No doubt, usually in the civil courts, unless the opportunity of the cross-examination is given, the examination in chief are not as a whole admitted in the evidence save and except where some admission appears. But in this case what we curiously find that the learned Judge, Family Court, South Tripura, Udaipur, has deviated from the normal rule of recording evidence but he has done the same uniformly and following a very simple method of inquiry. The respondent (the appellant herein) was even allowed to adduce her witnesses first and thereafter the petitioner (the respondent herein) was allowed to adduce his witnesses. No grievance surfaces from the record stated to have demonstrated by either of the parties in this regard. This court is also not oblivious of the fact that usually in the proceedings of the Family Court, no lawyer is permitted to represent the parties unless of course if permitted by the court. In view of this, even though this procedure cannot be claimed to be foolproof, cannot be even questioned at this stage by the appellant. However, this procedure is not advisable to be followed by the Family Courts, rather the Principal Counselor of the Family Court where no legal practitioner is permitted to represent the case of the parties would demonstrate the rights of cross-examination available to the parties and how to exercised the same before recording of the evidence in a detached manner without making any reference to the subject-matter of the case. It is also expected that the adverse party would be asked by the Family Court to question or to suggest or to bring contradiction or omission of previous admission from the witnesses appearing for the one party or from the other party."

20. The right of cross-examination is a very important right. In many cases the Family Courts are recording the testimony by way of affidavit. When affidavits are tendered in evidence, it has been found that more often than not these are affidavits in the language of Counsel where many facts relevant and irrelevant are stated. It is necessary that such witnesses be cross-examined. Even where a witness appears in person before the Court, the opposite party has a right to cross-examine such witness. Without cross-examination, the veracity of the statement made in the examination-in-chief cannot be tested. At the same time, the art of cross-examination is not so simple. It takes years of experience for a lawyer to learn how to effectively cross-examine a witness. How can we expect an illiterate villager to cross-examine the witnesses? As far as cross-examination is concerned, the same must be invariably allowed in every case.
21. De Smith in his treatise on Judicial Review of Administrative Action has held that cross-examination of witnesses must be permitted. This has become a part of the rule of the *Audi Alteram Partem*.
22. Wade in his exposition of Administrative Law has pointed out that failure to allow cross-examination by an objector leads to quashing of the administrative decision.
23. Where matters are simple and the disputes are limited, the Family Court may be justified in refusing legal aid, but here also it is the duty of the Family Court as well as the Counsellor attached with the Family Court to ensure that the parties are able to comprehend what is the dispute and they are also effectively able to put forth their case. In case, the matters in issue are complicated or serious allegations have been leveled which may affect the reputation of any of the parties to the dispute, the party should be permitted to engage counsel and the rejection should not be in a mechanical manner. In the present case, we find that the lady has lost her case because she was not permitted to cross-examine the witnesses of the

husband whose statements have been relied upon by the learned Family Judge. The lady was not even in a position to cross-examine the witnesses. She was even denied maintenance on similar grounds.

24. We, therefore, have no hesitation in setting aside both the orders passed by the Family Judge in T.S. (Divorce) 12 of 2008 and Cr. Misc./F.C./UDP/09 of 2008. Both the matters are remanded to the learned Family Judge who shall decide the same after giving an opportunity to the parties to cross-examine the witnesses. In case, the lady desires, she shall be permitted to engage a counsel or she may be provided legal aid. In case, legal aid is provided to the lady, then obviously the husband shall also be entitled to be represented by counsel, if he so desires.
25. We would also like to give certain general guidelines:
 - (i) In case, the parties before a Family Court are unrepresented by counsel, then the Family Court as well as the Counsellor attached with the Family Court must not only try to arrive at a settlement between the parties, but if efforts for such settlement fail, they should also aid and advise the parties as to how they should proceed in the matter;
 - (ii) If legal questions are involved and/or there are issues which are serious in nature, parties should normally be permitted to be represented by counsel. Every request for appointment of counsel shall have to be decided on its own merit, but the Family Judge should follow the principles laid down by the Bombay High Court and quoted by us hereinabove in Leeia Mahadeo Joshi's case (supra). In all cases, the parties should be specifically permitted to cross-examine the witnesses.
26. In view of the above discussion, the appeal and the criminal revision petition are allowed. The judgment and decree dated 07-02-2009 in T.S.(Divorce) 12 of 2008 and judgment dated 06-08-2008 in Cr. Misc./F.C./UDP/09 of 2008 passed by the learned Judge, Family Court, Udaipur, South Tripura are hereby set aside. The matters are remanded to the Family Court for decision afresh. The Family Court is directed to decide the matter as early as possible and in any event, not later than 30-06-2014.
27. The husband shall continue to pay the maintenance as awarded by the Family Court as an interim measure till the dispute is finally decided by the Family Court.
28. The matters are disposed of accordingly.

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JYOTI PRAKASH BANERJEE VERSUS CHAMELI BANERJEE AND ANR.

Calcutta High Court

AIR 1975 Cal 260, 79 CWN 332

(Before Hon'ble Mr. Justice S. Mukherjea & Hon'ble Mr. Justice A Janah)

Decided on 10 October, 1974

- (1) Is the Court competent to make an order for maintenance pendente lite on an application for leave to sue as a pauper before such leave is granted?
- (2) Can an order for maintenance pendente lite be made at all in a suit for maintenance where the rights of the parties are governed by the Hindu Adoption and Maintenance Act

The question whether an order for maintenance pendente lite may be made in a suit for maintenance has to be examined from two angles viz., whether there is any substantive right in the wife or the minor child to be maintained pendente lite by the husband or the father and secondly, if such a right exists what is the procedure available for enforcement of that right. We may now sum up the legal position as we understood it. The right to interim maintenance is a part of the right conferred by Section 18 and Section 20 of the Hindu Adoption and Maintenance Act. In a suit for maintenance that right can be enforced. Ubi Jus ibi remedium. The right to interim maintenance can be enforced by an application in aid of the suit and an order can be validly made by the Court on such an application in exercise of its inherent power which has been saved by Section 151 of the Code of Civil Procedure. Needless to say, that the power should be exercised by the Court only in a proper case where the petitioner has satisfied the Court that she has a good prima facie case to entitle her to such an order.

JUDGMENT

Hon'ble Mr. Justice S. Mukherjea :—

1. This Rule is directed against an order passed by a learned Subordinate Judge granting maintenance pendente lite to a wife and her minor son on an application made by her for leave to sue as a pauper for maintenance. The main application is still pending. The questions of law raised on behalf of the husband are as follows :--
 - (1) Is the Court competent to make an order for maintenance pendente lite on an application for leave to sue as a pauper before such leave is granted?
 - (2) Can an order for maintenance pendente lite be made at all in a suit for maintenance where the rights of the parties are governed by the Hindu Adoption and Maintenance Act?
2. To determine the first question it is necessary to consider some of the provisions of Order 33 of the Code of Civil Procedure which relate to suits by paupers. Rule 2 enjoins that every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits and that it shall be signed and verified in the manner prescribed for the signing and verification of pleadings. Rule 3 provides for presentation of the application to the Court and Rule 4 for examination of the applicant. Rule 5 provides for rejection of the application for permission to sue as a pauper on certain preliminary

grounds. Rule 6 provides that where the Court sees no reason to reject the application on any of the grounds stated in Rule 5, it shall fix a day for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof. Rule 7 prescribes the procedure at hearing. Sub-rule (3) of Rule 7 provides that the Court -shall allow or refuse to allow the applicant to sue as a pauper. Rule 8 provides as follows :--

"Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit."

3. Rule 2 of Order 33 makes it clear that an application for permission to sue as a pauper is not a plaint, for otherwise no provision need have been made to enjoin that it shall contain the particulars required in regard to plaints in suits or that it shall be signed and verified in the manner prescribed for the signing and verification of pleadings. Moreover Rule 8 makes it clear that until and unless the application is granted, the application is not to be deemed a plaint.

4. Although the application is not to be regarded as a plaint before it is granted, can it be said that a suit is instituted by presenting the application? Rule 1 of Order 4 of the Code of Civil Procedure provides that every suit shall be instituted by presenting a plaint to the Court. Therefore, in the contemplation of Rule 1 an application for leave to sue as a pauper will not be a suit before leave is granted because at that stage the application is not to be treated as a plaint. Order 4, Rule 1 however does not stand in isolation. Order 33, Rule 1 of the Code says :

"Subject to the following provisions, any suit may be instituted by a pauper.". To institute is to initiate. On examination of all the provisions of Order 33 it will be perfectly clear that a suit by a pauper is initiated by an application alone. The suit comes into existence as soon as the application is presented under Rule 3. That this is so, is supported by Rule 8 which provides that where the application is granted the suit shall proceed in all other respects as a suit instituted in the ordinary manner. If the suit has not come into existence before the application is granted it can hardly be said that the suit shall proceed thereafter as a suit instituted in the ordinary manner. The use of the word 'proceed' indicates that the suit is in existence before the application is granted. The suit is of course instituted not in the ordinary manner, that is to say, in the manner contemplated by Order 1, Rule 4 but in the extraordinary manner or out of the ordinary manner. The legal position therefore appears to be that by the presentation of an application under Order 33, Rule 3, a suit is instituted although the application is not to be treated as a plaint until leave is granted. Moreover Order 33, Rule 8 provides that if the application is granted it shall be deemed the plaint in the suit, meaning thereby that a suit is already in existence although there is no plaint in the suit until leave is granted.

5. In *Manorama Dasi v. Sabita Dasi*, AIR 1961 Cal 357 it was held by a Division Bench of this Court that in a pending pauper application the Court has no jurisdiction to grant an injunction under Order 39, Rule 1 as there is no pending suit at that time. In that case, the learned Judges held that pending the decision on the question of pauper-hood, the application by a minor to sue her step mother as a pauper for a declaration of a charge for her maintenance on the property of her deceased father and for an order restraining the step-mother from selling any property without the permission of the Court till the disposal of the suit, could be made under the inherent power of the Court which is saved by Section 151 of the Code of Civil Procedure. In *Sonnammal v. Coimbatore Maha Jana Bank Ltd.*, AIR 1934 Mad 690 a Bench consisting of Madhavan Nair and Cornish, JJ. held that by operation of law a petition to sue as a pauper becomes converted into a suit when it is allowed by the Court.

6. In so far as it was held by those Bench decisions that an application for leave to sue as a pauper is not a suit until the application is granted those decisions must be regarded as unsound having regard to the provisions of Order 33. At all events, those decisions must be regarded as having been overruled

by the decision of the Supreme Court in *Vijai Pratap v. Dukh Haran Nath*, AIR 1962 SC 94] where in connection with an application under Order 1, Rule 10 by a defendant to be transposed to the position of a plaintiff in an application for permission to sue as a pauper, the Court held that the application under Order 1, Rule 10 was maintainable. At page 945 of the Report, Shah, J. speaking for the Court observed :

"An application to use in forma pauperis is but a method prescribed by the Court for institution of a suit by a pauper without payment of fee prescribed by Court-fees Act. If the claim made by the applicant that he is a pauper is not established the application must fail. But there is nothing personal in such an application. The suit commences from the moment an application for permission to sue in forma pauperis as required by Order 33 of the Code of Civil Procedure is presented and Order 1, Rule 10 of the Code of Civil Procedure would be as such applicable in such a suit as in a suit in which court-fees had been duly paid."

7. In view of the pronouncement of the Supreme Court in the aforesaid decision as also on a consideration of the provisions of Order 33 of the Code of Civil Procedure, the contention of the petitioner that the application for maintenance pendente lite is not maintainable during the pendency of the application for leave to sue as a pauper on the ground that there is no suit in which the application could be made, must be rejected.
8. The other contention raised on behalf of the petitioner, namely, that no application for maintenance pendente lite lies and the Court has no jurisdiction to make such an order having regard to the absence of any relevant provision in the Hindu Adoption and Maintenance Act, 1956 has to be considered. Learned advocate appearing on behalf of the petitioner pointed out that although there is a provision for maintenance pendente lite in Section 24 of the Hindu Marriage Act and for alimony pendente lite in Section 36 of the Special Marriage Act, no similar provision has been made in the Hindu Adoption and Maintenance Act 1956. He submitted that if it were the intention of the legislature that orders for maintenance pendente lite should be granted by Courts in cases which are governed by the Hindu Adoption and Maintenance Act, express provision might be reasonably expected to have been made by the legislature in that regard. The question raised by the learned advocate may be answered by pointing out that the Hindu Marriage Act and the Special Marriage Act primarily relate to marriage and not to maintenance. It was therefore necessary to provide expressly for maintenance or alimony pendente lite in those statutes. The Hindu Adoption and Maintenance Act relates primarily to adoption and maintenance. Sub-section (1) of Section 18 of the Act provides as follows :--

"18(1). Subject to the provisions of this Section, a Hindu wife, whether married before or after the commencement of this Act shall be entitled to be maintained by her husband during her life time."
- 9-10. This is merely a statutory recognition of the age-old principle of the traditional Hindu law that a husband is liable to maintain his wife throughout her life. If the husband is under an obligation to maintain his wife throughout her life it is difficult to see why a separate provision need be made for maintenance pendente lite. The greater includes the less. In our opinion, the absence of such a provision in the statute is only natural and therefore immaterial. Section 20 of the Act provides as follows :--

"20 (1) Subject to the provisions of this Section a Hindu is bound during his or her life time to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor."
11. Here again no separate provision appears to have been found necessary for granting maintenance pendente lite to minor children.
12. The question whether an order for maintenance pendente lite may be made in a suit for maintenance has to be examined from two angles viz., whether there is any substantive right in the wife or the minor child

to be maintained pendente lite by the husband or the father and secondly, if such a right exists what is the procedure available for enforcement of that right.

13. In our opinion, the substantive right to maintenance is conferred by Section 18 and Section 20 of the Hindu Adoption and Maintenance Act.
14. It is true that there is no provision in the statute or in the Civil P. C. for making an application in a suit for maintenance pendente lite. In some cases, as for example, in such an order was made under inherent powers or in other words, under the provision of Section 151 of the Code of Civil Procedure.
15. In *Subbaya v. Kandaswami*. AIR 1935 Mad 105 it was held that in a petition suit an order granting interim maintenance to a party is within the jurisdiction of the Court under Section 151 of the Code of Civil Procedure, In *Mabommed Abdul Raha-man v. Tazunnisa Begum*, , a Bench of Madras High Court presided over by Rajamannar, C, J. held that the Civil P. C. confers certain powers on the Court to grant relief in interim proceedings, such as for example, power to issue injunction, attachment before judgment or appointment of receiver. Where such a relief is claimed, the Code prescribes the condition on which such order could be granted. But apart from such powers, there is no inherent jurisdiction in Courts to grant interim relief which properly ought to be granted only by the decree after determination of the points in controversy.

Therefore in a suit for maintenance by the wife where the claim is hotly contested, an order for payment of interim maintenance is without jurisdiction, The learned Judges relied on the decisions in *Latchanna Dora v. Malludora*, AIR 1941 Mad 55 and *Gopal Saran v. Sita Devi*, AIR 1924 Pat 69. In the first case, the plaintiff filed a suit to recover possession of certain properties, or in the alternative, for partition. During the pendency of the suit he made an application for award of interim maintenance. A learned single Judge of the Madras High Court held that the Court had no jurisdiction to make such an order when the claim is in dispute. In the Patna case the plaintiff brought a suit to enforce a charge upon certain properties belonging to her husband which were charged with payment of annuity of Rs. 30,000/- to her payable by monthly instalments under a deed executed by him. The plaintiff made an application for appointment of a Receiver of the property charged with the payment of the annuity and asked for a direction to pay to the plaintiff a fixed sum per month as the Court should think fit pending the disposal of the suit. The Court held that there is no rule of law or equity which requires, in the interest of justice that a plaintiff suing to enforce a contract for the payment of money, where the claim is disputed, should be awarded a portion of the amount claimed before his right has been established by the suit brought for that purpose.

16. The Court was of the view that when the claim is in dispute, such an order could not be made under the Court's inherent power which has been saved by Section 151 of the Code. The learned Chief Justice was however careful to observe "It is important to bear in mind however, that the suit is not one for maintenance nor is there any claim for alimony pendente lite." In *K. S. Sabra-mani Iyer v. Padmavathi Animal*, AIR 1954 Trav-Co 123 it was held following the Bench decision that an order awarding interim maintenance can be passed only under Order 12. Rule 6 to the extent of the amount admitted by the defendant and that the Court has no inherent jurisdiction to pass such an order for a larger amount. In *Muniammal v. Ranganatha*, it was held that the ratio of the case decided in was that interim maintenance should not be granted in suits for maintenance or partition where the status and the right of the claimant are hotly contested supported by a volume of prima facie evidence. The Court held that it does not mean that whenever the contesting defendant merely denies the claim of the plaintiff and raises a contest, interim reliefs must be denied, which in fitting cases can be granted under Section 151 of the Civil P. C.
17. In *M. S. Basavarajappa v. Basavannappa*, AIR 1959 Mys 152 a learned single Judge of the Mysore High Court relying on the decision in held in a suit for partition where the minor plaintiff claimed to be a son of the defendant and the defendant denied that the plaintiff was his son and contested bis right to claim

partition, that the Court cannot under Section 151 of the Code of Civil Procedure grant the plaintiff any relief by awarding interim maintenance.

18. In *Nemi Chand Jain V. Smt. Lila Jain*, a Division Bench of this Court, dissenting from the view expressed in and AIR 1959 Mys 152 held that the Court can pass an order granting interim maintenance to the wife in a suit for arrears of maintenance and future maintenance instituted by her when the wife succeeds in establishing a prima facie case for the order. When the jurisdiction of the Court is attracted by filing a suit, the Court has power to make interlocutory orders in aid of the suit. In delivering the judgment of the Court to which I was a party, A. N. Ray, J. observed : "interim maintenance is not an act of exercising inherent jurisdiction. Interim maintenance is granted as an interlocutory relief in the suit." In *Tarini Gupta v. Gouri Gupta*, the same Bench re-affirmed the principles underlying the earlier decision. Ray, J. in delivering the judgment of the Court upheld the contention that the right of a wife to claim maintenance flows from Section 18 of the Hindu Adoption and Maintenance Act. The learned Judge observed : "If there is a general right under the statute to claim maintenance, in my opinion it follows that also during the pendency of the suit she has a right to claim maintenance. There is a right to claim maintenance because she is the wife. Secondly, the right to claim maintenance is being asserted in the suit and thirdly, there is a right to claim maintenance till the suit is determined and followed by decree." At paragraph 19 of the judgment, Ray, J., observed that the power of the Court to grant maintenance is derived from the Hindu Adoption and Maintenance Act 1956 as also the general provisions in Hindu law and said "The power of the Court does not flow from Section 151 of the Code of Civil Procedure. Section 151 confers power on the Court to make orders in relation to administration of justice and the Court has always inherent power to make such orders. It was said by counsel for the appellant that the order of grant of interim maintenance would have the effect of conferring a substantive right of maintenance. The order is not made under Section 151 of the Civil P. C. The order is made in a suit with reference to the provisions of Hindu Law and the provisions of the 1956 statute." In paragraph 7 of the judgment, A. N. Ray, J. said : "if a claim is denied that would not take away the jurisdiction of the Court to make interim orders in a suit for maintenance. The jurisdiction of the Court does not depend on the denial of a case by the defendant. It is one thing to say that the Court declines to make an order in a case where facts are disputed and quite another thing to say that the court has no jurisdiction to make an order because the claim is contested."
19. In *G. Appanna v. G. Seethamma*, the Court dissented from the views expressed in those Bench decisions of the Calcutta High Court and followed the decision of the Madras High Court . Reddy, J. expressed the view that the inherent powers recognised by Section 151 cannot extend to matters other than procedural. The Court cannot resort to the provisions of Section 151 to encroach upon substantive rights in an interlocutory application upon matters which await adjudication in the suit.
20. The learned Judge further observed :

"Section 18 of Hindu Adoption and Maintenance Act does not authorise the award of interim maintenance pending decision of the claim to maintenance in contest in the suit. The right of the wife to be maintained by the husband should not be confused with the power of the Court to award interim maintenance pending an action for maintenance where such right is in dispute. The Court has no power unless statute expressly confers such a power on it."
21. In *Monoharlal Chopra v. Seth Hiralal*, in which a question of the Court's inherent power to issue a temporary injunction came up for consideration, a majority of Judges speaking through Raghubar Dayal, J. observed : "It is well settled that the provisions of the Code are not exhaustive for the simple reason that the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression "if it is so prescribed" (in Section 94) is only this that when the Rules prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the

necessary orders in the interest of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunction but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power."

22. In paragraph 23 of the report the learned Judge said: "Section 151 itself says that nothing in the Code would be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court, it is a power inherent in the Court by virtue of its duty to do justice between the parties before it." Shah, J. in his dissenting judgment observed : "inherent jurisdiction of the Court to make order *ex debito justitiae* is undoubtedly affirmed by Section 151 of the Code but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive."
23. In the light of the Supreme Court decision it is clear that inherent powers of the Court which have been saved by Section 151 may be exercised where no provision exists in the Code for making necessary ad-interim orders in the interest of justice. Even according to Shah, J. an. order can be made in exercise of the Court's inherent power *ex debito justitiae* where the Code does not expressly provide for making the order. It is not in dispute that there is no express provision in the Civil P. C. for making an order for maintenance *pendente lite* although a substantive right has been conferred by Section 18 and Section 20 of the statute on the wife to claim maintenance throughout her life and on minor children during their minority. In my opinion, an order for maintenance *pendente lite* in enforcement of the substantive right of maintenance may be made by the Court in exercise of its inherent powers. I desire to add that on further consideration of the matter I am of the opinion that the order for interim maintenance can be made and is made under inherent powers of the Court and the observation in the Bench decision that the order is made not under Section 151 of the Code but by way of interlocutory order in aid of the suit is not apposite. The order is no doubt made in aid of the suit. The question is what is the source of the power to make the order? No doubt, the substantive right is conferred by Sections 18 and 20 of the Hindu Adoption and Maintenance Act, but the right has to be enforced by a proceeding for interim maintenance. In such a proceeding an order can only be made either in exercise of some statutory power or in exercise of the inherent power of Court which has been saved by Section 151 of the Code of Civil Procedure. As no specific provision has been made in the statute for making an order for interim maintenance, the Court makes the order in exercise of its inherent powers in enforcement of the right of interim maintenance which is included in the general right of the wife to be maintained by her husband throughout her life and by the children during their minority. We respectfully agree with the learned Judges of the Andhra Pradesh High Court where they say that Section 151 cannot confer any substantive right. The question before us is one only of procedure. In our opinion an order for interim maintenance can be made in exercise of inherent powers in aid of a suit for maintenance in which the rights of the parties are governed by Hindu Adoption and Maintenance Act.
24. In this connection we may refer to a recent decision of the Mysore High Court. In *Ramappa Parappa v. Gourwwa*, AIR 1968 Mys 270, the learned Judge held that the power created by Section 151 is an independent power, uncontrolled by other provisions of the Code. That power could be exercised even if there is another specific provision in the Code authorising an order such as the one which is sought under Section 151. The learned Judge referred to the decisions in and AIR 1954 Trav-Co 123 and observed : "both these decisions proceeded on the assumption that the power to direct payment

of interim maintenance emanates exclusively from the provisions of Rule 6 of Order XII of the Code of Civil Procedure. What was overlooked, if I may say so with great respect, in these decisions was that that power was also a part of the inherent power created by Section 151 of the Code of Civil Procedure, the exercise of which was to no extent controlled by Rule 6 of Order XII or any other provision of the Code. It is now firmly established as can be seen from the decision of the Supreme Court in that the power created by Section 151 is a power uncontrolled by the other provisions of the Code. That power could be exercised even if there is another specific provision in the Code authorising an order such as the one which is sought under Section 151."

- 25-26. The learned Judge held that an order for interim maintenance could be validly made under Section 151 of the Code of Civil Procedure.
27. We may now sum up the legal position as we understood it. The right to interim maintenance is a part of the right conferred by Section 18 and Section 20 of the Hindu Adoption and Maintenance Act. In a suit for maintenance that right can be enforced. Ubi Jus ibi remedium. The right to interim maintenance can be enforced by an application in aid of the suit and an order can be validly made by the Court on such an application in exercise of its inherent power which has been saved by Section 151 of the Code of Civil Procedure. Needless to say, that the power should be exercised by the Court only in a proper case where the petitioner has satisfied the Court that she has a good prima facie case to entitle her to such an order.
28. In the view we have taken, we do not see any reason why we should interfere with the order made by the learned Subordinate Judge except that we feel that having regard to the present income of the petitioner, the quantum of maintenance has been fixed at too high a figure. We are of opinion that in the interest of justice, the amount should be reduced to Rs. 150/- per month for the wife and Rs. 150/- per month for the son. In the view we have taken, the order of the learned Judge is varied only to the extent that the petitioner will pay interim maintenance at the rate of Rs. 150/- per month to each of the respondents. The maintenance payable to the respondent No. 2 is directed to be paid to the respondent No. 1. There will be no order for costs.

Janah, J.

29. I agree.

□□□

HARNAM KOUR VERSUS GURMEET KOUR

In the High Court of Jammu and Kashmir at Jammu

CIMA No. 197/2004

(Before Hon'ble Mr. Justice Ramalingam Sudhakar)

Harnam Kour and anr.

Versus

Gurmeet Kour

For the appellant(s): Mr. Romeshwar P. Sharma, Advocate

For the respondent(s): Mr. R. S. Thakur, Advocate

- **The instant appeal was earlier filed by Gurdeep Singh s/o Jaswant Singh challenging that portion of the judgment of learned Additional District Judge (Matrimonial Cases) Jammu, whereby the Court vide order dated 25.08.2004, directed petitioner-husband to pay a sum of Rs. 5,00,000/- (Rupees five lac) as permanent alimony and maintenance to his wife.**
- **In this case the Court below has not considered the issue in the manner under which Section 31 has to be dealt with. There is no application filed by the respondent- wife seeking permanent alimony and maintenance. Even otherwise, there has to be some reasoning given by the Court as to the conduct of the parties and other circumstances of the case which would be just and reasonable to order that a particular sum as permanent alimony and maintenance. I find from the relevant portion of the order which has already been extracted, there is no discussion and there is no basis or relevant material considered for deciding the quantum of permanent alimony/maintenance.**
- **In such circumstances an order without reasons granting permanent alimony and maintenance of Rs. 5,00,000/- (Rupees five lac) cannot be accepted, as it does not comply with the requirement of Section 31.**
- **Without rendering a finding on the income and the property of the husband on whom the order of permanent alimony and maintenance has to be imposed, the order suffers from lack of reasons and, therefore, it cannot be just.**

Cross Appeal (C) 01/2004

Decided on July 15, 2016

Hon'ble Mr. Justice Ramalingam Sudhakar : — This appeal is of the year 2004.

2. The instant appeal was earlier filed by Gurdeep Singh s/o Jaswant Singh challenging that portion of the judgment of learned Additional District Judge (Matrimonial Cases) Jammu, whereby the Court vide order dated 25.08.2004, directed petitioner-husband to pay a sum of Rs. 5,00,000/- (Rupees five lac) as permanent alimony and maintenance to his wife. The order reads as under:-

"Hence, this petition is accepted and the marriage of the parties solemnized on 16.05.1991 is hereby dissolved by a decree of divorce. The wife has already lost 13 years of youth and is now on the odd side of the middle age, that too with a stigma of divorce. It will be just and proper if the petitioner husband is made answerable for her maintenance present and future, so that the wife lives rest of her life with

dignity and honour. An amount of Rs. Five lacs appear to be reasonable, if granted to the wife on account of permanent alimony after considering the family background and social status of both the parties. The office is directed to frame a decree sheet accordingly. The parties are left to bear their own costs. File to consigned to records after its due completion."

3. During the pendency of the appeal appellant-Gurdeep Singh expired on 13.07.2005 and his mother-Harnam Kour and brother Joginder Singh of the appellant-Gurdeep Singh got themselves impleaded as appellants to prosecute the appeal, only in respect of the issue relating to permanent alimony and maintenance. Learned counsel who represents' respondent-Gurmeet Kour submits that despite his best efforts he has no instructions in the matter.
4. Mr. Sharma, Learned counsel for the appellants submits that he has filed a miscellaneous application to indicate that the respondent has re-married with one Assa Singh s/o Saroop Singh on 02.12.2008 i.e. after the decree of the Court granting dissolution of the marriage between the parties, such application was filed on 31.03.2009. There is no reply filed to this application denying the factum of re-marriage of respondent-wife with Assa Singh.
5. In this background, appeal being of the year 2004 prosecuted by mother and brother of the appellant-late Gurdeep Singh is now being taken up. First there was a request for adjourning the matter, however, this Court is not inclined to adjourn the mater and the Appeal is taken up for final disposal.
6. The short issue in the instant Appeal is that the marriage between late Gurdeep Singh and Gurmet Kour-respondent was solemnized on 16.05.1991 as per the Sikh religion, however, it is pointed out that at the time of marriage, late Gurdeep Singh- husband was working in Rajouri city and his wife respondent herein was a Teacher in a School at village Pouni. Due to differences of opinion between the parties, it appears that right from the date of marriage there was no compatibility and despite intervention of relatives the relation got further deteriorated which ultimately resulted in filing of a petition for dissolution of marriage. Statements of witnesses were recorded and it is found that out of their wedlock no child was born and that they were living separately for more than 8-10 years. The respondent-wife has different story altogether, but, however, conceded that they were living separately for more than seven years at the time of filing of the petition. Court below however, came to the conclusion that the husband was not inclined towards his wife for whatever reasons and he remained silent most of the time. The Court below held that parties could not establish the marriage relation right from day one of the marriage. Court below also found that the husband had maintained silence and showed no interest in the marriage life. Court below came to the conclusion that the marriage between the parties has broken down irretrievably and there is no scope of the parties re-union as they were living separately right from 1994. It was further held that the marriage between the parties was dead emotionally as well as practically. At the same time, there is a finding that in absence of love and affection between the parties, especially on the side of the husband marriage should be dissolved and the reasons which have been given by the Court below are as follows:-
7. "Having regard to the facts and circumstances, given herein above, it is apparently clear that the marriage is dead between the parties emotionally as well as practically. The dispute which was started in a religious court has found its way into this Court, with the result both the parties are suffering torture and misery for the last more than ten years which is beyond any body's comprehension. The marriage of the parties has ceased to be a reality, as such, continuance of this marital knot for name's sake will amount to prolonging the agony and affliction of both the parties. It is best for the spouses to say goodbye to each other permanently in order to save themselves from further agony and torture, as the parties have already wasted 13 years of their youth in marital discord. It would be an exercise in futility to return a finding on the ground of cruelty and desertion, as such, it will be in the interests of justice to order the dissolution of the marriage of the parties which has brought miseries and untold hardships not only to the petitioner

but also to the respondent who has been endlessly waiting for her rehabilitation in the matrimonial home."

7. Per contra in cross appeal the respondent-wife has prayed for setting aside the decree passed by the Additional District Judge (matrimonial Cases), Jammu whereby the marriage solemnized between late Gurdeep Singh and appellant-wife on 16.05.1991 has been dissolved by a decree of divorce and late Gurdeep Singh -husband has been directed to pay a sum of Rs. 5,00,000/- (Rupees five lac) as permanent alimony and maintenance to his wife. The cross appeal becomes academic as admittedly she has remained and has not denied the miscellaneous petition filed by appellant contending that she has remarried. Hence cross appeal is infructuous.
8. The question for determination is whether the Court was justified in passing permanent alimony and maintenance of Rs. 05 Lac. Section 31 of the Hindu Marriage Act provides for permanent alimony and maintenance. The said Act reads as follows:-
 - (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 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, be a charge on the immovable 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 re-married 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 may at the instance of the party vary, modify or rescind any such order in such manner as the court may deem just."
9. In this case the Court below has not considered the issue in the manner under which Section 31 has to be dealt with. There is no application filed by the respondent- wife seeking permanent alimony and maintenance. Even otherwise, there has to be some reasoning given by the Court as to the conduct of the parties and other circumstances of the case which would be just and reasonable to order that a particular sum as permanent alimony and maintenance. I find from the relevant portion of the order which has already been extracted, there is no discussion and there is no basis or relevant material considered for deciding the quantum of permanent alimony/maintenance.
10. In such circumstances an order without reasons granting permanent alimony and maintenance of Rs. 5,00,000/- (Rupees five lac) cannot be accepted, as it does not comply with the requirement of Section 31.
11. Without rendering a finding on the income and the property of the husband on whom the order of permanent alimony and maintenance has to be imposed, the order suffers from lack of reasons and, therefore, it cannot be just.
12. Therefore, the appeal insofar as it relates to grant of permanent alimony/maintenance has to be set aside and is set aside.
13. Appeal stands allowed, as above. Cross appeal is dismissed.

□□□

MRS. SHUBRA BAGCHI VERSUS P.K. BAGCHI

Jammu and Kashmir High Court Full Bench

Civil Misc. Appeal No. 30 of 1973

(Before Hon'ble Mr. Justice S. Murtaza Fazl Ali, C.J. and Hon'ble Mr. Justice Jaswant Singh and Hon'ble Mr. Justice Mian Jalal-Ud-Din, JJ.)

Mrs. Shubra Bagchi ... Appellant;

Versus

P.K. Bagchi ... Respondent.

Decided on September 10, 1974

- The Division Bench which has made the reference to the Full Bench was of the opinion that the Division Bench decision (Supra) required reconsideration in the light of later decisions of other High Courts in India, and accordingly the point that has been referred to us is as follows: —

"Whether an order passed by the District Judge under Section 24 of the Act refusing alimony and litigation expenses and as a consequence thereof closing the evidence of the appellant is appealable to the High Court."

- Therefore the plain meaning of the words in Section 28 of the H.M. Act would be that from such decrees or orders as are appealable under the Code of Civil Procedure under Section 104 and Order 43 an appeal shall lie, to the High Court. Other orders which do not satisfy the definition of a decree or are not enunciated in Section 104 or Order 43 of the CPC cannot be made the subject-matter of an appeal before the High Court but are revisable under the provisions of Section 115 of the CPC. Section 28 of the H.M. Act presents no difficulty and we do not find that there is any scope for so much of conflict about its interpretation.

If the interpretation put on this section by such authorities as AIR 1964 Ori 122, AIR 1959 Cal 455 or AIR 1961 Guj 202 (Supra) is accepted, it would lead to ridiculous result. According to these authorities every order passed in a proceeding under the H.M. Act would be appealable. That would mean that every interim order would be appealed from. For instance, if a certain plaintiff is directed to deposit process fee for a defendant he could go in appeal against that order. If a witness is not present on a certain hearing and a fresh summons is issued for that witness, the order would be appealable. If a counsel for a party wanted time for argument the order would be appealable. This could never be the intention or the law and would reduce the working of the Act to a farce.

- An appeal against an order under S. 24 lies under S. 28 we express our respectful dissent from the view taken by a single Judge of the Mysore High Court. On a careful consideration therefore, of the plain language employed in Section 28 of the Act and the authorities of almost all the High Courts interpreting Section 28 as conferring a right of appeal, the conclusion is irresistible that an order passed by the District Judge in the instant case refusing litigation expenses and alimony to the appellant was clearly appealable to the High Court and therefore the preliminary objection taken by the counsel for the respondent that the appeal is not maintainable is completely devoid of force. Consequently we hold that the Division Bench decision of this Court in AIR 1965 J and K 88 (Supra) was not correctly decided and is hereby overruled. We, therefore, answer the reference in

the affirmative and hold that the present appeal is maintainable. The appeal will now go back to the Division Bench which had made the reference to the Full Bench for decision on merits.

The Judgment of the Court was delivered by

Hon'ble Mr. Justice S.M.F. Ali :— The present reference to the Full Bench was necessitated by a preliminary objection taken by the counsel for the respondent before a Division Bench of this court which heard the appeal that the present appeal was not maintainable and did not lie under Section 28 of the Hindu Marriage Act (hereinafter referred to as the Act). Reliance was placed by the counsel for the respondent on an earlier Division Bench decision of this court in *Mohan Rani v. Mohan Lai*, AIR 1965 J and K 88. The Division Bench which has made the reference to the Full Bench was of the opinion that the Division Bench decision (Supra) required reconsideration in the light of later decisions of other High Courts in India, and accordingly the point that has been referred to us is as follows: —

"Whether an order passed by the District Judge under Section 24 of the Act refusing alimony and litigation expenses and as a consequence thereof closing the evidence of the appellant is appealable to the High Court."

2. It appears that the respondent, P.K. Bagchi, the then Sr. Superintendent of Post Offices, Kashmir Division, filed a suit praying for a decree for judicial separation and custody of the minor child against the appellant Mrs. Shubra Bagchi before the District Judge Srinagar on various grounds. When the suit proceeded to hearing the appellant made an application before the court for grant of temporary alimony and litigation expenses. The Court below by its order dated 18-3-1972 ordered that Rs. 2000/- out of the amount deposited by the petitioner may be paid as alimony and Rs. 500/- as litigation expenses. This order was passed presumably on the assumption that the application would be decided soon. Unfortunately more than two and a half years have passed and the case has not yet come to a close. The appellant was asked to produce her evidence and she made an application before the court below that since the proceedings had continued for a period of three years, a fresh amount of litigation expenses so as to enable her to summon witnesses may be directed to be deposited by the respondent husband. No specific order was passed on this application but by virtue of order dated 8-10-73 the District Judge rejected the application on the ground that the litigation expenses had already been ordered to be deposited and since the appellant had not produced her evidence, the court closed her evidence. This led to an appeal before the Division Bench which has now referred the question formulated above to the Full Bench. In this case we are not concerned with merits of the case of the parties which shall have to be gone into by the Division Bench after the reference has been answered and the case is sent back. We have, however, to decide whether the present appeal is maintainable under Section 28 of the Act, or, in other words, whether or not an order passed under Section 24 or for that matter the order closing the evidence of the appellant is appealable under Section 28 of the Act. As before the Division Bench, so also before us, the learned counsel for the respondent has relied on a Division Bench decision of this Court in AIR 1965 J and K 88 (supra) and has submitted that this decision lays down the correct law. On the other hand counsel for the appellant has cited a large catena of authorities taking a contrary view and holding that an order under the Act, more particularly under Section 24 is appealable. Before dealing with the Division Bench decision whose correctness or validity we are called upon to decide, it may be necessary to extract the section and the authorities on which the D.B. decision was based.

3. Section 28 of the Act runs thus: —

"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.

Provided that there shall be no appeal on the subject of costs only."

4. An analysis of this section would show that this provision runs into two parts: (1) that which deals with the enforceability of a decree or orders passed under the Act; and (2) that which regulates appeals

against decrees or orders passed in the proceedings under the Act. The proviso makes a specific provision prohibiting any appeal on the subject of costs only. On an interpretation of this section, the Division Bench of this Court in the case (AIR 1965 J. and K. 88) (supra) has held that the section itself did not confer any right of appeal, but it left it to the law concerned to govern the right, the forum and the procedure of the appeal. The Division Bench held that as decrees passed under the Act were clearly appealable, only those orders passed under the Act could be appealable which fell within the ambit of Order 43 Rule 1 of the CPC. In this connection their Lordships observed as follows: —

"Therefore the plain meaning of the words in Section 28 of the H.M. Act would be that from such decrees or orders as are appealable under the Code of Civil Procedure under Section 104 and Order 43 an appeal shall lie, to the High Court. Other orders which do not satisfy the definition of a decree or are not enunciated in Section 104 or Order 43 of the CPC cannot be made the subject-matter of an appeal before the High Court but are revisable under the provisions of Section 115 of the CPC. Section 28 of the H.M. Act presents no difficulty and we do not find that there is any scope for so much of conflict about its interpretation.

If the interpretation put on this section by such authorities as AIR 1964 Ori 122, AIR 1959 Cal 455 or AIR 1961 Guj 202 (Supra) is accepted, it would lead to ridiculous result. According to these authorities every order passed in a proceeding under the H.M. Act would be appealable. That would mean that every interim order would be appealed from. For instance, if a certain plaintiff is directed to deposit process fee for a defendant he could go in appeal against that order. If a witness is not present on a certain hearing and a fresh summons is issued for that witness, the order would be appealable. If a counsel for a party wanted time for argument the order would be appealable. This could never be the intention or the law and would reduce the working of the Act to a farce." (See page 89 of the Reports)

5. From the observations made by their Lordships it would appear that the learned Judges were swayed by the consideration that if Sec. 28 is held to have conferred a right of appeal against all decrees and orders, then it would lead to absurd results and even interim orders regarding deposit of process fee and summoning of witnesses would become appealable to the High Court which would lead to multiplicity of proceedings. I was also a party to that judgment, but I think at that time we did not consider the question in all its aspects having regard to the scheme and the context of the Act. It is well settled that where the language of the provisions of a statute is absolutely clear and unambiguous, it is not open to interpret it by importing into it something which is not there or by doing violence to the language of the section merely because certain anomalous results might follow or because the interpretation may lead to complicated consequences. In order to interpret the provisions of Section 28 it will be necessary to examine the scheme and purport of the relevant provisions of the section which is necessary for a decision of the issues before us. It will be seen that the various provisions of the section make a clear distinction between decrees and orders. It is obvious that a decision given on an application under Sections 9, 10, 12 and 13 would not amount to a decree as envisaged by the provisions of the Code of Civil Procedure but by the statutory force of the Act the decision becomes a decree which is appealable. Thus we find that in Sections 9, 10, 12, 13, 15, 23 and 27 the statute conspicuously uses the word 'decree' in relation to an application for restitution of conjugal rights, judicial separation, divorce or a declaration of nullity of marriage. Vide the words in Section 9(1) of the Act "may decree restitution of conjugal rights accordingly." In Section 10 the words 'praying for a decree for judicial separation.' In Sec. 12 the words "may be annulled by a decree of nullity." In Section 13 the words "be dissolved by a decree of divorce." In Section 15 the words "when a marriage has been dissolved by a decree of divorce. In Section 23(e) the words: "the court shall grant such relief accordingly." and in Sec. 27 the words "the court may make such provisions in the decree as it deems just and proper."
6. On the other hand in Sections 24, 25 and 26 of the Act which relate to maintenance, alimony and custody of children the statute contemplates only orders and not decrees being passed. For instance in Section 24 the relevant provision runs thus: "It may on the application of the wife or the husband, order the

respondent to pay to the petitioner." In Section 25 the words run thus: "It may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just." Similarly in Section 26 the relevant provision is as follows: "make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children." Thus it is manifest that the statute contemplates two kinds of proceedings: 1) that culminate in a decree, and 2) that culminate in an order which may be more or less of an interim or an interlocutory type, but at the same time S. 28 makes both the decrees and orders enforceable and appealable. We are not concerned with the first part of S. 28 relating to the enforceability of decrees and orders but with the second part of that section which relates to appeals. The words 'may be appealed from under any law for the time being in force' clearly contemplate two things. First, that the statute confers the right of appeal against an order or decree in the proceedings under the Act, but the forum and the procedure for the appeal is to be determined by the concerned law, whether it is the Code of Civil Procedure or any other law. In fact Section 28 has to be read with Section 21 of the Act which runs thus: —

"Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure 1908 (Act 5 of 1908)."

7. Section 21 clearly provides that all proceedings under the Act shall be regulated in accordance with the Code of Civil Procedure unless there are provisions to the contrary in the Act. So far as the right of appeal is concerned, Section 28 contains a clear and specific provision which confers a right of appeal to the aggrieved party against any order or decree in any proceeding under the Act. In these circumstances, therefore, in so far as the conferment of the appellate power which is the creature of the statute is concerned, it is expressly provided for in the second part of Section 28. The forum of appeal, the procedure and the manner in which an appeal is to be entertained or heard is left to the concerned law which means the Code of Civil Procedure by force of Section 21 of the Act (Supra). In these circumstances we have no hesitation in holding that whatever be the complicated consequence of our interpretation the language or the second part of Section 28 is clear enough to indicate that a right of appeal is expressly conferred against the decrees and orders mentioned therein and there is no justification for putting a narrower interpretation merely to avoid multiplicity of proceedings. Our conclusion is further reinforced by the existence of the proviso to Section 28 which clearly provides that there shall be no appeal on the subject of costs only. This proviso therefore envisages the existence of the right of appeal which has been curbed by it.
8. In other words if there is no right of appeal, the question of placing any limitation on such a right would not arise and therefore the proviso would become redundant if we hold that the second part of Section 28 does not contain or confer any right of appeal. Secondly the Act is a completely self-contained statute and provides for a decree in certain cases and orders in others. It is not reasonable to infer that being a completely self-contained statute, it would leave the right of appeal to the mercy of some other statute. Furthermore it seems to us that the act has revolutionised the ancient Hindu Law and conferred new rights and liabilities on Hindu spouses and the various orders and decrees passed in the proceedings under the Act are matters of moment and therefore it could not have been the intention of the legislature to give a stamp of complete finality to the interim orders passed under the Act, even though some of those orders may touch the Civil rights of the parties, for instance the right to claim alimony, litigation expenses or even custody of the children. The legislature was aware that a civil revision against an order of the District Judge was not maintainable in such cases and in its wisdom it thought that the best thing was to make all decrees and orders appealable in accordance with the forum laid down by the Code of Civil Procedure. Thus it seems to us that the intention was to equate decrees with interim orders so far as the matter of appeals or for that matter their enforceability was concerned. We are fortified in our view by a large catena of decisions to which we shall now refer.

of the right of appeal which depend on the procedure, jurisdiction and power of the court in dealing with the appeal are governed by the law for the time being in force which includes inter alia the Code."

11. A similar view was taken by a Division Bench of the Allahabad High Court in *Sarla Devi v. Baiwan Singh*, AIR 1969 All 601, at p. 602 wherein the following observations were made: —

"A right of appeal is a substantive right and is not a mere matter of procedure. The use of the words 'shall be regulated as far as may be, by the Code of Civil Procedure 1908' in Section 21 of the Act clearly indicate that it is the procedure only which is to be regulated by the Code of Civil Procedure. Section 28 of the Act confers an unqualified right of appeal. The words used 'and may be appealed from' in Section 28 of the Act clearly give a person aggrieved the right to file an appeal. In our opinion, therefore, an order passed under Section 24 of the Act is appealable at the instance of a party aggrieved."

12. The M.P. High Court in *Rukhamanibai v. Kishanlal*, AIR 1959 Madh Pra 187 observed as follows: —

"Sec. 28 of the Act has been enacted with the intention of giving a right of appeal. If the right of appeal is to be inferred from the provisions of any other law, the section so far as it relates to appeal would be meaningless and the words underlined would be superfluous. It cannot be accepted that a right of appeal from orders which are passed under specific provisions of the Act should be provided for in any other law."

13. In this case *Shrivastava J.* held that Section 28 clearly conferred a substantive right of appeal against an order passed under Section 24 of the Act.

14. To the same effect is a Division Bench decision of the Calcutta High Court in *Smt. Sobhana v. Amar Kanta*, AIR 1939 Cal 455, 457 wherein their Lordships observed as follows: —

"On consideration of all these, I have come to the conclusion that the intention of the legislature was that all decrees and orders made by the court in a proceeding under the Act shall be appealable and that the words 'under any law for the time being in force' were added to indicate that the forum where the appeal would lie, viz. to the D.J. or to the High Court, and such other matters as regards procedure for the hearing of the appeals would be decided by the law on the subject for the time being in force." There are two Full Bench decisions which have also affirmed the view that orders passed under Section 24 are appealable under Section 28 which confers a right of appeal.

15. In *Kutumba Rao v. Sesharatnamamba*, AIR 1967 Andh Pra 323, at p. 331 their Lordships of the Full Bench pointed out as follows: —

"Be that what it may, it is clear from our discussion that the expression 'under any law for the time being in force' must be referable not to the substantive right of appeal which is conferred by Section 28 itself in relation to all decrees and orders specified as such in the relevant provisions of the Act viz. Sections 9 to 13 and Sections 24 to 27, but to the procedure, forum and other relevant matters for the enforcement of the right of appeal. It is this interpretation which ought to be preferred to the other interpretation sought to be put as it removes absurdity, repugnancy and inconsistency which the other interpretation gives rise to and further gives effect to the intention of the legislature apparent from the statute without straining or doing violence to the language used and by putting that construction as the words employed admit of."

We are of the view that Section 28 by itself gives the right of appeal and the enforcement thereof is made subject to the laws in force relevant thereto. That is what is contemplated by the second part of S. 28 of the Act." Similarly in *Paras Ram v. Janki Bhai*, AIR 1961 All 395 (FB), at p. 396, the Full Bench observed as follows: —

"Section 28 lays down that an order made by the court in any proceeding under the Act "may be appealed from under any law for the time being in force." The court of a Civil Judge in the State is created under the Bengal, Assam and Agra Civil Courts Act, 1887. Section 21 of the Act lays down that an appeal from

an order of a Civil Judge shall lie to (a) the District Judge where the value of the original suit in which the order was made does not exceed ten thousand rupees and (b) the High Court in any other case."

16. It is true that in this case the point was not fully discussed, but the clear and unequivocal view expressed by the Full Bench no doubt fortifies the view that we have taken in this case.
17. There is another Division Bench decision of the Bombay High Court in *M.T. Ghisad v. Malti*, AIR 1973 Bom 141 which has taken the same view after overruling its previous decision in *Prithviraj Singhji v. Bai Shivprabhakumari*, AIR 1960 Bom 315 which was relied upon by the Division Bench decision of this Court in AIR 1965 J and K 88 (Supra). In this connection their Lordships of the Bombay High Court observed as follows: —

"We have heard the counsel for the parties at considerable length and on a proper construction of provisions of Section 28 of the Act we are inclined to take the view that the right of appeal against a decree or an order made in a proceeding under the Act is given by the provisions of Section 28 itself,"

X X X

"In our view a right of appeal against decrees and orders passed under this Act is given by the provisions of Section 28 itself. There has to be some law to which one can look for the purpose of deciding the forum where an appeal can be filed. The Code of Civil Procedure does not provide for forum though, it may provide for the procedure to be adopted while deciding the appeal."

X X X

"It also appears to us that the legislature having given a right of appeal in Section 28 it also provided in the latter part of that section for the procedure for filing the appeal and the forum for the appeal as also the jurisdiction and power of the court in dealing with the appeal filed, by enacting the latter part of Section 28 using the words 'under any law for the time being in force.'

X X X

"Since Section 28 is a self contained provision regarding the right of appeal the forum for and the procedure applicable to such an appeal, we are not inclined to agree with the observations made in *Prithviraj Singhji's* case, AIR 1960 Bom 315 that having made a reference in Section 21 of the Act to the CPC accepting the argument of the opponents counsel in that case, would mean that the legislature again emphasised in Section 28 that the procedure governing the appeal would be that under the Code of Civil Procedure which the legislature did not intend to do."

X X X

"We may also usefully refer to the provisions of the proviso to Section 28. The proviso provides that no appeal shall lie on the subject of costs only. It is now well settled that a proviso deals with a topic which would but for the proviso, have fallen into the main provisions of the section. The proviso to Section 28 also indicates that the legislature intended to carve out certain orders in respect of which no right of appeal was given. If the effect of the proviso is that no right of appeal was to be given in respect of the subject of costs, then construing the proviso and the main section together it must be held that if the proviso was not there a right of appeal could be exercised even in respect of an order with regard to costs. This could only be done if the substantive provision in Section 28 itself gave a right of appeal."

"In enacting the proviso to Section 28 the intention of the legislature was that an order with regard to costs was not to be the subject-matter of an appeal. The proviso also, therefore, indicates to us that Sec. 28 gives a substantive right of appeal in respect of decrees or orders passed under the Act." (See pp. 143-146 of the Reports).

18. A Division Bench of the Patna High Court was also of the same view in *Suresh Prasad v. Manorama Debi*, AIR 1973 Pat 321, at p. 325 wherein their Lordships observed as follows: —

"Having regard to the discussion made above, I am of the opinion that all decrees and orders passed in a proceeding under the H.M. Act are appealable by virtue of the provisions of Section 28 itself. The words 'may be appealed from under any law for the time being in force' have to be understood as meaning that although the right of appeal is derived from this section itself, so far as the procedural aspect of the appeal is concerned, it will be governed by the Code of Civil Procedure 1908, and the Rules prescribed for matters relating to the Act by the respective High Courts, in this case the Civil Court Rules of the High Court of Judicature of Patna (Civil). Since an appeal lies against the impugned order, the petition in revision is not maintainable, It has therefore to be dismissed." In paragraph 14 however the DB observed as follows: —

"I may, in passing, observe that the appealable orders are only those which have been made by a court in any proceeding under the Act and not all orders having connection, with any proceeding under the Act. In other words, only such orders are appealable which have been passed under Sections 24 to 27 of the Act."

19. We, however, find ourselves unable to agree with the view expressed by their Lordships in para 14 of the judgment. (Supra). The distinction made by their Lordships between orders passed in any proceeding under the Act and orders having connection with any proceeding under the Act appears to be, with due respect, a distinction without any difference. An order passed under the provisions of the Act, whether under Sections 24, 25 or 26 would undoubtedly be an order in the proceeding under the Act and therefore the said distinction made by their Lordships appears to be purely artificial and illusory. Furthermore, the interpretation is not borne out by the clear language of Section 28 which does not distinguish the kind of orders passed under the Act and makes all kinds of orders passed under the Act appealable. With due deference, therefore, we express our respectful dissent from the view expressed by their Lordships in para 14 (Supra). On the other point, however, the decision fully supports our view that an appeal against an order under Section 24 lies under Section 28 of the Act.
20. There are some other decisions of other High Courts also which have taken the same view.
21. In *Snehlata v. Jagdish Dansana*, AIR 1964 Ori 122, at p. 123 G.K. Misra J. (as he then was) observed as follows: —

"The legislature was quite aware of the position that there is no other law for the time being in force under which an 'appeal can lie from any order in any proceeding under the Act. If no appeal is provided under Section 28, there would be no meaning in saying in the proviso that no appeal lies against costs only. In that case the language used should have been that no appeal lies against any order in any proceeding under the Act. The right of appeal is a substantive right which is always a creature of the statute and is not a mere matter of procedure, *C. Veeraya v. N. Subbiah Choudhry*, AIR 1957 SC 540. The proper construction is that the expression 'may be appealed from' confers substantive right of appeal against all decrees and orders made by the Court in any proceeding under the Act. This substantive right is created by the Act under Section 28. The expression 'under any law for the time being in force', refers to the forum and the procedure to be followed under any other law for the time being in force which includes Code of Civil Procedure and the Rules framed by the High Court"

22. To the same effect is a decision of the Punjab High Court in *Tariochan Singh v. Mohinder Kaur*, AIR 1961 Punj 508, at p. 509 wherein Manajan J. observed as follows:

"I am inclined to follow the view of the Calcutta and the Madhya Pradesh High Courts in preference to the view propounded by the Andhra Pradesh High Court.

If I accept the view of the Andhra Pradesh High Court, the provision of appeal in Section 28 of the Act becomes wholly meaningless, for no appeal against an order would be competent and this will lead to far-reaching consequences. The language of the section is somewhat defective, but the intention seems to

be clear that an appeal against the orders under the Act was sought to be provided for, I would, therefore, repel the preliminary objection."

23. The Madras High Court has taken the same view in *Valliammai v. Periswami*, AIR 1959 Mad 510. To the same effect is a decision of the Rajasthan High Court in *Govind Ram v. Lila Devi*, AIR 1969 Raj 253, at p. 254 wherein Jagat Narayan J. has observed: —

"The difficulty arises in the case of orders made under the Act under Sections 24, 25 and 26. Section 24 provides for the grant of maintenance pendente lite and expenses of proceedings, Section 25 for grant of permanent alimony and maintenance and Sec. 26 for the custody of children. It seems to me that the legislature intended that orders under these sections should be appealable although the language of the section is undoubtedly not happy."

24. The Judicial Commr, of Himachal Pradesh also took the same view in AIR 1965 Him Pra 12.
25. The view taken by a single Judge of the Madras High Court in AIR 1959 Mad 510 (Supra) was reiterated by a D.B. in *D.S. Seshadari v. Jayaiakshmi*, AIR 1963 Mad 283, at p. 285 wherein their Lordships observed as follows: —

"In our opinion Section 28 in terms confers a right of appeal against all decrees and orders passed by the court in any proceeding under the Act.

X X X

"The learned Judges held that the words 'under any law for the time being in force' in Section 28 of the Act were intended to provide for the forum of appeal and that they did not qualify or restrict the right of appeal given under the statute. A different note has however been struck by Gokhale J. in *Prithvirai Singhji v. Bai Shivprabha Kumari*, AIR 1960 Bom 315, who was inclined to interpret the words 'any law for the time being in force' in S. 28 as regulating the appeal-ability of decrees and orders passed under the Act. In our opinion the view taken in AIR 1959 Cal 455 is consistent with the principles stated above and we accept the same."

26. It would thus appear that the High Courts of Calcutta, Bombay, Madras, Allahabad, Rajasthan, Gujarat, Orissa, Patna, Punjab, Andhra Pradesh and Madhya Pradesh have taken the view that an order under Section 24 is appealable under Section 28. In other words this appears to be the general consensus of judicial opinion on this point.
27. The Division Bench of this court in AIR 1965 J and K 88 (Supra) relied on AIR 1960 Andh Pra 30, AIR 1960 Bom 315 and AIR 1962 Cal 455. There is, however, a decision of the Mysore High Court in AIR 1962 Mys 172 which supports the view taken by the aforesaid Division Bench decision of this Court. So far as AIR 1960 Andh Pra 30 is concerned it was specifically overruled by a Full Bench of the Andhra Pradesh High Court in AIR 1967 Andh Pra 323 (Supra) which also dissented from the view taken in AIR 1960 Bom 315 (Supra) and the Division Bench decision of our own High Court. So far as AIR 1960 Bom 815 is concerned it was also specifically overruled by a latter Division Bench decision of the Bombay High Court in AIR 1973 Bom 141 (Supra). Thus the Bombay case on which the Division Bench of this court relied is no longer good law.
28. As regards AIR 1962 Cal 455 it is undoubtedly a single Bench decision but it is contrary to the earlier Division Bench decision of the same High Court in AIR 1959 Cal 455. The Mysore High Court is therefore the solitary court which has consistently held the view that no appeal would lie against an interim order passed under the Act.
29. For the reasons that we have given above and in view of the general preponderance of the authorities in favour of the view that an appeal against an order under S. 24 lies under S. 28 we express our respectful dissent from the view taken by a single Judge of the Mysore High Court. On a careful consideration therefore, of the plain language employed in Section 28 of the Act and the authorities of almost all the

LANDMARK JUDGMENTS ON ALIMONY & MAINTENANCE

High Courts interpreting Section 28 as conferring a right of appeal, the conclusion is irresistible that an order passed by the District Judge in the instant case refusing litigation expenses and alimony to the appellant was clearly appealable to the High Court and therefore the preliminary objection taken by the counsel for the respondent that the appeal is not maintainable is completely devoid of force. Consequently we hold that the Division Bench decision of this Court in AIR 1965 J and K 88 (Supra) was not correctly decided and is hereby overruled. We, therefore, answer the reference in the affirmative and hold that the present appeal is maintainable. The appeal will now go back to the Division Bench which had made the reference to the Full Bench for decision on merits.

JASWANT SINGH, J.:— I have had the advantage of going through the elaborate judgment prepared by the Hon'ble Chief Justice and find myself in complete agreement with the views expressed by his Lordship after an exhaustive review of the authorities bearing on the matter.

MIAN JALAL-UD-DIN, J.:— I agree.

30. Reference answered in affirmative.

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VIKRAM JAMWAL VERSUS GEETANJALI RAJPUT

561-A CrPC No. 77 of 2007

(Before Hon'ble Mr. Justice Gh. Hasnain Massodi)

Vikram Jamwal ...Petitioners
Versus
Geetanjali Rajput & anr ...Respondent

MR.R. S. Thakur, Advocate

Mr. L. K. Sharma, Advocate

Decided on February 10, 2010

- Whether father of a minor child, claiming to have no financial resources, can avoid to maintain his child living with his mother, on the ground that mother of the child is an earning hand, and thus obligated to maintain the child, is the question that calls for an answer in the present petition.
- he petitioner resisted the main application as also the interim application on the grounds that the respondent No. 1 had withdrawn from petitioner's association and left the marital home on her own and was, thus, disentitled from claiming any maintenance from the petitioner. The petitioner blaming respondent No. 1 for turbulence in the marital life insisted that the respondent No. 1 was working as a Lecturer in Government Gandhi Memorial Science College, Jammu and getting a salary of Rs. 8,000/- per month. It was averred that the petitioner was jobless and still pursuing his higher studies and thus, not in a position to pay any allowance to the respondents.
- Section 488 Code of Criminal Procedure saddles a person with duty to maintain his legitimate or illegitimate minor child, subject to the conditions laid down therein.
- The provision vests, corresponding right in the child to claim maintenance from his father, in the event, the child is unable to maintain itself. The obligation of father to maintain his child does not at any point of time shift to any other person including mother having custody of the child.
- In other words, even if, the child is temporarily living with mother or in custody of any other person, the father continues to be under statutory duty to maintain the child.
- The right with which the child is vested under section 488 cannot be bartered away, compromised or surrendered, even by his mother. The language of Section 488(l)(b) makes abundantly clear that the law makers under Section 488 Cr.P.C. put the duty to maintain the child on the father. It is having, this is in mind that reference to, "legitimate or illegitimate child", has been made in Section 488(l)(b)&(c). It is true that in case of parents, both son and daughter have been held to be under duty to maintain them.
- It is a fact of common knowledge that an amount much more that the amount of maintenance granted by the Court below is required to meet expenses of school going child like the respondent No. 2, even at Pre-nursery stage, on his food, clothes, books, school fee, health care etc. Learned Magistrate has asked the petitioner to pay an amount of Rs. 1500/- per month to respondent No. 2, which represents only part of the expenses that must be incurred by respondent No. 1 on maintenance of respondent No. 2.

- **This apart the order under challenge is a threshold order. The Trial Court has yet to record evidence likely to be adduced by the parties. The respondents' case before the Trial Court was that the petitioner was drawing salary of Rs. 18,000/- per month from his employer. The petitioner has controverted the averments. It is for the Trial Court to decide after an objective appraisal of the evidence brought on the file by the parties, whether the petitioner is possessed of sufficient means and whether the respondents are unable to maintain themselves.**
- **The order impugned is temporary in nature subject to final outcome of the application. The grounds urged in the petition are factual in character and can be dealt with only after the parties adduce evidence in support of their stands.**
- **The order impugned in the present petition does not amount to abuse of process of the Court and exercise of inherent powers under Section 561-A Cr.P.C. is not called for.**

JUDGMENT

Whether father of a minor child, claiming to have no financial resources, can avoid to maintain his child living with his mother, on the ground that mother of the child is an earning hand, and thus obligated to maintain the child, is the question that calls for an answer in the present petition.

The petitioner is keen to wriggle out of his obligation to pay interim maintenance to his minor son, Master Anirudh Singh, only on the ground that the mother of the minor, with whom the minor is presently living, is a Government employee getting about Rs. 10,000/- salary per month, whereas the petitioner is unemployed, pursuing his Ph.D. in Information Technology.

The background facts are as under:-

Ms. Geetanjali Rajput-Respondent No. 1 herein, on 06.10.2005 filed an application on her behalf and on behalf of her minor son Anirudh Singh against the petitioner, under Section 488 Criminal Procedure Code, in the Court of Judicial Magistrate, 1st Class (Passenger Tax, Magistrate) Jammu. The respondents' case before the Trial Magistrate was that the petitioner immediately after his marriage with the respondent No. 1 solemnized on 18th February, 1999 went to Mumbai to work as a Junior Research Scientist in the National Centre for Science and Technology and has ever since refused and neglected to maintain respondent No. 1 as also respondent No. 2 born out of the wedlock, on 18th September, 2000.

According to the respondent No. 1, she incurred huge expenses at the time of birth of respondent No. 2 and also on account of fee and other expenses on admission of respondent No. 2 in Little Blue Bells Nursery and K.G. Preparatory School Rani Talab, Jammu. It was pleaded that the petitioner was getting salary of more than Rs. 18,000 per month and was, thus, possessed of sufficient means to maintain the respondents.

The respondents alongside the application under Section 488 Cr.P.C. also filed an application for grant of interim maintenance pending disposal of the main application.

The petitioner resisted the main application as also the interim application on the grounds that the respondent No. 1 had withdrawn from petitioner's association and left the marital home on her own and was, thus, disentitled from claiming any maintenance from the petitioner. The petitioner blaming respondent No. 1 for turbulence in the marital life insisted that the respondent No. 1 was working as a Lecturer in Government Gandhi Memorial Science College, Jammu and getting a salary of Rs. 8,000/- per month. It was averred that the petitioner was jobless and still pursuing his higher studies and thus, not in a position to pay any allowance to the respondents.

Learned Trial Magistrate vide Order dated 22nd November, 2006 allowed the application for grant of interim maintenance and directed the petitioner to pay an amount of Rs. 1,500/- per month to the respondent No. 2. The application for grant of interim maintenance as regards the respondent No. 1 was deferred, to be disposed of after the parties led their evidence.

The petitioner aggrieved of the order of Learned Trial Magistrate filed a Revision before Learned Sessions Judge, Jammu. The order was impugned before Revision Court on almost the same grounds as are set out in the present petition. Learned Sessions Judge, Jammu not impressed by the grounds urged in the Revision Petition held that the order impugned did not suffer from any illegality or impropriety, so as to warrant interference under Section 435(4-a). The Revision Petition was dismissed and the order of Learned Trial Magistrate upheld.

The petitioner through the medium of instant petition under Section 561-A Code of Criminal Procedure, seeks to invoke inherent powers of this Court to ask for quashment of the order of Learned Sessions Judge dated 3rd May, 2007 and also the order of Trial Magistrate dated 22nd November, 2006. The weft and warp of the petitioner's case is that in the changing scenario, an earning mother is equally saddled with the responsibility to maintain her minor child/children as a father, more so, when father of the child/children is without any source of income. It is pleaded that as respondent No. 1 is a Government employee having a recurring income of about Rs. 10,000/- per month, therefore, respondent No. 1 is under moral and legal obligation to maintain her minor son and can not ask the petitioner to pay any maintenance allowance to the respondent No. 2. It is further pleaded that the petitioner is himself a liability on his parents and his educational and other expenses, are at present borne by his parents and the Courts below have failed to consider the matter in its right prospective and oblivious of the case set up by the petitioner, fastened the petitioner with a duty to pay maintenance allowance, which the petitioner is not in a position to discharge. The petitioner has signified his intention to take care of his son once the petitioner completes his studies and is able to take a job and earn for himself as also for his family.

Heard

Learned counsel for the petitioner, while elaborating on the grounds urged in the petition insists that the mother possessed of sufficient means and financial resources is under equal duty as a father to maintain her minor child/children. It is argued that duty under Section 488 Cr.P.C. to maintain a minor child "unable to maintain itself" is cast with equal force on both the parents.

Learned counsel for the petitioner, in this behalf, refers to Section 20, Hindu Adoption and Maintenance Act whereunder "a mother is made equally liable to maintain the child." It is insisted that the parties being governed by Hindu Law, the Magisterial Court while dealing with an application under Section 488 Cr.P.C. is to have due regard to the rights and duties of the parties under Hindu Law including Hindu Adoption and Maintenance Act. It is argued that the Court must take notice of changing trends in the society and more and more women taking up professions till recently exclusive domain of men and making a significant financial contribution to the family coffers. With new strides in the empowerment of woman, it is insisted, a woman cannot escape responsibility to maintain their children. The application for grant of interim maintenance, according to the learned counsel for the petitioner, should have met outright rejection, in as much as, there was sufficient material before the learned Trial Magistrate to conclude even at the threshold that the petitioner in the facts and circumstances of the case was under no legal obligation to pay maintenance allowance to the respondents.

It is further argued that inability to maintain himself, a condition precedent for grant of maintenance allowance, has not only reference to age of the minor child but also his or her resource and that a minor child living with a mother having sufficient recurring income cannot be said to be, "unable to maintain itself" and, thus, cannot claim maintenance from his father under Section 488 Cr.P.C.

Learned counsel for the respondents on the other hand insisted that the petitioner as father is under moral and legal duty not only to maintain his minor child but also his wife; that the Learned Trial Magistrate while impliedly declining the prayer of respondent No. 1 for interim maintenance, has rightly restricted the interim relief to respondent No. 2, minor son of the petitioner. It is argued that the petitioner cannot shift his responsibility to maintain his minor child/children to the respondent No. 1, only on the ground that the respondent No. 1 was working lady having recurring income from her salary.

Learned counsel for the respondents defending the impugned order argued that the orders are in accordance with law and that the petitioner cannot press into service under Section 561-A Cr.P.C. to upset the orders, in as much as, there was no abuse of process of the Court.

Section 488 Code of Criminal Procedure saddles a person with duty to maintain his legitimate or illegitimate minor child, subject to the conditions laid down therein.

The provision vests, corresponding right in the child to claim maintenance from his father, in the event, the child is unable to maintain itself. The obligation of father to maintain his child does not at any point of time shift to any other person including mother having custody of the child.

In other words, even if, the child is temporarily living with mother or in custody of any other person, the father continues to be under statutory duty to maintain the child.

The right with which the child is vested under section 488 cannot be bartered away, compromised or surrendered, even by his mother. The language of Section 488(l)(b) makes abundantly clear that the law makers under Section 488 Cr.P.C. put the duty to maintain the child on the father. It is having, this is in mind that reference to, "legitimate or illegitimate child", has been made in Section 488(l)(b)&(c). It is true that in case of parents, both son and daughter have been held to be under duty to maintain them.

The Supreme Court in (1987) 2 SCC 278 held the expression "his father or mother" to be construed as "her father or mother" having regard to the Joint Committee Report on Code of Criminal Procedure 1973, in which the expression children "instead of son ----" as also Section 8 Indian Penal Code and Section 13(1) of General Clause Act.

However, the expression "his legitimate or illegitimate child" in Section 488 (1) (b)& (c) cannot be construed as "her legitimate or illegitimate minor child". Neither language of 488(1) (b)&(c) permits such construction nor is there support to such interpretation by Joint Committee Report on Cr.P.C. 1973. The interpretation to make room for shifting of statutory duty to maintain the minor child from the father to the mother or the person having custody of the minor child, shall rob the provisions of purpose and object. There can be no disagreement with learned counsel for the petitioner that when the child is possessed of sufficient resources and thus, not unable to maintain itself, the father of the child is discharged from his duty to maintain the child. However, the income, if any, of mother cannot be said to make the child possessed of sufficient resources.

Reliance placed on law laid down in AIR 1919 Madras 193, is thus misplaced. In the said case, the child had sufficient funds available from "TAVAZHI" and the Court disallowing the application for maintenance held that "unable to maintain itself" did not merely refer to the tender age of the child but must have reference to its financial dependence. The facts of the present case are markedly different from the facts to the reported case. AIR 1919 Madras 193 thus does not extend any support to petitioner's case.

In AIR 1956 Madras 154, application by mother for maintenance of children was resisted on the grounds that the mother was possessed of sufficient means and as she was the natural guardian and charged with the custody of the wards she must maintain them out of her own income. The Court rejecting the plea observed that the duty of maintaining the child is cast upon the father, and whatever may be the civil law, the provisions of S. 488, Criminal P.C. are quite "equal to the office of enforcing the duties of the father" which is to maintain the child, legitimate or illegitimate. No such duty is cast on the mother, either under the Code or any other law. Under the Criminal Procedure Code, it is clear that it is the father who has got to maintain the child and therefore the court is entitled to order a certain amount to be paid to the guardian of the minor children towards the maintenance of the children.

The obligation of the mother under Section 20 Hindu Adoption and Maintenance Act to maintain the child does not in any manner dilute the statutory duty of the father under section 488 Cr. P.C to maintain the child. The duty to maintain the child under Section 488 Criminal Procedure Code remains to be that of the father and in the event, the father is of the belief that any other person including the mother, independent of Section 488

Cr.P.C is under duty to maintain or contribute to maintenance of the child, it is for him to bring appropriate action against such person. But in no case can father washes hands of the duty cast upon him under Section 488 Cr.P.C. to maintain his minor child.

The object and purpose of Section 488 Cr.P.C, it has been pointed out time and again, is to save wives, children and parents from destitution and vagrancy. The obligation to maintain wife, minor children and parents unable to maintain themselves though essentially civil in nature has been made part of the Code of Criminal Procedure, so as to inculcate a sense of urgency in the matters regarding maintenance and ensure that such matters are speedily dealt with, unhampered by procedural wrangles as are come cross in civil proceedings.

A person from the very moment, he takes the marital vow, makes himself duty bound to maintain his wife and after he is blessed with child/children to maintain the child/children. A person cannot escape his moral and legal obligation to maintain his wife or minor child/children, unable to maintain herself/itself on the ground that he is following higher academic pursuits and thus, does not intend to presently take up a job. A person cannot plead penury to avoid his statutory duty to maintain his child, unable to maintain itself. It is to emphasise nature of duty cast on a person to maintain his wife, child/children and parents that "Sufficient means" has been interpreted to include "capacity to earn". It has been held that as long as a person is able bodied with capacity earn, he cannot escape his legal duty to maintain his wife, children and parents unable to maintain themselves, on the ground that he does not actually have any income. Once a person enters into wedlock and decides to raise a family he cannot turn around and say that he is not ready to perform his moral and legal obligation flowing out of the wedlock, as he is in no mood to earn a livelihood. It is for the person to decide to marry or not to marry but once a person decides to marry, he is duty bound to perform all the duties and discharge all the obligations that the society and law expect and require him to discharge.

The contention of the petitioner that the petitioner is pursuing Ph.D. Programme and has no income if accepted still the petitioner cannot be held exempted from discharging his marital obligations including an obligation to maintain his wife and minor child. It is for the petitioner, after having contracted the marriage and decided to start a family, to find ways and means, to maintain his wife and child/children.

Even if, respondent No. 1 on ethical and moral grounds is held to be expected to chip in her resources for maintenance of her child, yet the petitioner cannot escape the responsibility to contribute towards the maintenance of his minor child, as the duty to maintain respondent No. 2 primarily remains that of the petitioner.

In the case in hand, the Learned Magistrate while awarding interim maintenance allowance of Rs. 1500/-per month in favour of respondent No. 2, appears to have taken note of the income of respondent No. 1 as has been pointed out by the learned Sessions Judge in order dated 22nd November, 2006.

It is a fact of common knowledge that an amount much more that the amount of maintenance granted by the Court below is required to meet expenses of school going child like the respondent No. 2, even at Pre-nursery stage, on his food, clothes, books, school fee, health care etc. Learned Magistrate has asked the petitioner to pay an amount of Rs. 1500/- per month to respondent No. 2, which represents only part of the expenses that must be incurred by respondent No. 1 on maintenance of respondent No. 2.

This apart the order under challenge is a threshold order. The Trial Court has yet to record evidence likely to be adduced by the parties. The respondents' case before the Trial Court was that the petitioner was drawing salary of Rs. 18,000/- per month from his employer. The petitioner has controverted the averments. It is for the Trial Court to decide after an objective appraisal of the evidence brought on the file by the parties, whether the petitioner is possessed of sufficient means and whether the respondents are unable to maintain themselves.

The order impugned is temporary in nature subject to final outcome of the application. The grounds urged in the petition are factual in character and can be dealt with only after the parties adduce evidence in support of their stands.

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The order impugned in the present petition does not amount to abuse of process of the Court and exercise of inherent powers under Section 561-A Cr.P.C. is not called for.

Resultantly, the petition being meritless is hereby dismissed. The record be send down. The parties shall cause their appearance before the Trial Court on 25.02.2010

(Gh. Hasnain Massodi) Judge

Jammu

10th February, 2010

Ram Murti

Home

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SUNIL KUMAR VERSUS SUMITRA PANDA

Orissa High Court

CRIMINAL REVISION NO. 781 OF 2013

(Before The Honourable Mr. Justice S. K. Mishra)

Sunil Kumar ... Petitioner

Versus

Sumitra Panda ... Opposite

For petitioner - M/s. Sangam Kumar Sahoo, G..Sahoo, D.P.Pattnaik and A.Mohanty

For opposite party - M/s. Bansidhar Baug, M.R.Baug, S.Rath, P.K.Jena and S.K.-----

From the judgment dated 17.07.2013 passed by the learned Sessions Judge, Cuttack in Criminal Appeal No.18 of 2013 in upholding the order dated 05.02.2013 passed by the learned S.D.J.M. (Sadar), Cuttack in CrI. Misc. Case No.353 of 2012.

Date hearing - 09.12.2013

Date of judgment - 06.01.2014

Hon'ble Mr. Justice S.K.Mishra :— The following questions arise for determination in this case:

- (i) Whether a divorced wife can maintain an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005, hereinafter referred as the "Act" for brevity, and seek relief under the Act ?
 - (ii) Whether a divorced wife, who has sought some relief before this Court in a pending proceeding in view of Section 26 of the Act, can pray for identical relief before a Magistrate under Section 27 of the Act ?
2. The opposite party is the divorced wife of the petitioner. Their marriage was solemnized on 16.03.1998 and out of the wedlock twin sons were born on 03.03.2000. The petitioner and the opposite party were serving in the Indian Railways and they are living separately since September, 2010. The opposite party-wife filed Civil Proceeding No.989 of 2010 before the Judge, Family Court, Cuttack for a decree of divorce and judicial separation. She has also filed another petition bearing Civil Proceeding No.990 of 2010 before the Judge, Family Court, Cuttack for custody of minor twin sons.
 3. The learned Judge, Family Court, Cuttack allowed the divorce petition i.e. Civil Proceeding No.989 of 2010 filed by the opposite party-wife on 20.10.2011 and dissolved the marriage between the parties by a decree of divorce. By the common order dated 29.10.2011, the Civil Proceeding No.990 of 2010 filed by the opposite party-wife was dismissed and direction was given to the opposite party-wife to hand over the minor son Luv Kumar to the petitioner.
 4. In the Civil Proceeding bearing No.989 of 2010, the Judge, Family court, Cuttack, inter alia, held that the opposite party-wife was leading an adulterous life and, therefore, she has challenged the finding before this Court in MATA No. 99 of 2011, which is subjudiced. Similarly, she has filed another appeal i.e. MATA No. 98 of 2011 against the judgment and order passed by the learned Judge, Family Court, Cuttack in Civil Proceeding No. 990 of 2010 and for a direction for custody of the two minor children

in her favour. The second appeal is also subjudiced. When the matter stood thus, the opposite party filed an application before the learned S.D.J.M., Sadar, Cuttack, inter alia, on the ground that the claim of opposite party-wife does not come within the purview of the Act and she has already been divorced and there is non-availability of the report of the Protection Officer.

5. The opposite party-wife filed her objection to the maintainability of the petition filed by the petitioner and the learned S.D.J.M., Sadar, Cuttack, which was dismissed by the learned Sessions Judge, Cuttack in Criminal Appeal No.18 of 2013. The opposite party-wife has filed an application bearing Misc. Case No. 55 of 2012 before this Court in MATA No. 98 of 2012 with a prayer to allow her to stay in the Mahanadi Bihar Apartment and also for a direction to the petitioner-husband not to create any disturbance during her stay. Such petition is still pending for adjudication. The petitioner assails the order passed by the learned J.M.F.C., Cuttack in Criminal Misc. Case No. 353 of 2012, which has been confirmed by the learned District Judge, Cuttack in Criminal Appeal No. 18 of 2013 as per his judgment dated 17th July, 2013.
6. In course of hearing, the learned counsel appearing for the petitioner relies upon the reported case of Harbans Lal Malik v. Payal Malik, 2011 (1) Crimes 496; wherein a Single Judge Bench of the High Court of Delhi held that an application under Section 12 of the Act is not maintainable by a divorcee-wife. The learned counsel has also relied upon the reported case of Abdul Haque (MD.) v. Jesmina Begum Choudhury and another, I (2013) DMC 384; wherein a Single Judge Bench of the Gauhati High Court has taken the same view as that of the Delhi High Court.
7. The Delhi High Court in the case of Harbans Lal Malik v. Payal Malik (supra) has held that the definition of domestic relationship as defined under Section 2(f) of the Act speaks of living together at any point of time. However, it does not speak of having relation at any point of time. Thus, if the domestic relationship continued and if the parties have lived together at any point of time in a shared household, the person can be a respondent, but if the relationship does not continue and the relationship had been in the past and is not in the present, a person cannot be made respondent on the ground of a past relationship. The learned Single Judge of the Delhi High Court further held that the domestic relationship between the aggrieved person and the respondent must be present and alive at the time when complaint under the Domestic Violence Act is filed and if this relationship is not alive on the date when complaint is filed, the domestic relationship cannot be said to be there. At paragraph 19 of the judgment, the learned Single Judge of the Delhi High Court held that the definition of "wife" as available under Section 125 of the Code of Criminal Procedure, 1973, hereinafter referred as the "Code" for brevity, could not be imported into Domestic Violence Act. The Legislature was well aware of Section 125 of the Code and if Legislature intended, it would have defined "wife" as in Section 125 of the Code in Domestic Violence Act as well. On such grounds the Delhi High Court held that a divorced wife cannot claim maintenance under Section 12 of the Act.
8. In Abdul Haque (MD.) v. Jesmina Begum Choudhury and another (supra), the Single Bench of Gauhati High Court held that the definition of "aggrieved person" is couched in present-indefinite tense in perfect infinitive sense. Unlike Section 125 of the Code, it does not admit a 'divorcee' within the meaning of "aggrieved person". It is further held that in this way most of the reliefs that can be granted on the basis of an application under Section 12 of the Act can be granted only if an "aggrieved person" is in domestic relationship with the respondent. Though the definition of "domestic relationship" gives an indication that to obtain certain reliefs under Chapter IV of the Act, the "aggrieved person" need not be in continuing relationship with her husband and in-laws it also does not admit a divorcee. The learned Single Judge further held that however, a wife or a woman in "domestic relationship" can seek reliefs provided under Chapter-IV though she may be living separately at the time of filing of application under Section 12 of the Act. It is further held that keeping in mind the definition of "aggrieved person" and domestic relationship", it can be held that though the Act is prospective, reliefs can still be granted to the "aggrieved person" if the domestic relationship between the aggrieved person and the respondent

continues to exist. The learned Single Judge has, therefore, held that an application under Section 12 of the Act of a divorcee is not maintainable.

9. A similar question arose before the Bombay High Court. A Single Judge of Goa Bench of the Bombay High Court in *Smt. Bharati Naik v. Ravi Ramnath Halarnkar and another*, 2011 CrL. Law Journal 3572 has held as follows :

"8. In my view, the definition of the "aggrieved person" and the "Respondent" are the defining definitions in so far as the issue that arises for consideration in the present petition is concerned. The definition of "aggrieved person" postulates a woman who is, or "has been" in a domestic relationship with the Respondent and the Respondent means any adult male person who is, or "has been" in a domestic relationship with the aggrieved person. Since a domestic relationship is a sine qua non for invoking the provisions of the said Act. Section 2(f) also becomes material, Section 2(f) as can be seen from a reading of the said provision means a domestic relationship between two persons who live or "have", at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Therefore, the aforesaid three definitions take in their sweep even a past relationship as the words "has been" or "have lived" have been used in the said definitions. The said words therefore have been used purposefully as the said Act has been enacted to protect a woman from domestic violence and, therefore, there cannot be any fetter which can come in the way by interpreting the provisions in a manner to mean that unless the domestic relationship continues on the date of the application, the provisions of the Act cannot be invoked. The words "has been" and the words "have lived" have been used for the purpose of showing the past relationship or experience between the concerned parties. To interpret the said provisions so as to mean that only subsisting domestic relationship are covered would result in turning the provisions of the said Act otiose. As is well settled by the judgments of the Apex Court in cases of beneficent Legislations, an interpretation which furthers its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Reference could be made to the judgment of the Apex Court reported in (2009) 14 SCC 546: (AIR 2010 SC 1253: 2010 Lab IC 1104) the matter of *Union of India v. De- vendra Kumar Pant and others*. Apart from that a literal construction of the provisions would show that even if the woman was in the past in a relationship she would be entitled to invoke the provisions of the said Act. The words "has been" or "have lived" appearing in the definitions are plain and clear and therefore effect would have to be given to them. In the instant case, the petitioner who is the aggrieved person and the Respondent no.1 had lived together in the shared household when they were related by marriage. The petitioner though divorced continued to stay in the shared household till she was allegedly forcefully evicted by the Respondent no.1, she would therefore be entitled to invoke the provisions of the said Act, as the petitioner and the Respondent no.1 are squarely covered by the provisions of the said Act."

10. Observing thus, the Single Judge of Goa Bench of the Bombay High Court held that in so far as the application filed by the divorcee for residing in the shared household on an interpretation of the provisions of the said Act, it would have to be held that even a divorced wife is entitled to invoke the provisions of the said Act, whether she is entitled to protection or not in a given fact situation, would be for the concerned Court to decide.
11. Similar question arose before a Division Bench of the Rajasthan High Court in the case of *Smt. Sabana @ Chand Bai and another v. Mohd. Talib Ali and another*, in Criminal Revision Petition No. 362 of 2011. The specific question that arose for determination in that case is as hereunder. "Whether the Protection of Women from Domestic Violence Act, 2005 can be applied retrospectively specially where the aggrieved party (wife) was divorced by the respondent (husband) prior to the Act coming into force on October 26, 2006 or not ?"

12. Thus, there are two questions which have been decided in the said unreported case. The first question is, whether the Act is to be applied retrospectively and secondly, whether a divorcee-wife can claim relief under Section 12 of the Act. After discussing various provisions of the Act, the Division Bench of the Rajasthan High Court held that it is not necessary that an applicant- woman should have a marriage or relationship in the nature of marriage existing and subsisting with the respondent as on the date of coming into force of the Act or at the time of filing of the application under Section 12 of the Act before the Magistrate for one or more reliefs as provided for under the Act. In other words, the aggrieved person, who had been in domestic relationship with the respondent at any point of time even prior to coming into force of the Act and was subjected to domestic violence, is entitled to invoke the remedial measures provided for under the Act. It, therefore, appears on the face of the two cases that there is conflicting views on the point. However, the view taken by the Division Bench of the Rajasthan High Court at Jodhpur appears to be more acceptable than the other views.
13. Section 2(a) of the Act provides as follows :
- "2. Definitions - In this Act, unless the context otherwise requires -
- "(a) "aggrieved person" means any woman who is, or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;"
14. Learned counsel for the petitioner emphasizing on the expression "or has been" appearing in Sub-clause (a) of Section 2 of the Act, argues that it is in the present perfect continuous tense.
- Therefore, there has to be a continuing relationship between the parties. However, an examination of the definition on domestic relationship indicates otherwise. It reads as follows:
- "2 (f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;" (emphasis supplied) This expression, "who live or have, at any point of time, lived together in a shared household is a domestic relationship" shows that subsisting relationship between the parties, i.e. the aggrieved person and a respondent is not a sign qua non for filing an application for seeking relief under Section 12 of the Act. This view is supported by decision rendered by the Division Bench of the Rajasthan High Court. In that view of the matter, this Court comes to the conclusion that the view taken by the Rajasthan High Court and the Goa Bench of the Bombay High Court is the correct approach and an application is maintainable even by a divorced wife.
15. As far as the second question is concerned, it is admitted that the maintainability of the application before the Magistrate in view of the provision of sub-section 26 of the Act has not been raised before the learned Magistrate or before the learned Sessions Judge. So, this Court refrains from taking into consideration any point not agitated before the original and appellate court. Hence, no decision is rendered on the same.
16. On the basis of the aforesaid reasoning, this Court comes to the conclusion that the order passed by the learned Magistrate in rejecting the petition filed by the petitioner, which has been confirmed by the learned District Judge, Cuttack in Appeal is correct. Hence, the Revision Application is dismissed at the stage of admission.

S.K.Mishra, J.

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MISS MOUMITA ROY CHOUDHURY VERSUS ABHIJIT CHATTARJEE

Orissa High Court

MATA Nos. 41 of 2012

(Before The Honourable Kumari Justice S. Panda and The Honourable Dr. Justice B.R.Sarangi)

Miss Moumita Roychoudhury Appellant

Versus

Abhijit Chattarjee Respondent

For appellant : M/s. Subhasis Sen, M.Ganguly, C. Nayak. M/s Gautam Mukherjee, Partha Mukherjee, S.D.Ray, A.C.Panda, S.Priyadarshini

For respondent : M/s Er. Nagendra Kumar Mohanty, B.K.Mohanty, B.K.Mohapatra, M/s G.N. Rout, S.K. Das.

In the matter of an appeal under Section 19 of the Family Courts Act, 1984.

Date of Hearing: 13.08.2013

Date of Judgment : 27.08.2013

Hon'ble Mr. Justice Dr. B.R.Sarangi :— Against the judgment and decree dated 24.03.2012 passed by the learned Judge, Family Court, Cuttack in Civil Proceeding No. 815 of 2007 annulling the marriage by decree of nullity subject to payment of permanent alimony of Rs.5,00,000/- against the respondent-husband and directing to pay the said amount within three months, the present appeal has been filed by the appellant- wife.

2. The wife-appellant filed an application under Section 12 of the Hindu Marriage Act, 1955 admitting the marriage with the respondent-husband on 20.06.2007 as per the Hindu rites and customs at Cuttack. At the time of marriage, it is stated that her parents have gifted to her as well as the respondent-husband articles as per Scheduled-A of the petition. The appellant-wife also admitted that both the appellant and respondent were highly qualified at the time of marriage and she was serving as a Nursery Teacher at D.A.V. Public School, Shree Vihar Colony, Tulasipur, Cuttack and was getting a consolidated salary of Rs.5000/- and for the marriage, she left that job. The respondent has passed M.Sc. in Mathematics from IIT, Kanpur and has also done Post Graduate degree in Computer Science from Birla Institute of Technology and Science, Pilani, Rajasthan. After completion of his study, he served as a software engineer for some time and thereafter opened his own software business at Delhi in the name and style of "Towards Vision Technology Private Limited" and from his business he is getting more than rupees one lakh per month. She further alleged that there has been no sexual cohabitation among them and therefore their marriage dated 20.6.2007 is voidable and is liable to be annulled by a decree of nullity. She has prayed that keeping in view her mental agony, life and future, the respondent-husband is liable to pay her a consolidated compensation of Rs.10,00,000/- and also liable to return all her articles as mentioned in scheduled-A of the petition.
3. The respondent-husband filed his written statement stating that after the marriage he never expressed his inability to perform sexual act with the appellant-wife. He alleged that the appellant-wife intentionally avoided to have sexual intercourse with him and always disliked him and humiliated him also. He further urged that no dowry had been given to him at the time of marriage and the description of articles mentioned in the scheduled-A of the petition is imaginary one, thereby her request to return the articles cannot be allowed. He further vehemently urged that under the matrimonial law there is no payment of

compensation and as such, the appellant is not entitled to get such relief. According to him, the appellant-wife being a working lady having sufficient means, the prayer for decree of nullity annulling the marriage dated 20.6.2007 has to be unconditional.

4. In order to substantiate the contention, the appellant- wife has examined two witnesses, namely, P.W.1, she herself and P.W.2, her mother, Krishna Roychoudhury, whereas the respondent husband has examined one witness, namely, O.P.W.1, he himself. The appellant, has relied upon the document, marked as Exts. 1 to 7 and 7/a, whereas the respondent relied upon the documents, marked as Exts. A to E.
5. From the materials available on record, it is found that after the marriage was solemnized, both the appellant and respondent went to the house of the respondent at Hazaribag, Jharkhand but in the fourth night their marriage could not be consummated as respondent- husband did not establish physical relationship with the appellant-wife on that night. They stayed at Hazaribag from 22.6.2007 to 11.7.2007 in the house of the respondent-husband along with other family members and during the said period there was no physical relationship among them. However, the appellant-wife came to know from his family members that the respondent-husband is very shy and due to such shyness he was hesitant to keep physical relationship with her. On 11.7.2007, the appellant-wife came to the house of her parents for appearing in her 1st Year M.Sc. Examination. On 16.8.2007 while she was in the house of her parents, she heard the news of the death of her father-in-law and on 17.8.2007 she went to Hazaribag. After funeral ceremony was over, she came back on 28.8.2007 but during the period from 17.8.2007 to 28.8.2007 there was no physical relationship among them. For business purpose, the respondent-husband was staying at New Delhi in a rented house and after the examination was over the appellant-wife went to the house of the respondent-husband at Arjun Nagar near Sufderjung on 18.10.2007 and stayed with him till 1.11.2007. The appellant-wife felt that the respondent-husband was trying to dominate her and was not interested to keep any marital relationship including sexual relationship with her. This inflicted mental agony and shock on her and she suspected that the respondent- husband was impotent. At the same time, the respondent-husband was showing indifferent attitude towards sex and told that he has no sexual appetite or desire. In one occasion the appellant-wife forced him for cohabitation but the respondent-husband expressed his inability for the same thereby she became definite that the respondent-husband was lacking in capability for sex. Due to such conduct of the respondent husband, the appellant-wife became harassed and she lost her mental balance and therefore, the marriage has not been consummated at all. Due to the illness of the grandmother of the appellant, she came to Cuttack immediately where she disclosed before her friends and close relations about the impotency of her husband and thereafter her parents also came to know about the same. On being contacted, the family of the respondent-husband reluctantly admitted about his impotency and requested her to tolerate it for the sake of their family prestige and also stated that impotency could be cured through treatment.
6. Learned counsel appearing for the respondent-husband stated that on perusing the application filed under Section 12 of the Act by the appellant-wife, it would be seen that neither there is any pleading nor any prayer for claiming permanent alimony. On the other hand, appellant-wife has claimed compensation of Rs. 10 lakhs, on consideration of which the learned Judge, Family Court has granted Rs.5 lakhs as permanent alimony, which is beyond the pleading. Therefore, he vehemently urged that the appellant is not entitled to get any permanent alimony, save and except the compensation claimed in her application under Section 12 of the Act. He further urged that by granting such permanent alimony learned Judge, Family Court has exceeded his jurisdiction and therefore the impugned judgment to that effect cannot be sustained.
7. To the above contention, learned counsel for the appellant-wife states that though no relief has been sought in the application filed under Section 12 of the Hindu Marriage Act, 1955, hereinafter referred to as "the Act" though claim of compensation has been made but in effect the same amounts to relief for grant of permanent alimony and rightly the learned Judge, Family Court has passed the order granting permanent alimony of Rs.5 lakhs. However, he disputes with regard to the quantum of Rs.5

lakhs as permanent alimony keeping in view the status of the appellant-wife at par with the status of the respondent-husband. He has relied upon the judgments of the apex Court Vinny Parmvir Parmar v. Parmvir Parmar, AIR 2011 SC 2748, Vishwanath Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal, reported in AIR 2012 SC 2586 and U. Sree v. U. Srinivas, AIR 2013 SC 114.

8. In view of the aforesaid background of the case, the following questions arise for consideration in this case.
 - (i) Whether the marriage has been consummated between the appellant and the respondent?
 - (ii) Whether the decree of nullity annulling the marriage can be granted to the appellant?
 - (iii) whether the compensation claimed by the appellant can be equated with the claim of permanent alimony or not?
 - (iv) Whether the appellant is entitled to get any permanent alimony?
 - (v) To what order?
9. Marriage between the appellant and the respondent is not disputed. The appellant in her application under Section 12 of the Act, prays for a decree of nullity annulling the marriage dated 20.6.2007 on the ground that the respondent is impotent and their marriage has not been consummated since the date of their marriage. To such assertion, the respondent has neither denied specifically in his written statement nor has stated with regard to consummation of their marriage by sexual intercourse. On the other hand, in paragraph-17 of the written statement filed by the respondent-husband it is stated that the appellant-wife on each and every occasion has avoided to have sexual intercourse with him. At the same time, respondent-husband has also admitted that he has no objection if a decree of nullity by annulling the marriage is passed.
10. The appellant-wife has proved by convincing evidence available on record that the respondent-husband by his conduct has subjected her to cruelty. That apart, the appellant-wife has not produced any document to prove the impotency of the husband- respondent. Because of that reason the marriage has not been consummated. The respondent has not taken any step to have him medically examined by a competent medical officer to prove that he is not impotent. Even from the oral evidence adduced by P.W.1 nothing has been elucidated to discard her testimony about the impotency of the respondent. In view of such position, since the marriage has not been consummated due to impotency of the respondent-husband, learned Judge, Family Court is justified in annulling the marriage by passing a decree of nullity on the application filed under Section 12 of the Act.
11. In course of hearing on a query being made by the Court to the counsel appearing for both the parties, it reveals that there is no possibility of reunion by the parties. Therefore, the order passed by the Judge, Family Court annulling the marriage by a decree of nullity is not required to be interfered with. Thus, questions no. (i) and (ii) are answered accordingly.
12. So far as the question No.(iii) is concerned, in order to answer this question, it would be profitable to deal with the dictionary meaning of compensation and "permanent alimony".
 - "(1) The word "compensation" should be taken to mean the sum remaining after setting-off the gains from the amount of loss through the non-fulfilment of the contract. [Muralidhar Chatterjee v. International Film Co. Ltd., AIR 1943 P.C. 34:206 IC 1].
 - (2) The expression "compensation" ordinarily used as an equivalent to damages, although compensation may often have to be measured by the same rule as damage in an action for the breach. The term "compensation" as pointed out in Oxford Dictionary, signifies that which is given recompense, an equivalent rendered damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money,

of something lost or withheld. The term "Compensation" etymologically suggests the image of balancing one thing against another. Its primary signification is equivalent, and the secondary and more common meaning is something given or obtained as an equivalent. [Mohamed Mozahara Ahad v. Mohamad Azimadin Bhauinya, AIR 1923 Cal.507 at 511].

- (3) According to dictionary it means, "compensating or being compensated; thing given as recompense". In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. [Lucknow Development Authority v. M.K. Gupta, AIR 1994 SC 787].
- (4) Though the word "compensation" is not defined in the Act or in the rules it is the giving of an equivalent or substitute of equivalent value. It means when you pay the compensation in terms of money it must represent, on the date of ordering such payment, the equivalent value, (Para 24) Rathi Memon v. Union of India, (2001) 3 SCC 714:2001 SCC (Cri) 1311:AIR 2001 SC 1333.
- (5) The dictionary meaning of the word "compensation" is as under " Blacks Law Dictionary "money given to compensate loss or injury."

Websters Third New International Dictionary "the act or action of making up, making good or counterbalancing rendering equal:"

P.Ramanatha Aiyar: Law Lexicon "something given or obtained as an equivalent; ... an equivalent given for property taken or for any injury done to another;" The meaning of "permanent alimony reads as follows:-

"Alimony, signifies that allowance which a married woman sues for on separation from her husband.

As to construction and force of covenants in a Separation Deed. [See F. Strouds Judicial Dictionary] (Alimonia), the allowance which is made to a woman for her support out of her husbands estate when she is under the necessity of living apart from him. This provision is allowed to the wife during the pendency of a suit for divorce or judicial separation as well to provide the wife with the means to obtain justice as for her ordinary subsistence (Matrimonial Causes Act, 1950. Section 19 and 20). When there has been a decree of judicial separation, alimony becomes a permanent allowance, and is continued during the whole period of separation (Section 20). Upon a decree of divorce, the relief granted to a wife is called maintenance (q.v.). Upon an application for alimony, the court requires on the part of the husband a statement both of his casual and of his certain income to be set forth (Matrimonial Causes Rules, 1957, Rule 48). The wife, although the guilty party, is sometimes allowed alimony, or a provision by way of alimony subject to conditions, but alimony pendente lite is normally refused where the wife has been guilty of adultery. As a rule, maintenance is fixed at about one-third of the joint incomes of husband and wife if there are not and a larger amount if there are children to be supported by the wife; in the case of alimony pendente lite, the usual rate is one-fifth. See also, the Matrimonial Causes (Property and Maintenance) Act, 1958. [See Earl Jowitts The Dictionary of English Law, 2nd Ed. At 98-99].

13. Even though in the application filed under Section 12 of the Act, the appellant claims for compensation, in view of the analogy made in the foregoing paragraphs, the said compensation can be construed as alimony. Therefore, we do not have any hesitation to state that mentioning of compensation in the application under Section 12 of the Act amounts to claim of alimony by the appellant-wife. Thus, question no.(iii) is answered in favour of the appellant-wife.
14. Since there is no possibility of any reunion, what should be the just and proper permanent alimony that can be granted to the appellant to meet the situation. During pendency of this appeal, the appellant has filed Misc. Case No. 85 of 2013 under Order 41, Rule-27 read with Section 151 of the Code of Civil Procedure, 1908 by furnishing documents to be treated as additional evidence for determination of alimony. Apart from the same, Misc. Case No. 100 of 2013 has been filed under Order-6, Rule-17 of the

Code of Civil Procedure, 1908 seeking amendment of the appeal memo where she has given enhanced figure claiming higher amount towards permanent alimony. To the said petitions, objection has been filed by the respondent-husband denying the contentions raised in both the misc. cases. However, both the misc. cases are taken into consideration for determination of alimony in favour of the appellant.

15. Learned counsel for the respondent-husband relied upon the judgment passed in D. Balakrishnan v. Pavalamani, AIR 2001 MADRAS 147, Bhausahab alias Sandu s/o Raghuji Magar v. Smt. Leelabai w/o Bhausahab Magar, AIR 2004 BOMBAY 283 and unreported judgment of the apex Court in Poonam v. Mahendra Kumar (CRLMP 18899 of 2009 disposed of on 16.11.2009, arising out of the judgment and order dated 19.03.2009 in CRM No. 24684 of 2008 of the High Court of Punjab & Haryana at Chandigarh). So far as the judgments of the Bombay and Madras High Courts are concerned, the courts have held that permanent alimony can be granted on making an application furnishing all details regarding his/her own income or other property whereas the apex Court in Poonam (supra) has held that no alimony can be granted to the women who deserted the husband. The judgment of the apex Court is not applicable in the present context in view of the fact that the question of deserting by the appellant to the respondent does not arise in the case in hand, rather it is otherwise.
16. From the materials available on record, it is found that in paragraph-19 of the evidence adduced by the appellant, she herself admitted that she is working in D.A.V. Public School, Tulasipur, Cuttack as a primary teacher from 19.6.2008 and stated that her monthly salary is Rs.3500/-, but she being an employee, cannot be deprived of getting permanent alimony. In paragraph-17 she has stated that she has not filed any documents to show the business of the respondent in the name and style of "Towards Vision Technology" rather she has only filed a document showing payment of income tax by the respondent. However, vide Ext.1 she has proved that the respondent is the Director of "Towards Vision Technology" but referring to Exts. 1 and 2 neither the appellant nor her mother during course of examination have stated that they have no knowledge about the information contained in Ext.1. Therefore, no importance can be attached to Ext.1. However, referring to Ext.7, the income tax return for the assessment year 2011-2012 of the respondent, the appellant has stated that the gross income of the respondent is Rs.13,72,750/- and he was paying tax of Rs.2,42,899/- whereas the respondent in paragraph-26 of his evidence during course of examination stated that his earning is Rs.30,000/- per month from "Towards Vision Technology" and he is working as a consultant of some other firms. In paragraph-25 of his evidence he has stated that he gets remuneration at times for his other jobs and he also pays money to those firms. In paragraph-3 of the evidence, the appellant has stated that the respondent has completed his M.Sc. examination in Mathematics from IIT, Kanpur and he has also completed his Post Graduate Degree in Computer Science from Birla Institute of Technology and Science, Pilani, Rajasthan, and being a qualified person, it cannot be said that he has no income.
17. Apart from the evidence available on record during pendency of the appeal, Misc. Case No.85 of 2013 has been filed by producing additional evidence providing income tax return and share valuation certificate of the respondents company prepared by the Chattered Account. The same has been taken into consideration for determination of permanent alimony to be granted in favour of the appellant-wife.
18. In view of the materials available on record, since there is no possibility of any reunion between the parties, this Court has to grant permanent alimony to settle the dispute for all times to come. As it transpires from the record even in this proceeding the appellant has not filed any separate application seeking permanent alimony and maintenance. Even if no separate application has been filed, the Court can take into consideration the contention raised by the appellant at the time of hearing. Therefore, in order to consider this aspect for grant of permanent alimony, reference is made to Section 25 of the Act, which reads as follows:-

"Section 25. Permanent alimony and maintenance:- (1) Any Court exercising jurisdiction under this Act, may at the time of passing any decree or at 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 pay to the appellant 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 respondents 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.

- (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 may at the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem just."

A perusal of the above provision makes it clear that any Court exercising jurisdiction under the Hindu Marriage Act, before granting permanent alimony under Section 25 of the Act, is required to consider the following:

- (a) that the order granting permanent alimony is made at the time of passing any decree under the Act, 1955 or at any time subsequent thereto,
- (b) the income and other property of the applicant,
- (c) the respondents own income and other property,
- (d) the conduct of the parties, and
- (e) other circumstances of the case.

In the light of the language used in Section 25 of the Act, there is no dispute that it would be open to either party to claim permanent alimony and maintenance even before this Court. The powers of the appellate court are also indicated in Section 107 of the Code of Civil Procedure which provides that the appellate court shall have the same powers as are conferred on the original court. This too was based on the principle that the power which was available to the original court could be exercised by the appellate court also. It is clear from Section 107 of the Code of Civil Procedure as well as the language used in Section 25 of the Act, the appellate court viz., this Court has same powers as are conferred on the original Court.

19. The apex Court in *Vinny Parmvir Parmar v. Parmvir Parmar*, AIR 2011 SC 2748 held as follows:-

".....It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony."

20. In *Vishwanath Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal*, reported in AIR 2012 SC 2586 the apex Court while granting permanent alimony has observed that the amount that has already been paid

to the respondent-wife towards alimony is to be ignored as the same had been paid by virtue of the interim orders passed by the courts. It is not expected that the respondent-wife has sustained herself without spending the said money.

21. In *U. Sree v. U. Srinivas*, AIR 2013 SC 415, the apex Court while dealing with Section 25 of the Act has observed as follows:-
"..... while granting permanent alimony, no arithmetic formula can be adopted as there can not be mathematical exactitude. It shall depend upon the status of the parties their respective social needs, the financial capacity of the husband and other obligations."
In the said judgment the apex Court has also observed that "..... it is the duty of the court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man made misfortune....."
22. During pendency of this appeal, admittedly the appellant filed Misc. Case No. 63 of 2013 under Section 24 of the Hindu Marriage, Act, 1955 for payment of interim maintenance and litigation expenses but no order has been passed in the said Misc. Case.
23. In view of the fact and law discussed above, this Court has the power under Section 25 of the Act to award permanent alimony just like the original court. The respondent being the Director of a company, taking his social status and income on the basis of income tax return, share valuation certificate and the balance sheet of the company into consideration, it would be just and proper to award a sum of Rs.15 lakhs towards the permanent alimony in favour of the appellant-wife, though she has claimed compensation of Rs.10 lakhs and also return of her articles as mentioned in Schedule-A of the petition. Accordingly, we direct the respondent to pay a sum of Rs.15 lakhs within a period of two months.
24. At the same time, we do hereby hold that since the marriage has not been consummated due to impotency of the respondent-husband, learned Judge, Family Court is justified in annulling the marriage by passing a decree of nullity on the application filed under Section 12 of the Act.
25. With the above observation and direction, the appeal is disposed of.

Dr.B.R.Sarangi, J.

S.Panda, J. I agree.

S.Panda, J.

□□□

RITANJALI PATRA VERSUS BHABANI SHANKAR PATRA

Orissa High Court

MATA NO. 87 OF 2016

**(Before The Honourable Shri Justice I. Mahanty and
The Honourable Shri Justice K.r. Mohapatra)**

Ritanjali Patra Appellant

-Versus-

Bhabani Shankar Patra Respondent

For Appellant : M/s. Bharat Jalli & A.K. Parida

For Respondent: M/s. Yudhisthir Dalei, P. Sahoo, D. Mandal, & H. Pradhan.

From the judgment and order dated 03.12.2014 Sri Madanlal Khedia, Senior Civil Judge, Bhanjanagar in MAT No. 36 of 2013 and decree dated 14.04.2016 passed by Judge, Family Court, Berhampur in C.P. No. 152 of 2013.

Date of Judgment : 21.09.2017

Hon'ble Mr. Justice K.R. Mohapatra :—

Judgment and order dated 03.12.2014 passed by learned Senior Civil Judge, Bhanjanagar in MAT No. 36 of 2013 and consequential decree dated 14.04.2016 passed by learned Judge, Family Court, Berhampur in C.P. No. 152 of 2013 are under challenge in this appeal.

2. Marriage between the parties to this appeal was solemnized on 05.02.2010 as per Hindu rites and custom. They were blessed with a girl child on 21.11.2010. Due to dissension between the parties, the respondent (husband) filed C.P. No. 152 of 2013 before learned Judge, Family Court, Berhampur under Section 13 of the Hindu Marriage Act, 1955 (for short, 'the Act') for dissolution of the marriage with the appellant (wife) by a decree of divorce. The said case was subsequently transferred to the court of learned Senior Civil Judge, Bhanjanagar and was renumbered as MAT No. 36 of 2013.
3. Admitting the marriage and parentage of the child, the respondent in his petition under Section 13 of the Act contended inter alia that the appellant went to her parental home on 01.05.2012 with an understanding that she would come back within a month. When she did not return, the respondent went to bring her on 28.06.2012, but the appellant blatantly refused to accompany him. The respondent thereafter approached the permanent and continuous Lok Adalat at Berhampur in P.L.A. Case No. 56 of 2012 for restitution of conjugal rights. Due to non-cooperation of the appellant, the said case was dropped on 04.05.2013. Finding no hope of reunion, the respondent filed the aforesaid case for dissolution of their marriage by a decree of divorce.

Due to non-appearance of the appellant, learned Senior Civil Judge proceeded with the matter and passed the impugned judgment and decree ex parte, which is under challenge in this appeal under Section 19 of the Family Court's Act.

4. Learned counsel for the appellant-wife submitted that the appellant had entered appearance in C.P. No.152 of 2013 before learned Judge, Family Court, Berhampur on 05.07.2013 and prayed for some

time to file written statement. While the matter stood thus, the case record in C.P. No.152 of 2013 was transferred to the court of learned Senior Civil Judge, Bhanjanagar on 03.12.2013 and was renumbered as MAT No. 36 of 2013. Although notice was issued to the appellant (wife), she had never received any notice from the court of learned Senior Civil Judge, Bhanjanagar for which she could not know about the developments in the matter. The impugned judgment was passed on 03.12.2014 allowing the prayer of the respondent (husband) for dissolving the marriage by a decree of divorce. However, the decree could not be drawn up, due to the order of stay passed by this Court in TRPC No.125 of 2014, which was disposed of transferring the case to the Family Court, Berhampur. Accordingly, learned Senior Civil Judge, Bhanjanagar transferred the matter to the court of learned Judge, Family Court, Berhampur on 16.10.2015. On receiving the case record, learned Judge, Family Court, Berhampur drawn up the decree on 14.04.2016 without issuing notice to the appellant (wife). He further submitted that in the meantime, the respondent (husband) taking undue advantage of the ex parte decree of divorce had remarried. He, therefore, contended that there is no chance of reunion between the parties. He further submitted that while passing the ex parte decree of divorce, learned court below has not considered the question of grant of permanent alimony. He, therefore, prays for a direction to the respondent (husband) to pay a reasonable amount towards permanent alimony.

5. Learned counsel for the respondent, on the other hand, submitted that the appellant (wife) had been served with the notice of the proceeding by Family Court, Berhampur. However, it was subsequently transferred to the court of learned Senior Civil Judge, Bhanjanagar. Accordingly, notices were issued to the appellant (wife). She all along was aware of the proceeding, but preferred not to contest the same. On the other hand, assailing such transfer of the case record, she had moved this Court in TRPC No. 125 of 2014, which was allowed retransferring the case to the Family Court, Berhampur. By the time the order of stay of further proceeding in MAT No. 36 of 2013 was communicated to learned Senior Civil Judge, Bhanjanagar, he had already passed the ex parte judgment allowing the prayer of the respondent (husband) dissolving the marriage by a decree of divorce. Since no prayer was made for permanent alimony, learned Senior Civil Judge rightly did not allow the same. As such, due to her own latches, the appellant (wife) was not awarded with any permanent alimony. The prayer for grant of permanent alimony cannot be adjudicated in this appeal as the same is made for the first time in this Court. He further submitted that no petition to set aside the ex parte decree of divorce was filed by the appellant (wife) before learned trial court. Hence, this appeal is not maintainable.
6. It would be opt to mention here that vide order No.6 dated 20.01.2017, both the parties were directed to appear before the Coordinator, High Court Mediation Centre to work out a possibility of mediation. Accordingly, Mr. Bibhudananda Mohapatra, learned counsel of this Court was appointed as a Mediator by this Court. In course of mediation, the appellant (wife) expressed her unwillingness to return to her matrimonial home because of the reason that the respondent (husband) had remarried after passing of the ex parte decree of divorce. She, therefore, insisted upon grant of permanent alimony. In spite of best effort of learned Mediator, both the parties did not agree to the particular amount to be granted to the appellant(wife) as permanent alimony. As such, learned Mediator submitted his failure report on 26.04.2017. Thus, consideration in this matter is only with regard to the quantum of permanent alimony.
7. As there was no evidence available on record with regard to the income of the husband, this Court vide order No.10 dated 14.07.2017 directed the respondent to produce his latest salary certificate to enable the Court to assess the quantum of permanent alimony to be granted in favour of the appellant (wife). Pursuant to the direction of this Court, the respondent (husband) filed his current salary certificate on 08.09.2017, which has been taken on record. The current salary certificate issued by the Block Education Officer, Buguda, Ganjam in favour of the respondent discloses that the respondent is working as an Assistant Teacher in Project Primary School at Brudabanpalli under Block Education Office, Buguda, Ganjam. The salary certificate contains the salary particulars of the respondent for the months of January 2017 to June 2017. The gross salary of the husband for the months of January, 2017 to June, 2017 was @

Rs.21,614/- per month. The net salary of the respondent for the months of January to March, 2017 was @ Rs.17,064/- per month and from April, 2017 to June, 2017 it was @ Rs.18,579/- per month. Thus, taking into consideration the net salary of the respondent to be Rs.18,679/-, we proceed to assess the permanent alimony.

8. The Hon'ble Supreme Court in the case of Kalyan Dey Chowdhury -v- Rita Dey Chowdhury Nee Nanday in Civil Appeal No. 5369 of 2017 (disposed of on 19.04.2017) placing reliance on Dr. Kulbhushan Kumar -v- Raj Kumari and another, reported in (1970) 3 SCC 129, has laid down that the wife is entitled to 25% of the net salary of the husband towards her maintenance. Taking into consideration the age of the husband and his future prospect in service, the wife is entitled to Rs.4,644.75 per month towards monthly maintenance. Further, this Court in the case of Ruby @ Pritipadma Pradhan -v- Debasis Pradhan, reported in 2014 (II) ILR CUT 709, had laid down the broad guidelines to assess the quantum of permanent alimony. Taking into consideration the said guidelines and the fact that the age of the wife was 24 years at the time of filing of the matrimonial case before learned Judge, Family Court, Berhampur and the normal life expectancy of a female to be 70 years in India at the minimum, we compound it at 15 years. As such, the wife would be entitled to permanent alimony of (Rs.4,645/- x 12 x 15 =) Rs.8,39,655/- . Taking into consideration the rising trend of price and future prospect of the respondent (husband), we round up the permanent alimony at Rs.9,00,000/- (Rupees nine lakh). The parties to this appeal are blessed with a daughter, who is at present seven years old. Keeping in view her maintenance and education in one hand and the paying capacity of the respondent (husband) on the other, we feel it proper that a sum of Rs.3,00,00/- (Rupees three lakh) be deposited by the respondent in the name of his daughter in any Nationalized bank in a fixed deposit scheme. On attaining the age of 18 years, the daughter would be entitled to withdraw the said amount for higher education.
9. We, therefore, allow the appeal in part modifying the impugned judgment and decree as aforesaid and direct the respondent (husband) to pay a sum of Rs.9,00,000/- (Rupees nine lakh only) to the appellant (wife) towards permanent alimony and deposit a sum of Rs.3,00,000/- (Rupees three lakh only) in the name of his daughter, which shall be disbursed in the manner, as directed above. Payment of permanent alimony as well as deposit in the name of the daughter shall be made within a period of two months hence, failing which the appellant (wife) shall be at liberty to recover the same by taking recourse to law. In the circumstances, there shall be no order as to costs.

K.R. Mohapatra, J.

I. Mahanty, J. I agree.

I. Mahanty, J.

□□□

SMT. PRATIMA MOHAPATRA @ NEPAK VERSUS DIBAKAR MOHAPATRA

Orissa High Court

MATA No.93 of 2012

**(Before The Honourable Shri Justice Vinod Prasad and
The Honourable Shri Justice Pramath Patnaik)**

Smt. Pratima Mohapatra @ Nepak Appellant

-Versus-

Dibakar Mohapatra Respondent

For Appellant : M/s. R.K. Patnaik, G. Acharya, S. Jena, B.C. Parija and R.R. Rout.

For Respondent : M/s. D.P. Dhal, S.K. Dash, and A. Tripathy

In the matter of an application under Section 19(1) of the Family Court Act, 1984.

Date of Hearing : 11.11.2014

Date of Judgment :02.12.2014

Hon'ble Mr. Justice Pramath Patnaik :— This appeal has been filed by the appellant wife under Section 19(1) of the Family Court Act, 1984. The challenge has been made to the impugned judgment and order dated 04.11.2011 passed by the learned Judge, Family Court, Bhubaneswar in Civil Proceeding No.578 of 2011 inter alia to the extent of enhancement of permanent alimony from Rs.3,00,000/- (rupees three lakhs) to Rs.20,00,000/- (rupees twenty lakhs).

2. The facts as depicted in this appeal are that the present appellant filed a petition under Section 13 of the Hindu Marriage Act before the learned Judge, Family Court, Bhubaneswar inter alia praying for passing of a decree of divorce by dissolution of marriage and further prayer for a direction to the respondent to pay Rs.20,00,000/- towards permanent alimony to her along with cost of the suit vide C.P. No.578 of 2011.
3. The appellant and respondent being Hindus got married on 25.02.1988. The appellant after marriage stayed in her in-laws house and led conjugal life. It has been stated that the parents of the respondent constructed a building at Kamapalli, Berhampur. Thereafter the respondent started demanding more valuable articles and the house at Berhampur belonging to the parents of the appellant. Since the demand was not acceded to, the appellant was subjected to torture and mental cruelty and the situations became so unbearable that she had left her in-laws house. Since 13.09.1991, both the appellant and respondent have been staying separately. The appellant is staying with her daughter. During the subsistence of the first marriage, the respondent got married for the second time which shattered the hopes of the appellant for a reunion. Left with no alternative, the appellant filed the aforesaid proceeding seeking a decree of divorce and consequential permanent alimony. Despite service of notice, the respondent chose neither to appear nor to file any objection controverting the allegation/averments made by the appellant. The present respondent had earlier filed a suit in the court of learned Civil Judge (Sr. Division), Berhampur vide O.S. No.26 of 1993 seeking a decree of divorce which was dismissed on contest on 04.12.2002. Against the order of dismissal, the present respondent preferred an appeal before the learned District Judge,

Berhampur which was numbered as Mat Appeal No.02 of 2003 subsequently transferred to 2nd Addl. District Judge, Berhampur and renumbered as Mat Appeal No.1 of 2006. Subsequently, the respondent withdrew his appeal on 18.02.2006. During pendency of O.S. No.26 of 1993, the present respondent filed an application under Section 151, C.P.C. with a prayer to pass a decree of divorce without examining the parties. The present appellant who was the respondent in that case had filed counter and learned Civil Judge (Sr. Division), Berhampur after hearing the application, rejected the same.

Against that order, the present respondent filed a Civil Revision before the learned District Judge, Berhampur in Civil Revision No.31 of 2000 which was transferred to the court of 1st Addl. District Judge, Berhampur, renumbered as Civil Revision No.5 of 2000 and the same was dismissed vide order dated 23.02.2001. The present respondent preferred writ application vide O.J.C. No.9168 of 2001 challenging the order of dismissal in civil revision. This Court vide order dated 12.05.2008 disposed of the said writ application inter alia directing the trial court to dispose of the same as expeditiously as possible preferably within a period of four months, if there will be no impediment.

However, at the time of disposal of the writ application, the fact of dismissal of the O.S. No.26 of 1993 on 04.12.2002 was not brought to the notice of this Court.

4. On perusal of factual matrix, learned Civil Judge (Sr. Division), Berhampur while deciding issue nos.2 and 3 held that the respondent subjected the appellant with the cruelty and desertion. Since the allegation/averments made by the appellant has not been controverted/rebutted by the respondent, learned Judge, Family Court, Bhubaneswar has come to the categorical finding that there are just grounds for dissolution of marriage and the appellant is entitled for divorce. So far as permanent alimony is concerned, learned Judge, Family Court, Bhubaneswar has fixed Rs.3,00,000/- (rupees three lakhs) towards permanent alimony.
5. After perusal of the lower court records, we have bestowed our anxious consideration. Learned counsel for the appellant has assailed the impugned judgment and order dated 04.11.2011 on the following grounds :
 - (i) That the permanent alimony granted by the learned Judge, Family Court, Bhubaneswar appears to have been made without considering the cost of living in the present society as well as the economic condition of the appellant.
 - (ii) Learned Judge, Family Court, Bhubaneswar has erred in law in not taking into consideration the maintenance of the unmarried daughter who has attained marriage of the age and the marriage expenses to be incurred by the appellant.
 - (iii) Learned Judge, Family Court, Bhubaneswar has acted illegally in fixing the permanent alimony to Rs.3,00,000/- (rupees three lakhs). Although no rebuttal evidence has been made by the respondent regarding the income. On the other hand, learned counsel for the respondent husband has strenuously urged and vehemently defended the impugned judgment passed by the learned Judge, Family Court, Bhubaneswar.
6. Section 25 of the Hindu Marriage Act deals with permanent alimony and maintenance, which reads as under :

"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 the husband shall pay to the appellant 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 husband'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 husband."

7. Hon'ble apex Court in a catena of decisions has dealt with Section 25 of the Hindu Marriage Act pertaining to permanent alimony and maintenance. The guidelines propounded by the Hon'ble apex Court in landmark judgments in the case of Vinny Paramvir Parmar v. Paramvir Parmar, AIR 2011 SC 2748. Paragraph-12 of the said judgment held as follows :-

"12. As per Section 25, while considering the claim for permanent alimony and maintenance of either spouse, the husband's own income and other property, and the income and other property of the applicant are all relevant material in addition to the conduct of the parties and other circumstances of the case. It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, aving regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony."

8. In the case of U. Sree -vrs.- U. Srinivas, AIR 2013 SC 415, the Hon'ble Supreme Court has determined the permanent alimony taking into consideration the status of the husband and social strata to which both the parties belonged. Hon'ble apex Court has held that no arithmetical formal can be adopted but the alimony would depend on status of parties, their social needs, financial capacity of husband and other issues and the court has to ensure that the wife lives not luxuriously but with dignity with comfort. Therefore the quantum is to be fixed considering the status and strata to which the husband and the wife belong.
9. So far as the basis of the claim for permanent alimony of the appellant is concerned, the appellant in the proceeding before the learned Judge, Family Court, Bhubaneswar has submitted that the respondent being a practicing advocate of the Berhampur Bar Association, has been earning Rs.50,000/- per month. He has also got a double storied building getting monthly income of Rs.10,000/-. The respondent has also got agricultural land and from that sources is getting Rs.1,00,000/- per annum and also getting interest from fixed deposits. The said assertion of the appellant has gone un- rebutted and doctrine of non-traverse applies in this case.
10. During course of argument, it has been stated at the Bar by the learned counsel for the appellant that the appellant being a hapless and helpless woman has been taking utmost care of her daughter and in the meantime she has got married for which more than 11 lakhs has been spent. Apart from that the appellant has to maintain herself and she has to bear all her future medical expenses. The conduct of the respondent has put the appellant in a state of destitute.
11. The appellant at the time of filing of the MATA was 51 years and the life expectancy of a female being 70 years minimum, we feel it appropriate to enhance the monthly permanent alimony to Rs.5,000/- (rupees five thousand) per month and taking into consideration compounding the same for 19 years, the whole permanent alimony comes to around about Rs.11,40,000/- (rupees eleven lakh forty thousand) without deduction of any amount which has already been paid to the appellant wife under the direction of different courts in the meantime. The amount of permanent alimony will be paid to the appellant wife within a period of six months in three equal installments. First installment falling on 31st January 2015, second installment on 31st March 2015 and the last installment shall be paid by 31 st May 2015. On

LANDMARK JUDGMENTS ON ALIMONY & MAINTENANCE

failure of payment of aforesaid installments in time, the amount shall carry 7% interest per annum and the appellant will be free to take recourse to law for its realization.

With the aforesaid direction, we allow the MATA No.93 of 2012 but there shall be no order as to cost.

Pramath Patnaik, J.

Vinod Prasad, J. I agree.

Vinod Prasad, J.

□□□

LANDMARK JUDGMENTS ON

DIVORCE

REKHARANI VERSUS PRABHU

IN THE HIGH COURT OF KERALA

Mat. A. No. 87 of 2007

(Before Hon'ble Mr. Justice Kurian Joseph and Hon'ble Mr. Justice T.R. Ramachandran Nair)

Appellants: Rekharani

Versus

Respondent: Prabhu

Decided On: 04.07.2007

For Appellant/Petitioner/Plaintiff: R. Sudhir, Adv.

For Respondents/Defendant: D. Sajeev, Adv.

Acts/Rules/Orders:

Hindu Marriage Act, 1955 - Section 13(1), Hindu Marriage Act, 1955 - Section 13B; Marriage Laws (Amendment) Act, 1976 ;Buildings (Lease and Rent Control) Act, 1965

Cases Referred:

Sureshta Devi v. Om Prakash, I (1991) DMC 313 : AIR 1992 SC 1904; Janki Vashdeo v. Indusind Bank I (2004) CLT 577 (SC) : 2005 (2) KLT 265 (SC); Ummer Farooque v. Naseema 2005 (4) KLT 565; Ratheesh Kumar v. Jithendra Kumar 2005 (2) KLT 669

Background :

Family - O.P filed for seeking a decree of divorce under Section 13(1)(i) and (ia) of the Hindu marriage Act, 1955 - Appellant appointed her father as the power-of-attorney holder to prosecute the case - Joint petition filed for dissolution of marriage under Section 13(B) of the Hindu marriage Act, 1955 - Divorce granted - Appeal filed on the ground that the Appellant did not gave her consent for divorce.

Issues :

Whether the Court can enter a satisfaction regarding the areas required for a decree of divorce by mutual consent?

Holding :

Matters which required personal knowledge cannot be tendered through the power of attorney holder. If after filing the petition for divorce, the parties have met and lived as husband-wife they were not entitled to the decree for dissolution. If one party has change of heart or second thought then the Court has no jurisdiction to grant the decree for dissolution. Therefore, appeal allowed.

Disposition:

Appeal Allowed

JUDGMENT

Hon'ble Mr. Justice Kurian Joseph :—

1. Whether a power of attorney holder is entitled to present a petition for dissolution of marriage by a decree of divorce by mutual consent under Section 13B of the Hindu Marriage Act, 1955 is the interesting question arising for consideration in this case. The marriage between the appellant and the respondent was duly solemnized on 29.10.2001, After three years, on the grounds of illicit relationship with another person, and cruelty, the appellant filed O.P. (HMA) No. 1470/04 before the Family Court, Thiruvananthapuram (later transferred to the Family Court, Nedumangad) seeking a decree of divorce under Section 13(1)(i) and (ia) of the Hindu Marriage Act. In the meanwhile, the appellant left for Gulf. However she executed a power of attorney, appointing her father as the power of attorney holder to prosecute the case before the Family Court. According to the appellant, O.P. (HMA) No. 1470/04 was got dismissed as not pressed on 17.12.2005 and on the same day, a joint petition for dissolution of marriage by mutual consent was filed under Section 13B of the Act. The appellant was represented through the power of attorney holder and the respondent appeared in person. The Family Court took the statements of the appellant's father, the donee of power of attorney, and the respondent-husband on the same day and by order dated 20.12.2005, a decree was passed dissolving the marriage by a decree of divorce by mutual consent. At the risk of redundancy of the factual matrix, in order to appreciate the stand taken by the Family Court, it is necessary to extract two paragraphs from the judgment under appeal, which read as follows:
 4. The statements of both the Power of Attorney Holder of the 1st petitioner and the 2nd petitioner were recorded. Their statements show that petitioners 1 and 2 got legally married on 29.10.2001 and thereafter they resided together as husband and wife and that due to incompatibility of temperaments they are residing separately from 16.7.2004 onwards. The statements also show that the petitioners have decided to dissolve their marriage by mutual consent and that their decision is not vitiated by fraud, collusion, undue influence or misrepresentation. It is also clear that the marital tie is irretrievably broken and it is practically and emotionally dead and that there is no chance for any reunion. Hence the statutory requirement of waiting for a period of 6 months is waived. No children were born in the wedlock. All financial matters between the parties are settled.
 5. The marriage has been broken down and the parties can no longer live together as husband and wife. In the circumstances the life of the spouses shall not be allowed to put in perpetual agony and despair. Hence it may be better to bring the marriage to an end.

Therefore, the O.P. is allowed.

2. According to the appellant-wife, she met the respondent on several occasions at Thiruvananthapuram in the meanwhile and she has not given consent for a divorce. It is also contended that the procedural requirements have not been satisfied. Hence the appeal.
3. Section 13B of the Hindu Marriage Act, 1955 reads as follows:

13B. Divorce by mutual consent.-

 - (1) Subject to the provisions of this Act, a petition for dissolution of marriage by a decree of divorce may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

- (2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in Sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

The Court gets jurisdiction to consider a petition under Section 13B of the Act for divorce by mutual consent, only if a petition for that purpose is presented to the Court by both the parties to the marriage together. The parties to the marriage referred to in Section 13B are the husband and wife only. They have to present the petition themselves for dissolution of their marriage by a decree of divorce by mutual consent to the Court together. The grounds available to the parties on such a petition are, (1) the husband and wife have been living separately for a period of one year or more and (2) they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. If the petition is not withdrawn by the parties within 18 months, they may move the Court after six months of the presentation of the petition, but before 18 months.

Thereafter, the Court has to conduct appropriate inquiry to enter a satisfaction that consent was not obtained by fraud and that there is no collusion between the parties. The period of minimum six months' time is given in divorce by mutual consent, to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. The mutual consent should continue till the divorce decree is passed. The Court should be satisfied about the bona fides and consent of the parties. If the Court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality, as held by the Supreme Court in *Sureshta Devi v. Om Prakash*, MANU/SC/0718/1991 : [1991]1SCR274 . There has to be a lie over period, a transitional period; the purpose of such period is to give time and opportunity to the parties to have sound and mature reflections on their move.

4. Whether such a petition can be presented through the power of attorney holder of the party to a marriage and whether the Court can enter a satisfaction regarding the areas required for a decree of divorce by mutual consent is the further question to be considered.
5. The Supreme Court in *Janki Vashdeo v. Indusind Bank I* (2004) CLT 577 (SC) : MANU/SC/1030/2004 : 2005 (2) KLT 265 (SC), also has reiterated that a power of attorney can give evidence only in respect of acts done by him in the exercise of powers granted by the instrument, but he cannot depose for the principal in respect of the matter on which the principal alone can have personal knowledge. It was also held therein that the power of attorney..."cannot depose for the principal in respect of the matter, which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined". A Division Bench of this Court in *Ummer Farooque v. Naseema* MANU/KE/0402/2005 : 2005(4)KLT565 , on a question as to which sect a party to a marriage belongs to, held that "Power of Attorney can give evidence only in respect of acts done by him in the exercise of powers granted by the instrument, but he cannot depose for the principal in respect of the matter on which the principal alone can have personal knowledge". In *Ratheesh Kumar v. Jithendra Kumar* MANU/KE/0145/2005 : 2005(2) KLT669 , in the matter arising under the Buildings (Lease and Rent Control) Act, 1965, another Division Bench of this Court held that "A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff. The power of attorney holder of a party can appear only in his personal capacity and cannot appear on behalf of the party in the capacity of that party". Thus the law is well settled that in matters requiring personal knowledge, evidence cannot be adduced through a power of attorney.

LANDMARK JUDGMENTS ON DIVORCE

6. The extracted portions from the judgment under appeal would show that the power of attorney holder of the appellant-wife has deposed regarding the emotional incompatibility of temperaments between the wife and the husband. The power of attorney holder has also further deposed that the wife and husband have decided to dissolve their marriage by mutual consent and that the decision is not vitiated by fraud, collusion, undue influence or misrepresentation. Still further, it is deposed that the marital tie between the wife and husband is practically and emotionally dead and that there is no chance for union. It needs no further discussion to hold that those are matters requiring personal knowledge and in such matters, the evidence cannot be tendered through the power of attorney holder. It is significant to note that in this case the wife herself has stated in the appeal that, in the meanwhile the husband and wife met together, on many occasions. If that be so, certainly the Court lacked jurisdiction to grant the decree as the pre-conditions are not satisfied. Not only that, under Section 13B of the Act, a petition for dissolution of marriage by a decree of divorce by mutual consent is to be presented by the parties to the manage and not through the power of attorney holder. They should satisfy the Court that as on the date of presentation of the case that they had not been living together as husband and wife for more than one year, that they have not been able to live together and that they have mutually agreed for the dissolution. If after presentation of the petition, during the lie over period the parties have met and lived as husband-wife, they are not entitled to the decree for dissolution. The Court on motion after the lie over period has to satisfy that the parties had not been living together as husband and wife, at least for one year prior to the presentation of the petition, they are not able to so live together even after the presentation of the petition, and that they have not actually so lived during the lie over period either. The Court should a I so satisfy that the mutuality on consent persisted in both the parties during the lie over period. If one party has change of heart or second thought in the meanwhile, the Court has no jurisdiction to grant the decree for dissolution. The endeavour of the Court should be as far as possible to sustain and nurture the institution of marriage. The approach made by the Family Court in the instant case is patently erroneous and it is casual too. The inquiry by the Family Court should be with the parties to the marriage, regarding the essential ingredient for a decree of divorce by mutual consent under Section 13B of the Hindu Marriage Act.
7. In the result, the judgment in O.P. (HMA) No. 2439/05 on the file of the Family Court, Nedumangad is set aside and the appeal is allowed.

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TUHIN GUCHHAIT VERSUS ARATI GUCHHAIT

Calcutta High Court

First Appeal No. 136 of 1992

(Before Hon'ble Mr. Justice S.N. Mallick and Hon'ble Mr. Justice R.P. Gupta)

Tuhin Guchhait (Sri) ... Plaintiff;

Versus

Arati Guchhait (Smt.) ... Respondent.

Decided on March 14, 1996

Sec.13(1)(a) of the Hindu Marriage Act, 23(2)(3) and 22(3) of Hindu Marriage Act, 1955, Order 32A CPC sec 9 and 12 in the Family Courts Act, 1984, The legislative intent, in matters of matrimonial disputes, is that an attempt at settlement between the parties should be made and for that purpose, help of relatives of the parties or other social organisations can be taken. If the parties make such endeavours before any proceeding is started in court and a spouse approaches relatives or any social organisations or neighbours, for seeking aid in process of reconciliation and they make efforts, their efforts cannot be said to be coercion or pressure on any of the spouses. After all, in matters of family disputes, a certain healthy social pressure is a welcome measure to achieve conciliation between the parties. This is consistent with ethos of Hindu family and Indian society as a whole.

The Judgment of the Court was delivered by

Hon'ble Mr. Justice R.P. Gupta, J.:— The appellant is husband of the respondent. Having failed in his petition for obtaining divorce on the grounds of cruelty from his wife in the court of Additional District Judge (Sixth Court), Midnapore, vide judgment dt. 30th June, 1970, he approached this court in appeal for the same relief. The divorce petition was filed on 1st September, 1987. The parties were married on 2nd July, 1983 (17th, Asher, 1390 B.S.) according to Hindu Law and Customs in Village-Salmabad, Police Station, Pataspur where the respondent used to reside with her parents. The petitioner was at that time residing in Garho, Radha Nagar, Police Station, Belda. However, at present he resides in Digha, P.O. Siksha Sadan, Dist. - Madnapore where he is employed as a teacher in a school. At the time of marriage also, the petitioner was working in Sikaha Sadan High School in Digha, D.J. This school is far from his village Salmabad. So he used to reside as a paying guest in the house of one Baikunt Nath Kar at Digha, D.J. As he found it convenient, even after marriage he used to stay at Digha, D.J. in the House of Shri Kar from Monday to Saturday. He would go to his village every Saturday. He would return to Digha on Monday morning. That was his routine. The assertions of cruelty made by the petitioner-appellant against the respondent were that the marriage between them was not happy, that respondent is a cruel lady by nature that she refused to cohabit with the petitioner-appellant at any time except on the night of Fullsajya; that on consultation with the specialist doctor, he learnt that she had some physical defects; that the respondent became displeased on knowing her physical defects and was misbehaving with the petitioner-appellant, that she used to abuse him, that she used to behave rudely with appellant's mother and brother and never did any household work, that she visited the house of neighbours and relatives without anybody's permission and on being questioned by his mother, she would abuse her in filthy language; that she threatened to commit suicide, if any agitation was done against her wishes, that she kept contact with persons

who are inimical to the petitioner and raised false doubt about appellant's character, that she refused to live in the village home and demanded that she should be taken to the place of work with the appellant, that the appellant was unable to take her to Digha because there was no sufficient room there with the appellant, that in the year 1984, appellant's father died, the father and brother of respondent came at Sradha Ceremony and threatened the appellant in various ways asking him to follow the advice of the respondent and put pressure on him to take the respondent to his place of work and at that time, when the appellant expressed that he had no sufficient place in Digha, the respondent began to allege falsely that the appellant was a characterless man and threatened to teach him a lesson and that in July, 1986, the respondent verbally asserted before the Head Master of the Digha D.J. Siksha Sadan High School that the appellant had been leading an illicit life with Smt. Renu Bala Dutta, at the house of Baikunt Nath Kar and, that is why, he was refusing to keep her (respondent) at his place of work, that the respondent herself and through her supporters began to spread various false and scandalous allegations against the appellant in the village, that on 24th June, 1986, the respondent sent for the appellant, by a false message of mother's illness at Radha Nagar, and when respondent reached there, he was detained by the respondent and she and her party, exerted pressure on him and threatened to kill him and got a paper written and signed from appellant; that this gave mental shock to the appellant who filed a petition for divorce being Matrimonial Suit No. 126 of 1986 in the Court of District Judge, that on receiving notice of that suit, the respondent who is a worker of Mahila Samity, managed a social boycott of the appellant, and, in this way, the appellant was not even allowed to cultivate his lands in his village, that under such pressures, the petitioner was compelled to write a reconciliation letter on 13th July, 1986 at P.S. Belda at the dictation of the respondent and her brother and other supporters and he was compelled to withdraw the divorce petition, that thereafter the appellant left the house of Baikunt Nath Kar and began to live in the school Hostel while the respondent was still residing in Village Radha Nagar, that she would misbehave with the appellant's mother and brother; that in the month of August, 1986 the respondent came to Digha and complained to the Head Master of the school that the appellant was not keeping good relationship with her, that the Head Master made, arrangements in a portion of his own house for the appellant & respondent to live together, that the respondent lived in that house only for a few days and then went away to her parent's house and, thereafter on 2nd October, 1986, she along with her brother and other associates came to the school of the appellant and in the presence of assistant teacher, Head. Master and students insulted and abused the petitioner in filthy languages, such as 'characterless', 'Mewd' etc. and the respondent's brother dragged the appellant by catching hold of his shirt, that the respondent submitted an application to the Head Master on 23rd October, 1986, with false allegations against the appellant; that the appellant was mentally depressed and disheartened by such cruel behaviour of respondent and her supporters; that on 23rd February, 1987, again the respondent and her brother and other supporters came to the school of the appellant and they abused the appellant in filthy language in the presence of assistant, teachers of the school and others and that the petitioners-respondent falsely alleged that appellant had illicit connections with Rankala Dutta and the respondent and her supporters dragged the appellant and beat him up and thus insulted and humiliated him; that the respondent lodged a false complaint against the petitioner to the managing committee and to teachers; that this spoiled the peace and discipline of the school and the teacher's Council and the Head Master and the management expressed their displeasure and the appellant was led to think of committing suicide; that in this pressure, the appellant was mentally so disturbed that he sent his resignation from the post of teachership on 24th February, 1987, however, his resignation was not accepted and he withdrew his resignation on 8th April, 1987 by a telegram on that day and also moved an application on "10th April, 1987 for withdrawing his resignation. The resignation was allowed to be withdrawn by the Managing Committee as they found that the allegations against the appellant were false. It was further asserted that the respondent had been torturing the mother and brother of the appellant in Village Radha Nagar, and the respondent and her brother and other supporters would even beat them, that the respondent holds meeting of Mahila Samity from time to time in petitioner's house in the village and they shout slogans against the appellant and threatened to murder him. It is asserted that in this manner, the respondent has been insulting and humiliating the appellant and has indulged in character assassination of the appellant and has ruined his honour and prestige and the appellant suffers from mental agony.

2. The wife had controverted all the allegations of cruelty against husband. She has not disputed that after marriage, she started residing at Radha Nagar while the appellant used to work at Digha and he used to visit Radha Nagar at week ends. She, however, asserted that, the appellant never showed any warmth, towards her and expressed ill-feelings towards her. He made her mentally unhappy and ignored her and never offered conjugal warmth to her and even rebuked her alleging that she was unhealthy and sick. After some weeks, the appellant stopped coming to Radha Nagar even on Saturdays a number of times. She became anxiety-ridden. She made enquiries about the appellant with the help of her brother and father and they learnt about his having illicit connections with Renubala Dutta, a married daughter of Baikunt Nath Kar (who had deserted her husband). The respondent confronted Appellant's mother about this information, but the Appellant's mother kept quiet and so the respondent believed the information as true and became aggrieved at her plight and mentally broke down. She asserts that at the time of Sradha Ceremony of her father-in-law, she had, in fact, requested the appellant not to spoil her life and to take her to Digha and to live with her as husband and wife. The appellant rejected this request. At this, she confronted the Appellant with her information about him and Renubala Dutta. The Appellant became enraged and threatened never to live with respondent as husband and wife and even confessed his illicit connections with Renubala Dutta and as living with Renubala Dutta; the respondent broke down with sorrow and informed her father and brother about these matters and they persuaded the appellant to take her to Digha, but he would not agree. At this, there was exchange of hot words and altercations between them. Some relatives Of the appellant came to know of all these happening at that time. The villagers came to know of it. The father and brother of respondent felt extremely insulted and mentally shocked at the conduct of the appellant. They took the respondent to their home. After some period, she went to Digha to her husband. The appellant became agitated and ordered her to leave at once, asked her to reside at Radha Nagar, as there was no place for her in the house at Baikunt Nath Kar. When the respondent stressed that she should be kept at Digha, the appellant became extremely angry and abused her in filthy language and drove her away. Her brother was with her at that time. So, she was compelled to meet the Head Master of the School and apprised him of her sorrows. And she returned to her father's house, Few days later, she went to Radha Nagar and began to live there. The Head Master tried to persuade the appellant to mend his ways about his wife and to keep his wife or the matter may draw notice of the school authorities and other teachers. The Head Master made arrangements for the stay of appellant and respondent in a portion of his own house at Digha. The appellant then came to Radha Nagar to take the respondent with him. The relatives of the appellant and his neighbours had come to know of the conduct of the appellant and were displeased with him and bore disrespect towards him due to his own doings. They did not believe the appellant's promise to rectify his character and asked him to give a written promise to her to mend his ways. So, the appellant gave a written promise on 24th June, 1986. The respondent believed in the promise of the appellant made at that time. However, on returning to his place of work, the appellant again fell under the influence on Renubala Dutta and lodged quite false complaint to SDO and SP against the respondent and started a suit for dissolution of marriage in the court of District Judge, Midnapore. After this, the relatives of the appellant reminded him of promise and they met him at P.S. Belda in the presence of officer-in-charge of Belda Police Station. Then the appellant gave written promise on 30th July, 1986 that he would have a-normal conjugal life with respondent. He promised to take her back with him after finding residence as soon as possible. Then, the appellant left the house of Baikunt Nath Kar and began to live in a hostel, but made no effort to find a house to take the respondent with him. At last, on August 1986, the respondent went to Digha and met the Head Master of the school and sought his help. The Head Master called the appellant and offered to him that he live with the respondent in a portion of the house of the Head Master. The appellant had thus to agree to this suggestion and the parties started living in a portion of the house of the Head Master. The Head Master found out a residence for them, but the appellant suddenly disappeared from his place of work. In these circumstances, she had to return to her father's house. She gave an application to the Head Master stating the conduct of the appellant. The school authorities felt extremely dissatisfied with the conduct of the

appellant and wanted to start proceedings against him. At that stage, the appellant, confessing his guilt, tendered his resignation from his job of his own accord. However, his resignation was not accepted and the school authorities gave him another chance of leading an honest normal life with the respondent. The appellant gave written promise to the school authorities to cut off all connections with Renu Bala Dutta and undertook to lead a normal conjugal life with his wife. So, the school authorities allowed him to join duties again in the school. It is, however, urged by the respondent that he could not cut off connections with that lady and filed his present divorce petition on false grounds. The main issue which arose for adjudication before the trial court was whether the wife had treated the husband with cruelty. This issue was decided against the husband-appellant after considering the pleadings and the evidence of ten witnesses produced by appellant and four witnesses examined by the respondent wife. The Id. Additional District Judge examined the alleged cruelty under Five Heads:

- (i) rude behaviour of the wife towards the appellant and his relatives.
- (ii) completely avoiding sexual intercourse with her husband except on the first night.
- (iii) raising unreasonable accusation of the adultery with Renu Bala against the husband by the wife.
- (iv) instigating the neighbours and relatives of the appellant against him by making false allegations and thus leading to social boycott of husband and his family by neighbours and relatives.
- (v) Making false complaints to the Head Master and colleagues of the appellant and to the school authorities, thus humiliating the appellant.

3. The Id. Additional District Judge found total absence of any evidence on the allegation of rude behaviour of the respondent towards appellant's relatives. He considered the evidence of the appellant (PW 1) and his brother Tusar Kanti Guchhait (PW 9). The evidence was that after the wife was examined by a doctor namely Dr. P.L. Kajhi of Contai, she started behaving harshly towards the appellant. The wife had denied any examination of her by the doctor and had denied any physical defects in herself. The doctor was not produced in evidence. No prescription of the doctor was brought on record nor any report of the doctor was produced. The appellant alleged that all the documents were with the wife. That was an easy way to explain away non-producing of the documents, even if they did not exist. The Id. Additional District Judge noticed that even if this allegation of the husband (about documents being with wife), was correct, he could examine the doctor to show that the wife was examined. The trial Court thus found the allegation of physical defect in the wife or her examination by the doctor as unfounded. The evidence of these witnesses about wife's harshness towards the husband or other relatives was disbelieved. The second ground of cruelty i.e. denial of conjugal rights of the husband, was also found not proved on finding that. Pleas of both sides are contradictory, on this aspects and each is putting blame on the opposite side. However, the trial court also noticed from a letter exhibit A written by the husband to the wife about fifteen days after marriage, that the husband had been having sexual relationship with wife and had expressed strong desire for further sexual relationship on coming to the house. The trial court observed:

“If the wife really resisted the advances of her husband to have sexual intercourse, then the petitioner would not have written a letter like exhibit A (an admitted document)”.

The trial court was also persuaded by the fact that the wife, all through, wanted to reside with the husband; she would not have so desired, if she wanted to avoid sexual relations with the husband. She even resided in the house of her father-in-law while the husband not visiting her.

4. On the third aspect of unfounded allegation of illicit connection between husband and Renu Bala Dutta, the trial court, on a consideration of documentary or oral evidence, came to conclusion: —

“In the facts and circumstances of the case, we find that the wife raised bona fide allegations, touching the character of her husband as she had reason to believe the involvement of her husband with the woman-Renu Bala Dutta.”

In reaching this conclusion, the Id. trial court was persuaded by several circumstances appearing in evidence:

- (i) The husband avoiding to go to his wife at Radha Nagar on flimsy ground, even as early as after a month of marriage (letter exhibit A1, dt. 27th August, 1983, written by Husband and Wife along with oral evidence was relied upon),
- (ii) Exhibit D1 letter dt. 27th December, 1986 written by husband to some members of staff of his school, admitting that he did not have normal relationship with his wife and was not giving her proper respect and promising to normalise the relationship in future,
- (iii) The fact that the wife was trying again and again to live with husband at Digha and he was resisting on flimsy ground of non-availability of house after a few days living with wife.
- (iv) Undertakings dt. 24th June, 1986 and 20th May, 1987 (Exhibit B and Exhibit D) in writing given by husband mentioning that he (husband) would sever all connections with Renu Bala Dutta. The undertakings were in his own writing and signed by him and 1st one was given to the relatives and neighbours of the husband. The second writing was given to the Managing Committee of the School where he was an employee.

5. On the fourth allegation, also the trial court found, after going through the evidence of the witnesses, that it was not established that the wife instigated the co-villagers and relatives of the husband to humiliate the husband or his family and the trial court observed:

“We have got the impression that because of the peculiar behaviour of the petitioner towards his wife, the co-villagers and agnates of the petitioner might be agitated and might resort to social boycott in order to create some kind of social pressure on the petitioner to lead normal life with his wife. But, for that, we cannot come to hasty conclusion that the respondent was in any way responsible for these incidents and in this way it cannot be said for a moment that these incidents would constitute mental torture on the petitioner.”

6. Regarding the last item of cruelty also the trial Court found against the husband. The trial Court said that if the aggrieved wife goes to the authorities concerned to complain of her husband, she cannot be held liable for committing cruelty on such husband. The Court observed: —

“We have seen from the entire facts and circumstances that poor wife had enough reason to make the complaint before the Head Master and before the School authority.” The trial Court held as unbelievable and false, statement of some of witnesses of the husband that he was abused and physically assaulted by wife and her relatives in the School area in the presence of his colleagues and students. That was held to be a concocted evidence. No colleague, teacher or student was examined as witness. The respondent had examined the Head Master herself and the Head Master did not support any such incident and spoke of sudden disappearance of the husband from the accommodation supplied by him to the couple. Thus the petition was dismissed by the trial court.

7. In the appeal, the assertions, of the Id. Counsel for the husband-appellant is that the trial Court has not properly appreciated the evidence and so the conclusions reached are erroneous. According to him, the explanation given by husband about the use of pressure and force on him for taking the undertakings in writing by wife and her supporters, have been erroneously ignored. Similarly, the circumstances have been misinterpreted in favour of wife. The fact that the wife made complaints against the husband to the school authorities should be taken as proof of dishonouring and humiliating him before his colleagues and employers and on the same ground, his assertions that he was mishandled and abused by wife and his

relatives and supporters should have been accepted when it is undisputed that the wife and his relatives went to the school and made him to write an undertaking. It is urged that if the alleged undertakings, containing admissions of connections with Renu Bala Dutta are ignored as having been obtained by force and coercion, the other evidence of the respondent to that effect loses all its credibility and, in fact, adds to the weight of the petitioner's-assertions that the allegations about Rebu Bala Dutta were unfounded and amount to mental cruelty on-the husband. It is asserted that there is a wide age difference between the appellant and Renu Bala Dutta and she was so much elder to him that there could be no chance of any indecent liaison between them. It is urged that this has been wrongly ignored by the trial Court and further that the marriage has been irretrievably broken down. There was no sexual relationship between the parties after the first night and there could be no reason for it, except certain physical incapacity of wife-respondent for which reason the wife felt annoyed and created a vicious atmosphere. It is urged that the compulsions of the situations of the husband about non-availability of independent residential accommodation with him at Digha and his financial incapacity, have been taken as evidence of his non-desire to life with his wife which is erroneous approach. It is argued that social boycott of the appellant and his family members did take place, that was because of the complaints of wife. It should be taken as cruelty upon the husband giving him a right to seek for dissolution of marriage. The Id. Counsel urges that the evidence of witness (PW 5) before whom he (husband) was mishandled by wife and his relatives in the school before his colleagues and students has been wrongly disbelieved and discarded.

8. We have heard the Counsel for appellant as well as respondent at length and we have again gone through the entire evidence including statement of witnesses and the documents, for ourselves to weigh the evidence on the various allegations of cruelty.
9. Cruelty is the only ground for seeking divorce u/s 13(l)(a) of the Hindu Marriage Act. In this case, the following circumstances are undisputed facts: —
 - (i) marriage on 2nd July, 1983.
 - (ii) wife residing in Radha Nagar after marriage while husband resided in Digha where he was employed in a school,
 - (iii) husband visiting wife at week-ends at his father's house only for a few weeks after the marriage and then erratic in those visits,
 - (iv) wife pressing upon the husband to take her with him to Digha for living and husband not doing so either out of inability or unwillingness,
 - (v) The husband was residing at Digha as a paying guest in the house of Baikunt Nath Kar whose one daughter Renu Bala Kar (Dutta) resides in that house. She was separated from her own husband.
 - (vi) The husband, Appellant filed a divorce petition against the wife as a Matrimonial Suit No. 126/1986 before August 1986 which he withdrew before October, 1986.
 - (vii) The Head Master of the school at Digha provided one room to the couple to reside together, but they lived together only for three or four days and thereafter either the husband went away or the wife left.
 - (viii) On 23rd October, 1986, the wife had filed an application before the Head Master of the School demanding that the husband should live with her at, Digha and should give her the status of her wife,
 - (ix) Circumstances arose in the relationship between the husband and wife wherein the husband had written various undertakings either voluntarily or under pressure (as claimed by him) at least on three occasions that he would have normal relationship with his wife, that he would give up all his connections with Renu Bala (Dutta) and that he would keep his wife with him and give her the status of his wife.

10. Some of the disputed pieces of evidence in this case are the various undertakings and letters containing admissions of the husband-appellant. The question is whether they were written by him under physical coercion and fear or voluntarily, faced with an unjust situation created by himself towards his wife and out of regret and feeling of remorse for his own conduct. The believability and non-believability of witnesses is a factor to be considered in the overall circumstantial background.

While going through the entire evidence produced by parties in the light of the prevailing circumstances, this court feels that it must be kept in mind that while a wife is expected to give proper consideration to circumstances of her husband including financial circumstances and needs of his family to a certain extent, she is not precluded either in law or in propriety to complain about excesses wrought upon her, she is not expected to suffer cruelties of her husband, silently. Of course, if circumstances create adversity in family, that would not be called cruelty of the husband on her and she has to suffer adversity with the husband and will not be justified in bringing disrepute to her husband for the adverse circumstances by shouting from the house top about the adverse circumstances. At the same time, it is also clear to us that a wife can insist upon her husband to keep her with him to perform his matrimonial obligations towards her, unless the circumstances compel the husband to live away temporarily from matrimonial home for his work. The wife, in this case, had a grievance that the husband was not residing with her. The husband explains that his financial condition was not so good, as to be able to afford two homes, he being the sole bread earner of his family, that is himself and his family. It is really a strange and unacceptable explanation, on his part. He was living at least five days a week at Digha as a 'paying guest.' So, he must have been paying for his stay and food. He does not explain how much he was spending monthly out of his income there. It is common knowledge that expense as a paying guest is much more than expense incurred while staying with family. A kitchen run for husband and wife can hardly be more costly than the expense incurred by any of them singly for staying as a paying guest. In the former case, the wife does the labour of cooking and cleaning. Thus, in any case, so far as these parties are concerned, he was running two establishments; one for himself as a paying guest and another for his wife and parents at Radha Nagar. If he was not making any payments at the house of Baikunt Nath Kar, the big question would be why not and that, by itself, would also be a suspicious circumstance against him. The appellant has narrated in the witness box as PW 1 that due to financial stringency, it was not possible for him to spend Rs. 700 per month to run a separate establishment at Digha and so he could not take his wife with him to Digha. The husband admitted that ever since their marriage, his wife requested him to take her to his place of work so that she could live with him at Digha, but he was compelled by his financial stringency, not to concede this wish of his wife. He, however, did not explain what was his salary and what was his other income from land, although he said that the family had agricultural land which used to be cultivated. He did not say how much he paid as a paying guest at the house of Mr. Kar. The appellant has produced as witness, his younger brother - Tushar Kanti Guchhait. He appeared as a witness No. (9). He is about six years younger to petitioner. In the year 1989, he gives his age as 33 years.

So, at the time of marriage of petitioner in the year 1983, he must have been 27 years old. He has not stated what occupation he has followed. This witness narrated that their total land was about seven acres. This witness narrated that he pays maintenance in the form of food and clothings to the respondent and pays even expenses for her coming to the court during litigation. He said that they (brothers) are in joint cultivation of the lands and had income of the properties enjoyed by all of them. It has not been suggested even to respondent, appearing as her own witness No. 3, that the financial condition of the appellant-petitioner warranted his separate stay from her. Considering this nature of entire evidence on record, on this aspect, it can be easily stated that financially speaking, if the husband made attempts to keep the wife with him at Digha, it could not create an unbearable extra financial burden on him or a financial doom for his parents on brothers or situation of total non-support for them. So non-fulfilling her wish to take her with him, by making arrangements for a house at Digha even after three years of marriage, was unjustifiable. The insistence of wife to live with her husband was justified.

11. Now, let us turn to the justification for allegations against the appellant regarding Renu Bala Dutta. There is no doubt that she was in her father's house, the same house where the appellant was residing. She was estranged from, her own husband. The appellant was avoiding to take his wife with him to Digha and was continuing to reside in the house of Baikunt Nath Kar. We do not know on what terms he was residing there as the appellant does not say what he was paying for his boarding and lodging there. The wife never saw him in company with Renu Bala. She does not say so. However, she learnt of their relationship because of information received by her from her father and brother who made inquiries when the appellant failed to visit her wife on week-ends. Let us see what happened when she made these allegations. On 25th June, 1986, the appellant's husband gave an application to S.P. Midnapore and another to SDO, Midnapore. These are exhibits 8(a) and 8 (b). In these letters, he complained that on the previous day, that is, 24th June, 1986, while he was in his house, his wife—Arati Guchhait along with some of his hostile relations such as Sri Badal Guchhait, Bijan Guchhait and Kamal Guchhait with other persons, attacked him and threatened that he would be physically assaulted and his brothers will be socially boycotted and that against his Will and forcefully caused him to write on a paper as dictated by them and that whatever had been written on that paper was completely false and he had to write out of fear for his life. Bijan Guchhait was stated to be Arati's sister's husband. This application was given to two authorities noted above.

Let us see what was written on 24th June, 1986 by the appellant, that is an undertaking exhibited as 'B'. It is titled as letter of undertaking in the presence of neighbours of Radha Nagar, Purba Para, dt. 24th June, 1986. It is in the writing of this appellant and signed by him. The undertaking is to the following effect, after narration of marriage between the parties.:

“As good relationship was not prevailing between us for quite sometime past.

On 24th June, 1986, Tuesday in the Evening on the basis of a discussion in presence of my relatives and neighbours. I hereby promise to maintain good relation between us on the following conditions: —

1. I shall leave the present residence at my place of work and reside at a boarding
 2. I shall cut off all connections with Renu Bala Kar (Dutta) from today.
 3. Except in unavoidable circumstances, I shall stay at home on every Saturday and Sunday and on other holidays.
 4. I shall take all responsibilities as head of the family.
 5. My relatives or neighbours will not be responsible if any accident takes place regarding my life after writing this letter of undertaking.
 6. If there be any breach of relationship as written above, then further decision taken by the neighbours shall come into force.
12. This writing was made by the appellant in his own house as the place of writing is recorded in the undertaking itself. Intrinsically considering it, it is an undertaking recorded on the basis of a discussion between parties in the presence of his relations and neighbours. It is the first writing in which name of 'Renu Bala' is mentioned. The father of the appellant had died two years earlier on 26.6.84. Even thereafter, the wife of the respondent was continuing to reside in the house of her parents-in-law while the husband was continuing in Digha and was not visiting her even on week-ends. According to the evidence of wife, she had learnt about the connections between her husband and Renu Bala after the death of the appellant's father. An objection had been raised at the time of Sradha Ceremony then. So, this aspect was simmering between me parties ever since. The husband in his evidence in court has not narrated what force was used on him to coerce to write this undertaking, exhibit 'B'. The husband has stated that he was pressed by some of his relatives (agnates) and his wife and her father and brother to take her to Digha at the time of Sradha Ceremony of his father. He expressed his inability due to

financial stringency. Then in July, 1985, (one year later) the respondent's wife went to the school to the Head Master and complained that he (appellant) was involved with the daughter of Baikunt Nath Babu and so he (appellant) was not taking with him. In July, 1985, he was called home on an information of illness of his father and mother, but when he reached home, he found the father and brother of his wife in his house with his own relations including his mother in the house. At that time, the brother of the respondent asked him to give him undertaking to take the respondent to Digha and to leave the house of Baikunt Nath Kar and that there was threat to murder him. So, he was forced to give a writing to that effect. Then, he filed Matrimonial Suit No. 126 of 1986 before District Judge, Midnapore.

13. Thus, what the appellant is narrating relates to some incidents in July, 1995 and some writing of that time, but the present writing is of 24th June, 1986. In the year 1986, this appellant had filed an earlier suit for divorce against the respondent. But that was withdrawn soon. The copy of that petition has not been placed on record, but he had explained that on receiving summons, of the suit, his wife was angry and with the help of the people of the village and others, she created pressures on his brothers, threatened his family, with ex-communication at that time, the cultivation was stopped by boycott and so as a result of this pressure, he withdrew that case. It was 22nd October, 1986, that his wife had gone to the Head Master at Digha, according to the witness. It may be kept in mind that in the house of the appellant, there were his two brothers and his mother. There is no allegation that he was beaten before writing mis undertaking dt. 24.6.88. The brother of the appellant appeared as PW 9. He narrates that one day in June, 1986, he found that the appellant in the House at Radha Nagar. His sister-in-law (respondent) procured the presence of some of her neighbours and agnates (relatives) of appellants and there was a meeting. They created pressure on the appellant to take his wife to Digha. The appellant expressed that no proper accommodation was available there and that he had financial stringency. The people assembled, pressurised him to give an undertaking, and so his brother gave an undertaking. Next day, his brother went to Digha. But first, he lodged a report to SP and SDO, then filed a divorce petition and he (appellant) was pressurised by neighbours to withdraw and case "or there would be social boycott. They were actually socially boycotted for fifteen days and they could not get their lands cultivated. So, his brother withdrew the matrimonial suit. There was a settlement at the police station in his presence-before the suit was withdrawn. That settlement is Exhibit-5. It is dated 30.7.86. This is signed by the appellant and others. It is interesting to note that this written settlement is signed by the brother of the appellant also, namely PW 9, and seven other persons of the village including Kedar Nath (RW 1). This document records that the appellant withdraws his complaints to SDO and SPr dt. 25th June, 1986 against his wife and that he settles the matter of disagreement with his wife and that he will not quarrel with his wife and that he would withdraw the divorce suit by 18th August, 1986 and that his brother or mother will not assault or provoke his wife and that his wife will not misbehave with her mother-in-law in relation to past conflict. From this it appears that the husband had filed the suit of divorce before 30th July, 1986, that is soon after the undertaking, exhibit 'B' was written by him. PW 9 alleged that within six months of the withdrawal of the former suit, his brother filed the present suit. Again, his sister-in-law (Respondent) had continued to reside in Radha Nagar even after withdrawal of the present suit. The brother (appellant) did not visit the house at Radha Nagar after withdrawal of suit. The date of the present suit was 1st September, 1987. This witness said that his sister-in-law did not coerce him to execute the deed, but his co-villagers coerced him after the suit was filed and summons was received by the respondent. According to this witness, he and his other brothers were coerced by the villagers to give transfer deed (sale deed) of joint lands to the extent to their 2/7th share in favour of the respondent. An important part of the statement of this witness is that he has still affection towards his sister-in-law, the respondent, and vice-versa. This witness and respondent and other family members live together affectionately and due to the respondent's conduct or behaviour, there is no friction in the family. The witness RW 1, Kedar Nath, has narrated that, in fact there was a 'sallish' (reconciliation meeting of the villagers) on the basis of which it was decided that parties would live together and a writing was prepared in the village and that was signed by the parties.

Then, it was taken to the P.S. and given there. No pressure was put on Tuhin Babu (appellant). Although he put his signatures against his wish, but there was no boycott.

14. There is one more important document is worth consideration, with respect to the alleged relationship between the appellant and Renu Bala and the allegation of coercion in getting writing about her from the appellant by the respondent-wife. It is exhibit D'. It is letter dt. 20th May, 1987. It is addressed to the "Respectable Managing Committee and the teachers of Digha, D.J., Siksha Sadan." The appellant undertook that in the interest of school and education, he shall exhibit the qualities of a teacher in his behaviour and that he will obey their direction in all respect and: "I state that in order to get rid of the ill-repute spread in my life regarding Smt. Renu Bala Dutta, I shall never come in contact with Smt. Dutta, if I do, I shall lose eligibility of my service in the institution." A copy of this letter was kept in the custody of Sub-Inspector of School, Digha and one copy with the Head Master of the School. Another undertaking of a same type is dt. 27th December, 1986. It is Exhibit DI addressed to the Secretary, Staff Council, Digha, D.J. Siksha Sadan. It refers that a meeting has been held on the request of wife Arati Guchhait and further:

"Till today, I did not behave normally with my wife and I did not give her due respect of a wife. In the previous meeting of Staff Council, I promised to maintain normal relations with my wife. But as I did not act according to my promise, I beg pardon at the meeting. I have stated the previous fault of mine and I do hereby promise before the meeting that I shall lead normal conjugal life with my wife and I shall give due respect to my wife." There are some other promises also which need not be specifically referred. This undertaking was written and signed by the appellant in the presence of 28 persons including Sri Debi Prasad Maiti, the Head Master of the School. The Head Master, as RW 4, says that the respondent-wife was approaching the Head Master and the other teachers of the school to persuade the appellant to rehabilitate her as a respectable wife with conjugal rights due to her. RW 4 came to know the respondent as she filed an application with him due to her matrimonial dispute with her husband. She visited school a number of times. In that connection, she moved an application on 22nd October, 1986 to intervene in the dispute with her husband. He called a meeting of the Staff Council in the presence of parties. The Staff Council, as a result of a discussion passed resolution which was recorded in the Resolution Book. The appellant assured them to compromise the matter with his wife and gave a written undertaking. RW 4 proved that undertaking, exhibit 'D' as has been referred to above. It was written by the appellant himself. Another undertaking given by the appellant was on 27th December, 1986. This was signed by teachers of the school and some members of the Managing Committee who were present. It was also proved by the witness. The witness narrated that the appellant did not want to bring his wife on the plea of non-availability of accommodation at Digha. So, he (mis witness) gave them one room in his own house and asked the appellant to reside there with his wife. The appellant's wife resided there for about fifteen days and then he simply disappeared. In this background, even the respondent had to leave that place. This happened sometime in 1986. Following these incidents, the respondent had filed an application before the Staff Council informing of all the incidents. The Head. Master deposed that the respondent never insulted her husband in front of the, teachers and students in the school and she always met her when she went to school. In fact, the respondent touched the feet of her husband and requested him to compromise the matter, but the husband did not change his behaviour. When the husband sent a resignation in 1987, the wife and some villagers had requested the School Authorities not to accept the resignation. So instead of accepting the resignation, he wrote to the appellant, if he really wanted to resign. He said that the appellant started living in Hostel since the time he withdrew his resignation letter and was allowed to rejoin. The wife respondent appearing as RW 3, has admitted that on receiving notice of first divorce petition, she approached some him, and a decision was taken at the local Police Station that suit would be withdrawn. She has denied of a social boycott of her husband's family or forcing the husband to come to compromise even after the present suit was filed. She complained to the villagers and then also there was discussion. She approached the school Authorities several times and had moved the

application in the committee of the Head Master and the Staff Council. The cause of differences between them was that the husband was not returning to her even on Saturdays and Sundays and through enquiry, made by her brother and father, she learnt that he had a liaison with Renu Bala and told her husband about it.

So, this is the evidence on the allegations of coercion on the husband to give the undertakings. So this husband gets pressurised even in presence of his grown up brothers and in his own house and time and again and even after complaining to police that he was pressurised. It will be called a mere pretention to avoid effect of his own admissions. We must note that intervention of social institutions and relatives of the disputing parties, in matrimonial disputes, is a welcome factor and is, in fact, much desired as per the provisions of the Hindu Marriage Act, 1955 and an attempt to lead the parties to reconcile, even after they have approached the court, is a golden thread which runs through the various statutes on the subject.

It has been recognised in the mandatory provisions of S. 23(2)(3) of Hindu Marriage Act, 1955. The provision is that before proceeding to grant any relief under this Act, it shall be the duty of the Court, in the first instance, in every case, where it is possible so to do, consistently with the nature of the circumstances of the case, to make every endeavour to bring about reconciliation, between the parties. S. 22 (3) provides that for the purpose of aiding the court, in bringing about such a reconciliation, the court, may, if the party shall desire or if the court thinks it just and proper so to do, adjourn the proceedings in his own power, not exceeding fifteen days and refers matter to any person named by the parties to the petition or to any person nominated by the Court, if the parties fail to name any person, that person is to report to the court as to whether reconciliation can be and has been effected and the court shall, in disposing the proceedings, have due regard to the report.

15. Order 32A CPC pertains to the procedure in suit relating to matters concerning the family. Rules 3 and 4 of this Order lay down that in every suit, or proceeding to which this Order applies, an endeavour shall be made by the court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit. For this purpose, the court may adjourn the proceedings. It shall be open to the court to secure the services of such person, whether related to the parties or not, including person generally engaged in promoting the welfare of the family as the court may think fit, for the purpose achieving the objects imposed by these rules (that is settlement between the parties).

A similar provision exists now in the Family Courts Act, 1984, Sections 9 and 12 of that Act contain similar provisions as noted above.

So, the legislative intent, in matters of matrimonial disputes, is that an attempt at settlement between the parties should be made and for that purpose, help of relatives of the parties or other social organisations can be taken. If the parties make such endeavours before any proceeding is started in court and a spouse approaches relatives or any social organisations or neighbours, for seeking aid in process of reconciliation and they make efforts, their efforts cannot be said to be coercion or pressure on any of the spouses. After all, in matters of family disputes, a certain healthy social pressure is a welcome measure to achieve conciliation between the parties. This is consistent with ethos of Hindu family and Indian society as a whole.

16. A Hindu Marriage is a sacrament and not a contract. It transplants the wife in a new family. The obligation of the wife arises to the entire family including the husband. So, also the obligations of the entire family, correspondingly arises toward the wife. The society in which the husband resides has also certain social, though not legal, obligations towards his wife. The ethos of Hindu society from times immemorial, has been that society is interested peaceful in matrimonial life of its constituent families and any discord in that peaceful life due to one of the erring spouses, puts the society at its alert, and a "healthy society reacts in a healthy manner and will not be a mere mute spectator. It attempts to set right disorientation

by sound friendly advice. Such an ethos of life cannot be disfavoured by calling it as undue interference or coercion on any one of the parties even if it relates to purely matrimonial matters between the spouses. If a wife notices her husband going wayward, she will not be unjustified in approaching the relatives of the husband to get justice to herself. It is not legal requirement that she must suffer her privations caused by the husband, without any demur. On the one hand, she is not expected to do any thing which may tarnish the fair name of her husband in the society even if there are some minor lapses on his part due to circumstances beyond the control of the husband, but, at the same time, it will be within her rights to approach all those who are interested in the welfare of the couple, to get protection of justice against any misdeeds of her husband and even in circumstances where it appears to her that the husband is deliberately neglecting her even in marital duties and that is being caused due to his affections going towards a third party. Thus, if she approaches, the respectables of her husband's society or his relatives and complains how she is being neglected and the relatives of the husband approach him and discussed the matter and put even some pressure on the Husband to give up his neglect and misdemeanour, it would not be coercion if in such circumstances, the husband undertakes to take a righteous path and to opt out of his domestic deviation. Such undertaking would not be called a result of coercion, but will only disclose the existing circumstances and a promise of expiation by the husband.

17. An important factor is why should the name of Renu Bala arise at all and why should the husband accept any liaison with Renu Bala, not once, but twice in writing, and several times orally. The appellant has not stated what was his enmity with any of his villagers or relatives. He has named them as agnates, but does not state what was the background of his enmity and what was the nature of enmity and why should they act against his interest when they were his own agnates. Even his brother PW 9 does not throw any light on this. No other witness does so. At least, the teachers are not even alleged to have any enmity towards the appellant. Least so the Head Master. The School Authorities give him chance to withdraw his resignation and retain his job, which is the most difficult thing to get by, these days. The respondent-wife cannot be faulted merely because she expressed her grievances before the Head Master and the Staff Council takes cognizance of this and discussed the matter with the appellant. A teacher is expected to have a conduct of utmost morality and any allegation of fall in that standard becomes a concern for the fellow teachers as well as Head of the Institution. They are within their rights to discuss the matters with the defaulter in an attempt to root out the malady. When the husband was writing before the teacher's Council that he would have nothing to do with Renu Bala, henceforth, it clearly was not a result of any force on him. That appeared to be accepted fact and the cause of the entire episodes between the couple. If the husband was earlier forced or coerced by the co-villagers and relatives to give a written undertaking and even complained of that fact to the police, he would not take back those allegations in later letters nor would he give any such admission or undertaking before his fellow teachers or before the Head Master later on, unless the whole thing was based on his own lapses in character. So; whatever he writes in those undertakings does not appear to be result of use of force or coercion, as a result of which false facts might have been got written from him. These are undertakings given by him as promises of expiation for his wrongful conduct. They contain admissions of a course of his conduct, which can be inferred from the writing. These cannot be ignored merely because the appellant chooses to explain them as given under social pressure or under use of force. Such force is not proved nor coercion to obtain false facts established. Why should the wife get false facts written from the husband? There is nothing against her character. The appellant's brother admires her for her affectionate conduct towards him, as well as his own wife and children and says that she wishes to keep peace in the family where she resides. She loves the children who are not her own. She, of course, complains of being rejected and ignored by her own husband. She has a valid reason to do so. She, on information received, was inclined to believe that the husband (appellant) was leaning towards another woman. The husband accepted it in two undertakings. It is really-strange mat he did not bring his wife with him at Digha. The excuse of financial crunch does not appear justified, when the feeling had come to such a pass. Even when the Head Master gave a part of his own house to live to the couple and they resided there, the husband disappeared. The Head Master

has no reason, to state falsely that few days later the husband disappeared from there. The husband has come out with a false story that the wife disappeared after few days. There was no reason for wife to disappear. She was not entangled with anybody else.

18. The totality of the evidence, the conduct of the parties, the narration by witnesses of various facts and circumstances and the documents, which are acceptable, clearly go to show that the wife respondent, in this case, had justification in inferring that the appellant was having unholy liaison with another woman - Renu Bala and, therefore, was continuing to neglect her and not taking her to Digha, and denying conjugal rights to Respondents, while continuing to live in the same house where Renu Bala resided.

Renu Bala has not been produced as a witness nor her father was produced. The Counsel for the appellant has argued that Renu Bala is about 16 years senior to the appellant in age and so any such allegation of illicit liaison between them would be outrageous and false and there could be no such possibility. The Id. Trial Court has considered this part of evidence and has come to the conclusion that there is no proof of age of Renu Bala nor proper proof of age difference between the appellant and Renu Bala. We have perused the evidence ourselves. The respondent-wife has stated that she had never seen Renu Bala nor she went to her house. So, she does not know her age at all.

19. The appellant had examined PW-4 Gopal Chandra Kar, a cousin of Baikunt "Nam Kar, who tells the age of Ranu Bala as about 47 years on the date of his statement which was recorded on 14.3.1989. At the same time, he expresses ignorance if the petitioner had any illicit relationship with Renu Bala Dutta. He is a neighbour of Baikunt Nath Kar and on visiting terms with him. He is also a life member of Digha, D.J., Sikaha Sadan. In that capacity he said that there was no complaint ever made regarding the character of the petitioner (appellant) and that he (appellant) used to call Ranu as 'TJidi'. The petitioner once submitted a resignation but it was not accepted by the managing committee. He admitted that in a meeting of the managing committee, on 10.4.87, he learnt that there was allegation that the petitioner was involved illicitly with Renu Bala, that meeting was to consider if resignation of the appellant should be accepted or not. He did not state the year of birth of Ranu Bala. The appellant had given his age as 39 years in February, 1989. So, according to the appellant's evidence of PW 4, there was a difference of 8 years between him and Renu Bala. The evidence of PW 4 is not certain regarding age of Renu Bala. He has concealed certain facts such as appellant not having given anything in writing before the managing committee. The writing exhibit D2 belies this. He is avoiding the issue of relationship between the appellant and Renu Bala by saying that he does not know about it. So, evidence of this witness does not inspire much confidence. The trial Judge discarded the evidence of this witness. In our view there is no definite evidence regarding age difference between the appellant and Ranu Bala. At any rate, even the age difference of 7 to 8 years (when the parties are in the age group of 33 to 40) would be not such, that any physical attraction between them should be ruled out.

20. Two other relevant witnesses on the aspect of relationship between Renu Bala and the appellant are PW 6, Sushil Kr. Jana and PW 7 Ganapati Patra. PW 6 is a neighbour of Baikunt Nath Kar and visits him often. He claims that he has been hearing the appellant calling Ranu as 'Didi'. At the same time he also expressed that he was 'not aware' of any illicit relationship between the appellant and Renu Bala., But, he has seen him (appellant) respecting her by touching her feet. He claims that Baikunt Nath Babu is his maternal uncle 'by some relationship'. PW 7 is son-in-law of Baikunth Nath Babu that is brother-in-law of Renu Bala. He resides in another village. According to him his wife aged about 35 years is younger sister of Renu Bala. Between his wife and Ranu Bala, there is one son of Baikunth Nath Babu. He says that Ranu Bala was 12 years senior to his wife. Even this would suggest age difference between appellant and Ranu Bala as 8 years. He narrated that the appellant used to stay as a paying guest in the house of his father and used to address Ranu as 'Didi'.

The evidence of these witnesses considered with evidence of appellant himself is not such as can show improbability of immoral relationship between the appellant and Ranu Bala. It is immaterial that the

appellant was outwardly addressing Ranu Bala as 'Didi'. We have to see from the angle of the respondent's wife, considering the conduct of the husband towards his wife in keeping her away from himself. The documents which this appellant wrote and executed admit, at least impliedly, his leanings towards Ramu Bala and his promises not to keep liaison with her in future. These clearly suggest that he was having a relationship with her, which was immoral in nature.

21. In our view, on consideration of the entire evidence including the admitted facts the respondent's wife justified in suspecting that the appellant husband had immoral relationship towards Ramu Bala, that is some lady residing in the same house where the appellant used to reside in Digha. Any such allegation by the respondent against the appellant either to the relatives of the husband or her own relatives or to the colleagues of the appellant or the Head Master or managing committee, to seek their help, should not be taken as mental cruelty on the appellant. The appellant had to thank himself for inviting such a situation by his own conduct.

The law on the subject of mental cruelty resulting from such allegations between husband and wife has been enunciated in a number of judgments of this High Court and other High Courts. Such allegations in order to amount to mental cruelty, should be 'without foundation' and based on mere suspicions. Thus, in case cited at "AIR 1986 Calcutta page 150", titled "Nemai Kr. Gosh v. Mita Ghosh", a Division Bench of this Court held that a total unfounded allegation of illicit relationship between the husband and his elder brother's wife, who had reared him up like a mother from his childhood, gives sufficient mental agony to the husband to entitle him to divorce from wife on the ground of cruelty. Such unfounded allegation would give sufficient cause to the husband to think that it would not be safe for him to live with the wife.

It is an important ingredient of such a matrimonial offence that the allegation should be without foundation. One more judgment by a Division Bench of this court referred to by Counsel for appellant is '1990 (1) CD page 53' titled 'Smt. Santana Banerjee v. Shri Sachindra Nath Banerjee'. It was held that wife's alleging the husband's sexual relationship with a girl outside wedlock tantamounts to cruelty. The Division Bench had found that the allegation of illicit relationship of the husband with his office colleagues was false and motivated and so such a false imputation against the character of the husband was undoubtedly a cruelty without provocation" justifying a decree for divorce.

22. The Delhi High Court speaking through a Single Bench in a case cited at "AIR 1984 Delhi page 360" titled "Mukesh Kr. Gupta v. Kamini Gupta", has also observed that an unfounded allegation by wife against husband being a womaniser or having illicit connection with other women is a mental cruelty on the husband. A perusal of the various judgments in this regard clearly suggests that the allegation of one spouse against the other regarding illicit sexual relationship with a third party should be 'unfounded' in order to become a 'matrimonial offence of cruelty' to warrant divorce. It stands to reason also. If one of the spouses has justification for allegations, it is his or her duty to point it to the other spouse or ask him to mend his or her ways, in the interest of matrimonial enmity. The aggrieved spouse will be justified in seeking help of those who have their goodwill in mind or who are in Authority. The cases which I have referred to above and which have been relied upon by the Counsel for appellant, show, on perusal of their judgments, that the allegations which were found to be mental cruelty, were adjudicated to be unfounded and reckless. In the present case, as we have already discussed, on a consideration of the evidence of both sides, it is clear that the wife had full justification to seek help of the relatives as well as those in authority, against the misdemeanour of the husband regarding his immoral leanings towards another woman known as Renu Bala and resultant conduct of the husband in ignoring his wife.
23. Now, we take up the allegation by the husband regarding mental cruelty caused by denial of sexual relationship to him by wife, except on the first night of 'Foul Sajha'. The wife, in fact, alleges such a denial towards her by the appellant. The husband's main case is based on the allegation that the wife's reluctance to his sexual approaches was due to some physical defects and that she was taken to a doctor who examined her and prescribed some treatment to her. This infuriated her and she denied future sexual

approach to him. The wife has totally denied any physical defect or any consultation with any doctor. On persual of the evidence we find that these allegations by the husband have not been established, even on prima facie basis. Even the doctor has not been produced and in order to avoid adverse inference for non-production of any medical certificate or medical prescription, assertions have been made that these documents were with wife. These are unacceptable assertions of the husband and must be rejected. This also throws light on the attitude of the husband (appellant) as to how, by introducing concocted evidence orally, he wants to sever his matrimonial relationship with the respondent. These allegations against the wife remain not proved.

24. Now, we take up the allegations of the husband that he was manhandled by the respondent and her relatives and was dragged by them by his collar that she abused him before his colleagues and students in the school compound and thus humiliated him. It is admitted by the wife that she had visited the school several times but it never happened that she caused a physical assault on the husband or abused him in the open. According to husband an incident, took place on 22nd Feb. 1987, when the respondent and her brother went to the school while the appellant was residing in hostel They beat the appellant and abused him with filthy language in the presence of all. At that time, the Head Master told them that all the allegations of the respondent were false, yet they did not desist. Even the teachers and Head Master and Secretary of the School expressed their displeasure over the behaviour of respondent. In order to support his this deposition, the appellant examined some witnesses. According to PW 6, Sushil Kr. Jana, his daughter studied in Digha, D.J., Siksha Sadan and in that connection, he visited that school on 22nd Feb. 1987. He was with the Head Master when he heard a commotion outsider and he along with the Head Master rushed out of the room and saw that this appellant was being dragged by some persons. He did not see any lady there. But the appellant told him that he had a heated exchange with his brother-in-law and some companions of his brother-in-law and then the incident occurred. In cross-examination, he said that he found the wife of the appellant catching hold of the collar of the shirt and she was trying to drag him. This part is contrary to his earlier part that he saw no lady there.
25. Another witness to similar effect is Chandra Mohan Das, PW 5. He is a cook attached to hostel of that school. He says that the appellant was residing in the hostel since the start of the hostel. One day, he found the appellant and his wife quarrelling with each other within the school premises when a meeting of the teachers was going on, that was the month of Ashvin or Kartick. A crowd gathered. The wife of the appellant was abusing him. Then four months later the wife of the appellant again Came to the school with some persons in the month of Magh and a similar quarrel ensued. Then also the wife caught hold of collar of the appellant. He did not say that the appellant was being dragged. It is worth noting that Magh does not fall four months after Kartick on even after Ashvin.
26. The evidence of RW 4, the Head Master is extremely important on these aspects. We have already discussed the statement of the Head Master. He is denying that wife or her relatives were ever involved in any violent incident or violent conduct towards the appellant in the school complex. He admits that Chandra Mohan Das is a cook in the hostel, but he denies any such quarrel between husband and wife in the school premises. In fact, he has asserted that the wife even touched the feet of the husband to persuade him to start living with her at Digha. The appellant has not alleged or stated as a witness that he was collared by his wife in the school premises. In the petition, the petitioner had urged that it was on 22nd October, 1986, that his wife and her brother and other companions came to school and insulted him in presence of Head Master, students and teachers in filthy language and wife's brother forcibly dragged him by his shirt. No allegation was made about the wife collaring him at that time. Regarding 23rd Feb. 1987, the plea is that the wife, abused him and made false allegations and she and her companions dragged him.
27. The Head Master has denied these allegations, appearing as RW 4. The appellant's witnesses including himself claim the presence of Head Master at such incident. If they were true, why should the Head Master deny them? The Head Master is not inimical towards this appellant. The Head Master had been

helping the appellant. First, he provided him a vacant room in his own house so that he could live, with his wife there. Then, he helped him in re-instatement even after resignation. He is not related to the respondent in any way. He has categorically asserted that the respondent never insulted her husband in front of teachers and students in the school. She came to him (Head Master) whenever she went to school. On the other “hand, the appellant did not change his behaviour and conduct in spite of his repeated undertakings. The testimony of PW 5, Chandra Mohan Das is unacceptable as he is giving a version, which is not even narrated by the appellant and he claims to be a person always present at such incident between the parties, although he is a total stranger. He was asked what were the utterances of the parties at the time of these quarrels. He was unable to say what they were. Even the statement of PW 6 is not reliable as he says that the Head Master was with him when the incident occurred. But the Head Master denies any such happenings.

28. In the totality of the evidence, we are of the view that the appellant has totally failed to establish that the respondent’s wife had physically assaulted him by herself or instigated his brother or others to assault him or that the respondent was dragged by her or in her presence in the school premises.
29. One more factor, in this regard, is the alleged misconduct towards the appellant by the father and brother of the respondent and by some relatives of the husband or neighbours of the husband at the instigation of the respondent (wife). The testimony of the husband, in this regard, is erratic. His assertion is that this happened when the document dated 24.6.1986, exhibit B, was written and signed by him as an undertaking. In evidence, however, he narrated that this happened in the year 1985, that is, one year after the death of his father, which took place in 1984. There is no credible witness to support him on that aspect. The appellant produced one witness, Smt. Saphali Guchhait as PW 3. She resides in Radha Nagar and she is a member of Mahila Samity of village - Radha Nagar and asserts that this Samity is a supporter of CPI(M). The Samity had collected a subscription of 25 paise from the respondent-Arati Guchhait and he issued to her the receipt dt. 10th July, 1986. exhibit 4. They collected this subscription by going to the house of the respondent. By this evidence, the appellant wants to show that the respondent is a member of CPI(M), Mahila Samity and so she exercises influence over the local area people and uses force to insult and subdue him. The respondent denied membership of the Samity. The document exhibit 4 is titled as “Donations Receipt”. It mentions that 25 paise has been received for membership: The appellant has further relied on the evidence of PW 8, Smt. Nagen Kotal. She is a member of the party in Radha Nagar. She narrates that a trouble took place at the time of the Sradha Ceremony of the father of appellant and such trouble took place over the wife of the appellant. She narrated that about six months later, the appellant was called to village through the village headman to ask him why he was not taking his wife. A meeting took place and the appellant went away from such a meeting, for some purpose. At that time, he was assaulted by four named persons. The appellant then left the village. The testimony of this witness is vague, unreliable, particularly in the face of evidence of PW 10. PW 10 Rishikesh was the Secretary of Radha Nagar Palli Mangal Samity. The respondent had filed, an application before this witness in writing that her husband had taken her to his place of work, but he used to disappear from there for days together without information and so she had to leave that place. He called the appellant by giving a notice, but the appellant told them that he would not live with his wife and that he had filed an application against her. His evidence is thus post suit evidence. In cross-examination, he narrated that in the village, there were two other meetings earlier regarding notice between the appellant and his wife. He (this witness) had called the meeting each time, but the appellant was never assaulted nor the wife even insulted the husband. So, this witness produced by the appellant himself has asserted that no insult or assault was caused by wife or her relatives. The court cannot ignore this testimony of witness which is produced by the appellant himself.
30. It may be that in July, 1986, the respondent’s wife paid a subscription to Mahila Samity and became its member. There is, however, no allegation that Mahila Samity held any demonstrations against the appellant or his family members, or actively participated in any action against the appellant. Merely

becoming a member of Mahila Samity by paying subscription of 25 paise in July, 1986, does not raise any inference against the wife. That was three years after the marriage and the husband had already given written undertakings to give up connections with Renu Bala and to restore his wife to her proper matrimonial status. Thus, we find no credible evidence whatsoever suggesting that, at the instance of this wife, anybody or she by herself, abused or assaulted this appellant. She has been suffering due to the conduct of her husband is denying her conjugal rights in matrimonial life. He has repudiated that he committed any adultery but she has made a justifiable grievance that he had illicit connections with Renu Bala. The evidence shows that such allegations were “not without foundation”.

31. Thus, on a thorough scanning and analysis of the evidence produced by the parties, we find that the Id trial Judge was right in his finding that the husband has failed to prove the ground of ‘cruelty’ against the wife.
32. No other ground has been pressed before this court. The appeal fails. It is dismissed with costs which we fix at Rs. 4,000. The judgment and decree of trial court and affirmed.
33. **S.N. MALLICK, J.:**— I agree.
34. Appeal dismissed.

□□□

DEBALEENA BHAWAL VERSUS CHIRAJIT PARESH CHANDRA BHAWAL

**In the High Court of Calcutta
Civil Appellate Jurisdiction Appellate Side**

C.A.N. 3826 of 2015

(Before Hon'ble Mr. Justice Dipankar Datta and Hon'ble Mr. Justice Debi Prosad Dey)

*Smt. Debaleena Bhawal ...Appellant/Applicant
Versus*

Chirajit Paresh Chandra Bhawal ...Respondent/Opposite Party

C.A.N. 3826 of 2015

In

F.A. 265 of 2012

With

F.A.T. 290 of 2012

Decided on September 22, 2017, [Heard on: 17.03.2017, 16.06.2017, 23.06.2017 and 30.06.2017]

For the Appellant: Mr. Hiranmoy Bhattacharyya, Mr. Saunak Bhattacharya.

For the Respondent: Mr. Kallol Basu, Mr. Bratin Kumar Dey, Ms. Debarati Mukherjee.

Sec 25, section 29 and sec.27(1)(b) and (d) of the Special Marriage Act, 1954 In order to prove“desertion”, both the factum of physical separation and the animus deserendi or intention to desert have to be proved, that too, for a continuous period of two years preceding the date of presentation of the plaint. Animus deserendi means the intention to bring cohabitation permanently to an end. Therefore, the act of desertion must have the following elements: — Withdrawal of a spouse from the society of the other, Without the consent, wish of the spouse so aggrieved, Without an intimation to such spouse, with the intention of not returning, With the intention to bring cohabitation permanently to an end.

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Debi Prosad Dey :— A common judgment and decree dated 30.04.2012 passed by the learned Additional District Judge, 7th Court at Alipore, 24 Parganas (South) whereby two matrimonial proceedings were finally decided, has been questioned before us by the wife.

2. F.A. 265 of 2012 is directed against the judgment and decree passed in Mat. Suit No. 108 of 2010, whereby and whereunder the learned trial judge decreed such suit by awarding a decree for divorce under Section 27(1)(b) and (d) of the Special Marriage Act, 1954 (hereafter the Act) in favour of the husband. F.A.T. 290 of 2012 is directed against the same judgment and decree whereby and whereunder Mat. Suit No. 7 of 2011, filed by the wife for restitution of conjugal rights, was dismissed.
3. Feeling aggrieved by and dissatisfied with such judgment and decree, the wife has filed these appeals, inter alia, on the grounds that though the husband had filed Mat. Suit No. 108 of 2010 under Section 25 of the Act praying for annulment of marriage but the learned trial Judge erred in law by awarding a decree under Section 27(1)(b) and (d) thereof on the ground of desertion and cruelty. According to

her, there was absolutely no pleadings with regard to desertion and cruelty and no issue was framed in relation thereto; in fact, the learned trial judge did not take into account that, no decree for divorce could be passed in a suit for nullity and also that, there was no consideration of the period of limitation in filing such suit for divorce, and thereby she came to an erroneous finding and erroneously decreed the suit in favour of the husband. It is also the grievance of the wife that the learned trial judge, having decreed Mat. Suit No. 108 of 2010, did not take into consideration her case in Mat. Suit No. 7 of 2011 and thereby erred in law by dismissing the same.

4. The husband had instituted Mat. Suit No. 2023 of 2010 against the wife (renumbered as Mat. Suit No. 108 of 2010) under Section 25(i)(iii)(a)(b) of the Act and prayed for decree of nullity by annulling the marriage between the parties to the suit. The marriage between the parties was solemnized according to the provisions of the Act on 11.12.2009 and Mat. Suit No. 2023 of 2010 for annulment of the marriage solemnized between the parties was filed on 09.11.2010 i.e. within 8 months 27 days of such marriage.
5. On scrutiny of the plaint filed by the husband, it transpires that the following grounds have been set out for obtaining such decree for nullity:
 1. Abnormal behaviour of the wife.
 2. Marriage was not consummated between the parties.
 3. The wife was engaged in some “tantric” activities.
 4. The wife divulged before the husband over phone that she has had an affair with one person prior to her marriage and she did not wish to continue her marital relationship with her husband and thereby the wife has practised fraud on the husband
6. The wife denied all the material allegations contained in the plaint by filing a written statement. On the contrary, the wife categorically stated in her written statement that there was absolutely no ground to declare the marriage as void since she was/is always ready and willing to live with her husband and that the marriage was consummated between the parties immediately after their marriage and thereafter during their stay at Goa.
7. The wife also filed a suit praying for restitution of conjugal rights with her husband and the said suit being Mat. Suit No. 7 of 2011 was also adjudicated upon by the learned trial Judge analogously with the suit of the husband.
8. It may be recorded here that we made an endeavour to reconcile the differences between the parties prior to hearing of these appeals considering the submission of Mr. Bhattacharya, learned advocate representing the wife she is desirous of staying together with her husband. However, the husband categorically submitted through Mr. Basu, learned advocate representing him that he is not willing to stay together with the wife. Reconciliation having failed, we had no other option but to decide these appeals according to law.
9. Decree of nullity may be granted by the Court if the husband could prove that there was no consummation of marriage between the parties since their marriage, in terms of Section 25(i) of the Act. The relevant provisions may be set out below for proper appreciation of the case of the parties, which runs as follows:

“25. Voidable marriages.—Any marriage solemnized under this Act shall be voidable and may be annulled by a decree of nullity if,—

 - (i) the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or
 - (ii) the respondent was at the time of the marriage pregnant by some person other than the petitioner; or

- (iii) the consent of either party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872 (9 of 1872).

Provided that, in the case specified in clause (ii), the court shall not grant a decree unless it is satisfied,—

- (a) that the petitioner was at the time of the marriage ignorant of the facts alleged;
- (b) that proceedings were instituted within a year from the date of the marriage; and
- (c) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree:

Provided further that in the case specified in clause (iii), the court shall not grant a decree if,—

- (a) proceedings have not been instituted within one year after the coercion had ceased or, as the case may be, the fraud had been discovered; or
- (b) the petitioner has with his or her free consent lived with the other party to the marriage as husband and wife after the coercion had ceased or, as the case may be, the fraud had been discovered.”

10. It is therefore apparent from Section 25(i) of the Act that decree of nullity may be granted if the marriage has not been consummated owing to wilful refusal of the respondent to consummate the marriage. The remaining clauses of Section 25 are not applicable in the context of the given facts and circumstances of this case.
11. It was, therefore, incumbent upon the husband to prove that there was wilful refusal of the wife to consummate the marriage resulting in non-consummation of marriage.
12. Matter of consummation of marriage being personal and private between the parties, cannot be proved by adducing corroborative and direct evidence. The factum of consummation of marriage has to be proved either by the attending circumstances or by the direct evidence of the parties to such marriage. The parties to these proceedings did not insist for medical examination of the parties concerned to show any physical infirmity of the parties to perform natural cohabitation. No allegation has been levelled against the wife by the husband that due to physical infirmity, she is unable to perform natural sex.
13. Therefore, the factum of consummation has to be gathered from the attending circumstances and the oral evidence of the wife and the husband only.
14. The evidence of other witnesses do not prove or disprove anything about consummation of marriage. The burden of proving such wilful refusal also heavily lies upon the husband.
15. The husband as witness no. 1 categorically stated that the wife was frigid, indulged in “tantric” activities and there was no consummation of marriage. On the contrary, it is apparent from the evidence on record that the wife is in the habit of worshipping God after taking bath and she had been to Goa for a pleasure trip with her husband alone. They stayed together in a hotel for some days. The husband also admitted that he had seen the naked body of his wife. Considering the attending circumstances as well as the evidence of both the husband and wife, the learned trial Judge was justified in holding that the marriage between the parties was consummated and, accordingly, the husband was not entitled to a decree of nullity.
16. The other witnesses, being close relations of the husband, have categorically stated about non-consummation of marriage and the husband has also tried to introduce the case of extra marital affair of the wife. It has also been stated in evidence that the version/utterings of the wife were duly recorded by the husband. No such recording, however, has been produced before the trial Court. The statutory

requirement under Section 65-B of the Indian Evidence Act was not complied with by the husband and accordingly, such evidence of the husband and his witnesses may safely be discarded. The learned trial Judge was also justified in rejecting such evidence of the husband and his witnesses.

17. To our utter surprise, we find that the learned trial Judge thereafter proceeded to consider the case of the parties as if she was deciding a suit for divorce under Section 27 of the Act. The learned trial Judge thereafter held that the husband was subjected to cruelty and that the wife wilfully deserted the husband and that is why the husband is entitled to a decree for divorce under Section 27(b) and (d) of the Act. The learned trial Judge also refused to consider the case of the wife as made out in Mat. Suit No. 7 of 2011 and accordingly, dismissed the said suit.
18. Since decree has been granted under Section 27(b) and (d) of the Act, we have read it. While Section 27(b) provides that a petition for divorce may be presented to the District Court either by the husband or wife on the ground that the respondent has deserted the petitioner for a continuous period of not less than 2 years immediately preceding the presentation of the petition, clause (d) thereof provides that similar petition may be presented if the respondent has, since the solemnisation of marriage, treated the petitioner with cruelty. In other words, on the ground of proved desertion and cruelty decree of divorce may be granted under either clause.
19. Section 29 of the Act may be reproduced below in order to look into the period of limitation as prescribed thereby regarding filing of petitions for divorce:
 - “29. Restriction on petitions for divorce during first three years after marriage.— (1) No petition for divorce shall be presented to the district court unless at the date of the presentation of the petition one year has passed since the date of entering the certificate of marriage in the Marriage Certificate Book:

Provided that the district court may, upon application being made to it, allow a petition to be presented before one year has passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the district court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the district court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition, without prejudice to any petition, which may be brought after the expiration of the said one year upon the same, or substantially the same, facts as those proved in support of the petition so dismissed.
 - (2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of one year from the date of the marriage, the district court shall have regard to the interests of any children of the marriage, and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said one year.”
20. Section 29 of the Act thus provides that no petition for divorce shall be presented to the District Court unless at the date of presentation of the petition one year has elapsed. Admittedly, the marriage was solemnised and registered on 11.12.2009 and the suit was filed on 09.11.2010, i.e. within 8 months 27 days from the date of such marriage. The suit is thus clearly hit by Section 29 of the Act. In order to prove “desertion”, both the factum of physical separation and the animus deserendi or intention to desert have to be proved, that too, for a continuous period of two years preceding the date of presentation of the plaint. Animus deserendi means the intention to bring cohabitation permanently to an end. Therefore, the act of desertion must have the following elements: —
 1. Withdrawal of a spouse from the society of the other.
 2. Without the consent, wish of the spouse so aggrieved.

3. Without an intimation to such spouse.
 4. With the intention of not returning.
 5. With the intention to bring cohabitation permanently to an end.
21. Evidence on record reveals that the wife was/is willing to stay with her husband and at no point of time she ever desired to withdraw herself from the society of her husband or that she had the intention to bring cohabitation permanently to an end.
- Therefore, in the given facts and circumstances, we do not find that the wife has deserted her husband in the sense of desertion as stipulated under Section 27 of the Act. Secondly, we also do not find any specific evidence of cruel acts of the wife whereby she could be held responsible for subjecting her husband to cruelty in terms of Section 27 of the Act.
22. The learned trial Judge did not consider that there was absolutely no prayer in the petition filed by the husband and no such argument was advanced before her for obtaining a decree for divorce. The evidence adduced by the husband is also not sufficient to bring home the grounds of desertion and cruelty. Moreover, the suit (if it were construed as one for divorce either on the ground of desertion or cruelty or both) is also barred by limitation as stipulated under Section 29 of the Act.
 23. The pleadings are also not sufficient to hold that any such decree of divorce could be granted on the basis thereof. The learned trial Judge, as noted earlier, also did not consider that no issue was framed with regard to the allegations of desertion and/or cruelty on the basis of the pleadings on record and thereby she misdirected herself in decreeing the suit ignoring the settled principles of law as well as the evidence on record.
 24. Mr. Bhattacharya, learned advocate appearing on behalf of the wife contended that the learned trial Court misdirected itself in considering the case of the husband in the light of Section 27(b) and (d) of the Act. He referred to the decision reported in AIR 1982 Cal 547 (*Smritikana Bag v. Dilip Kumar Bag*) wherein the Hon'ble Court while dealing with the provision laid down under Section 14(a) of Hindu Marriage Act, 1955 specifically held in paragraph 5 of the said judgment that inability to entertain a petition for divorce within 1 (one) year of marriage means not inability to grant relief to the plaintiff but inability to give him a trial at all. This observation of the High Court has been fortified with decision of Calcutta High Court reported in AIR 1945 (Cal) 381 (*Nakul Chandra v. Shyamapada Ghose*).
 25. The intention of the legislature in providing such limitation in filing of matrimonial suit is grounded on public policy and it provides restriction upon hasty recourse to legal proceedings without making any real effort to save the marriage. This principle of law has been enunciated in the decision reported in AIR 1967 Madras 423 (*Meganatha Nayagar v. Shrimathi Shusheeia*).
 26. Mr. Basu, learned advocate appearing on behalf of the husband contended that the period of limitation as stipulated under Section 29 of the Act is not mandatory but the same is directory in view of the decision reported in 95 CWN 1085 (*Rabindra Nath Mukherjee v. Iti Mukherjee alias Chatterjee*). He further contended that the parties were well aware about the rival cases and led all the evidence in accordance with their respective cases and therefore, the decision of the trial Court cannot be discarded only on the ground that no issue was framed.
 27. Mr. Basu further contended that the Court has got enough jurisdiction to mould the prayer of the parties. In support of his contention Mr. Basu referred to various decisions which we shall consider presently.
 28. It has been observed in AIR 1963 SC 884 (*Nedunuri Kameswaramma v. Sampati Subba Rao*) that where the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was vital to the case or that there was mis-trial which vitiates the proceedings. Having regard to the facts of the case, the Court observed that the suit could not be dismissed on this narrow ground and also

there is no need for a remand as the evidence which has been led in the case is sufficient to reach the right conclusion and neither party claimed that it had any further evidence to offer. The said decision is apparently not applicable in the given facts and circumstances of this case since the parties went to trial fully knowing that the prayer for nullity of such marriage was being adjudicated upon by the learned trial Court. The parties had no knowledge that the learned trial Court would decide the suit by invoking the grounds of desertion and cruelty and thereby would decree the suit. The aforesaid decision relied on by Mr. Basu, in that view of the matter, is not at all applicable here.

29. In AIR 1956 SC 593 {Nagubai Ammal v. B. Shama Rao}, it has been held by the Apex Court that adverse possession of mortgaged property cannot affect the right of a prior mortgagee to bring the property to sale and the adverse possession against the purchaser under that sale cannot commence prior to the date of that sale. The Apex Court has decided the date of commencement of lis and differentiated between collusive proceedings and fraudulent proceedings while deciding the date of commencement of lis in respect of immovable property. The materiality of this decision for deciding the appeal, however, could not be comprehended.
30. In (1975) 1 SCC 770 : AIR 1975 SC 1409 (Pasupuleti Venkateswariu v. The Motor and General Traders), the Apex Court dealt with the issue as to whether the High Court can take note of subsequent events in an eviction suit while dealing with an appeal under Section 100 of the Code of Civil Procedure. We do not find any application of the principle of law laid down therein in the given facts and circumstances of this case.
31. Mr. Basu has also relied upon the decision in Rabindra Nath Mukherjee (supra) to submit that the suit is not hit by Section 29 of the Act since the limitation stipulated by the said provision is not mandatory but directory. The aforesaid decision did not take into consideration the effect of the provision laid down in Section 29(1) of the Act which creates a restriction upon the presentation of a plaint and as such the said decision is not at all applicable in the given facts and circumstances of this case. Moreover, paragraphs 6 and 17 of the said decision would show that the said decision is clearly distinguishable. The same are quoted below:
- “6: The expression ‘entertain’, however, as pointed out by the Supreme Court in Laxmiratan Engineering Works (AIR 1968 SC 488 at 492) and in Hindusthan Commercial Bank ((1971) 3 SCC 124 : AIR 1970 SC 1384 at 1385), may not necessary mean receiving or accepting the plaint or the petition, or the initiation of the proceeding, but may mean ‘adjudicate upon’ or ‘proceed to consider on merits’. Therefore, if the relevant expression in Section 14(1) was ‘it shall not be competent for any Court to entertain any petition unless one year has elapsed since the date of the marriage’, I would have held that all that is necessary is the expiry of one year, not necessarily before the presentation of the petition, but before the date on which the Court adjudicates thereon or proceeds to consider on merits. But the express user of the word ‘presentation’ in the expression ‘unless on the date of the presentation of the petition one year has elapsed since the date of the marriage’ nakedly stands in the way of such a construction and I regret my inability to delete the words ‘on the date of presentation of the petition’ by any amount of judicial activism.”
- “17: In Smritikana (supra), as already noted, the petition was filed even before the expiry of 7 months from the date of marriage. In the case before us, it was filed only about 9 days before. That is enough substantial compliance. Law does not take notice of trifles.”
32. It is evident from the facts and circumstances of this appeal that the suit was filed within 9 months of marriage but in Rabindra Nath Mukherjee (supra) the suit was filed only 9 days before and that is why the Court accepted the same as substantial compliance of the law of limitation holding, inter-alia, that “law does not take notice of trifles”. Therefore, the said decision is also not applicable in the given facts and circumstances of this case.

LANDMARK JUDGMENTS ON DIVORCE

33. Based on our appreciation of the evidence on record, we hold that the learned trial Judge was justified in holding that the husband is not entitled to a decree of nullity and that the evidence was sufficient to hold that the marriage was duly consummated between the parties.
34. Unfortunately, the learned trial Court thereafter misdirected itself and proceeded to decide the case as if the suit for divorce was being adjudicated upon. For the reasons assigned above, we are unable to uphold the decree granted by the learned trial Judge in Mat. Suit No. 108 of 2010. Such suit having succeeded, the learned trial Judge did not decide Mat. Suit No. 7 of 2011 in its true perspective after scanning the entire evidence on record. In view of what we propose hereunder, Mat. Suit No. 7 of 2011 would have to be reheard and decided on merits.
35. In the result, the appeal (F.A. 265 of 2012) stands allowed. The judgment and decree passed by the learned trial Judge in Mat. Suit No. 108 of 2010 and 7 of 2011 stands set aside. Mat. Suit No. 108 of 2010 is dismissed, without costs.
36. F.A.T. 290 of 2012 too stands allowed, without costs. We do hold that a retrial in respect of Mat. Suit No. 7 of 2011 is necessary to decide the actual dispute between the parties and accordingly, Mat. Suit No. 7 of 2011 is remanded to the Court of the learned Additional District Judge, 7th Court, Alipore for retrial. Parties are at liberty to adduce further evidence, if required, for appropriate decision of Mat. Suit No. 7 of 2011. The learned trial Judge after completion of recording of the evidence, if adduced by the parties, shall decide the suit afresh preferably within a period of one year from the date of receipt of the lower court records.
37. In view of the above, nothing survives for decision in CAN No. 3826 of 2015. It stands disposed of.
38. Let photocopy of this judgment along with the lower Court records be sent to the learned Court below forthwith for information and necessary action.
39. Urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible.
40. Photocopy of this judgment shall be retained with the records of F.A.T. 290 of 2012, duly countersigned by the Assistant Court Officer.
41. I entirely agree with the reasons assigned and the conclusions recorded by His Lordship.

DIPANKAR DATTA, J.:— I agree.

□□□

RABINDRA NATH MUKHERJEE VERSUS ITI MUKHERJEE @ CHATTERJEE

Calcutta High Court

95 CWN 1085, II (1991) DMC 227

(Before Hon'ble Mr. Justice A. Bhattacharjee & Hon'ble Mr. Justice P. K. Banerjee)

Rabindra Nath Mukherjee

Versus

Iti Mukherjee @ Chatterjee

Decided on 22 January, 1991

The question as to whetherer the bar, imposed under Section 14(1) of the Hindu Marriage Act, 1955 (called the Act) in respect of petitions for dissolution of Marriage by a decree of divorce filed prematurely, is absolute or notThe Proviso to Section 14(1) indicates that the provisions requiring intervention of one year between the date of marriage and the date of presentation for petition for divorce are not that mandatory. The Proviso provides for leave to the parties by the Court to present petition before the expiry of such period on the ground that the case is of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. But the proviso proceeds to provide that at the trial "if appears to the Court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect untill the expiry of one year from the date of the marriage.

The Courts have been mandated by the Legislature (vide. Section 23(2) & (3) of the Hindu Marriage Act, Section 34(2) & (3) of the Special Marriage Act and now Section 9 of the Family Courts Act, 1984), to make every endeavour to bring about reconciliation between the parties and that should go a long way to prevent rash and hasty divorces. But otherwise, a blanket interdiction against initiation of divorce proceedings may inflict unbearable miseries in a case,..... a petition for Judicial Separation is no within the ambit of Section 14 At any rate, a petition for Judicial Separation is no within the ambit of Section 14 and, as already noted, under Section 13A, the Court, in a divorce proceeding on the ground of cruelty, as is the case before us, may grant Judicial Separation. A petition, even though labelled as one for divorce, should not therefore be rejected on the ground of having been presented before one year from the date of marriage, but the Court should proceed to trial in order to ascertain whether the materials on record would justify a decree for Judicial Separation At any rate, a petition for Judicial Separation is no within the ambit of Section 14 and, as already noted, under Section 13A, the Court, in a divorce proceeding on the ground of cruelty, as is the case before us, may grant Judicial Separation. A petition, even though labelled as one for divorce, should not therefore be rejected on the ground of having been presented before one year from the date of marriage, but the Court should proceed to trial in order to ascertain whether the materials on record would justify a decree for Judicial Separation

JUDGMENT

Hon'ble Mr. Justice A. Bhattacharjee :—

1. A petition under Section 13 of the Hindu Marriage Act, 1955 for dissolution of marriage by a decree of divorce filed by the appellant-husband against the respondent-wife on the ground of cruelty has been dismissed by the trial Court on merits as well as on the ground of the petition having been presented few days before the expiry of one year from the date of the marriage in contravention of the provisions of Section 14(1). My learned brother Banerjee, J. has, for the reasons stated in his judgment hereinafter, upheld the decision of the trial Judge on merits. While I respectfully agree with the view of Banerjee, J. that the petition has been rightly dismissed on merits and that the alleged cruelty by the wife has not been proved. I have my doubts as to whether the provisions of Section 14(1) prohibiting the entertainment of a petition for divorce before the expiry of one year from the date of marriage is that mandatory to require compliance with mathematical precision and to warrant rejection for any and every non-compliance. The provisions of Section 14(1) are reproduced herein below :

"14(1) Notwithstanding anything contained in this Act, it shall not be competent for any Court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition one year has elapsed since the date of the marriage.

Provided that the Court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the Court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition to dismissed."

2. These provisions and their counter-part in Section 29(1) of the Special Marriage Act, 1954, are not Indian innovations, but are the results of blind imitation, so often resorted to by us, of British Legislations. There is no corresponding provision in the Indian Divorce Act of 1869 governing the Christians or the Parsi Marriage & Divorce Act of 1936, governing the Parsis, the obvious reason being that when those legislations were enacted, we had no such provisions in the corresponding British Laws to serve as our guide or model. These provisions were introduced in United Kingdom for the first time by the Matrimonial Causes Act of 1937, and continued to be retained in the successive Matrimonial Causes Acts of 1950, of 1965 and of 1973. These provisions came to be known as "Fair Trial to Marriage Rule", the avowed object being to prevent hasty divorce proceedings resorted to rashly and in the heat of passion and to require the spouses to give a trial to the marriage for a period of three years so that the heated passion may spend up and calm of mind is restored and marriages are maintained for the stability of the Society.
3. It is not easy to appreciate the objects of these provisions. The Courts have been mandated by the Legislature (vide. Section 23(2) & (3) of the Hindu Marriage Act, Section 34(2) & (3) of the Special Marriage Act and now Section 9 of the Family Courts Act, 1984), to make every endeavour to bring about reconciliation between the parties and that should go a long way to prevent rash and hasty divorces. But otherwise, a blanket interdiction against initiation of divorce proceedings may inflict unbearable miseries in a case, for example, where one spouse finds the other to suffer from virulent and incurable leprosy or venereal disease in a communicable form or to indulge in adultery and the like. And if the societies of the Christians, the Parsis and also the Muslims (whose women can also sue for divorce without any such waiting period under the Dissolution of the Muslim Marriages Act, 1939), did not break down

notwithstanding the absence of any such provision in their matrimonial laws, there could have been no good reasons to import these provisions from abroad in the laws relating to Hindus and the persons marrying under the Special Marriage Act, 1954.

4. The Law Commission of India, under the Chairmanship of Justice Gajendragadkar, an eminent Jurist and a former Chief Justice of India, recommended the deletion of these provisions in its 59th Report on the Hindu Marriage Act and observed (at paragraphs 2.31) as hereunder :

"While we appreciate the legislative policy of placing an emphasis on reconciliation rather than on a hasty divorce, we think that there should be no restriction as to time. The Court will have, under Section 23(2), opportunity to consider if the peace and harmony are beyond retrieval. If they are not beyond retrieval, reconciliation under Section 23(2) will succeed, because Section 23(2) is intended to create condition for maintaining or restoring the mutual confidence between the parties. We, therefore, recommend that Section 14 should be deleted."

I have already indicated that, in my view, the utility of the provision of Section 14 is very much doubtful, And the observations of the Law Commission of India, extracted hereinabove also go to show that in the view of the Law Commission also, the provisions serve no useful purpose, so much so, to warrant deletion. I may be wrong, but I have no doubt that if a legislative provision is that useless, it should, so long it exists, be construed to be directory and not mandatory, unless such construction is not at all reasonably possible. I would accordingly be inclined to hold that the provisions of Section 14 are not mandatory as in my view the contrary construction is not irresistible.

5. Mr. Roy Chowdhury appearing for the petitioner-husband has urged that it is the settled law that even though a right was inchoate at the date of the commencement of the Us, the proceeding for its enforcement would nevertheless be maintainable, if the inchoate right has matured into a full-fledged one during pendency of the proceeding. Mr. Roy Chowdhury is undoubtedly correct and the authorities of this Court and also of the apex Courts, referred to and followed in the Division Bench decision of this Court in (1) Krishna Chandra v. Hart Sadhan, (86 Calcutta Weekly Notes 105) are binding authorities for this view. But I do not think that this view can be straightway pressed into service in this case because, as pointed out in Krishna Chandra (Supra, at 107), those were cases where there was bar to the proceeding being initiated by the parties before the expiry of certain period, but "no express statutory bar on the tribunal entertained" the proceeding. But, going by the latter, Section 14(1) appears to impose a bar on the Court to entertain, the relevant words being, "it shall not be competent for any Court to entertain any petitionunless at the date of the presentation of the petition one year has elapsed since the date of the marriage".
6. The expression "entertain", however, as pointed out by the Supreme Court in (2) Laxmiratan Engineering Works and in (3) Hindusthan Commercial Bank , may not necessarily mean receiving or accepting the plaint or the petition, or the initiation of the proceeding, but may mean "adjudicate upon" or "proceed to consider on merits". Therefore, if the relevant expression in Section 14(1) was "it shall not be competent for any Court to entertain any petition unless one year has elapsed since the date of the marriage" I would have held that all that is necessary is the expiry of one year, not necessarily before the presentation of the petition, but before the date on which the Court adjudicates thereon or proceeds to consider on merits. But the express user of the word "presentation" in the expression "unless on the date of the presentation of the petition one year has elapsed since the date of the marriage" nakedly stands in the way of such a construction and I regret my inability to delete the words "on the date of presentation of the petition" by any amount of judicial activism.
7. But the reasons that are weighing with me for holding these provisions to be directory and thus to require substantial compliance only, and not to be mandatory warranting strict adherence on pain of rejection or dismissal, are as hereunder.

8. The period of three years, as originally enacted by the Legislature, has now been reduced to one year only by the Amendment Act of 1976. That, in my view, clearly indicates that the Legislature itself has been convinced that the period provided for "fair trial" to marriage was unduly long and required circumscription.
9. If the Legislature considered this "fair trial rule" to be of that great importance and of that paramount necessity for the stability of marriage to make it mandatory, it would have inserted similar provisions in the other matrimonial legislations also by way of later amendments. It may be noted that the Legislature has amended rather extensively the Parsi Marriage & Divorce Act, 1936 but without inserting any such analogous provision. If the Legislature really intended the provisions to be that mandatory, it would have a fortiori inserted such provisions in the other matrimonial legislations, with Article 14 of the Constitution mandating equal protection of laws and Article 15 interdicting any discrimination on the ground of religion. If Hindu 'Marriages and Special Marriages warranted protection of "fair trial rule", the Christian or the Parsi marriages cannot be discriminated by denial of such protection.
10. The Proviso to Section 14(1) would also indicate that the provisions requiring intervention of one year between the date of marriage and the date of presentation for petition for divorce are not that mandatory. The Proviso provides for leave to the parties by the Court to present petition before the expiry of such period on the ground that the case is of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. But the proviso proceeds to provide that at the trial "if appears to the Court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until the expiry of one year from the date of the marriage.....". Now a leave obtained by suppress veri or suggestio falsi should be treated as vitiated to the extent of being not est, and the Proviso, therefore, provides that "the Court may dismiss the petition" but without prejudice to any petition which may be brought after the expiry of one year as aforesaid. But since the Court may also decree the petition only with the rider that the decree shall not be operative before one year from the date of the marring.', the petition, though filed before the prohibited period of one year, and that too on misrepresentation or concealment, stands fully legalised and regularised and the prohibition that the decree shall not be effective until one year from the date of marriage may itself become of no practical effect or utility as in contested divorce cases, a decree is seldom available before that period, notwithstanding the directive' in Section 21B(2) of the Act.
11. A premature petition presented with leave wrongfully obtained is no better, if not worse, than one presented without leave, and if such a tainted petition can nevertheless be decreed, then I am yet to know why premature petition, without any such taint, cannot be similarly decreed. Once the Legislature has been found to have permitted decreeing of a premature petition founded on leave obtained dishonestly, the provision in Section 14(1) prohibiting presentation of petition before the prescribed period cannot be held to be that mandatory to warrant rigid compliance, and must be held to be directory to require substantial compliance only. For, to hold otherwise would amount to rule that law favours the dishonest maneuverer and discriminates against the honest errant.
12. There is yet another way of looking into the matter. While I do not suggest that the Legislature, or even the Judiciary, goes or can always afford to go in a common-sense course, we must, whenever possible, interpret laws in a common-sense way and by importing a little bit of common-sense, whenever necessary. Now, Section 14(1) does not at all provide for any waiting-period for a matrimonial proceeding for judicial separation which can be decreed only on grounds which justify divorce, nor for dissolution of marriage by a decree of nullity under Section 11. Now, while pregnancy of the wife per alium at the time of marriage is a ground for nullifying the marriage under Section 11, pregnancy per alium after the date of marriage is a ground for divorce under Section 13 and, therefore, for judicial Separation also under Section 10. Judicial Separation is very often a stepping stone to a divorce and, more often than not, a decree for Judicial Separation serves, as the foundation for a decree of divorce under Section 13(1A)(i).

From the matrimonial point of view, a post-marital per alium pregnancy is obviously more deprecable than a premarital one and if the aggrieved husband intending to proceed for divorce on the ground of post-marital per alium pregnancy of the wife is still mandatorily required to give a "fair trial" to the marriage for one year, I do not understand why a husband shall be relieved therefrom when he proceeds to sue the wife for Judicial Separation on the same ground or to sue the wife for a declaration of nullity on the ground of per alium pregnancy of the wife at the date of marriage.

13. Then again, under the provisions of Section 23A, if one spouse sues the other for, say, restitution of conjugal rights or for Judicial Separation, the other spouse may not only oppose the relief sought, but may himself or herself claim for any relief, including divorce, on the ground of the suing spouse's adultery, cruelty or desertion. One can, therefore, easily visualise a case where one spouse has sued the other for restitution or Judicial Separation within, say, a month from the date of marriage and the other spouse on entering appearance within, say, one month thereafter, makes a claim for divorce in the written statement. As at present advised, I have my doubts as to whether the provisions of Section 14(1) would stand in the way of such a counter-claim.
14. At any rate, a petition for Judicial Separation is not within the ambit of Section 14 and, as already noted, under Section 13A, the Court, in a divorce proceeding on the ground of cruelty, as is the case before us, may grant Judicial Separation. A petition, even though labelled as one for divorce, should not therefore be rejected on the ground of having been presented before one year from the date of marriage, but the Court should proceed to trial in order to ascertain whether the materials on record would justify a decree for Judicial Separation. As the Supreme Court observed in (4) *Pratap Singh v. Shri Krishna Gupta*, the tendency of the Courts towards technicalities or formalities are to be deprecated for it is the substance that must count and must prevail and take precedence over form. A party's bonafide right to Judicial Separation cannot be scuttled in limine solely on the ground that the party, on legal advice or otherwise, brought himself within the prohibition of Section 14(1) by labelling his or her petition as one for divorce.
15. The Division Bench decision of this Court in (5) *Smritikana v Dilip Kumar*, (AIR 1982 Calcutta 247), cannot, on a careful reading, be construed to have laid down any contrary proposition, but, on a meaningful reading would go to support the ratio of my view. There also the Division Bench after holding the petition for divorce to be not maintainable on the ground of having been filed within about 6 1/2 months from the date of marriage, nevertheless proceeded to consider as to whether a decree of Judicial Separation could be awarded. It is true that, as already noted, under Section 13A, a decree for Judicial Separation can be awarded "on a petition for dissolution of marriage by a decree for divorce". If the Division Bench held Section 14(1) to be that mandatory, then it would have had to hold that the petition, as one for divorce, being beyond the competence of the Court to entertain, there was no legal and proper "petition for dissolution of marriage by a decree of divorce", on which alone a decree for Judicial Separation could be awarded under Section 13A.
16. To go back to the decision of the Supreme Court in *Pratap Singh v. Shri Krishna Gupta*, some rules are so important and fundamental that they go to the root of the matter and must be treated as mandatory and any non-compliance therewith would vitiate everything. Some are not that fundamental and even though mandatory in form substantial compliance therewith would be good enough. In the absence of the "fair trial" rule in the Indian matrimonial legislations for the Christians, the Parsis, the Muslim women and also in the absence of any such provision even in the Hindu Marriage Act or the Special Marriage Act for matrimonial proceedings for Judicial Separation and for declaration of nullity, and for the other reasons stated hereinbefore, I have not been able to persuade myself to hold that Section 14(1) is that mandatory to warrant rejection or dismissal of the petition presented without rigid and strict compliance thereof. I would rather hold them to be directory to require substantial, but no literal, compliance. This aspect was not considered by the Division Bench in *Smritikana v. Dilip Kumar* (Supra), but there is nothing contrary either to the view I propose to take.

17. In *Smritikana* (Supra), as already noted, the petition was filed even before the expiry of 7 months from the date of marriage. In the case before us, it was filed only about 9 days before. That is enough substantial compliance Law does not take notice of trifles.
18. I would, therefore, hold that the trial Judge was wrong in holding and dismissing the petition as not maintainable. As however I agree with my learned before Banerjee, J. in holding that the trial judge was right in dismissing the petition on merits on the ground that the allegations relating to cruelty were not proved, I agree with the order of Banerjee, J. that the appeal should be dismissed.

Banerjee, J.

The question as to whetherer the bar, imposed under Section 14(1) of the Hindu Marriage Act, 1955 (called the Act) in respect of petitions for dissolution of Marriage by a decree of divorce filed prematurely, is absolute or not is not free from controversy and while questioning the wisdom of the legislature, the circumstances giving rise to such controversy have been dealt with exhaustively by My Lord Bhattacherjee, J. in the preceding paragraphs. I find no reason to take a contrary view in that regard.

20. It appears that the learned Trial Judge dismissed the suit both on merits as also on the ground of its non-maintainability. Although the disposal of the suit on both the issues was not illegal, it was not proper and legitimacy should not be confused with propriety. Still, as there are findings on the merits of the petition and as because we entertain doubts as to the true import and impact of Section 14(1) of the Act, it becomes necessary to enter into the merits of the petition for divorce and to see whether the petitioner could succeed in getting a decree as prayed for. We propose to discuss only those facts which are germane for this purpose.
21. The petitioner Rabindra Nath Mukherjee, a Commerce Graduate working in a Bank, was married to the respondent Iti on the 4th December, 1979 according to Hindu rites. At the time of their marriage, which was a negotiated one, Rabindra Nath was 34 years old and Iti 19. On the following day, that is on 5th December, the petitioner brought his wife to his place of residence at Makardah within district Howrah where he used to live jointly with his widowed mother P.W. 3 Binapani, brother P.W. 4 Madan, his wife and their children P.W. 5 Ranjit and P.W. 6 Kalpana. 'Phulsajya' Ceremony took place in the groom's house on 6th December. The petition for divorce starts with the narration of two incident stated to have taken place in the petitioner's house on that night. It is alleged that the petitioner was surprised to see "the ugly and silly behaviour of the respondent towards her brother-in-law before the petitioner's relations who had to move away'. The second one is alleged to have occurred when the petitioner got his wife exclusively in the bed-room after the formalities of the ceremony were over. At the earliest opportunity, as the petitioner (P.W. 1) states, the respondent wife firmly demanded in a commanding tone that (1) the title of the house must be transferred in her name; (2) she was to be made nominee in respect of the LIC policy and Provident Fund and (3) henceforth the monthly salary of the petitioner was to be handed over to her. The petitioner tried to pacify his wife without success and when he approached her she violently pushed him back and insisted that the won't allow "the conjugal Union" until the demands were fulfilled. While after the first incident the petitioner was surprised at the shameless behaviour of his wife, on the next occassion he was shoked and dis-appointed. The story of both the incidents is liable to be rejected because of its improbability and absurdity. It is inconceivable that a newly-married girl could "hug and Kiss" her 'Jamaibabu' (elder sister's husband) before the very eyes of his wife and the petitioner's relations. Even if she had any immoral affair with his Jamaibabu, she must not have displayed such a shameless behaviour before the full house. D.W. 2 Mukti (Iti's Jamaibabu) has cetegorically denied any such incident having taken place that night and the photographs with the smiling faces of the couple, admittedly taken after the alleged incident, belie the statement of the petitioner in regard to the alleged ugly incident. It is unfortunate that the petitioner dragged the teenagers. P.W. 5 Ranjit and P.W. 6 Kalpana, to the Court to support such a false story.

22. The next incident relating to certain demands made by Iti is also improbable and unbelievable. It is impossible to hold that a girl of 19 would venture to press for the demands to her husband aged 34 on the very first night and would insist on fulfilment of those demands before the husband could touch her body. That the story of both the incidents aforesaid is false would be further evident from the discrepancies between the averments made in the pleading and the statements made by P.W. 2 at the trial. Thus, while in Paragraph 13 of the petition it was alleged that on 27th January, 1980 Iti for the first time, disclosed that, "she had her first happy sex experience with one of her relations" in his deposition the petitioner (.P.W. 2) indulged in saying that on the 'Phulsajya' night (612.79) the wife had given out that she loved another person and asked the petitioner not to touch her body. Again, while in the petition it was alleged that on the very first night Iti grew furious and behaved rudely in his deposition P.W. 2 did not mention about the violent temperament of his wife on that night. The petitioner has examined his elder brother Madan (P W 4) to corroborate his statements regarding the 'Phulsajya' night incidents. His evidence is that on 7th morning Rabin (Petitioner) came out of his room weeping and reported that Iti did not allow him to touch her body and she had told that she had already taken Mukti Mukherjee, husband other Nanidi, as her husband He also reported about the demands made by Iti. It has already been pointed out that the story of the "Phulsajya' night incidents is improbable and false and accordingly the corroboration of the alleged incidents by P.W. 4 does not deserve consideration at all.
23. In the petition for divorce the petitioner made various complaints against the respondent and with reference to certain incidents on certain dates he tried to make out a case he feared that he might be killed by his wife and that it was impossible for him to live with such a woman any longer. The gist of such incidents, between 7.12.79 and 5.10.80, which the petitioner described as the period of utmost misery, is this:- (1) on 10th December respondent's second brother instigated his sister within the hearing of the petitioner that he (brother) would kidnap Rabin and Iti and force them to live in his house; (2) on 12th December when the petitioner had been to his father-in-law's place on invitation, he was insulted by Iti's parents who insisted that Robin must live in his father-in-law's house at Gharjamai; (3) on 18th April and 29th October the respondent kicked the petitioner and physically assaulted him with fists and blows; (4) In October that year the respondent assaulted her mother-in-law and left the matrimonial home with cash and ornaments; (5) on 14th October the petitioner was attacked by his brother-in-law and his associate while he was returning home from the office; (6) on 4th and 15th October the father-in-law of the respondent and her relations visited the petitioner's office and threatened the petitioner; (7) on several dates in November, 1980 the respondent and her relations incited some local people and tried to ransack the petitioner's house.
24. With regard to the incidents referred to in paragraphs 17 and 21 of the petition, there is no corroboration. Even P.W. 1 who claimed to be a colleague of the petitioner does not state anything about the alleged threatening by the father-in-law inside the petitioner's office. No neighbour has been examined to prove the incidents dated 16th and 19th November. P.W. 1, a colleague of the petitioner, speaks nothing about the relationship between Robin and Iti. Is it not surprising that the petitioner, who had been subjected to severe mental agony for more than eleven months, would not give vent to his feelings to his colleague working in the same branch ? As regards the accusation of physical assaults on Robin by Iti, P.W. 4. Madan has stated that Robin had reported that he was kicked twice on the belly by Iti, who also throttled her husband and on another occasion Iti pressed Robin's testicles and on the last occasion she hit him on the chest with a glass. P.W. 3 Binapani speaks about the incidents when Iti kicked Robin and pushed Binapani on the ground. P.Ws. 5 and 6 have stated about the incidents on two occasions. On a careful scrutiny of the evidence of the P.Ws. we are satisfied that the story of physical assault by Iti on Robin is a fabrication. It appears that in the petition there is mention of assault on two occasions only and there is no allegation that the respondent ever hit the petitioner with a glass or pressed his testicles violently. P.W. 3 simply stated that Iti threw a glass of water at Robin. She does not speak about the physical assault on Robin, although P.W. 4 Madan has testified that on hearing the alarm raised by Robin on some

occasions he along with his mother rushed to his room and got the report of assault by Iti on Robin. P.W. 4 is not truthful and so also the petitioner himself. That the allegations made in the petition are totally false would be evident from the circumstances set out below. It is alleged that on 5.10.80 Iti assaulted her mother-in-law and left the matrimonial home along with her parents and relations as a result of which Binapani fell down on the ground and became unconscious. The homeopath doctor who is said to have treated the lady has not been examined. If the incident dated 5.10.80 did at all occur in the manner alleged, then after nine days, that is on 14th October, the mother-in-law could not have showered plenty of love and blessings on her bouma (Iti) through the letter marked Ext. A. The authenticity of the letter has not been challenged by the petitioner or by his mother. The alleged incident dated 5th October is strongly contradicted by the statement made in Paragraph 15 of the petition which shows that on 29th October Iti assaulted Robin his house with fists and blows. The respondent herself and her father (D.W.5) and brother (D.W. 4) have categorically denied the material allegations made in the petition and in view of the contradictions and discrepancies appearing in the petition and in the evidence we find no reason to disbelieve them. Robin's mother tried to canvass simple that "the relationship between Rabin and bouma was not at all good. Bouma's behaviour with Robin was also bad". P.W.s 5 and 6 have also stated that the quarrel between Chotokaka and Kakima was a 'daily affair'. Even if Iti was quarrelsome and short tempered, in the absence of any convincing proof that the wife's conduct was so grave so as to endanger the husband's personal safety and destroy his mental peace, the said conduct by itself would not constitute legal cruelty within the scope and meaning of Section 13(1)(ia) of the Act, because as observed by their Lordships in the case of (6) Dastane v. Dastane, , "Passion and petulance have perhaps to be suffered in silence as the price of what turns out to be an injudicious selection of a partner". The natural wear and tear in the married life may not be taken note of seriously. It appear that from 5.12.79 till 5.10.80 the respondent wife lived in her matrimonial home with occasional visits to her father's place. Is it probable or believable that despite her shameless and cruel behaviour she would be allowed to stay in the matrimonial home for such a long period or that the man would simply weep on each occasion when he as assaulted by his wife? Thus on weighing various probabilities, we find that the preponderance is against the petitioner and accordingly the suit is liable to be dismissed. We find no reason to interfere with the findings of the learned trial Judge on the merits of the petition for divorce. The result is that the appeal fails and the same is dismissed, but in the circumstances of the case, without costs.

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MALZA D. SHIRA VERSUS ARCHANA MARAK AND ANR.

Gauhati High Court

AIR 2004 Gau 165, (2004) 1 GLR 109

**(Before Hon'ble Mr. Justice P Naolekar & Hon'ble Mr. Justice A Saikia,
Hon'ble Mr. Justice A Roy)**

Malza D. Shira

Versus

Archana Marak And Anr.

Decided on 27 March, 2003

Whether the Court has jurisdiction or authority to adjudicate upon the title to the property or give directions of return of that property to the wife holding it that the wife has right, title and interest over the property as per customary law applicable to the parties while granting the decree for divorce under the Act 1869.. It is apparent from the section that whenever the Court pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, and it is made apparent to the Court that the wife is entitled to any property, the Court may, if it thinks fit, order such settlement as it thinks reasonable to be made of such property or any part thereof for the benefit of the husband or the children of marriage or of both. The primary requirement for application of this Section is that, the Court is pronouncing a decree of dissolution of marriage or judicial separation for adultery of the wife. Thus, the decree should be for dissolution of marriage or judicial separation for the adulterous conduct found by the Court against the wife and not against the husband. Secondly, the settlement which is permissible under Section 39 of the property, is in favour of or in benefit of the husband or of the children of marriage or of both. Thus, when the Court passes a decree of divorce on the ground of adultery of the wife, the Court gets jurisdiction to pass a direction for settlement of property in favour of the husband or the children of marriage or both. The settlement of the property contemplated under Section 39 is in favour of the husband or the children of the marriage or both. It does not contemplate settlement of the property in favour of the wife when the Court passes a decree on the ground of adultery found to have been committed by the husband. Apart from this, it is essential that the decree should be on the ground of adultery, if the decree is not on the ground of adultery but on any other grounds then the Court does not get jurisdiction to pass an order under Section 39 of the Act.

JUDGMENT

Hon'ble Mr. Justice P.P. Naolekar, CJ.

1. None appears for the respondents.
2. The petitioner-husband Shri Malza D. Shira has filed a suit for divorce under Section 10 of the Indian Divorce Act, 1869 (for short "the Act"). It is alleged that Smti Archana Marak, the wife of the petitioner and Simon Sangma, had adulterous relations. His wife has deserted him without any justifiable cause. The respondent No. 1, the wife has entered appearance and filed her written statement denying the allegations of adultery and desertion. On the contrary, she has alleged adultery, cruelty and desertion on the part of the husband. She further prayed for return of all the matrimonial properties and maintenance of Rs. 2,000 per month for herself and minor children. The Court below after recording evidence of the

parties have reached to the conclusion that both the parties have failed to prove the adultery alleged by them against each other. However, the wife has successfully proved the cruelty and desertion against the petitioner-husband and consequent thereof, the decree of divorce was passed. The Court further directed custody of the minor children with the mother Smti Archana Marak. While passing the decree of divorce, the Court gave further direction regarding the property shown in Annexure-I of the written statement of the Respondent No. 1 holding it to be property of the wife being matrimonial property. The Court has directed that on any matrimonial property, the husband has no right, title and interest as per the customary law applicable to the Garos. Therefore, the property shown in Annexure-I is to be returned back by the petitioner-husband to the wife, i.e., the Respondent No. 1 within a period of one month.

3. When the matter came up for confirmation of decree of divorce as required under Section 17 of the Act, Miss A. Paul, the counsel for the petitioner-husband submitted that the decree for divorce by the Court on the basis of the allegations made in the written statement could not have been granted. Besides this, the Court has no jurisdiction or authority to adjudicate upon the title to the property or give directions of return of that property to the wife holding it that the wife has right, title and interest over the property as per customary law applicable to the Garos while granting the decree for divorce under the Act 1869.
4. It is true that Court below has refused decree of divorce on the allegations made by the petitioner-husband as he has failed to substantiate those allegations, but has granted decree of divorce on the basis of grounds alleged by the wife in her written statement having found them proved by the respondent wife. Miss A. Paul urged that the husband-petitioner having failed to prove the allegations, the Court could have at best dismissed the petition for divorce and has no jurisdiction to pass decree on the basis of allegations made in the written statement. Answer to the question of the counsel lies in Section 15 of the Divorce Act, which reads :

"Section 15 : Relief in case of opposition, of certain grounds. - In any suit instituted for dissolution of marriage, it is respondent opposes the relief sought on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty, or desertion without reasonable excuse, or in case of such a suit instituted by a wife, on the ground of her adultery and cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief, and the respondent shall be competent to give evidence of or relating to such cruelty or desertion."

Section 15 authorise the Court to give decree on the basis of allegation made by the respondent/defendant in written statement and proved by him or her. This Section lays that when a suit is instituted for dissolution of marriage, the respondent can oppose the relief on the ground of petitioner's adultery, cruelty or desertion, and on such grounds or ground being raised, the court should permit the respondent to prove those grounds by leading an evidence and if the court reaches to the conclusion that grounds/ground is proved, then to grant decree for divorce. Section 15 permits respondent defendant to be petitioner/ plaintiff while defending the suit for divorce. The decree of divorce passed by the learned Judge of the trial Court is in accordance with law being permissible by virtue of Section 15 of the Act.

5. Coming to the second submission of Miss Paul regarding directions for return of Annexure-I property to the respondent wife, we find that under Section 39 of the Act (later on omitted by Act 51 of 2001) (as it stand at relevant time), the Court has jurisdiction and authority to pass an order while passing a decree of divorce, as it thinks reasonable, to be in regard to the property of the wife. The question really is, whether the Court in the facts of the present case could have exercised such power. For better appreciation of the submission made by the counsel for the petitioner-husband, it would be appropriate to reproduce Section 39 of the Act.

"39. Power to order settlement of wife's property for benefit of husband and children. - Whenever the Court pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, if

it is made to appear to the Court that the wife is entitled to any property, the Court may, if it thinks fit, order such settlement as it thinks reasonable to be made of such property or any part thereof, for the benefit of the husband, or of the children of the marriage, or both. Any instrument executed pursuant to any order of the Court at the time of or after the pronouncing of a decree of dissolution of marriage or judicial separation, shall be deemed valid notwithstanding the existence of the disability of coverture at the time of execution thereof.

Settlement of damages. - The Court may direct that the whole or any part of the damages recovered under Section 34, shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife."

6. It is apparent from the section that whenever the Court pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, and it is made apparent to the Court that the wife is entitled to any property, the Court may, if it thinks fit, order such settlement as it thinks reasonable to be made of such property or any part thereof for the benefit of the husband or the children of marriage or of both. The primary requirement for application of this Section is that, the Court is pronouncing a decree of dissolution of marriage or judicial separation for adultery of the wife. Thus, the decree should be for dissolution of marriage or judicial separation for the adulterous conduct found by the Court against the wife and not against the husband. Secondly, the settlement which is permissible under Section 39 of the property, is in favour of or in benefit of the husband or of the children of marriage or of both. Thus, when the Court passes a decree of divorce on the ground of adultery of the wife, the Court gets jurisdiction to pass a direction for settlement of property in favour of the husband or the children of marriage or both. The settlement of the property contemplated under Section 39 is in favour of the husband or the children of the marriage or both. It does not contemplate settlement of the property in favour of the wife when the Court passes a decree on the ground of adultery found to have been committed by the husband. Apart from this, it is essential that the decree should be on the ground of adultery, if the decree is not on the ground of adultery but on any other grounds then the Court does not get jurisdiction to pass an order under Section 39 of the Act.
7. In the present case, the Court has specifically recorded the finding that the Court does not find the ground of adultery alleged by the petitioner-husband or by the respondent wife is proved. The decree granted by the Court is on the ground of cruelty and desertion found against the petitioner-husband. Therefore, there is no decree on the ground of adultery. That apart, the Court does not get jurisdiction to settle the property in the benefit of the wife under Section 39. Section 39 only authorises settlement of property in favour of the husband and children of the marriage. On the facts found, the Court could not have exercised jurisdiction to pass decree for delivery of the property to wife and, therefore, although confirming the decree of divorce we set aside the decree of the Court directing return of the property mentioned in Annexure-I to the written statement. As the result, decree for divorce is confirmed and the decree for return of Annexure-I to the written statement property is set aside. We, however, make it clear that it shall be open for the parties to approach the appropriate court for settlement of dispute, if any, regarding Annexure-I property.
8. The decree is partly modified as indicated above.

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KYNTIEW AKOR SUCHIANG VERSUS WOSTON HYNNIEWTA

MAF No. 1 Of 2015

(Before Hon'ble Mr. Justice S.R. Sen)

*Smt. Kyntiew Akor Suchiang, C/o Office of the Principal District Institute of Education and Training
Nongpoh, Ri-Bhoi District Meghalaya, R/o Ladthalaboh (Dongmihnsngi) Jowai, West Jaintia Hills
...Appellant*

Versus

*Shri Woston Hynniewta, S/o Shri Shemphang Wanshong R/o Mawlai Umjaiur East Khasi Hills District,
Meghalaya Or Senior Accountant (Cash Section) Office of Accountant General (A&E) Meghalaya,
Shillong 793001 ...Respondent*

For the Petitioner: Mr. S Jindal, Mr. S Dey, Ms. QB Lama re Advocates

For the respondent: Mr. CH Mawlong, Advocate

Decided on September 21, 2015

It is the duty of the Court to try to reconcile and save the family and not to just grant divorce. Besides that, if it is apparent from the order that before taking up the issue the Court has not taken any steps to reconcile the matter between the parties which is mandatory in nature trial, such ex-parte judgment is not a good judgment, the court to proceed by first adopting reconciliation method and after it failed then to proceed with the trial in accordance with law.

JUDGMENT AND ORDER (ORAL)

Hon'ble Mr. Justice S.R. Sen : — Appellant's case in nut-shell is that;

"By this appeal under clause (d) of Rule 1 Order 43 of the Code of Civil Procedure, the Appellant herein has assailed the order dated 31-7-2015 passed by the L'd court of Judge District Council Court Shillong in Divorce Suit No. 45/2013, by which order the Application dated 17-12-2014 filed by the Appellant under Order 9 Rule 13 CPC for setting aside the ex parte judgment and decree dated 26-9-2014 passed by the said court was rejected.

The Appellant and the Respondent herein are husband and wife and their marriage was solemnized according to Christians rights at Seventh Day Adventist Church, Jowai, Jaintia Hills District on 16-3-2000. The party belong to Khasi Panar Schedule Tribes of Meghalaya. Out of the said wedlock of the parties, two children were born viz; Miss Vanessa Grace Suchiang and Master Dajied Kyrpang Suchiang on 21-1-2007 and 31-3-2008 respectively. The Respondent husband is working as a Senior Accountant in the Cash Section of the Office of the Accountant General (A&E), Meghalaya, Shillong and he is drawing a monthly salary of Rs. 56,617.00.

The Respondent husband has extra marital relation and he right from 2009, intended to get rid of the Appellant wife and for that he has sent two application consecutively in the month of August 2009 and November 2009 for seeking divorce by mutual consent and the said applications were however not signed by the Appellant wife. Subsequently the Respondent husband filed a divorce suit No. 22/2010 in the court of Judge District Council Court, Jowai and the Appellant wife entered appearance and contested the case by filing her show cause but subsequently the Respondent husband withdrew the said suit by order dated 19-3-2013 with a liberty to file a fresh suit.

After the withdrawal of the said divorce suit No. 22/2010 vide order dated 19-3-2013, the Respondent husband again instituted a fresh divorce suit No. 45/2013 in the court of Judge District Council Court Shillong for seeking divorce and dissolution of marriage under 10(l)(x) of the Divorce Act, 1869 as amended by falsely alleging inter alia that the Appellant wife has falsely accused the Respondent husband of having an extra marital relation and she has chased the Respondent husband from her house. The Appellant wife entered appearance in the case and filed her show cause and resisted vehemently the prayer of the Respondent husband for seeking divorce and dissolution of marriage on the aforesaid unfounded grounds and allegations. The appellant wife engaged Shri N.M. Mansuri, Advocate Shillong, practicing in Shillong Bar Association as her counsel and entrusted the contest of the case in his hand. But however, the Appellant was always keeping track over telephone and was occasionally meeting her counsel.

The L'd Counsel of the Appellant filed show cause and he also cross examined two witnesses of the Respondent husband and the matter was fixed on 12-8-2014 for cross examination of PW3 and on that day the L'd Counsel of the Appellant wife was found to be absent and for that reason the L'd court below passed the order dated 12-8-2014 that the case shall proceed ex parte against the Appellant. The order dated 12-8-2014 is bad in law as in absence of cross examination of PW3 the L'd court below would have close the cross examination and would have discharge the witness, but the L'd Court below was not entitled to order that the case shall proceed ex parte without affording any opportunity to the Appellant wife to adduce her evidence and evidence of other witnesses in support of her case.

Thereafter, an Application No. 698/2014 dated 11-9-2014 was filed by the Appellant wife to vacate the order dated 12-8-2014 and the said application was fixed for show cause and hearing on 19-9-2014 and on that day also the L'd Counsel of the Appellant was found to be absent and for that reason the L'd Court below rejected the said application No. 698/2014 and straight away posted the case for delivery of judgment on 26-9-2014 without affording any opportunity to the Counsel of either side to make submission on the basis of their pleadings and cross examination of the Respondents witnesses. Thereafter, the L'd court below delivered the ex parte judgment and decree dated 26-9-2014 in absence of the parties.

The Appellant wife obtained the certified copy of the entire order sheet of the L'd Court below and on perusal of the same she came to know that the L'd Counsel appointed by her was not in a position to look after the interest of the Appellant and therefore, she decided to engage another lawyers, and they filed another application No. 971/14 under Order 9 Rule 13 for setting aside the ex parte judgment and decree dated 26-9-2014 as well as the order dated 12-8-2014. The Respondent opted not to file any show cause to the said Application and the application was heard on 15-7-2015 and by impugned order dated 31-7-2015 the said application filed under order 9 Rule 13 of CPC for setting aside the ex parte judgment and decree dated 26-9-2014 was rejected. Being aggrieved by the said order the Appellant has filed the instant Appeal under Order 43 Rule 1 of Code of Civil Procedure with a prayer to set aside the impugned order dated 31-7-2015 and consequent upon the setting aside of the order dated 31-7-2015, also set aside the ex parte judgment and decree dated 26-9-2014 and order dated 12-8-2014 passed in Divorce suit No. 45/2013."

2. Heard Mr. S Jindal, learned counsel for the appellant who submits that learned Judge, District Council Court, East Khasi Hills District, has passed an ex-parte judgment in Divorce Suit No. 45 of 2013 on 26.09.2014.
3. Being aggrieved by the said judgment, appellant approached the learned Court of the District Council, for vacating the ex-parte judgment but the same was rejected vide order dated 31.07.2015.
4. Being aggrieved by the order dated 31.07.2015, appellant approached this Court. Learned counsel submits that the learned District Council Court passed the impugned judgment and order without hearing the parties. He prayed that necessary order may be passed.

LANDMARK JUDGMENTS ON DIVORCE

5. On the other hand, Mr. CH Mawlong, learned counsel for the respondent submits that the Court has fairly recorded the reason for rejecting the petition for vacating the ex-parte judgment and order dated 26.09.2014. So appeal may be dismissed.
6. After hearing the submission advanced by the learned counsel for the parties and after going through the ex-parte judgment dated 26.09.2014 as well as impugned order dated 31.07.2015, it can be seen that in the order dated 31.07.2015, the Court observed that respondent was mostly not present personally before the Court on the date fixed. Therefore, she has no right to blame the lawyer. Learned Court also came to the conclusion that due to the negligent attitude of the respondent, lawyers were helpless.
7. After considering the impugned orders and the submissions advanced by the learned counsel for the parties, I am of the view that it is apparent from the order that before taking up the issue the Court has not taken any steps to reconcile the matter between the parties which is mandatory in nature. It is the duty of the Court to try to reconcile and save the family and not to just grant divorce. Besides that, in my view, ex-parte judgment is not a good judgment. Therefore I am of the further opinion that it is a fit case to remand back the case to the learned Court of the District Council for fresh trial, by first adopting reconciliation method and after it failed then to proceed with the trial in accordance with law.
8. Accordingly, the matter is remanded back to the District Council Court, Shillong. Impugned order dated 26.09.2014 and impugned order dated 31.07.2015 are hereby set aside. The case is restored back to the stage from where it started moving ex-parte. However, before proceeding further reconciliation method is to be adopted.
9. Learned counsel for the appellant also raised the question of jurisdiction, that, I leave to the court of the District Council to decide after hearing the learned counsel for the parties in accordance with law.
10. With these observations, this appeal is allowed to that extent and is accordingly disposed of.
11. Registry is directed to forward a copy of this order to the District Council Court, Shillong, immediately.

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SUPRATIM DATTA VERSUS MOUTUSHI SEN

Mat. Appeal No. 04 of 2014

(Before Hon'ble Mr. Justice Sunil Kumar Sinha, C.J. & Hon'ble Mrs. Justice Meenakshi Madan Rai, J.)

Dr. Supratim Datta, S/o Dr. S.K. Datta, R/o Agartala, Tripura. Presently residing at 5th Mile Tadong, P.O. Samdur & P.S. Ranipool, East Sikkim ...Appellant

Versus

Moutushi Sen, D/o Shri Mrinal Sen, R/o Udaipur, Tripura. Presently residing at 5th Mile Tadong, P.O. Samdur & P.S. Ranipool, East Sikkim ...Respondent

Mr. A.K. Upadhyaya, Senior Advocate with Ms. Gita Bista,

Advocate for the Appellant.

Appellant Dr. Supratim Datta in person.

Dr. Doma T. Bhutia, Ms. Rupa Dhaka, Ms. Mina Bhusal and Ms. Yangchen Dadul, Advocates for the Respondent.

Respondent Ms. Moutushi Sen in person.

Decided on August 27, 2015

While dealing with the question of Mental Cruelty, it has to be borne in mind that no human standard can be laid down for guidance as to what comprises "mental cruelty". It could comprise of acute mental pain, agony and suffering as would make it impossible for the parties to live with each other. Whether a particular act or conduct complained of is covered by the ground of mental cruelty or not is to be decided on the merits of each individual case.

JUDGMENT

Hon'ble Mr. Justice Meenakshi Madan Rai :— Being aggrieved by the Judgment of the Learned Judge, Family Court, Gangtok in F.C. (Civil) Case No. 62 of 2012 (Reg. No. 167/2013) dismissing his petition seeking dissolution of his marriage with the Respondent, the Appellant in this Appeal seeks to assail the said Judgment.

2. The germane facts are that the Appellant (hereinafter 'Petitioner') and the Respondent were married in February, 2006 as per Hindu rites and customs and from the wedlock they have a daughter, now aged about seven years. The Appellant avers that the Respondent after their marriage insisted that they shift to either Kolkata or Agartala from Gangtok, his workplace, despite having agreed to live here prior to their marriage. That, after about four months of their marriage, the Respondent accused him of impotency and communicated this to her parents which led the Petitioner to doubt the state of her mental health. She then went to live with his parents at Agartala, where she reiterated this accusation to the Petitioner's parents threatening to file for a divorce. After living away from the Petitioner for about one and a half years, she returned to Gangtok but attempted to ruin the cordial relations between the Petitioner and his relatives by making unfounded allegations of his sister-in-law practicing black magic to harm their daughter. She wrongfully alleged harassment by a friend of the Petitioner's brother who according to her called her constantly on the phone which turned out to be to the contrary. She also made efforts to create

a rift between the Petitioner and his aged parents with whom she had indifferent relations by speaking against them and after the birth of their daughter prevented his parents from seeing the child. That, the relations between the Respondent and the parents of the Petitioner became acrimonious due to her misbehaviour added to which she threatened to commit suicide.

3. That, in the month of February, 2010 the Petitioner came to learn that the Respondent and her mother were threatening to file a case against the Petitioner and his entire family under Section 498A of the Indian Penal Code, 1860 which was however temporarily resolved between them. She also told malicious lies regarding the character of the Petitioner to his colleagues, one Sunil Kumar Panday (PW-5) and Debranjana Dutta (PW-4) by frequenting their house and informed them that she intended to file a case of Domestic Violence against him. Apart from the above, it was alleged that she created nuisance in his workplace and abused him in filthy language, while on another occasion in a fit of rage, she assaulted him with a teacup and broke household articles.
4. That, she spent unreasonably long periods of time with one Kunzang Ongmu (DW-2), who also arranged a job for her at M.G. Marg, and the Respondent shifted to the house of the DW-2 for a month on account of renovation of the flat at which time she tried to keep the Petitioner's daughter away from him.
5. That, the Petitioner used to take his child to and from school. On one Friday night, the Respondent called him informing him that their child had fever and some rashes in her private parts. On the following day, she informed him that on the child being examined by a doctor, she was diagnosed with urinary infection. But, the very next day when he went to visit the child, she restrained him from meeting her and accused him of molesting his own child after taking her to his workplace. That, this allegation traumatised the Petitioner to the extent that he could not carry out his day to day activities.
6. As a consequence of the acrimony between the Petitioner and the Respondent, on 7.10.2012 the Petitioner looked for alternative accommodation and left his home subsequent to which the Respondent lodged a Missing Report at the Sadar Police Station and displayed his photograph in the local print and electronic media. That, on the above account, the Respondent has meted out mental cruelty to the Petitioner and if the parties were to continue living together, it would harm his academic career, reputation as well as the reputation of his family members, hence the prayer for a divorce in terms of Section 13(l)(ia) and (iii) of the Hindu Marriage Act, 1955.
7. The Respondent resisted the contentions of the Petitioner and interalia submitted that it is the Petitioner who is infact of sick behavior and spent time watching pornographic sites in the computer, of which Exhibit-C is evidence. She denied having accused him of impotence but asserted that on 27.5.2012, the Petitioner dropped their daughter home from school at about 2:30 p.m., which was late as compared to other days. After coming from school, their daughter told the maid that she was having some pain in her private part. The maid in turn, called the Respondent, who found her daughter unwell, running a fever with some redness and rashes in her private part. On enquiry from the child, it was contended that the child informed the Respondent that the Petitioner had put his finger inside her private part. A Gynaecologist examined the child on the next day.
8. It was also put forth that the Petitioner refused to give her household expenditure. She admitted to having lodged a missing report against the Petitioner and issuing missing advertisements in two local papers after he left the house on 7.10.2012. That, on 10.10.2012, she also filed an application before the Women's Commission seeking help to trace out the Petitioner. On the same day, the Sadar Police Station informed her that the Petitioner was at the Police Station. On reaching there, although the Police persuaded him to go with her but he refused. It is her contention that the Petitioner was unhappy on account of the birth of their baby girl and was taking steps to file a divorce, hence the Petition be dismissed.
9. The Learned Judge, Family Court framed three issues for determination as follows:-

1. Whether the Respondent has after the solemnization of her marriage with the Petitioner treated the Petitioner with cruelty?
 2. Whether the Respondent has been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder of such a count and to such an extent that the Petitioner cannot reasonably be expected to live with her?
 3. Whether the Petitioner is entitled to a decree of divorce on the above grounds?
10. The parties led their evidence and on appreciation of the evidence and documents on record, the Learned Judge, Family Court dismissed the Petition filed by the Petitioner recording a finding that the Petitioner had not been able to prove either Cruelty or that the Respondent was of unsound mind, hence this Appeal.
 11. The grounds emphasized by the Learned Sr. Counsel Mr. A.K. Upadaya, before this Court was that the marriage between the Appellant and the Respondent had broken down irretrievably and no purpose would be served by them living together again. It was contended that the Respondent by making allegations of impotency, lying about his character to his friends and more especially by making unproved allegation of him having molested his own child, as well as lodging a missing report against him before the Police and publishing it in the newspapers, has not only maligned him but caused him mental agony. In such circumstances a divorce is the only option. In support of his submissions, he has placed reliance on K. Srinivas Rao v. D.A. Deepa: (2013) 5 SCC 226. Learned Sr. Counsel submitted that he does not press the grounds of mental unsoundness of the Respondent.
 12. Per contra, Dr. Doma T. Bhutia, Learned Counsel arguing for the Respondent submitted that since the marriage between the parties was an arranged one, he was unhappy with it, to exacerbate which a baby girl was born to them, which is the main motive for the divorce. That, Exhibit R-1, the letter written by him clearly depicts his mentality which is inextricably connected to the child's molestation. According to her, the fact of molestation is proved by the Medical Examination of the child conducted by a Gynaecologist, who found redness in her private part. That, DW-2 had accompanied the Respondent for the Medical Checkup of her daughter and the evidence of this witness indicates that after examination, the Doctor observed that something had been inserted in the child's private part. That, witness Parinita Lama (DW-1) has also said that she along with Debranjana Dutta (PW-4) and Sunil Kumar Panday (PW-5) had seen the videography recorded by the Respondent, wherein the private part of the minor child appeared to be molested and that the child disclosed the name of the Petitioner as the assailant. The Respondent, thus relied on the evidence of DW-1 and DW-2.
 13. That, the Appellant had deserted his family having left their house without informing anyone on 7.10.2012. It was also contended that Exhibit R-1 names one "Geeta" and hence proves that the Petitioner was having an extra marital affair as borne out by the said document. In the same breath, it was, however, vociferously argued that the Respondent desires to live with the Petitioner along with their child and should the divorce be granted to him, the Respondent and the child would not have any shelter. Hence, the Appeal be dismissed.
 14. To buttress her submissions, Dr. Doma T. Bhutia, Learned Counsel has placed reliance on the following:-
 1. Gurbux Singh v. Harminder Kaur: (2010) 14 SCC 301,
 2. Hemali Bindesh Kelaiya v. Bindesh Jayantilal Kelaiya: (2014) 3 AIR Bom R 268,
 3. Mrs. Sanjana Sandip Pednekar v. Mr. Sandip Sitaram Pednekar: 2014 (3) ALL MR 93 Bom,
 4. Geeta Nainy @ v. B.B. Nainy: 27 (1985) DLT 292,
 5. Chetan Dass v. Kamla Devi: (2001) 4 SCC 250,
 6. Dr. N.G. Dastane v. Mrs. S. Dastane: (1975) 2 SCC 326 and
 7. Vinita Saxena v. Pankaj Pandit: AIR 2005 Delhi 243

15. The rival contentions put forth by Learned Counsel for both parties have been duly considered and the entire documents and evidence relied on by the parties have also been perused and carefully considered.
16. With regard to the allegation of Impotency, we refrain from a prolonged discussion as the parties have a child from the wedlock and no arguments were pressed in this regard by the Respondent.
17. The other allegations of the Respondent leaving the house without information to her in-laws and having acrimonious relations with them can be attributed to in the occasional wear and tear of family life, in which compromises have to be made by both sides.
18. The primary allegation of the Petitioner is of mental cruelty meted out to him by the Respondent by accusing him of molesting their child who was three years old at the relevant time.
19. Before proceeding further, it is pertinent to remark here that the matter was listed for final hearing after both the parties submitted before this Court that there was no possibility of a Compromise or even of Mutual Divorce between them.
20. While dealing with the question of Mental Cruelty, it has to be borne in mind that no human standard can be laid down for guidance as to what comprises “mental cruelty”. It could comprise of acute mental pain, agony and suffering as would make it impossible for the parties to live with each other. Whether a particular act or conduct complained of is covered by the ground of mental cruelty or not is to be decided on the merits of each individual case.
21. In *Shobha Rani v. Madhukar Reddi* (1988) 1 SCC 105, the Hon’ble Apex Court held thus;

“The word ‘Cruelty’ has not been defined in the Hindu Marriage Act. It has been used in Section 13(1) (i-a) of the act in the context of human conduct or behavior in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical or intentional or unintentional. If it is physical it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty.”
22. Later in time in *V. Bhagat v. D. Bhagat*: (1994) 1 SCC 337, it was held that

“Mental cruelty means that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other, must be of such a nature that the parties could not reasonably be expected to live together. Regard must be had to the social status, education level of the parties and the society they move.”
23. In the case of *A. Jayachandra v. Aneei Kaur*. (2005) 2 SCC 22, the Hon’ble Apex Court observed as follows;

“Mental cruelty has to be considered in the light of the social status of parties, their education, physical and mental condition, customs and tradition. Court to draw inference and decide on the basis of the probabilities of the case having regard to the effect on the mind of the complainant spouse because of the acts or omissions of the other spouse. However, where the conduct complained of itself is bad enough and per se unlawful or illegal, the impact or injurious effect on the other spouse need not be considered. In such cases, cruelty will be established if the conduct itself is proved of admitted. To constitute cruelty, the conduct complained of should be “grave and weighty”whereupon it can be concluded that the Petitioner spouse cannot be reasonably expected to live with the other spouse, it must be something more serious than “ordinary wear and tear of married life.” 24. In *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511, while discussing the concept of mental cruelty, the Hon’ble Apex Court observed that no uniform standard can ever be laid down for guidance, yet it is deemed appropriate to enumerate some instances of human

behavior which may be relevant in dealing with cases of "mental cruelty", cautioning that the same are only illustrative and not exhaustive, i.e.

- (i) On consideration of the complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make it possible for the parties to live with each other, could come within the broad parameters of mental cruelty;
- (ii) On a comprehensive appraisal of the entire matrimonial life of the parties, if it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party;
- (iii) Mere coldness or lack of affection cannot amount to cruelty; but frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable;
- (iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of the other for a long time, may lead to mental cruelty;
- (v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse;
- (vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting the physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty;
- (vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness, causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty;
- (viii) The conduct must be much more than jealousy, selfishness, possessiveness which cause unhappiness and dissatisfaction and emotional upset, but may not be a ground for grant of divorce on the ground of mental cruelty;
- (ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.
- (x) The married life should be reviewed as a whole and a few isolated Instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty;
- (xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly, If the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty;
- (xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty;
- (xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty;
- (xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feeling and emotions of the parties. In such like situations, it may lead to mental cruelty.

25. The aforesaid principles were reiterated in the case of Gurbux Singh v. Harminder Kaur: AIR 2014 SC 114.

26. The Hon'ble Apex Court in (2013) 5 SCC 226: K. Srinivas Rao v. D.A. Deepa (relied on by the Petitioner) while enumerating the illustrative cases where inference of mental cruelty can be drawn as detailed in Samar Ghosh's case (supra) remarked as herein below;
- “16. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or job of the spouse and filing repeated false complaints and cases in the court against the spouse would in the facts of the case amount to causing mental cruelty to the other spouse.”
27. The Petitioners primary grievance is of the allegation against him of molesting his child, which was unsubstantiated by any proof. It was vehemently contended that neither the child nor the maid who was allegedly the first recipient of the information from the child, nor the Doctor who examined the child were arrayed as witnesses for the Respondent, nor was there any other independent witness furnished to lend credence to the allegation.
28. The response of Dr. Doma T. Bhutia to this argument was that if the Petitioner so desired, he could have examined the child himself to disprove the allegation.
29. Pausing here for a moment, we may revert to the Provisions of Section 103 of the Indian Evidence Act, 1872 which lays down that the Burden of Proof as to particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that proof of that fact shall lie on any particular person. Illustration [(a)] of the said Section explains the position which is reproduced below: -
- “[(a)]. A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission....”
30. Thus, when the Respondent asserts that the molestation had taken place, she has to furnish the best evidence in proof thereof. If she fails to do so without reason, the Court can draw an adverse inference under Section 114(g) of the Indian Evidence Act, 1872 against the Respondent. It was contended by Dr. Doma T. Bhutia that the incident occurred when the child was three years old and the evidence of the Respondent was recorded on 3.4.2014 by which time the child was already about 6 years old and in all likelihood would not have been able to recall the incident. Even if this submission was accepted as true, the non examination of the Gynaecologist who had medically examined the minor and whose evidence was undoubtedly crucial cannot be brushed aside. Although, it was submitted before this Court that at the time of evidence the maid was away on leave, this fact does not appear to have been agitated before the Learned Family Court, besides which, they have not been even listed as witnesses therein.
31. On perusal of Exhibit-D, relied on by the Respondent purporting to be the Medical Report of the molestation, the same is dated “28.4.2012”, while as per evidence of the Respondent the alleged molestation took place on “27.5.2012”. There is thus a difference of approximately one month between the two dates. Nevertheless, assuming the date on Exhibit-D has been wrongly recorded as “28.4.2012” instead of “28.5.2012” the examination allegedly having been done after a day of the molestation, the Doctor in her report has not reflected that she had observed that something had been inserted in the private part of the child, contrary to the deposition of DW-2 Kunzang Ongmu Bhutia. It may be relevant to state here that under cross-examination, this witness has admitted that there is no document in the case papers to show any authenticity of molestation of the minor daughter.
32. Reverting to Exhibit-D, it interalia reads as
1. Redness
 2. 102° F
 3. WT - 15 ...”

33. Apart from the said observation, the Doctor has not even specified as to on which part of the child's body the redness was detected. In such a situation, it can well be presumed that the redness was on face of the child due to the high temperature that she was running.
34. The Respondent evidently made a video clipping of the redness of the genital of the minor child, apparently as proof of the molestation by the Petitioner. She has admitted to showing the same to Parinita Lama (DW-1), Sunil Kumar Panday (PW-5) and Debranjana Dutta (PW-4). The evidence of Parinita Lama (DW-1), however, does not establish that the molestation, if any, was indeed committed by the Petitioner, as according to her she had witnessed the videography recorded by the Respondent wherein the private part of the minor child appeared to be molested and the child disclosed the name of the Petitioner by saying "Daddy". Merely because the child said 'Daddy' on the prodding of the Respondent, by no stretch of the imagination establishes that he had molested the child. As pointed out by Learned Sr. Counsel Mr. A.K. Upadhyaya, since the child had fever she could well be looking for her father due to her illness and calling out to him.
35. Neither the evidence of PW-4 or PW-5 who had viewed the video clipping shown to them by the Respondent support the allegation of molestation. PW-4 has categorically deposed that in the video the Respondent was asking her daughter as to whether she was molested by her father or not. Although, the father of the Respondent Mrinal Kanti Sen was also examined by the Respondent as DW-3, he could throw no light on the allegation of molestation and admitted that there were no documents to establish the said act. The offending video clip was not produced as evidence before the Learned Family Court.
36. No assumption on molestation can be made by the Court without proof, the standard of proof in such matters of course being based on a "preponderance of probability". At this juncture, the ruling in *Dr. N.G. Dastane v. Mrs. S. Dastane*: AIR 1975 SC 1534 can usefully be referred to, wherein it was held that "The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Sec.3, a fact is said to be proved when the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Reference therein was made to the English case of *Blyth v. Blyth*: (1996) 1 All ER 524: 1966 AC 643: (1966) 2 WLR 634 (HL), wherein the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, the case, like any civil case, may be proved by a preponderance of probability. Reference was also made to an Australian case of *Wright v. Wright* (1948) 77 CLR 191: 22 Aus U 534, wherein the view taken was that the civil and not a criminal standard of persuasion applies to matrimonial causes, including issues of adultery. In the matter at hand, a scrutiny of the evidence reflects that it is bereft of any substance with regard to the allegation of molestation, thereby not even living up to the standard of "preponderance of probability".
37. Thus, on consideration of the evidence and facts and circumstances, in our opinion the Respondent by making the vulgar and scurrilous unproved allegation against the Petitioner of molesting his own child with the intention of demeaning him not only in the eyes of the social circle in which he moves around his family, but also in his own psyche, has without a shred of doubt caused him mental agony which thereby tantamounts to mental cruelty. The FIR lodged by the Respondent before the Sadar Police Station bore not only the details of Petitioner's absence from his home but also indicated that he was not providing the Respondent maintenance allowance to run her house or to purchase her daily requirements thereby demeaning him. The Missing Reports published in the two local papers along with the FIR's definitely added to the woes of the Petitioner. It is to be borne in mind that the Petitioner is a Doctor by profession and working as an Associate Professor in Manipal, the "Hue and Cry" message flashed by the Sadar Police Station to all the Station House Officers and Incharge of Police Stations in Sikkim would have adversely affected his reputation and consequently, his mental state. Evidently, he had moved out of his house on 7.10.2012, after finding the situation in the house intolerable.

38. In conclusion, in the facts and circumstances as explained above and bearing in mind the social status of the parties, their education and background, we are of the considered opinion that the Respondent Wife has by her conduct caused mental cruelty to the Appellant Husband by making an abhorrent and unfounded allegation of molestation by the Petitioner of his own child. The allegation is grave and sufficient by itself to qualify as mental cruelty on the anvil of the principles enunciated in the various authorities referred to herein above. The facts of the case bear out that the marriage has not only irretrievably broken down but also that it would be impossible for the Petitioner to live with the Respondent.
39. We are constrained to observe that if the Respondent alleges that the Petitioner was responsible for molesting her child, it is unfathomable as to why she not only failed to report the matter to the Police but why she insists on going back to living with him, when such a situation could be fraught with the risk of the act being repeated. The Petitioner on his part is unwilling to live with the Respondent for obvious reasons and insists that even if they were persuaded to live together, there would be no semblance of a marriage.
40. In the backdrop of the insistence of the Respondent to live with the Petitioner despite allegations made by her against him, we may refer to the decision in *Naveen Kohli v. Neelu Kohli* (2006) 4 SCC 558, where the Hon'ble Apex Court while dealing with a divorce matter in which both the appellant and the respondent had been living apart for more than ten years but the wife was not prepared to have a decree for divorce of mutual consent, observed as follows:-
- “Even at this stage, the respondent does not want divorce by mutual consent. From the analysis and evaluation of the entire evidence, it is clear that the respondent has resolved to live in agony only to make life a miserable hell for the appellant as well. This type of adamant and callous attitude, in the context of the facts of this case, leaves no manner of doubt in our minds that the respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together, or living together again.”
41. The observation appears to be apt for the facts and circumstances of the matter at hand.
42. Before closing, it would be appropriate to mention here that Section 25 of the Hindu Marriage Act, 1955 enjoins upon the Court to pass orders pertaining to Permanent Alimony and Maintenance. In this regard in Revision Petition (FAM. C.T.) No. 1 of 2014, one of us, Sinha C.J., vide Order dated 23.9.2014 had while dismissing the Petition, declined to enhance the monthly maintenance allowance of Rs. 20,000/- being received by the Respondent from the Petitioner under Section 125 of the Code of Criminal Procedure, 1973. It was found that the Gross Salary as per the Pay Slip of the Petitioner for the month of February, 2013 was Rs. 86,579/- and the Deduction therein were Rs. 32,994/-, his Net Salary, thus, amounting to Rs. 53,585/-. That, the Petitioner was required to maintain his aged parents and himself as well as the Petitioner and their daughter from the above said sum. This Court on considering the facts and circumstances of the case was of the view that the monthly maintenance of Rs. 20,000/- awarded to the Petitioner and their daughter cannot be said to be either unreasonable or on the lower side, so as to call for interference in that Petition. Accordingly, in terms of the said Order, while considering this aspect pertaining to maintenance, we are of the considered view that said amount of Rs. 20,000/- for the Respondent and her child does not require any interference and shall continue until further orders.
43. In the end result, in view of the discussions above, we set aside the impugned Judgment of the Family Court and direct that the marriage between the parties be dissolved in terms of the provisions of the Hindu Marriage Act, 1955.
44. Appeal succeeds.
45. Decree be drawn up accordingly.
46. Parties to bear their own costs.
47. Records of the Learned Trial Court be returned forthwith.

□□□

SMT. JAYANTI DEB VERSUS SRI MANAS KUMAR DAS

THE HIGH COURT OF TRIPURA AGARTALA

MAT Appeal 02 of 2012

*Smt. Jayanti Deb (Das) W/O Sri Manas Kumar Das D/O Sri Durgakumar Deb Resident of Arundhutinagar Road No. 1, P.O. A.D. Nagar, P.S. West Agartala, District-Tripura West PIN-799003.
..... Wife-Respondent-Appellant*

Versus

Sri Manas Kumar Das S/O Lt. Abanibhushan Das Resident of Village Sekerkote, P.S. Amtali, P.O. Sekerkote, District-Tripura West. At present: C/O Office of the CDPO, ICDS, Bishalgarh Block, PO & PS Bishalgarh District-Tripura West PIN- 799 102 ... Husband-Petitioner-Respondent

(Before Hon'ble The Chief Justice Mr. Deepak Gupta & The Hon'ble Mr. Justice U.B. Saha)

Date of delivery of judgment & Order : 19.02.2015

Date of hearing : 05.02.2015.

For the appellant : Mr. DR Choudhury, Advocate, Mr. D Deb, Advocate

For the respondent : Mr. D Chakraborty, Sr. Advocate, Mr. H Laskar, Advocate

- **This appeal is directed against the judgment dated 27.01.2012 passed by the learned Judge, Family Court, Agartala, West Tripura in TS(Div)191/2008 whereby and whereunder the learned Family Judge allowed the suit granting decree of divorce on the ground of cruelty between the parties.**
- **The learned Family Court considering the contentions made in the petition as well as in the written statement framed three issues which are as follows:**
 - (I) **Whether the petition is maintainable in its present form and nature?**
 - (II) **Whether after the marriage, the petitioner was tortured mentally in many ways and abused in filthiest language by the respondent, her sister and father for which he was compelled to live at his place of posting at Teliamura for some days to save himself from the tyranny of the respondent and whether thereafter, the respondent deserted her matrimonial home, i.e. the rented house without any reasonable cause in the month of April, 2007 permanently or whether after marriage, the respondent was tortured by the husband both mentally and physically being influenced by the wife of the elder brother of the petitioner, compelling her to take shelter in the house of her parents in the middle part of April, 2007? (III) Whether the petitioner is entitled to get a decree of divorce as prayed for?**
- **Issue nos. (ii) and (iii) relate to cruelty and the false allegation leveled by the appellant against the respondent. The petition for divorce was filed primarily on the ground of mental cruelty. Evidence was led by the parties, the respondent husband as PW 1 stated in his evidence that he was ill-behaved by the appellant and also since she did not like to live in the house of the elder brother of the respondent and when he could not accept such a proposal, she started non-cooperation in all affairs for which he was ultimately compelled to shift to a rented house and even in the rented house she did not stay more than 10 days in a month. He denied the allegations made by the appellant-wife**

regarding torture upon her as well as allegation regarding maintaining a special relationship with the wife of his elder brother (Boudi /Bhabhi) whom he considers like his own mother. He also stated that the allegation of not allowing the appellant to enter into the rented house after delivery of their daughter is totally false and in fact she herself did not come back to the said rented house and is now leading her own life as per her own whims. He also stated that due to constant mental torture he prayed for a decree of divorce on the ground of cruelty.

In view of the above, we are of the opinion that the learned Family Court did not commit any wrong granting the decree of divorce on the ground of mental cruelty as such mental cruelty has been established. It also appears from the judgment of the learned Family Court that while granting the decree of divorce, he also directed the respondent husband to give maintenance allowance of Rs. 4,000/- per month to the daughter of the respondent w.e.f. 01.02.2012 and this maintenance allowance of Rs. 4,000/- per month is to be sent to the appellant through her savings bank account within the first 10 days of every English calendar month. Therefore, it cannot be said that the learned Family Court did not consider regarding the maintenance of their minor daughter. The respondent-husband shall comply with the order of maintenance passed by the learned Family Judge in letter and spirit and the same is maintained by us. Thus, it is not necessary on our part to interfere with the order of the learned Family Judge.

JUDGMENT AND ORDER

Hon'ble Mr. Justice U.B. Saha :—

This appeal is directed against the judgment dated 27.01.2012 passed by the learned Judge, Family Court, Agartala, West Tripura in TS(Div)191/2008 whereby and whereunder the learned Family Judge allowed the suit granting decree of divorce on the ground of cruelty between the parties.

2. The appellant and the respondent are wife and husband, respectively. The respondent filed a petition under Section 13(1)(ia) of the Hindu Marriage Act, 1955 for divorce. The learned Family court after comprehensively dealing with the matter ordered dissolution of the marriage between the parties under Section 13 of the Hindu Marriage Act. The marriage was solemnized on 10th May, 2005 according to vedic rites and customs in the house of the father of the appellant at Arundhutinagar, Road No. 1, Agartala, West Tripura. The appellant, aggrieved by the aforesaid judgment of the Family Court preferred the instant appeal on the ground that the wife-appellant has sufficiently proved the mental and physical torture caused upon her by the respondent-husband due to her unwillingness to stay in the house of the elder brother of the husband-respondent. The appellant has also stated that the learned Family Court wrongly concluded about her cruelty upon her husband though, there is no evidence adduced by the husbandrespondent on that ground.

3. Brief facts which are necessary to dispose of this appeal are as under:

The respondent-husband Sri Manas Kumar Das in his petition under Section 13(1)(ia) of the Hindu Marriage Act stated, inter alia, that in the year 2004 when both the respondent-husband, petitioner in the suit and the appellant-wife, respondent in the suit, used to visit a coaching class for appearing TCS examination, they used to meet each other in the coaching class and were introduced and in course of time their acquaintance developed to love affairs and ultimately in spite of advice and caution given by his well-wishers not to be associated with the appellant, he decided to marry the appellant and ultimately their marriage was solemnized on 10.05.2005 according to the Hindu rites and customs, as stated supra. At the time of marriage, the respondent was residing in the house of his elder brother namely, Sri Ratan Das at Joynagar Road No. 1, Agartala. Just after completion of marriage both the appellant and the respondent shifted to the house of said Sri Ratan Das. But immediately after moving in the house of the elder brother of the respondent, the appellant clearly told that she would not live in the house of his elder brother and on the same night the appellant proposed the respondent to shift to the house of her father

since there was sufficient place in her father's house. As the respondent disagreed to the proposal given by the appellant, the appellant started non-cooperation with him as well as other family members and also started abusing the respondent in filthy language. In such a situation, the respondent had to shift along with the appellant to a rented house owned by Shri Debasish Datta at Jaynagar, Agartala and from 23.06.2005 to the middle of April, 2007 both the respondent and the appellant resided in the said rented house but during that period also the appellant did not live for more than 10 days on average in a month and for the remaining 20 days of the month she used to reside in the house of her father.

4. It is also alleged that during that period, the appellant's unmarried sister, namely, Smt. Jayasree Deb used to visit the rented house on regular basis, at least twice in a day and at the same time the appellant also used to leave the rented house every now and then with her elder sister without any notice to the respondent and in the event of protest made by the respondent, both the appellant and her sister used to rebuke the respondent in filthy language. One day when the respondent returned to his rented house from office at 6 p.m. he found that the appellant was not available in the house. Meanwhile at 8 p.m. the appellant returned along with her elder sister and when the respondent asked her as to where she had been during the period, instantly both the appellant and her sister started rebuking the respondent with filthy language and at about 12 a.m. (mid night) the father of the appellant also came to the rented house and they started rebuking the respondent. Not only that, the respondent was arrested by the police at the instance of the appellant though subsequently he was released and as a result the respondent was totally upset and mentally broken.
5. It is the further case of the respondent that during this period the appellant with the help of her sister used to move here and there giving no respect to the respondent and she used to use the mobile phone registered in the name of her elder sister and through such mobile phone, the appellant used to talk to someone and on many occasions when the mobile phone used to ring up, the respondent used to attempt to receive the call, but he did not get any reply from the other end and under such a mental helpless position he left Agartala in October 2006 and started residing at Teliamura in his place of work to save himself from the tyranny of the appellant, her sister and her father.
6. Ultimately, at the instance of the appellant, the respondent returned to his rented house at Agartala but in the middle part of April, 2007 the appellant left the rented house and started residing in the house of her father permanently. In the meantime, they were blessed with a female child on 30.07.2007. The respondent also stated in his petition that one day when he went to his father's house at Sekerkote under Amtali PS and on the way back to the rented house he visited the father's house of the appellant but on seeing him the father and elder sister of the appellant attacked him with filthy language which cannot be uttered by any reputable person and ultimately, the respondent seeing no other alternative fled away from that house to save his prestige.
7. It is further stated that he was under constant threat by the appellant to use the law of Section 498A IPC for sending him to jail, since she is an advocate and as such she has cordial relationship with the police officers and she also told him that one single call would be enough to put him behind the bars. In such constant mental torture, the respondent came to the conclusion that it would not be possible on his part to live with the appellant as husband and wife and under such a situation he filed the petitioner for getting a decree of divorce on the ground of cruelty.
8. The appellant-wife in her first statement denied all the allegations leveled against her but it is alleged in her written statement that after the marriage she was subjected to physical and mental torture and because of severe torture she lost her senses and admitted herself in the IGM hospital as an outdoor patient for her treatment. It also alleged that the wife of the elder brother of the respondent-husband is a pivot and she was continuously controlling the affairs of the matrimonial home resulting in violence created by the respondent upon her. Not only that, the respondent-husband had special relationship with the wife of his elder brother and in spite of that also she tried to adjust with her husband. It is further alleged that during

the advanced stage of her pregnancy and also at the time of delivery of their child the respondent did not visit to see her even for a single day and when she visited her matrimonial home after the maternity period she was humiliated and was not allowed to stay in her matrimonial home and as a result, she had to stay in the house of her parents for her survival. In spite of being an advocate by profession she could not earn anything as she kept herself busy with her newly born child. The respondent-husband being the Supervisor of ICDS was drawing a salary of Rs. 18,000/- per month and did not provide any maintenance either to her or to her minor daughter.

9. The learned Family Court considering the contentions made in the petition as well as in the written statement framed three issues which are as follows:
 - (I) Whether the petition is maintainable in its present form and nature?
 - (II) Whether after the marriage, the petitioner was tortured mentally in many ways and abused in filthiest language by the respondent, her sister and father for which he was compelled to live at his place of posting at Teliamura for some days to save himself from the tyranny of the respondent and whether thereafter, the respondent deserted her matrimonial home, i.e. the rented house without any reasonable cause in the month of April, 2007 permanently or whether after marriage, the respondent was tortured by the husband both mentally and physically being influenced by the wife of the elder brother of the petitioner, compelling her to take shelter in the house of her parents in the middle part of April, 2007?
 - (III) Whether the petitioner is entitled to get a decree of divorce as prayed for?
10. For proving the case, respondent-husband has examined himself as PW 1 and one Sri Malay Chakraborty as PW 2. On the other hand, the appellant-wife has examined seven witnesses including herself. Learned Family court decided the issue No. (ii), after discussing the evidence, in favour of the respondent-husband and ultimately decreed the suit. Hence, the appeal.
11. Issue nos. (ii) and (iii) relate to cruelty and the false allegation leveled by the appellant against the respondent. The petition for divorce was filed primarily on the ground of mental cruelty. Evidence was led by the parties, the respondent husband as PW 1 stated in his evidence that he was ill-behaved by the appellant and also since she did not like to live in the house of the elder brother of the respondent and when he could not accept such a proposal, she started non-cooperation in all affairs for which he was ultimately compelled to shift to a rented house and even in the rented house she did not stay more than 10 days in a month. He denied the allegations made by the appellant-wife regarding torture upon her as well as allegation regarding maintaining a special relationship with the wife of his elder brother (Boudi /Bhabhi) whom he considers like his own mother. He also stated that the allegation of not allowing the appellant to enter into the rented house after delivery of their daughter is totally false and in fact she herself did not come back to the said rented house and is now leading her own life as per her own whims. He also stated that due to constant mental torture he prayed for a decree of divorce on the ground of cruelty.
12. PW 2, Sri Malay Chakraborty, stated in his evidence that the elder brother of the respondent Sri Ratan Das is well known to him and his house is located at a short distance from his house. This witness further stated that in the month of September, 2006 he was informed by one Sri Chandan Majumdar that the respondent was arrested by the police at the instance of the appellant and accordingly he along with Chandan Majumdar went to the West Agartala PS where he found that the respondent was sitting in the police station and the appellant, her elder sister and her father with some unknown persons were rebuking the respondent in filthy language in chorus and all of them tried to put him in lock up but the Officer-in-Charge of the PS tried to pacify the appellant and her group. This witness also stated that on their request the respondent was ultimately released from the PS at about 2.30 a.m.(night).

13. The appellant, being DW 1, in her evidence though denied the allegation of the respondent but stated regarding the illicit relationship of the respondent with the wife of his elder brother for which they could not lead a peaceful conjugal life. She further stated that in spite of the extreme torture made upon her by the respondent-husband, she wanted to live together with her husband.
14. DW 2, Sri Durga Kumar Deb, father of the appellant, though in his evidence stated regarding the habit of the respondent of leading special life with his sister in law, during cross-examination, he specifically stated that he did not see the respondent-petitioner maintaining any kind of relationship with the wife of his elder brother but he was told so by his daughter.
15. DW 4, Smt. Manju Chakraborty, DW 5, Smt. Namita Acharji, DW 6, Smt. Mani Bala Das stated that as told by the appellant, they knew that the appellant was tortured by the husband-respondent.
16. DW 7, Smt. Hemanta Bala Biswas, who was working in the house of the father of the appellant as maid servant, in her affidavit in chief stated that one day when she went to the rented house of the respondent at Jaynagar with a Tiffin box she found the respondent-petitioner and a lady in the same bed and during her cross-examination, she specifically stated she cannot say what she has written in that affidavit in chief. Not only that, it appears from the record that this witness is an illiterate one and she put her thumb impression in the affidavit which is written in English and there is also no such statement that the contents of the affidavit were read over or explained to her. In such a situation, it is very difficult to rely upon the evidence of this witness so far the allegation of adultery is concerned.
17. Mr. Choudhury, learned counsel for the appellant while urging for setting aside the decree of divorce would contend that the owner of the rented house Sri Debasish Datta was not brought as witness and not only that, the allegation made by the respondent regarding cruelty is also not proved. He further submits that the allegation of the respondent that he was pressurized by the appellant to shift in rented house cannot be considered as cruelty and in support of his aforesaid contention he has placed reliance on a decision of the Delhi High Court in *Harish Chander Drall v Suresh Wati*, AIR 2007 (NOC) 2272 (Delhi) wherein it is stated that the allegation by the husband that the respondent wife had pressurized him to set up a separate residence and had behaved badly in presence of the neighbours and also filing of a criminal case by the wife against the husband would not constitute cruelty. He further submits that mere allegation of cruelty itself would not be a ground for granting divorce unless the same is proved. In the instant case, the respondent husband though in his petition has made some allegation regarding cruelty but he failed to prove those allegations and for proving cruelty under Section 10(i)(b) it has to be proved by the person who alleges cruelty that harm or injury to his health, reputation, working career is affected by the appellant wife but the same is also absent. In support of his aforesaid contention he has placed reliance on *Dr. NG Dastane V. Mrs. S Dastane*, AIR 1975 SC 1534, particularly para 30 & 31 which are as under:

“30. An awareness of foreign decisions could be a useful asset in interpreting our own laws. But it has to be remembered that we have to interpret in this case a specific provision of a specific enactment, namely, section 10(1) (b) of the Act. What constitutes cruelty must depend upon the terms of this statute which provides :

“10(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-(b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;”

The inquiry therefore has to be whether the conduct charged a,- cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English law, that the cruelty must be of such a

character as to cause “danger” to life, limb or health or as to give rise to a reasonable apprehension of such a danger.

Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other.

31. The risk of relying on English decisions in this field may be shown by the learned Judge’s reference to a passage from Tolstoy (p. 63) in which the learned author, citing *Horton v. Horton* 1940 P. 187, says : “Spouses take each other for better or worse, and it is not enough to show that they find life together impossible, even if there results injury to health.”

If the danger to health arises merely from the fact that the spouses find it impossible to live together as where one of the parties shows an attitude of indifference to the other, the charge of cruelty may perhaps fail. But under section 10(1) (b), harm or injury to health, reputation, the working-career or the like, would be an important consideration in determining whether the conduct of the respondent amounts to cruelty. Plainly, what we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent.”

18. Mr. Chakraborty, learned senior counsel for the respondent husband while supporting the decree of divorce passed by the learned Family Court would contend that if for argument sake it is admitted that the respondent failed to prove his allegation then also the allegation of the appellant-wife to the effect that the respondent was maintaining adulterous life with the wife of his elder brother itself is a cruelty and a ground for divorce. He further submits that the learned trial court taking note of the decision of the Apex Court in *V Bhagat vs. D Bhagat* (1994) 1 SCC 337 held that “because of series of mental torture made upon the petitioner, he is entitled to seek a decree of divorce on the ground of mental cruelty shown to him, particularly when the respondent though raised allegation of having illicit relationship of the petitioner with the wife of his elder brother could not convincingly prove before this court and hence, issue No. (II) is decided in favour of the petitioner but against the respondent.”

19. Before we examine the submission of the learned counsel for the parties, it would be proper on our part to consider the word “cruelty”.

“Cruelty” is not defined in the Hindu Marriage Act. Thus, it would be proper to consider the dictionary meaning of cruelty. Shorter Oxford Dictionary defines “cruelty” as “the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another’s pain; mercilessness; hard-heartedness”.

20. The term “cruelty” has been defined in *Black’s Law Dictionary* (8th Edn., 2004) as under:

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

21. As the learned trial court considered *V Bhagat* (supra) it would be proper on our part to reproduce para 16 and 20 of the said report.

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

What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.”

20. In the light of the principles enunciated hereinabove, we may now examine whether the allegations made by the wife in her written statement and the questions put by her counsel to the petitioner in cross-examination amount to mental cruelty within the meaning of the said sub-clause? The relevant portions of the written statement have already been set out by us hereinbefore. We have also set out in the said paragraph the explanatory statement made by the respondent's counsel in court in Justification of the questions put by him to the petitioner in his cross-examination. It is true that the said averments must be read in the context in which they were made. At the same time, it must be remembered that the wife was merely defending herself against what are, according to her, totally unfounded allegations and aspersions on her character. It was not necessary for her to go beyond that and allege that the petitioner is a mental patient, that he is not a normal person, that he requires psychological treatment to restore his mental health, that he is suffering from paranoid disorder and mental hallucinations-and to crown it all, to allege that he and all the members of his family are a bunch of lunatics. It is not as if these words were uttered in a fit of anger or under an emotional stress. They were made in a formal pleading filed in the Court and the questions to that effect were put by her counsel, at her instructions, in the cross-examination. Even in her additional written statement she has asserted her right “to make correct statement of facts to defend herself against the wanton, imaginary and irresponsible allegations”.

These are not the mere protestations of an injured wife; they are positive assertions of mental imbalance and streak of insanity in the mental build-up of the husband. The husband is an Advocate practicing in this Court as well as in Delhi High Court. The divorce petition is being tried in the Delhi High Court itself. Making such allegations in the pleadings and putting such questions to the husband while he is in the witness-box, is bound to cause him intense mental pain and anguish besides affecting his career and professional prospects. It is not as if the respondent is seeking any relief on the basis of these assertions. The allegations against her may not be true; it may also be true that the petitioner is a highly suspicious character and that he accuses things against his wife which are not well founded. But on that ground, to say that the petitioner has lost his normal mental health, that he is a mental patient requiring expert psychological treatment and above all to brand him and all the members of his family including his grandfather as lunatics, is going far beyond the reasonable limits of her defence. It is relevant to notice that the allegations of the wife in her written statement amount in effect to “psychopathic disorder or any other disorder” within the meaning of the Explanation to clause (iii) of sub-section (1) of Section 13, though, she has not chosen to say that on that account she cannot reasonably be expected to live with the petitioner-husband nor has she chosen to claim any relief on that ground. Even so, allegations of ‘paranoid disorder’, mental patient’, ‘needs psychological treatment to make him act a normal person’ etc. are there coupled with the statement that the petitioner and all the members of his family are lunatics and that a streak of insanity runs through his entire family. These assertions cannot but constitute mental cruelty of such a nature that the petitioner, situated as he is and in the context of the several relevant circumstances, cannot reasonably be asked to live with the respondent thereafter. The husband in the position of the petitioner herein would be justified in saying that it is not possible for him to live with the wife in view of the said allegations. Even otherwise the peculiar facts of this case show that the respondent is deliberately feigning a posture which is wholly unnatural and beyond the comprehension of a reasonable person. She has been dubbed as an incorrigible adulteress. She is fully aware that the marriage is long dead and over. It is her case that the petitioner is genetically insane. Despite all that, she says that she wants to live with the petitioner. The obvious conclusion is that she has resolved to live in agony only to make

life a miserable hell for the petitioner as well. This type of callous attitude in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the petitioner with mental cruelty. It is abundantly clear that the marriage between the parties has broken down irretrievably and there is no chance of their coming together, or living together again. Having regard to the peculiar features of this case, we are of the opinion that the marriage between the parties should be dissolved under Section 13(1)(i-a) of Hindu Marriage Act and we do so accordingly.

Having regard to the peculiar facts and circumstances of this case and its progress over the last eight years-detailed hereinbefore-we are of the opinion that it is a fit case for cutting across the procedural objections to give a quietus to the matter.”

22. In *Savitri Pandey v. Prem Chandra Pandey*, (2002) 2 SCC 73, the Apex Court considered what should be mental cruelty and noted as under:

“Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. “Cruelty”, therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other.”

23. In *Parveen Mehta V. Inderjit Mehta*, (2002) 5 SCC 706, the Apex Court again examined mental cruelty, particularly in paragraph 21 which is as follows:

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

24. In view of the above decisions of the Apex Court, it can be said that cruel treatment by one of the spouse to the other not amounting to physical cruelty is actually mental cruelty. There is no doubt that asking for shifting to a rented house for any reason cannot be considered to be mental cruelty. In the instant case, admittedly the appellant-wife in her written statement made allegation regarding the extra marital relationship of the respondent with the wife of his elder brother but could not prove the same. Such an allegation is serious in nature particularly, when in our society wife of elder brother is called as Boudi/ Bhabhi and treated like mother. The allegation of adultery made by the wife appellant and not proved is nothing but mental cruelty. It is very easy to make a wild allegation of adultery but is difficult to prove.

25. In view of the above, we are of the opinion that the learned Family Court did not commit any wrong granting the decree of divorce on the ground of mental cruelty as such mental cruelty has been established. It also appears from the judgment of the learned Family Court that while granting the decree of divorce,

he also directed the respondent husband to give maintenance allowance of Rs. 4,000/- per month to the daughter of the respondent w.e.f. 01.02.2012 and this maintenance allowance of Rs. 4,000/- per month is to be sent to the appellant through her savings bank account within the first 10 days of every English calendar month. Therefore, it cannot be said that the learned Family Court did not consider regarding the maintenance of their minor daughter. The respondent-husband shall comply with the order of maintenance passed by the learned Family Judge in letter and spirit and the same is maintained by us. Thus, it is not necessary on our part to interfere with the order of the learned Family Judge.

26. In the result, the appeal is dismissed. No order as to costs. Send down the LCR.

JUDGE CHIEF JUSTICE

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SIMA DAS VERSUS SHIBU DEY

F.A. No. 02 of 2012

(Before Hon'ble Mr. Justice Deepak Gupta, CJ. and Hon'ble Mr. Justice S. Talapatra, J.)

Smti. Sima Das (Dey), Wife of Shri Shibu Dey, Daughter of Shri Niranjan Dey, Residing at ward No. 14 of Udaipur Nagar Panchayat, P.O. Rajarbagh, P.S.-R. K. Pur, Udaipur, District-South Tripura

Wife Appellant Mr. R. Datta, Adv.

Versus

Shri Shibu Dey, Son of late Jagneswar Dey, Resident of Dariya, Bagma Chowmuhani, P.O. Bagma, P.S.-R.K. Pur, Udaipur, Dist.-South TripuraRespondent

Mr. Somik Deb, Adv.

- This appeal by the wife is directed against the judgment and decree of the Family Court dated 29.11.2011 whereby he dismissed the petition for grant of divorce filed by the wife-appellant.
- Parties were married according to Hindu rites on 8th December, 2000. The petitioner-wife filed a petition for grant of divorce in May, 2011 alleging that her husband had treated her with cruelty after the birth of a male child.
- It is futile to claim on behalf of the appellant that the withdrawal of allegations unilaterally by the husband, by filing an application for amendment of the written statement wiped out completely all those allegations for all purposes.
- As already stated above, even with regard to the general allegations of cruelty levelled by the wife in an examination-in-chief, she was not subjected to any cross examination whatsoever. The only crossexamination which she was subjected to was that she was an unchaste woman having an extramarital illicit affair with another person outside the wedlock. This by itself is a sufficient act of cruelty. It would also be pertinent to mention that in the present case one of the charges of the wife was that the husband used to treat her with cruelty in as much as he used to allege that she was a characterless woman. This charge levelled by the wife has been proved by the husband himself by putting those questions in crossexamination to the wife. These charges have not been proved by the husband and therefore, the levelling of these false charges itself amount to an act of cruelty entitling the wife to grant of a decree of divorce.
- In view of the above discussion, we allow the appeal, set aside the judgment of the learned trial Court and dissolve the marriage between the parties by granting a decree of divorce on the ground of cruelty.

Decided on September 24, 2013

JUDGMENT & ORDER (ORAL)

Hon'ble Mr. Justice Deepak Gupta, C.J.

This appeal by the wife is directed against the judgment and decree of the Family Court dated 29.11.2011 whereby he dismissed the petition for grant of divorce filed by the wife-appellant.

[2] Briefly stated, the facts of the case are that the parties were married according to Hindu rites on 8th December, 2000. The petitioner-wife filed a petition for grant of divorce in May, 2011 alleging that her husband had treated her with cruelty after the birth of a male child. In support of her allegation that her husband used to treat her with cruelty, she levelled the following allegations:

“8. That after few months from the child’s birth, the husband used to insult the wife petitioner in the manner of suspicion, and used to make slang language blaming her character. And the husband opp. party used to consume alcohol and torture her mentally and as well as physically also.

9. That the problem reaches on the height, when the husband used to sell alcohol from his rented house, the wife wants to resist but all are in vain. Then the wife petitioner inform their land lord about that matter and land lord give the ultimatum to the husband not to run that business from her house otherwise she will drive them from her house. That after that event the husband opposite party blamed the wife petitioner for the incident and started to torture her.”

[3] The husband filed a written statement contesting the claim petition and denied the allegations made in para 8 and 9. He thereafter set out the facts, which according to him the real facts of the case, in para-11 of the written statement. Para-11(c) and (h) read as follows:

“(c) That the petitioner after her marriage was not in the mood of discharging her duties toward the O.P., her parents in law and other family members of the O.P. She used to all the family members of the O.P. The character of the petitioner is not good and she mixes with some boys who are also the agents of chain marketing business and the petitioner is moving with them at any time and place without doing her domestic work or without take any care of her child. And whenever the O.P tried to resist these things the petitioner used to pick up quarrel and abusing filthy languages to the O.P. She do not/did not care anybody and she was/is living her life according to her own wish and style. The O.P tried to convince the petitioner and (h) That ultimately in the month of October 2009 A.D the petitioner after assaulting drove the O.P from the rented house and the petitioner is still residing in that rented house and frequently mixes with other boys.

The petitioner said the O.P that after getting decree of divorce she will marry again with an another boy.” Therefore, according to the husband the wife was not of good character and used to mix out with other boys and would not take care of the child.

[4] The parties led evidence and in cross-examination, the husband put the following questions to the wife:

“Cross Examination: It is not a fact that I have illicit relationship with Rajib Ghosh.

It is not a fact that I am maintaining this relationship for the last 1 year.

It is not a fact that I was riding with Rajib Ghosh on 11.09.2009 on his bike.

It is not a fact that my husband found used condoms under my bed in my bedroom.

It is not a fact that my husband wanted my explanation and I failed to explain it to him.”

Other than these questions, the only other suggestion put to the wife was that the contents of her affidavit filed in evidence as her examination-in-chief were wrong. She was not cross-examined in respect of any of the other allegations of cruelty levelled by her in her examination-in-chief in the form of an affidavit.

[5] The husband filed his own affidavit in evidence and in this affidavit in para-4 he stated as follows:

“4. That the petitioner after her marriage was not in the mood of discharging her duties towards the requested to change her character but the petitioner did not hear anything, me, my parents in law and other family members. She used to misbehave with all the family members of myself. The character of the petitioner is not good and she mixes with some boys who are also the agents of chain Marketing business and the petitioner is moving with them at any time and place without

doing her domestic work or without take care of our child. And whenever I tried to resist these things the petitioner and used to pick up quarrel and abusing filthy languages to me. She do not/did not care anybody and she was/is living her life according to her own wish and style. I tried to convince the petitioner and requested to change her character but the petitioner did not hear anythings.”

And again in para-8 he made the following allegations:

“8. That whenever I myself and the petitioner came at Udaipur, the petitioner without care of anybody or anything frequently moving with other boys and continuing her life style. On several time I tried to resist the petitioner but failed. Local people and well wishers of both sides tried to resist the petitioner for her activities and mitigate our problem but the petitioner did not hear them and did not obey them.”

Thus though in the affidavit he did not clearly name Rajib as was suggested in the cross-examination he again made similar allegations regarding the character of his wife-appellant.

[6] Sri Ratan Datta, leaned counsel appearing on behalf of the appellant submits that even if other allegations were not proved and deemed to be proved, the mere fact that the husband has levelled grave allegations regarding the character of the appellant and has in no indirect terms suggested to her that she was having an illicit relationship with Rajib by itself is ground for grant of divorce since this allegation is not proved by the respondent. In support of his submission Sri Datta has cited the following authorities.

- (1) Harendra Nath Burman v. Sm. Suprova Burman, (AIR 1989 Calcutta 120);
- (2) Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate, (AIR 2003 SC 2462);
- (3) Vishwanath Agrawal, S/o Sitaram Agrawal v. Sarla Vishwanath Agrawal, ((2012) 7 SCC 288;
- (4) Ramesh Kumar Sharma v. Smnt, Akash Sharma, (AIR 2008 Himachal Pradesh 78).

[7] On the other hand, Sri Somik Deb, learned counsel for the husband submits that since this matter was not put to issue by the Court below and therefore, this cannot be a ground for grant of divorce by itself and in this behalf he relies upon the judgment of the Apex Court in Gurbux Singh v. Harminder Kaur, (2010) 14 SCC 301. He also submits that the wife has also levelled allegations regarding the character of the husband in as much as she has stated that he used to indulge in the sale of alcohol and, therefore, this is a case of allegations and counter allegations and the counter allegations must be read at this context.

[8] We need not cite the other judgments in detail but reference may be made to the judgment of the Supreme Court in Vijaykumar Ramchandra Bhate case (supra) wherein the Apex Court held as follows:

“7. The question that requires to be answered first is as to whether the averments, accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under Section 13(1)(ia) of the Act. The position of law in this regard has come to be well settled and declared that leveling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extra marital relationship is a grave assault on the character, honour, reputation, status as well as the health of the wife. Such aspersions of perfidiousness attributed to the wife, viewed in the context of an educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, sufficient by itself to substantiate cruelty in law, warranting the claim of the wife being allowed. That such allegations made in the written statement or suggested in the course of examination and by way of cross examination satisfy the requirement of law has also come to be firmly laid down by this Court. On going through the relevant portions of such allegations, we find that no exception could be taken to the findings recorded by the Family Court as well as the High Court. We find that they are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law

causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous for her to live with a husband who was taunting her like that and rendered the maintenance of matrimonial home impossible.”

It would also be pertinent to mention that in the case before the Apex Court the allegations of unchastity levelled against the wife were later withdrawn by amending the written statement but still the Apex Court held that merely because the allegations were withdrawn does not efface them from the pleadings and went on to hold as follows:

“10. In the light of all these, it is futile to claim on behalf of the appellant that the withdrawal of allegations unilaterally by the husband, by filing an application for amendment of the written statement wiped out completely all those allegations for all purposes.

11. That apart, in our view, even the fact that the application for amendment seeking for deletion of the accusations made in the written statement was ordered and amendments carried out subsequently does not absolve the husband in this case, from being held liable for having treated the wife with cruelty by making earlier such injurious reproaches and statements, due to their impact when made and continued to remain on record. To satisfy the requirement of Clause (i a) of Sub section (1) of Section 13 of the Act, it is not as though the cruel treatment for any particular duration or period has been statutorily stipulated to be necessary. As to what constitute the required mental cruelty for purposes of the said provision. In our view, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct, but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. If the taunts, complaints and reproaches are of ordinary nature only, the Courts perhaps need consider the further question as to whether their continuance or persistence over a period time render, what normally would, otherwise, not be a so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonable conclude that the maintenance of matrimonial home is not possible any longer. A conscious and deliberate statement leveled with pungency and that to placed on record, through the written statement, cannot so lightly be ignored or brushed aside, to be of no consequence merely because it came to be removed from the record only. The allegations leveled and the incidents enumerated in the case on hand, apart from they being per se cruel in nature, on their own also constitute an admission of the fact that for quite some time past the husband had been persistently indulging in them, unrelented and unmindful of its impact. That the husband in this case has treated the wife with intense cruelty is a fact, which became a fait accompli the day they were made in the written statement. They continued on record at any rate till 5.10.1988 and the indelible impact and scar it initially should have created, cannot be said to have got ipso facto dissolved, with the amendments ordered. Therefore, no exception could be taken to the courts below placing reliance on the said conduct of the appellant, in this regard, to record a finding against him.”

[9] Reliance placed by Sri Somik Deb on the judgment in Gurbux Singh case (Supra) is totally misplaced. In that case divorce was sought by the husband on the ground that his wife had treated him with cruelty, she was not looking after his parents and used to get annoyed on trivial issues. She was also not attending to his parents and other relatives. The wife in her written statement denied all the averments but also made allegations that the husband was a greedy person not satisfied with the dowry articles received in marriage. He used to misbehave and ill treat her and abused her on several occasions. She also alleged that the husband was a habitual drinker and had threatened to kill her. It was also alleged that the appellant pulled her hair and gave beatings in the presence of his parents. It is in the light of these allegations that the Apex Court held that the judgment in Vijaykumar Ramchandra case was not applicable since these instances were not put to issue in the case before the Apex Court. Para 17 and 18 of the judgment read as follows:

- “17. The learned Counsel appearing for the appellant by drawing our attention to certain allegations made by the respondent wife in the reply to the petition under Section 13 of the Act before the Additional District Judge submitted that by considering all these aspects it is just and reasonable to consider and grant divorce on the ground of cruelty. In support of the same, he relied on the decision of this Court in *Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate*: (2003) 6 SCC 334.
18. No doubt, in that decision, this Court has held that allegations made in the written statement or suggested in the course of examination and by way of cross examination satisfying the requirement of law has also to be taken note of while considering the claim of either party. In the case on hand, it is true that the respondent wife has made certain allegations against her appellant husband. However, admittedly based on the same, the trial Court has not framed any issue and no evidence let in in support of the same. In such circumstances, the said decision is not helpful to our case. Admittedly, no such issue was framed by the trial Court or any point determined by the High Court based on such averments in the reply/written statement. Accordingly, we reject the said contention.”
- [10] In our considered opinion, the judgment in *Gurbux Singh’s* case (*supra*) does not apply because the allegations made by the wife were of acts of cruelty, allegedly committed by the husband. They themselves did not constitute an act of cruelty. Leveling of false allegation of beating etc. may by itself not be an act of cruelty but when any spouse charges the other spouse with adultery then, in the Indian context if the charge is not proved to be correct that by itself is an act of cruelty. In India, especially amongst Hindus marriage is not a contract but a sacrament. In such a situation both spouses are expected to be faithful to each other and whenever in the context of Indian society charges of unchastity are levelled by one spouse against the other, they cast a serious aspersion on the character of the other person, therefore, they themselves constitute an act of cruelty. In *Gurbux Singh’s* case the allegations made by the wife were not of unchastity/infidelity by the husband but were charges of other nature.
- [11] Even in the later judgment of the Supreme Court in *Gurbux Singh* case, the judgment rendered in *Vijaykumar Ramchandra Bhate’s* case has only been distinguished and in the facts of the present case it is the judgment in *Vijaykumar’s* case which is more apposite and not the judgment in *Gurbux Singh’s* case. As already stated above, even with regard to the general allegations of cruelty levelled by the wife in an examination-in-chief, she was not subjected to any cross examination whatsoever. The only cross-examination which she was subjected to was that she was an unchaste woman having an extramarital illicit affair with another person outside the wedlock. This by itself is a sufficient act of cruelty. It would also be pertinent to mention that in the present case one of the charges of the wife was that the husband used to treat her with cruelty in as much as he used to allege that she was a characterless woman. This charge levelled by the wife has been proved by the husband himself by putting those questions in cross-examination to the wife. These charges have not been proved by the husband and therefore, the levelling of these false charges itself amount to an act of cruelty entitling the wife to grant of a decree of divorce.
- [12] In view of the above discussion, we allow the appeal, set aside the judgment of the learned trial Court and dissolve the marriage between the parties by granting a decree of divorce on the ground of cruelty.
- [13] The appeal is disposed of. No order as to costs.

□□□

MALA RAI VERSUS BAL KRISHNA DHAMALA

In the High Court of Sikkim

Mat. App. No. 01 of 2015

(Before Hon'ble Mr. Justice Sunil Kumar Sinha, C.J. & Hon'ble Mrs. Justice Meenakshi Madan Rai, J.)

Smt. Mala Rai, W/o Shri Bal Krishna Dhamala, R/o Chalamthang, Pakyong, East Sikkim
...Appellant

Versus

Shri Bal Krishna Dhamala, S/o Dadhiram Dhamala, R/o Amba Busty, Pakyong, East Sikkim
...Respondent

Mr. B.K. Gupta, Advocate (Legal Aid Counsel) for the Appellant. Appellant in person. Mr. Umesh Ranpal and Ms. Kesang Choden Tamang, Advocates for the Respondent. Respondent in person.

- **In the instant Appeal, the Appellant assails the Judgment and Decree dated 18-04-2015 of the Learned Judge, Family Court, East Sikkim at Gangtok, in Family Court (Civil) Case No. 83 of 2014, ordering dissolution of the marriage between the Appellant and the Respondent under Section 13(1) (i) of the Hindu Marriage Act, 1955 (for short “the Hindu Marriage Act”).**
- **Advancing his arguments before this Court, Learned Counsel for the Appellant put forth the grounds that there are no independent witnesses to the alleged adultery claimed to have been witnessed by the Respondent and his elder brother, which they failed to either photograph or videograph.**
- **In order to assess the matter in its correct perspective, it would be necessary to first consider the averments made by the parties before the Learned Family Court. According to the Respondent, he was married to the Appellant in the year 1999, according to customs prevalent amongst the Nepali Hindu Community and from the wedlock, they have two children, i.e., one son aged about 11 years and one daughter aged about 8 years. The parties lived together at Pakyong, East Sikkim, in the Respondent's house after their marriage, where he was working as a Range Officer in the Forest Department. For some time they had good matrimonial relations, but with the passage of time, the Appellant started picking up quarrels on trivial issues and harassing him mentally as well as physically. Admittedly a Petition for Divorce on grounds of ‘Cruelty’ was filed previously but was dismissed on failure to establish cruelty.**
- **The question that arises for determination before this Court is whether the Learned Family Court was correct in granting the divorce to the Appellant based on the evidence placed before it.**
- **In construing the provisions of Section 13 of the Hindu Marriage Act one has to remember that divorce is not generally favoured or encouraged by the Courts and is permitted only for very serious and grave reasons. [See Swarajya Lakshmi v. Dr. G.G. Padma Rao: (1974) 1 SCC 58] While at the same time it must be borne in mind that in allegations of adultery law does not postulate direct proof of adultery, the assumption of which is to be drawn from the conduct of the parties and the evidence on record. Therefore, the accepted rule is that circumstantial evidence can normally be expected in proof of the allegation, the general rule being that the circumstances should be such as would lead a reasonable and just man to the conclusion of adultery. It is also essential to mention**

here that such proof does not extend to one which is beyond reasonable doubt, but is sufficient if there is a preponderance of probability.

- On the anvil of the principles enumerated above, we now turn to analyse as to whether the evidence on record proves that the Appellant had indulged in adultery. While going through the evidence of D.W.1, the Appellant, she has specifically denied having any relation with D.W.3. On the other hand, the evidence of P.W.1, the Respondent, is to the effect that on 17-07-2014, while he was having dinner with his Senior Officer at Pakyong, he received a telephonic call from P.W.3 informing him that, he had seen the Appellant entering her home with one man at around 10.30 p.m. The Respondent informed his elder brother P.W.2, who accompanied him to the house where they both witnessed the Appellant engaged in sexual intercourse with D.W.3. He also added that the Appellant accepted and admitted the act of adultery and having illicit relations with D.W.3. His evidence has not been demolished under cross-examination, but is duly supported by the evidence of P.W.2, his elder brother, who is a Teacher by profession at Takshang Government Primary School, East Sikkim. According to him, on 17-03-2014 at around 10.30 p.m. he received a telephonic call from the Respondent. He accompanied his brother to the Respondent's house where they found the room was locked from inside and from the ventilation they saw the Appellant and D.W.3 engaged in sexual intercourse. P.W.3 is the person who admits to having previously had extra marital relations with the Appellant when she was married to the Respondent and admits that they had physical relationship. According to him, the Appellant also had relations with another person after him. This witness is the one who saw D.W.3 entering the home of the Respondent on 17-07-2014 on which he informed the Respondent immediately, this evidence has withstood the cross-examination. On this aspect, it was pointed out by Counsel for the Appellant that in such circumstances it would be impossible to agree that P.W.3 was a well-wisher of the Respondent. We do not find any force in this argument since it is for Respondent to decide who his well-wisher is.
- In view of the evidence on record which has been discussed hereinabove, there is no reason to doubt that the Appellant was in an adulterous relationship with D.W.3. It is thus apparent that the findings of the Learned Family Court warrant no interference.

Decided on June 16, 2016

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Meenakshi Madan Rai :— In the instant Appeal, the Appellant assails the Judgment and Decree dated 18-04-2015 of the Learned Judge, Family Court, East Sikkim at Gangtok, in Family Court (Civil) Case No. 83 of 2014, ordering dissolution of the marriage between the Appellant and the Respondent under Section 13(1)(i) of the Hindu Marriage Act, 1955 (for short "the Hindu Marriage Act").

2. Advancing his arguments before this Court, Learned Counsel for the Appellant put forth the grounds that there are no independent witnesses to the alleged adultery claimed to have been witnessed by the Respondent and his elder brother, which they failed to either photograph or videograph. That, according to the Respondent, he was informed by P.W.3, a well-wisher, that he had seen the Appellant entering her house along with one man at around 10.30 p.m., but the evidence of this witness is not reliable as before the Learned Family Court, P.W.3, deposed that earlier he had illicit relations with the Appellant. If such be the case, it cannot be fathomed as to how he could be the well-wisher of the Respondent. In the next leg of his argument, emphasising on the provisions of Order I Rule 10 of the Code of Civil Procedure, 1908 (for short "CPC"), it was contended that D.W.3, alleged to be in an adulterous relationship with the Appellant, is a necessary and proper party to the proceedings, but was not impleaded as a party on which ground alone, the impugned Judgment and Decree of the Learned Family Court is liable to be set aside. To fortify this submission, reliance was placed on the decision of the Hon'ble High Court of Andhra Pradesh in *Smt. Ch. Padmavathi v. Ch. Sai Babu*, F.C.A. No. 21 of 2009 dated 12-09-2012, wherein it was,

inter alia, held that, the alleged adulterer will be a proper party to a proceeding under Section 13(l)(i) of the Hindu Marriage Act.

3. It was urged that the Learned Family Court had also wrongly observed that there are satisfactory and convincing circumstantial evidence as well as direct evidence of the Appellant having extra marital relations with other persons and indulging in illicit sexual relationship with them, when to the contrary, the Respondent lives in adultery with another lady. That, the Respondent had earlier filed a Petition for Divorce on grounds of "Cruelty", but as the matter was dismissed on 26-03-2013, the instant matter was filed subsequently reflecting an ulterior motive and mala fide intention. It is prayed that the impugned Judgment and the resultant Decree, dated 18-04-2015 be set aside.
4. Per contra, the arguments put forth by Learned counsel for the Respondent is that, in the first instance there is no shortcoming in the impugned Judgment of the Learned Family Court which has made its decision after analysing the evidence on record. In the next limb of his argument, it was expostulated that although Order I Rule 10 of the CPC requires that the Court at any stage of the proceedings may strike out or add any person as a Plaintiff or Defendant to effectually and completely adjudicate the matter but one cannot lose sight of the mandatory provision of Order I Rule 13 of the CPC, which requires that all objections on grounds of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity. The Appellant cannot be heard to say belatedly, at the stage of Appeal, that the alleged adulterer ought to have been added as a necessary party. That, therefore, in view of the lack of substance in the Appeal, the same be dismissed.
5. We have heard the rival arguments of Learned Counsel at length and given due and anxious consideration to the same. We have also carefully perused all relevant documents on record including the evidence and the impugned Judgment.
6. In order to assess the matter in its correct perspective, it would be necessary to first consider the averments made by the parties before the Learned Family Court. According to the Respondent, he was married to the Appellant in the year 1999, according to customs prevalent amongst the Nepali Hindu Community and from the wedlock, they have two children, i.e., one son aged about 11 years and one daughter aged about 8 years. The parties lived together at Pakyong, East Sikkim, in the Respondent's house after their marriage, where he was working as a Range Officer in the Forest Department. For some time they had good matrimonial relations, but with the passage of time, the Appellant started picking up quarrels on trivial issues and harassing him mentally as well as physically. Admittedly a Petition for Divorce on grounds of 'Cruelty' was filed previously but was dismissed on failure to establish cruelty. After such dismissal, the Appellant's behaviour towards him deteriorated and the Appellant started indulging in illicit relations with other men, of which, he alleges, was one man from Rhenock. That apart, she was missing from their home from 03-07-2014 when he was on duty, which he learnt of on 11-07-2014 and come to know that she was out with another person with whom she had illicit relations and returned on 14-07-2014. Following this incident, on 17-07-2014 when the Respondent had gone for dinner to the house of his Superior Officer in Pakyong, he was informed by P.W.3, that the Appellant was seen entering her house with one man at around 10.30 p.m. The Respondent immediately called his brother P.W.2, who resides at Amba Busty, Pakyong and both of them reached the Respondent's home at around 11.40 p.m., where they saw the Appellant and D.W.3 in a room inside the house of the Appellant, having sexual intercourse. On repeated knocking, the Appellant opened the door after 10 minutes, where D.W.3 was hiding in a corner of the room. It was alleged that both admitted their illicit relations and the act of adultery. That, in view of the said act, the marriage has broken down irretrievably and hence, the prayer for divorce.
7. The Appellant to the contrary, inter alia, averred that on 17-07-2004, the Respondent, his brother and sister-in-law came to their matrimonial house at around 10 p.m. and suddenly started assaulting her with kicks and blows in front of her visitors. Her contention is that D.W.3 is a neighbour and a distant brother from her mother's side and on the relevant day after parking his vehicle at around 9.30 p.m., in

the common compound, he had sought shelter her house as it was raining heavily. She denies that such an incident, as alleged, ever occurred with D.W.3 and that photographs allegedly taken in her house have been manufactured by the Respondent. She denied all allegations of adultery.

8. The Learned Family Court after hearing the parties, framed the following issues;
 - (i) Whether after the solemnization of their marriage, the respondent had voluntarily {sic, voluntary} sexual intercourse with any persons other than her spouse.
 - (ii) Whether the Petitioner is entitled to a decree of divorce.
9. After the parties led evidence, the Learned Family Court on analysing the same decided both issues in favour of the Respondent and decreed the marriage between the Appellant and the Respondent as dissolved.
10. The question that arises for determination before this Court is whether the Learned Family Court was correct in granting the divorce to the Appellant based on the evidence placed before it.
11. In this regard, we may go through the relevant provisions of Section 13 of the Hindu Marriage Act, which reads as follows:-

“13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

 - (i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
12. Therefore, for divorce to be granted under Section 13(l)(i) of the Hindu Marriage Act, voluntary intercourse by the spouse with a third person has to be proved by the person seeking the relief.
13. However, in construing the provisions of Section 13 of the Hindu Marriage Act one has to remember that divorce is not generally favoured or encouraged by the Courts and is permitted only for very serious and grave reasons. [See *Swarajya Lakshmi v. Dr. G.G. Padma Rao*: (1974) 1 SCC 58] While at the same time it must be borne in mind that in allegations of adultery law does not postulate direct proof of adultery, the assumption of which is to be drawn from the conduct of the parties and the evidence on record. Therefore, the accepted rule is that circumstantial evidence can normally be expected in proof of the allegation, the general rule being that the circumstances should be such as would lead a reasonable and just man to the conclusion of adultery. It is also essential to mention here that such proof does not extend to one which is beyond reasonable doubt, but is sufficient if there is a preponderance of probability. [Vide *Dr. N.G. Dastane v. Mrs. S. Dastane*: (1975) 2 SCC 326 : AIR 1975 SC 1534 and *Subbarama Reddiar v. Saraswathi Ammal*: AIR 1967 Madras 85].
14. On the anvil of the principles enumerated above, we now turn to analyse as to whether the evidence on record proves that the Appellant had indulged in adultery.
15. While going through the evidence of D.W.I, the Appellant, she has specifically denied having any relation with D.W.3. On the other hand, the evidence of P.W.I, the Respondent, is to the effect that on 17-07-2014, while he was having dinner with his Senior Officer at Pakyong, he received a telephonic call from P.W.3 informing him that, he had seen the Appellant entering her home with one man at around 10.30 p.m. The Respondent informed his elder brother P.W.2, who accompanied him to the house where they both witnessed the Appellant engaged in sexual intercourse with D.W.3. He also added that the Appellant accepted and admitted the act of adultery and having illicit relations with D.W.3. His evidence has not been demolished under cross-examination, but is duly supported by the evidence of P.W.2, his elder brother, who is a Teacher by profession at Takshang Government Primary School, East Sikkim. According to him, on 17-03-2014 at around 10.30 p.m. he received a telephonic call from the Respondent. He accompanied his brother to the Respondent's house where they found the room was locked from inside and from the ventilation they saw the Appellant and D.W.3 engaged in sexual intercourse. P.W.3 is the person who admits to having previously had extra marital relations with the Appellant when she was married to the

Respondent and admits that they had physical relationship. According to him, the Appellant also had relations with another person after him. This witness is the one who saw D.W.3 entering the home of the Respondent on 17-07-2014 on which he informed the Respondent immediately, this evidence has withstood the cross-examination. On this aspect, it was pointed out by Counsel for the Appellant that in such circumstances it would be impossible to agree that P.W.3 was a well-wisher of the Respondent. We do not find any force in this argument since it is for Respondent to decide who his well-wisher is. D.W.3 is the alleged adulterer who states that as he shares a common compound with the Appellant, he parked his vehicle and went into the house of the Appellant due to the heavy rain along with a friend of his. Inside the house, when they were about to settle down, all of a sudden P.W.1 and P.W.2 as well as the sister-in-law of P.W.1, entered the house and assaulted the Appellant in their presence. Although he stated that he had entered the house of the Appellant with “one friend”, neither the identity of the person has been disclosed nor has the Appellant herself stated that any other person had entered her house along with D.W.3. Both P.W.1 and P.W.2 have made no mention of a third person, therefore, this statement of D.W.3 has to be taken with a pinch of salt. Also what is incongruous is, admittedly he shared a common compound with the Appellant then the question arises as to why he would take refuge from the rain in the house of the Appellant instead of going into his own house, after parking his car. The contention of the Appellant that D.W.3 is a distant brother of the Appellant can also be safely ruled out being improbable as D.W.3 himself has deposed that he has known the Appellant only for the last 10-12 years apart from which he is unable to name the parents or brothers of D.W.1.

16. On traversing the law points of the matter, Order I Rule 10 of the CPC clothes the Court with power to add any person as a party at any stage of the proceedings to enable the Court to effectively and completely adjudicate upon all issues involved. Thus, all necessary and proper parties can be added by the Court at any stage of the proceedings. The spirit behind impleading an adulterer as a party is to allow him an opportunity to defend himself against the allegations levelled and to vindicate himself. In the instant matter, the person who is alleged to have committed the adultery, i.e., D.W.3, has already been examined as a witness giving him sufficient opportunity to extenuate himself against the allegations foisted upon him. However, he has not been able to demolish the case of the Respondent, despite sufficient opportunity extended to him during his deposition. In such a situation, we are of the considered opinion that it would serve no purpose to implead him as a party to the proceeding. The involvement of a second person also as an adulterer was not strongly pressed by the Respondent and, therefore, we find that it is not essential to implead him. That apart, we may set out the provisions of Order I Rule 13 of the CPC which mandates as follows;

“I. Who may be joined as Plaintiffs.—

13. Objections as to non-joinder or misjoinder.—All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.”
17. On this point, it has to be stated that the prayer for impleadment is indeed belated, and it is not the Appellant’s case that she was unable to agitate the point of impleadment as the ground arose subsequently, in which event even the provisions supra cuts some slack.
18. In view of the evidence on record which has been discussed hereinabove, there is no reason to doubt that the Appellant was in an adulterous relationship with D.W.3. It is thus apparent that the findings of the Learned Family Court warrant no interference.
19. In the result, the Appeal is dismissed. Decree be drawn accordingly.
20. Copy of this Judgment and Decree be sent to the Learned Family Court for information.
21. Records of the Learned Family Court be remitted forthwith.

□□□

JIA LAL ABROL VERSUS SARLA DEVI

Jammu and Kashmir High Court Full Bench

**(Before Hon'ble Mr. Justice Mian Jalal-Ud-Din, C.J. and Hon'ble Mr. Justice Dr. A.S. Anand
and Hon'ble Mr. Justice G.M. Mir, JJ.)**

Jia Lai Abrol ... Appellant;

Versus

Sarla Devi ... Respondent.

- This appeal is directed against the order of the learned District Judge, Jammu, dated 30-4-1976 in a petition under Sections 10/13 of the Hindu Marriage Act. The trial Judge holding that there was no substance in the petition and that the appellant having failed to prove the grounds alleged by him in the petition for judicial separation/divorce dismissed the petition with costs.
- The case at hand however on facts stands distinguished from Gollins (1963-2 All ER 966) (supra) and the Bombay case. The husband here is not complaining of any rude behaviour or of a particular conduct of the wife injurious to the health of the husband. It was not the case of the husband that the illness was deliberate or aimed at him with intention to injure or harm him. The disease itself as it transpires from evidence was not of the nature that would lead a reasonable person to conclude that it would be dangerous for the health of the husband to continue to remain united in the bond of marriage with the wife. The alleged disease was neither contagious nor incurable. In fact the bad smell was not there throughout the day and night. Its effect could be diminished to a large extent by removing the crusts from the nose. It was not the case of the husband that with intention to harm him, wife declined to cleanse her nose or refused treatment. On facts, it appears, on the other hand, that no serious attempt has ever been made by the husband to provide proper treatment to the wife.
- We are therefore, convinced that the appellant has not been able to establish the factum of alleged cruelty by any evidence whatsoever. May be the wife was speaking the truth when she alleged that the husband in order to take another person as his wife was vainly trying to find fault with her nose and putting up pretexts which were imaginary and false. Holding, therefore, that on facts of the case the appellant has not been successful in showing that the act complained of was an act of cruelty aimed at him by his wife, and also that on facts appearing in the case intention was a necessary element to be established which has not been done, this appeal we dismiss but we make no order as to costs.

Civil Misc. Appeal (First) No. 4 of 1976

Decided on April 3, 1978

The Judgment of the Court was delivered by

Hon'ble Mr. Justice G.M. Mir :— This appeal is directed against the order of the learned District Judge, Jammu, dated 30-4-1976 in a petition under Sections 10/13 of the Hindu Marriage Act. The trial Judge holding that there was no substance in the petition and that the appellant having failed to prove the grounds alleged by him in the petition for judicial separation/divorce dismissed the petition with costs.

2. The parties were admittedly married according to Hindu rites in Jammu in July 1967. They lived together for some time but according to the appellant-petitioner, the wife, the respondent, was suffering from a disease in nose because of which she was continuously emitting such awful smell as made it unbearable for him either

to sit by her side or to enjoy her company or to have sexual intercourse with her. The petitioner also alleged that besides suffering from this awful disease the wife was also of an unsound mind. According to him the wife was suffering from both these diseases even at the time of marriage itself but this fact was kept back from him by her and her parents. He alleged further that the disease of nose was incurable and despite all possible treatment which he arranged for the wife, the disease could not be cured, and as such has caused a reasonable apprehension in his mind that it would be harmful and injurious for him to continue to live with her. According to the petitioner the very purpose of the marriage has thus been foiled and the circumstances have given rise to a situation sufficient to show that the wife has been guilty of committing cruelty towards him. The wife however, denied all these allegations and contended that after the marriage between the parties she lived with the petitioner for about two years and the relations during that period remained very cordial between her and her husband. The petitioner according to her, however, developed an idea to have another wife during the lifetime of the respondent and therefore, with that aim in view started maltreating her and the attitude of the petitioner towards her underwent a change and his behaviour became so cruel that she had to leave the house of the petitioner and take refuge in the house of her brother. The petitioner however, on intervention of the relatives took her back after some time but finally turned her out of his house in March 1972 and since then she has been living separately from him. She denied to be suffering from any disease of nose or throat which could possibly prevent the petitioner from having cohabitation with her or from enjoying her company. She also denied that she was of unsound mind and contended that she was a completely normal person competent to manage her affairs. She finally contended that the petition has been lodged with the sole intention of getting rid of her without any reasonable cause and to enable the petitioner to take some other person as his wife. On the pleadings of the parties, on 29-6-1972 the trial court raised the following four issues:—

1. Whether the petition has not been drafted according to the rules prescribed in that behalf and if so, what is its effect on the application? O.P.P.
 2. Whether the respondent is suffering from any incurable disease of nose and throat from which she is emitting obnoxious foul smell and because of that it is harmful and injurious for the petitioner to live or cohabit with her? O.P.P.
 3. Whether the respondent was of unsound mind at the time of marriage and continued to be as such? O.P.P.
 4. What relief if any is the petitioner entitled to? O.P.P.
3. A number of witnesses were produced and examined by both the parties in the trial court. On behalf of the petitioner Ram Paul, Devi Dass, Chaman Lai Mattoo and Bishan Dass, Yesh Paul, and Dr. J.R. Sethi were examined. The respondent produced Om Parkash, Mahesh Dass, Ved Parkash, Dr. K.R. Gandotra, Hira Nand, Dr. Chaman Lai, Ashok Kumar and Virinder Khajuria. The parties were also examined as their own witnesses and Dr. Jyoti Parkash appears to have been examined as a court witness.
 4. On a perusal of the testimonies of the witnesses examined by the petitioner in the trial court, it appears that C.L. Matoo, the first witness, has nowhere referred to any disease of throat or nose on account of which the respondent was emitting foul smell. In his presence, however, the respondent sometimes behaved in an unusual manner which led him to suspect the presence of some disease in her. According to him she was examined by Dr. Sethi. Bishan Dass P.W. 2 has found that the respondent was not behaving like a normal person inasmuch as she neither understood the conversation properly nor was able to do any work in a proper manner. She, according to him, emitted foul smell from her nose. Yash Paul P.W. 3 has stated that the petitioner took the respondent to various places for treatment because, as he had heard from the house of the petitioner, the respondent was suffering from some disease of the nose. Devi Dass P.W. 4 has deposed that the respondent was suffering from some disease of throat and nose because of which she was emitting foul smell causing mental torture to the petitioner and that the parties were unable to live as husband and wife any longer. Dr. J.R. Sethi P.W. 5 is the only medical witness produced and examined by the petitioner. He has examined the respondent and prescribed treatment for her nose

trouble which according to him was chronic rhinitis. He found that because of this disease she was emitting foul smell from her nose and also found that her mental development was defective.

He treated her for 2A months but the respondent was not cured. The respondent according to him was emitting foul smell from her nose which was so obnoxious as to render it difficult for any person to sit by her side. She was suffering from a chronic infection but the disease was not contagious. In his opinion in most cases such patients do not completely recover. The witness however, found very little smell coming out of the nose of the respondent when he examined her from a close distance again in the court during his testimony at the suggestion of the opposite party. This witness gave rise to a controversy between the parties as to whether he was an expert and a specialist in the branch of medicine known as E.N.T. He claimed to be one but admitted that he had not obtained any degree as a Specialist in E.N.T. Dr. Jyoti Prakash has refuted the claim of Dr. Sethi.

5. In his own statement the petitioner has stated that the respondent was suffering from a disease of the nose because of which she was emitting foul smell which made it impossible for him to have cohabitation with her. Further, he contended that she was neither able to speak properly nor her voice was normal. He got her examined by Dr. J.R. Sethi who told him that the disease was incurable. He has not been able to have cohabitation with her which has resulted in mental agony for him and that his health has been adversely affected. He has maintained that the respondent was of unsound mind, and was suffering from the nasal disease even before she was married to him.
6. On the other hand, witnesses for the respondent namely, Om Parkash, Mahesh Dass, Ved Parkash, Hira Nand, Ashok Kumar and Virender Knajuria have claimed to have known the parties, more particularly the respondent, and were aware of no foul smell coming out of the respondent's nose or throat. To them she has always appeared to be a normal human being capable to attend to her affairs as a normal person and they found her of good sound mind. Besides these persons the respondent has examined two Medical experts namely, Dr. K.R. Gandotra and Dr. Chaman Lai. None of them however has claimed to be an E.N.T. Specialist. They have as general practitioners examined the respondent at various times. Both of them are unanimous in saying that the respondent suffers from a minor defect in her nose which they called 'deviated nasal septum; but because of this defect, they maintained, she was not emitting any awful smell and that the defect could not be removed and was curable on a minor surgery of the nose. According to Dr. Chaman Lai the respondent was of sound mind and capable of looking after herself and managing her affairs. He examined the respondent from a very close distance but found no awful smell coming from her nose. Minor surgery which was suggested by these Doctors would according to them need hardly a week's hospitalisation.
7. Appearing as her own witness the respondent has categorically denied that she was of unsound mind, or that she was emitting foul smell from her nose. She has admitted to have been examined by some Doctors for treatment of a wound in her nose caused by the ill-treatment of the petitioner. The wound has now been cured and she was completely all right. She has alleged that the petitioner was trying to get rid of her on one pretext or the other, so that he may be able to marry another girl during her life time.
8. Dr. Jyoti Prakash who appears to be the most important witness has been examined. He was an M. Sc., in E.N.T. and has worked in local hospitals since 1966 as Nose and Throat Specialist. He examined the respondent on 30-5-1974 at the direction of the court. He found no foul smell coming out from the nose of the respondent. According to him she was suffering from 'deviated nasal septum' to the right with unilateral dry rhinitis of the left nostril. Her nasal septum was not in mid-line but deviated to the right causing dryness in the left nostril. This was the only malady he found in her nose. He admitted that such a disease may cause foul smell from the nose. On examination he however did not find any foul smell coming out of her nose. The disease according to him was curable on a minor surgery and medication. He has claimed to have performed such like operations quite a number of times and about the instant case he felt that if the operation was performed the result would be quite satisfactory. Explaining further

the witness said that foul smell may be caused if crusts accumulate and are not cleaned. When the nose is cleaned of crusts, the smell would not be there. He was of the opinion that the respondent was not emitting foul smell of the nature which could possibly prevent a person from sitting near her. He has further stated that if the disease was left untreated, it was likely to lead to the disease of the nose called "Atrophic rhinitis" but the witness could not say with certainty that the respondent would in that event develop such a disease.

9. The conclusion at which the trial court of the District Judge arrived was that there was no substance in any of the grounds set out by the petitioner for divorce or in the alternative for judicial separation and therefore, it dismissed the petition with costs. The petitioner-appellant preferred an appeal in this Court which came to be heard by Justice Mian Jalal-ud-Din, Acting Chief Justice (as his Lordship then was) on December 21, 1976. During the course of arguments his Lordship felt that an important question of law being involved in the appeal, the same, as a whole, be heard by a Full Bench. His Lordship referred to a Division Bench Judgment of this Court viz: *Rup Lal v. Kartaro Devi*, reported in 1970 K.L.J. 311 : (AIR 1970 J and K 158) and was of the view that it may require further consideration as the scope of intention had not been considered in that judgment in matters of petitions for judicial separation under clause (b) of sub-sec. (1) of Section 10 of the Hindu Marriage Act. In his Lordship's words:

"In this appeal which is directed against the judgment and decree dated 30-4-1976 of the learned District Judge, Jammu, the important question involved is whether it is open to a Hindu husband to claim divorce or in the alternative judicial separation from his wife on the ground that the wife is suffering from a disease of her nose and throat and that she emits foul smell which renders it impossible for the husband to enjoy the society of the wife."

His Lordship went on to say in the order of reference that:

"The matter raised before me is of considerable importance. There is, however, an authority of the Division Bench of this court reported in 1970 Kash L J 311 : (AIR 1970 J and K 158) which deals with the proposition that has been debated before me. In my opinion, the Judgment delivered in the aforesaid authority does not take into consideration the aspect of intention. It needs to be reconsidered in view of the fact that if it is laid down that even a nasty disease contracted by either party to the marriage can furnish a ground for claiming dissolution of marriage, this will have far reaching effect on the Hindu Society

In my opinion, it is, therefore, necessary to refer the question and also the whole case to a Full Bench for an authoritative pronouncement on the points involved in the appeal, and also for reconsideration of the observations made in 1970 Kash U 311 : (AIR 1970 J and K 158)"

10. It is in this manner that the present appeal has come to be heard by this Bench.
11. Before us during the hearing of the appeal arguments advanced were confined and limited firstly to the inquiry and consideration as to whether to succeed in the petition, it was incumbent for the petitioner to prove in a matter for judicial separation under Section 10(l)(b) of the Hindu Marriage Act the intention on the part of the defaulting party to injure, harm, or to harass the other spouse and secondly on facts of the case whether factum of cruelty as envisaged u/s 10(l)(b) of the Act has been established or not. It was urged by the learned counsel for the appellant that intention did not form an important or necessary element for a matrimonial offence as envisaged u/s 10(l)(b) of the Act. According to him the only point that would arise for consideration in matter like this would be to see what consequences flow or may reasonably be expected to flow from the action complained of, on the other spouse. If the consequences, he contended, were found to be injurious or harmful to the other spouse, the question of intention would not arise. The intention of the legislature, according to him, could reasonably be presumed to be the same as otherwise the legislature while enacting S. 10(l)(b) of the Act would have specifically laid down the requirement of intention for establishment of such an offence. The argument advanced by the learned counsel for the other side was that the language used in sub-cl. (b) of sub-sec. (1) of Section 10 of the Act

obviously leads to the only interpretation that the proof of intention was a sine-qua-non for a decree of judicial separation on the ground mentioned in that sub-clause. A number of judgments were cited at the bar in support as well as against the importance of the existence of intention in a matter like this. Most of the judgments, of course, pertain to cases for divorce which arose in England and have been reported in All England Reports. We have been particularly referred to

- (i) *Atkins v. Atkins*, (1942) 2 All ER 637;
- (ii) *Squire v. Squire*, (1947) 2 All ER 529;
- (iii) *Kasiefsky v. Kasiefsky*, (1950) 2 All ER 398 and (iv) *Goilins v. Goilins*, (1963) 2 All ER 966 and the Indian cases: (i) *Smt. Umri Bai v. Chittar*, AIR 1966 Madh Pra 205, (ii) *Trimbak Narayan Bhagwat v. Smt. Kumudini Trimbak Bhagwat*; AIR 1967 Bom 80 and (iii) *Rup Lai v. Kartaro Devi*, 1970 Kash LJ 311 : (AIR 1970 J and K 158).

12. Upto 1963 the view taken in most of the cases by courts in England with regard to the necessity of intention in a matrimonial offence has been consistently unanimous to the effect that the element of intention was an essential ingredient to be proved for a decree of divorce or judicial separation on the plea of cruelty. The English courts were of the view that the defaulting spouse must be found guilty of deliberate behaviour on his or her part, the effect of which either has been or must be, in the ordinary course, to injure the health, bodily or mentally, of the other spouse. In *Squire v. Squire* ((1947) 2 All ER 529) (supra) on the facts appearing in the case the opinion of the court was that the wife's conduct arising as it did from illness, did not amount to legal cruelty, to constitute which the conduct complained of must be deliberate, malignant and intentional.
13. In *Kasiefsky v. Kasiefsky*, (1950-2 All ER 398) (supra) the view taken was that in the absence of evidence that the wife's conduct was due to her intention to wound the husband's feelings and that it had resulted in injury or reasonable apprehension of injury to his health, the conduct of the wife could not be held to amount to cruelty.
14. In *Goilins v. Goilins*, (1963-2 All ER 966) (supra) however, the House of Lords after taking note of a number of authorities on the question of cruelty came to hold the view that an intention on the part of one spouse to injure the other was not a necessary element of cruelty for a matrimonial offence. Two of the five Law Lords dissented from this view. In their dissenting judgments delivered separately the two law Lords were of the view that intention on the part of the defaulting spouse to injure the other spouse was a necessary ingredient to establish the matrimonial offence of cruelty. Lord Reid the presiding Judge, in effect, was of the view that intention was not a necessary element in such matters. He however observed at the dose of his judgment that "if the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent's mind. In other cases the state of his mind is material and may be crucial". The state of mind of the defaulting spouse, in the opinion of Lord Reid also, was not obviously an element of no consequence that could be lightly ignored in all cases of matrimonial offences. It may be crucial and material in some cases and requires due consideration. It was clearly on the facts of the case and the circumstances appearing in *Gollins v. Gollins* (Supra) that the majority of the Law Lords came to hold the view that intention was not a necessary element for proving the matrimonial offence of cruelty as alleged. Obviously the judgment in the said case has not and should not be interpreted as having laid down a general principle of law applicable in all cases wherein cruelty was a ground for judicial separation or divorce. The desirability of making a distinction between cases of this nature for the requirement or otherwise of the element of intention has found favour with the majority of the law Lords who decided *Gollins v. Gollins* (supra). It may be hazardous and on facts of a particular case even unjustified to lay down as a general principle of law the necessity or otherwise of the element of intention as a requirement sine-qua-non for establishing or rejecting a case for judicial separation or divorce on the basis of cruelty. Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to

individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection the culture, temperament and status in life and many other things are the factors which have to be considered. All these factors need be considered for judging the conduct complained of in relation to the fact as to whether it amounts to matrimonial offence of cruelty within the meaning of S. 10(1)(b) of the Act.

15. In most cases decided by English and Indian courts the question of the cruelty came up for consideration in the context of a particular behaviour or conduct exhibited by the defaulting spouse. The case of *Gollins v. Gollins* (1963-2 All ER 966) (supra), was one of such cases. A particular conduct and behaviour of the husband was held to be sufficient to establish cruelty and on the facts appearing in the case it was laid down that intention was not necessary element to establish cruelty. A similar view was taken in AIR 1967 Bom 80 and on facts of the case the insanity of husband coupled with his attempt to strangle the brother of the wife on one day and their child on the other was held to be an act of cruelty without proof of intentional behaviour of the husband.
16. The case at hand however on facts stands distinguished from *Gollins* (1963-2 All ER 966) (supra) and the Bombay case. The husband here is not complaining of any rude behaviour or of a particular conduct of the wife injurious to the health of the husband. It was not the case of the husband that the illness was deliberate or aimed at him with intention to injure or harm him. The disease itself as it transpires from evidence was not of the nature that would lead a reasonable person to conclude that it would be dangerous for the health of the husband to continue to remain united in the bond of marriage with the wife. The alleged disease was neither contagious nor incurable. In fact the bad smell was not there throughout the day and night. Its effect could be diminished to a large extent by removing the crusts from the nose. It was not the case of the husband that with intention to harm him, wife declined to cleanse her nose or refused treatment. On facts, it appears, on the other hand, that no serious attempt has ever been made by the husband to provide proper treatment to the wife. A minor surgery might have been of great help as a result of which the disease might have been brought to an end. This was not done and the responsibility squarely lies on the husband. In cases of illness of the nature we are dealing herein it would not be only desirable but necessary to show the existence of intention to injure so as to meet the requirements for judicial separation on the ground of cruelty. The phraseology employed in sub-clause (b) of sub-section (1) of Section 10 of the Act may give an indication of the intention of the Parliament with regard to the requirement of element of intention for establishing the matrimonial offence as envisaged under the said sub-clause if it is conceded that the word "has treated the petitioner" used therein in some form or other point out to a deliberate act in the treatment of the petitioner by the defaulting spouse. We however, would not go to that extent in interpreting these words in the manner but the fact remains that the contention is not totally devoid of force. The words used are capable of creating an impression of that kind. On turning to other permissible grounds for judicial separation enumerated in the Act, one immediately comes across the provisions in (c), (d) and (e) of the same sub-section wherein diseases have been distinctly and specifically mentioned which may, on certain conditions, provide valid grounds for judicial separation. The diseases, mentioned therein are virulent form of leprosy, venereal diseases, and unsoundness of mind. No other disease, be it ordinary or dangerous, could be made a ground for dissolution of marriage or judicial separation under these sub-clauses of Sub-section (1) of S. 10 of the Act. There is no gainsaying the fact that many more diseases exist which may be equally or in some ways even more dangerous than leprosy or venereal diseases, but those diseases would not by themselves furnish valid grounds for judicial separation or divorce, unless such diseases are further shown to have created a situation for the other spouse which amounts to cruelty. For a petitioner under sub-clauses (c), (d) and (e) of sub-section (1) of S. 10 of the Act, it may not be necessary to prove intention to harm; the factum of the existence of such a disease is sufficient for a decree for judicial separation. But in case of other diseases further requirement is to establish that the cruelty as envisaged under sub-clause (b) of sub-section (1) of S. 10 of the Act has resulted in. The

aspect of intention may become “important and crucial” in such cases. May be venereal disease and leprosy because of being at once dangerous as well as contagious have been, on fulfilment of certain conditions, declared to be good grounds for judicial separation but as is well known these are not the only contagious and dangerous diseases. The Parliament in its wisdom has however, singled out these two diseases only for this purpose. Be it as it may, it is for the Parliament to think about it. We have to interpret the law as it is or as it appears to be. We are conscious that cruelty includes mental cruelty also besides physical cruelty. Yet the door of cruelty could not be opened too wide as otherwise we may soon find ourselves granting divorce on the ground of mild diseases and even for the incompatibility of the temperament. True, that the husband or wife as the case may be, could not be blamed and condemned to suffer for ever for no fault of his or her, but the temptation to grant divorce or judicial separation has to be resisted lest we step into a state of affairs where the sacred institution of marriage itself is endangered. Illness was bound to create a position of great difficulty and inevitable suffering for both the spouses but then it must be remembered that one has taken the other for good or bad as the one’s spouse and the sacred bond of marriage could not and should not be allowed to be scrapped on light or flimsy grounds.

17. In this view of the matter, we feel obliged to agree with the learned counsel for the respondent that the extent and nature of the element of intention not having been considered in 1970 Kash U 311 : (AIR 1970 J and K 158) (supra) decided by a Division Bench of this court, the proposition of law expounded therein could neither be followed nor taken as a general principle of law applicable to all cases of judicial separation on grounds of cruelty as envisaged under sub-cl. (b) of sub-section (1) of S. 10 of the Act. On the evidence in that case it had been established that the wife was suffering from a disease called Atrophic rhinitis as a result of which the wife had developed a serious type of sinus and a fleshy portion of the nose had got putrefied and consequently it emitted very bad smell. It was laid down by their Lordships in that case that “in the instant case it is manifest that in view of the dirty disease from which Mst. Kartaroo is suffering it was impossible for the husband either to have sexual intercourse with the wife, or to enjoy her company. In this view of the matter the very purpose of marriage would be foiled so long as the wife was suffering from this disease.” A decree for judicial separation therefore, against the wife was ordered. The judgment speaks of a positive finding of fact with regard to the existence of the deadly disease of nose and also about its awful smell. The Division Bench had also on the basis of evidence come to the conclusion that under the circumstances of the case it was impossible for husband to cohabit with wife. It was also found that wife was suffering from a disease known as Atrophic rhinitis. These were findings of fact and on the basis of these findings a decree for judicial separation appears to have been ordered without taking into consideration the element of intention in matters like these, as the same does not appear to have been pointed out to their Lordships of the Division Bench, the proceedings in appeal having been ex parte. The decree for judicial separation ordered therein might have been justified on facts of the case but the omission to refer to the necessity or otherwise of the element of intention in matrimonial matters for purposes of establishing cruelty has rendered the judgment effective only with regard to that particular case, and could not form a precedent for any other.
18. The question of intention in our view is important and may in appropriate cases turn out to be crucial. We therefore, find ourselves in agreement with the learned counsel for the respondent wife and would not (as we have not) leave this case without considering the scope and extent of the element of intention in a matter of judicial separation (like the one at hand) on grounds of cruelty.
19. We now turn to the evidence produced in the instant case to find as to whether the petitioner-appellant has been successful in proving as a fact that the wife was suffering from a deadly and injurious disease, which was harmful and injurious to his health. On having perused it minutely, we are satisfied that the petitioner-appellant has completely failed to establish a case in his favour. From whatever angle one scrutinises it, the most cogent and relevant piece of evidence that is on record in this behalf is the testimony of Dr. Jyoti Prakash, a Specialist in nose diseases. He was firm in his view that the disease in her nose was an ordinary one and could be permanently cured on a minor surgery. It was not (he found

on physical examination) that the wife would give out bad smell through her nose every time. It may be so only when the crusts accumulate in the nose and the nose remained unwashed and uncleaned. The smell even then was not of the nature that would prevent or make it impossible for others to sit near her. It was on record that on examination in the court the nose was not found to be giving out any awful smell. When Dr. Jyoti Prakash could not find any bad smell coming out of the nostrils of the respondent, which was also the case with Dr. J.R. Sethi, the petitioner-appellant's own witness, (who said so after bringing his nose very close to the nose of the respondent during his deposition in the trial court) it is difficult to believe the petitioner-appellant when he says that it was impossible for him to sit near his wife or enjoy her company or have sexual intercourse with her. The charge of cruelty as a matrimonial offence requires to be established as any other fact. It has to be determined by taking into account the individual concerned and the particular circumstances of the case. No objective standards can be laid down for this purpose.

20. We are therefore, convinced that the appellant has not been able to establish the factum of alleged cruelty by any evidence whatsoever. May be the wife was speaking the truth when she alleged that the husband in order to take another person as his wife was vainly trying to find fault with her nose and putting up pretexts which were imaginary and false. Holding, therefore, that on facts of the case the appellant has not been successful in showing that the act complained of was an act of cruelty aimed at him by his wife, and also that on facts appearing in the case intention was a necessary element to be established which has not been done, this appeal we dismiss but we make no order as to costs.

M. JALALUDDIN, C.J.:— I agree.

DR. A.S. ANAND, J.:— I also agree.

21. Appeal dismissed.



MST. ZOONA VERSUS MOHAMAD YAKUB NAJJAR

Civil Second Appeal No. 25 of 1981

(Before Hon'ble Mr. Justice I.K. Kotwal)

Mst. Zoona ... Appellant;

Versus

Mohamad Yakub Najjar ... Respondent.

- The appellant in this appeal is the wife, whose suit for dissolution of her marriage with the respondent her husband, was decreed by the trial Court, but was dismissed on appeal by the lower appellate Court.
- This controversy gave rise to a number of issues, out of which issues Nos. 1 and 4 related, to cruelty, issues Nos. 2 and 3 to failure of maintenance despite demand, and issue No. 5 to failure to resume cohabitation. The parties joined the issues and led evidence on them, on consideration whereof the trial Court found against the appellant on Issues Nos. 1, 4, and 5, but found in her favour on Issues Nos. 2 and 3, and consequently passed the decree prayed for in favour of the appellant.
- The appellant having failed to show that she was beaten up to leave her husband's house, the case of the respondent that she had gone out of his house of her own free will in the company of her father to attend her brother's marriage, and had thereafter refused to return at the behest of her father on account of some land dispute, becomes highly credible and has to be accepted.
- Any obligation on the part of the husband to maintain his wife, necessarily postulates a corresponding right in the wife to claim it. It is more so, because the relations between the spouses arising out of a Muslim Marriage are contractual in nature. Under the Mohammadan Law, the husband is not obliged to maintain his wife, if she is not willing to live with him and discharge her marital obligations without any justification.
- Viewed thus, the appellant having failed to go back to her husband without any justification, she was not entitled to claim any maintenance from him, so long as she lived in her father's house. Consequently, the respondent, granting that he failed to provide her maintenance there, he cannot be said to have neglected or failed to provide maintenance to the appellant, to attract the mischief of Section 2(ii). The decree of dismissal of her suit passed by the learned District Judge has, therefore, to be maintained, though on a ground different from the one relied upon by him.

Decided on December 3, 1982

JUDGMENT

1. The appellant in this appeal is the wife, whose suit for dissolution of her marriage with the respondent her husband, was decreed by the trial Court, but was dismissed on appeal by the lower appellate Court.
2. The suit was brought by her under Section 2(ii), (iv), and (viii) of the Dissolution of Muslim Marriages Act, 2003, hereinafter to be referred to as the Act, on the allegations that her marriage with the respondent was solemnized nearly six years prior to the institution of the suit. Hardly two years had passed, when she was given a severe beating by the respondent and was turned out of her matrimonial home, after snatching all her ornaments and clothes. She sent a number of persons to the respondent to persuade

him to taken her back to his fold and provider her maintenance, but he refused to do so and did not resume cohabitation with her, non did he provide any maintenance to her ever since she was turned out by him.

3. The respondent denied all these allegations and resisted the suit alleging that the appellant had left his house of her own free will in furtherance of plan, and had refused to return even after he had gone himself and had also sent a number of persons to her to persuade her to come back to his house. She had also taken all clothes and ornaments with her. He was willing to provide her all the maintenance and resume-matrimonial relations with her, provided she too was prepared to live with him.
4. This controversy gave rise to a number of issues, out of which issues Nos. 1 and 4 related, to cruelty, issues Nos. 2 and 3 to failure of maintenance despite demand, and issue No. 5 to failure to resume cohabitation. The parties joined the issues and led evidence on them, on consideration whereof the trial Court found against the appellant on Issues Nos. 1, 4, and 5, but found in her favour on Issues Nos. 2 and 3, and consequently passed the decree prayed for in favour of the appellant.
5. On appeal the learned District Judge refuse to hear the appellant on the findings recorded by the trial Court on issues Nos. 1, 4 and 5 on the ground that the cross-objection taken by her in regard to these findings was barred by time and thereby confirmed the findings of the trial Court on these issues. He, however, upset its findings on Issues Nos. 2 and 3 and dismissed the appellant's suit by holding that even though the respondents had failed to maintain her for a period of more than two years, yet she was not entitled to any decree, for she had failed to prove that she had made any demand to the respondent to provide her maintenance.
6. As before the lower appellate Court, findings of the trial Court on Issues Nos. 1, 4 and 5 relating to cruelty and failure to resume cohabitation for a period of three years were attacked before me as well. At this juncture it necessary to point out that the lower appellate Court committed an error of law in refusing to hear the appellant on these findings. The appellant had claimed the decree on three grounds, viz., cruelty, failure of maintenance for a period of not less than two years, and failure to resume cohabitation for a period of three years. Out of these, the trial Court found only one ground i.e., failure of maintenance in her favour, and granted the decree prayed for on this ground simpliciter. There was thus no part of the decree which it could be said, was passed by the trial Court against the appellant. She had claimed a decree for dissolution of her marriage with the respondent, which was granted in her favour. She thus got all that she had asked for no matter that she got it on one ground only, or on all the grounds pleaded by her. No part of the decree being thus against the appellant, she was not required to take any cross-objection against any part of it, and could have supported, the same before the lower appellate Court on the two grounds found against her by the trial Court, by assailing its findings on them. The bar contained in Order 41 Rule 22 Civil P.C. was not attracted to her case.
7. Even so, these findings of the trial Court are clearly unassailable. The witnesses produced by the appellant to prove these issues are Gh. Mohi-ul-Din Najar, Gh. Hassan Yatu, Salam Yatu, Gh. Nabi Yatu, Gani Yatu, and Mohd. Akbar, all residents of Nagam. The beating is alleged to have been given to her at village Kralapora. No witness from this village has been produced to prove this fact. Out of the aforementioned witnesses, P.W. Gh. Mohi-ul-Din is the real brother of the appellant. Statements of the other witnesses on the point of cruelty are also not of much help to her. Whereas P.W. Gh. Hassan Yatu stated that the respondent and his parents had merely abused the appellant when they had turned her out of their house, P.W. Gani Yatu stated that she was caught hold from her hair by the respondent and was given a severe beating by him. The trial Court also noted the demeanour of this witness, who it found was very clever and cunning, and would take time to reply the questions put to him. P.W. Salam Yatu was fair enough to concede that no beating was given to the appellant in his presence. P.W. Ghulam Nabi Yatu merely saw the appellant weeping and wailing and the knowledge of P.W. Mohd. Akbar is based upon the complaint that was made to him by the appellant that the treatment of her in laws with her was not good. On the

other hand all the witnesses examined by the respondent have with one voice stated that as long as the appellant had stayed in the respondents house at Kralapora, she was treated well by him. The witnesses examined by him belong to village Kralapora, and are reasonably expected to have the knowledge of the relations between the parties.

8. There is also variance between the pleading of the appellant and the evidence led by her on the issue that the respondent failed, to resume cohabitation with her for a period of three years prior to the institution of the suit. Whereas in her plaint she averred that she stayed in her husband's house for two years after her marriage, her witnesses stated that she remained there for hardly a month or so. On the other hand the witnesses examined by the appellant stated that the appellant had left her matrimonial home a little more than two years prior to the institution of the suit. The trial Court, therefore, rightly disbelieved her witnesses that the parties failed, to resume matrimonial relations at least three years prior to the institution of the suit, which is the basic requirement of Section 2(iv) of the Act. In this state of evidence, the trial Court was perfectly justified in deciding issues 1, 4 and 5 against the appellant. Its findings on these issues are, therefore, confirmed.
9. As regards the issue relating to failure of maintenance the trial Court found, and rightly so, that the respondent had failed to provide maintenance to the appellant for a period of more than two years prior to the institution of the suit. She examined all the aforesaid witnesses to depose to the fact that they had gone to the respondent's house at her instance and had told him to bring her back to his home, but he had given a blank refusal and had told them that he did not want her at all. The demand for providing her maintenance, there can be no manner of doubt, was implicit in these statements. In view of this evidence, the finding recorded by the lower appellate Court that the appellant failed to prove that she had demanded maintenance from the respondent, is clearly erroneous, and that recorded by the trial Court that such a demand was made is clearly warranted on the evidence recorded in the case.
10. The appellant having failed to show that she was beaten up to leave her husband's house, the case of the respondent that she had gone out of his house of her own free will in the company of her father to attend her brother's marriage, and had thereafter refused to return at the behest of her father on account of some land dispute, becomes highly credible and has to be accepted. Not only the witnesses of the respondent, but some of her own witnesses have stated that there was a land dispute between her father and the father of the respondent, which indirectly came in the way of matrimonial relations of the parties. There is ample evidence on the record to show that such a dispute did exist. D.Ws. Mohd Yusuf, Gh. Qadir Mir, Gh. Rasul Najar and Mohd. Shafi depose to this effect. They further stated that they went to the appellant and asked her to come back to the respondent, but she at the behest of her father refused to do so due to some land, dispute. These statements inspire confidence, more so, because Gh. Rasool Najar, one of the witnesses examined by the respondent, happens to be common relation of the parties. Statements of the appellant's witnesses that the respondent had told them that he did not want her at all do not appear to reflect truth. If it were a fact that he really did not want her, or wanted to get rid, of her, he in all likelihood must have seized the opportunity and straightway admitted the appellant's claim for a decree of dissolution of marriage. He should not have, in these circumstances, resisted her suit tooth and nail. Obviously, therefore, the appellant had no reason to stay back till the land dispute between the parents of the parties was finally resolved.
11. Neither the trial Court, nor even the lower appellate Court found to the contrary. The trial Court has held that even though the appellant had no reason not to go to live with her husband, she could yet get the marriage dissolved, as in its opinion, irrespective of the fact whether or not she had any justification for refusing to live with the respondent, the latter was bound to maintain her, once she had asked for it, as such, he could have refused to do so only at the peril of the dissolution of his marriage with the appellant. For this, it relied upon a Single Bench decision of the High Court of Kerala reported as A. Yousuf Rawther v. Sowramma, AIR 1971 Ker 261. The lower appellate Court, however, shifted its stand immediately after it found that the appellant had no justification for not living with her husband, and dismissed her

suit by holding that she had failed to prove that she had made any demand for maintenance, which in contradistinction to Cl. (ii) of Section 2 of the Dissolution of Muslim Marriage Act (Central Act No. VIII of 1939), was a precondition for obtaining a decree under Clause (ii) of Section 2 of the Act. Decision of this appeal, therefore, turns upon the question: Can a wife claim a decree for dissolution of her marriage under Section 2(ii) of the Act on the failure of her husband to provide her maintenance for a period of two years after a demand in that behalf has been made by her to him, even if it is shown that she had no justification not to live with him.

12. There is undoubtedly a cleavage in judicial opinion on the point. One view is that on the plain language of Section 2(ii) of the Act, the husband is bound to maintain the wife in all circumstances, even if she had no justification for living separately from him. The clear words used in the Section, according to this view, must be given effect to, and a right in the wife to claim maintenance from her husband should not be read into the section of which it does not specifically speak. (See *Mt. Akbari Begum v. Zafar Hussain*, AIR 1942 Lah 92, *Mt. Zainaba v. Abdul Rahman*, AIR 1945 Peshawar 51, *Mt. Noor Bibi v. PirBux*, AIR 1950 Sind 8 and *A. Yousuf Rawther v. Sowramma*, AIR 1971 Ker 261). It is this view which prevailed with the trial Court, in particular, the following observations of Krishna Iyer, J., in AIR 1971 Ker 261 (at p. 270) (supra):

“For all these reasons, I hold that a Muslim woman, under S. 2(ii) of the Act, can sue for dissolution on the score that she has not as a fact been maintained even if there is good cause for it — the voice of the law, echoing public policy is often, that of the realist, not of the moralist.”

13. The other view is that the husband is not bound to pay maintenance to his wife in all cases. Where the wife is not willing to discharge her marital obligations towards her husband, she is not entitled to claim maintenance from him. The husband, according to this view, is not bound to follow her to provide her maintenance wherever she goes, unless she can show some legal justification for not living with, or not discharging her marital obligation towards him. (See *Mt. Khatijan v. Abdulla*, AIR 1943 Sind 65, *Mt. Badrulnisa Bibi v. Syed Mohammad Yusuf*, AIR 1944 All 23, *Zafar Hussain v. Mt. Akbari Begum*, AIR 1944 Lah 336, *Mt. Umat-ul-Hafiz v. Talib Hussain*, AIR 1945 Lah 56, *Mt. Shamim Fatma v. Ahmad Uiiiah Khan*, AIR 1947 All 3, *Jamila Khatun v. Kasim Ali Abbas All*, AIR 1951 Nagpur 375 *Amir Mohd v. Mt. Bushra*, AIR 1956 Raj 102 and *Smt. Rabia Khatoon v. Mohd. Mukhtar Ahmad*, AIR 1966 All 548).
14. In AIR 1944 All 23 (supra), for instance, the expressions neglect and failure to provide maintenance occurring in S. 2(ii) were explained by the Division Bench in these words:

“The words “has failed to provide” are not very happy, but even they imply an omission of duty. Where the wife through her own conduct leads the husband to stop the maintenance, the Court will not allow dissolution of marriage for that would be giving her a benefit — if benefit it can be called — arising from her own wrongful acts. It may be that the husband is too poor to maintain the wife and then perhaps it will be open to the wife to claim dissolution of marriage for even in that case there might be some omission of duty on the part of the husband although such omission may be due to circumstances beyond his control. It is to cover such cases that the words “without reasonable cause” have been omitted from clause (ii), but where the wife or her parents are entirely to blame and no blame attaches to the husband it is not possible for the Courts to say that the husband has failed to provide for the maintenance of the wife...”

This section again fell for interpretation in AIR 1956 Raj 102 (supra) and was interpreted by the Court thus:

“On the question of law, we are of opinion that the failure or neglect to provide maintenance in order to give rise to claim for dissolution must be without any justification. For if there is justification, there cannot be said to be neglect. Neglect or failure implies non-performance of a duty. But if the husband is released from the duty on account of the conduct of the lady herself, the husband cannot be said to have

neglected or failed to provide maintenance. In the present case, as aforesaid, there was neglect or failure to provide maintenance.”

15. A similar view was taken by Lahore High Court in AIR 1944 Lah 336 (supra) wherein the contrary view taken by Abdul Rashid, J., in AIR 1942 Lah 92 (supra) was overruled by the Division Bench and the judgment of the learned single Judge reversed in the Letters Patent Appeal preferred against the same.
16. The view taken in these decisions appears to be more commendable. Any obligation on the part of the husband to maintain his wife, necessarily postulates a corresponding right in the wife to claim it. It is more so, because the relations between the spouses arising out of a Muslim Marriage are contractual in nature. Under the Mohammedan Law, the husband is not obliged to maintain his wife, if she is not willing to live with him and discharge her marital obligations without any justification. Section 2(ii) cannot be interpreted to envisage an absolute and unfettered right in the wife to be maintained by her husband under all circumstances, however faulty her own conduct may be, on the general rule of interpretation of statutes that clear words used in a statute should ordinarily be given effect to. True, this section does not specifically say that the wife should have a right to claim maintenance, nevertheless, such a right has to be read into the section, for unless it is so read, it is bound to bring it into conflict with the aforesaid general principle of Mohammedan Law. The intention behind enacting the Act was to supplement the principles of Mohammedan Law relating to matrimonial relations of spouses, but not to supplant them. In order, therefore, to determine its true ambit and scope. Section 2(ii) has to be read in conjunction with Mohammedan Law, and cannot be read in isolation from it. In taking this view I am supported by the following observations made by Mudholkar, J. in AIR 1951 Nag 375 (supra): —

“Where, therefore, the question arises whether there has been failure on the part of the husband, to maintain his wife, the question must necessarily arise whether the wife was at the relevant time entitled to be provided with maintenance. It is true that Act VIII(8) of 1939 crystallises a portion of the Muslim law as stated by the learned Judge in his previous decision but it is precisely for that reason that it must be taken in conjunction with the whole of the Muslim law as it stands.”
17. Viewed thus, the appellant having failed to go back to her husband without any justification, she was not entitled to claim any maintenance from him, so long as she lived in her father’s house. Consequently, the respondent, granting that he failed to provide her maintenance there, he cannot be said to have neglected or failed to provide maintenance to the appellant, to attract the mischief of Section 2(ii). The decree of dismissal of her suit passed by the learned District Judge has, therefore, to be maintained, though on a ground different from the one relied upon by him.
18. In the result the appeal fails, which is dismissed accordingly, but in the circumstances of the case, without any order as to costs.

Appeal dismissed.



USHARANI PRADHAN VERSUS BRAJAKISHORE PRADHAN

Mata No. 104 of 2011

(Before Hon'ble Mr. Justice Vinod Prasad and Hon'ble Mr. Justice S.K. Sahoo)

Usharani Pradhan ...Appellant

Versus

Brajakishore Pradhan ...Respondent

For Appellant:- M/s. Debi Prasad Dhal S.K. Dash, A. Behera

For Respondent:- M/s. Dinesh Kumar Mohanty Deepak Kumar Rath

Decided on November 19, 2015

- This matrimonial appeal has been filed by Usharani Pradhan (hereafter “the appellant”) under section 28 of Hindu Marriage Act, 1955 read with section 19(1) of Family Courts Act, 1984 challenging the impugned judgment and order dated 23.09.2011 passed by the learned Judge, Family Court, Puri in Civil Proceeding No. 162 of 2010 in allowing the petition filed by Brajakishore Pradhan (hereafter “the respondent”) under section 13 of Hindu Marriage Act, 1955 and dissolving the marriage between the parties with a decree of divorce subject to payment of alimony of monthly maintenance @ Rs. 3,000/- by the respondent-husband to the appellant-wife.
- Desertion of one of the spouses by the other for a continuous period of not less than two years immediately preceding the presentation of the divorce petition as well as treating the spouse with cruelty are some of the grounds of divorce.
- According to the Explanation provided under Section 13 of Hindu Marriage Act, 1955, “desertion” means the desertion of the one party by the other party to the marriage without reasonable cause and without consent or against the wish of such party and includes willful neglect of the petitioner by the other party to the marriage.
- Therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two elements are essential so far as the deserted spouse is concerned; (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period.”
- To prove desertion in matrimonial matter, it is not always necessary that one of the spouse should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case.”
- Thus keeping in view the aforesaid settled position of law that there can be no desertion without animus deserendi and it implies not only factum of separation but also intention to separate

permanently and to put an end to matrimonial relationship and cohabitation, on scanning of the materials on record, we found that the conduct of the appellant in leaving the company of her husband and their small children and living separately for so many years since 2007 for pursuing her so-called political ambition clearly indicates that she had deserted the respondent without reasonable cause and without his consent and against the wish of the respondent.

Hon'ble Mr. Justice S.K. Sahoo :— “A home with a loving and loyal husband and wife is the supreme setting in which children can be reared in love and righteousness and in which the spiritual and physical needs of children can be met.”

David A. Bednar

2. This case depicts the sordid episode of the life of a woman who spoiled her homely environment and family relationships running after the politics and politicians forgetting her solemn duties and responsibilities of a matrimonial life and neglecting her husband and children. She was cautioned and reminded of her pious obligations but she was mesmerized so much by the political thoughts and quite adamant that she failed to understand the consequence of her negligent attitude. When she faced the reality and started realizing her wrongdoings, by that time it was too late and much water had flowed under the bridge.
3. This matrimonial appeal has been filed by Usharani Pradhan (hereafter “the appellant”) under section 28 of Hindu Marriage Act, 1955 read with section 19(1) of Family Courts Act, 1984 challenging the impugned judgment and order dated 23.09.2011 passed by the learned Judge, Family Court, Puri in Civil Proceeding No. 162 of 2010 in allowing the petition filed by Brajakishore Pradhan (hereafter “the respondent”) under section 13 of Hindu Marriage Act, 1955 and dissolving the marriage between the parties with a decree of divorce subject to payment of alimony of monthly maintenance @ Rs. 3,000/- by the respondent-husband to the appellant-wife.
4. It is the case of the respondent-husband that he married the appellant on 22.05.1991 in accordance with the caste, custom and rites and both of them stayed together as husband and wife and out of the wedlock, they were blessed with a daughter and a son. It is the further case that since the appellant was interested in political activities, she neglected the family and she used to return back home in the late hour of the night. Even though the respondent raised objection but the appellant did not bother about the same. She was not preparing food for her family members and behaving very badly with her husband and even gone to extent of instituting false police cases against him for which he was taken into custody. The appellant left her in-laws’ house on 07.03.2007 and started residing at another place. After desertion of the appellant for a period of more than two years, the respondent instituted a divorce proceeding on the ground of cruelty and desertion.
5. On being noticed, the appellant appeared and filed her written statement and denied the averments made in the divorce petition. She put forth a case that after her maternal aunt expired giving birth to a female child, she and her husband adopted that child as their own daughter but when both of them were blessed with a daughter and son, the respondent lost interest in the adopted child and pressed the appellant to hand over the child back to her father. As the appellant did not agree to such proposal of her husband, there was dissention between the couple and for that reason the respondent started taking liquor and assaulting the appellant mercilessly causing serious injuries for which she instituted G.R. cases. The respondent also started maintaining distance from the appellant as a result of which their relationship deteriorated. It is her further case that after being mercilessly assaulted, she was driven out of her in-laws house with her adopted daughter for which she was constrained to take shelter in her paternal place at Jatani. The appellant denied the allegations leveled against her by the respondent regarding cruelty and desertion and it is her case that such allegations have been concocted just to get a decree of divorce and prayed to dismiss the divorce petition.
6. The learned Family Judge formulated the following points for determination:-

- (i) Whether the respondent was entitled to divorce the appellant on the ground that she had treated him with cruelty?
 - (ii) Whether the appellant had deserted the respondent for a continuous period of not less than two years immediately preceding the presentation of the petition?
7. In order to prove his case, the respondent examined himself as P.W.I and proved certain documents. Ext.1 and Ext.3 are the certified copies of the FIR, Ext. 2 and 4 are the certified copies of the charge-sheet, Ext.5 series is the notice issued by Mahila Commissioner and Ext.6 series is the cash receipt issued by Sovaniya Sikhashram.
 8. The appellant examined himself as R.W.I.
 9. The learned Family Judge while discussing the evidence on record has been pleased to observe that the case of the appellant that the respondent had kept the seized articles in the house of a Muslim at Tiadi Sahi which was seized by police is not correct inasmuch as the articles were seized from the house of the respondent as per seizure list and was left in the Zima of the appellant.
 10. It was further held that the allegation that the respondent had history of contact with home guard Netramani Dei has not been substantiated anywhere rather such allegation amounts to cruelty to her better half. It was further held that the claim of the appellant-wife about her separate living since 2009 or 2010 is contradicted by the recital in the FIR vide Ext.1 which indicates that they were living separately since 2007. It was further held that living in another house in the same town away from her husband is humiliating to the husband and it also amounts to cruelty.
 11. The learned family Judge further held that the appellant had deserted her husband since the year 2007 by living separately from her husband and children which might be due to her involvement in Mahila Samiti work or any other office work at Puri beyond the normal office hour. It was further held that it is abundantly clear that the appellant had deserted her since 2007 for a period of more than two years by the time of filing of the petition in the year 2010 and she had also subjected her husband to cruelty beyond repair and toleration with unsubstantiated allegation of involvement with another woman.
 12. On 29.10.2015 both the spouses and their children were present before us in person. We had a long deliberation with each of them and when we asked the children, who are staying in the company of their father as to whether they are interested to stay with their mother, both of them bluntly denied and stated that when they were small kids, their mother had left them and their father is treating them with all care and affection and they are prosecuting their studies and the girl is staying in a hostel and her father used to visit her regularly. Though the appellant expressed her willingness to stay in the company of her husband but the manner in which she responded to our query indicated that she had also no real inclination to stay in the company of her husband. The respondent also denied to stay in the company of the wife and according to him, he and his children are living peacefully and happily and they do not want any further disturbance in their life.
 13. The learned counsel for the appellant-wife while challenging the impugned judgment and order of the learned Family Judge contended that there was no proper conciliation which is mandated in the statute and the factum of desertion as alleged has not been proved with cogent evidence. It was also urged that the learned Family Judge has failed to appreciate that the respondent was torturing and humiliating the appellant and in spite of that she was living with her husband and looking after the children. It was further urged that when the appellant is still interested to live in the company of her husband and children to save her marriage, it was not proper on the part of the learned Family Judge to pass a decree of divorce in favour of the respondent and it would also not be proper for this Court to give a stamp of approval to such a decree.

14. The learned counsel for the respondent on the other hand while supporting the impugned judgment and order contended that the findings are based on the materials available on record and from the evidence, the respondent appears to have discharged his burden of proof regarding desertion by the appellant. It was further urged that the manner in which the appellant neglected to perform her duty as a wife, as a mother keeping high ambition of becoming a politician and also instituted false cases against the respondent after deserting him, the Family Judge was quite justified in granting decree of divorce.
15. Adverting to the contentions raised by the learned counsels for the respective parties, perusing the materials available on record and the documents proved by the respondent, we find that the appellant had instituted two police cases i.e. one in the year 2005 and the other in the year 2007 which led to the arrest of the respondent. The case of the appellant that she was driven out of the house in the year 2009 which she had pleaded in her written statement as well as in the year 2010 which she has stated in her evidence appears to be not acceptable in view of the institution of aforesaid two police cases and the averments made in the F.I.R. The appellant alleged that the respondent had illicit relationship with a home guard namely Netramani Dei which she had mentioned in the FIR dated 19.04.2007 vide Ext.1. This allegation has not been substantiated by any evidence. The materials available on record rather indicate that the appellant was involved in Mahila Samiti activities for which she was neglecting her family. She did not even bother to take care of her small children and deserted her husband for which since last eight years, the respondent was looking after the children with all care and attention and also providing them good education. It further appears that the case of the appellant is inconsistent with her pleadings and contradicted by the two FIRs vide Exts.1 and 2.
16. Desertion of one of the spouses by the other for a continuous period of not less than two years immediately preceding the presentation of the divorce petition as well as treating the spouse with cruelty are some of the grounds of divorce.
17. According to the Explanation provided under Section 13 of Hindu Marriage Act, 1955, “desertion” means the desertion of the one party by the other party to the marriage without reasonable cause and without consent or against the wish of such party and includes willful neglect of the petitioner by the other party to the marriage.
18. In case of *Adhyatma Bhattar Aiwari v. Adhyatma Bhattar Sri Devi* reported in AIR 2002 SC 88, it is held as follows:-

“6. ‘Desertion’ in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may furnish a ground for relief are:

 1. The factum of separation;
 2. The intention to bring cohabitation permanently to an end-animus deserendi;
 3. The element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period;

8. The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include ‘willful neglect’ of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence, desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation, it is abundantly clear that the legislature intended to give to the expression a wide import which includes willful neglect of the petitioner by the other party to the marriage. Therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to

bring cohabitation permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as the deserted spouse is concerned; (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period.”

19. In case of *Savitri Pandey v. Prem Chandra Pandey* reported in 2002 (1) Kerala Law Journal 193, the Hon, ble Supreme Court held as follows:-

“7. “Desertion”, for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other’s consent and without reasonable cause. In the other words, it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalizes the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to host of authorities and the views of various authors, this Court in *Bipinchandra Jaisinghbhai Shah v. Prabhavati* (AIR 1957 SC 176) held that if a spouse abandons the other in a state of temporary passions, for example, anger or disgust without intending permanently to cease cohabitation, it will be amount to desertion. It further held:

For the office of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The Petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law, those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. But it is not necessary that they should commence at the same time. The *de facto* separation may have commenced without the necessary *animus* or it may be that the separation and the *animus deserendi* coincide in point of time: for example; when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the *locus poenitentiae* thus provided by law and decide to come back to the deserted spouse by the *bona fide* offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refused to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period

that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce, the Plaintiff must prove the offence of desertion like other matrimonial offence beyond all reasonable doubt. Hence, though corroboration is not required is in absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court.

8. Following the decision in Bipinchandra's case (supra), this Court again reiterated the legal position in Lachman Utamchand Kirpalani v. Meena alias Mota (AIR 1964 SC 40) by holding that in its essence, desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. For the offence of desertion so far as deserting spouse is concerned, two essential conditions must be there (1) the factum of separation and (2) the intention to bring co-habitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion proved, the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation.

9. To prove desertion in matrimonial matter, it is not always necessary that one of the spouse should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case."

20. Thus keeping in view the aforesaid settled position of law that there can be no desertion without animus deserendi and it implies not only factum of separation but also intention to separate permanently and to put an end to matrimonial relationship and cohabitation, on scanning of the materials on record, we found that the conduct of the appellant in leaving the company of her husband and their small children and living separately for so many years since 2007 for pursuing her so-called political ambition clearly indicates that she had deserted the respondent without reasonable cause and without his consent and against the wish of the respondent.
21. The evidence on record further indicates that the appellant treated the respondent with cruelty. She had not only neglected to perform her matrimonial duties and obligations but also instituted one after another case against her husband. The manner in which she had conducted herself for so many years and harassed and humiliated her husband has caused reasonable apprehension in the mind of the respondent that it would be harmful and injurious on his part to live in the company of the appellant and that is the probable reason why the respondent is not interested to live in the company of the appellant.
22. Section 13(1)(i-a) of the 1955 Act states that any marriage solemnized can be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the ground that the other party after solemnization of marriage had treated the petitioner with cruelty.
23. The expression 'cruelty' has not been defined under Section 13 of the 1955 Act. Law is well settled that the cruelty may be physical or mental or both. The expression 'cruelty' has got an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status. The burden of proof lies on the aggrieved party to make out a case of cruelty. The act of cruelty must be such which would cause reasonable apprehension in the mind of the aggrieved party that it would be harmful or injurious on his part to live with the other party. A particular conduct which may amount to cruelty in one case may not necessarily amount to cruelty in the other case due to change of various factors and different set of circumstances.

24. In case of Praveen Mehta v. Inderjit Mehta reported in AIR 2002 SC 2582, it is held as follows:-
- “21. Cruelty for the purpose of Section 13(l)(ia) is to be taken as a behavior by one spouse towards the other which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical cruelty, the mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty, it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behavior is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.”
25. The case of the appellant has not been substantiated and the contents of the FIR, the pleadings in the written statement as well as her evidence in Court contradict each other.
26. Accordingly, we are of the view that the learned Family Judge is quite justified in holding that the respondent has proved desertion and cruelty against the appellant.
27. In view of what we have discussed above, we are of the view that when the reconciliation between the parties is not possible and the parties are living separately since 2007 and the marriage has remained only for the name sake, the learned Family Judge was justified in allowing the divorce petition and therefore we do not find any infirmity, impropriety in the impugned judgment. The quantum of alimony which was awarded in favour of the appellant has not been challenged before us. We therefore affirm the decree of divorce and the dissolution of the marriage between the parties including the payment of monthly maintenance @ Rs. 3,000/- by the respondent to the appellant from the date of the decree.
28. In the result, the MATA application stands dismissed.
29. The parties are directed to bear their own costs.

□□□

NIBEDITA DASH VERSUS BIRANCHI NARAYAN SATPATHY

MATA No. 64 of 2011 and MATA No. 65 of 2011

(Before Hon'ble Mr. Justice Sanju Panda and Hon'ble Mr. Justice B.R. Sarangi)

Smt. Nibedita Dash ...Appellant

Versus

Sri. Biranchi Narayan Satpathy ...Respondent

For Appellant: M/s. Bibekananda Bhuyan, B.N. Das, S.K. Panda, R. Ray A.K. Rout, B.N. Mishra, C.R. Swain, P. Mohanty, Ms. S. Sahoo & S. Samal

For Respondent: M/s. K.C. Kanungo, H.V.B.R.K. Dora, & Chitra Padhi

- **The husband filed Civil Proceeding No. 251 of 2003 under Section 12(I)(c) of the Hindu Marriage Act, 1955 (in short, “the Act”) to declare the marriage with wife as void and in the alternative to grant a decree of divorce and permanently restrain her from claiming maintenance from him. The wife filed Civil Proceeding No. 204 of 2005 under Section 9 of the Act for restitution of conjugal rights. The court below dismissed the application filed by the wife for restitution of conjugal rights on contest without cost and allowed the application filed by the husband on contest without cost and dissolved the marriage by a decree of divorce subject to payment of cost of Rs. 3 lakhs as permanent alimony to the wife within three months from the date of the order.**
- **Law is well settled that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other’s consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. The inference of desertion has to be made on a balance of probabilities.**
- **In view of the above settled principle of law and the pleadings as well as the evidence led by the parties, in the present case, it does not reveal that the wife is guilty of desertion. She left the matrimonial home with an intention to return back to the matrimonial home after treatment. Her subsequent conduct appears that she is ready and willing to return to the matrimonial home and resume the conjugal rights. However, on a false plea the husband was not willing to bring her back to the matrimonial home; rather through P.W 2 (elder brother of the husband), he pressurized the wife for a divorce. Thereafter on a false plea filed the present proceeding with an allegation that consent of marriage obtained by fraud and misrepresentation and he failed to prove such plea during trial.**
- **So far as cruelty is concerned, in the present case, the respondent-husband has not brought the wife to the matrimonial home. The appellant-wife when left the matrimonial home has not disclosed any intention of permanent forsaking or abandonment of the spouse or she has left the matrimonial home without consent; rather she has left the matrimonial home for treatment. As per the doctor’s advice, she was overstayed to take rest. The said overstayed of wife in her parents house will not constitute cruelty towards husband.**

Hon'ble Mr. Justice Sanju Panda :—

Since both the appeals arise out of a common order, they were heard together and are being disposed of by this common judgment.

2. Challenge has been made in these appeals by the wife to the order dated 15.7.2011 passed by the learned Judge, Family Court, Cuttack in Civil Proceeding Nos. 251 of 2003 and 204 of 2005.
3. The husband filed Civil Proceeding No. 251 of 2003 under Section 12(l)(c) of the Hindu Marriage Act, 1955 (in short, "the Act") to declare the marriage with wife as void and in the alternative to grant a decree of divorce and permanently restrain her from claiming maintenance from him. The wife filed Civil Proceeding No. 204 of 2005 under Section 9 of the Act for restitution of conjugal rights. The court below dismissed the application filed by the wife for restitution of conjugal rights on contest without cost and allowed the application filed by the husband on contest without cost and dissolved the marriage by a decree of divorce subject to payment of cost of Rs. 3 lakhs as permanent alimony to the wife within three months from the date of the order.
4. Learned counsel for the appellant submits that CP No. 251 of 2003 was filed by the husband under Section 12(l)(c) read with Section 13(l)(i-a) of the Act. During pendency of the proceeding, by way of amendment, the relief claimed in the proceeding was only under Section 12(l)(c) of the Act and his prayer to declare the marriage as void on the plea of fraud, which could not be proved by him during trial.

Therefore, the judgment and decree is liable to be reversed. The court below illegally granted relief under Section 13(l)(i-a) of the Act specifically when the said relief was deleted from the pleadings of the parties. The finding of the court below, that there is no chance of reunion without taking into consideration the application filed by the wife for restitution of conjugal rights, is illegal as the court below neither averred regarding desertion of wife nor proved the said facts. Therefore, the said finding is based on surmises and conjectures and not sustainable in the eye of law. It was further contended that ICC No. 200 of 2006 was filed by the wife after threatening given by her to implicate the husband, his family members and relatives in a false case of torture and demand of dowry and the fraud practiced by the wife suppressing the facts that due to hormonal imbalance, moustache and beard were appeared on her from 1996 and on totality of the said facts, one can conclude that the husband has been subjected to cruelty by the wife and due to such harassment and mental agony practically there can be no reunion and therefore, the order passed by the court below granting divorce in favour of the husband is liable to be reversed. The application filed by the wife for restitution of conjugal rights should have been passed by the court below in view of the medical report that she is medically fit to lead a normal conjugal life. In support of his contention, he cited a decision of the Madhya Pradesh High Court in the case of Shrikant v. Smt. Saroj reported in AIR 2001 Madhya Pradesh 94 and submits that in absence of any evidence to grant relief under Section 13 of the Act, the court below has exercised its power illegally in the absence of any evidence on record. Hence, the decree is liable to be set aside. He also cited a decision of the apex Court in the case of Dr. N.G. Dastane v. Mrs. S, Dastane reported in AIR 1975 SC 1534 and the decision of the Punjab & Haryana High Court in the case of Krishan Kumar v. Smt. Nidhi Arora reported in AIR 2010 (NOC) 441 (P&H) wherein it has been held that in absence of positive pleading and evidence, the court has lack jurisdiction to grant such relief.

5. Learned counsel appearing for the respondent submitted that learned Judge, Family Court dissolved the marriage by a decree of divorce subject to payment of Rs. 3 lakhs on the ground of admission by the wife that the father of the wife refused to send her to the matrimonial home and the rebuttal evidence of P.W.2, the brother of the husband, amounts to cruelty and desertion. As the wife has already received Rs. 3 lakhs as permanent alimony on 8.8.2012 as directed by this Court, the judgment and decree passed by the court below need not be interfered with as the judgment is passed as per the provision of Order 12 Rule 6(1) of the Civil Procedure Code read with Section 18 of the Indian Evidence Act on the admission of the wife. The court has jurisdiction under Section 23(l)(a) of the Act to draw a decree on the basis of material evidence in the end of justice. She further submitted that implicating the entire family members in criminal case by filing ICC Case No. 200 of 2006 amounts to cruelty. As the husband was frustrated and sustained huge financial expenses for his frequent coming to court from his working place, there is no chance between the husband and the wife to lead a happy conjugal life. Therefore, the judgment and decree need not be

interfered with. In support of his contention, the decisions of the apex Court in the case of Praveen Meheta v. Inderjit Mehta, reported in AIR 2000 SC 2582 and the decision of the Delhi High Court in the case of Sangeeta v. Hitesh Kumar reported in AIR 2013 Delhi 83 and the decision of this Court in the case of Smt. Pratima Biswal v. Amuiay Ku, Biswal reported in AIR 2002 Orissa 125 have been cited.

6. From the rival submissions of the parties and after going through the LCR and pleadings of the parties, it appears that the husband filed Civil Proceeding No. 251 of 2003 on 23.3.2003 under Section 12(1)(c) read with Section 13(1)(i-a) of the Act on the ground that he is a permanent employee of Indian Railways and working as TTI.

The wife is a Graduate and her father is also an educated person and working in an organization at Jagatsinghpur. The marriage was solemnized between the parties on 28th February, 2002 as per Hindu rites and customs. It was an arranged marriage. The wife lived one month in matrimonial home and returned to her father's house. The husband left for his service place. Thereafter, the wife went with him to his service place on 1st December, 2002 where she fell ill and was admitted to South Eastern Railway Hospital where it was detected ovarian tumor. The husband found moustache and beard on her face and on being asked, she disclosed regarding her hormonal imbalance. She was under regular treatment from 1996. She also disclosed that she was under treatment of ovarian tumor. Accordingly, he was shocked. He informed the said facts to her father who took her to the native place for better treatment. She was admitted in a nursing home at Cuttack and operated there. After discharging from the nursing home on 14.1.2003, the doctor advised her to take rest. It came to his knowledge that the right ovary had been removed by operation and left ovary had been scratch for removal of cyst as a result of which chance of conception was very remote. The said fact was disclosed to all the family members of the wife. Though the family members of the wife were aware about the said illness of the wife, they did not disclose the said fact before marriage. Had the said fact been brought to his notice and his family members, he would not have given his consent for such marriage. Since it was an arranged marriage and the marriage was held by obtaining fraud and misrepresentation of facts and this fraud gave mental shock and agony, he is entitled to decree of divorce. To resolve the dispute, his family members and well-wishers arranged a meeting in his house on 23.4.2003. The father of the wife was invited to attend the meeting. He also admitted the above facts. It was disclosed before him that since the marriage was held by fraud and misrepresentation of facts and chance of wife to conceive was very remote, the husband was constrained to file an application for mutual divorce. The father of the wife did not agree to such proposal and threatened to implicate the family members in false case. As the matter was not settled amicably, he filed the proceeding under Section 12 of the Act.

7. The wife appeared and filed the written statement and it was stated therein that she was ill on 6.12.2002. She traversed all other allegations made by the husband. She stated that after marriage, she led a happy conjugal life for more than 10 months and the marriage was consummated. She also disclosed that she was admitted to a nursing home at Cuttack with prior intimation to the husband and his family members were very much present in the hospital on the date of the operation and took care of her. On 6.12.2002, the ovarian disease was detected. As per the opinion of the doctor, she was medically fit to lead a normal life; rather the husband forced her to remain with her parents and the relief sought by the husband should not be granted on a defamatory and unfounded allegations. Her father never threatened to file a false criminal case. She was ready and willing to join the company of the husband. Similar pleading was made in Civil Proceeding No. 204 of 2005 filed by the wife for restitution of conjugal rights.
8. In support of their pleadings, the husband examined himself as P.W.1 and his brother as P.W.2. The wife examined herself as OPW 1, her father was examined as OPW 2 and her mother as OPW 3. They filed documents and letters which were marked as exhibits. On analyzing the evidence on record, the court below recorded a finding that the marriage was not in dispute. The court below held that the husband failed to establish convincingly that wife had growth of moustache and beard on her face and she had ovarian complication prior to her marriage. Therefore, he failed to establish the plea that by false representation and fraud, he had been given in marriage with respondent-wife. Under such circumstances, the marriage

could not be held invalid or void. However, the court below taking into consideration the fact that the wife was operated on 11.1.2003 and after her discharge from nursing home, when her in-laws sought to bring her back to the matrimonial house, her father refused to send her with a plea that the doctor advised her rest for 6 months. Since the wife did not return to the matrimonial home and she preferred to stay at her father's house, her said act amounts to cruelty to the husband. In view of that and on totality of the evidence on record, one could conclude that the husband was subjected to cruelty by the wife and on such findings, the court below passed the impugned judgment and decree.

9. From the above findings of the court below, it appears that the court below passed a decree under Section 13(l)(i-a) of the Act on the ground of desertion without analyzing what amounts to desertion.
10. Law is well settled that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. The inference of desertion has to be made on a balance of probabilities.
11. In view of the above settled principle of law and the pleadings as well as the evidence led by the parties, in the present case, it does not reveal that the wife is guilty of desertion. She left the matrimonial home with an intention to return back to the matrimonial home after treatment. Her subsequent conduct appears that she is ready and willing to return to the matrimonial home and resume the conjugal rights. However, on a false plea the husband was not willing to bring her back to the matrimonial home; rather through P.W 2 (elder brother of the husband), he pressurized the wife for a divorce. Thereafter on a false plea filed the present proceeding with an allegation that consent of marriage obtained by fraud and misrepresentation and he failed to prove such plea during trial.

Law is also well settled that the burden of proving desertion-the "factum" as well as the "animus deserendi" - is on the petitioner; and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the husband has still to satisfy the Court that the desertion was without cause (See AIR 1964 SC 40, Lachman Utamchand Kirpalani v. Meena alias Mota and AIR 1975 SC 1534, Dr. N.G. Dastane v. Mrs. S. Dastane). Hence, the husband has failed to prove the plea of desertion against the wife.

12. So far as cruelty is concerned, in the present case, the respondent-husband has not brought the wife to the matrimonial home. The appellant-wife when left the matrimonial home has not disclosed any intention of permanent forsaking or abandonment of the spouse or she has left the matrimonial home without consent; rather she has left the matrimonial home for treatment. As per the doctor's advice, she was overstayed to take rest. The said overstayed of wife in her parents house will not constitute cruelty towards husband.

Accordingly, the finding of the court below is arbitrary and perverse so far as cruelty is concerned.

13. The decisions cited by the husband in the case of Praveen Meheta (supra), Sangeeta (supra) and Smt. Pratima Biswal (supra) are not applicable to the facts and circumstances of the present case. It appears that the criminal case has been filed by the wife in the year 2006 during pendency of the present proceeding. Therefore, the allegation made by the husband that the father of the wife threatened to file criminal case against the family members of the husband is not correct.
14. Accordingly, we set aside the judgment and decree passed in Civil Proceeding No. 204 of 2005 and reverse the judgment and decree passed in Civil Proceeding No. 251 of 2003 and dismiss the said civil proceeding filed by the husband to declare the marriage as void on the plea of fraud and directs him to pay maintenance at the rate of Rs. 6000/- (rupees six thousand) per month to the wife from the date of the order as she has reasons to stay separate from the respondent-husband and has no income.

The appeals are accordingly disposed of.

LANDMARK JUDGMENTS ON

CUSTODY OF CHILDREN

AND VISITATION RIGHTS

SRI KOUSTAV DEY VERSUS SRI SUDHIR CHANDRA DAS

In the High Court of Calcutta [Civil Appellate Jurisdiction]

F.M.A. No. 2822 of 2013

(Before Hon'ble Mr. Justice Jyotirmay Bhattacharya & Hon'ble Mr. Justice Debi Prosad Dey)

Sri Koustav Dey ... Appellant;

Versus

Sri Sudhir Chandra Das ... Respondent.-

F.M.A. No. 2822 of 2013

With

C.A.N. No. 1633 of 2014

With

C.A.N. No. 6692 of 2014

Decided on April 28, 2014

It is settled principle of law that in selecting proper guardian of a minor the paramount consideration should be welfare and well-being of the child. In selection of the guardian, the Court is exercising "Parens Patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings." It is a human problem and is required to be solved with human touch. We do expect that both the parties being near and close relation of the minor should give preference to the proper development and up-bringing of the minor.. As ideal persons of the society and then only, the minor on attaining majority, would be able to contribute towards the development of the society. Both the parties should keep their problems away from the development of the minor and they would settle their scores/disputes, keeping the minor away from their own problems.

The Judgment of the Court was as follows: —

Hon'ble Mr. Justice Debi Prosad Dey :— This appeal is directed against the judgement passed by the learned District Judge of Paschim Medinipur in case No. 15 of 2009 of Act VIII, wherein learned District Judge has been pleased to appoint the petitioner/respondent (herein after referred to as respondent only) as the guardian of the person and property of minor Master Shreyan Dey.

2. Being aggrieved by and dissatisfied with such judgement of learned District Judge, Paschim Medinipur, the opposite party/appellant, being father of Shreyan Dey, has preferred this appeal on amongst other grounds that the findings of learned District Judge in law as well as in fact are not correct and that learned Trial Judge acted in excess of its jurisdiction by not adhering to the order of remand dated August 14, 2012 passed by this Hon'ble Court in FMA No. 655 of 2012. The further grounds of appeal are that learned Trial Judge did not adhere to the principles for adjudicating an application under Section 7 of Act VIII of 1890 and the principles as enunciated under Section 19 of the said Act. In short, learned Trial Judge without having specific observation/finding, about the fitness of the appellant, in having the custody of the minor, has erroneously repeated the earlier order passed by learned District Judge, Paschim Medinipur.

3. The fact of the case is that Somarani and Koustav (appellant) got married in the month of December, 2007. Soma was a school teacher. Soma gave delivery of a male child on 4th December, 2008 out of her wedlock with Koustav. Admittedly, Soma and Koustav were residing in a rented house at Suranankar in the House of one Adwitya Jana within PS-Panskura. It has been alleged that Soma was subjected to mental torture by her husband, mother in law, sister of her mother in law and the husband of the sister of her mother in law since her marriage but somehow Soma tried to adjust herself and used to stay with her husband.
4. On 05.06.2009 the father of Soma was informed over telephone by the wife of Adwitya Jana, the landlord of Soma and Koustav that his daughter has fallen ill. On receipt of such information the respondent visited the rented premises of Soma and found her dead with ligature mark on her neck. The further case of the respondent, as has been unfolded in the petition of guardianship, that Soma committed suicide or she has been compelled to commit suicide being unable to bear with the torture meted out to her by her husband and in laws or she might have been killed by her husband and her in laws.
5. The respondent lodged a written complaint at Panskura Police Station on that very date and on the basis of that written complaint Panskura PS case No. 114 of 2009 dated 05.06.2009 under Sections 498A/306, IPC was started against the appellant and his relatives. The said case was ultimately ended in charge sheet and the appellant was committed to the Court of learned Sessions Judge for trial along with other accused.
6. The respondent specifically stated in his application, before the learned District Judge that Shereyan aged about seven months was found lying in the bed in the rented house of Soma and the appellant fled away leaving behind that baby in that rented house. The father in law of Soma and other family members of Koustav did not take any information about the baby and they did not make any sort of arrangement for the maintenance of the baby. The respondent, being an M.A. (B.ED.), teacher and having sufficient means to maintain the baby has prayed for appointment of himself as the guardian of the person and property of the minor.
7. The case was filed before the learned District Judge, Paschim Medinipur on 04.09.2009. The appellant appeared before the learned District Judge and filed written statement on 01.12.2009. The appellant denied the material allegations contained in the petition of the respondent. The specific case of the appellant is that the appellant is an M.B.A. degree holder. The appellant fell in love with Soma (who was also a teacher) and thereafter they got married. The father of the appellant is a retired Civil Engineer. The mother of the appellant is a retired school teacher (M.S.C. in Mathematics)-. The brother of the appellant is B. Tech. At the time of marriage the appellant used to work in one of the companies of Tata group. The respondent and his family however did not accept the marriage between Soma and Koustav and they used to threat Soma and Koustav with dire consequences. On 05.06.2009 when the appellant was at his service place in Kolkata, Soma locked the house from inside and hanged herself and thereby committed suicide. The landlord informed all concerned about such death of Soma. The respondent had been to the rented house of appellant and falsely lodged a case against the appellant. The officer in charge of Panskura Police Station suddenly became so active that he handed over all the articles of the rented house of the appellant to the respondent along with the baby. It is submitted that the cultural, social and educational environment of the family of the appellant is much more congenial for the up bringing of the minor. The respondent is an old man and the educational background of the wife of respondent is also not forthcoming in the pleadings on record. The appellant has thus prayed for rejection of the petition.
8. The written statement of the appellant in the Court below was amended with the leave of the Court and Para '6' was added. The appellant has further stated that the respondent after receiving the custody of the minor did not keep the minor in his custody and transferred the minor to Raiganj, in the custody of one Sankar Das, which is 600 kilometer away from their present residence. Sankar Das is the son in law of Sudhir Das, respondent. Sudhir Das, being appointed as guardian by learned District Judge, had

had no authority to transfer the custody of such minor without the leave of the Court and the interest of the minor was not at all protected in the hands of Sankar Das. Secondly, the appellant has had two show rooms for different types of goods at Balichowk and at Loada. The appellant is also earning a lot in order to maintain his own son. The intention of the respondent in transferring the minor to Raiganj is only to deprive the appellant and his family members to look after the child.

9. The appellant is competent enough, to maintain the child and to give proper education to the child. On careful scrutiny of the paper book, we do not find any rejoinder against such amendment of the written objection on behalf of the respondent. Finally, learned District Judge, Paschim Medinipur allowed the application of the respondent Sudhir Ch. Das and appointed him as guardian of the person and property of the minor. Being aggrieved by and dissatisfied with such order/judgement of learned District Judge, Paschim Medinipur, this appeal was preferred before this High Court being FMA No. 2822 of 2013.
10. It may be mentioned here that the appellant was prevented from executing the right of his visitation, as granted by learned District Judge and accordingly the matter was agitated before this High Court. The Division Bench of this High Court ultimately appointed a special officer for executing the right of visitation of the appellant. After hearing both sides the Division Bench of this High Court in FMA No. 2822 of 2013 set aside the judgement of learned District Judge and sent back the case on remand to learned District Judge, Paschim Medinipur with specific observation, which runs as follows: —

"Having heard the learned Advocates for the respective parties and having considered the materials on record, placed before us, we are of the view that the learned Court below did not come to any finding that the appellant is unfit for obtaining the custody of the child. At least, no proper reason has been assigned as to why the appellant may be considered to be unfit for obtaining the custody of the child. Mere pendency of a criminal proceeding against the appellant cannot be the sole consideration for declaring the appellant to be unfit to have the custody of his own child.

No one knows at this stage as to what would be the ultimate fate of the said criminal proceeding. In the event, the said criminal proceeding is concluded by way of conviction of the appellant, the respondent can always seek for appropriate order before the appropriate forum for the proper custody of the child in case the custody remains with the father of the child at that point of time.

This Court, of course, is not making any observations at this stage as to whether or not the father of the child, that is, the appellant, is fit or unfit to have the custody of the child since this Court is of the view that question should be first decided by the learned Court below upon proper evidence.

The learned Court below has not come to any conclusion as to what is the actual income of either the appellant or the respondent and whether or not the appellant would be able to bring up the child in a proper way considering the status of the respective family. It has to be borne in mind that the appellant is the father of the child and he has preferential right of custody over the right of the respondent. It does not appear from the impugned judgment that any special circumstance has been established to deprive the appellant of such right. Section 19 of the said Act of 1890 will have an important bearing in the decision of this matter."

11. It appears to us that the fact that a criminal proceeding was pending against the appellant and the fact that the appellant could not take care of the child immediately after the death of his wife persuaded the learned Court below to come to the conclusion that the custody of the child should be given to the respondent herein.
12. It further appears to us that the learned Court below did not address the question as to whether or not there exist special circumstances in the facts of this case to deprive the appellant herein of his preferential right.

13. In view of the discussions made above, we are of the considered opinion that the impugned order should be set aside and the matter should be sent back to the learned Court below for a fresh consideration keeping in mind the principles of law involved in this matter.
14. The parties to the proceeding adduced further evidences before learned District Judge, Paschim Medinipur. Learned Trial Judge again reiterated his earlier order and appointed the respondent Sudhir Ch. Das as guardian of the person and property of minor Shreyan Dey.
15. Legality of the judgment passed by learned District Judge, Paschim Medinipur in case No. 15 of 2009 of Act VIM dated 19.06.2013 is under challenge before us.
16. Learned Advocate for the appellant contended that learned Trial Judge did not adhere to the directions given by the Division Bench of this Court and did not make any specific observation as regards the competency of the appellant in having the custody of the minor Shreyan Dey. Learned Advocate for the appellant further contended that the judgement of learned Trial Judge is devoid of any special reasons for appointment of the respondent as the guardian of the minor Shreyan Dey.
17. Per contra, learned Advocate for the respondent contended that the appellant never tried to take the custody of the minor and virtually left the minor without any care and fled away immediately after the death of the mother of the minor. Learned Advocate for the respondent further contended that Shreyan was brought up by the respondent for the last 5/6 years and thereby Shreyan has developed special attraction to his grand-parents, which should not be disturbed for the welfare of the minor.
18. It appears from the judgment of learned Trial Judge that learned Trial Judge has given emphasis on the factum of pendency of a criminal case against the appellant. Learned Advocate for the appellant drew our attention that the appellant has been "acquitted" by a competent Sessions Court that is by learned District Judge, Purba Medinipur at Tamluk from the case which was started at the behest of the respondent. That clearly goes to show that no criminal case is at present pending against the appellant. We are told by learned Advocate of the respondent that an appeal has been preferred before this Court against such order of acquittal passed by learned District Judge, Purba Medinipur. However, pendency of that appeal, even if be accepted, in no circumstances, will change the present scenario to the effect that the appellant has been acquitted from the charges leveled against him by the respondent.
19. Moreover, it appears from the judgement of learned trial Court that learned trial Court has heavily relied on the decision reported in (2008) 9 SCC 413 (Nil Ratan Kundu v. Avijit Kundu).
20. Unfortunately, learned trial Court did not consider the ratio enunciated in the aforesaid decision of our Apex Court. Hon'ble Supreme Court has been pleased to evolve the principles governing custody of minor in the aforesaid decision and specifically observed in paragraph 52 of its judgement, as follows: —

"In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a Court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising *parens patriae* jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor."

21. It is therefore apparent from such principle enunciated by the Apex Court that all round development of a minor has to be considered at the time of selecting the guardian. Hon'ble Court further has been pleased to observe that over and above physical comforts, moral and ethical values cannot be ignored. The custody of a minor being a human problem is required to be solved with human touch and while doing so the hands of the Court are not tied with strict rules of evidence or procedure nor by precedence. The factual aspect of the case under reference is altogether different from the factual aspect of the case decided by Apex Court referred to here-in-above. The Apex Court refused to give the custody of the minor to the father on the ground that one criminal case was pending against the father and secondly that the minor was reluctant to go with his father.
22. The certified copy of the judgement wherein the appellant has been acquitted from the charges leveled against him, has been filed with the paper book. We have been taken through the judgment of the learned Sessions Judge whereby and where under learned Sessions Judge has been pleased to acquit the appellant from the charges leveled against him, at the behest of the respondent. We are constrained to observe that learned Trial Judge ought not to have held that the appellant was guilty for such unfortunate death of Soma. In our view learned Trial Judge acted beyond his jurisdiction and he should have restrained himself from making any comment with regard to the merit of the criminal case pending against the appellant. However, it is apparent from the judgement of learned Sessions Judge Purba Medinipur (sessions trial No. 08/March/2011/sessions case No. 169/July/2010) that the appellant along with other accused were acquitted from the charges leveled against them. We do not want to make any comment on the merit of the judgment passed by learned Sessions Judge. However, it is settled principle of law that the findings of the trial Court in case of acquittal shall not be disturbed by any higher forum unless the judgment is declared perverse or devoid of reasons. After going through the judgment passed by the learned Sessions Judge, Purba Medinipur we found that the judgement of learned Sessions Judge, Purba Medinipur is fortified with cogent reasons. Therefore, pendency of any appeal before the higher forum would in no way be an obstacle for the appellant in getting the custody of the minor. This fact was presumably not considered by learned Trial Judge since the judgment was pronounced by learned Sessions Judge, long after passing of the impugned judgment by learned Trial Judge.
23. Unfortunately, Soma committed suicide leaving behind her minor son. The reasons for such commission of suicide cannot be ascertained with the help of direct evidence. The neighbour or landlord of the appellant did not subscribe to the view that there was bitter relationship between Soma and Koustav. Admittedly, Soma and Koustav used to reside in a separate residence in order to attend their respective place of work conveniently. Therefore, we are to depend on circumstantial evidence about such unnatural death of Soma. On the contrary, there is absolutely no scope to venture on such point in this case for want of jurisdiction and sufficient evidence. The respondent tried to establish before learned Sessions Judge that Soma was subjected to torture by the appellant but such case has been rejected by learned Sessions Judge. There may be various reasons for committing suicide by Soma. Such reasons have not been translated into evidence and as such we cannot come to a definite conclusion about such reasons for commission of suicide by Soma. Therefore, pendency of a criminal appeal at the behest of the respondent against the appellant, in our view, cannot be a bar for the appellant in getting custody of the minor. Learned Trial Judge had no occasion to consider such factum of acquittal of the appellant since the judgement was delivered by learned Sessions Judge, Purba Medinipur long after the judgment delivered by learned Trial Judge. We also find support for such conclusion from the judgement given by other Division Bench while sending the case on remand to learned Trial Judge.
24. We have been taken through the evidences on record. On the basis of the evidences on record we may make a comparative study with regard to the welfare of the child keeping in mind the rival contention of the parties to the appeal. Admittedly, the respondent is a retired school teacher and his monthly income is Rs. 16,750/-only. We do not find any evidence on record about the income and educational qualification of the wife of the respondent. On the contrary, we find that the respondent is supposed to

maintain the child with his meagre income of Rs. 16,750/-only. The evidence on record further reveals that the mother of the appellant is also getting Rs. 16,750/- towards her pension. She is also a retired school teacher. The father of the appellant is the retired civil engineer and he is getting Rs. 6,740/-towards pension. Admittedly, the appellant was working in one of the companies of Tata Group, having an M.B.A. degree. The appellant has atleast been able to prove that he has had some sort of income from the shop rooms. Absence of any income tax return would not nullify that the appellant has had no income. An educated person having an M.B.A. degree is competent enough to earn his livelihood either by service or by business. The appellant being father of the minor is also duty bound to maintain his own son by resorting to any sort of profession. In the case under reference, we find that the appellant has some sort of income though such income may not be taxable.

25. The sister of the mother of the appellant has been residing in the house of the appellant. She has got properties of her own and she has also got income from her properties. The daughter of the sister of the mother of the appellant is an educated lady and she has been residing in the family of the appellant. Thus, we find that atleast there are 4-5 educated persons having sufficient means, if not, more than that of the respondent, to take care of the minor. While hearing the appeal, we also heard the special officer appointed by this Court and came to know that she has been paid by the appellant. The appellant has been pursuing this case since 2009 and we all know that litigation is a costly affair now a days. Therefore, the income or the capacity of expenditure of the appellant, cannot be ruled out only on the ground that the appellant could not file his income tax return in Court. It has been elicited from the cross examination of the appellant that his monthly turn over per shop room is about Rs. 3,00,000/-. This sort of cross examination has virtually lend credence to the claim of the appellant that he has got sufficient income to maintain the minor. The relatives and other members of the family of the appellant have been examined on dock on oath and they have clearly stated to get back the minor in their family. The report of the special officer also assumes great importance in deciding the custody of the minor.
26. The special officer found that the environment in the residence of the maternal grand-parents of Shreyan was not conducive to his well-being. In particular the special officer found two photographs in the room, which according to her, was harmful for a child of tender age. The special officer, submitted that one of the photographs was of the dead body of Soma, hanging from the ceiling. It is really unfortunate that the minor is being exposed daily to the photograph of the dead body of his mother, hanging from ceiling. The respondent, admittedly, has got the custody of the minor by the order of learned Trial Judge. Admittedly, the house of the appellant is about two and half kilometers away from the house of respondent. Despite having an order of visitation of the minor child, the respondent took various pleas to deprive the appellant from executing the order of visitation. Ultimately, other Division Bench of this Court appointed special officer and with the help of the special officer, the right of visitation of the appellant was finally executed. We find from the report of special officer that the minor was happy with his father during his stay in the house of the appellant and he assured his father to come again while leaving the house of the appellant.
27. Learned Advocate for the respondent contended that the appellant had no intention to take the custody of the minor and never tried to take the custody of the minor. It is apparent from the materials on record that a criminal case was started against the appellant and definitely he was busy in getting himself acquitted from that case. The appellant also suffered shock and trauma at the death of Soma. Naturally, it was next to impossible on the part of appellant and his family members to get the custody of minor at the relevant point of time. It may safely be stated that they were busy in defending themselves against the criminal charges that was started against them at the behest of the respondent. It appears from the lower Court record that despite having such pendency of criminal case the appellant appeared and filed written objection at the first available opportunity and contested the case for the last five years in order to get back his own son.
28. That clearly indicates that the appellant was diligent enough in getting the custody of his own son. The report of special officer gave a horrific picture towards the psychological and moral world of the minor.

The respondent filed objection against such report of special officer but ultimately did not press the same at the time of hearing of the appeal.

29. The intention of a person cannot be translated with the help of direct evidence. The intention of a person however can be gathered from the attending circumstances. The respondent kept one photograph of the dead body of the minor's mother on the wall obviously to make an indelible mark in the mind of such minor. The intention of the respondent is to remind the minor daily about the death of his mother and probably to remind him that his father was the author of such crime. This sort of picture would definitely cause serious impact in the tender mind of the minor and would not be congenial/comfortable for the proper up-bringing of such minor.
30. We also find from the evidence of the respondent that the minor was removed to Raiganj and he was admitted in a school there, under the care of one Sankar Das. The minor stayed at Raiganj for about seven months. The defence of the respondent, on that score, is that on account of the illness of his other daughter, the respondent was compelled to go to Raiganj and stayed there. During his stay at Raiganj, the minor was admitted in a school at Raiganj. It is apparent from the evidence on record that Sankar Das signed on the papers of admission of the minor in a school for the guardian. Admittedly, Sankar Das is not in speaking terms with the appellant and has got inimical interest and relationship with the appellant. Therefore, Sankar Das is not an ideal person to have the custody of the minor without having any sanction from the Court of law. The respondent has had no authority to transfer the custody of such minor in the hands of Sankar Das who has got inimical interest against appellant. The respondent has failed to produce a scrap of paper in the trial Court as regards the illness of his daughter. The respondent has also failed to produce any sort of paper or evidence in the trial Court about his own stay at Raiganj. The evidence of respondent clearly indicates that without having any sanction of law and without having any authority, the respondent dared to transfer the custody of the minor to Sankar Das, at a far-away place, obviously in order to feed fat his grudge against the appellant. Had the respondent been present at the Raiganj, in that event, Sankar Das would not have signed on the form of admission of the minor at Raiganj. The respondent or his wife could have signed on the form of admission of such minor in the school at Raiganj. Therefore, the plea of the respondent that he used to stay at Raiganj along with the minor, is not only incorrect but also depicts the actual intention of the respondent in dealing with the minor.
31. It is unfortunate that Soma, the daughter of respondent committed suicide for the reasons best known to Soma. The respondent being father of Soma has definitely suffered pain and sorrow at the death of Soma.
32. It is equally unfortunate that respondent has tried to feed fat his grudge, on that score, against the appellant by playing with the tender mind of the minor. Children are asset of the Nation. They are the future citizen of India. Revengeful attitude of such minor would ultimately be counter productive to the society. Proper up -bringing of the minor, would one day, satisfy the dreams of Soma. The respondent being father of Soma (since deceased), should be satisfied with the proper up-bringing of the minor and would visualize Soma through the minor instead of settling his own score with the appellant. We do expect that good sense will prevail upon both the families for the sake and welfare of the minor Shreyan.
33. It is therefore crystal clear from the discussions made in the foregoing paragraphs that the custody of child in the hands of the respondent is not at all safe and is not congenial for the proper up-bringing of the minor.
34. Learned Trial Judge also failed to provide any special circumstances by which the preferential right of custody of the appellant may be denied. Learned Advocate for the respondent has further contended that the minor has been brought up by the respondent since he was aged about seven months and change of custody at this stage may create serious impact on the mind of the minor. We find from the evidences on record that the house of the appellant is almost in the close vicinity of the house of the respondent. Minor would be residing in the same locality and would be reading in the same school. He would be with his

friends in the same school. The respondent must have the right of visitation and thereby the minor would get the required care, affection and love of his maternal grandparents also. On the contrary, he would be getting the dignified company of his father, paternal grand-parents along with other family members of the family of the appellant. Shreyan would be the only minor in the family of the appellant, who would grab the attention of all the family members of the appellant and who are eagerly waiting and who are equally intending to have him in their family.

35. Hon'ble Supreme Court in the decision referred in (2008) 9 SCC 413 (Nil Ratan Kundu v. Avijit Kundu), observed that the wish of the minor has had an important role in deciding the custody of the minor.
36. We did not ask the minor about his preference to stay with the parties to this case as we find from the learned Special Officer's report that the child was very much comfortable in his father's family during the period when he was with the members of his father's family at their residence to celebrate his birthday function. Admittedly, the respondent despite having the custody of the minor has treated the minor in such a manner so as to inject a sense of revenge in his tender mind against his father and thereby tried to train the minor to be the most hostile person on the earth against the appellant. This state of affair is not at all congenial to the proper mental development of the minor. The minor may appear to be safe in the custody of the respondent but deep in his mind, he would be psychic/revengeful person in near future. The report of special officer appointed by this Court may be of great help in this regard. Secondly, the respondent removed the minor from his own custody and sent him to far-away place at Raiganj under the custody of Sankar Das ignoring the immediate impact on the mind of such minor in view of such illegal, unauthorized change of custody. The respondent being father of Soma would not have transferred the minor under the custody of Sankar Das, who has got inimical interest against the appellant. Therefore, the wish of the minor pales into in-significance in the given facts and circumstances of this case for the welfare and proper up-bringing of the minor.
37. Learned Advocate for the respondent has relied on two decisions reported in AIR 1979 Raj 29 (Smt. Dr. Snehlata Mathur, Appellant v. Mahendra Narain, Respondent) and (1977) 3 SCC 513 : AIR 1979 SC 1359 (Smt. Mohini v. Virender Kumar). We have duly considered the decisions cited by learned Advocate for the respondent. Factual aspect of the case under reference is altogether different from the cases referred to herein above and we do not find any relevancy of such decisions in determining the custody of the minor in the given facts and circumstances of this case.
38. To sum up the aforesaid discussion and having regard to the facts and circumstances of this case, we are of considered view that the custody of the minor should be with the appellant and not with the respondent. The respondent could not do justice to the well-being of the minor after getting the custody of the minor. On the contrary, the subsequent developments clearly indicate that the respondent could not do justice and could not honour the verdict of the Court even after getting the custody of the minor. However, we do not want to deprive the respondent from having the right of visitation of the minor. It is settled principle of law that in selecting proper guardian of a minor the paramount consideration should be welfare and well-being of the child. In selection of the guardian, the Court is exercising "Parens Patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings." It is a human problem and is required to be solved with human touch.
39. We do expect that both the parties to this appeal being near and close relation of the minor would give preference to the proper development and up-bringing of the minor. No one is immortal in this world. The posterity of Soma and Koustav would remember his maternal grand-parents as well his own parents, as ideal persons of the society and then only, the minor on attaining majority, would be able to contribute towards the development of the society. We do expect that both the parties to the appeal would keep their problems away from the development of the minor and they would settle their scores/disputes, keeping the minor away from their own problems.

40. Considering all aspects of the case under reference we dispose of the appeal with the following terms: —
41. The judgment passed by learned Trial Judge in case No. 15 of 2009 of Act VIII is set aside.
42. The petition of respondent/Sudhir Das is rejected.
43. The custody of minor Shreyan shall be with the appellant, father of Shreyan.
44. The father/appellant being natural guardian of the minor shall take proper steps towards the education and welfare of the minor and if required, the father/appellant may also change the school of Shreyan in the self-same locality for the better education of Shreyan.
45. The respondent is permitted to meet the minor with prior notice to the appellant in every fortnight, preferably on Sundays. Considering the relationship between the parties, we do appoint the self-same special officer Miss Dipannita Ganguly to supervise the change of the custody of the minor within fortnight from date and the fees of special officer is assessed at 200 gems to be paid by the appellant.
46. Liberty is given to the parties to move this Court for modification of this order and/or seeking any direction regarding the well-being of the minor in case of any adverse order passed by this Court in respect of pending criminal appeal against the appellant.
47. The appellant thus steps into the shoes of natural guardian of minor Shreyan and he would automatically be the natural guardian of the minor and his properties.
48. We therefore dispose of the appeal with the above direction but without any cost.
49. Having regard to the fact that the appeal itself has been disposed of, no further order need be passed on the interlocutory applications. Accordingly those applications are all deemed to be disposed of. Urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible.

JYOTIRMAY BHATTACHARYA, J.:— I agree.

Later

50. After delivery of the judgment Mr. Bhattacharyya, learned Advocate for the plaintiffs/respondents prays for stay of operation of the order as his client wants to challenge this order before the higher forum. Such prayer for stay is opposed by Mr. Chakraborty, learned Advocate for the appellant.
51. After considering such submissions made by the learned Counsel of the parties, we stay the operation of the order for a period of four weeks.

DEY, J.: —

BHATTACHARYA, J.: —

D.N.C.

□□□

RAJ KUMAR GUPTA VERSUS BARBARA GUPTA

Calcutta High Court

AIR 1989 Cal 165, 93 CWN 256

(Before Hon'ble Mr. Justice A Bhattacharjee & Hon'ble Mr. Justice A K Nayak)

Raj Kumar Gupta

Versus

Barbara Gupta

Decided on 21 July, 1988

Section 25, Guardians and Wards Act, 1890, in Section 3, Hindu Minority and Guardianship Act, 1956, Section 2, Hindu Marriage Act, 1955, and the Hindu Succession Act and the Hindu Adoption and Maintenance Act of 1956. Section 3(3), Hindu Minority and Guardianship Act

If the mother is a diabetic and smokes cigarette and drinks wine too. Diabetis is an ailment to which any one may be subject and unless it is suggested, and it has not been suggested, that the same has incapacitated her in any way from discharging her parental duties and obligations, it would be absolutely irrelevant for our present purpose. Smoking again may be, as we very often find these days, a fashion for many ladies and at any rate, no one can seriously suggest that a father or a mother, if otherwise found to be fit to have the custody of the child, is to be denied such custody only on the ground that he or she smokes tobacco. And looking to our modern society with its craze for pseudo-sophistication, it would be impossible to regard drinking, by itself, to be such as to disqualify a person from guardianship or custody of a child. The prolific growth of Bars under State patronage by way of granting licences therefor in and around our city and other places has really eroded Article 47 of our Constitution almost out of existence, whereunder it was provided that "the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks". Even assuming the mother to be a drunkard, it is not alleged that she is such a drunkard to have become unfit to properly look after the custody and up-bringing of the child

JUDGMENT

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

1. A husband filed an application under Section 25, Guardians and Wards Act, 1890, against his wife for an order for the return of their minor daughter, then aged about 2 1/2 years, to his custody on the allegation that the child "was taken away from his lawful custody" by the wife and the application having been dismissed, the husband has preferred this appeal.
2. However anachronistic it may appear to be, even to-day in India, proclaimed to be "Secular" in its National Charter and mandated thereby almost four decades ago to secure to all its citizens a Uniform Civil Code, "religion" is still being allowed to have a dominant and decisive role even in secular matters relating to law and its administration and the rights and status of a person in matters relating to marriage, succession, guardianship and the like still depend on the religion he would belong to. The husband here is a Hindu, the wife a Christian and they were married under the Special Marriage Act, 1954. What religious community the child would then belong to? The question appears to have been authoritatively settled by both our pre-independence and post-independence apex Courts, the Judicial Committee of the Privy

Council and the Supreme Court of India. In *Helen Skinner v. Sophia Evelina Orde*, (1871) 14 Moo Ind App 309 at p. 323, decided in 1871, it was ruled that "from the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social status". A five-Judge Bench of the Supreme Court in *Commr. of Wealth Tax v. R. Sridharan*, , decided in 1976, has virtually reproduced the above quoted words almost verbatim, but has referred to Mayne's Hindu Law (11th Edition, page 290) as authority for this view. But in Mayne's Hindu Law, the above observation in *Helen Skinner* (supra) was quoted with quotation marks, citing *Helen Skinner* (supra) as the authority therefor and, therefore, if we may say with respect, the real authority for this view is not the Mayne's Treatise, but *Helen Skinner* (supra). Reference, if need be, may also be made to an old Division Bench decision of the Madras High Court in *Queen-Empress v. Veeradu*, (1894) ILR 18 Mad 230 at p 232 where also it was held that "children are in law presumed to follow their father's religion".

3. We would also come to the same conclusion on a consideration of the relevant provisions in Section 3, Hindu Minority and Guardianship Act, 1956, which again are in pari materia with the corresponding provisions in Section 2, Hindu Marriage Act, 1955, and the Hindu Succession Act and the Hindu Adoption and Maintenance Act of 1956. Under Section 3(3), Hindu Minority and Guardianship Act, the expression "Hindu" in the Act shall include all persons to whom the Act would apply under Section 3(1) and under Section 3(1)(c), the Act would apply "to anyperson domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by Hindu law if this Act had not been passed". Now the child being a minor must have its further's Indian domicile. It is nobody's case that the child is a Muslim, Parsi or Jew by religion. Neither the father nor even the Christian mother claims the child to be a Christian by religion. And the Privy Council decision in *Helen Skinner* (supra) and the Supreme Court decision in *R. Sridharan* (supra) are clear authorities that under the Hindu Law as it stood before this Act, the child would have, under ordinary circumstances, belonged to its father's Hindu religion and would have been governed by Hindu Law. The child, therefore, is a Hindu within the meaning of the Hindu Minority and Guardianship Act in view of its Section 3(1) and (3), notwithstanding its Christian mother.
4. The same conclusion would also be arrived at on a consideration of the Explanation (ii) to Section 3(1) whereunder "any child, legitimate or illegitimate, one of whose parents is a Hindu.....and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belong" is a Hindu. The child here has a Hindu father, and it is not the case of either the appellant-father or the respondent-mother that she was not brought up as one belonging to the Hindu community, group or family. The fact that the child bears a Hindu surname, Gupta, and also a Hindu name "Sweta" are also factors we have taken note of in this connection. In fact neither Mr. Chatterjee, the learned Counsel for the appellant-husband nor Mr. Roy, the learned Counsel for the wife-respondent, has disputed that the child is a Hindu and both of them have proceeded on the basis that the child is a Hindu in fact as well as in law.
5. Once we hold, as we do, that the child is a Hindu, then the question relating to its guardianship and custody and wardship would be governed by the Hindu Minority and Guardianship Act of 1956 super-added to the provisions of the Guardians and Wards Act of 1890, as provided in Section 2 of the former Act. The relevant portion of Section 6, Hindu Minority and Guardianship Act, may be reproduced hereunder : --

'6. The natural guardians of the Hindu minor, in respect of the minor's person as well as the minor's property. are --

- (a) In case of a boy or 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;"

6. This part of the Section does not expressly provide that the father or the mother must also be a Hindu in order to be entitled to be such natural guardians. As already noted, the Explanation (ii) to Section 3 of the Act, extracted hereinbefore, clearly contemplates cases of "any child, one of whose parents is a Hindu" and expressly provides in Section 3 that "this Act applies" to such a child. If, thus being fully alive to such cases where a father or a mother may not be Hindu, the Act in declaring the natural guardianship of a minor child of such parents in Section 6(a) uses the expression "father" or "mother" only without any qualification as to his or her religion, then should it not be held that even a non-Hindu father or a non-Hindu mother, as the case may be, may become the natural guardian of a Hindu minor? To illustrate, if the father is a Christian and the mother is a Hindu, but the child is brought up as a member of the mother's Hindu community, the child would be a Hindu within the meaning of Explanation (ii) to Section 3(1) to whom the Act would apply and would thus be a Hindu minor within the meaning of Section 6(a) of the Act, whereunder the father is to be the natural guardian. Since the expression "father" in Section 6(a) is unqualified, can it not be urged that the father, though a Christian, would be a natural guardian? Similarly, in a case, as here, where the father is a Hindu and the mother is a Christian, but the child is brought up as a member of the father's Hindu community, the child would be a Hindu under Section 3(1) -- Explanation (ii) and a Hindu minor within the meaning of Section 6(a), whereunder a mother is ordinarily entitled to the custody of the child who has not completed 5 years of age. Since the expression mother is un-qualified, can it not be urged that the mother, even though a non-Hindu, would ordinarily be entitled to the custody of the Hindu minor till the completion of its fifth year? As we read the provisions of Section 3(1) and its Explanation (ii) and Section 6(a), Hindu Minority and Guardianship Act, we are inclined to think that it could be urged with reasonable plausibility that the father, in order to be entitled to the natural guardianship, or the mother, in order to be entitled to the custody, need not necessarily be a Hindu by religion in case of a minor whose one of the parents only is a Hindu and the minor is also brought up as a Hindu. Reference in this connection may also be made to the other Hindu Law of 1955-1956 Acts and it may be noted that a non-Hindu can very well inherit the properties of a Hindu under the Hindu Succession Act of 1956 and a non-Hindu mother can very well become the adoptive mother of a Hindu son adopted by her Hindu husband.
7. But the Proviso to Section 6 appears to strike a somewhat different note, which reads as under : --

"Provided that no person shall be entitled to act as a natural guardian of a minor under the provisions of this Section --

(a) if he has ceased to be a Hindu".
8. Now, the body of a Section has got to be read, wherever possible, harmoniously with the Proviso appended thereto, one throwing light on the other, unless such reading, in a given case, is logically impossible, as it is also a well-accepted canon of interpretation that a Proviso cannot cut down the generality of the ambit of the body of the Section, if adumbrated with irresistible clarity. If under the mandate of the Proviso, a parent becomes disentitled to act as a natural guardian on his or her ceasing to be Hindu, it may not be possible to urge that a parent is nevertheless entitled to become a natural guardian under the body of Section 6, even though he or she was or is never a Hindu. A person can cease to be a Hindu only when he or she was a Hindu and a combined reading of Section 6 and the proviso may, therefore, be construed to give rise to the inference that one is not entitled to become a natural guardian of a Hindu minor under this Act unless he or she is a Hindu. A learned author has, however, observed that "ceasing to be a Hindu" may be a disqualification, which is different from "being a non-Hindu" and so where a parent has been a non-Hindu from the very beginning, Clause (a) of the proviso to Section 6 cannot be invoked. (See, Dr. Tahir Mahmood's "Studies in Hindu Law", 2nd Edition, page 196).
9. Be that as it may, the Proviso, in our view, is unfortunate and clearly a retrograde step and is in clear conflict with the Caste Disabilities Removal Act of 1850, otherwise known as the Freedom of Religion

Act, enacted about a century and four decades ago. That Act, which is still a law in force, clearly provides that --

"So much of any law or usage now in force within India as inflicts on any person forfeiture of rights or property, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in any Court"

10. Under that law, therefore, conversion to another religion cannot by itself deprive a Hindu parent of the right of guardianship or custody of his or her minor child. No citation should be necessary in view of the express provisions of the Act, quoted hereinabove, whereby, as held by Sir Ameer AH in the decision of the Privy Council in *Khunni Lal v. Gobind Krishna Narain* (1911) ILR 33 All 356 at p. 366, "Legislature virtually set aside the provisions of Hindu Law which penalizes renunciation of religion or exclusion from Caste". But if need be, reference may be made to the decisions of the Allahabad High Court in *Kanahi Ram v. Bidhya Ram* (1904) ILR 1 All 549 at p. 560 and in *Kaulesra v. Jorai Kasundhan*, (1906) ILR 28 All 233 at p. 235, of the Sind Judicial Commissioner's Court in *Mahammad Yakub v. Mst. Radhibai*, AIR 1918 Sindh 32 at p. 34 and of the Lahore High Court in *Hari Chand v. Ghulam Rasul*, AIR 1932 Lahore 385 at p. 386, which are clear authorities for the view that the right to guardianship is also a "right" within the meaning of the Caste Disabilities Removal Act of 1850 and no person can be deprived of such right on account of renunciation of religion or conversion to another religion.
11. We are afraid that the provisions of this proviso depriving a Hindu parent of his or her right to guardianship might well be violative of the right to equality and ultra vires Article 15 of the Constitution countermanding any discrimination on the ground of religion. It is now well settled that even if a classification is otherwise permissible under Article 14 as being based on a reasonable differentia having a rational basis with the object of the law, it shall still be struck down under Article 15, which supplements Article 14, if such classification is solely based on one or more of the forbidden grounds listed in Article 15, including religion. The proviso providing that a Hindu parent "ceasing to be Hindu" shall not "be entitled to act as the natural guardian" of his or her minor child, in effect, classifies Hindu parents into two classes, namely, (i) Hindu parents continuing to be Hindu and (2) Hindu parents ceasing to be Hindu, and disentitles the latter from the guardianship of their children and thus discriminate against them. Even assuming the classification to be otherwise reasonable, it cannot probably to be disputed that the classification is based solely on the continuation and cessation of religion to attract the interdiction of Article 15. However otherwise reasonable or even laudable the object of the classification may be, it is, as pointed out by the Supreme Court in the eleven-Judge Bench in the *Bank Nationalisation case (R. C. Cooper v. Union of India,)* and later further explained in *Bennett Coleman v. Union of India, ,* not the object or the purpose or the form that determines the question of impairment of the fundamental rights, but the direct operation or effect of the law on those rights.
12. But even though we do not, as we need not, decide the question as to the vires of the proviso and allow it to have its operation, we can only allow it to operate strictly according to its express terms. As we have already indicated, but for the proviso, there is nothing in Section 6(a) of the Hindu Minority and Guardianship Act to disentitle a non-Hindu parent from the natural guardianship, particularly in view of Section 3(1) and Explanation (ii) which clearly contemplates a case of a Hindu minor having one non-Hindu parent. Conceding that as a result of the Proviso, a non-Hindu parent cannot become a natural guardian, the said proviso has got nothing to do with the right of custody of the mother, as distinguished from her right to guardianship. Since according to our reading of the provisions of Section 6(a) read with Explanation (ii) to Section 3(1), a non-Hindu mother may be entitled to the custody of the minor child who has not completed 5 years of age, as distinguished from guardianship of that child, and since the proviso refers to the right of guardianship only and not to the right of custody, a non-Hindu mother of a Hindu minor is not to be deprived of her such right to custody under Section 6(a), because of her not being a Hindu or ceasing to be a Hindu. The child in this case was admittedly born on 17th April, 1983 and, therefore, in January, 1986 when the child is alleged to have been taken away by the wife-

respondent and the present application under Section 2S was filed, she was less than 3 years old and, therefore, under Section 6(a), Hindu Minority and Guardianship Act, the custody of the child was and was to be in the ordinary course with the respondent-mother. Section 6(a) declares that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother and nothing has been brought on record to show, nor it has been alleged by the husband-appellant, that there was something extraordinary in this case as a result whereof the custody of the child, which was to be ordinarily with the wife-respondent, was not with her on the date when the child is alleged to have been taken away by her and the present application was filed.

13. Section 25(1), Guardians and Wards Act, 1890, reads as under : --

"If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of the guardian may make an order for his return..."
14. If the child in the case at hand was in fact and was to be deemed in law to be in the custody of the wife-respondent, then it is difficult to understand as to how she, herself having the custody, can be said to have removed the child from the custody. It is true that Section 25 speaks of removal of the ward from the custody of the guardian of his person and under Section 6(a), Hindu Minority and Guardianship Act, the appellant-father is a lawful guardian of the ward. But since under Section 6(a), the custody was lawfully with the mother, and not with the father, there cannot be a case of removal of the ward from the custody of the father, when the mother, who is the lawful custodian, takes the child with her even away from the matrimonial home. We are accordingly of the view that on the date when the instant application, giving rise to this appeal was filed, the child having been lawfully in the custody of the mother, there could not be any removal by her of such a child within the meaning of Section 25, Guardians and Wards Act, and the application was to be rejected on that ground alone.
15. But we do not propose to dismiss the appeal on this ground, as by the time the appeal was being heard by us, the child has already completed 5 years of age and it is now well established that a Court, including a Court of appeal, can and, wherever possible should take into account the events and developments which have taken place after the institution of the lis when the relief otherwise awardable at the date of the commencement of the lis would become inappropriate in view of the changed circumstances and mould the relief in accordance therewith, whenever it is necessary to do so to shorten the litigation or to do complete justice between the parties and if any citation is needed for such a well-settled proposition, reference may be made to the decision of the Supreme Court in *Shikharchand v. Digambar Jain*, , approving the leading decision of this Court by Sir Ashutosh in *Rai Charan v. Biswanath*, AIR 1915 Cal 103. Such a course should all the more be adopted in proceedings relating to marriage, divorce, guardianship and the like, where multiplicity and protraction of proceedings must always be avoided not only in the interest of the parties to the proceeding but also the society in general so vitally concerned in the institution of marriage and the children of such marriage who would constitute the future generation. We would accordingly proceed to dispose of the case at hand on the basis that the child has already completed 5 years of age and, therefore, the mother has no longer any preferential right to its custody under the Act, even if the Hindu Minority and Guardianship Act applies to the case. There can be no doubt that detention of a minor by one who has no right of custody against the wish of one who has such right amounts to "removal of the child" from the custody of the latter. Let us, therefore, have a fresh look at the provisions of Section 25, Guardians and Wards Act, without the provisions of the Hindu Minority and Guardianship Act superimposed therein.
16. Under the general law as indicated in the Guardians and Wards Act, if the father is living, then in view of Section 19(b) thereof, no one else can be declared or appointed to be the guardian of the person of the minor, unless the Court is of opinion that the father is "unfit" to be a guardian. Since nothing has been brought on record to show that the father-appellant is so "unfit", we would proceed on the basis that no

one but the father-appellant is the guardian of the minor within the meaning of Section 4(2), Guardians and Wards Act, which has defined "guardian" to mean "a person having the care of the person of the minor". Guardians and Wards Act, unlike Hindu Minority and Guardianship Act, nowhere provides that the custody of a child of any age shall ordinarily be with the mother. We, therefore, proceed on the basis that the father-appellant is the guardian of the child, and is entitled to its custody and, therefore, taking away of the child by the mother-respondent was "removal of the child" from the custody of the guardian within the meaning of Section 25. But a reading of the provisions of Section 25 would at once make it clear that a father as the guardian and having the custody of the child, who has been removed from such custody, is not entitled to an order of its return as a matter of course only on proof of such guardianship, custody and removal therefrom, The Section clearly invests the Court with the discretion to order or not to order return and "may" order such return, if, and only if, "it is of opinion that it will be for the welfare of the ward to return to the custody, of his guardian". We have not the slightest doubt that where, as here, a child of tender years was all along with the mother in the matrimonial home of its parents, and thereafter also, when the mother has left the matrimonial home with that child without the consent of the father, and has thus removed the child from the custody of its guardian within the meaning of Section 25, Guardians and Wards Act, the father cannot still claim return of the child to him under Section 25 as of right and as a matter of course, merely on the strength of his guardianship-cum-custody, unless the Court is also satisfied that such return would be conducive to the welfare of the minor. In the case at hand, therefore, we would be justified in ordering the return of the child to the father, only if we are satisfied that such return would be for the welfare of the child, notwithstanding the right of the father-appellant to the guardianship and custody of the child and the child's removal therefrom by the mother-respondent.

17. It must, as it cannot but be accepted as settled law in this jurisdiction that under whichever enactment this jurisdiction is invoked, be it the matrimonial enactments governing the various communities or the Hindu Minority and Guardianship Act or the Guardians and Wards Act, all questions relating to the custody of a minor must and cannot but be decided solely and only from the point of view of the welfare of the minor and the decision of the Supreme Court in *Thrity Hoshie Dolikuka v. Hoshiqm Sharakasha Dolikuka*, may be referred to as a rather recent re-enunciation of that well-established principle. In *Halsbury's Laws of England* (3rd Edition, Vol.21, Para 428, pages 193-194), which has been quoted with approval by the Supreme Court in the aforesaid decision, it has been stated that in any proceedings before any Court, concerning the custody or up bringing of an infant, the Court must regard the welfare of the infant as the first and paramount consideration, and must not take into consideration, whether from any other point of view, any right at common law possessed by the father or the mother in respect of such custody. We must make it clear that in the earlier portion of our judgment, we have taken into consideration, the legal right of the mother to the custody of a minor under Section 6(a) of the Hindu Minority and Guardianship Act, only to decide the question as to whether a mother who has in fact and in law such a custody can at all be regarded to have removed the minor from any lawful custody to attract the statutory provisions of Section 25 Guardians and Wards Act, which can be invoked only when there is such removal. We must not be taken to have said that since a mother has the lawful custody of her minor child aged not more than 5 years, such custody cannot in any event be changed and be given to the father, even if the welfare of the minor irresistibly requires such a changed And now that we have noticed that the minor having already completed 5 years of age during the hearing of this appeal, the ordinary right of the mother to such custody has ceased, we have decided to proceed on the basis of the merits of the case and to determine whether we can be satisfied that an order of return of the minor to the father's custody will be for the welfare of the minor, even assuming for the purpose that there was a removal of the minor by the mother from the custody of the father.
18. The fact that the child was with the mother since its birth in 1983 is not disputed though until the mother left the matrimonial home in 1986, the child was also with the father. It is also not disputed that since

1986, the child is with the mother alone. In the law relating to guardianship and custody, the welfare of the minor is paramountly the decisive consideration and would outweigh the mere legal right of the parents to the minor's guardianship and custody as would be evident from the various provisions of the Guardians and Wards Act and also the Hindu Minority and Guardianship Act, particularly Section 7 of the former and Section 13 of the latter. Therefore, Section 6(a), Hindu Minority and Guardianship Act in providing that "that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother" must be taken to have enacted a legislative presumption that ordinarily in case of a minor of such tender age, the custody of the mother is conducive to the welfare of a minor. This is what has been held by a Division Bench of this Court in *Gopa Guha v. Rathin Guha*, (1987) 1 Cal HN 64 at p. 70 and we would like to think that the presumption does not automatically stand dislodged immediately on the minor completing the age of 5 years. The statutory presumption, though expressly enacted in Section 6(a), Hindu Minority and Guardianship Act, must be taken to be of universal application, for a Hindu mother is not necessarily more motherly because of her being a Hindu, nor a non-Hindu mother would be less motherly in her care and affection for the child because of her professing some other faith and the presumption must ordinarily be allowed to operate whatever religion the mother may belong to. We are inclined to think that if a mother has in fact the custody of the minor of tender years, even if she may not have the legal right to such custody, the same should not be changed or altered except for compelling reasons and we are glad to find that our view finds support from the observations of Lord Mac Dermot in the House of Lords in *J. v. C.*, (1969) 1 All ER 788 at p. 824, to which our attention has been drawn by Mr. Roy, the learned counsel for the wife-respondent, where the learned Law Lord has observed that "even though some of the authorities convey the expression that the upset caused to a child by change of custody is transient and a matter of small importance", "a growing experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused by such a change". We should, therefore, order a change of the existing custody only if we are satisfied that the welfare of the minor, which is the paramount consideration in all such matters, warrants such a course.

19. Mr. Chatterjee has very strongly urged that once it is shown that the father is the legal guardian and custodian and the ward was removed from his custody, then an order under Section 25 for return of the ward to such custody should be made as a matter of course, unless the person opposing such order for return can affirmatively satisfy the Court that such return would not be for the welfare of the minor. As we have already indicated, legal right to custody is not, by itself, the decisive factor in matters relating to retention or restoration of custody and as we have further indicated, custody of child of tender years with the mother is ordinarily to be presumed to be conducive to the welfare of the child and, therefore, such custody should not ordinarily be altered or disturbed by the Court unless the Court is of opinion, on the materials on record, that there is something extraordinary to outweigh that ordinary presumption and to warrant alteration of such custody and its commitment to the father.
20. It has not been urged on behalf of the father-appellant that the child has not been properly looked after and brought up and the mother has failed to provide the child with anything that may be reasonably necessary for its proper up-bringing. We have ourselves seen the child in the Court as well as in our Chamber in the presence of the parents and their lawyers and we found the child to be well-nourished, sprightly, lively, vivacious and gay and we have been told by the learned lawyers that the child was hopping, playing and even dancing in the Court room during the recess period. The child in answer to our queries has no doubt said that she would like to stay with the mother only. But we would be taking no notice thereof as we do not think that the child has attained that maturity to form any intelligent preference.
21. It has, however, been urged that the mother is a diabetic and smokes cigarette and drinks wine too. Diabetis is an ailment to which any one may be subject and unless it is suggested, and it has not been suggested, that the same has incapacitated her in any way from discharging her parental duties and obligations, it would be absolutely irrelevant for our present purpose. Smoking again may be, as we very

often find these days, a fashion for many ladies and at any rate, no one can seriously suggest that a father or a mother, if otherwise found to be fit to have the custody of the child, is to be denied such custody only on the ground that he or she smokes tobacco. And looking to our modern society with its craze for pseudo-sophistication, it would be impossible to regard drinking, by itself, to be such as to disqualify a person from guardianship or custody of a child. The prolific growth of Bars under State patronage by way of granting licences therefor in and around our city and other places has really eroded Article 47 of our Constitution almost out of existence, whereunder it was provided that "the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks". Even assuming the mother to be a drunkard, it is not alleged that she is such a drunkard to have become unfit to properly look after the custody and up-bringing of the child.

22. It has no doubt been urged that the mother was having some adulterous relation with another person and it appears that the father instituted a prosecution against that person under Sections 497 and 498, Penal Code. But certified copies of that proceedings (being Case No. C/165 of 1986 in the Court of the 14th Metropolitan Magistrate, Calcutta) have been produced before us to show that the father did not care to proceed with the case and was absent in court on several dates and the accused has been ultimately discharged under Section 245, Criminal P.C., whereunder such discharge can be made only when the Court considers the charge against the accused to be groundless. It has also been urged that when the father went to the flat where he thought that the mother was residing with the child, he found the same to be dark and some armed guards to be posted there. We have completely failed to understand that even assuming that the mother was residing at the flat with the child, how the fact that on one evening there was no light in the flat and that guards were posted there can, by themselves, go to show that the custody of the child with the mother would be injurious, and the return of the child to the father would be conducive to the welfare of the child.
23. As held by the learned trial Judge, materials on record clearly demonstrate that the relation between the father and the mother has become bitter to the extreme. There are allegations of physical violence against each other and diaries have been lodged with the police by both the parties, one accusing the other. There almost appears to be a deadlock in their wedlock and the marriage appears to have suffered a serious breakdown, at least for the time being and admittedly they are living separately. We have also taken note of the fact that, as found by the trial court and as has also been admitted by the learned Counsel, Mr. Mitra, appearing for the father, that the father stays alone with no female relation, and in fact no other relation, with him and it is also admitted that he has his business to look after. Reliance has been placed both by Mr. Roy and also Mr. Chatterjee on the decision of the Supreme Court in *Rosy Jacob v. Jacob*, but as pointed in *Rosy Jacob* itself (supra at 2099), all that was and can be laid down is the broad proposition that Section 25, Guardians and Wards Act, vests the Court with discretion, the controlling consideration for the exercise thereof being the welfare of the minor; but otherwise "each case has to be decided on its own facts and other cases can hardly serve as binding precedents, facts of two cases in this respect being seldom -- if ever -- similar". We have, however, taken note of the observation in *Rosy Jacob* (supra, at 2100), to the effect that "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".
24. On a consideration of these facts and circumstances, we find no justification to interfere with the impugned order of the trial Judge, which, in our view, has been passed on proper appreciation of the facts of the case and in judicious exercise of his discretion and the order is accordingly upheld. All the other directions given by the trial Judge about the right of the appellant-father to visit the child and about the respondent-mother to furnish to the trial court her address where she would be staying with the child and about the parties applying to the court giving their suggestions as to the day of the week, time and place where the appellant-father can meet the child in the presence of the mother-respondent or any other person on her behalf, are also accordingly maintained, with this modification that the date 3-11-87

LANDMARK JUDGMENTS ON CUSTODY OF CHILD & VISITATION RIGHTS

fixed therefor by the trial Judge for making such application is extended to one month from this date and the trial Judge shall thereafter pass necessary orders as expeditiously as possible. Security arrangements provided for the respondent and her child under orders of this Court are to continue as before until such further orders, as aforesaid, are passed by the trial court and thereafter, further security arrangements, if any, shall be made as may be directed by the trial Judge. The records of the case, if any, along with a copy of our judgment, to go down at once to the trial court by a special messenger. No costs for this appeal.

Ajit Kumar Nayak, J.

25. I agree.

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KOUSTAV DEY V. SUDHIR CHANDRA DAS

FMA No. 2822 of 2013

(Before Hon'ble Mrs. Justice Indira Banerjee and Hon'ble Mr. Justice Mrinal Kanti Chaudhuri)

Sri. Koustav Dey

Versus

Sri. Sudhir Chandra Das

Mr. Srijib Chakraborty, Mr. Rahul Karmakar For the Appellant.

Mr. Aswini Kumar Bera, Mr. Arijit Bera For the Respondent.

FMA No. 2822 of 2013

With

CAN 1633 Of 2014

- This application filed by the appellant is for custody of his minor son, Shreyam who is presently residing with his maternal grand father being the respondent/opposite party. We are informed that Shreyam is about 6 years of age. The petitioner's wife, Somarani, mother of Shreyam who was married to the appellant/petitioner sometime in December, 2007 committed suicide on 5th June, 2009 by hanging herself. After the death of Shreyam's mother, proceedings were started against the appellant/petitioner and the members of his family inter alia under Section 498A and Section 306 of the Indian Penal Code and the appellant/petitioner and the members of his family were arrested. At that time Shreyam was about 7 months old. Since then, Shreyam has been residing with his maternal grand parents.
- The respondent/opposite party and his wife, who lost their daughter in tragic circumstances, hold the appellant/petitioner responsible for the death of her daughter and the relationship between the appellant/petitioner and his parents in law has become extremely bitter. From the arguments advanced in Court, it is patently clear that the relationship has gone far beyond the level of ordinary civility.
- The respondent/opposite party and his wife, who lost their daughter in tragic circumstances, hold the appellant/ petitioner responsible for the death of her daughter and the relationship between the appellant/petitioner and his parents in law has become extremely bitter. From the arguments advanced in Court, it is patently clear that the relationship has gone far beyond the level of ordinary civility.
- Mr. Chakraborty, learned Counsel, appearing for the appellant, submits that the Special Officer had informed the previous Division Bench that the photographs are of Shreyam's mother's dead body hanging from the ceiling. It will be open to the parties or any of them to file exception to the report of the Special Officer.

In the meanwhile, the appellant/petitioner may have the child at his residence every Sunday. The respondent/opposite party shall take the child to the residence of the appellant/petitioner every Sunday between 10.00 and 11.00 A.M. and pick him up at around 5.00-5.30 P.M. If the respondent/opposite party cannot/does not go and drop the child himself, he will send the child through some other responsible person. The respondent/opposite party shall comply with this order, failing which consequences shall follow.

Decided on July 1, 2014

ORDER

Hon'ble Mrs. Justice Indira Banerjee : — This application filed by the appellant is for custody of his minor son, Shreyam who is presently residing with his maternal grand father being the respondent/opposite party. We are informed that Shreyam is about 6 years of age.

The petitioner's wife, Somarani, mother of Shreyam who was married to the appellant/petitioner sometime in December, 2007 committed suicide on 5th June, 2009 by hanging herself.

After the death of Shreyam's mother, proceedings were started against the appellant/petitioner and the members of his family inter alia under Section 498A and Section 306 of the Indian Penal Code and the appellant/petitioner and the members of his family were arrested. At that time Shreyam was about 7 months old. Since then, Shreyam has been residing with his maternal grand parents.

We are informed that the appellant/petitioner and the members of his family have been acquitted of the charges levelled against them. After acquittal, the appellant/petitioner wanted custody and/or visitation rights in respect of his minor son.

The respondent/opposite party and his wife, who lost their daughter in tragic circumstances, hold the appellant/petitioner responsible for the death of her daughter and the relationship between the appellant/petitioner and his parents in law has become extremely bitter. From the arguments advanced in Court, it is patently clear that the relationship has gone far beyond the level of ordinary civility.

Diverse orders have, from time to time been passed in this appeal/application. By an order dated 15th May, 2014 passed by consent, Miss. Dipanwita Ganguly, Advocate was appointed Special Officer to be present at the residence of the respondent/opposite party when the appellant/petitioner and his advocate visited the residence of the respondent/opposite party. The respondent/opposite party was directed to handover the child, Shreyam, to the appellant/petitioner in the presence of this Special Officer and the appellant/petitioner was directed to return the said child to the respondent/opposite party also in presence of the Special Officer. The Special Officer was directed to submit a report with regard to the happenings that took place at the time of the visit.

The Special Officer has filed a report, photo copies whereof are directed to be supplied to the respective parties. In her report, the Special Officer has opined that the appellant/petitioner's house is suitable for the minor child. The situation is healthy. Other children come to play.

The Special Officer found that the environment in the residence of the maternal grand parents of Shreyam was not conducive to his well being. In particular, the Special Officer found two photographs in the room, which according to her was harmful for a child of tender age. The Special Officer has not, however, given particulars of the photographs.

Mr. Chakraborty, learned Counsel, appearing for the appellant, submits that the Special Officer had informed the previous Division Bench that the photographs are of Shreyam's mother's dead body hanging from the ceiling. It will be open to the parties or any of them to file exception to the report of the Special Officer.

In the meanwhile, the appellant/petitioner may have the child at his residence every Sunday. The respondent/opposite party shall take the child to the residence of the appellant/petitioner every Sunday between 10.00 and 11.00 A.M. and pick him up at around 5.00-5.30 P.M. If the respondent/opposite party cannot/does not go and drop the child himself, he will send the child through some other responsible person. The respondent/opposite party shall comply with this order, failing which consequences shall follow.

Let this matter appear in the list six weeks hence under the heading "Applications".

Let photostat copies of this order, duly countersigned by the Assistant Registrar (Court), be supplied to the learned Counsel for the appearing parties on usual undertakings.

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MEERA AGARWALLA BANSAL AND ANR. VERSUS SHYAM SUNDAR AGARWALLA

Gauhati High Court

Matrimonial Appeal No. 2 of 1999

(Before Hon'ble Mr. Justice D.N. Chowdhury)

Decided on 18 Dec 1999

Section 10 of the guardians and wards act, 1890, sec. 16 of the hindu adoptions and maintenance act, 1956

***Whether the petition for guardianship is maintainable ?**

***Whether welfare of the minor would be better protected if he is given in custody of the petitioner from the respondent ?**

The Family Court is/was competent Court to adjudicate the matter regarding guardianship or the custody of the minor. Section 7(a) of the Act clearly enumerates the categories of matters respecting which Family Court shall have an exercise of jurisdiction. A proceeding in relation to the guardianship of a person or the custody of a minor cannot be treated as a proceeding pertaining to the adoption of a minor. Under the Scheme of the Act, in appointing or declaring the guardian of a minor the Court shall, subject to provisions of section 17, is to be guided for the welfare of the minor. The Court is bound to consider the welfare of the child and to treat it as the paramount consideration. It is in the interest of the State that children should be properly brought up and educated and the State as parents patriae is duty bound to look to the maintenance and education of the children. The Indian Constitution being alive to this aspect of the matter incorporated it as one of the directive principles of State Policy in Chapter-IV 39(f).

JUDGMENT

- 1. This appeal is concerned with the wardship proceeding effecting the custody, care and control of minor Ankur who was born on 9.12.1991. The real issue in this case is whether the child Ankur should be given in custody of the paternal grand father or the maternal grand father which has arisen on the following circumstances.**
- 2. The respondent in this proceeding made an application before the Family Court for an order as to the guardianship of the minor Master Ankur impleading the mother of the child as well as the maternal grand father, the appellants in this proceeding, as the opposite parties. The respondent, in the aforesaid application before the Principal Judge, Family Court pleaded that his only son Sanjay Agarwalla had married the opposite party No. 1 (appellant No. 1 herein) on 5.5.1990 as per the Hindu rites and customs. Out of their wedlock Master Ankur was born on 9.12.1991. His son Sanjay Agarwalla died on 1.8.1995. The opposite party No. 1 (appellant No. 1) used to live in his house with Master Ankur till the first part of 1996. She left the house in the first part of 1996 for Bombay leaving Master Ankur with him and his wife with the intention to remarry. She returned to his house in July, 1996. On July 26, 1996 the opposite party No. 1 went out with Master Ankur (hereinafter referred to as the minor) for a walk in the garden with his permission. But instead of returning to his house the opposite party No. 1 along with the minor went to the house of her father (opposite party No. 2). He went to the house of the opposite party No. 2 (appellant No. 2) with his wife and found his grand son eagerly waiting for them.**

Then the respondent wanted to take back his daughter-in-law with her son (that is the appellant No. 1 and the minor) the appellant No. 2 informed him that the appellant No. 1 would get re-married soon and the minor would remain with the appellant No. 2. Appellant No. 1 finally re-married at Calcutta to one Rajesh Bansal of Calcutta, a widower having a 10 years son and 5 years daughter. The respondent coming to know that the minor would be adopted by the appellant No. 2 and thereby depriving him of his only male legal heir the respondent instituted the case before the Family Court on 27.2.1997 Under section 7 of guardians and wards act, 1890 (hereinafter referred to as the act, 1890) for appointing him as the guardian and custodian of the minor. Respondent also moved a petition under order 39, rules 1 & 2, cpc for restraining the opposite party No. 1 (appellant No. 1) from giving the minor to her father, the opposite party No. 2 (appellant No. 2) for adoption. The notice of injunction was served on the opposite party No. 1 on 28.2.1997. The opposite party No. 1 filed her objection against the injunction petition stating inter alia, that her father the opposite party No. 1 had adopted the minor at Dergaon on 9.2.1997 and the adoption was duly registered on 27.2.1997/28.2.1997. The respondent questioned the aforesaid adoption as violative of the provisions of the hindu adoptions and maintenance act, 1956 (for short the Act, 1956) so much so that the opposite party No. 2 had already adopted another boy Sanjeet Khadaria on 18.12.1987. The respondent (petitioner before the Family Court) also pleaded that the minor is his only legal heir, the opposite party No. 1 (appellant No. 1) was living in Calcutta after remarriage the minor Ankur is his only male legal heir and island of hope. Accordingly he prayed for the guardianship of the minor. The appellants as opposite parties contested the claim of the respondent and filed two separate written statements contents of which are similar in nature and which are dealt herein below. According to the opposite parties, the opposite party No. 1 lived in the house of the petitioner with the minor after the death of Sanjay Agarwalla, husband of the opposite party No. 1. It was admitted that the opposite party No. 1 was taken to Bombay keeping the minor in the petitioner's house in connection with her re-marriage and that ultimately opposite party No. 1 got married to one Rajesh Bansal of Calcutta. They claimed that before re-marriage the opposite party No. 1 lived in the house of the petitioner with the minor but she was not properly treated by her uneducated father-in-law and mother-in-law. 'The opposite party No. 1 asserted that her life as well as the life of the minor was made miserable by the in-laws and they began to hurl allegation on her character. In those circumstances she left the house with the minor and, according to the opposite party No. 1, for such leaving no such permission is required either for herself or for the minor as she was a natural guardian of the minor at the relevant time. The opposite party also pleaded and asserted that the opposite party No. 2, father of the opposite party No. 1 is/was rich person having enormous resources to take care of the minor whereas the petitioner is comparatively much poorer to the appellant No. 2. The opposite party No. 1 in her written statement, which was also adopted by the opposite party No. 2 in its entirety alleged that the application Under Section 7 of the Act, 1890 became infructuous on the ground that the minor was given in adoption on 9.2.1997 by the appellant No. 1 to the appellant No. 2 according to Hindu rites and customs and subsequently on 27.2.1997/28.2.1997 the deed of adoption was executed between the respondents 1 and 2 which was registered at Golaghat Sub-Registry office since the adoption place at Dorgaon. The opposite party also questioned the jurisdiction of the Family Court in maintaining the petition for guardianship on the face of the adoption of the minor by the appellant No. 2.

3. The opposite party also pleaded that the petitioner (respondent in this appeal) and his wife had bequeathed all their movable and immovable properties in the name of their two daughters leaving nothing for the grand son who was given on adoption to the opposite party No. 2 who became the natural guardian of the minor and, therefore, question of appointing the guardian did not arise.
4. Upon pleadings, the Family Court framed the following issues :
 - (1) Whether the petition for guardianship is maintainable ?
 - (2) Whether welfare of the minor Master Ankur would be better protected if he is given in custody of the petitioner from the respondent No. 2 ?

5. The respondent examined four witnesses including himself and exhibited seven documents. The opposite party also examined themselves and exhibited 20 documents. The learned Family Court also in addition called upon the child and conversed with him in Court in presence of both the parties and also in their absence to know his mind. After considering the materials and evidence on record learned Family Court found the application Under Section 9 as maintainable. The learned Family Court also addressed itself to the issues raised about the defect in the petition in the absence of the required declaration or willingness of the proposed guardian to act along with the declaration signed by him and attested by two witnesses as prescribed in Sub-Section (3) of Section 10 of the Act, 1890. The learned Principal Judge, Family Court held that the above defect was a formal defect which was removed by the petitioner on being pointed out by the Court. The Family Court did not attach much importance on the deed of adoption taking note of the surrounding circumstances. As regards the issue No. 2 the learned Judge on evaluation of the facts and circumstances held that both the parties are financially capable of maintaining the minor, but preferred the respondent for appointing as guardian on the ground that the minor would get more love and personal care in the custody of the respondent than in the custody of the opposite party No. 2. The Family Court reached the said conclusion of appraisal of the evidence on records. The Family Court while passing the above order also took into consideration the fact that the respondent/petitioner was nearer of kin of the minor than the opposite party No. 2. On evaluation of the facts the Family Court reached the conclusion that the appellant No. 2 had already adopted Sangeet Khadria as his son and whereas the petitioner would be without any male legal heir in the absence of the minor. The Family Court on consideration of the evidence on record found that the opposite party No. 2 would have little time to spend with the minor in view of his business commitment and social works. He also referred in his discussion that Master Ankur in course of his confabulation apprised the Judge, Family Court that most of the time the minor had to stay with the servants in the house of the opposite party No. 2 as the opposite party No. 2 had to live at Dergaon, about 200. kms. from Guwahati. Since the daughters of the opposite party No. 2 lived outside there was no other person except the servants in the house to look after the minor. In the circumstances the Family Court appointed the present respondent (petitioner before the Family Court) as the guardian of the minor and the Court ordered the opposite party No. 1 to hand over the minor to the petitioner as soon as his annual examination was over. Hence this appeal.
6. Mr. O.P. Bhati, learned Counsel for the appellant at first assailed the jurisdiction of the Civil Court for entertaining an application Under Section 7 of the Act, 1890. The learned Counsel submitted that on the adoption of the minor by the appellant No. 2 which was registered on 27.2.1997 the factum of adoption became fait accompli and under the circumstances the Family Court was not competent to assume the jurisdiction on the subject-matter, more so, on a matter pertaining to hindu adoptions and maintenance act which was outside the purview of Section 7. Mr. Bhati did not dispute that the Family Court is/was within its jurisdiction to entertain a proceeding in relation to the guardianship of a person or the custody of, or access to, any minor. The subject-matter for adjudication before the Family Court is/was in relation to guardianship of a person or the custody of the minor Ankur. In that proceeding the respondents referred to and relied upon the alleged adoption which was duly considered by the Family Court and did not give any credence to the said deed. The Family Court is/was competent Court to adjudicate the matter regarding guardianship or the custody of the minor. Section 7(a) of the Act clearly enumerates the categories of matters respecting which Family Court shall have an exercise of jurisdiction. A proceeding in relation to the guardianship of a person or the custody of a minor cannot be treated as a proceeding pertaining to the adoption of a minor. Therefore, the aforesaid contention of Mr. Bhati does not hold any ground. Mr. Bhati brought our attention to section 10 of the guardians and wards act, 1890 which provided the prescribed form of application. Under the Act the application must be accompanied by declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested atleast by two witnesses. The learned Counsel referring to the application submitted that in the case in hand the respondents did not make the aforesaid declaration as required under sub-section 3 of section 10 and therefore the application itself was* liable to be dismissed.

7. The above contention of Mr. Bhati, the learned Counsel does not hold water in view of the fact that the petitioner/respondent removed the initial defects in his application filed an affidavit on 7.12.1998 accompanied by declaration showing his willingness to act as guardian and the said declaration was signed by him and attested by two witnesses. Mr. Bhati, the learned Counsel then referred to Ext. F the deed of adoption, which was duly registered under the Indian Registration Act and also submitted that whenever any document registered under the law in time being in force is/was produced before the Court regarding adoption made and is/was signed by the persons giving and the persons taking the child in adoption a duty was cast to the Court to presume that the adoption has been made in compliance with the provision of the Act, unless and until it is disproved under Section 16 of the Act. The learned Counsel submitted that the registered deeds/documents Ext. F clinch the issue regarding adoption and the Court ought to have presumed that the said adoption was made as per the provisions of the Act and was duty bound to give full fact to the aforesaid adoption.
8. Mr. B.K. Das, the learned Sr. Counsel appearing on behalf of the respondents, on the other hand, submitted that the section 16 of the Hindu Adoptions and Maintenance Act, 1956 only provides a presumption to be drawn by the Court and such presumptions are always rebuttable on the basis of evidence adduced before the Court concerned. Mr. Das the learned Counsel in support of his contention referred and relied upon the decision of the Supreme Court in *Lal Man v. Dy. Director of Consolidation and Ors.*, reported in (1998) 8 SCC 693. The learned Family Court on considering the materials on record rightly reached its conclusion that in fact there was no valid adoption by the appellant No. 2. Mr. Das, the learned Sr. Counsel in support of his contention further referred to the evidence of the respondent No. 1 who was examined as witness No. 1 on behalf of the petitioner. Wherein he stated that the respondent No. 2 has had adopted another boy namely Sangeet Khadria who was studying in Carmel School, Ext. 1 is the certificate issued by the Principal, Ext. 2 is the declaration of the appellant No. 2 made at the time of admission of Sangeet Khadria in the Carmel School showing himself as parent of said Sangeet Khadria along with his two daughters, Geetanjali and Arpita, Ext. 3 was the Admit Card of Sangeet Khadria who appeared in the H.S.L.C. Examination in 1995. In all these three documents Exs. 1, 2 and 3 the appellant No. 2 was shown as father of Sangeet Khadria. The witness was cross-examined by the parties. In cross-examination the witness stated as follows : While my son, Sanjay Agarwalla was alive, we were made known by the respondent No. 2 and others that he had adopted Sangeet Khadria, the son of his younger brother. The fact that the respondent No. 2 has shown himself as the father of Sangeet Khadria proves that Sangeet Khadria was adopted by the respondent No. 2". The above witness was practically not cross-examined on this issue. The appellant No. 2 in his evidence, however, denied that he was not the adopted father of Sangeet Khadria and Principal of Carmel School, Jorhat had clarified it by certificate Ext. Q.
9. The learned Family Court duly considered this aspect of the matter and did not give any credence on Ext. Q issued by the Principal of the Carmel School, Jorhat. It may be mentioned that Ext. Q dated 21.5.1998, which is a certificate, was issued by the Principal of the School much after filing of the application by the respondent praying for guardianship. The aforesaid certificate dated 21.5.1998 reads as follows:

"TO WHOM IT MAY CONCERN The certificate issued by this school on 4.6.1997 showing the name of the father and mother of Mr. Sangeet Khadria as Mr. Jay Prakash Khadria and Mrs. Bina Khadria is hereby cancelled as the same was issued due to inadvertent mistake and misrepresentation.

It is certified that the actual name of the father of Mr. Sangeet Khadria is Jyoti Prasad Khadria and there is not any record in the school as regards the name of his mother. Illegible Principal
10. The learned Family Court considering the materials on record did not put any reliance on Ext. Q and relied upon the Ext. 2 and, therefore, did not act upon Ext. F. As alluded the above document is ad litem. The author of the document was not examined by the appellant No. 2 explaining the circumstances and occasioned the cancellation and clarifying the state of affairs that led to issuance of certificate, as well as the situations calling for the revocation of the certificate dated 4.6.1997.

11. section 16 of the hindu adoptions and maintenance act, 1956 is only a rule of evidence, it cannot be construed as mandate upon the Court to act upon such an adoption deed as a proof of adoption. Needless to say that the question of onus loses its significance to a great extent when evidence are laid by the parties, the learned Family Court on appraisal of the evidence and in the circumstances held that the said adoption could not validly take place during the existence of prior adoption of Sangeet Khadria. The conditions for valid adoption are delineated in Chapter-II of the Act, 1956. In case of adoption of a son the adoptive father or mother by whom the adoption is made must not have a Hindu son's son or son's son's (whether by legitimate blood relationship or by adoption) living at the time of adoption. Under this circumstance the finding of the Family Court cannot be said to be unjustified. The learned Family Court on appreciation of the materials on record in its entirety balanced the respective claim and on evaluation found the respondent to be suitable to act as a guardian of the minor, having regard to, and keeping in mind the interest and Welfare of the minor. Under the Scheme of the Act, in appointing or declaring the guardian of a minor the Court shall, subject to provisions of section 17, is to be guided for the welfare of the minor. The Court is bound to consider the welfare of the child and to treat it as the paramount consideration. It is in the interest of the State that children should be properly brought up and educated and the State as parents patriae is duty bound to look to the maintenance and education of the children. The Indian Constitution being alive to this aspect of the matter incorporated it as one of the directive principles of State Policy in Chapter-IV 39(f). In the case in hand, as alluded earlier, the Family Court took into consideration the consanguinity and propinquity of the parties. The above consideration is in conformity with the spirit of Section 17 of the Act. The minor is undoubtedly, the only male heir of the respondents. The parties are Hindu and according to the Hindu Law in case of minor who has lost both his/her parents the nearest male kinsman should be appointed their guardian, the paternal kinsman having the preference over the maternal (Re Gulbai and Lilbai, Minors, Dhaklibai, widow, reported in ILR Bombay XXXI and XXXII). In the circumstances from amongst the two grandfathers the learned Family Court preferred the paternal grand father than the maternal grand father which as such, cannot be faulted. The learned Family Court took note of all the facts pertaining to respective parties. The learned Judge on considering all the materials on evidence found that the respondents and his wife were taking more concern about the health and well being of the minor than the appellant No. 2. The learned Judge mentioned this aspect of the matter which reads as follows:

".....On consideration of the evidence of both sides as a whole, find that the petitioner will have plenty of time to play with Master Ankur and to look after his education in proper manner while opposite party No. 2 will have little time to spend with Master Ankur in view of his personal business firms and social works. While talking to Master Ankur in Court in absence of both the parties, I had learnt that Master Ankur spent most of his time with the servants in the house of the opposite party No. 2 as the (opposite party No. 2) had to live mostly in Dergaon about 200 kms. from Guwahati. As all the daughters of opposite party No. 2 live outside, there is no other person except the servants of the opposite party No. 2 in his house to look after Master Ankur. Therefore, it cannot be expected that love, affection and care necessary for Master Ankur's welfare will be more favourable in the custody of the opposite party No. 2 than in the custody of the petitioner, although Exts. E, S & T show that Master Ankur has been maintaining normal health and good academic record at present in the custody of opposite party No. 2."

12. On appreciation of the evidence on record the learned Judge found that Master Ankur had to live mostly in Dergaon about 200 kms. from Guwahati the evidence on record also clearly points out to the concern of the respondent No. 1 and his wife, pertaining to health and well being of the minor. The learned Judge also took note of the fact that minor was born at Guwahati at the residence of respondent No. 1 and he was staying with the respondent No. 1 at the time of institution of the case. The learned Family Court also found that the appellant No. 1, the mother of her re-marriage was staying in Calcutta at the house of her second husband leaving the minor with her father, the opposite party No. 2 (appellant No. 2). The Court also noted about the brisk manner of the execution and registration of the deed of adoption by the

appellants Nos. 1 and 2. The Family Court also took into consideration of the facts that the respondent was well settled in his business and was not required to be physically present at his business place. He had enough time to look after the education of Master Ankur and to give his company. "The learned Family Court also rejected the plea of the appellant that since the respondent and his wife were not highly educated the minor would not. get proper attention in his education. The learned Judge turning down the said plea observed that the two daughters of the respondent were graduated from the Cotton College of Guwahati, a premier, institution of Assam while his deceased son was a Commerce graduate. On overall consideration of the matter the learned Court reached the following conclusion "(a)..... both the parties are financially capable of maintaining the minor Master Ankur well. (b) Master Ankur would get more love and personal care in the custody of the petitioner than in the custody of the opposite party No. 2. (c) The opposite party No. 2 has already taken Sangeet Khadria as his adopted son while the petitioner will be without any male legal heir in the absence of Master Ankur. (d) The petitioner is nearer of kin of Master Ankur than opposite party No. 2. (e) Master Ankur has no ill-feeling towards his paternal grandfather, the petitioner. Accordingly the learned Family Court appointed the respondent as guardian of Master Ankur. The reason given by the Appellate Authority cannot be said to be arbitrary, capricious and unreasonable. Further, it was not arid cannot be disputed that the question of custody of minor Ankur is a matter which by statute conferred on the Family Court and that it peculiarly lies within the discretions of the learned Principal Judge. Family Court had heard the case and had the opportunity of seeing the parties and investigated the circumstances. Such decision of the Court are not to be disturbed unless it is found that the learned Judge concerned has clearly acted on some wrong principle or disregarded some material evidence. An Appellate Court will not interfere with the discretion of the Judge at first instance except for very strong reasons (Re Kaye (1866) 1 Ch App 387). No circumstances which could be regarded in any way relevant to the welfare of the minor was ignored. Under the Scheme of the Act the Court is bound to consider first the welfare of the minor and treat it as the paramount consideration. The learned Family Court has bestowed its due regard to the above circumstances."

13. Mr. O.P. Bhati, the learned Counsel for the petitioner/appellant emphasised on the material superiority of the appellant No. 2 which provided an edge upon the said appellant in his claim for the wardship. The contention of the learned Counsel is based on the assumption that in the end the cash nexus wins-money talks. But money is to everything it cannot buy one's happiness. In *Dhanwanti Joshi v. Madhavunde* reported in I (1998) DMC 1=1998(1) All India Hindu Law Reporter 114 (SC), the Supreme Court aptly adverted to the following observation of Lindley, L.J., in *Mc Grath* (1893)1 Ch 143 and the statement of Hardy Boys, J in *Walker v. Walker and Harrison* in (1981 New Zealand Recent Law) in the following passages respectively:

".....We shall next consider the point which solely appealed to the Family Court and the High Court in the present proceedings namely that the respondent is financially well off and can take care of the child better and give him superior education in USA.

Lindley, L.J. in *Me Grath* (infants), Re Ch at p 148 stated that:

"... 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 widest sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded"

".....As to the "secondary" nature of material consideration, Hardy Boys, J. of the New Zealand Court said in *Walker v. Walker & Harrison* (cited by British Law Commission, working paper No. 96, para 6. 10) :

"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 living 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."

14. In our view to the superior financial strength of the appellant No. 2 to that of the respondent alone cannot be a ground for appointing the appellant No. 2 as the guardian of the minor. Economic consideration is one of the factors apart from the material comfort a child requires care, understanding and attention at home and the learned Court while deciding the matter took care of those situations.
15. In this context the following passage from the American Jurisprudence may be aptly recalled-
"As a rule, in the selection of a guardian of a minor the best interest of the child is the paramount consideration, which even the rights of parents must some times yield. As a consequence, the Court may consider a parent's fitness for guardianship at the time of the hearing of the petition, and it may inquire into the financial condition of the applicant for letters of guardianship. But it is not to be inferred that statutory requirements are wholly to be ignored or that the Court should override the rights of one who is legally entitled to be appointed. If the one having a legal right to appointment is found to be a fit and proper person, he should not ordinarily be denied such right merely because, in the opinion of the Judge, the appointment of some other person would be more to the infant's advantage. Thus, the fact that the one seeking appointment as guardian for a minor has more property than the minor's father, or is more thrifty in accumulating property than the father, is no legal reason for depriving the father of the custody of the child....."
(American Jurisprudence 2nd Ed. Vol. 39 - S. 31)
16. In our view the learned Family Court reached its conclusion by giving reasons thereof. These reasons are based on evidence available on records which was properly evaluated in the light of the observation of the demeanour of the witnesses and in consultation with the minor. In the circumstances, we do not find any justifiable reason to disagree with the conclusion reached by the learned Trial Court. We accordingly uphold the judgment and order of the learned Family Court dated 7.12.1998 and the appellants are ordered to hand over Master Ankur to the respondent forthwith subject to completion of his annual examination. The appeal stands dismissed with costs.

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PAUL TUSHAR BISWAS VERSUS ADDL. DIST. JUDGE AND ANR.

Gauhati High Court

II (2006) DMC 59

Paul Tushar Biswas

Versus

Addl. Dist. Judge And Anr.

(Before Hon'ble Mr. Justice A Roy)

Decided on 21 November, 2005

If a certified copy of a decree of any of the superior Courts of any reciprocating country is filed in a District Court, the decree may be executed in India as if passed by the District Court. A reciprocating country has been defined to mean a country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of the section. Similarly, Superior Courts with reference to any such territory has been defined to mean such Courts as may be specified in the said notification. The above provision of the Code, therefore, exclusively deals with the execution of the decrees passed by a foreign Court in a reciprocating territory within the meaning thereof. Section 45, CPC, however, appears to be more relevant for the present purpose as it relates to execution of decrees outside India. It ordains in essence that a Court in any State is empowered to send a decree for execution to any Court established by the authority of the Central Government outside India to which the State has by notification in the Official Gazette declared the said section to apply. Section 45, therefore, prescribes the essential pre-conditions for execution of a decree of an Indian Court outside the country.

JUDGMENT

Hon'ble Mr. Justice Amitava Roy :—

1. The matrimonial alliance between the parties though conclusively determined by a decree of divorce, the issue pertaining to maintenance of their minor son has kept them belligerently engaged in Courts of law. The instant application witnesses a challenge by the petitioner/husband to the judgment and order dated 9.4.2003 passed by the learned District Judge, Shillong, in (Civil) Miscellaneous Application 7(H)/2002 arising out of matrimonial case No. 6(H)/ 2000 under Section 43 of the Indian Divorce Act, 1869 (hereafter referred to as the Divorce Act), rejecting his application to allow him to provide child maintenance to the offspring, Timothy Biswas.
2. I have heard Ms. A. Paul, Advocate assisted by Mr. K. Paul, Advocate for the petitioner and Ms. P.D.B. Baruah, Advocate for the respondent No. 2.
3. The prefatory facts building up the factual edifice would be essential. The petitioner claims to be an Indian National presently residing at California in the United States of America and is serving the Sheriffs Department of the County of Fresno, California. The petition before this Court is through his legally constituted attorney. The parties who profess Christian faith were married on 4.10.1990 at All Saints Church, Shillong, under the Christian Marriage Act, 1872 (hereafter referred to as the Marriage Act). The child, a son named hereinabove was born to them. He is a minor and is presently residing with the mother, respondent No. 2. The petitioner in the year 1999 filed an application under Section 10 of

the Divorce Act in the Court of the District Judge at Alipore, West Bengal, praying inter alia for a decree for divorce which was registered as Matrimonial Suit No. 388/1999. While the summons in the said proceedings were yet to be served on the respondent No. 2, she also filed an application under Section 10 of the Divorce Act before the learned Additional District Judge, Shillong, seeking dissolution of the marriage. It was amongst others alleged therein that the petitioner had deserted her from the year 1994 and had been living in adultery since February, 1993. The divorce proceeding initiated by the respondent No. 2, registered as Matrimonial Case No. 6(H)/2000, was eventually disposed of by the judgment and order dated 5.7.2002 granting the relief prayed for. The decree of divorce was sanctioned. The petitioner, however, failed to contest the proceedings. While the petition for divorce was pending before the learned Court below at Shillong, on the initiative of the respondent No. 2, a proceeding for child support for the maintenance of the minor son was commenced before the Superior Court of California, County of Fresno being Case No. 01CEFS03419 of 2002, County of Fresno/Petitioner v. Paul Tushar Biswas/Respondent, wherein by an order dated 4.2.2002, the Fresno County Superior Court directed the petitioner to pay a monthly support amount of \$ 500 payable w.e.f. 1.2.2002 in favour of the minor child.

4. The Court of the District Judge at Alipore in the meantime, on an application filed by the petitioner in Matrimonial Suit No. 388/99 (renumbered as Matrimonial Suit No. 27/2001 of the Court of the 5th Additional District Judge, Alipore) by order dated 13.2.2001 allowed his prayer for visitation rights to meet the minor child subject to the conditions set out therein. The respondent No. 2 thereafter filed an application for vacating the said order. She also filed an application under Order 7 Rule 11, Code of Civil Procedure for rejection of the plaint. The learned 5th Additional District Judge (to whose file the case was in the meantime transferred) finally by order dated 16.1.2002 rejected the plaint in the Matrimonial Suit 27/01 and vacated all interim orders passed. In doing so, the learned Court took note of a letter written by the petitioner to the Officer-in-Charge, Park Street Police Station mentioning inter alia that he had already obtained a decree of divorce from a Court in the United States of America. It was held that the petitioner in view of the above was guilty of suppression of material facts. Besides, it observed that in view of the admission of annulment of the marriage by a decree of divorce of foreign Court, the matrimonial suit was per se not maintainable.
5. As the matter rested at that, the petitioner, on 2.11.2002, submitted an application under Section 43 of the Divorce Act in the Court of the Additional District Judge at Shillong in Matrimonial Case No. 6(H)/2000 to assess the amount of child maintenance to be paid by him for the sustenance and education of the minor son. He also prayed for an interim order to permit him to pay a sum of Rs. 5,000 per month pending final adjudication of the issue. In the application sworn by the Attorney of the petitioner, it was stated on oath that he had been residing in the United States of America and that being deeply concerned about the welfare of his son and to ensure that his requirements, educational and otherwise, are well taken care of, he wished to make adequate provision therefor by providing maintenance to him till he attained majority. It was alleged that the petitioner's efforts to meet the child and arrange for the maintenance having otherwise failed in spite of his best endeavours, intervention of the Court was warranted.
6. The learned Court below fixed 25.11.2002 directing service of notice of the proceedings on the respondent No. 2 in the meantime. On the next date, an interim order was passed permitting the petitioner to deposit a sum of Rs. 5,000 as maintenance allowance for the child pending final orders. Leave was granted to the respondent No. 2 to file her written objection.
7. In the show cause submitted by the respondent No. 2, she, amongst others, questioned the jurisdiction of the learned Court below to entertain and decide the prayer for maintenance contending that the application was barred by the principles of res judicata, waiver, acquiescence and estoppel. Apart from the fact that the respondent No. 2 and her son were residing in Calcutta since January, 1997, and were thus beyond the territorial jurisdiction of the learned Court at Shillong, it was asserted that in view of the order dated 16.1.2002, passed by the learned 5th Additional District Judge, Alipore, rejecting the plaint of Matrimonial Suit No. 27/ 2001 and vacating all interim orders passed therein, the application was not

maintainable in law, the order dated 16.1.2002 as above being unchallenged having become final and binding on the parties. The respondent No. 2 further pointed out the pendency of the child support case before the Superior Court of California, United States of America and the order for monthly maintenance passed therein. It was asserted that the petitioner was a citizen of the United States of America and in absence of reciprocity between India and the State of California, USA, within the meaning of Section 44A, CPC, any order passed by the learned Court below would not be enforceable in the State of California and a fortiori against the petitioner, a resident thereof. A copy of the proceedings of the Superior Court of California was also produced.

8. The learned Court below after hearing the parties and on a consideration of the pleadings on record concluded that the California Court had already passed an order directing payment of monthly child maintenance or child support to the tune of \$ 500 and that the petitioner had also made some payments on 6.12.2002, 20.12.2002 and 3.1.2003 of \$ 230.77 on each occasion. The learned lower Court held the view that there was no reciprocity between India and the State of California and, therefore, in terms of Sections 44A and 45 of the CPC, any order passed by it would not be enforceable in the State of California. Recording that the welfare of the child, having regard to the issue involved, was a paramount importance, the learned Court below opined, in the attending facts and circumstances, that the petitioner's application was only an endeavour to avoid the maintenance payable under the orders of the California Court. The application was thus rejected.
9. Ms. Paul has assiduously argued that the dissolution of the marriage between the parties having been applied for and granted by the learned Court below under the Divorce Act, it is the only Court to adjudicate upon the claim for maintenance of the minor child in view of Section 43 thereof and, therefore, the learned lower Court failed to exercise its jurisdiction under the above provision of the Act in rejecting the petitioner's application. She contended that the respondent No. 2 being fully aware of the Divorce Act under which she had pursued her remedy for dissolution of marriage, she was guilty of misrepresentation of facts in asserting absence of any law empowering the Indian Courts to grant child support/maintenance and in that view of the matter, the proceedings before the California Court being in ignorance or disregard of the relevant law in force in India is non est and thus cannot be a bar for entertainment of the petitioner's request for providing maintenance to his minor son. She urged without prejudice to the above that the support order passed by the California Court directing payment of monthly allowance by the petitioner being temporary in nature and subject to the adjudication by a competent Indian Court, the learned Court below acted against the fundamental principles of law in passing the impugned order warranting interference by this Court under Article 227 of the Constitution of India. The proceedings before the California Court being based on incorrect and misguided facts, any order passed therein is not binding on the parties and for that matter any Indian Court. Relying on the proviso to Section 10, CPC. Ms. Paul argued that having regard to the interim nature of the support order passed by the Superior Court of the State of California, there was no interdiction for the learned Court below to entertain the petitioner's application on merits. Further, according to her, in terms of Section 13, CPC as well, the support order of the California Court was not conclusive and the learned Court below in refusing to adjudicate upon the issue of child maintenance raised by the petitioner before it failed to exercise a jurisdiction vested in law. She maintained that not only the California Court in the attending facts and circumstances lacked jurisdiction in initiating a proceeding for child support at the instance of the respondent No. 2, it also omitted to recognize the relevant Indian law having a bearing thereon. Further the proceedings before the California Court were also opposed to natural justice and being structured on misrepresentation of facts was afflicted by fraud as well. The learned Counsel questioned the bona fide of the respondent No. 2 asserting that the only purpose of approaching a foreign Court in preference to the Indian Courts was to vest higher amount of maintenance at the cost of the petitioner by projecting distorted facts. She maintained that the instant application before the learned Court below was not conceived of to avoid the support order of the California Court as alleged, the petitioner having

earlier approached the Court of the District Judge at Alipore, Calcutta, (subsequently 5th Additional District Judge, Alipore) praying for visitation rights and custody of his minor son. The application for divorce filed by the petitioner before the Calcutta Court not having been dismissed on merits, the order dated 16.1.2002 would not attract the bar of res judicata to the application filed before the Shillong Court, she urged. Ms. Paul placed reliance on the decision of the Apex Court in *Y. Narasimha Rao and Ors. v. Y. Venkatalakshmi and Anr.* .

10. Ms. Barua in reply, firstly questioned the maintainability of the petitioner contending that the petitioner's attorney was not authorized to file the same before the Shillong Court. Further, as all the pages of the petition did not contain the signature of the attorney, the same was liable to be rejected in limine being in contravention of the procedure prescribed. According to her, the petitioner being a citizen of the United States of America and a permanent resident of California, the Superior Court of California, County of Fresno, had the jurisdiction to initiate and conduct the proceedings of child support registered on the request of the respondent No. 2. Further as the petitioner participated in the said proceeding without any demur, it was not open for him at this stage to insist on the plea of lack of jurisdiction of that Court. She submitted that though at the first instance challenge was made by the petitioner to the proceedings before the California Court based on the doctrine of Forum Non Conveniens, the objection was over ruled by the said Court upon hearing the parties. The petitioner also did not question the said order or the support order passed by the California Court before any higher forum.
11. Ms. Barua maintained that as none of the clauses enumerated in Section 13, CPC was attracted in the facts of the instant case, the support order was conclusive and, therefore, the petitioner's application before the Shillong Court was neither sustainable nor bona fide. The learned Counsel also referred to Section 14, CPC raising presumption of jurisdiction of a foreign Court to buttress the above plea. Drawing the attention of this Court to Sections 44A and 45, CPC, the learned Counsel urged that as there was no reciprocity between India and the State of California, any order passed by an Indian Court was neither enforceable nor executable in the State of California and, therefore, the learned Court below was justified in declining to entertain the petitioner's application for child maintenance. Referring to the pleadings of the parties, the learned Counsel contended that the petitioner's sudden concern for the child's well-being and his urge to provide maintenance for his adequate upbringing plainly lack bona fide, he having maintained a slightist indifference towards the respondent No. 2 and the minor child for all these years. The endeavour before the Shillong Court was clearly to avoid the support order of the California Court, she contended. The learned Counsel submitted that there being no discernible error on fundamental principles of law or procedure, the impugned order does not merit any interference of this Court. Ms. Barua rested her submission on the following decisions. *Said-ul-Hamid v. F.I. Assur Co.* AIR 1951 SC 255; *Mohammed Abdulla v. P.M. Abdul Rahim* .
12. Ms. Paul in her reply argued that the power of attorney produced before the Court does not limit the authority of the attorney to file cases on behalf of the petitioner and to take steps in connection therewith only before the Courts in Calcutta and that there being no requirement under the Gauhati High Court Rules of all the pages of the petition being signed by the petitioner's attorney, the preliminary objections on the maintainability are perse untenable. She insisted that both the parties are citizens of India and though the petitioner is presently a resident of California and the respondent No. 2 of Canada, they are not governed by the laws of California. She reiterated that as the divorce proceeding initiated by the respondent No. 2 before the learned Court below under the Divorce Act was pending at the time of initiation of the proceedings before the California Court the support order dated 4.2.2002 passed by it in face of Section 43 of the Divorce Act was clearly unsustainable in law.
13. I have lent my anxious consideration to the rival arguments. Before dealing with the contentions appertaining to the proceedings of the California Court and the support order passed by it and the tenability of the learned lower Court's view on the aspect of reciprocity qua executability of its order in

the State of California, it would be appropriate to clear the deck of the other fringe assertions referred to above.

14. The special power of attorney executed by the petitioner on 16.8.2002 in favour of Ms. Nimmi Karim reveals that the letter was authorized, amongst others, to act, appear and defend and to take all necessary steps in the Court of law on his behalf and under her signature. She was empowered to file, verify and present documents, pleading, etc. in the Court. The recital in the deed proceeding the aforementioned empowerment, however, discloses the willingness of the petitioner to file cases in the Courts at Calcutta against the respondent No. 2. The authorization was because of the petitioner's inability to do so personally for his permanent residence in the United States of America. The plea of want of authority of the attorney raised on behalf of the respondent No. 2 is understandably based on the above recital. A reading of the contents of the special power of attorney as a whole, however, in my view, does not lead to the conclusion that the petitioner had limited his attorney's authority to act on his behalf in the Court at Calcutta alone. Having regard to the nature and extent of the powers conferred on the attorney, the objection to the contrary does not commend acceptance.
15. Chapter IV of the Gauhati High Court Rules outlines the general rules for applications and affidavits to be filed before this Court. Clause 8 thereof mandates that every application should be signed with the full name and date either by the applicant or the declarant or his Advocate. Chapters VA and VB dealing with rules governing applications under Articles 226 and 227 of the Constitution of India also do not prescribe the requirement of signing each and every page of the petition. In that view of the matter, omission to sign all the pages of the instant petition cannot be held to be violative of the High Court Rules. The affidavit annexed to the petition has been sworn and signed by the attorney on being identified by the learned Counsel for the petitioner. The affidavit is in prescribed form and the petitioner has stood by the statements made in the petition. The underlying purpose of a verification and/or the affidavit required by the law being to obviate the possibility of disownment of the pleaded facts by the party concerned at his/her convenience, I am, in the above factual premises, unable to uphold the plea of infraction of any procedural directive in this regard. The preliminary objections raised on the maintainability of the petition therefore fall.
16. On the bar of res judicata, suffice it to mention that the application filed by the petitioner "under Section 10 of the Divorce Act in the Court of the District Judge at Alipore was for a decree for divorce. The interim application by him was for custody and visitation rights to meet the minor child. No prayer was made to provide maintenance. The suit was eventually dismissed acting on the contents of the letter addressed by the petitioner to the Officer-in-Charge, Park Street Police Station, Calcutta, indicating that a decree for divorce had already been obtained by him from a Court in the United States. No issue as such on the maintenance of the child was either framed or decided. The plaint was rejected mainly on the ground of suppression of material facts. In the above view of the matter, the bar of res judicata is obviously not attracted in the facts of the instant case.
17. The pleaded facts present conflicting versions with regard to the citizenship of the petitioner. Though he has asserted in clear terms before this Court that he is an Indian national but a resident of California, statements by him in the application dated 6.12.2001 filed by him before the Superior Court of California, County of Fresno praying for dismissal/abatement of the maintenance proceedings reveal that he claimed himself to be a citizen of United States of America. He, however, admitted therein that the respondent No. 2 was a citizen of India. The same stand finds reflection in a subsequent application filed by the petitioner on 21.7.2005 before a Canadian Court alleging abduction of the minor child by his mother, respondent No. 2 and praying for an order to apprehend the minor and deposit him in the petitioner's custody. In the application filed by the petitioner before the Calcutta Court, he asserted that he was a permanent resident of U.S.A. On the other hand, the respondent No. 2 in her affidavit before this Court has stated on oath that the petitioner is a citizen of the USA.

18. Noticeably though the documents relatable to the California/Canada Court proceedings as above were produced in course of the arguments, no objection whatsoever was raised with regard to the authenticity thereof. These bear the signature of the petitioner and/or his attorney. It further transpired in course of the arguments that the petitioner is a permanent resident of California and that the respondent No. 2 is currently residing at Canada. On a consideration of the relevant facts on record on this fact of the lis, more particularly, in view of the recorded plea of the petitioner, it would be permissible to proceed on the basis that he is a citizen of United States of America. The ultimate determination of the issues raised herein, however, is not contingent on the citizenship of the petitioner.
19. Is the Court at Shillong, the only Forum competent in law to entertain the prayer for child support/maintenance, in view of Section 43 of the Divorce Act, so as to oust the jurisdiction of any other Court including the Superior Court of the State of California as asserted on behalf of the petitioner? The provision of the Divorce Act ex facie does not support the above plea. It is a statute to amend the law relating to divorce of persons professing Christian religion and to confer upon certain Courts, jurisdiction for matrimonial matters. Court as defined in Section 3(4) means the High Court or the District Court as the case may be. Section 43 thereof empowers the Court to make such interim orders as it may deem proper with respect to the custody, maintenance and education of the minor children in a suit for obtaining a dissolution of marriage or a decree of nullity thereof and to direct proceedings to be taken for placing such children under the protection of the Court. Where a decree of dissolution or a nullity of marriage is passed, the District Court under Section 44 of the Act, may, upon application for the purpose, make from time-to-time such orders and provision with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was subject of the decree. Under the said provision, the District Court may also pass order for placing such children under its protection. The statute does not contain any overriding or exclusionary provision mandating ouster of jurisdiction of any other competent Court of law to entertain and adjudicate upon any prayer inter alia for support or maintenance of any minor child, marriage of whose parents was the subject matter of controversy in a suit before a Court thereunder. In view of the aforementioned scheme of the Divorce Act, it is, therefore, not possible to hold that even if the legally recognized jurisdictional essentials stand satisfied vis-a-vis any other judicial forum it would lack competence to adjudicate upon any issue of child support or maintenance of a minor, the marriage of whose parents was either dissolved by a proceeding under the Divorce Act or was declared a nullity thereunder. The contention to the contrary, therefore, does not appeal to this Court.
20. The validity or otherwise of the proceedings of the California Court is relevant primarily to judge the bona fide of the petitioner's concern to provide maintenance to the minor child for his upbringing, the order of child support, interim though, in the California proceedings, notwithstanding. The basic thrust of the petitioner's case in this regard is that Section 43 of the Divorce Act bars the jurisdiction of the said Court and that the Shillong Court having granted the decree for dissolution of marriage, it is that Court alone which can determine the issue of custody, maintenance and education of the minor child.
21. The documents on record which include copies of the proceedings before the California Court (authenticity whereof is not in dispute) disclose that the child support case was registered at the instance of he respondent No. 2 in the later part of 2001 being represented by the County of Fresno with the petitioner as the respondent therein. Her contention in substance had been that the petitioner had deserted her and the child in the year 1994 and had left for USA and since then had not provided any financial support. In the letter dated 15.1.2002 addressed by her to Mr. George Gingo, Deputy District Attorney appearing for her, she referred to the proceedings before Calcutta Court initiated by the petitioner for the custody of the minor contending that the said Court would not make a verdict on child maintenance principally as the petitioner was a resident of another country.
22. In the meantime, on 6.12.2001, the petitioner submitted an application before the California Court describing him to be a citizen of USA and a resident of Fresno, California. He contended inter alia that in the year 1994 he had filed an application before the Calcutta Court for dissolution of his marriage

with the respondent No. 2 as well as custody of the minor child and visitation rights. He pleaded that the Matrimonial Suit No. 388/1999 was pending under Section 43 of the Divorce Act and that he had established a trust fund for the support of the child besides transferring his computer operation business in favour of the respondent No. 2 wherefrom she had been earning a handsome income. According to him, notwithstanding the pendency of the above proceeding, the California Court had the jurisdiction regarding the issue of child support, as one of its parents was a resident in California in terms of the Family Code but the case was dismissible on the doctrine of Forum Non Conveniens. As the mother and the child were citizens of India and residents thereof and a proceeding initiated by the petitioner is pending, any decision in the California case might result in conflict of rulings. As there was no urgency warranting intervention by the California Court, the proceeding before it was liable to be dismissed more particularly when the Courts in India were competent to resolve the same issue adequately and an appropriate arrangement for child support have in the meantime been made by the petitioner in India.

23. The application was resisted on behalf of the respondent No. 2 contending that the cause of child support/maintenance had been taken up under the policy enacted by the Fresno County Family Support Division under the US Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, whereunder the necessary support services are to be provided to any person who applies therefor, regardless of the place of residence of the custodial parent and the child. It was maintained that in such child support enforcement actions, the plea of Forum Non Conveniens is wholly untenable.
24. The California Court in its proceeding held on 24.1.2002 denied the motion to dismiss the child support case. Subsequent thereto, on 4.2.2002, it passed an order directing the petitioner to provide monthly support amount of \$ 500 to the minor child w.e.f. 1.2.2002 with the rider that the said arrangement would continue until further orders of the Court unless terminated by operation of law.
25. In the proceeding next held on 22.7.2002 (Annexure 8 to the writ petition), the California Court upon hearing the rival submissions on the necessity of continuance of the proceedings before it observed that it had the jurisdiction to make orders of child support in the facts and circumstances of the case and expressed in categorical terms that it was not inclined to eliminate the interim support order unless it was satisfied that the child was being maintained by an order of the Indian Court. While noticing that the endeavour to get the proceeding before it abated or dismissed on the ground of Forum Non Conveniens was by a person residing within its jurisdiction and that any order passed by it could be enforced there, the California Court made it categorically clear that any consideration for abatement of the proceedings before it would not arise unless there was an appropriate order of child support in India. It held the view that any such order of the Indian Court notwithstanding, it might not abate the proceedings before it. The California Court, however, in view of the insistence on the part of the learned Counsel for the petitioner to have the issue considered by an Indian Court, in the attending factual premises adjourned the further hearing of the case till 25.11.2002. On that date (Annexure 9 to the writ petition), the California Court while continuing the child support order passed earlier fixed the case next on 8.7.2003 directing the parties to file updated income and expenditure declarations. The respondent No. 2 was also ordered to provide her temporary address in the United States.
26. In the mean time, on 22.11.2002, the petitioner filed an application before the Shillong Court under Section 43 of the Divorce Act, which got rejected by the order impugned in the present petition. Noticeably before 22.7.2002 as above, the application for dissolution of marriage, custody and visitation rights filed by the petitioner before the Calcutta Court had been rejected on 16.1.2002 and the marriage between the parties had been dissolved by the Shillong Court on 5.7.2002. Admittedly, therefore, on 22.7.2002, no application by either of the parties was pending before any Indian Court for child support/maintenance.

27. Assertive submissions having been made for and against the validity of the California Court proceedings based on Section 13. CPC, expedient it would be to deal with the authorities on this facet of the controversy as cited at the bar and otherwise.
28. In *Y. Narusima Rao and Ors. v. Y. Venkatalakshmi and Anr.* (supra), the appellant No. 1 and the respondent No. 1 were married in India at Tirupati in the year 1975 according to Hindu law but got separated in the year 1978. The appellant prayed for dissolution of marriage in the Sub-Court of Tirupati averring that he was a resident of New Orleans, Louisiana, USA and a citizen of India. In the year 1980, he filed another petition for dissolution of marriage in the Circuit Court of St. Louis County, Missouri, USA, contending that he had been a resident of Missouri for 90 days or more. He alleged desertion by the respondent No. 1 for one year or more, preceding the filing of the petition by refusing to live with him in the United States. The averments made in the petition before the Sub-Court of Tirupati, however, reveal that the petitioner No. 1 and the respondent No. 1 lived at New Orleans and not within the jurisdiction of the St. Louis Court in the district of Missouri.
29. The respondent No. 1 in her reply while questioning the jurisdiction of the foreign Court, without prejudice to the above stand, contested the case on merits. The Circuit Court assumed jurisdiction in the matter on the ground that the appellant No. 1 had been a resident of the State of Missouri for a period of 90 days before the commencement of action and passed a decree for dissolution of marriage in absence of the respondent No. 1 on the ground that the marriage was irretrievably broken. The petition before the Sub-Court of Tirupati was not pressed and the appellant No. 1 then married appellant No. 2 in 1981.

The respondent No. 1 then filed a criminal complaint against the appellants for the offence of bigamy. The appellants were granted discharge by the learned Magistrate examining the complaint had accepted the defence of dissolution of marriage by the Missouri Court. On revision, however, the jurisdictional High Court set aside the order of the Magistrate on the ground that the photostat copy of the judgment of the Missouri Court was not admissible in support of the assertion of the dissolution of marriage. The Apex Court in the above factual premises held the decree of dissolution of marriage passed by the Circuit Court of St. Louis County, Missouri, USA, a Foreign Court, to be without jurisdiction according to the Hindu Marriage Act, 1955, on the considerations as hereinbelow:

As pointed out above, the present decree dissolving the marriage passed by the foreign Court is without jurisdiction according to the Act as neither the marriage was celebrated nor the parties last resided together nor the respondent resided within the jurisdiction of that Court. The decree is also passed on a ground, which is not available under the Act, which is applicable to be marriage. What is further, the decree has been obtained by appellant No. 1 by stating that he was the resident of the Missouri State when the record shows that he was only a bird of passage there and was ordinarily a resident of the State of Louisiana. He had, if at all, only technically satisfied the requirement of residence of 90 days with the only purpose of obtaining the divorce. He was neither domiciled in the State nor had he an intention to make it his home. He had also no substantial connection with the forum. Appellant No. 1 has further brought no rules on record under which the St. Louis Court could assume jurisdiction over the matter. On the contrary, as pointed out earlier, he has in his petition made a false averment respondent No. 1 has refused to continue to stay with him in the State of Missouri where she had never been. In the absence of the rules of jurisdiction of that Court, we are not aware whether the residence of respondent No. 1 within the State of Missouri was necessary to confer jurisdiction on that Court, and if not of the reasons for making the said averment.

30. Dwelling on the elemental rules of Private International Law and noticing the absence of any enacted rules therefor in the country, the Apex Court, to ensure certainty in the matter of recognition of foreign judgment in India, laid down the guidelines for elucidation of Section 13, CPC. It held the view that the principles of interpretation so evolved were called for to secure the required certainty in the sphere of this

branch of law in conformity with public policy, justice, equity and good conscience as well as to protect the sanctity of the institution of marriage and the unity of family, the cornerstones of our social life.

31. Dilating on the various clauses of Section 13, CPC, the Apex Court held that Clause (a) thereof which appertains to the jurisdiction of a foreign Court, should be interpreted to mean that the Court of competent jurisdiction would be one which the Act or the Law under which the parties are married is recognized to entertain the matrimonial dispute. It further held that any other Court would be without jurisdiction unless both the parties voluntarily and unconditionally subject themselves to its jurisdiction. The Apex Court held Clause (b) to convey that the decision of the foreign Court should be on the ground available in law under which the parties are married and the decision should be a result of the contest between the parties. It was of the view that a mere filing of the reply to the claim under protest without submitting to the jurisdiction of the Court or an appearance in the Court either in person or through a representative for objecting to the jurisdiction of the Court cannot be considered to be a decision on the merits of the case.
32. It was held with reference to Clause (c) that when a foreign judgment is founded on a jurisdiction or on a ground not recognized by the law under which the parties are married it would be one in defiance thereof and consequently not conclusive of the matters adjudicated therein and, therefore, unenforceable in the country. Observing that Clause (d) of Section 13 states no more than an elementary principle on which the civilized system of justice rests, it held that the requirement of the principles of natural justice should be interpreted to mean more than mere compliance of the technical rules or procedures. It observed that mere service of the process of the Court on the respondent should not be deemed to be sufficient but it ought to be ascertained whether the respondent was in a position to present himself/her self and contest effectively the proceedings. The Apex Court added a rider that the mandate of Clause (d) could be held to be satisfied if as a matter of rule the foreign matrimonial judgment is recognized only if it is of the forum where the respondent is domiciled and habitually or permanently resides. The Apex Court reiterated its view in *Smt. Sutya v. Teju Singh* refusing to recognize a foreign judgment obtained by fraud in terms of Clause (e) of Section 13, CPC. It added that fraud for the said purpose need not be only in relation to the merits of the matter but also regarding jurisdictional facts. The Apex Court summarized its view on the principles of interpretation of a foreign matrimonial judgment in India in paragraph 20. From the aforesaid discussion the following rule can be deduced for recognizing a foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign Court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.
33. On the touchstone of the above rules of interpretation of Section 13, CPC, the decree of dissolution of marriage by the Circuit Court of St. Louis County in the State of Missouri was held to be unenforceable in India as the jurisdiction of the forum as well as the ground on which the same was passed was not in terms of the Hindu Marriage Act, 1955, under which the parties were married and further the respondent had not submitted to the jurisdiction of that Court or had consented to the passing of the said judgment.
34. Noticeably in the summary of deductions made in the above extract, the Apex Court had carved out some exceptions to the rule that the jurisdiction of the foreign Court and the grounds on which relief is granted in any matrimonial proceeding has to be essentially in accordance with the law under which the parties are married, these being when the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the

matrimonial law under which the parties are married or where the respondent voluntarily and effectively submits to the jurisdiction of the forum and contests the claim which is based on a ground available under the matrimonial law under which the parties are married or if the respondent consents to the grant of relief.

35. Earlier in point of time, the Apex Court in *Viswanathan v. Abdul Wajid*, while elaborating on the essence of Section 13, CPC held that the judgment of a foreign Court to be conclusive between the parties must be one of a Court of competent jurisdiction in an international sense and not merely by the law of the foreign State in which the Court delivering the judgment functions. It observes that private international law is not one governing relations between independent States but is simply a branch of a civil law of the State evolved to do justice between litigating parties in respect of transactions or personal status involving a foreign element. The rules of private international law of each State must, therefore, in the very nature of things differ but by the comity of nations certain rules are regarded as common to the rules of civilized jurisdictions. It held the view that though in the judicial system of each State these common rules have been adopted to adjudicate upon disputes involving a foreign element and to effectuate judgments of foreign Courts in certain matters or as a result of international conventions. While underlining that Section 13, CPC in essence enacts a branch of the rule of *res judicata* in its relation to foreign judgments, the Apex Court ruled that a foreign judgment to be conclusive it must be by a Court competent both by law of the State which has constituted it and in an international sense and it must have directly adjudicated upon a matter which is pleaded as *res judicata*. On the requirement of Clause (d), Section 13, CPC, the Apex Court ruled that the essence of a judgment of a Court being due observance of the judicial process, the Court rendering the judgment must observe the minimum requirement of natural justice namely it must be composed of impartial persons acting fairly without bias and in good faith and provide reasonable notice to the parties and offer each one of them reasonable opportunity to present his case.
36. In the same vein, the Apex Court in *Sankaran Govindan v. Lakshmi Bhurathi and Ors.* observed that the true basis of enforcement of a foreign judgment is that it imposes an obligation upon the defendant and therefore, there must be a connection between him and the forum sufficiently close to make it his duty to perform that obligation. This, the Apex Court highlighted in the context of the essentiality of a foreign Court's jurisdiction in the international sense. On the precept of natural justice incorporated in Clause (d) of Section 13, CPC, the Apex Court while underlining that the wholesome maxim *audi alteram partem* is deemed to be universal and not merely of domestic application emphasized the substantial compliance with the prevailing notion of fair play in conducting the proceedings to ensure that the defendant is not deprived of an opportunity to present his case would be sufficient.
37. In *Smt. Satya v. Teja Singh*, the parties were married according to the Hindu rites. They were Indian citizens and domiciled in India at the time of their marriage. Later the respondent moved to USA for higher studies. For the next five years, the appellant continued to live in India with her minor children and did not join the respondent in America. The appellant subsequent thereto moved an application before the Indian Court seeking maintenance alleging that the respondent had neglected to maintain her and the minor children. The respondent pleaded dissolution of marriage by a decree of divorce granted by the Second Judicial District Court of the State of Nevada, etc. The respondent though unsuccessful before the lower judicial tiers succeeded before the jurisdictional High Court which returned a finding that at the time of commencement of the proceedings for divorce before the Nevada Court, he was domiciled within that State in the USA and therefore, the domicile of the wife followed his. The challenge was taken before the Apex Court by the aggrieved wife. It was held that in determining whether a divorce decree would be recognized in another jurisdiction as a matter of comity, public policy and good morals may be considered, however, no country is bound by comity to give effect in its Courts the divorce laws of another country which are repugnant to its own laws and public policy. It reiterated that if a decree of divorce is to be accorded full faith and credit in the Courts of another jurisdiction it is necessary that the Court granting the decree has jurisdiction over the proceedings. A decree of divorce is thus treated

as a conclusive adjudication of all matters in controversy except the jurisdictional facts on which it is founded. The Apex Court, therefore, was of the view that a foreign divorce decree is subject to collateral attack for lack of jurisdiction even where the decree contains the findings or recitals of jurisdictional facts besides being open to challenge on the ground of fraud. Observing that domicile is a jurisdictional fact, the Apex Court in the facts of the case, determined that prior to the institution of the divorce proceedings before the Nevada Court, the respondent might have stayed within its jurisdiction but had no domicile as required. It concluded that the respondent had gone to Nevada as a bird of passage and resorted to the Court there solely to procure a decree of divorce on misrepresentation and left the place even before the ink on his domiciliary assertion was dried. Referring to Section 13 of the CPC and Clause (e) thereof in particular, the Apex Court held that fraud as to the jurisdiction of the Nevada Court on false representation of domicile brought the judgment of the Nevada Court within the coils of Section 13(e), CPC which was thus not recognizable in India.

38. In *Rai Rajendra Sardar Moloji Nar Singh Rao Shitole v. Shankar Saran and Ors.*, the ex parte decree passed by the Gwalior Court on 15.5.1947 and transferred to the Court at Allahabad in UP for execution on 14.9.1951 was under challenge being a foreign decree and thus a nullity. The respondents against whom the suit was filed at the time of its institution were residents of UP and beyond the jurisdiction of the Gwalior Court. In terms of Section 2(5), IPC, Gwalior Court was a foreign Court and its judgment, therefore, had to be enforced in the manner like a foreign judgment. The Apex Court in the above factual backdrop and on a consideration of the contemporaneous law ruled against the extra territorial validity of the judgment of the Gwalior Court on the following considerations.
1. The respondents were not subjects of Gwalior and did not owe any allegiance to the Ruler of Gwalior and were under no obligation to accept the judgments of the Courts of the State.
 2. They were not residents of that State when the suit was instituted.
 3. They were not temporarily present in the State when the process was served on them.
 4. They did not in their character as plaintiffs in the foreign action select the forum where the judgment was given against them.
 5. They did not voluntarily appear in that Court.
 6. They had not contracted to submit to the jurisdiction of the foreign Court.
39. The Apex Court held that the Gwalior Court was, therefore, not a competent Court of jurisdiction and the decree was a nullity beyond the United State (Madhya Bharat) in which Gwalior was located. The plea that the decree was valid under the Madhya Bharat Code of Civil Procedure and that the impediment to its executability was removed as a consequence of subsequent constitutional changes and amendments of the Indian Code was also negated.
40. The Apex Court in *Renusagar Power Co. Ltd. v. General Electric Co.*, noticed the disapproval of Courts to recognize a foreign judgment found to be contrary to the public policy of the country in which it was sought to be invoked or enforced. It, however, observed that the application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and that the Courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved.
41. In this background of precedential law, the contextual facts may now be marshalled. Section 13, CPC which embodies the principle of international law and the elucidation thereof by the Apex Court in *Y. Narasimha Rao and Ors.* (supra), in particular, pertaining to foreign matrimonial judgment, provides the unassailable touchstone for the purpose. In terms thereof, a Court of competent jurisdiction within the meaning of Clause (a) of the above provision of the Code would be one recognized by the law under which the parties are married and entitled to entertain the matrimonial dispute. Exception to this would be, if both the parties voluntarily and unconditionally subject themselves to the jurisdiction of any other Court and the respondent contests the claim, which is based on the ground available under the

matrimonial law governing parties or where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on the ground available in the matrimonial law under which the parties are married or where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties. Admittedly at all relevant times, the petitioner was a permanent resident of the State of California. The action had been initiated in the California Court or the failure on his part to provide maintenance or support to the child he having deserted the respondent No. 2 and the minor in the year 1994. The obviously is also a ground to " seek relief for child maintenance under the matrimonial law applicable to the parties. No objection had been taken by the petitioner questioning the jurisdiction of the California Court founded on the bar of Section 43 of the Divorce Act. The contest was only on the ground of the Forum Nan Convenient. No law, policy or convention mandating ouster of the California Court's jurisdiction has been brought to the notice of this Court. The interdiction of Clause (a), therefore, is not attracted.

42. The child support order, interim though, has been passed any/or maintained thereafter upon hearing both the parties. The petitioner was represented by his Counsel and the proceedings of the California Court disclose a conscious consideration of the materials on record culminating in the support order. Per se, therefore, it is not possible to conclude that the child support order is not on the merits of the case. Admittedly on the date of the said order, no other order by any other Court for the maintenance of the minor was in existence. No proceeding before any Indian Court was also pending. Clause (b) of Section 13, CPC as well does not come in the way.
43. The proceeding of the California Court, available on records, do not reveal that the action was founded on an incorrect view of international law. Refusal to recognize any law in India relevant to the issue is also not discernible. As held hereinabove. Section 43 of the Divorce Act does not exclude the jurisdiction of any other Court of competent jurisdiction. Clause (c) of the above provision of the Code also is not applicable.
44. Admittedly the petitioner had appeared before the California Court being noticed of the child support case and in addition to filing his pleadings, contested the issue by duly participating in the proceedings being represented by his lawyer. No plea of want of any reasonable opportunity or breach of the judicial process had ever been raised. No misrepresentation on jurisdictional facts or otherwise have also been pointed out to indicate any fraud perpetrated by the respondent No. 2 in the matter of assumption of jurisdiction by the California Court. True it is that at the time of initiation of the action before the California Court, the application of the petitioner before the Calcutta Court for dissolution of marriage, for custody of the child and visitation rights as well as proceedings for dissolution of marriage before the Shillong Court instituted by the respondent No. 2 were pending. But in none of these cases, the issue of maintenance was subjudice. The proceedings before the California Court and the support order passed by it cannot thus be denounced on the ground of fraud.
45. The petitioner being the father of the minor under the Indian law governing the parties, he is obliged to maintain him. Except the child support order passed by the California Court, there is no order by any Indian Court to the said effect requiring the petitioner to provide maintenance to the child. The consideration which weighed with the California in passing the maintenance order was the interest and welfare of the child and the lack of adequate means of the mother to independently rear him up in a way befitting to the status of the family to which he belonged. The factor prompting the California Court to entertain the proceedings and render the support order embodies a common principle of general application for adjudicating issues on child maintenance. The California Court, therefore, cannot be said to have sustained a claim founded on any breach of law in force in India. Clause (f) is not attracted either.
46. The contention that the child support passed by that California Court was for all practical purposes, intended to be subjects to fresh proceedings before the competent Indian Court and orders to be passed

by it, is also not borne out by the proceedings in the foreign Court. The observations of the California Court in its proceedings of 22.7.2002 do not admit those to be so interpreted. The observations were clearly generated by its concern for the child and to ensure adequate maintenance by a legal forum. By no means, the California Court intended that the proceedings before it and the child support order passed therein would get effected proprio vigore with the initiation of an action before an Indian Court on the issue and orders passed in it. Noticing, however, the eagerness expressed by the petitioner's Counsel to have the issue examined by an Indian Court on the ground of Forum Non Conveniens, the California Court adjourned the proceedings so as to enable the petitioner, if so advised, to act in terms of the representation made before it. The child support case before the California Court, therefore, on this Court as well, cannot be held to be incompetent or lacking in jurisdiction.

47. From the materials available on record, it transpires that the Family Support Division in the State of California functions under the Child Support Enforcement Programme established in the year 1975 to provide amongst others child support services as comprehended under the Title IV-D of the Social Security Act. The office of the Child Support Enforcement functions under the US Department of Health and Human Services. The documents furnished to this Court in course of the hearing reveal that Section 454(4)(A)(ii) of the Social Service Act, imposes an obligation on the State agencies to provide Title IV-A services to anyone who had applied therefor. It appears further that Section 454(6)(A) of the said legislation requires that services under the plan shall be made available to residents of other States on the same terms as to residents of the State. No residency or citizenship requirement as a pre-condition for availing Title IV-D services has been insisted upon.
48. Under Section 4000 of the California Family Code, if a parent has the duty to provide for support of the child but wilfully fails to do so, the other parent or the child by a guardian ad litem, may bring an action against the parent to enforce the duty. Section 4002(a) empowers a County to proceed on behalf of the child to enforce its right of support against the parent. The primary jurisdictional foundation, in view of the above, is thus also available for the California Court to deal with the issue.
49. The respondent No. 2 invoked the child support mechanism available in the State of California of which the petitioner was a permanent resident and thus readily reachable within the jurisdiction of that Court. The petitioner, it is noticeable, as such did not question the competence or jurisdiction of the California Court on any ground other than an assumed statutory bar perceived by him under Section 43 of the Divorce Act. His resistance somewhat otherwise had been on the ground of Forum Non Conveniens. This, by itself, does not strip the California Court of its jurisdiction in view of the other overwhelming materials to the contrary. The learned Court below, as rightly contended on behalf of the respondent No. 2, did not return a finding of lack of jurisdiction on its part to entertain the application of child support made by the petitioner. It only exercised its discretion against him expressing reservation on his bonafide in view of the pendency of the California Court proceedings.
50. The reciprocity aspect, having a bearing on the executability of an order of an Indian Court in a foreign country next deserves attention. The relevant provisions of the Civil Procedure Code again would be pertinent as under Section 55 of the Divorce Act, all decrees and orders made by the Court thereunder in any suit or proceeding would be enforceable and appealed from, in the like manner as decrees and orders thereof, in the exercise of its original civil jurisdiction are enforced and appealed from, under the law, rules and orders for the time being in force. Section 45 of the said Act prescribes that subject to the provisions thereof, all proceedings thereunder would be regulated by the Code of Civil Procedure.
51. Sections 38 to 45 of the CPC deal with the Courts by which decrees may be executed. Having regard to the issue under consideration, it would be permissible to confine the attention to Sections 44A and 45 thereof. Section 44A provides for execution of decrees passed by Courts in reciprocating territory. Thereunder, if a certified copy of a decree of any of the superior Courts of any reciprocating country is filed in a District Court, the decree may be executed in India as if passed by the District Court. A

reciprocating country has been defined to mean a country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of the section. Similarly, Superior Courts with reference to any such territory has been defined to mean such Courts as may be specified in the said notification. The above provision of the Code, therefore, exclusively deals with the execution of the decrees passed by a foreign Court in a reciprocating territory within the meaning thereof.

52. Section 45, CPC, however, appears to be more relevant for the present purpose as it relates to execution of decrees outside India. It ordains in essence that a Court in any State is empowered to send a decree for execution to any Court established by the authority of the Central Government outside India to which the State has by notification in the Official Gazette declared the said section to apply. A plain reading of the above provision of the Code yields the following features:
- (1) The decree to be executed is of an Indian Court for execution in a foreign territory.
 - (2) The transferee Court should be one established by Central Government in such foreign territory.
 - (3) The State Government, by notification, has declared this section to apply to the said foreign Court.
53. Section 45, therefore, prescribes the essential pre-conditions for execution of a decree of an Indian Court outside the country. Having regard to the unequivocal precepts of permissibility, the inevitable conclusion is that in absence of either of these conditions, an Indian Court has no jurisdiction to send its decree for execution to a Court not situated in India. No material, whatsoever, has been produced on behalf of the petitioner to demonstrate that the above statutorily prescribed essentials are satisfied. On the other hand, Annexure F to the affidavit in opposition filed by the respondent No. 2 suggests absence of reciprocity between India and the State of California. The conclusion of the learned Court below in this regard, therefore, is unassailable. The authorities cited at the Bar in SS Said-id Hamid (supra) and Md. Abdulla (supra), being referable to the execution of judgments of foreign Courts in India in the manner contemplated under Section 44A, CPC do not call for any detailed discussion.
54. Is the petitioner's conduct in resisting the California proceedings on the plea of Forum Non Conveniens compatible with his concern to provide maintenance to the child through an order of the Indian Court? Noticeably no such endeavour had been made by him prior to the filing of the application on 22.11.2002 before the Shillong Court. Though he applied for dissolution of marriage under the Divorce Act before the Calcutta Court and by an interim application sought visitation rights, there was no offer to provide maintenance to the child. It was only after the child support order passed by the California Court on 4.2.2002 and rejection of his prayer for dismissal of the said proceedings that he approached the Shillong Court presumably to fall in line with the stand taken by him before the Court at California. The proceedings initiated by the respondent No. 2 being for the maintenance of the child, the resistance from the petitioner's side and his urge to obtain a separate order from the Shillong Court is really intriguing. If the petitioner's reservation is on the amount granted by the California Court, he has ample opportunity to contest the issue on this Court by adducing relevant materials in support of his stand. He enjoys the advantage of participating in the proceedings before the California Court being a permanent resident of that place. The petitioner's proclaimed dormancy over the need of his child's maintenance for all these years and his sudden animation following the California Court's support order constrains this Court to hold that the concern expressed before the Shillong Court is ostentatious and not real. There appears to be no logic or rationale in permitting parallel proceedings before the learned Court below on the same issue. The impugned order does not suffer from any vitiating error on a fundamental principle of law or procedure to merit invocation of the supervisory jurisdiction of this Court under Article 227 of the Constitution of India.
55. The petition, thus being without any merit, is dismissed. No costs.

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SREEPARNA BANIK (SAHA) VERSUS ANKUR SAHA

Crl. Petn. No. 09 of 2015

(Before Hon'ble Mr. Justice Deepak Gupta, C.J.)

Smt. Sreeparna Banik (Saha), W/o Sri. Ankur Saha, D/o - Sri. Pradip Banik, Resident of 59 Central Road, Agartala, P.O. - Agartala, P.S. - West Agartala, District - West Tripura ...Petitioner

Versus

1. Sri. Ankur Saha, S/o - Lt. Amar Saha, Resident of - Saha Gas Traders, Haradhan Sangha, Lake Chowmuhani, Krishnanagar, Agartala, P.O. - Agartala, P.S. - West Agartala, District - West Tripura ...Respondent 2. The State of Tripura, Represented by the Secretary to the Government of Tripura, Home Department Proforma ...Respondent

For the Petitioner: Mr. S. Mahajan, Advocate., Ms. B. Sur, Advocate.

For the respondents: Mr. S. Lodh, Advocate., Mr. A. Pal, Advocate.

Decided on October 13, 2015

The role of Judges who handle matters pertaining to custody of children . A child of such tender age has to be handled in a manner where the child finds a friend in the Judge. First of all the consultation with the child should be done in a language which the child understands. Secondly, the child should never be called to the Court room but only to the chamber. Thirdly, the Judge must make an effort to build up a relationship with the child where the child starts trusting the Judge. It is the duty of the presiding officer to find out the truth from the child.

JUDGMENT & ORDER (ORAL)

Hon'ble Mr. Justice Deepak Gupta :— By this petition the petitioner has challenged the order dated 17th March, 2015 passed by the learned Sessions Judge, West Tripura, Agartala.

2. Briefly stated the facts of the case are that the petitioner (hereinafter referred to as the 'mother') was married to the respondent No. 1 (hereinafter referred to as the 'father') on 27.02.2009. Differences arose between husband and wife. In this case, this Court is only dealing with the issue as to who should be granted the custody of the child and therefore, I am not going into the allegations made by the husband and wife against each other. There is no dispute that in the month of August, 2013, the mother left the matrimonial home along with her child. It is disputed whether the mother left over own accord or whether she was forced and compelled to leave the matrimonial home. This matter is not being decided here. A few days later, the mother of the respondent i.e. grandmother of the child took the child back to the father's home. Thereafter, a notice was issued on behalf of the wife to the husband on 19.08.2014 leveling charges and seeking custody of the child.
3. Thereafter, the mother filed a petition under the provisions of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the Act) in December, 2014. Many reliefs were claimed by the wife but in this petition we are only concerned with the application filed by the wife under Sections 12, 21 and 23 of the Act praying that she may be granted custody of her minor daughter. The learned Magistrate to whom the case was transferred passed an ex-parte order directing the husband to handover the child to the wife and also by interim order directed that till the case is decided the custody of the minor daughter will remain with the mother.

4. The main reason which weighed with the learned Magistrate while passing the order was that a child of such tender age needs the love, care and affection of her parents especially the mother. The learned Magistrate found that the female child is only 4 years old and, therefore, requires the care and nourishment of the mother. Even from the facts which were alleged in the complaint it was apparent that the child had been living with the father for more than one year and four months prior to the date of the order being passed. On 16.8.2014 a notice had been sent by the wife-petitioner to the husband in which the wife had complained that the child had been taken away from her on 15.8.2013. Thereafter in response to this notice the husband sent a reply in which it was mentioned that for 33 days the child had remained with the mother on various dates.
5. In the reply to the notice, it was also stated as follows:-

"5. Regarding the question of restoring custody, my client states that welfare of the minor child is of paramount consideration. In the demand notice, no where it is mentioned as to how the welfare of the child will be benefitted in the custody of the notice giver. The notice giver, has not given any details regarding her monthly earning or as to how she proposes to maintain the expenses of schooling, fooding, studies and other expenses of the child which are essentials for the welfare of a minor child."
6. The learned Magistrate was absolutely right in coming to the conclusion that a child needs the love and affection of both the parents. Parents who are adults may fight with each other. Parents have their egos and because of their egos they do not want to compromise with each other. The parents may do anything to each other but the child has the right and in fact, the requirement of every child is that if both parents are alive the child should receive the love and affection of both the parents.
7. I am also of the considered view that a female child of the age of three or four years should normally stay with the mother. However, while passing orders with regard to transfer of custody of children the Court must not only have a legalistic approach but must also have a humane approach and should understand human problems. In any case of custody of a child paramount importance must be given to the interest of the child. The child cannot be made a scapegoat due to the inability of the parents to live with each other. Where the learned Magistrate went wrong was to direct that the custody of the child be handed over immediately to the mother that too by an ex-parte order. The young girl who is the subject matter of this litigation, is a living human being. She has emotions. She has her likes and her dislikes. She is not an inanimate object like a pen or a pencil. She is not an animal. Even an animal who lives with one human being develops love and affection for that human being. The child had been living with the father for more than one year. Only for a few days the child had lived with the mother. The girl child is only 5 years old.
8. The husband filed an appeal challenging the said order before the learned Sessions Judge, West Tripura, Agartala. The learned Sessions Judge called the parents and found that the minor girl had been in the exclusive custody of the father since 26.8.2013. He talked to the child and found that the child did not want to go with the mother and in fact was not going near the mother at all. He, therefore, held that it is not possible to order restoration of the custody of the child to the mother. Further, the learned Sessions Judge directed that the appellant i.e. the husband will take necessary steps in consultation with the wife so that she can visit her daughter twice in a month and the time and place to be decided by the parties through their engaged counsel.
9. The learned Sessions Judge may have been right in taking into consideration the views of the child but the learned Sessions Judge was absolutely wrong in leaving it to the parents to decide what are the visitation rights of the mother. It is for the Court to lay down the visitation rights because the parties may never come to an agreement with regard to the visitation rights and that would lead to further chaos.
10. I myself had called the parties as well as the minor child to my Chamber. I found that both the husband and wife had taken very rigid stands and they were not willing to compromise the matter under any

circumstances. Both did not want to give in even an inch to settle the matter. As far as the minor girl is concerned, I found her to be an extremely intelligent girl. She could converse with me confidently in 'Hindi' without the aid of any interpreter. No doubt she said that she did not want to go with her mother but when I questioned her in private in presence of the Court staff she also admitted that she had been told by her father and grandmother to state that she did not like the mother and did not want to go with the mother. This clearly shows that she was tutored. Where parents fight with each other these things are bound to happen. If the child is in the custody of the mother the mother will tutor the child and child will start hating the father. In the present case the situation is just reverse. A child of 4/5 years is totally under the influence of the father and family members of the father with whom the child is residing. She will in Court say only what she has been told to say at home.

11. Here comes the role of Judges who handle such matters. A child of such tender age has to be handled in a manner where the child finds a friend in the Judge. First of all the consultation with the child should be done in a language which the child understands. Secondly, the child should never be called to the Court room but only to the chamber. Thirdly, the Judge must make an effort to build up a relationship with the child where the child starts trusting the Judge. It is the duty of the presiding officer to find out the truth from the child. Unfortunately, neither the learned Magistrate nor the learned Sessions Judge tried to do this.
12. When I had won over the confidence of the child in chamber I found that not only she is very confident but she was a very honest and truthful child. Any child by nature is honest. It is society which turns a child dishonest by the time the child grows up. Why should the child be denied the love of her mother? I have already held that the child is not an inanimate being and the Magistrate was wrong in transferring the custody of the child to the mother all of a sudden. However, I at the stage of initial hearing felt that first of all an attempt should be made to build up a strong loving relationship between the child and the mother where the mother gets love and affection of the child and the child learns how to love and respect the mother. The father and the family members were also clearly warned that if on the next occasion when the child comes to Court I find that she states that she hates her mother then I might think of taking away the custody of the child from them immediately because if the child is taught to hate the mother then the child is not being brought up in a proper manner.
13. Even if the child is living with the father, the father and the family members of the father should tell the child to love and respect the mother. Just because the husband and wife are fighting does not mean that the child should be taught to hate her mother. A child who is taught to hate her mother can never turn out to be a good human being. In any society the most important trait of any person, be that person howsoever high or howsoever low, is that the person should be a good human being.
14. The most important aspect is that the best interest of the child has to be kept in mind while passing any order with regard to custody, visitation rights etc. Legally speaking when the child is a female and only 5 years of age the mother has the legal right to get the custody of the child.
15. Keeping in view the aforesaid facts and circumstances, on 24.06.2015, a detailed order was passed, the operative portion of which reads as follows:
That w.e.f. 05.7.2015 the father shall take the child to the house of the mother on every Sunday at 9.00 a.m. and bring back the child at 6.00 p.m. This will go on for the entire month of July, 2015 till 2nd August, 2015 and thereafter the child shall be produced before me in my chamber on 5th August, 2015 at 4.30 p.m. so that the child does not miss school on that day.
16. On 27th July, 2015, this order was modified as follows:-
"That w.e.f 1st August, 2015 on every working Saturday of the High Court the child shall be brought to the High Court at 10.30 a.m. The child shall be handed over to Ms. Sima Dutta the Private Secretary to this Court who shall then take the child to the auditorium. The mother shall meet the child in the auditorium and the child will not be handed over directly to her. At 1.00 p.m. Ms. Sima Dutta will ensure

that the child is handed over to the father. Ms. Sima Dutta is also requested to introduce the child to two/ three other lady Officers of this Court and in case Ms. Sima Dutta is on leave on any of the days one of the other lady Officers shall see that the child is well looked after. In case Saturday is not a working day then on the Friday prior to the Saturday the child will similarly be brought to the Court at 2.00 p.m. and shall remain till 5.00 p.m. In case auditorium is not available then the child will meet her mother in alternative arrangement as may be found suitable by the Court officials."

17. Even today, the child is only about 5 years old. She is a female child. It is in her interest to stay with the mother. Over the period of last V?, months she has met her mother on a number of occasions. It has been reported to me that though the child was initially reluctant to meet the mother but after 10/15 minutes she gets involved with the mother and start playing with the mother. It is more than apparent that even now she is being tutored by her father and his family members to speak against the mother. I have observed that she has become aggressive in her behaviour. This is totally different to what her initial behaviour was. The only presumption I can draw is that the father and his family members are trying to tutor the child against the mother. I had clearly mentioned in my earlier order that it is the duty of the parent with whom the child is living to ensure that the child respects and love the other parent also. This has unfortunately not happened. A small female girl needs the attention of her mother. The grandmother cannot provide the love and affection which a mother can provide. On behalf of the father, it was contended that the mother is not earning. It was stated on behalf of the mother that though she was not earning when the petition was filed but now she is working in a school. There is no manner of doubt that the mother is a Post Graduate. She is an educated lady. The husband is a rich businessman and it is his duty to maintain the child and he can pay the expenses of the child even when she is living with the mother. I am clearly of the view that now the time has come to handover the custody of this 5 year old girl to the mother. By now the child has become accustomed to her mother and has been meeting her every week for more than two months.
18. Therefore, the petition is allowed and disposed of in the following terms:-
 - (i) That the husband shall produce the child namely, Miss Anushka Saha before the Registrar General of this Court on 16th October, 2015 at 10.30 a.m.
 - (ii) the Registrar General with the help of Ms. Sima Datta, the Private Secretary and Ms. Bappi Dey, Superintendent to this Court shall handover the child to the mother in the Court premises and the mother shall remain in the Court premises till about 1 O'clock and by that time, the Registrar General and the Court official shall ensure that the child is comfortable with the mother.
 - (iii) The father shall bring the clothes and other essential items of the child to be handed over to the mother. On and with effect from 1st October, 2015, the father will pay maintenance of Rs. 10,000/- (Rupees Ten thousand) per month for use of the child to the mother by remitting into her Bank Account directly. The counsel for the mother is directed to submit the Bank Account number of the mother to the respondent-father within one week from today. The remittance for every month be made on or before 5th of every month, (iv) The child shall stay with the mother for one complete month without any visitation rights of the father and thereafter, the matter will be taken up by the Magistrate, who keeping in view the order passed hereinabove, will grant visitation rights to the father to meet the child at least once a week.
19. The parties are directed to appear before the Magistrate on 17th November, 2015, when the Magistrate will deal with the matter. In case, the husband has not complied with the direction of this Court and has not paid the maintenance by that date, the defence of the husband in the proceedings before the Magistrate shall be struck off and he shall not be permitted to contest the proceedings till he complies with the orders of this Court.

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DILIP GOSWAMI VERSUS STATE OF TRIPURA

W.P. (HC) No. 05 of 2013

(Before Hon'ble Mr. Justice Deepak Gupta, CJ. and Hon'ble Mr. Justice S. Talapatra, J.)

Shri Dilip Goswami, S/o, Sri. Dulal Goswami of Malaynagar, Rentus Colony, P.S. East Agartala, Agartala, Tripura(w), PIN-799004 Petitioner Mr. D.C. Saha, Adv.

Versus

- 1. The State of Tripura Represented by Commissioner to the Government of Tripura, Home Department, New Secretariat Building Capital Complex, P.O-Kunjaban, P.S-East Agartala, Agartala, West Tripura.*
- 2. The Director General of Police, Government of Tripura, Office of the Director General of Police, Fire Brigade Chowmohani, PHQ Agartala, West Tripura, PIN-799001.*
- 3. The Superintendent of Police, Office of the Superintendent of Police, Agartala, West Tripura, PIN-799001.*
- 4. The Officer-in-charge, West Agartala Police Station, Agartala, West Tripura, PIN-799001.*
- 5. Smt. Kalpana Das, W/o Sri. Sukhlal Das of Mahashakti Pran Krishan Homeopathy Doctor Gail, P.S-East Agartala, Agartala, Tripura West.*
- 6. Sri. Santu Das, S/o Sri. Sukhlal Das of Mahashakti Pran Krishna Homeopathy Doctor Gali, P.S-East Agartala, Agartala, Tripura West ...Respondents*

Mr. A. Ghosh, Adv.

Mr. Samarjit Bhattacharji, Adv.

W.P. (HC) No. 05 of 2013

Decided on February 3, 2014

In case the petitioner seeks custody of the child, he can also seek visitation rights as an interim measure and the appropriate forum shall decide the dispute between the parties as early as possible, but always keeping into consideration the fact that it is interest of the child which is of paramount importance. The child is a tender human being. He is not an inanimate object. He is not a pen which can be taken out from one pocket and put in another pocket. The child may be two years old but has emotions and feelings. We cannot in writ jurisdiction direct that the child be taken from the custody of the grandmother and the maternal uncle with whom the child has been residing for two years and suddenly be handed over to the father. This process may have to be done over period of time. We are also clearly of the view that if the father wants to visit the child, he must get visitation rights and must be able to meet his son and once there is an emotional bond between the son and the father then the custody may be handed over to the father. Without such bond being developed it would not be in the interest of the child to virtually take him out of the environment in which he is growing up and place him in a totally new environment to which he is not used to.

JUDGMENT & ORDER (ORAL)

Hon'ble Mr. Justice Deepak Gupta :—

By means of this habeas corpus petition, the petitioner who is admittedly the father of the minor, Niladri Goswami has prayed that the custody of his child, Niladri Goswami be handed over to him.

- [2] The admitted facts are that the minor child was born on 27th December, 2011 out of the wedlock of the petitioner with Late Jaba Das (Goswami). During child birth, the mother unfortunately developed certain medical problems and she expired on 5th January, 2012. According to the case set up in the petition itself, on 2nd January, 2012 when the mother was alive but unwell the respondents 5 and 6 being the mother-in-law and brother-in-law of the petitioner took away the minor son from the nursing home where the mother was admitted to their residence. The petitioner claims that since he is the father and natural guardian of the minor, he alone is entitled to the custody of the child.
- [3] On the other hand, the respondents submit that they have been taken care of the child right from the birth and they are entitled to the custody of the child. They are not total strangers but the grand-mother and maternal uncle of the child. Many allegations and counter allegations have been made by the parties against each other. We are not going into those allegations because in writ proceedings we cannot decide those contentious issues of fact.
- [4] The fact however remains that the minor child whose custody is sought by means of this habeas corpus petition is residing in the house of his maternal grand-mother and maternal uncle right from the time of his birth. More than two years have been elapsed. The child must have developed some affection for them. True it is, that the father is the natural guardian and his claim to custody may be stronger. However, the most important consideration which weighs with the Court is the welfare of the child. It is the child's future which is of paramount importance and rival claims of the parties will have to give way to the interest of the child.
- [5] The child is a tender human being. He is not an inanimate object. He is not a pen which can be taken out from one pocket and put in another pocket. The child may be two years old but has emotions and feelings. We cannot in writ jurisdiction direct that the child be taken from the custody of the grand-mother and the maternal uncle with whom the child has been residing for two years and suddenly be handed over to the father. This process may have to be done over period of time. We are also clearly of the view that if the father wants to visit the child, he must get visitation rights and must be able to meet his son and once there is an emotional bond between the son and the father then the custody may be handed over to the father. Without such bond being developed it would not be in the interest of the child to virtually take him out of the environment in which he is growing up and place him in a totally new environment to which he is not used to.
- [6] In the present case, we feel that the writ jurisdiction is not the appropriate jurisdiction for grant of relief. We may make it clear that if necessary this Court can exercise writ jurisdiction even in matters of custody. However, here we are dealing with a case where the petitioner has not placed even a scrap of paper on record to show that from 2nd January, 2012 till September, 2013 he ever wrote to any authority or to any person claiming custody of the child.
- [7] Therefore, we find no urgency in the matter to entertain it in writ proceedings. Hence, the writ petition is rejected. We, however, make it clear that the petitioner may seek custody of the child before the appropriate forum. In case the petitioner seeks custody of the child, he can also seek visitation rights as an interim measure and the appropriate forum shall decide the dispute between the parties as early as possible, but always keeping into consideration the fact that it is interest of the child which is of paramount importance.
- [8] With these observations, the writ petition is disposed of. No order as to costs.

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RATAN RABI DAS VERSUS RATNA SEN

Mat. App. No. 13 of 2013

(Before Hon'ble Mr. Justice U.B. Saha and Hon'ble Mr. Justice S. Talapatra)

Sri Ratan Rabi Das, son of Narayan Rabi Das, resident of Kishoreganj, P.S. Kakraban, Udaipur, Dist: Gomti, Tripura ...Petitioner

Versus

1. Smt. Ratna Sen (Saha), wife of Sri. Joy Kumar Saha, daughter of Sri. Radha Ballab Sen, at present, care of: Sri. Dilip Das, East Palatana, P.S. Kakraban, Udaipur, Dist: Gomti, Tripura

2. Sri. Radha Ballab Sen, son of Khagendra Sen, of East Palatana, P.S. Kakraban, Sub-Division: Udaipur, Dist: Gomti, Tripura ...Respondents

For the petitioner: Mr. A. Bhowmik, Advocate.

For the respondents: Mr. B. Choudhury, Advocate.

Mat. App. No. 13 of 2013

Decided on September 15, 2015

If there is any difficulty like illness of the minor son on the appointed days of visitation, it would be the duty of the respondent to inform the appellant about such development. But again it is cautioned that the appellant shall not take the advantage of his right as granted by this Court at any point of time. If there is any difficulty as to the right of the re-visitiation, the parties would be at liberty to approach the Family Court.

Judgment and Order (Oral)

Hon'ble Mr. Justice S. Talapatra :— Heard Mr. A. Bhowmik, learned counsel appearing for the appellant as well as Mr. B. Choudhury, learned counsel appearing for the respondents.

2. This is an appeal against the order dated 18.03.2013 delivered in Civil Misc.(GC) No. 06 of 2012 by the Judge, Family Court, Udaipur, South Tripura. In the said petition being Civil Misc.(GC) No. 06 of 2012, the appellant herein sought custody of his minor son, namely, Lab Rabi Das. The petition was dismissed by the order dated 18.03.2013 on the ground that the minor son did not attain the age of 7 years for granting custody in favour of the father taking out him from the custody of the mother and till the age of 7 years, the mother remains the natural guardian.
3. There had been attempts by this Court to familiarize the minor son with the father in a manner so that the confidence in the father, the appellant herein, is enhanced and the Court may consider of granting custody of the minor son to the appellant on appreciating relevant factors.
4. There had been several attempts by the Principal Counsellor, Family Court, Udaipur, South Tripura in terms of the order dated 30.04.2014.
5. Later on, the Principal Counsellor, Family Court filed several reports on observing the attitude of the minor son. In one of such reports dated 24.06.2014, the Principal Counsellor Family Court, Udaipur, South Tripura has recorded her observation in the following terms:

"till date I have found the minor boy not at all interested to even look at his father".

6. Mr. Bhowmik, learned counsel appearing for the appellant has candidly submitted that unless the relation between the appellant and his son is developed, the custody as sought may not be proper looking at the welfare of the minor son.
7. We appreciate the fairness of the learned ounsel appearing for the appellant. But Mr. Bhowmik, learned counsel insisted for visitation rights of the appellant in the alternative.
8. Mr. Choudhury, learned counsel appearing for the respondent wife did not raise objection to such prayer and he has candidly stated that the father be always given the right to visit his son and to take all actions for welfare of his son even though he is not given the custody of his son.
9. Having regard to the proposition as advanced by the learned counsel, we must record that there is a consensus as to the visitation right of the father, the appellant herein. Accordingly, we direct the respondent, Smt. Ratna Sen (Saha) wife of Sri. Joy Kumar Saha to produce the minor son, namely, Lab Rabi Das, who is now staying in the residence of the respondent's father on the first and third Saturday of every month at 4.30 pm in the Palatana Bazaar Area Anganwadi Centre and allow the appellant Sri. Ratan Rabi Das to interact with the minor son for about an hour. It is made clear that before the fall of the darkness the appellant shall leave the custody of the minor son with the respondent without fail.
10. The appellant is cautioned that under no circumstances he shall annoy the minor son. However, the respondent shall allow the appellant to give her son gifts, reading materials, food etc., to express his affection to his son. During that period the respondent shall avoid being present so that the appellant and his son may interact freely.
11. If there is any difficulty like illness of the minor son on the appointed days of visitation, it would be the duty of the respondent to inform the appellant about such development. But again it is cautioned that the appellant shall not take the advantage of his right as granted by this Court at any point of time. If there is any difficulty as to the right of the re-visitation, the parties would be at liberty to approach the Family Court, Udaipur, Gomti, Tripura for an appropriate order.
12. In terms of the above, this appeal stands disposed of.
13. Copies of this order be sent to the parties through their engaged counsel.

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MOHD. RAMZAN MAGREY VERSUS TAJA AND OTHERS

Civil Misc. First Appeal No. 8 of 1983

(Before Hon'ble Mr. Justice A.S. Anand)

Mohd. Ramzan Magrey ... Appellant;

Versus

Taja and others ... Respondents.

- This appeal is directed against the order of the learned District Judge, Jammu, dated 30-4-1976 in a petition under Sections 10/13 of the Hindu Marriage Act. The trial Judge holding that there was no substance in the petition and that the appellant having failed to prove the grounds alleged by him in the petition for judicial separation/divorce dismissed the petition with costs.
- The case at hand however on facts stands distinguished from Gollins (1963-2 All ER 966) (supra) and the Bombay case. The husband here is not complaining of any rude behaviour or of a particular conduct of the wife injurious to the health of the husband. It was not the case of the husband that the illness was deliberate or aimed at him with intention to injure or harm him. The disease itself as it transpires from evidence was not of the nature that would lead a reasonable person to conclude that it would be dangerous for the health of the husband to continue to remain united in the bond of marriage with the wife. The alleged disease was neither contagious nor incurable. In fact the bad smell was not there throughout the day and night. Its effect could be diminished to a large extent by removing the crusts from the nose. It was not the case of the husband that with intention to harm him, wife declined to cleanse her nose or refused treatment. On facts, it appears, on the other hand, that no serious attempt has ever been made by the husband to provide proper treatment to the wife.

We are therefore, convinced that the appellant has not been able to establish the factum of alleged cruelty by any evidence whatsoever. May be the wife was speaking the truth when she alleged that the husband in order to take another person as his wife was vainly trying to find fault with her nose and putting up pretexts which were imaginary and false. Holding, therefore, that on facts of the case the appellant has not been successful in showing that the act complained of was an act of cruelty aimed at him by his wife, and also that on facts appearing in the case intention was a necessary element to be established which has not been done, this appeal we dismiss but we make no order as to costs.

Decided on April 11, 1983

JUDGMENT

1. This appeal is directed against the judgment and order dt. 18-2-1982, passed by District Judge, Anantnag, in an application under the Guardians and Wards Act. The application was filed by the father of a minor child Jahangir Ahmad seeking custody of the minor and for a declaration to the effect that he is the guardian of the child and for his appointment as such a guardian. The mother of the child not only resisted the application but also prayed instead that she be declared and appointed as the guardian of the minor and the custody of the minor be got delivered to her. The learned District Judge vide impugned judgment and order dt. 18-2-1983, dismissed the application of the father and granting the prayer of the mother appointed her the guardian for the person of minor Jahangir Ahmad. The custody of the minor was also directed to be delivered to the mother. The father is aggrieved of the order and hence this appeal.

2. The brief facts leading to the present litigation are that the parties (appellant and respondent No. 1) lived as husband and wife for a number of years and a son Jahangir Ahmed was born out of the wedlock. According to the father, Jahangir Ahmad was born on 1-1-1975, while according to the mother Jahangir was born on 1-7-1977. The relationship between the parties, later on, became strained. The father, Mohd. Ramzan Magrey, married another woman and the mother, Mst. Taja, left her matrimonial home and went to live with her parents at Noorpora. The minor child was living with the mother, but was, later on, taken away by the father to Magreypura. On 30-4-1981, the father filed an application under Sec. 17/25 of the Guardians and Wards Act praying for being appointed the guardian of the minor child and for his custody. The mother and her parents were arrayed as respondents in the application. They resisted the application and also filed a counter application for the appointment of the mother as the guardian of the minor and for the custody of the minor. The parties were directed to lead evidence in support of their respective contentions. The father examined Abdul Rashid Magrey, Assad Ullah Magrey, Ghulam Hassan Wani, Gani Bhat, Salam Ganai and Abdul Rehman Wani. He also appeared as his own witness. The respondents, on the other hand, examined Gaffar Dar Mohd. Hussain Bhat and Sona Sheikh. The mother also appeared as her own witness.
3. The theme song of the evidence led by the father through his witnesses named above is that they knew the parties and that the minor Jahangir is about 7 years old. That he goes to School That the father can look after the minor better than the mother, who is living with her parents. That the minor was living with his father, who was looking after him. Abdul Rehman Wani witness, however, admitted in his cross-examination that the minor was living with his mother at Noorpora when the father brought him from there about IV2 years ago.
4. According to Mohd. Ramzan Magrey, the appellant herein. Mst. Taja is his wife and that even if she comes to him now, he would look after her and rehabilitate her as his wife. That he is keen to bring her back to the matrimonial home. That about 7 years ago Jahangir was born at Noorpora. That for the last about 2V2 years the child is living With him. That Mst. Taja has been living away from him for the last about 2V2 years. That she went away with her father leaving the minor in his custody and has not returned ever since. To quote the appellant in his own words: —

"Wah Noorpoora men paida hua aur sath Taja takariben 2V2 sal se alag rah rahi hai aur Bache ko Walid ke pas chhod kar apne Baap ke sath chali gai aur wapas na ayi."
5. Gaffar Dar, the first witness appearing for the mother deposed that the relations between the parties had got strained because Ramzan Magrey had married another woman. That the minor child was born at Noorpora at the parental house of the wife and that Ramzan Magrey took away the child against the wishes of the mother from Noorpora.
6. Ghulam Hussan Bhat also deposed in the like tone and corroborated the testimony of Gaffar Dar.
7. Sona Sheikh was examined by the mother to prove the date of birth of the child. The witness is the Chowkidar of Noorpora. He produced the Chowkidari register relating to births. At serial No. 231031 dt. 1-7-1977 an entry exists according to which a son is shown to have been born to Taja at Noorpora. The name of the father of the child, as entered in the register, against the said entry, is Mohd. Ramzan Magrey resident of Magreypora.
8. Mst. Taja, appearing as her own witness, stated that out of her wedlock with Mohd Ramzan Magrey, Jahangir Ahmad was born. That about 2 years ago Ramzan Magrey married second time. She then left the matrimonial home and since then she is living with her parents at Noorpora That her fattier is looking after her. That, later on, Ramzan Magrey took away Jahangir from her house without her consent and that ever since then the child is at the mercy of his step mother. That she wants to look after the child herself for whom she has natural love and affection. That her father is prepared to meet expenses for the up-keep of the child. That the child was born about 5 years ago (prior to the recording of her statement).

That the birth of the child was got recorded in the birth register of the Chowkidar of Noorpora. Rest of her evidence is not really material for the disposal of this appeal and need not be reproduced.

9. This is the entire evidence in the case.
10. From a perusal of the aforesaid evidence, it transpires that the minor child Jahangir Ahmad (alias Prince) was born on 1-7-1977 and an entry of his birth stands recorded in the Chowkidar's register at Sr. No. 231031 dt. 1-7-1977. The assertion of the appellant that the child was born on 1-1-1975 has not been established. Though the father and all his witnesses deposed, in a parrot-like manner, that the child was going to school yet no certificate was produced from the school to show the date of birth of the child. No teacher was examined from any school either to corroborate the testimony of these witnesses that the child was going to school. The appellant produced no documentary evidence in support of the date of birth, as given by him and the oral evidence produced by him is of no value for none of those witnesses belong to Noorpora or were present at the time of the birth of the child. The Chowkidar, Sona Sheikh, who produced the Chowkidari register, was not at all challenged in cross-examination when he gave the date of birth of the child. In the face of his evidence which corroborates the statement of the mother it stands established that the child was born on 1-7-1977 and not on 1-1-1975, as alleged by the appellant. By giving the date of birth of the child as 1-1-1975 the appellant father was obviously attempting to make the child above the age of 7, perhaps in view of the position in the personal law but this attempt has failed.
11. Again, the attempt of the father made in his statement, to show that the mother had left the child in his custody herself and gone away to live with her parents, was presumably done by him to show that the mother did not care for the child so as to create an impression on the mind of the court that the mother has no love for the child. This attempt has also aborted not only the evidence of the mother and her other witnesses show that the appellant took away the child from Noorpora, against the wishes of his mother, but the appellant's own witness. Abdul Rehman Wani, also admitted in his cross-examination that the appellant had brought Jahangir Ahmad from Noorpora. The appellant, thus, stands contradicted on this aspect by his own witness and it stands established that Jahangir Ahmad was not left by Mst. Taja in the custody of Mohd. Ramzan Magrey, but that he brought the child from Noorpora, without the consent of the mother.
12. Mr. Hagroo learned counsel for the appellant has urged that even if the child was born on 1-7-1977, the father is his natural guardian and keeping in view the welfare of the minor, the court below was not justified in refusing the guardianship and custody to the father. Argued the learned counsel, that the mother has no source of income as she herself lives on the doles of her father and, therefore, she did not possess the capacity to look after the minor and the court below was not justified in declaring the mother to be the guardian and entrusting the custody of the child to her. It was further urged that the court below was not justified in presuming that the parties were governed by Hanafi Law and that it should have been investigated by the court below as to which school did the parties belong to before applying the principles of Hanafi Law. Learned counsel then submitted that for the last about 2 years the child has been living with the father and that the preference of the minor should be given due weight and, since the minor has expressed his wish to live with the father, it should not be ignored.
13. Mr. Z.A. Shah, learned counsel for the respondents has on the other hand, urged that welfare of the minor has been given supremacy, for determining the question of his custody and that the welfare of a minor of about 5 years of age can be more safe in the hands of the mother rather than in the hands, of the father who has taken another wife. According to Mr. Shah, a mother ordinarily cannot be deprived the custody of her minor son only on the ground that she does not have independent financial resources because the obligation of the father to maintain the child born out of the wedlock is not dependent upon the fact that the child must be in the custody of the father and that the obligation extends to all cases wherever the minor child is living as long as the minor cannot support himself.

14. Before proceeding any further, it would be advantageous to first notice the relevant provisions of Sees. 7, 17 and 25 of the Guardians and Wards Act. These read as under: —
- "7. (1) Where the court is satisfied that it is for the welfare of a minor that an order should be made:—
- (a) appointing a guardian of his person or property, or both, or
 - (b) declaring a person to be such a guardian, the court may make an order accordingly.
- (2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the court.
- (3) Where a guardian has been appointed by will or other instrument or appointed or declared by the court an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act."
- "17. (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.
- (5) The court shall not appoint or declare any person to be a guardian against his will.
- "25. (1) If a ward leaves or is removed from the custody of a guardian of his person, the court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.
- (2) For the purpose of arresting the ward, the court may exercise the power conferred on a Magistrate of the First Class by Sec. 100 of the Criminal P.C.
- (3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."
15. A bare reading of Sec. 25 shows that this section has no application unless it" is shown that the ward has left or has been removed from the custody of his or her guardian. The expression "Guardian" in this section is used in a wider sense and does not necessarily mean a guardian appointed or declared by a court. As a matter of fact, the expression guardian in this section includes a natural guardian or even a de facto guardian. In the instant case, the father had the custody of the child on the date of the application. It was not his case that the child had been removed from his custody at any time. The application of the father, therefore, under Sec. 25 of the Guardians and Wards Act was misconceived and did not lie. On the other hand, the wife Mst. Taja, could maintain the petition under Sec. 25 of the Act, since the ward had been removed from her custody by the appellant. This legal position, however, does not bring to an end the controversy raised in the appeal because the father had also prayed in his application that he be appointed as the guardian for the person of the minor, a prayer which essentially brings into play Sec.

17 of the Act read with Sec. 7 of the Act. Both these sections deal with declaration of guardian and the appointment of a guardian.

16. In the case of appointment of the guardian, the court is charged with a duty of appointing the most suitable person amongst the rival claimants for guardianship. Under Sec. 17, normally, a person who under the personal law would be entitled to the custody of the child of the minor in preference to any one else should be appointed as the guardian. This is, however, a flexible rule. The scope of sub-sec. (1) of Sec. 17 of the Act is that the court has to see who out of the several applicants has a preferential right to be appointed guardian of the minor under personal law of the minor keeping in view the welfare of the minor. Should, however, that person be found unfit, he will not be appointed the guardian and even where he is found fit enough if there exist weighty considerations against his appointment in comparison to the rival claimant, he will still not be appointed if that course is found necessary for the welfare of the minor. The welfare of the minor thus has been given greater significance in deciding the question of custody and guardianship under the Act.
17. Before elaborating on the question of "welfare of the minor," in the instant case, let me first examine the position under the personal law, to which a reference has been made in Sec. 17 of the Act also.
18. The argument of Mr. Hagroo that the trial court should first have investigated whether or not the parties belong to Hanafi School, before applying the law applicable to that school, appears to be only an argument of despair. At no point of time was the case of either party that they do not belong to the Hanafi School. The trial court could not embark upon an enquiry as to whether or not the parties belong to Hanafi School when that was not an issue in controversy. The parties, thought their counsel, based their arguments before the trial court on the basis that the parties were governed by Hanafi Law. That apart, under the Mahammadan Law the mother is entitled to Hizanat (Custody) of a male up to the end of 7 years and in the case of a female child, the custody belongs to the mother till the female reaches the age of puberty. It appears to me that since the position of law was clear to the appellant, he was attempting to advance the date of birth of the minor to show that he was above 7 years of age and this also shows that the application of Hanafi Law was never in dispute between the parties. According to Hanafi Law, as between a mother and father, the mother has preferential claim to the custody of a minor male below the age of 7 years. The mother would lose that right if she has any defect of character which would have rendered her unfit to have the custody of the minor (See AIR 1948 All 198).
19. In the instant case, keeping in view the fact that the date of birth of the minor, is 1-7-1977, it is obvious that the minor is below the age of 3 years. The mother is, therefore, the preferential guardian under the personal law. There is no evidence, nor even a suggestion that the mother, Mst. Taja has any defect of character which may render her unfit to have the custody of her minor son. The only ground on which the custody is sought to be denied to her on behalf of the appellant, is that the mother has no independent financial resources to maintain the minor son. This, is in my opinion, is not a valid ground on which custody can be denied to her. Irrespective of his right to custody, the responsibility of maintaining his minor son until he attains majority rests primarily upon the father so long as he is in a position to do so, because like a Hindu father, a Mohammadan father's duty to maintain his son until he attains majority is absolute. In this view of the matter, the lack of financial resources cannot stand in the way of the mother for getting custody of the minor child under the personal law of the parties.
20. Thus, in the facts and circumstances of this case, I find that the mother respondent No. 1, is the natural guardian and is entitled to the custody of the minor under the personal law.
21. However consideration of the personal law of the parties, though to an extent relevant, has become almost subservient to the Guardians and Wards Act in so far as the appointment of a guardian and custody of the minor is concerned. In appointing a guardian for a minor, the main question under the Guardians and Wards Act is — what order would be best for securing the welfare of the minor — that indeed is the first and paramount consideration in such case.

22. Section 17 of the Act enumerates certain tests which the court generally take into consideration while determining the question of the welfare of the minor. The principal considerations as suggested in that section are the age sex, and religion of the minor, the character and capacity of the proposed guardian: the nearness of bin of the proposed guardian to the miner and his relationship with the minor. Further, the wishes of the minor may also be taken into consideration if the minor is old enough to form an intelligent preference. The court may also be guided by the personal law of the parties while declaring the guardian of the minor. The court is not so much concerned with the feelings of the parents as with the welfare of the minor. As a matter of fact, the question of true welfare of a minor is of such paramount consideration that the recognized rights of the guardian under the personal law, to which a minor belongs, have been assigned a relatively subordinate position. The court to take into consideration every circumstance while determining the welfare of the minor and it must act in a manner as a wise parent acting for the true interest of the child would act. Neither the physical comforts that can be offered by one of the claimants nor his economic well being can override the interests of the minor. In re Mac Grath (1893) Ch D 143 Lord Justice Lindley laid down: —

"The dominant matter for the consideration of the court is the welfare of the child, but the welfare of the child is not to be measured by money or by physical comfort only. The word must be taken in its widest sense. The moral, the religious welfare of the child must be considered as well as his physical well being."

23. The aforesaid observation of Lord Justice Lindley have been followed by a Full Bench of the Kerala High Court in AIR 1973 Ker 100. The Supreme Court in AIR 1982 SC 1276 and (1973) 1 SCC 840 : (AIR 1973 SC 2090) have also reiterated the same relevant factors to be kept in view while determining the question of welfare of the minor for the purpose of appointing a guardian and entrusting the custody of the minor to a guardian.
24. Coming now to the facts of the present case: It stands established that the appellant has taken a second wife. It also stands established that the appellant had removed the minor from the custody of respondent No. 1 some time ago. With a view to determine as to what order should be passed in this case keeping in view the welfare of the minor. I directed the minor to be produced before me and I asked him certain questions in my chamber, both in the absence of and in the presence of the counsel for the parties. The record of the question and answers was prepared and has been kept on the file. The minor stated that he did not want to go with the mother and that he wanted to live with the father. He said that his mother had gone away with her father. He even refused to see his mother. The minor thus, expressed his preference to live with the father. I am, however, of the opinion that this minor child, aged less than 6 years, is not fit enough to form an intelligent preference which may be considered in deciding his welfare. I, therefore, cannot agree with Mr. Hagroo that the preference of the child must be given due weight. The minor, no doubt stated, that he did not want to go with the mother but keeping in view the fact that for the past some time, the minor has been in the custody of the father, it was but natural for him to refuse to go to his mother who was living separately. It was quite obvious to me when the minor answered certain questions before me that he was under the influence of the appellant. I therefore, cannot attach any weight to the preference given by the minor. The answers given by the minor, however, to some of the questions have an important bearing for determining his welfare. I enquired, from the minor if his father had married another woman and he replied in the affirmative. I then asked him with whom did he sleep at night and the answer given was that he slept with his father. To another question as to who helps him to take his bath or dress up or eat his food, the answer given was that it was the father and some times another elderly lady living in that house. Even to the question as to who takes him out for a walk etc., the reply of the minor was that it was his father only who used to take him out for walk or to play. Thus, it appears from answer to all these questions, which dealt with his daily routine, that the father alone was looking after various needs of the child personally. The answers given unmistakably show that the step mother is not taking any interest in the up-bringing of the boy. A child of such an impressionable age does not only need to be clothed and fed he needs the affection and care of his parents more particularly the mother

in these formative years. The father, admittedly, is a Government servant and he cannot be expected to be with the child all the time and the mother, therefore, is right in saying that the child is most of the time at the mercy of his step-mother, who in reality did not care for him. All these factors are suggestive of the position that it would not be in the interest of the welfare of the minor to entrust his custody and guardianship to the father. The mother, in the facts and circumstances of the case and also keeping in view the personal law of the parties, is in my opinion more suited for being entrusted with the custody and guardianship of the minor. The argument of Mr. Hagroo that the welfare of the minor cannot be assured with the mother because she herself is living on the doles of her father, does not appeal to me. Apart from the fact, as noticed earlier, that the obligation to maintain the minor till he reaches the age of majority or is able to maintain himself, is of the father. I am of the opinion that the welfare of the minor cannot be measured in terms of money. The 'capacity of a guardian to maintain the minor' as contemplated by S. 17(1) of the Act, cannot solely depend upon the financial resources. The capacity would include the physical and the moral capacity and the capacity to look after the physical, psychological and moral well being of the minor. Had the capacity to be judged only in terms of money, then the poor parents in the country would not be able to retain the custody of their minor children, if for any reason, these children have remained with other relations, having better financial status. Law does not favour such a situation. It is a matter of common-knowledge that in this country most of the wives are dependent upon their husbands for financial support. If independent financial position is to be considered as the predominant criteria for determining her capacity to retain, the custody of a child, most of the Indian wives (mothers) would have to be denied that right, should, an occasion so arise. I, therefore, do not find any reason to deny the custody, of the minor to the mother only on the ground that she has no independent source of income and is herself being supported by her father.

25. After giving my careful consideration to various facts and circumstances of this case, I am of the opinion that respondent No. 1, being, the mother and natural guardian of her minor son, Jahangir Ahmad, is entitled to be declared as his guardian because nothing has been proved against her for holding her unfit to be so declared. In my opinion, it will be for the welfare of the minor, if his custody, is restored to the mother respondent No. 1. The love and affection which the mother can give to her son cannot be bestowed upon him by anybody else much less by his stepmother. She is more suited to look after the physical, psychological and moral welfare of the minor, than the father who would not have much time to devote to the child, being a working man. No exceptional circumstance has been proved or brought to my notice which may disentitle the mother, respondent No. 1 to the grant of custody of the minor. Jahangir Ahmad. The learned trial court was, thus, perfectly justified in rejecting the application of the appellant under S. 25/17 of the Guardians and Wards Act and of appointing respondent No. 1 as the guardian for the person of minor Jahangir Ahmad and I find no reason to interfere with the same.
26. While declaring respondent No. 1, Mst. Taja to be the guardian of the minor Jahangir Ahmad, I further declare that it will be for the welfare of the minor to return him to the custody of Mst. Taja. The appellant is therefore, directed to deliver the custody of the minor Jahangir Ahmad to respondent No. 1 within one week from today failing which the said minor may be recovered in accordance with law (S. 100 Cr. P.C.) and delivered to the custody of Mst. Taja respondent No. 1. The necessary warrants for that purpose shall be issued by the trial court, on an application of respondent, should the necessity so arise. The directions, of this court given hereinabove, shall be strictly and punctually complied, with by the appellant.
27. The appeal fails and is dismissed, but with no order as to costs.

Appeal dismissed.

□□□

ANIL KUMAR VERSUS STATE OF J & K

In the High Court of Jammu and Kashmir at Jammu

Cr. Rev. No. 64/2016

(Before Hon'ble Mr. Justice Sanjay Kumar Gupta)

Anil Kumar

Versus

State of J&K

Cr. Rev. No. 64/2016 & M.P. No. 01/2016

Decided on July 24, 2017

For petitioner(s): Mr. Roop Lal, Advocate.

For respondent(s): Mr. S.S. Nanda, Sr. AAG for respondent No. 1.

Mr. Koshal Parihar, Advocate for respondent No. 2 & 3.

This appeal is directed against the order of the learned District Judge, Jammu, dated 30-4-1976 in a petition under Sections 10/13 of the Hindu Marriage Act. The trial Judge holding that there was no substance in the petition and that the appellant having failed to prove the grounds alleged by him in the petition for judicial separation/divorce dismissed the petition with costs.

- **The case at hand however on facts stands distinguished from Gollins (1963-2 All ER 966) (supra) and the Bombay case. The husband here is not complaining of any rude behaviour or of a particular conduct of the wife injurious to the health of the husband. It was not the case of the husband that the illness was deliberate or aimed at him with intention to injure or harm him. The disease itself as it transpires from evidence was not of the nature that would lead a reasonable person to conclude that it would be dangerous for the health of the husband to continue to remain united in the bond of marriage with the wife. The alleged disease was neither contagious nor incurable. In fact the bad smell was not there throughout the day and night. Its effect could be diminished to a large extent by removing the crusts from the nose. It was not the case of the husband that with intention to harm him, wife declined to cleanse her nose or refused treatment. On facts, it appears, on the other hand, that no serious attempt has ever been made by the husband to provide proper treatment to the wife.**

We are therefore, convinced that the appellant has not been able to establish the factum of alleged cruelty by any evidence whatsoever. May be the wife was speaking the truth when she alleged that the husband in order to take another person as his wife was vainly trying to find fault with her nose and putting up pretexts which were imaginary and false. Holding, therefore, that on facts of the case the appellant has not been successful in showing that the act complained of was an act of cruelty aimed at him by his wife, and also that on facts appearing in the case intention was a necessary element to be established which has not been done, this appeal we dismiss but we make no order as to costs.

Hon'ble Mr. Justice Sanjay Kumar Gupta :— The instant revision petition is filed by one Anil Kumar S/o Sh. Ram Ditta R/o Village Thalwal, Tehsil Mandal, District Jammu against the order dated 06.10.2016 of learned Special Excise Magistrate, Jammu, allowing the application filed by Jissa Ram, father of Shilpa Devi, for handing over the custody of Shilpa Devi who was kept in Apna Ghar, Kachi Chawni, Jammu on suparadnama as also

against order dated 12.07.2016 passed by the learned Magistrate dismissing the application filed by Anil Kumar, husband of Shilpa Devi for the release of Shilpa Devi W/o Anil Kumar from the custody of Incharge Apna Ghar, Kachi Chawni, Jammu, and allow her to join the society of her husband or otherwise according to her choice.

2. It is stated in the petition that the petitioner is the husband of respondent No. 3 Shilpa Devi and the marriage between the parties was solemnized on 08.03.2016 in accordance with Hindu Rites. That before solemnization of the marriage, respondent No. 3 was got medically examined from Arora X-Ray, Ultrasound, EEG and ECG Clinic, opposite SMGS Hospital Gate, Shalimar Road Jammu for determining her age and the Radiologist after conducting the test of different body bones including wrist, elbow & shoulder, has opined that the age of Shilpa Devi was 18 years. That on 09.03.2016 respondent No. 3, after filing a complaint against respondent No. 2 and other relations, was returning back to her matrimonial house along with her husband, they were intercepted by the police and produced before the Court. The petitioner was taken to Police Station, Nowabad whereas respondent No. 3 was sent to Apna Ghar, Kachi Chawni, Jammu and on the same day, respondent no. 3 was medically examined by the police in Govt. Hospital Sarwal, Jammu, and after conducting ossification test on Shilpa Devi, the radiologist gave an opinion that her age was more than 16 years and less than 18 years. On 11.03.2016, the statement of respondent No. 3 was recorded under Section 164-A Cr.P.C. and in her statement the age was recorded as 20 years and in her statement, she stated that she got married with Anil Kumar out of her free will and without any coercion.
3. It is further stated that the petitioner filed an application before the trial Court for release of respondent No. 3 from custody of Incharge Apna Ghar, Kachi Chawni Jammu and allow her to join the society of her husband, but the trial Court dismissed the same vide order dated 12.07.2016 ignoring the fact and the law on the subject. Respondent No. 2 (father of respondent No. 3) also filed an application for handing over the custody of respondent No. 3, which came to be allowed by the trial Court vide order dated 06.10.2016 directing the handing over of the prosecutrix to natural guardian father subject to his executing bond with additional surety who shall be responsible for causing any physical harm to the victim.
4. The instant revision petition has been preferred against impugned orders on the ground that the same are against facts and law. The challan in the case has been presented and the petitioner has been charge sheeted under Section 363 RPC although no offence under Section 363 RPC is made out against the petitioner. The petitioner being husband is the legal guardian of respondent No. 3. Order dated 06.10.2016 is in violation of natural justice as the petitioner being husband of respondent No. 3 has not been afforded an opportunity of being heard. The trial Court has ignored the statement of the prosecution witness namely Shilpa Devi recorded in the Court as witness under Section 164-A Cr.P.C. as well as the statement of the prosecutrix recorded in the Court wherein she has expressed her willingness to reside with her husband with whom she was duly married. In her statement recorded under section 164-A Cr.P.C, she has stated that she had called Anil Kumar through telephone and left with him during the night and she married with him out of her free will and without any coercion. Thus, orders impugned are also against the wishes of respondent No. 3.
5. In support of his contentions, learned counsel for the petitioner relies upon the decision of Hon'ble Supreme Court in case titled as 'S. Varadarajan v. State of Madras' reported as 1965 AIR (SC) 942, as also the decision of High Court of Himachal Pradesh in case titled as ^State of H.P. v. Mano alias Man Singh' reported in 2010 Law Suit (HP) 2151.
6. With the aforementioned submissions, learned counsel prays for setting aside of the impugned orders and allowing of the instant petition.
7. Heard learned counsel at length and with the assistance rendered by them, gone through the impugned orders passed by the learned trial Court.

8. From the perusal of record annexed with the file, it reveals that petitioner is facing trial under section 363 RPC before Court below with the allegation that he has kidnapped respondent No. 3 Shilpa Devi. During the course of trial before the court below, petitioner moved an application for releasing of Shilpa Devi from the custody of Incharge, Apna Ghar, Kachi Chawni Jammu. One application was also filed by Father of respondent No. 3, Jeesa Ram, for custody of his daughter. Trial Court after inviting the objections, passed two orders on different dates by virtue of which application of husband of the petitioner was rejected vide order dated 12.07.2016 and application by the father was allowed vide order dated 06.10.2016. The court below categorically held that the prosecutrix was minor and has not attained the age of majority so she cannot be handed over to the petitioner.
9. Court below has categorically held in its orders that school leaving certificate of prosecutrix would reveal that her date of birth is 22.1.2000 and she went missing on 07.03.2016, so she was minor at that time.
10. The alleged marriage agreement executed between prosecutrix and petitioner is dated 08.03.2016; similarly the Arya Samaj certificate is also dated 08.03.2016. So as per date of birth entered in school certificate, the prosecutrix was minor at that time. The argument of counsel for petitioner that as per Doctor Certificate, which was given after conducting test of bones of different parts, the age of prosecutrix comes to 18 years, is not tenable. Hon'ble Apex court in case titled 'State of MP v. Anoop Singh' (Cr. Appeal 442/2010 decided on 03.07.2015) has held as under: —

"This Court in the case of Mahadeo S/o Kerba Maske v. State of Maharashtra, (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

"Rule 12(3): In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

- (a)
 - (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
 - (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
 - (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

13. This Court further held in paragraph 12 of Mahadeo S/o Kerba Maske (supra) as under.

"Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well." (Emphasis supplied) This Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix. In paragraph 13, this Court observed:

"In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her V standard and in the school leaving certificate issued by the school under Exhibit

54, the date of birth has been clearly noted as 20.05.1990 and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.05.1990. the reliance placed upon the said evidence by the Courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of occurrence was perfectly justified and we do not find any grounds to interfere with the same." 14. In the present case, we have before us two documents which support the case of the prosecutrix that she was below 16 years of age at the time the incident took place. These documents can be used for ascertaining the age of the prosecutrix as per Rule 12(3)(b). The difference of two days in the dates, in our considered view, is immaterial and just on this minor discrepancy, the evidence in the form of Exts. P/5 and P/6 cannot be discarded. Therefore, the Trial Court was correct in relying on the documents."

11. So at this stage school certificate of victim can be relied in view of above law; the victim was, thus, minor at the time of occurrence. Any consent given by minor is no consent under law. In this way, custody of minor victim, cannot be given to petitioner, who is otherwise facing trial in criminal case of her kidnapping. The custody of a minor victim has to be given to father, who is termed as natural guardian under law. The laws cited by learned counsel for petitioner are not applicable in present case. Because facts of those cases were entirely different to that of present case. Thus, both the orders passed by Court below do not suffer from any infirmity of law. These are upheld accordingly.
12. Hence this petition is dismissed.

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SWAPNA SATPATHY @ UPADHYAYA VERSUS UNKNOWN

Orissa High Court

W.P.(CRL) No. 665 OF 2013

(Before The Honourable Shri Justice M.M. Das and The Honourable Dr. Justice A.K.Rath)

Swapna Satpathy @ Upadhyaya. Petitioner

-Versus-

State of Orissa and others. Opp. Parties

For Petitioner: M/s. P.K. Ray and N. Dash.

For opp. parties: Addl. Government Advocate.

(For opp. Parties 1 to 3) M/s. D.Panda, D.P.Dhal, C.R.Panda & R. Panda.

(For O.Ps 4 to 8)

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Decided on 22.01.2014

Hon'ble Mr. Justice M. M. Das :— This writ petition has been filed by the wife as the petitioner for issuance of writ of habeas corpus for recovering the son of the petitioner from the custody of the opp. Party no. 4 - husband allegedly under wrongly confinement.

2. The opp. Party no. 4 - husband raised a question of maintainability of the writ petition. Mr. P.K. Ray, learned counsel for the petitioner - wife relied upon the decisions of the Allahabad High Court in Habeas Corpus writ petitions in the cases of Baby Kavya Awasthi and another v. State of U.P. and others, (Civil Misc. Habeas Corpus Writ Petition No. 10996 of 2013 decided on 22.3.2013) and Smt. Sunita Malik v. Dharam Veer Singh Malik and another, (Habeas Corpus Writ Petition No. 2641 of 1990 decided on 1.8.1991), where the Allahabad High Court negated the preliminary objection with regard to maintainability of a writ of habeas corpus qua the provisions made in the Guardians and Wards Act, 1890 (for short, 'the Act') by holding that if proceedings under the Act is initiated by the mother, for the custody of her minor daughter aged about two years, the proceedings and the appeal thereunder will take long time to finally decide the immediate issue of custody and, therefore, the said remedy under the Act cannot be said to be an adequate remedy nor can it be said to be an efficacious remedy.
3. The Hon'ble Supreme Court in the case of Gaurav Nagpal v. Sumedha Nagpal, AIR 2009 SC 557, also laid down that 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.
4. Mr. Panda, learned counsel appearing on behalf of the opp. Parties 4 to 8, however, submitted that the petitioner earlier took recourse to section 26 of the Hindu Marriage Act for custody of the breast fed child before the Judge, Family Court, who granted the custody of the child in favour of the petitioner (mother) against which the opp. Party no.4 - husband preferred MATA No. 11 of 2013 and this Court finding that an application under section 26 of the Hindu Marriage Act cannot be maintained when no proceeding is pending under the said Hindu Marriage Act, reversed the said order of the Judge, Family Court and, thereafter, the child is in custody of the opp. Party no. 4 - husband (father). Mr. Panda further submitted

that taking the child from his father's custody will adversely affect the sentiments and upbringing of the child. He also submitted that if the custody of the child is given to the petitioner - wife, she will not be able to look after the upbringing of the child as she is not cable of doing so.

5. The brother of the petitioner - wife has filed an affidavit with regard to the financial status of his sister (petitioner) wherein it has been stated that the brother is supporting his sister by paying Rs. 10,000/- per month as the opp. party - husband is not paying the maintenance and they will take all care of the petitioner as well as the child if the child is left in the custody of the petitioner - wife. The petitioner herself has filed an affidavit that she has started earning now after securing a new employment in a charitable trust group of schools and she would have sufficient means to maintain the child which would include all expenses of the child. She has further stated that she is living with her parents, brother and sister-in-law and apart from her own income, her parents, who own a considerable amount of ancestral property, would support her. She is a qualified person having B.Tech. Degree in Civil Engineering and was financially independent till her marriage in 2011, as she was working as a Junior Engineer in an Architect Studio in Bhubaneswar for three years until she was compelled by her husband and in-laws to quit the job. From her affidavit, it is also revealed that her brother is also a Civil Engineer, currently working as a Deputy Manager, Bhusan Steel Ltd. Dhenkanal and his sister-in-law is also a B. Tech. Degree Holder in I.T. and is now working. Her elder sister is a school teacher and her younger sister is also qualified having acquired M.B. A. degree and is a H.R. employee.
6. This Court, therefore, finding that the writ of habeas corpus would be maintainable, more so, in view of the decision of the Hon'ble Supreme Court in the case of Gaurav Nagpal (supra) that English Law in this aspect is also applicable to India and the Hon'ble Supreme Court has quoted the Halsbury's Law of England to the effect that where in any proceedings before any court, the custody or upbringing of the minor is in question, then in deciding that question, the court must have regard to the minor's welfare as the first and paramount consideration, this Court is of the view that in this writ petition for habeas corpus, the Court is required to examine and find out the welfare of the child by taking the same as the paramount consideration.
7. As quoted by the Hon'ble Supreme Court in the case of Gaurav Nagpal (supra), in Habeas Corpus, Vol. I, page 581, Bailey states as follows:-

"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".
8. This Court has no hesitation in examining the matter with regard to the welfare of the child while deciding as to who should have the child's custody. This being a writ of Habeas Corpus, we would like to further state that in such a proceeding for determining the custody of the child, the Court is required to exercise its inherent and equitable power and exert the force of the State as *parens patriae* for the protection of its infant ward and, thus, the very nature of this proceeding and scope of enquiry and the result sought to be achieved call for the exercise of the jurisdiction of this Court as a Court of equity. The Court is not required, in such situation to test the legality of a confinement or restraint as contemplated in case of writ of habeas corpus, the primary purpose of exercising such jurisdiction being to exercise its judicial

discretion for determining what is best for the welfare of the child even though the special Statute may prescribe that the father is the legal guardian of the child.

9. To determine the above question appropriately, we state the facts involved in the case in gist. The marriage between the petitioner and the opp. Party no. 4 took pace on 24.2.2011. It was an arranged marriage on negotiation between both the families. After marriage, the petitioner stayed in her matrimonial home at Bhubaneswar. The male child was born out of their wedlock, to the petitioner on 30.11.2011. They resided together until July, 2012 with the elder brother of opp. Party no. 4 - husband and, thereafter, they remained in separate rented premises. The parties are living separately from 24.10.2012. The petitioner - wife filed an application under section 26 of the Hindu Marriage Act, 1955 along with an application for interim relief before the learned Judge, Family Court, Bhubaneswar seeking custody of the minor child. The learned Judge, Family Court issued a direction to the opp. Party no.4-husband to deliver the child to the custody of the petitioner-wife within fifteen days from the date of the said order. The said order was challenged before this Court in MATA No. 11 of 2013. This Court finding that there is no proceeding pending, as contemplated under section 26 of the Hindu Marriage Act, disposed of the said MATA holding that the application under section 26 of the Hindu Marriage Act was not maintainable.
10. It is alleged by the petitioner-wife that immediately after this Court passed the aforesaid order, the opp. Party no. 4- husband forcibly took the custody of the child for which the present writ petition has been filed.
11. Keeping the settled position of law in view that the welfare and interest of the child is the paramount consideration for taking a decision with regard to the custody of the child, we find that the child is aged about three years, who can be appropriately said to be an infant. Now considering that the three years old child will be deprived of his mother's care and vigilance, which is considered to be indispensable in this age for proper physical and mental growth of the child and further considering that there cannot be any mother's substitute for a child, who is always watchful over the cradle and of the active moments of her offspring, coupled with the fact that the mother, i.e., the petitioner, who is residing with her parents is in an atmosphere, where all the family members are well educated and are earning , we are of the view that the welfare and interest of the child would be best served if the custody of the child is given to the petitioner - mother with certain conditions.
12. We, therefore, direct the opp. party no. 4 - husband to give the custody of the child to the petitioner-wife within a fortnight hence by leaving the child with her mother at her residence where she is residing now subject to the condition that the opp. Party no. 4 - father will have a visiting right to visit his son once in every month at the house where the mother (petitioner) is residing. The opp. Party no. 4 - father shall be permitted to stay with their son continuously for at least not less than two hours during his visit with prior intimation to the petitioner - wife. However, failing to comply with this order, the opp. Party no. 4 - husband shall be directed to produce the child before this Court and the petitioner - wife shall be also directed to remain present to take the custody of the child.
13. With the aforesaid direction, the writ petition is disposed of.

M.M. Das, J.

Dr. A.K. Rath, J. I agree.

Dr. A.K.Rath, J.

□□□

VINAY GUPTA VERSUS SAVERI NAYAK

Orissa High Court

CRLREV NO.635 of 2016

(Before The Honourable Mr. Justice S.K. Sahoo)

Vinay Gupta *Petitioner*

-Versus-

Saveri Nayak *Opp. Party*

For Petitioner: - Mr. Raghu Tandan Gyanloka Mohanty Divya Bansal

For Opp. Party: - Mr. Sourya Sundar Das (Senior Advocate) Suman Modi Byomokesh Sahu Shalaka Das

From the order dated 18.07.2016 passed by the S.D.J.M. (Sadar), Cuttack in D.V. CRLMC No.179 of 2016 and the order dated 02.08.2016 passed by the Sessions Judge, Cuttack in Criminal Appeal No.70 of 2016.

Date of Hearing-01.11.2016

Date of Judgment-28.11.2016

Hon'ble Mr. Justice S. K. Sahoo :— The little angel 'Sadhika' came to see the beauty of this wonderful world with an honest face, simple looks and heart touching smiles. She was full of expectations that her parents would be her role models and would shoulder all the responsibilities to give her the wings of independence and allow her to grow of in an atmosphere of unselfishness. She wanted to prove herself to be the greatest gift of God with the divine love of her parents. Time rolled on. With the passage of time, her dream started shattering. She kept on wondering, fearing and doubting her peaceful existence. She saw her parents fighting for their ego forgetting all ethics of domestic discipline. She started crying, "Please Papa Mama! Don't spoil your tiny creation. Be magnanimous in forgiving each other. Don't fight for my custody. I can't be happy with one without the other. Come together. I am waiting for both of you with open arms. Hold my hands from both the sides. Lead me ahead. With all your brilliancy, we can recreate a heavenly home and prove ourselves to be the best family in the world."

The petitioner Vinay Gupta has filed this criminal revision petition challenging the impugned order dated 02.08.2016 passed by the learned Sessions Judge, Cuttack in Criminal Appeal No. 70 of 2016 in dismissing his criminal appeal and thereby upholding the order dated 18.07.2016 passed by the learned S.D.J.M.(Sadar), Cuttack in D.V. CRLMC No. 179 of 2016 in allowing the petition filed by the opposite party Saveri Nayak under section 23(2) of the Protection of Women from Domestic Violence Act, 2005 (hereafter 'P.W.D.V. Act') for ex-parte order of interim custody of the minor girl child of the parties namely, Sadhika Gupta in favour of the opposite party and directing District Protection Officer (D.P.O.), Cuttack for the production of the girl child from the custody of the petitioner on or before 08.08.2016 in his Court.

2. On 01.07.2016 the opposite party filed an application under sections 12, 18 and 21 of P.W.D.V. Act against the petitioner in the Court of learned S.D.J.M. (Sadar), Cuttack which was registered as D.V. CRLMC No. 179 of 2016.

It is the case of the opposite party that she is the legally married wife of the petitioner and their marriage was solemnized on 23rd February 2003 at Ludhiana in accordance with Hindu rites and customs and both of them are software professionals working in Multi National Company. After marriage, both the

petitioner and the opposite party stayed at Noida, U.P. till December 2003 and then they shifted to Gurgoan, Haryana in January 2004 and stayed till 2010. During this period, it is the case of the opposite party that the petitioner tortured her both physically and mentally and one year after marriage, the petitioner and his family members started demanding dowry and the petitioner did not even hesitate to assault the opposite party demanding a son. In May 2007 when the opposite party had to undergo surgery for the removal of her right ovary, neither the petitioner nor his parents took care of her. In December 2007 when the opposite party met with an accident and sustained injury on her spinal cord and after surgery, the doctor advised her to take complete bed rest for three months, the petitioner and his family members created an unhealthy atmosphere for which the opposite party had to undergo a state of depression, leading to migraine and was often in a state of anxiety. In January 2011, the opposite party became pregnant but the petitioner and his parents did not cooperate with the opposite party. They were expecting a male child. The opposite party came to her native place at Cuttack where she gave birth to a girl child namely Mehr @ Sadhika Gupta in the month of August 2011. The petitioner did not spend any amount towards the delivery and upbringing of the girl child and everything was managed by the opposite party with a lot of hardship and agony. As a girl child was born, the petitioner and his parents cursed the child and the opposite party was not provided with any kind of care and affection. During the 21st day celebration of the girl child at Cuttack, the petitioner created a lot of nuisance for which the opposite party had to undergo further depression and agony. By the time the girl child was born, both the petitioner and the opposite party had been transferred to Bengaluru for which the opposite party left the girl child in the care of her parents at Cuttack and she was frequently visiting her. The petitioner never accompanied the opposite party to Cuttack or enquiring about the well being of the child. The opposite party was trying her best to convince the petitioner to show fatherly love, affection and inclination towards the child but she had to face the anger and merciless beating in the hands of the petitioner. When both the petitioner and the opposite party were transferred to Noida, the opposite party was subjected to continuous torture for which in November 2015, she left Noida with her four years girl child and came to her father's place at Cuttack. Both the petitioner and his parents were hurling abusive words at the opposite party, her parents and her daughter over telephone. The girl child was admitted in a school in C.D.A., Cuttack. Due to physical and mental torture, the opposite party went on depression for which in the 1st week of June 2016, the opposite party and her mother came to Bengaluru for medical checkup. The girl child had also accompanied them. The opposite party informed the petitioner about her visit to Bengaluru for medical checkup. After five days, the petitioner came to the hotel where the opposite party was staying and on 14th June 2016 when the opposite party was in deep sleep, the petitioner took away the sleeping child without intimating the opposite party and left the hotel and nobody in the hotel could guess the foul play of the petitioner. The CCTV footage of the hotel confirmed that it was around 7.40 a.m. when the petitioner left with the girl child. The petitioner switched off his mobile phone for which the whereabouts of the girl child could not be known. The opposite party lodged an F.I.R. against the petitioner on 15th June 2016 for which a case under section 363 of the Indian Penal Code was registered. The petitioner travelled via road from Bengaluru to Chennai and then he took a flight from Chennai to Delhi and after reaching at Delhi, the petitioner answered to the call of the opposite party. The girl child also talked with the opposite party and she was desperate to come back to the opposite party.

It is further case of the opposite party that the conduct of the petitioner towards her and her child amounts to domestic violence and the girl child who was below the age of five years is under illegal/unlawful confinement of the parents of the petitioner. It is stated that the girl child needed the company, love and affection of the opposite party and that the opposite party is entitled to the custody of the child.

It was prayed for by the opposite party in her application that the petitioner be directed not to cause any domestic violence to the opposite party and her daughter and to further handover the daughter to the opposite party forthwith.

3. On 04.07.2016 the opposite party filed an application under section 23 of the P.W.D.V. Act before the learned S.D.J.M.(Sadar), Cuttack in the aforesaid D.V. CRLMC No.179 of 2016 praying for ex parte interim custody of the daughter and for a direction to the petitioner to hand over the girl child to the opposite party forthwith. It is stated in the application that the petitioner is working at New Delhi and he was spending fourteen to sixteen hours in his office and leaving no time to spend with the girl child and therefore, it is difficult to conceive that the child would be living in any kind of congenial atmosphere and accordingly, ex-parte order of interim custody of the girl child was prayed for.
4. The learned Magistrate vide order dated 11.07.2016 after hearing the learned counsel for the opposite party was of the view that the domestic incident report indicates the age of the girl child to be four years. It was held that the petitioner had not provided the address where the girl child was kept. The opposite party had given four addresses of the petitioner and accordingly, the Court gave opportunity to the opposite party to clarify regarding the complete address of the petitioner so that it can be disposed of. In pursuance of such order, the learned counsel for the opposite party filed a memo before the Magistrate with complete address of the petitioner.
5. The learned Magistrate passed the impugned order on 18.07.2016 wherein he has been pleased to observe that as per the domestic incident report, the petitioner subjected the opposite party to domestic violence and the age of the daughter of the parties is about four years. The learned Magistrate allowed the prayer made in the petition under section 23(2) of the P.W.D.V. Act regarding ex parte order for interim custody of the girl child in favour of the opposite party and directed the District Protection Officer (DPO), Cuttack to take necessary assistance from DCP, Cuttack regarding proper implementation of the order and to produce the girl child from the custody of the petitioner on or before 08.08.2016 in his Court.
6. The petitioner challenged the impugned order dated 18.07.2016 of the learned S.D.J.M.(Sadar), Cuttack before the learned Sessions Judge, Cuttack in Criminal Appeal No. 70 of 2016 and the learned Appellate Court vide impugned order dated 02.08.2016 has been pleased to observe that the petitioner is yet to make his appearance before the learned Magistrate who is competent to pass custody order in regard to the girl child under section 21 of the P.W.D.V. Act and section 25(2) of the P.W.D.V. Act gives a scope to the Court for alteration, modification or revocation of any order passed under the P.W.D.V. Act. While dismissing the Criminal Appeal, liberty was granted to the petitioner to approach the learned Magistrate, in the event of which it was directed that the learned Magistrate shall give opportunity of hearing to the petitioner on the question of custody of the child and to pass necessary order.
7. Mr. Raghu Tandan, learned counsel for the petitioner emphatically contended that passing of an ex-parte interim order regarding custody of the child in favour of the opposite party is not permissible under section 23(2) of P.W.D.V. Act and therefore, the learned Magistrate has exceeded his jurisdiction while passing the impugned order dated 18.07.2016. He further contended that the impugned order is in the nature of final relief at the interim stage which should not have been passed. He submitted that the opposite party is suffering from obsessive compulsive disorder (OCD) since 1997 and she had suffered three episodes of depression and also suffered suicidal ideations and she is still undergoing periodic treatment at NIMHANS, Bengaluru and she has suppressed all these aspects of her psychiatric disorder in her application filed before the Magistrate which amounts to playing fraud upon the Court and therefore, the interim order should be set aside. It was further contended that the welfare of the child is of paramount consideration and the Court should not have hastily passed the impugned order without considering such vital aspect and without hearing the petitioner in absence of any irreparable or irretrievable situation. It was further contended that a father cannot be said to have kidnapped his own child and a false case has been foisted by the opposite party with an oblique motive. While concluding his arguments, Mr. Tandan submitted that even though as per the Hindu Minority and Guardianship Act, ordinarily the custody of a minor child below the age of five years should be with the mother but if in the interest of the child, custody of the mother is not beneficial then the Court is not bound to give such custody to the mother. It was urged that since in the main application, the petitioner has already filed

his reply so also an application under section 25(2) of the P.W.D.V. Act before the Magistrate for keeping the impugned order dated 18.07.2016 in abeyance and for revocation of the impugned order, necessary direction be given to the Magistrate to dispose of the proceeding in accordance with law expeditiously without disturbing the custody of the girl child with the petitioner.

Mr. Sourya Sundar Das, learned Senior Advocate on the other hand in his inimitable style, forcefully but elegantly urged that the combined reading of the provisions under sections 21 and 23 of the P.W.D.V. Act clearly envisage that an ex parte order relating to interim custody of the child can be passed on the basis of the affidavit filed by the aggrieved party if the Magistrate is satisfied that the application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is likelihood that the respondent might commit an act of domestic violence. Though the word 'may' has been used for granting ex parte order on the basis of the affidavit in sub-section (2) of section 23 of the P.W.D.V. Act but looking at the purpose the Act seeks to achieve, the expression 'may' is to be construed as 'shall'. The learned counsel placed sub-section (2) of section 28 of the P.W.D.V. Act which permits the Court in laying down its own procedure for disposal of the application under sub-section (2) of section 23 of the P.W.D.V. Act. It was contended that on a conjoint reading of sections 21, 23(2) and 28(2) of the P.W.D.V. Act, it can be safely inferred that the Magistrate has got ample jurisdiction to pass ex parte interim orders with regard to the custody of child in favour of the aggrieved party. The learned counsel further urged that the conduct of the petitioner in taking away the minor child from Bengaluru hotel while the opposite party was sleeping coupled with the fact that the petitioner had never taken any responsibility of the child at any point of time earlier, it can be said to be a rare and exceptional case where the Court passed the ex parte interim order and no fault can be found with the same. It was contended that the opposite party has made categorical assertions in the application filed before the Magistrate that the petitioner subjected her to physical assault and mental harassment and she has further stated that because of the conduct of the petitioner, the opposite party was going into mental depression and therefore, there was no suppression of facts as contended by the learned counsel for the petitioner. It is further contended that section 6 of the Hindu Minority and Guardianship Act provides that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. It was urged that a mother would be in the best position to communicate with the daughter with regard to biological changes happening to her which due to shyness, she might not disclose the same to her father. The learned counsel emphasized that obsessive compulsive disorder (OCD) cannot be construed as a psychological disorder like schizophrenia. He submitted that the petitioner who is remaining busy in his official works for about fourteen hours a day cannot take care of the child's mental, physical and emotional needs rather the opposite party who is a successful software professional for nearly sixteen years and is financially independent and was taking all the care of the child single handedly is the best person in the circumstances to get the custody of the child for the welfare of the child which is of paramount consideration. It was urged that the child has been deprived of motherly love and affection due to highhandedness of the petitioner for which a criminal case of kidnapping has already been initiated against him. The learned counsel further submitted that P.W.D.V. Act does not provide a revision petition against the order of the Appellate Court and since in view of section 12(5) of the P.W.D.V. Act, the Magistrate has to make every endeavour to dispose of the application under section 12 within a period of sixty days, it would not be proper to interfere with the concurrent findings of the Courts below and therefore, the revision petition should be dismissed.

Maintainability of the revision petition

8. There is no dispute that there is no specific provision in P.W.D.V. Act for filing any revision against the judgment and order passed by the Appellate Court. Section 29 of the P.W.D.V. Act indicates that an appeal to the Court of Session is maintainable against the order passed by the Magistrate. The Act empowers the Magistrate to pass different orders like protection orders (section 18), residence orders (section 19), monetary reliefs (section 20), custody orders (section 21) and compensation orders (section 22). The

Act also empowers the Magistrate to pass interim orders and even ex parte orders in view of section 23. If either the aggrieved person or the respondent is aggrieved by any of the aforesaid orders, the remedy lies with her/him to challenge the same by filing an appeal under section 29 of the P.W.D.V. Act before the Court of Session.

Section 28(1) of the P.W.D.V. Act indicates that all the proceedings under sections 12, 18, 19, 20, 21, 22 and 23 so also the offences under section 31 of the P.W.D.V. Act shall be governed by the provisions of the Code of Criminal Procedure, if it is not otherwise provided in the Act. The Code of Criminal Procedure under section 397 of Cr.P.C. which deals with exercise of power of revision empowers the High Court to call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying himself about the correctness, legality or propriety of any finding or order or sentence passed and also to verify the regularity of any proceeding of such inferior Court. Section 401 of Cr.P.C. deals with powers of revision of the High Court. Sub-section (4) of section 401 of Cr.P.C. states that under the Code, if an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. Therefore, a party aggrieved by an order passed by the Magistrate under a P.W.D.V. Act proceeding cannot challenge the order directly before the High Court in a revision petition nor even the Court of Session is empowered to entertain a revision petition. So far as the other Acts are concerned, in absence of any specific provision in those Acts, against the order of the Magistrate, a revision petition is maintainable either to the Court of Session or to the High Court but if a revision application has been made either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them in view of the bar under sub-section (3) of section 397 of Cr.P.C. Second revision application by the same party to the High Court after the dismissal of the first revision application by the Sessions Judge is not ordinarily maintainable even under the garb of section 482 of Cr.P.C. The whole idea is to prevent unnecessary delay and multiplicity of the proceedings. However in case of *Krishnan - Vrs.- Krishnaveni* reported in (1997) 13 Orissa Criminal Reports (SC) 41, the Hon'ble Supreme Court held that when the High Court on examination of record finds that there is grave miscarriage of justice or abuse of process of the Courts or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensure. It is, therefore, to meet ends of justice or to prevent abuse of process that the High Court is preserved with inherent power and would be justified, under such circumstances, to exercise the inherent power and in an appropriate case even revisional power under section 397(1) read with section 401 of the Code. It was further held that though revision before the High Court under sub-section (1) of section 397 is prohibited by sub- section (3) thereof, inherent power of the High Court is still available under section 482 of the Code. In case of *Popular Muthiah -Vrs.- State of Tamil Nadu* reported in (2006) 34 Orissa Criminal Reports (SC) 749, it is held that the High Court while exercising its revisional or appellate power, may exercise its inherent powers. Inherent power of the High Court can be exercised, it is trite, both in relation to substantive so also procedural matters.

In case of *Harshakumar -Vrs.- State of Kerala* reported in 2011 (3) KHC 15, it was held that judgment of the Court of Session in an appeal though preferred under Section 29 of the Act being of an inferior Criminal Court, is revisable by the High Court in exercise of its power under Sections 397(1) and 401 of the Code.

In case of *K. Rajendran -Vrs.- Ambikavathy* reported in (2013) 2 Madras Law Journal 406, it is held as follows:-

"45. As far as the present case is concerned, as against the impugned order dated 21.9.2012 passed in D.V.O.P. No. 29 of 2012, the Revision Petitioners are to prefer only Statutory Appeal as per Section 29 of the Act. It is a viable efficacious, effective and alternative remedy, as opined by this Court. In the instant case, obviously, the Petitioners have not filed any petition seeking alteration, modification or revocation of the order passed by the Learned Judicial Magistrate in D.V.O.P. No. 29 of 2012 dated 21.9.2012. Without seeking alteration, modification or revocation of the order so passed in D.V.O.P. No.

29 of 2012 dated 21.9.2012 by the Learned Judicial Magistrate and also not filing the Statutory Appeal under Section 29 of the Act, the Petitioners have directly approached this Court by filing the instant Criminal Revision petition under Section 397 and Section 401 of Cr.P.C. Only when a Revision is filed as against the judgment or order passed by the Court of Session in Appeal as per Section 29 of the Act, then only, the right of availing the procedural facility of filing the Revision is available to the Petitioners, in the considered opinion of this Court. When a statutory right of filing an Appeal is provided to the Petitioners (as per Section 29 of the Act), then this Court is of the considered view that the Petitioners cannot invoke the Revisional Jurisdiction of this Court under Section 397 read with 401 of Cr.P.C. In the result, it is held by this Court that the present Criminal Revision Petition filed by the Petitioners before this Court will not lie in the eye of Law."

Even though there is no specific provision relating to preferring a revision petition in the High Court against the order of the Appellate Court in a P.W.D.V. Act proceeding, I am of the view where there is grave miscarriage of justice or abuse of process of the Courts or there is failure of justice by passing the order, in order to meet ends of justice, the High Court can entertain a revision petition. Accordingly, I do not find any force in the contention raised by the learned counsel for the opposite party that the revision petition is not maintainable in the eye of law.

Whether the Magistrate is competent to pass ex parte order of interim custody of girl child?

9. Section 21 of the P.W.D.V. Act empowers the Magistrate to grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf, at any stage of the hearing of the application for protection order or for any other relief under the Act. Section 21 of the P.W.D.V. Act further empowers the Magistrate to make arrangements for visit of the child or children by the respondent, if necessary. However, the Magistrate can refuse to allow the respondent to visit the child or children if he is of the opinion that any such visit would be harmful to the interests of the child or children.

The section starts with non-obstante clause. A non- obstante clause is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding effect over any other law in force as is mentioned in the non-obstante clause. It is a legislative device which is usually implied to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation of all contrary provisions. The provision in which the non-obstante clause occurs would wholly prevail over any other law for the time being in force and it removes all obstructions which might arise out of the provisions of any other law in the way of the operation of the principal enacting provision to which the non-obstante clause is attached.

Section 23(1) of the P.W.D.V. Act empowers the Magistrate to pass an interim order as he deems just and proper while adjudicating any proceeding before him. Section 23(2) of the P.W.D.V. Act empowers the Magistrate to grant an ex parte order on the basis of affidavit filed by the aggrieved person under sections 18, 19, 20, 21 and 22 against the respondent if he is satisfied that the application filed by the aggrieved party prima facie discloses that the respondent is committing or has committed an act of domestic violence or there is a likelihood that the respondent might commit an act of domestic violence.

In view of the conjoint reading of section 21 and section 23(2) of the P.W.D.V. Act, it is very clear that the Magistrate is empowered to pass an ex parte order in granting interim/temporary custody of any child or children to the aggrieved party even basing on the affidavit filed by such aggrieved party without notice to the respondent. The only criteria for passing such ex parte order must be a case of exigency under the facts and circumstances of each case which can only be considered if the application prima facie discloses regarding commission of domestic violence or likelihood of commission of such domestic violence on the aggrieved person. There must be sufficient and compelling reasons to persuade the Court to pass such ex parte interim/temporary custody order of the child. For example, if the Magistrate is prima facie

satisfied that the minor child of tender age has been separated from the mother forcibly or custody of the child with the respondent is harmful and against the interest of the child and further custody with the respondent is likely to aggravate the situation, the Magistrate can certainly pass ex parte interim order relating to grant of interim/temporary custody of the child or children in favour of the aggrieved person basing on the affidavit inasmuch as if prompt action at that stage is not taken then the legislative intent of making such a provision would be frustrated. At a later stage, the Magistrate being satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order passed then he can entertain the application filed on that behalf by either of the parties and can pass appropriate order recording his reasons. The Magistrate has got the power to revoke the ex parte order if he is satisfied that the order has been obtained by the aggrieved person by suppression of material facts or misrepresentation or by playing fraud upon the Court. The learned counsel for the petitioner placed reliance in case of Dr. Preceline George -Vrs.- State of Kerala reported in ILR 2010 (1) Kerala 663: 2010 (1) Kerala Law Times 454, wherein it was held that the Magistrate can pass ex parte ad interim order without notice to the respondent as provided under section 23 (2) and on the appearance of the respondent, after granting an opportunity to the respondent to object the claim and on hearing the applicant and the respondent, a final interim order under section 23 (1) is to be passed with or without modification of the ad interim order. It was further held that such relief under section 23 (2) can be granted only if urgent orders are warranted on the facts and circumstances of the case and delay would defeat the purpose or where an interim order is absolutely necessary either to protect the aggrieved person or to prevent any domestic violence or to preserve the then existing position. In case of Anvarbhai Rasulbhai Sanghvani -Vrs.- Mumtazben, a single Bench of Gujarat High Court in Special Criminal Application No.2410 of 2009 vide judgment and order dated 08.12.2009 held that under section 23 (2) of P.W.D.V. Act, the Magistrate is empowered to pass any order under section 21 not only as an interim order, but also as an ex parte ad-interim order. A woman who is fighting against domestic violence, faces number of hurdles. The mother whose minor child is separated from her forcibly that too at a young age, would be left distressed and her resistance against domestic violence would break down. Magistrates, therefore, while dealing with the applications of an aggrieved person seeking custody of minor children who may have been forcibly separated from the mother should be prompt and considered to give effect to the legislative intent. In view of the above discussions, I am of the view that the learned Magistrate has got the jurisdiction to entertain an application under section 23(2) of the P.W.D.V. Act relating to passing an ex parte order for grant of interim custody of the child in favour of the aggrieved person. Though it was urged by the learned counsel for the petitioner that the impugned order of the Magistrate is in the nature of final relief at the interim stage, I do not consider it to be so. In fact, the petitioner has already filed an application before the learned Magistrate under section 25 (2) of the P.W.D.V. Act which will be considered in accordance with law after hearing both the parties. Playing fraud on the Court by suppression of facts

10. It is contended by the learned counsel for the petitioner that the opposite party has concealed the aspect of her psychiatric disorder which amounts to playing fraud upon the Court and therefore, the interim order needs to be set aside. The learned counsel for the opposite party on the other hand contended that there are not only categorical assertions regarding physical assault and mental harassment in the application but also about the mental depression of the opposite party due to the conduct of the petitioner and his family members.

In case of S.P. Chengalvaraya Naidu -Vrs.- Jagannath reported in (1994) 1 Supreme Court Cases 1, it is held that the Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. A person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.

In Case of A.V. Papayya Sastry -Vrs.- Govt. of A.P. reported in (2007) 4 Supreme Court Cases 221, it is held that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or authority is a nullity and non est in the eye of law. Such a judgment, decree or order either by the 1st Court or by the final Court has to be treated as nullity by every Court superior or inferior. It can be challenged in

any Court, at any time, in appeal, revision, writ or even in collateral proceedings. Fraud is an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. In case of Dalip Singh -Vrs.- State of Uttar Pradesh reported in (2010) 2 Supreme Court Cases 114, it is held that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

On perusal of the application filed under section 12 of the P.W.D.V. Act, I find that not only there are specific averments relating to domestic violence committed on the opposite party by the petitioner and his family members but also it is mentioned that the opposite party went into a state of depression, leading to migraine and was often in a state of anxiety due to continuous ill treatment by the petitioner and his parents. It is further mentioned that because of the petitioner and his family members playing foul with the opposite party, both mentally and physically, the petitioner went into further depression for which in the 1st week of June 2016, the opposite party along with her mother had been to Bengaluru for a Medical checkup.

Though the learned counsel for the petitioner produced certain medical documents of the opposite party relating to her suffering from obsessive compulsive disorder (OCD) so also doctor's reports on the girl child but it is the contention of the learned counsel for the opposite party that the medical documents have been created with an oblique motive. Since the documents require proof in accordance with law and it can be considered by the Magistrate at the appropriate stage, I am not expressing any opinion on such medical documents in this revision petition. In view of the above discussions, I am of the view that the contentions raised by the learned counsel for the petitioner that the opposite party has suppressed material aspect relating to her psychiatric disorder and thereby played fraud on the Court is not acceptable.

Whether any illegality committed by passing the impugned order?

The application under section 12 of the P.W.D.V. Act along with affidavit was filed by the opposite party on 01.07.2016 which was registered and the learned S.D.J.M. (Sadar), Cuttack called for the domestic incident report from the Protection Officer which was received on 04.07.2016. Such report supports the averments made in the application filed by the opposite party regarding domestic violence. The learned Magistrate specifically observed that after perusal of the domestic incident report (DIR), it prima facie reveals that the aggrieved person was subjected to domestic violence by her husband and the age of the daughter of the aggrieved person is about four years. The learned Magistrate further held that it is the bounden duty upon the Court to see the welfare of the child which is always paramount consideration.

In case of Mausami Moitra Ganguli -Vrs.- Jayant Ganguli reported in (2008) 7 Supreme Court Cases 673, it is held that while determining the question as to which parent the care and control of a child should be committed, the first and paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. The question of welfare of the minor child has to be considered in the background of relevant facts and circumstances. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. The stability and security of the child is an essential ingredient for a full development of child's talent and personality.

In case of Rajesh K. Gupta -Vrs.- Ram Gopal Agarwala reported in (2005) 5 Supreme Court Cases 359, it was held that in an application seeking writ of habeas corpus for custody of a minor child, the principal consideration for the Court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else. It is equally well settled that in case of dispute between the mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties.

Since according to the appellant Rajesh K. Gupta, Smt. Aruna Gupta is a case of paranoid schizophrenia and not any kind of serious mental ailment, Hon'ble Court did not find any ground to take a contrary view and disturb the custody of Rose Mala with the mother and give her in the custody of the appellant.

In the present case, it is specifically averred in the application filed under section 12 of the P.W.D.V. Act that while the opposite party was in deep sleep, the petitioner got control of the child forcibly as she was in a sleeping state and went out of the hotel very politely and in a casual manner so that nobody in the hotel would ever smell/suspect his foul play and criminal act. The CCTV Camera footage of the hotel according to the opposite party confirms her averments that the petitioner had parted with the sleeping child around 7.40 a.m. An FIR has also been lodged under section 363 of the Indian Penal Code against the petitioner. Whether the criminal proceeding against the petitioner who is the father and natural guardian of the girl child for an offence of kidnapping is maintainable or not is a complete different matter but it can be said that on the basis of the averments made in the application supported by affidavit coupled with the domestic incident report which was called for by the Magistrate, it prima facie appears that the petitioner has committed an act of domestic violence on the opposite party and the manner in which the girl child of less than five years was allegedly separated from her mother, I am of the view that considering the welfare of the child, the learned Magistrate has rightly passed the ex parte interim order of granting interim custody of the girl child in favour of the opposite party. The petitioner is at liberty to establish before the Magistrate at appropriate stage that the psychological disorder of the opposite party, if any, is of such a nature that it would be harmful for the girl child to stay in the company of the opposite party. The Magistrate can duly consider the same and give his findings thereon at the time disposal of the application under sections 25 (2) and 12 of the P.W.D.V. Act filed by the petitioner and the opposite party respectively.

I shall be failing in my duty if I do not record here the impression that I have formed during the pendency of the proceeding before this Court. When this Court directed the petitioner to produce the girl child on different dates, in compliance to the orders, the petitioner produced the girl child and she was allowed to remain in the company of the opposite party till the end of Court hours. During Durga Puja holidays, as per the order of this Court, the girl child remained in the custody of the opposite party from 8th October 2016 to 14th October 2016. It was marked that though the girl child was initially reluctant and hesitant to come to the opposite party on each date but after few hours, she was found happy in the company of her mother. Whether the girl child was tutored by the petitioner and his family members against the opposite party as alleged by the learned counsel for the opposite party has to be ascertained at appropriate stage by the Magistrate.

Having bestowed my anxious consideration to the materials available on record and the observations made by the Courts below, I am of the view that there is no illegality or infirmity in the impugned orders and therefore, the revision petition filed by the petitioner being devoid of merits, stands dismissed.

The girl child Mehr @ Sadhika Gupta who is produced today in Court by the petitioner Vinay Gupta be handed over to the opposite party Saveri Nayak immediately. The opposite party shall allow the petitioner to talk every day preferably in the evening hours with the girl child and shall allow the opposite party to visit the girl child during holidays and she will be allowed to stay in the company of her father for about four hours on those days. The venue of their meeting shall be decided by the parties. This arrangement is purely interim in nature which will be decided finally by the Magistrate while considering the application filed under section 25 (2) of the P.W.D.V. Act filed by the petitioner or while disposing of the application under section 12 of the P.W.D.V. Act. In the meantime, the girl child has completed the age of five years. The Magistrate is at liberty to consider the custody of the girl child as provided under section 21 of the P.W.D.V. Act in accordance with law along with other reliefs sought for by the opposite party without being influenced by any observation made in this judgment. The learned Magistrate shall make endeavour to dispose of the application under section 25 (2) of the P.W.D.V. Act filed by the petitioner within a period of two weeks from the date of receipt of this judgment along with the L.C.R. and the application under section 12 of the P.W.D.V. Act within a period of sixty days from the date of its first hearing. L.C.R. be sent back immediately.

S.K. Sahoo, J.

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**THE SECRETARY, SUBHADRA MAHATAB SEVA SADAN OF
KOLATHIA AND ANOTHER.
-VERSUS- STATE OF ORISSA**

ORISSA HIGH COURT: CUTTACK

W.P.(C). NOS. 29388 AND 29389 OF 2011

(Before The Honourable Shri Justice M.M. Das)

*The Secretary, Subhadra Mahatab Seva Sadan of Kolathia and another. Petitioners
-Versus-
State of Orissa Opp. Party.*

For Petitioners : M/s. S.S.Das, K.Behera, S.Modi, S.S.Pradhan & K. Pradhan,

For opp. Party: Addl. Government Advocate.

WPC No. 29389/2011

*The Secretary, Subhadra Mahatab Seva Sadan of Kolathia and another. Petitioners
-Versus-
State of Orissa Opp. Party.*

For Petitioners : M/s. S.S.Das, K.Behera, S.Modi, S.S.Pradhan & K. Pradhan,

For opp. Party: Addl. Government Advocate.

- **A conjoint reading of section 41 (5) and Rules 25 (m) and Rule 33(3)(b) makes it crystal clear that when an abandoned child is offered for adoption, the Child Welfare Committee, which is a quasi judicial authority has to declare the child free for adoption, where-after the competent court has to pass necessary orders under section 41 allowing a child to be given in adoption**
- **It is only the Child Welfare Committee under the J.J. Act, who is authorized to declare a child free for adoption and law does not require any other agency, be it the State Council for Child Welfare or any other body, to have any say in regard to adoption.**
- **There was no scope on the part of the learned District Judge to call for a report from the Orissa State Council for Child Welfare, who in an evasive manner only stated in their report in one line that the petitioner no. 2 is not eligible to adopt two girl children under section 11 of the Hindu and Adoption and Maintenance Act, 1956**
- **Both the said children are in need of care and protection and as already held are required to be rehabilitated and socially reintegrated as early as possible within the period prescribed by placing them in the family by giving them in adoption to the petitioner no. 2 so that such children will feel themselves to be an integral part of the society and will not be looked down upon.**

Date of Judgment: 11.09.2012

M. M. DAS, J. As both the writ petitions have been filed against two verbatim orders passed in CMA Nos. 222 and 223 of 2009 by the learned District Judge, Khurda at Bhubaneswar on two applications filed by the same

petitioners, i.e., the writ petitioners, both the matters were heard together and are being disposed of by this common judgment.

2. Both the petitioners filed the aforesaid two CMAs purportedly under section 9 (4) of the Hindu Adoption and Maintenance Act, 1956 (for short, 'the Act, 1956') seeking permission of the learned District Judge for the adoption of two minor female children, namely, Kuni and Gudly by petitioner no.2. In both the cases, the petitioners filed the following documents:
 - (i) Child Study Report
 - (ii) Home Study Report
 - (iii) Release order for adoption
 - (iv) Medical report of petitioner no.2.
 - (v) Salary certificate of petitioner no.2.
 - (vi) Foster Care Agreement
 - (vii) Photograph of the petitioner no.2, i.e., the prospective adoptive mother,
 - (viii) Photographs of both the minor children.
3. The Child Welfare Committee, Khurda, District – Khurda has passed the release order for adoption of both the children as per the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short, 'the J.J. Act'). The Adoption Co-ordinating Agency, Karnataka prepared Home Study Report of the petitioner no. 2 with her detailed family history.
4. The learned District Judge in course of hearing the matters called for a report from the Orissa State Council for Child Welfare, who reported that the petitioner no. 2 is not eligible to adopt two girl children under section 11 of the Act, 1956. It may be mentioned here that the petitioner no. 1 is the legal guardian-cum- Adoption Placement Agency, which has been recognized by the State and in whose custody, both the above minor children were kept.
5. It is argued before me by Mr. S.S. Das, learned counsel for the petitioners in both the writ petitions that though the petitions were nomenclatured to be under section 9(4) of the Act, 1956, but, in substance, both the petitions were filed under the J.J. Act. He further submitted that all the required necessary documents for appreciation of the learned District Judge to grant permission for adoption of both the minor girl children by the petitioner no. 2 were produced before the learned District Judge, who has not appreciated the same though they satisfied all requirements as per the J.J. Act for grant of permission to the petitioner no. 1 to give both the minor girl children in adoption to the petitioner no.2. With regard to the finding of the learned District Judge that the petitioner no. 2 cannot adopt both the girl children in view of the bar under section 11 of the Act, 1956, he submitted that the learned District Judge has failed to interpret and apply the decision of the apex Court in the case of Lakshmi Kant Pandey v. Union of India, AIR 1984 SC 469. The opp. party – State, however, contended that under sub-section (4) of section 9 of the Act, 1956, permission is to be accorded by the competent authority for adoption of the child and section 9 (5) of the said Act states that if the court would be satisfied that the adoption will be for the welfare of the child, it will grant permission to that effect. He submitted that in the instant case, the petitioners instead of filing application under section 41 (6) of the J.J. Act, filed an application under section 9 (4) of the Act, 1956, which the learned District Judge considered to be one under the Act, 1956 and disposed of the same in accordance with law and, therefore, the impugned orders are not liable to be interfered with.
6. In order to appreciate the rival contentions, it is necessary to refer to the various provisions of the J.J. Act with regard to adoption of a child. Under section 2 (d) (v) of the J.J. Act, "child" in need of care and protection has been defined, as a child, who does not have parent and no one is willing to take care

of or whose parents have abandoned (or surrendered) him or who is missing and run away child and whose parents cannot be found after reasonable enquiry. Admittedly, the two small girl children sought to be adopted by the petitioner no.2 were abandoned children rescued by the petitioner no. 1 – Agency. Section 2 (f) of the J.J. Act defines “committee” to mean a Child Welfare Committee constituted under section 29. Under Chapter-IV of the said Act, provision is made with regard to rehabilitation and social reintegration of a child in need of care and protection. Section 41 of the J.J. Act under the said Chapter-IV deals with adoption, which reads thus:-

“41. Adoption.-(1) The primary responsibility for providing care and protection to children shall be that of his family.

- (2) Adoption shall be restored 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 organizations 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 under 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 declare the child legally free for placement in the case of abandoned children;
 - (b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and
 - (c) without his consent in the case of a child who can understand and express his consent.
- (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 and daughters; or
 - (c) to childless couples”.

Based on the judgment in the case of Lakshmi Kant Pandey (supra) and section 41 (3) of the J.J. Act, the Central Adoption Resources Agency (in short, ‘the CARA’), has framed a set of guidelines. As per the said guidelines, in Clause 23 (2) thereof, the Specialized Adoption Agency (the agency like the petitioner no.1) shall file a petition in the competent court of jurisdiction for obtaining necessary adoption order under the Act, within ten days of acceptance of referral by the prospective adoptive parents and shall pursue the same regularly with the court so that the provision of legal adoption is completed at the earliest. The said clause also envisages that the competent court is required to dispose of the case within a maximum period of two months from the date of filing in accordance with the direction of the Supreme Court in

the case of Lakshmi Kant Pandey (supra). Rule 33 (5) of the Rules framed under the J.J. Act envisages that for the purpose of section 41 “court implies a civil court” which has jurisdiction in matters of adoption and guardianship and may include the court of District Judge, Family Courts and City Civil Courts. Keeping the aforesaid provisions in view and on analysis of the material produced by the petitioners, it is amply clear that the petitioner no. 1 has been recognized as a Specialized Adoption Agency under section 41 (4) of the J.J. Act.

Under section 41 (5) (a), no child shall be offered for adoption until two members of the Committee declare the child legally free for placement in case of abandoned children. Rule 25 speaks about the functions and powers of the Committee. Rule 25 (m) envisages that the Committee shall declare a child legally free for adoption. Under Rule 33(3)(b), a child becomes eligible for adoption when the Committee has completed its enquiry and declares the child legally free for adoption.

Therefore, a conjoint reading of section 41 (5) and Rules 25 (m) and Rule 33(3)(b) makes it crystal clear that when an abandoned child is offered for adoption, the Child Welfare Committee, which is a quasi judicial authority has to declare the child free for adoption, where-after the competent court has to pass necessary orders under section 41 allowing a child to be given in adoption.

7. It is, therefore, seen that it is only the Child Welfare Committee under the J.J. Act, who is authorized to declare a child free for adoption and law does not require any other agency, be it the State Council for Child Welfare or any other body, to have any say in regard to adoption. Section 41 (6) (b) of the J.J. Act, as quoted above, specifically provides that the court may allow a child to be given in adoption to a person irrespective of marital status. Clause 44 (5) of the CARA Guidelines prescribes that siblings of different ages shall, as far as possible, be placed in adoption in the same family and such children shall also be categorized as special need children. The CARA guidelines were notified in a notification issued by the Ministry of Women and Children Development, Government of India on 24.6.2011 for the purpose mentioned therein. For better appreciation, the said notification is quoted hereunder:-

“MINISTRY OF WOMEN AND CHILD DEVELOPMENT

NOTIFICATION

New Delhi, the 24th day of June, 2011.

Guidelines Governing the Adoption of Children, 2011.

S.O. (E). In pursuance of the powers by sub-section (3) of section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) and in supercession of the Guidelines for In-country Adoption, 2004 and the Guidelines for Adoption from India, 2006, except as respects things done or omitted to be done before such supercession, the Central Government hereby notifies the Guidelines issued by the Central Adoption Resource Authority to provide for the regulation of adoption of orphan, abandoned or surrendered children.

Note:

- (1) In order to ensure smooth functioning of the adoption process, Central Adoption Resource Authority, from time to time, issues Adoption Guidelines laying down procedures and processes to be followed by different stakeholders of the a adoption programme. The Adoption Guidelines draw support from:
 - (a) The Juvenile Justice (Care and Protection of Children) Act, 2000;
 - (b) Judgment of the Hon’ble Supreme Court in the case of L.K. Pandey vs. Union of India in WP No. 1171 of 1982;
 - (c) UN Convention on the Rights of the Child, 1989;

(d) The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, 1993.

- (2) These Guidelines shall govern the adoption procedure of orphan, abandoned and surrendered children in the country from the date of notification and shall replace (i) Guidelines for In-country Adoption, 2004 (ii) Guidelines for Adoption from India, 2006.

(Sudhir Kumar)
Additional Secretary,
Ministry of Women and Child Development.”

8. This Court, therefore, considering the provisions of law under the J.J. Act with regard to adoption of a child finds that both the minor girl children, namely, Kuni and Gudly as required under the said Act were declared by the Child Welfare Committee to be fit and free for adoption, who also determined the date of birth of both the girl children being 7.2.2006 in case of Kuni and 13.3.2007 in case of Gudly. It also transpires from the records that the petitioner no. 2 has executed a Foster Care agreement with the petitioner no.1 and has taken both the minor girl children under her foster care. The petitioner no. 1 asserted in the petition that both Kuni and Gudly were being reared as siblings. Hence, as per the guidelines framed pursuant to the judgment of the Supreme Court in the case of Lakshmi Kant Pandey (supra), such siblings of different ages shall, as far as practicable, be placed in adoption in the same family, the corollary of which means that Kuni and Gudly should not be separated.

9. The Supreme Court in the case of Lakshmi Kant Pandey (supra) set out various principles for care and protection of children who are orphan or abandoned. The Court observed that when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might rise on account of cultural , racial or linguistic differences in case of adoption of the child by foreign parents. With regard to small children, who have been brought up as siblings, the Supreme Court in the said case held as follows:

“.....It is also necessary while considering placement of a child in adoption to bear in mind that brothers and sisters or children who have been brought up as siblings should not be separated except for special reasons and as soon as a decision to give a child in adoption to a foreigner is finalized, the recognized social or child welfare agency must if the child has reached the age of understanding, take steps to ensure that the child is given proper orientation and is prepared for going to its knew home in a new country so that the assimilation of the child to the new environment is facilitated.”

Moreover, following the aforesaid judgment of the apex Court, the CARA guidelines has also specifically prescribed that siblings should be placed in adoption in the same family. As already discussed above, there is no dispute that both Kuni and Gudly were being reared as siblings by the petitioner no.1. From the Home Study Report of the petitioner no.2 prepared by the Adoption Co-ordinating Agency, Karnataka, which was produced before the court below, it is also clear that the petitioner no. 2 is capable and competent under law to adopt the minor children in question. As both the said minor children have been growing up as siblings under the care and protection of petitioner no. 1 – Agency and are now with the petitioner no.2 on her executing a Foster Care agreement, they cannot be separated and given in adoption to two different families contrary to the decision of the Supreme Court in the case of Lakshmi Kant Pandey (supra) and the CARA Guidelines.

10. Now, the only question which remains to be answered is whether the learned District Judge erred in deciding both the applications strictly under section 9(4) of the Act, 1956 without due application of judicial mind by not considering the same to be applications made under the J.J. Act.

11. Law is well settled that it is the substance and not the form which is to be looked in to by a court of law while deciding any lis and appropriate relief to which a party may be entitled to should not be withheld on the technical ground that the nomenclature of an application has been made wrongly. The documents which were produced before the learned District Judge clearly envisage that the petitioners intended to obtain an order of allowing adoption under the J.J. Act and not under the Act, 1956. It was, therefore, incumbent upon the learned District Judge to deal with both the applications to be under the J.J. Act. Further, in view of the documents produced and in view of the provisions of the J.J. Act , as discussed above, there was no s cope on the part of the learned District Judge to call for a report from the Orissa State Council for Child Welfare, who in an evasive manner only stated in their report in one line that the petitioner no. 2 is not eligible to adopt two girl children under section 11 of the Hindu and Adoption and Maintenance Act, 1956 and relying upon which the learned District Judge mechanically held that section 11 is a bar for the petitioner no. 2 to adopt both the girl children without considering the ratio of the decision in the case of Lakshmi Kant Pandey (supra) in its proper perspective and the CARA Guidelines. In such cases, it is always incumbent upon the learned District Judge to carefully scrutinize as to whether giving an approval/sanction for adoption is in the best interest of the child in question, who needs care and protection as per the provisions of the J.J. Act for which the petitioners produced all required documents before him. The learned District Judge, therefore, keeping the spirit of the provisions of the J.J. Act in section 41 thereof and the law as laid down by the apex Court should have allowed the applications for rehabilitation and reintegration of both the girl children in the family of the petitioner no.2.
12. In view of the materials available on record, this Court has, therefore, no hesitation to hold that both Kuni and Gudly were under the custody and care of the petitioner no. 1 and being reared as siblings, are now under the petitioner no.2 pursuant to her executing the Foster Care agreement. Both the said children are in need of care and protection and as already held are required to be rehabilitated and socially reintegrated as early as possible within the period prescribed by placing them in the family by giving them in adoption to the petitioner no. 2 so that such children will feel themselves to be an integral part of the society and will not be looked down upon.
13. In view of the above findings, this Court is of the opinion that the impugned orders are unsustainable and necessary permission should be allowed permitting the petitioner no. 2 to adopt both Kuni and Gudly, who are under her Foster Care.
14. In the result, the impugned orders dated 20.9.2010 under Annexure-6 to both the writ petitions are, therefore, set aside and both the writ petitions stand allowed. Necessary steps be taken by the petitioner no. 2 to take both Kuni and Gudly in adoption in accordance with law.

M.M. Das, J.

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LANDMARK JUDGMENTS ON

ADOPTION

SOMA CHATTERJEE VERSUS CHAPALA CHATTERJEE AND ORS.

Calcutta High Court

(1990) DMC 312

(Before Hon'ble Mr. Justice M Mallick)

Soma Chatterjee

Versus

Chapala Chatterjee And Ors.

Decided on 21 August, 1989

Section 6,section 7,section 9,and section 11 of Hindu Adoption and Maintenance Act 1956... Article 57 of the Limitation Act...

The defendants in this suit for partition can take the defence that the deed of adoption is a void document and this defence is not barred only because defendants did not take any step within the period of limitation to file a suit for setting aside the adoption. A void deed can always be challenged and for such challenging a void deed there is no limitation particularly when the challenge is made way of defence, in a suit filed by the plaintiff claiming title and partition on the basis of such deed of adoption ... (Para -33)

Delegation of the authority to the mother by the father of does not violate the provision of Section 9(2). There is nothing in Section 9(2) prohibiting the father to give the mother the authority to give the child in adoption for and on his behalf and as his agent. General law of agency is not expressly prohibited. When an owner of the property can appoint a constituted attorney to act on his behalf and even to transfer his own property in favour of the another, then the law of agency treat such act as the valid act of the owner himself, then in this case if the father gives the authority to the mother to give the child in adoption and if the mother under that authority gives the daughter in adoption then under the law it is the adoption of the father. If that authority is abused then it is only the father who can challenge such adoption on the ground that the mother has violated the authority given to him and has given the adoption either in derogation or in excess of that authority. The defendants cannot challenge such authority..... (Para 44 ,47)

JUDGMENT

Hon'ble Mr. Justice Monoranjan Mallick :—

1. This is a suit for partition.

The plaintiff's case may be briefly stated as follows :

One Satkori Chatterjee who was a Hindu governed by Dayabhaga School of Hindu Law died intestate leaving behind him his only heirs, namely, Smt. Chapala Chatterjee, widow, Uttam Kumar Chatterjee, also known as Arun Kumar Chatterjee, since deceased, Barun Kumar Chatterjee and Tarun Kumar Chatterjee, as three sons. The said Satkori Chatterjee was the absolute owner of the premises No. 46, Girish Mukherjee Road, Calcutta and is used the same as his dwelling house. The plaintiff and the defendant Nos.

1 and 2 and Smt. Gouri Chatterjee also known as Smt. Gouri Debi, since deceased, are aft heirs and legal representatives of the said Uttam Kumar Chatterjee. The said Uttam Kumar Chatterjee, Barun Kumar Chatterjee and Tarun Kumar Chatterjee being Respondent Nos. 2 and 3 respectively were the joint owners of premises No. 46, Girish Mukherjee Road, Calcutta each having one undivided 1/3rd share therein. Since about 1963 and until his death the said Uttam Kumar Chatterjee had been residing at premises No. 3, Moira Street, Calcutta. On 21st February 1967 the plaintiff Smt. Soma Chatterjee then known as Smt. Soma Chowdhury was lawfully adopted by the said Uttam Kumar Chatterjee by and under the registered Deed of Adoption. On 24th July 1980 said Uttam Kumar Chatterjee died intestate leaving behind his mother Smt. Chapala Chatterjee, defendant No. 1, his widow Smt. Gouri Chatterjee since deceased, his only son Sri Goutam Chatterjee and only daughter Smt. Soma Chatterjee, the plaintiff herein and his only heirs and legal representations. Late Uttam Kumar Chatterjee who was a well known film actor during his life time seized and possessed various immoveable properties particulars whereof are set out in schedule annexed as Schedule 'A' to the plaint. The immoveable properties set out in Part I of Schedule 'A' are situated at Calcutta within the jurisdiction of the Original Side and the immoveable properties set out in Part II of Schedule are situated outside the jurisdiction of the Original Side. Sometime in 1957-58 the said Uttam Kumar Chatterjee, since deceased, purchased a plot of land at No. 23A/394, Diamond Harbour Road, 'G' Block, New Alipore, Calcutta which was purchased by Uttam Kumar Chatterjee in the Benami of his wife Smt. Gouri Chatterjee. Subsequently, said Uttam Kumar Chatterjee constructed a three storied building in the said vacant plot being premises No. 23A/394, Diamond Harbour Road, New Alipore and the same has been rented out for a sum of Rs. 2800/- per month. The said property was absolute ownership property of the said Uttam Kumar Chatterjee to purchase the same and constructed the said building out of his personal income in benami of his wife Smt. Gouri Chatterjee. The plaintiff claims the said property as part of the estate of late Uttam Kumar Chatterjee.

2. Since the death of said Uttam Kumar Chatterjee, various disputes and differences have arisen between the plaintiff and the defendants and particularly the defendant Nos. 1 and 2 and the said Smt. Gouri Chatterjee and they are wrongfully denying and/or denied the right, title and interest of the plaintiff in the estate of said Uttam Kumar Chatterjee. The plaintiff requested them for all amicable partition of the said joint property left by said Uttam Kumar Chatterjee but they have wrongfully refused to do so. The plaintiff further requested the defendant Nos. 3 and 4 for an amicable partition of the joint property, namely, 46, Girish Mukherjee Road in which the said Uttam Kumar Chatterjee had an undivided one-third share but the defendant Nos. 3 and 4 have wrongfully refused to do so.
3. On or about 23rd April, 1981 Smt. Gouri Chatterjee died leaving behind her surviving the plaintiff and the defendant No. 2, Goutam Chatterjee as her heirs and legal representatives. The plaintiff has been informed that the said Smt. Gouri Chatterjee died leaving a Will whereby she appointed her son Sri Goutam Chatterjee as sole executor. The said Will has not yet been probated.
4. The plaintiff, therefore, claims partition of the joint family property of 46, Girish Mukherjee Road, claiming one-twelfth share therein and in respect of the properties other than the premises No. 46, Girish Mukherjee Road, the plaintiff claims share to the extent of one-fourth share.
5. The plaintiff, therefore, prays for declaration of the shares of the plaintiff's and the defendants in respect of the properties as mentioned in paragraph Nos. 12 and 13 of the plaint, for declaration that the premises No. 23 A/394, Diamond Harbour Road, 'G' Block, New Alipore standing in the name of late Smt. Gouri Chatterjee belongs to the personal estate of late Uttam Kumar Chatterjee and the said Smt. Gouri Chatterjee is a benamdar of the said Uttam Kumar Chatterjee and for partition of the joint family properties in accordance with the share as specified in paragraph Nos. 12 and 13 of the plaint by metes and bounds and separate allotment of the plaintiff of her share after partition thereof.
6. The defendant Nos. 1 and 2, Smt. Chapala Chatterjee and Sri Goutam Chatterjee have filed a joint written statement. However during the pendency of the suit Smt. Chapala Chatterjee has died. Smt. Gouri

Chatterjee alias Gouri Devi also died before filing any written statement. According to the joint written statement, the case of defendant No. 1 and 2 are as follows :

7. The plaintiff was and still is the daughter of the Biswanath Chowdhury and Smt. Supriya Chowdhury and as such she has no right to describe herself as Soma Chatterjee as she has done in the cause title of the suit. There is no Municipal Holding bearing No. 46, Girish Mukherjee Road. The premises where the defendant No. 1 resides, bears the Municipal holding No. 46A Girish Mukherjee Road, Calcutta whereas the premises where the defendant No. 2 resides and late Gouri Devi resided, bears the Municipal holding No. 43A, Girish Mukherjee Road, Calcutta. The said defendants and the defendant Nos. 3 and 4 reside in the said, premises bearing Municipal holding No. 43A, Girish Mukherjee Road, Calcutta and the defendant Nos. 2 to 4 do not reside at premises No. 46, Girish Mukherjee Road, Calcutta. The defendant Nos. 2 is the only son of late Uttam Kumar Chatterjee and Smt. Gouri Chatterjee, since deceased. Upon the death of the late Satkori Chatterjee in 1959 a part of his residential house being re-numbered as premises No. 46, Girish Mukherjee Road, Calcutta came to devolve upon the defendant No. 1 herein and the other part being the re-numbered as 43A, Girish Mukherjee Road came to devolve upon Uttam Kumar Chatterjee and his two brothers, namely the defendant Nos. 3 and 4 jointly and in equal share. On the death of Uttam Kumar Chatterjee the said undivided share of Uttam Kumar Chatterjee in the said premises came to devolve upon his death on 23rd July 1980 on the defendant No. 1, his mother, the defendant No. 2, son Gautam Chatterjee and late Gouri Devi joint and equal shares and upon Gouri Debi's death on April 23, 1981 her share devolved only upon her only son and heir the defendant No. 2 in terms of the provision of a Will executed by Gouri Debi on or about 2nd April 1981 wherein the defendant No. 2 was named as the sole executor.
8. Though from 1963 onwards said Uttam Kumar Chatterjee started partly residing and spending most of the nights at premises No. 3, Moira Street, Calcutta, he almost daily visited and spent several hours at his ancestral house at Girish Mukherjee Road, Calcutta which constituted his ordinary place of residence.
9. The defendants deny that the plaintiff came to be duly and/or lawfully or at all adopted by Uttam Kumar Chatterjee. They state that the said pretended registered of Deed of Adoption is a sham document having been brought into existence under pressurisation from and undue influence of Smt. Supriya Chowdhury also known as Benu Chowdhury, the mother of the plaintiff herein. In any event, the said pretended deed of Adoption is void and/or no effect being in contravention of the provisions of Sections 7, 8 and 11(6) of the Hindu Adoptions and Maintenance Act, 1956. In particular, the said pretended Deed of Adoption was executed without the knowledge and consent of Gouri Devi. The father of the plaintiff Biswanath Chowdhury who alone was competent to give the plaintiff in adoption in terms of the mandatory requirements of Section 9 of the said Act did not participate or acquiesce in or consent to the giving of the plaintiff in adoption and that was so despite the fact that Biswanath Chowdhury was alive and not in any incapacitated otherwise at the time. The said pretended Deed of Adoption was executed by and between Smt. Supriya Chowdhury and the said deceased Uttam Kumar Chatterjee. The condition expressly set out in Section 11(VI) of the said Act, namely, that the child must be actually taken and given in adoption by the parents concerned with intent to transfer the child from the family of his birth to the family of his adoption. The adoption given clearly gives a go-bye and there was clear contravention of or at any rate non-compliance of the provisions of the said section in the facts and circumstances of the case. In other words and/or in any event the giving and taking any adoption were conspicuous by absence of Smt. Gouri Chatterjee in the matter of said pretended adoption of the plaintiff by Uttam Kumar Chatterjee. Far from being transplanted to the family fold of Uttam Kumar Chatterjee from the family-fold of Biswanath Chowdhury, the plaintiff remained an alien and an outsider although vis-a-vis the family of the former. The plaintiff, in fact, resided and continued to reside in the custody of her mother Smt. Supriya Chowdhury at the latter's residence at No. 3, Moira Street, Calcutta at all material times and never acquired any nexus vis-a-vis at the ancestral residence of Uttam Kumar Chatterjee at Girish Mukherjee Road, Calcutta except as a stray visitor on rare occasions. The plaintiff never developed

any contact with the family of Uttam Kumar Chatterjee and was never introduced to the members of his family including any of the defendants herein and Smt. Gouri Debi as a daughter of the family.

10. The defendants and Smt. Gouri Debi came to be first aware of the said pretended adoption of the plaintiff by Uttam Kumar Chatterjee years later in early January 1976 upon seeing an invitation card on the occasion of the plaintiff's marriage, wherein she had been described as the adopted daughter of Uttam Kumar Chatterjee. Gouri Debi immediately enquired of Uttam Kumar Chatterjee about the factum of the said pretended adoption and then protested since never had she been consulted and informed thereof and since she had firm objection to the taking of the plaintiff in adoption by her husband. Uttam Kumar Chatterjee then explained to Gouri Debi that the said document had to be executed under pressure exerted by Smt. Supriya Chowdhury, the mother of the plaintiff and further solely for giving some measure of respectability to the plaintiff and that since she had not given consent of the said adoption of the plaintiff, the same is invalid in law. Thereafter Gouri Debi consulted Mr. Prithwish Bagchi, the family lawyer of Uttam Kumar Chatterjee and learnt that the said pretended adoption was against the law and was invalid. Thereafter, Gouri Debi addressed a letter dated January 17, 1976 to the various persons including Uttam Kumar Chatterjee, his said brothers, the defendant Nos. 3 and 4 herein, his mother, the defendant No. 1, the brother of Gouri Debi, Mr. Prithwish Bagchi, the cousin and friends of Uttam Kumar Chatterjee and also to the father of the bride-groom elect of the plaintiff being one Kanai Lal Goswami of No. 23B, Ballygunge Circular Road, Calcutta and sent the same by registered post. In the said letter it was, inter alia stated that the said pretended adoption by late Uttam Kumar Chatterjee had not been effected with the consent and knowledge of the said Gouri Debi either in writing or oral and as such neither Gouri Debi nor her son, the defendant No. 2 was bound by the said pretended Deed of Adoption and further since Smt. Supriya Chowdhury had been divorced from her husband, it was not clear to Gouri Debi how the said pretended Deed of Adoption could have been executed. Gouri Debi's letter came to be received by the said addressees but none of whom replied the said letter at about the truth of correctness of its contents. Gouri Debi had a notice published in the Official Gazette dated 29th January 1976 stating therein that she had never any knowledge of the said pretended adoption of the plaintiff by late Uttam Kumar Chatterjee and in the process she had never given consent thereof. As the plaintiff never was or ever became the daughter of late Uttam Kumar Chatterjee there cannot be any question of Uttam Kumar Chatterjee leaving behind the plaintiff as his only daughter or as one of the legal representatives as alleged.
11. As regards the property being premises No. 23A/394 Diamond Harbour Road, Calcutta, New Alipore is concerned, the defendants state that it was the personal and absolute and exclusively owned property of Gouri Devi and on her demise the ownership has devolved upon her only son and heir being the defendant No. 2 who also obtained the same under Gouri Debi's last Will and testament. It is also contended that the land was acquired and the construction was made with the own money of Gouri Debi and after such construction on or about May 4, 1967 a tenancy agreement was entered into between one Biswanath Poddar with Gouri Debi and the rent of the said premises was all along being collected by late Gouri Debi. The defendants also contended that the plaintiff had willfully and wrongfully excluded with ulterior motive flat No. 11 May fair Road, Calcutta though ostensibly in the name of Sm. Supriya Chowdhury was really owned and possessed by Uttam Kumar Chatterjee. The defendants further state that the flat at Chetak Co-operative Housing Society Ltd. at Bombay also belonged to Uttam Kumar Chatterjee exclusively though it was ostensibly in the joint name of Uttam Kumar Chatterjee and Smt. Supriya Chowdhury. The defendants also contend that many of the personal effects and immoveable properties of Uttam Kumar Chatterjee are still lying with Sm. Supriya Chowdhury.
12. The defendants thus contend that the plaintiff not having at any right, title and interest into the estate of Uttam Kumar Chatterjee, there is no question of any of the defendants refusing for the amicable partition of the said properties and the plaintiff's suit for partition is liable to be dismissed.

13. The defendants also deny that the plaintiff has any manner of possession of any of the properties of late Uttam Kumar Chatterjee and the said suit for partition simplicitor is liable to be dismissed.
14. The defendant Nos. 3 and 4, the two brothers of late Uttam Kumar Chatterjee also contest the suit by filing a written statement. The contentions raised by the defendant Nos. 3 and 4 are similar. They also deny that the plaintiff is the adopted daughter of late Uttam Kumar Chatterjee. They also claim that the said pretended Deed of Registered Adoption is a sham and dishonest document and states that the execution of the same was the out-come of considerable pressurisation of Smt. Supriya Chowdhury also known as Benu Chowdhury being the mother of the plaintiff. They also allege that the said pretended registered Deed of Adoption is on the breach of provisions of Hindu Adoption and Maintenance Act and as such the same is void. They also claim that the plaintiff has not correctly set out or described the various properties owned and possessed by Uttam Kumar Chatterjee in the plaint. They also claim that the premises Nos. 23A/394 Diamond Harbour Road, G Block New Alipore at all material time constituted the personal property of Gouri Devi during her life time and now constituted the property of the defendant No. 2. They also reiterate that the plaintiff was and is the outsider to the family of Uttam Kumar Chatterjee and is therefore not entitled to his estate and the estate of Uttam Kumar Chatterjee devolved upon late Gouri Devi and his son and upon Gouri Debi's death, the defendant No. 2 is the absolute owner.
15. From the pleadings, the following issues have been framed.
ISSUES (1) Is the plaintiff Soma Chatterjee, legally adopted daughter of late Uttam Kumar Chatterjee ?
 - (2) Is the premises No. 23A/394 Diamond Harbour Road the personal, absolute and exclusively own property of late Gouri Devi Chatterjee as stated in paragraph 10 of the Written Statement ?
 - (3) Was late Uttam Kumar Chatterjee the joint owner of premises No. 46, Girish Mukherjee Road ?
 - (4) Is the plaintiff entitled to claim partition of the Estate of late Uttam Kumar Chatterjee ?
 - (5) To what relief, if any, are the parties entitled ?

Issue No. 2 : So far as the property being premises No. 23A/394 Diamond Harbour Road, New Alipore is concerned, it is the clear case of the defendants that it is the self acquired property of late Gouri Debi and it was not the property of late Uttam Kumar Chatterjee.
16. The plaintiff Smt. Soma Chatterjee has in her evidence stated that the said New Alipore property is the property of late Uttam Kumar Chatterjee, her adopted father.
17. On behalf of the defendants both oral and documentary evidence had been produced in support of their claim that the land was acquired by Gouri Debi on or about July 29, 1955 with the money given to Gouri Debi by her grand father late Nagendra Nath Ganguly; that on the occasion of purchase a part of consideration money being Rs. 8,000/- out of Rs. 18,000/- was left unpaid and for acquiring the same a deed of mortgage was executed in respect of the land as the mortgagor in favour of the vendor one Smt. Manjusree Dutta who became the mortgagee, which document was executed also on July 29, 1955. On May 7, 1956 a Deed of Release came to be executed by the vendor Smt. Manjusree Dutta in Gouri Devi's favour being unpaid balance of consideration money by Gouri Debi. The evidence has also been given that the construction of building was completed partly with the money of Gouri Debi and partly with the money gifted by her husband late Uttam Kumar Chatterjee, The evidence has also been given that it was Smt. Gouri Debi who let out the premises first to Attika & Co. and thereafter to Biswanath Poddar and Smt. Gouri Debi all along realised the rent of the said building let out. It has also been proved that in the Corporation record the name of Gouri Debi has been recorded as the owner thereof.
18. At the time of hearing, however, on behalf of the defendants it is urged that in view of the provision of Section 4 of the Benami Transaction (Prohibition) Act 1988 the plaintiff cannot file or continue with the suit to enforce any right in respect of the property held benami in the name of late Gouri Debi and Sub-

section (1) of Section 4 clearly bars such a suit. Sub-section (1) of Section 4 of the Benami Transaction (Prohibition) Act 1988 reads as follows :--

"4(1) No suit, claim or action to enforce any right in respect of any property held Benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property".

19. When the plaintiff files this suit claiming to be one of the heirs of late Uttam Kumar Chatterjee that the New Alipore property standing in the name of Gouri Debi was actually acquired by late Uttam Kumar Chatterjee with his own money and late Gouri Debi was merely the Benamdar then this is a suit filed by one who claims to be one of the legal representatives of the alleged real owner praying for a declaration that Uttam Kumar Chatterjee her adopted father was actually the real owner of the property. After the Benami Transaction (Prohibition) Act 1988 has come into force such a suit praying for declaration that Uttam Kumar Chatterjee was the real owner of the property by one claiming to be one of the heirs of late Uttam Kumar Chatterjee has clearly been prohibited by Section 4(1). In *Mithilesh Kumari v. Prem Behari Kharo*, the Supreme Court has held that the Benami Transactions (Prohibition) Act 1988 is retro-active and law of Section 4 would apply even when the appeal is pending in Supreme Court. So there is no doubt that it would attract a suit being filed before the date on which it has come into force. No such suit can be filed or continued claiming that property in question was actually acquired by late Uttam Kumar Chatterjee as the real owner and late Gouri Debi was the benamdar. In that view of the matter even if the plaintiff succeeds in establishing that she is the adopted daughter of late Uttam Kumar Chatterjee she cannot get the declaration that the real owner of the property being premises No. 23A/394, Diamond Harbour Road, New Alipore was of late Uttam Kumar Chatterjee and not of late Gouri Debi in whose name the property admittedly stood since its acquisition till her death in 1981.

20. Therefore, this issue is answered against the plaintiff.

Issue No. 3 : The plaintiff has claimed the premises No. 46, Girish Mukherjee Road to be part of the estate of late Uttam Kumar Chatterjee and claims that in the suit property late Uttam Kumar Chatterjee had 1/3rd share.

21. On behalf of the defendants, it is contended that the original holding No. 46 which was owned by late Satkori Chatterjee, the father of late Uttam Kumar Chatterjee and the defendant Nos. 3 and 4 is no longer in existence and has been sub-divided into two holdings, namely, 46A Girish Mukherjee Road and 43A, Girish Mukherjee Road, that 46A Girish Mukherjee Road is the exclusive property of the defendant No. 1 Smt. Chapala Chatterjee, widow of late Satkori Chatterjee since deceased and the premises No. 43A, is the joint undivided property of late Uttam Kumar Chatterjee and the defendant Nos. 3 and 4 in which Uttam Kumar Chatterjee had undivided 1/3rd share.

22. The plaintiff could not produce any sufficient evidence to controvert the above claim of the defendants. Therefore, I have to accept the contention of the defendants that late Uttam Kumar Chatterjee had undivided 1/3rd share in the present premises No. 43A Girish Mukherjee Road only and if the plaintiff can prove, that she is the adopted daughter of late Uttam Kumar Chatterjee then she can get the relief sought for in this suit along with the other properties described in the schedule to the plaint other than the New Alipore property which cannot be treated to be the part of the estate of late Uttam Kumar Chatterjee.

23. Therefore, the issue under consideration is thus disposed of.

Issue No. 1 : The main issue to be decided in this suit is whether the plaintiff has been lawfully adopted as the adopted daughter of late Uttam Kumar Chatterjee as claimed by the plaintiff since 21st February 1967.

24. There is no doubt that the plaintiff has proved a registered Deed of Adoption dated 21-2-1967 executed by Smt. Supriya Chowdhury, her mother for and on behalf of her natural father Biswanath Chowdhury and by late Uttam Kumar Chatterjee, her alleged adopted father. She has also produced and executed a power of Attorney executed by Biswanath Chowdhury in favour of Smt. Supriya Chowdhury by which Biswanath Chowdhury purports to give Supriya Chowdhury the mother of the plaintiff, the authority, amongst others, the authority to give the plaintiff in adoption to some respectable Brahmin family.
25. The defendants have seriously challenged the legal validity of those documents and the main contention of the defendants are--
- (i) Smt. Supriya Chowdhury did not have the legal authority to give the plaintiff in adoption when Biswanath Chowdhury her natural father was very much alive and not in any way capacitated to give the alleged adoption.
 - (ii) There is no consent of late Gouri Debi, wife of late Uttam Kumar Chatterjee to such adoption.
 - (iii) There was no ceremony of giving and taking and that the purported Deed of Adoption has no legal validity to effect a valid adoption of the plaintiff and the plaintiff cannot by virtue of the pretended Deed of Adoption claim any interest in the estate of late Uttam Kumar Chatterjee.
26. On the other hand the plaintiff has challenged all the above contentions. Their claim is that when Biswanath Chowdhury had given the power of attorney to Smt. Supriya Debi by the deed Ext. B and when Smt. Supriya Devi as the authorised agent of the father of Soma Chatterjee performed the ceremony of giving and taking in accordance with law on 21st February 1967 it was in effect the adoption given by the father of Soma and Smt. Supriya Chowdhury was only acting as constituted attorney of Biswanath Chowdhury in the matter of giving such adoption. It is also contended that there was valid consent of Smt. Gouri Devi, that in the deed of adoption there is clear recital that late Uttam Kumar Chatterjee had taken the consent of his wife, that Gouri Devi was personally present along with the defendant Nos. 3 and 4 at the ceremony of giving and taking on 21st February 1967 and that the fact that long after such giving consent, Smt. Gouri Devi with some ulterior motive sought to assert that she did not give consent would not affect the valid adoption when at the time of adoption she had given consent to her husband to adopt the plaintiff and participated in the ceremony of adoption.
27. The third contention of the defendant that there is no valid adoption is contested by the plaintiff and it is urged that there is valid adoption and as the deed of adoption Ext. A is by a registered instrument there is a presumption that the adoption is Valid and the defendant having failed to rebut that presumption by adequate evidence it cannot but be held that the adoption is valid. It is also urged that the adoption had taken place on 21st February 1967 and Smt. Gouri Devi did not file any suit for challenging such adoption within three years from her alleged date of knowledge in January 1976 and consequently in this suit neither Gouri Devi nor any person claiming through her can challenged the validity of the adoption.
28. As admittedly the parties are Hindus governed by Dayabhaga School of Hindu Law and as this adoption is alleged to have taken place after the Hindu Adoption and Maintenance Act, 1956 has come into force the provision of the above Act shall govern this adoption. Section 16 of the Hindu Adoption and Maintenance Act reads as follows :
- "Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."
29. Section 16 of the Hindu Adoption and Maintenance Act, 1956 lays down the rule of presumption which requires that when there is a duly registered deed of adoption the court shall presume that the adoption has been made in compliance of the provisions of the Act unless and until it is disproved. This is no doubt

a rebuttable presumption and the onus is upon the person challenging such adoption to rebut it. But on behalf of the defendant it is urged that the defendants have rebutted the presumption laid down in Section 16 by adducing sufficient evidence. It is also urged when in law there was no valid adoption as the alleged adoption was not given by the father of the plaintiff and that wife of the adoptive father did not give her consent to the adoption then the Section of 16 would not be attracted as it is not an adoption in accordance with law. It is also urged that initial onus is upon the plaintiff to prove the factum as well as validity of adoption. I would consider these questions in detail at the appropriate stage.

30. But before entering into the evidence adduced by the parties regarding the factum and validity of the adoption I would dispose of the plaintiff's preliminary objection that the defendants cannot challenge the adoption, as Gouri Devi did not take any step after she is alleged to have come to know about the adoption in January 1976 to set it aside by filing a properly constituted suit and the defendants by way of defence in this suit cannot challenge such adoption after such suit has become barred by limitation.
31. Any person challenging adoption has to file, the suit within a period three years from the date of knowledge of adoption as is provided in Article 57 of the Limitation Act. It is true that within 3 years from the alleged date of knowledge in January 1976 Smt. Gouri Devi did not file any suit for setting aside the adoption.
32. Even if it be accepted as the clear proposition of law that any person praying for setting aside adoption has to file the suit for that purpose within three years from the date of knowledge of such adoption yet such party's defence in a suit filed by the plaintiff claiming title on the basis of the adoption to challenge such adoption as invalid cannot be barred.
33. I am of the view that the defendants in this suit for partition can take the defence that the deed of adoption is a void document and this defence is not barred only because Smt. Gouri Devi did not take any step within the period of limitation to file a suit for setting aside the adoption. A void deed can always be challenged and for such challenging a void deed there is no limitation particularly when the challenge is made way of defence, in a suit filed by the plaintiff claiming title and partition on the basis of such deed of adoption. The decisions of Syed Rasul v. Md. Maulana in AIR 1977 Kerala page 173, Raghavamma v. Chenchamua, and Sadanand v. Vimla, AIR 1982 Orissa 13 support this view. Therefore, I am unable to hold that the defendants cannot challenge the factum and validity of adoption in this suit by way of defence in a suit filed by the plaintiff claiming title and partition on the basis of the adoption. However the plaint of Title Suit No. 459 of 1980 filed by Smt. Gouri Devi, Smt. Chapala Devi and Sri Gautam Chatterjee which has been transferred to Original Side of High Court Calcutta as Extra-Ordinary Suit No. 8 of 1981 is a suit filed by them sometime before the filing of the present suit in which Smt. Gouri Devi averred that she had not given consent to the alleged adoption. That suit is, however, still pending. However, under any circumstances the defence of the defendant in this suit challenging the adoption is in no way barred and has to be considered on merits.
34. I would now enter into the question as to whether thus there was in fact an adoption as alleged by the plaintiff and whether the purported deed of adoption creates a valid adoption of the plaintiff as the adopted daughter of late Uttam Kumar Chatterjee. In order to appreciate the contentions raised by the parties the following Sections of the Hindu Adoption and Maintenance Act 1956 are reproduced below :--

Section 6 : No adoption shall be valid unless--

- (i) the person adopting has the capacity, and also the right, to take in adoption;
- (ii) the person giving in adoption has the capacity to do so;
- (iii) the person adopted is capable of being taken in adoption; and
- (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

Section 7 : Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption :

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation--If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary, unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

Section 9 : (1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

- (2) Subject to the provisions of Sub-section (3) and Sub-section (4) the father, if alive, shall alone have right to give in adoption, but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.
- (3) The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.
- (4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.
- (5) Before granting permission to a guardian under Sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person had made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.

Explanation -- For the purposes of this section--

- (i) the expressions "father" and "mother" do not include an adoptive father and adoptive mother;
- (ii) "guardian" means a person having the care of the person of a child or of both his person and property and includes--
 - (a) a guardian appointed by the will of the child's father or mother, and
 - (b) a guardian appointed or declared by a court and
- (iii) "court" means the city civil court or a district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.

Section 11 : In every adoption, the following conditions must be complied with--

- (i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

- (ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;
- (iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty one years older than the person to be adopted;
- (iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty one years older than the person to be adopted;
- (v) the same child may not be adopted simultaneously by two or more persons;
- (vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or Under their authority with intent to transfer the child from the family of its birth or in case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption :

Provided that the performance of datta homem shall not be essential to the validity of an adoption.

35. I would now take up the question as to whether the adoption given by Sm. Supriya Devi of her daughter Soma to Uttam Kumar Chatterjee as pleaded in the plaint is in accordance with the provisions contained in Section 9 and Section 11 of the Hindu Minority and Guardianship Act. Mr. Gautam Chakravorty, learned Counsel appearing for the plaintiff has urged that there has been proper compliance of the provision of Sub-sections (2) and (3) of Section 9 of the Act, that under Section 9(2) the father as long as he is alive and has not completely and finally renounced the world or has ceased to be a Hindu or has been declared by the competent court of law to be of unsound mind has the authority to give the son or daughter in adoption but in this case the father has executed Ext. B a valid power of attorney appointing Sm. Supriya Devi as his constituted attorney for the purpose of giving the adoption of his daughter Soma and when Sm. Supriya Devi gave Soma in adoption to Uttam Kumar Chatterje'e and the ceremony of giving and taking was done on 25th February 1967 in presence of the witnesses by Smt. Supriya Devi as the constituted attorney of Biswanath Chowdhury, the father of the girl then it is in essence and adoption by the father through her constituted attorney and it is not an adoption by the mother and consequently the provision of Section 9 have been fully complied with and when the Deed of adoption Ext. A also clearly recites that Sm. Supriya Devi was given the adoption on the basis of the Power of attorney executed by her husband then the contention of the defendant that Supriya Devi had no capacity to give adoption of Soma to late Uttam Kumar Chatterjee is not a valid contention and must be rejected.
36. Ext. 'B' dated 6-2-67 has been executed in the form of an Agreement entered into between Smt. Supriya Devi and Sri Biswanath Chowdhury. By that Deed, Biswanath Chowdhury, the natural father of Soma who after his divorce with Supriya Devi has again re-marriage and has been living with his wife and children in Delhi has recited that as Smt. Supriya Devi the mother and natural guardian of Soma had all along maintaining the daughter and the expenses of her education he would not claim the Guardianship of the person of the property of the minor whereby her present mode of education, association and aspiration might be disturbed. The Deed thereafter recites as follows :--

"It is further agreed that the second party (i.e. Supriya Devi) may for the benefit of the minor and for her future well being and protection place her in the midst of reputed families of India or England for being trained up as a daughter of noble and dignified family, and for that purpose, may, if necessary, give her in adoption to any family or person of such very high repute. Provided always the adoption must be by a Brahmin belonging to a reputed Brahmin family. The second party assures and undertakes not to do anything whereby the future of the girl may be prejudiced or the status of the father may be lowered."

On the basis of this the Deed Ext. 'B' delegating the power to give adoption of the daughter Soma, Supriya Devi claims to have been given the adoption of 25th February 1967 allegedly by performing

the ceremony of giving and taking and also by executing a registered deed dated 21-2-67 signed by both Smt. Supriya Devi and late Uttam Kumar Chatterjee alias Arun Kumar Chatterjee in presence of two witnesses including Sri Prithwis Bagchi, Advocate who it is disclosed has prepared both the Deed of Adoption Ext. A and Deed of Agreement Ext. 'B'. Ext. 'A' also recites that Supriya Devi has been given the authority by Biswanath Chowdhury for giving the minor daughter Soma in adoption to a Hindu Brahmin of good repute and for that purpose for ensuring her better future, she has given her daughter Soma in adoption to Uttam Kumar Chatterjee and has declared that henceforth the minor daughter Soma shall and has declared that henceforth, the minor daughter Soma shall be the adopted daughter of the first party, namely, Uttam Kumar Chatterjee and be his other child with all rights of heirship and succession and be governed by the same Gotra of his adoptive father and be known as Soma Chatterjee, or Soma Chattopadhyay and as the father of the said minor, daughter the first party shall be her legal guardian for all purposes.

37. On behalf of the defendants it is strenuously argued that the adoption is invalid in as much as Smt. Supriya had no capacity to give Soma in adoption because Biswanath Chowdhury was and is still alive and Biswanath Choudhury has not given Soma in adoption and that Section 9(2) clearly provides that subject to Sub-section (3) and (4) of Section 9, the father if alive has alone have the right to give in adoption. It is also argued that if Sub-section (2) and (3) of Section 9 are read together it can only mean that the father can be incapacitated by any of the exceptions mentioned in Sub-section (3) and that when Section 9 clearly provides as long as father is alive and is not in any way incapacitated then when the incapacitated as contained in Sub-section (3) of Section 9 are not attracted, then mother cannot give any adoption because the law confers upon father the right to give in adoption as long as he is alive and as long as he is not in capacitated in any way as mentioned in Sub-section (3) of Section 9.
38. The following observations of Molla's Hindu Law (15th Edition) page 1098 has been referred to me by the learned Advocate for the defendants which reads thus--
- "The mother cannot give the daughter in adoption while the father is alive and capable of consent without the permission of the father. The mother can have the right if the father is dead or disabled from giving consent".
- It is therefore urged that the embargo upon the mother is absolute and mandatory and the fact that father Biswanath Chowdhury and Supriya Devi are divorced is all little consequence.
39. My attention has also been drawn to Raghabhacharia's Hindu Law, (8th Edition) page 1056 which reads as follows :
- "The position of the mother who is living separate from the father under a decree of judicial separation or divorce is also the same in this regard and she is incompetent to give the child in adoption during the life time of the husband".
40. It is also urged that Ext. B the purported Deed of authorisation of Biswanath Chowdhury so far as it delegates to Supriya the authority to give in adoption is against the law.
41. In support the learned Advocate for the defendants makes the following submissions, namely:
- (i) the language of Section 9(2) and Section 9(3) is specified and except in specified cases, the father is to give in adoption and mother cannot be substituted for the father except for the physical act of giving.
 - (ii) Hindu law in adoption, however, recognises the doctrine of limited delegation, namely, the delegation of the physical/ ministerial/corporeal act of giving which has been allowed by the courts in cases whereby the father is in any way capacitated because of illness or of conversion of Islam or such other grounds. He refers to the cases in Viziaramgam v. Lakshuman reported in 4 Bombay HCR., O.C. 244, Shyam Singh v. Santa Bhai 25 Bom. 554, Vijjama v. Surjya Prakash, AIR

1942 Madras 379 and *Laxman v. Rup Kanwar*, . The gist of the above decisions which has been affirmed by the Supreme Court under *Laxman v. Rup Kanwar* is that (a) the delegation only apply to the physical or ministerial or corporeal act of giving or receiving.

- (iii) Such delegation would follow only in case of physical infirmity or such other causes ; the pre-condition noted to be complied in cases of obligation was that there had to be an agreement between the natural and adoptive parent of giving or receiving in adoption.
 - (iv) In the instant case, there was no prior agreement between Biswanath Chowdhury and late Uttam Kumar Chatterjee who alone could support the delegation.
 - (v) This law of delegation has not been changed and the law as codified in Hindu Adoption and Maintenance Act 1956 has followed it by enacting the same provision for delegation in Section 11(vi) of the Act and consequently it must be held that the natural father is to select the adoptive father and only thereafter the ministerial act could be performed under the father's authority by the concerned person who has been authorised to give including the mother.
 - (vi) The evidence discloses that the selection of Uttam Kumar Chatterjee is the act of Smt. Supriya Devi and not of Biswanath Chowdhury and because Supriya Devi is purported to give Soma in adoption on her own volition and intended adoptive father is only her selection then the provision of Section 9(3) is violated and the adoption by Supriya during life time of Biswanath Chowdhury is therefore invalid.
42. I have considered the submissions made by the learned Advocate for the defendants in the light of the evidence adduced in this case. As regards the documents Ext. B and Ext. A it is only Supriya Devi who has given her evidence in this Court as regards the circumstances in which the said deeds had been executed and the adoption given. On clearly analysing the evidence of Smt. Supriya Devi in this respect, I find that Supriya Devi has clearly stated in her evidence that Uttam Kumar Chatterjee long before adoption used to love Soma as her child and while she along with Uttam Kumar and Soma was holidaying in Ranikhet, Uttam Kumar expressed his definite intention to take Soma in adoption that she had no objection but as Biswanath Chowdhury was the natural father she contacted trunk telephone to Delhi as it was the primary duty of the father to give adoption that he requested Biswanath Chowdhury over telephone to come to Calcutta, that Biswanath Chowdhury came to Calcutta and she had the discussions with Biswanath Chowdhury and after such discussion Biswanath Chowdhury executed the Deed of Ext. B which was prepared by Mr. Prithwis Bagchi and after executing that deed he left for Delhi.
43. As regards the validity of the Deed Ext. B the defendants have no right to challenge. It is only Biswanath Chowdhury who can alone challenge the validity of the said deed. For these long years and being fully aware that on the basis of the authority given by him Supriya Devi had given Soma in adoption to late Uttam Kumar Chatterjee, Biswanath Chowdhury did not ever challenge such giving of adoption by Supriya Devi under the authority given by him by Ext. B. Therefore, in this suit I have to consider Ext. B to be a deed validly executed by Biswanath Chowdhury. There can be no doubt that Biswanath Chowdhury by that deed entrusted his divorced wife Supriya Devi with the guardianship of Soma and to make of necessary expenses for her up keep and education and Supriya Devi also agreed to exonerate Biswanath Chowdhury for such maintenance. Therefore, by that Deed Biswanath Chowdhury agreed that Supriya Devi would act as her guardian and declared that he would not claim any guardianship of Soma as the natural guardian. As Biswanath Chowdhury had re-married and have been living with his new wife and children, such a deed would only safeguard the interest of the Supriya Devi if at any future time Biswanath Chowdhury wanted the custody and guardianship of the daughter being the father and natural guardian of Soma. Over and above, that deed has given Supriya Devi the authority to give in adoption in some respectable Brahmin family. It is to be considered as to whether such deed giving authority to mother to give the daughter in adoption which is a general authority subject to certain

limitations contained in Ext. B violates the provision of Section 9 and is therefore be considered as the invalid authority.

44. In my view this delegation of the authority to the mother by the father of Soma does not violate the provision of Section 9(2). When under such authority Supriya Devi selects Uttam Kumar Chatterjee who is admittedly a member of Hindu Brahmin family and whom she considers to be a person of a respectable family, then the adoption is in accordance with the authority given by Biswanath Chowdhury to Supriya Devi by the deed Ext. B. Only because there was no prior agreement between Uttam Kumar and Biswanath Chowdhury and only because in that deed no specific authority was given to Supriya to give the daughter Soma in adoption to Uttam Kumar, the authority cannot be an invalid authority.
45. The decisions which have been referred to me by the learned Counsel for the defendants and which has been clearly enunciated in the Supreme Court decision of Laxman v. Rup Kanwar is the enunciation of the Hindu Law of Adoption before its codification by the Hindu Adoptions and Maintenance Act 1956. Under the Hindu Law as it is stood prior to the above enactment as long as father was alive he alone had the right to give the child in adoption but the father can delegate the physical or ministerial or the corporeal act of giving to any person not only to mother but also to any other person. In the case of 4 Bom. HCR there was such delegation as the parent was unwell. In the case of 25 Bom. 551, the ministerial act of handing over the child was delegated to the brother as the parent was converted to Islam. Under the Hindu Law as its stood prior to the codification of Hindu Adoption and Maintenance Act there was the necessity of prior agreement between the natural and the adoptive parent for adoption as the precondition for the delegation of the physical or the ministerial or the corporeal act of giving or receiving the adoption. But when the law has been codified and we shall have to follow the law as codified while considering an adoption made after the Hindu Adoption and Maintenance Act came into force. Under Sub-section (2) of Section 9 the father can give in adoption but such right shall not be exercised save with the consent of the mother. Under Sub-section (3) mother can give the child in adoption if the father is death, or has been completely or finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.
46. In this case Sub-section (3) is not attracted. Only Sub-section (2) of Section 9 is attracted. Mr. Chakraborty has rightly urged that it is not a case in which Supriya Devi has exercised the right to give her daughter Soma under Sub-section (3) of Section 9 and she has exercised her right under the authority given by the father Biswanath Chowdhury and when the father gives the mother such authority and when even if the father has to give adoption she has to obtain the consent of the mother then this authority given by the father to the mother for giving the adoption under such authority and as the agent of the father is really the adoption given by father.
47. I am of the view, that there is nothing in Section 9(2) prohibiting the father to give the mother the authority to give the child in adoption for and on his behalf and as his agent. General law of agency is not expressly prohibited. When an owner of the property can appoint a constituted attorney to act on his behalf and even to transfer his own property in favour of the another, then the law of agency treat such act as the valid act of the owner himself, then in this case if the father gives the authority to the mother to give the child in adoption in a respectable Brahmin family and if the mother under that authority selects Uttam Kumar Chatterjee as the member of a respectable Hindu Brahmin Family and gives the daughter in adoption on the basis of that authority of Ext. B, then under the law it is the adoption of the father. If that authority is abused then it is only the father who can challenge such adoption on the ground that the mother has violated the authority given to him and has given the adoption either in derogation or in excess of that authority. The defendants cannot challenge such authority.
48. I am of the view that under the law as indicated in Section 9(2), there is no obligation for the parents to have a prior agreement regarding such adoption. Under Clause (vi) of Section 11 the child to be adopted must be actually given and taken in adoption by the parent or guardian concerned or under

their authority. This authority of the physical ministerial or corporeal act of giving or receiving is a clearly different matter. Under that provision the authority can be given even to a third party. But in this particular case when the father appoints mother to act as agent and to give the daughter in adoption under that authority imposing certain terms and conditions as to how the mother would exercise such authority then the adoption on the basis of that authority is the adoption of the father.

49. In that view of the matter I am unable to accept the contention of the defendants that the adoption of Soma is invalid on the ground that Biswanath Chowdhury even though alive and not in any way capacitated, did not give the adoption. I am of the view that Smt. Supriya Devi had the legal authority from the father of Soma to give the adoption as his agent and this adoption must be treated as the adoption of Biswanath Chowdhury performed by Smt. Supriya Devi under Biswanath Chowdhury's authority.
50. The main legal ground of the defendants to challenge the adoption is the lack of consent of Smt. Gouri Devi, the wife of late Uttam Kumar Chatterjee in the adoption of Soma. It is the clear case of the defendants that Sm. Gouri Devi never consented to the alleged adoption, that there was no ceremony of giving and taking on 21-2-1967 as alleged by the plaintiff and her witnesses and that as soon as Smt. Gouri Devi came across the invitation letter of Soma's marriage sometime in January 1976 she then and there protested to her husband, contacted Mr. Prithwish Bagchi, the Advocate of Alipore Court who had prepared the deed of adoption Ext. A and on his advise wrote letters by registered post with acknowledgment due to Uttam Kumar Chatterjee, Supriya Devi, her mother-in-law Smt. Chapala Chatterjee, her brothers-in-law Tarun Kumar Chatterjee and Barun Kumar Chatterjee and other relatives including Soma's would be father-in-law denying the factum of adoption and also asserting that she did not give any consent to any such adoption. She also declared in the Calcutta Gazette that she did not give any consent to the alleged adoption of Soma by Uttam Kumar Chatterjee.
51. Under Section 7 of the Hindu Adoption and Maintenance Act any male Hindu of sound mind and not a minor can take a son or a daughter in adoption provided that if he was a wife living he shall not adopt except with the consent of his wife, unless that wife has renounced the world, ceased to be a Hindu or has been declared by a competent court of law to be of unsound mind. In this case, Gouri Devi did not come under any of the excepted categories of wife. So, the adoption of Soma by Uttam Kumar Chatterjee has to be with the consent of Smt. Gouri Devi.
52. In order to prove that Smt. Gouri Devi had given her consent and Uttam Kumar Chatterjee prior to taking Soma in adoption has taken Smt. Gouri Devi's consent the plaintiff has relied upon the recital of Ext. A where it is mentioned that Late Uttam Kumar Chatterjee had obtained his wife's consent. She has also led evidence of her mother Smt. Supriya Devi, the evidence of the alleged priest who performed the religious ceremony of adoption and Mr. Debesh Ghosh and Mr. Ashim Sarkar who claim to have attended the ceremony of adoption on 21st February, 1967 at 3, Moira Street, Calcutta. The sum and substance of this evidence is that at the time when the ceremony of adoption was held Smt. Gouri Devi was present. If this evidence was to be believed then this would amount to her implied consent to the taking of adoption of Soma by her husband Uttam Kumar Chatterjee. This evidence has been seriously challenged by the defendants. It is denied that Smt. Gouri "Devi had attended the ceremony and in evidence a case has been sought to be made out that it was not physically possible for Smt. Gouri Devi to attend such ceremony as on that date she was lying in a Calcutta Nursing Home where she had been admitted prior to that date for undergoing uterus operation. I would now have to consider the respective cases of the parties in this respect in details. It is not disputed that there is no documentary evidence executed by Smt. Gouri Devi signifying her consent to the alleged adoption. Even regarding her verbal consent the plaintiff could not produce any direct evidence. The plaintiff being a young girl of 11 years at the time of alleged adoption could not enlighten the court about Smt. Gouri Devi's consent.
53. Even Smt. Supriya Devi in her evidence did not specifically state that in her presence Smt. Gouri Devi immediately prior to the alleged date of adoption gave the consent to her husband to take Soma in

adoption Smt. Supriya Devi in her evidence (Question Nos. 78 and 244), vaguely stated that Gouri Devi had also expressed the desire to take a girl like Soma in adoption. But that was sometime in 1962 or 1963. At that time there was no concrete proposal from Uttam Kumar to take Soma in adoption. According to Smt. Supriya Devi Uttam Kumar Chatterjee sometime in 1986 while holidaying with Supriya and Soma at Ranikhet, expressed firm desire to take Soma in adoption. So even if Gouri Devi vaguely suggested that Smt. Gouri Devi had such a desire to take a girl like Soma in adoption sometime in 1962 or 1963 that would not tantamount to her giving consent to her husband taking in adoption on 21-2-1967.

54. In the deed Ext. A there is, however, the recital that Uttam Kumar Chatterjee had taken Smt. Gouri Devi's consent. But that is the statement of Uttam Kumar Chatterjee and not of Smt. Gouri Devi. The deed Ext. A was drafted by Shri Prithwish Bagchi who is at present Government Pleader of Alipore Court. He has been examined as a witness by the defendant as a witness. His evidence is that he wrote the deed Ext. A under the instruction of Smt. Supriya Devi and Uttam Kumar Chatterjee. In his evidence he has clearly indicated that he had no personal knowledge as to whether Smt. Gouri Devi gave her consent to the adoption. So Shri Bagchi prepared the deed and wrote about the consent of Smt. Gouri Devi on the representations made by Uttam Kumar Chatterjee. He was a family friend of Uttam Kumar Chatterjee and Gouri Devi, since 1960 or 1961. In the preparation of the deed and in the execution thereof Smt. Gouri Devi was no where in the picture. At the time of the execution of the deed on 21-2-1967 he was present and attested it, as an attesting witness. If Gouri Devi had the consent that it was very probable for Shri Bagchi to obtain the signature for Smt. Gouri Devi as a confirming party. The fact that Smt. Gouri Devi did not sign the deed as a confirming party is a circumstance casting a doubt as to whether Smt. Gouri Devi really gave the consent prior to the taking Soma by Uttam Kumar Chatterjee as the adopted daughter.
55. The implied consent of Smt. Gouri Devi can, however, be presumed if Smt. Gouri Devi really participated in the alleged adoption on 21-2-1967.
56. I would therefore enter into details of the said evidence adduced.
57. The plaintiff Soma was a young girl of 11 years when the alleged ceremony of adoption had taken place. In answer to question No. 96 she admits that she vaguely remembered the ceremony. Even though she states that she had seen Smt. Gouri Devi, Tarun Kumar Chatterjee and Barun Kumar Chatterjee attending the ceremony, yet in answer to question Nos. 121 and 122 she says that she did not remember when they came. So, I do not wish to place much reliance on her evidence. Moreover her conduct in the witness, box shows that she has no regard for truth. On the first day of her cross-examination she even denied having known Biswanath Choudhury, her own father. In her exuberance to assert that late Uttam Kumar Chatterjee was her father she even denied having known Biswanath Chowdhury, her father. On the following day she, however, realised that she had made a blunder by even denying her own father. She tried to make amends by making some voluntary statement that on the last day she could not appreciate the question properly and that Biswanath Chowdhury was her natural father/However, I am of the view that when a daughter in her eagerness to substantiate her case as the adopted daughter of Uttam Kumar Chatterjee even tries to deny her own father such a witness cannot be taken to be at all a truthful witness.
58. The other witnesses to prove about Smt. Gouri Devi's presence at the alleged ceremony of adoption are Smt Supriya Devi, Mr. Upadhyaya, the priest and Mr. Debesh Ghosh a film Producer and Mr. Ashim Sarkar, another film producer. So far as Smt. Supriya Devi is concerned there is no doubt that she being the natural mother of Soma is highly interested in the case. She has executed the deed of adoption Ext. A no doubt along with Uttam Kumar Chatterjee. But the essential ceremony of adoption as laid down in Section 11 of the Hindu Adoption and Maintenance Act has to be proved in order that it shall be a valid adoption under the said Act. Section 11 lays down that the ceremony or Dattaka Boman is not an essential ceremony but that of giving and taking. Moreover, it has also to be proved that Smt. Gouri Devi, the wife of Uttam Kumar Chatterjee had given her consent. So the registration of the deed Ext. A is not

sufficient to prove adoption if in fact there was no consent of Gouri Devi or that the essential ceremony of giving and taking had not been performed. However, in her evidence Smt. Supriya Devi has stated that Smt. Gouri Devi attended the ceremony and was present then the religious ceremony was held and Soma was placed on the lap of Uttam Kumar by her. But she being the interested witness the said evidence needs proper corroboration by independent witnesses.

59. Now it is to be seen whether the other witnesses examined are really such independent witnesses on whom reliance can be placed. The Defendant challenge all these witnesses to be procured witnesses.
60. So far as the priest Mr. Upadhyay is concerned the defendants have alleged that he was not the priest at 3, Moira Street, Mr. Tarun Kumar Chatterjee, a younger brother of Uttam Kumar Chatterjee who himself a film actor, claims to maintain good relation with Smt. Supriya Devi. That fact is not challenged by the plaintiff. There is no challenge that he used to visit No. 3, Moira Street where Uttam Kumar spent his night regularly from 1963 till his death in 1980. He denies that Mr. Upadhyaya was ever the priest at 3, Moira Street and mentions the name of one Gopal Thakur as the priest performing Puja there.
61. Even though Smt. Supriya Devi mentions about one priest performing religious ceremony at 3, Moira Street on 21-2-1963. Yet Mr. Upadhyaya introduces three. Moreover, even though he claims to be the priest performing daily puja at 3, Moira Street he admits not to have been invited at the marriage of Soma. If he was really the priest it was very probable to participate in the religious ceremony of Soma's marriage. So his evidence that he did not get the invitation at Soma's marriage makes his evidence regarding to the ceremony at 3, Moira Street on 21-2-1963 very suspect. Moreover, his evidence as to in what manner he was engaged at 3, Moira Street as priest also indicates that a priest is not engaged in the way he suggests. So, I do not place any reliance on the evidence of Mr. Upadhyaya.
62. Mr. Debesh Ghosh, the Film Producer is at present residing at Bombay.
63. Even though Debesh Ghosh claims to be a close associate of Uttam Kumar Chatterjee in 1967, Mr. Tarun Kumar Chatterjee in his evidence stated that he was not so close to Uttam Kumar as he suggested. His evidence discloses that even though he lived in Bombay he was taking unusual interest in the case and came to depose on the request of Supriya without being summoned. In examination-in-chief he claims to have been intimidated by Uttam Kumar Chatterjee 2 or 3 days prior to adoption but in cross-examination he makes a different statement by saying that Uttam Kumar Chatterjee had discussion with him about the adoption on 2 or 3 months prior to the adoption. This cannot be true. Even the deed Ext. B was executed sometime on 6th February 1967 and there could be no occasion for Uttam Kumar Chatterjee to inform him about the adoption 2 or 3 months prior to the adoption. Moreover, this witness claims to see only Uttam Kumar Chatterjee, Supriya Devi, Gouri Devi, a priest and Mr. Lalmohan Chatterjee who is admittedly a boyhood friend of Uttam Kumar Chatterjee. No other witnesses mentioned about Dr. Lal Mohan Chatterjee's presence at the ceremony. He did not appear to see Tarun Kumar Chatterjee or Barun Kumar Chatterjee which other witnesses claim to have seen. His conduct appears to be very strange. In a letter to Dr. Lal Mohan Chatterjee Ext. 2 dated 26-12-86, he made a very uncharitable remarks about Supriya Devi and her long association with Uttam Kumar Chatterjee. It is, however, strange that two years after he comes to witness box as an un summoned witness to support the case of Smt. Supriya Devi's daughter. So, I do not consider him to be an independent and reliable witness.
64. The other witness is Shri Ashim Kumar Sarkar who also claims that he was verbally invited in the Studio by Uttam Kumar Chatterjee to attend the ceremony. But shooting of the film which he produced in which Uttam Kumar Chatterjee acted as the hero was admittedly started in 1968 and was released in 1971. That is admitted by Ashim in evidence. It is an admitted fact that he wanted to get tenancy in Rash Behari Avenue in the Uttam Kumar's name transferred in his name after Uttam Kumar Chatterjee's death but not having received any help from Goutam could be successful in getting it transferred in his name with the help of Soma. It is suggested to him that because of his infatuation with Smt. Supriya Devi, Uttam Kumar Chatterjee had once plunged one hairpin on his head. He, however, denies that suggestion. When

his association with Uttam Kumar Chatterjee began with the production of film with Uttam Kumar Chatterjee as Hero and when that film first started shooting in 1968 it is difficult to accept his testimony that he was too close to Uttam Kumar in the beginning of 1967 that in the Studio he would be invited to attend the ceremony of adoption in 1967. When he was not producing any film with Uttam Kumar Chatterjee as hero in 1967 it is difficult to accept his evidence that Uttam Kumar Chatterjee who was busy actor in 1967 would meet him in the Studio in February 1967 to invite him.

65. He has got a favour from Soma Chatterjee because he got the tenancy of Uttam Kumar transferred in his name after his death by taking Soma's help. So there was every reason for him to depose on behalf of Soma.
66. This is the sum total of evidence adduced by the plaintiff to prove the ceremony of adoption and the participation of Smt. Gouri Devi. Even as regards the evidence of essential ceremony of giving and taking there is contradiction in evidence. Soma at first states that Uttam Kumar himself takes her in her lap. Smt. Supriya Devi speaks a Chandnataala being prepared for the ceremony which Mr. Upadhyay contradicts by stating that there was no Chandnataala. Smt. Supriya Devi claims to have placed Soma on Uttam Kumar's lap. Debesh states the same thing. But the priest makes contradictory evidence. At first he says that Soma sat on Uttam Kumar's lap. But then he says that she sat in between Uttam Kumar Chatterjee and Gouri Devi. Ashim Sarkar however says that Supriya's sister placed Soma on the lap of Uttam Kumar. If that were so there was no proper giving and taking by Supriya to Uttam Kumar.
67. It is true that the incident having taken place about twenty years ago the witnesses may not remember things correctly. But nobody says that he could not remember things correctly because it happened long ago. But each of them vividly remembers things but makes contradictory statements. The evidence thus does not appear to be reliable. Therefore, there is no independent evidence to support the story of essential ceremony of adoption on 21-2-67 as well as the participation of Smt. Gouri Devi. Moreover, Uttam Kumar Chatterjee and Smt. Supriya Devi being in that business they had large number of friends in the film world. Smt. Supriya Devi admits that in every ceremony in her house photographs are taken. As a matter of fact, several photographs have been exhibited in respect of other such minor ceremony like birthday etc. But there is no single photograph of the ceremony of adoption. Moreover the adoption ceremony of Uttam Kumar Chatterjee's alleged daughter was their family ceremony. It would be reasonably expected that Uttam Kumar Chatterjee would invite people by invitation cards. Moreover, there could no hush hush in the matter. Smt. Chapala Devi has stated in her evidence on commission that she never knew of the adoption and that she never saw Soma. It is not probable that Uttam Kumar Chatterjee, would not inform his own mother about the ceremony of adoption. There is no suggestion to Smt. Chapala Devi that she was in full knowledge of adoption or that she was intimated about it by his son prior to that. Admittedly she was not invited nor did she attend it. Tarun Kumar Chatterjee has also denied that he had any knowledge about the adoption and only when Smt. Gouri Devi created a row about it in January 1976 on receiving the invitation letter of Soma's marriage he had enquired about it from his eldest brother Uttam Kumar Chatterjee. He has categorically denied that he had participated in the ceremony of adoption on 21-2-67. Dr. Lal Mohan Mukherjee whom Debesh claims to have seen at 3, Moira Street on 21-2-1967 also denies to have attended it.
68. The defendants have, however, through Tarun Kumar Chatterjee, Gautam Chatterjee, Dr. Lal Mohan Mukherjee and Mr. Sankar Ganguly, a brother of Smt. Gouri Devi have sought to prove that Smt. Gouri Devi was submitted in Calcutta Nursing Home on 15-2-67 and had been operated upon by Dr. Nandi and had been discharged only on 23-2-1967. It is also their clear evidence that Uttam Kumar also attended his wife Smt. Gouri Devi in the Nursing Home in the morning and in the evening every day and consequently it was not also possible for Uttam Kumar Chatterjee even to attend any such ceremony on 21-2-1967 in the morning as alleged by the plaintiff and her witnesses.

69. Dr. Lal Mohan Mukherjee is admittedly the family physician of Uttam Kumar Chatterjee and Smt. Gouri Devi. He has produced the Exercise Book in which he claims to have recorded the details of the treatment that Gouri Devi had taken for her almirah in 1967 and 1968. From the entry of the said Exercise book, Ext. 4 the defendants seek to prove that the defendants story in this respect is true. This story has been seriously challenged by the plaintiff. It is contended that Smt. Gouri Devi was operated upon only sometime in 1968 and the story of her admission to Nursing Home on 15-2-1967 is a got up story.
70. It is true that the records of the Calcutta Nursing Home has not been called for even though there is no evidence that records of the Nursing Home for the relevant period are not available. It is true that apart from the oral evidence of the defendants' witnesses who appear to be more or less interested and a few documents produced there is no satisfactory independent evidence to support that story. Moreover, the defendants did not cause to produce the best evidence available. That Smt. Gouri Devi was ailing at about that time had not been disputed. The plaintiff only challenges that she was not in Nursing Home on or about 21-2-1967.
71. Even if, I can hold that the defendants did not produce the best evidence in this respect yet that does not automatically prove Smt. Gouri Devi's participation in adoption ceremony. I am firmly convinced that the plaintiff has failed to prove by satisfactory evidence that Smt. Gouri Devi actually attended the alleged ceremony. I am also convinced that the evidence for the essential ceremony of adoption also is not at all satisfactory. On behalf of the defendants it is urged that not only Smt. Gouri Devi did not attend the ceremony but also she had no knowledge of the said adoption prior to January, 1976 and that he came to know of it on receiving the invitation card of Soma's marriage in which Uttam Kumar Chatterjee printed the invitation cards declaring him to be the adopted father of Soma. A copy of that invitation card has been exhibited in this case.
72. There is clear and preponderance of evidence that Smt. Gouri Devi was clearly upset on receiving that invitation card. Smt. Chapala Chatterjee mentions about it. Gautam Chatterjee, Dr. Lal Mohan Chatterjee and Tarun Kumar Chatterjee also mention about it. Smt. Gouri Devi had gone to meet Prithwish Bagchi, the advocate of Alipur Court who prepared the deed of adoption. Shri Prithwish Bagchi has in his evidence admitted that Smt. Gouri Devi came and met him at about that time. In answer to question Nos. 19 and 20 Mr. Prithwish Bagchi has admitted that Smt. Gouri Devi came to him and began to cry before his wife and he had told her that if actually Uttam did not take her consent, then she should ventilate her grievance. He also concedes that it was at the time when Uttam Kumar had printed the invitation cards of Soma's marriage. It is also in evidence that after that Smt. Gouri Devi wrote letters to her husband, Smt. Supriya Devi, other relatives and friends including Mr. Prithwish Bagchi denying that she had given consent to the adoption. The copy of that letter has been exhibited. Some of the acknowledgement cards have been exhibited. Some of the persons who have received the letter, have been examined. It is also in evidence that at about that time Smt. Gouri Devi declared in Calcutta Gazette that she had not given consent to her husband to take Soma in adoption.
73. On behalf of the plaintiff, it is urged that the subsequent conduct of the wife denying giving consent would be immaterial if really she gave the consent. It is true that if Smt. Gouri Devi really gave consent her subsequent assertion that she did not give the consent would be immaterial. But in my view on considering the nature of evidence produced by the plaintiff and the subsequent denial of Smt. Gouri Devi it is clearly established that Smt. Gouri Devi did not give the consent. It is not at all probable that if she really gave the consent voluntarily to Uttam Kumar Chatterjee to take Soma in adoption then only on coming across the invitation card of Soma's marriage she would create such a row and ventilate to her relatives and friends her grievance that she did not give the consent.
74. Even the evidence by the plaintiff for the ceremony of adoption is far from satisfactory. It is well settled that as adoption disturbs and displaces the natural line of inheritance and the plaintiff has to discharge

her heavy burden to prove both the factum and validity of adoption. The reference may be made to Kishori v. Chalij Bai, and Raghavamma v. Chenchammal, .

75. On behalf of the defendant it is urged that in order to prove a valid adoption there would be not only giving and taking but such giving and taking would be with intention to transplant the child from the family of the natural parents to that of the adopted parents and that in this case Soma continues to live at 3, Moira Street where she was previously residing and never went to reside with the family of the adopted parents at Bhowanipore.
76. It is true that even after the alleged adoption the plaintiff continued to live at 3, Moira Street and never went to live at Bhawanipore house of Uttam Kumar Chatterjee. It is urged that Uttam Kumar Chatterjee had been residing at 3, Moira Street with Supriya and Soma since 1963 and continued to do so till his death and that was why she did not have the occasion to live at Bhawanipur house and that she however went there and visited Smt. Gouri Devi and other relations.
77. But the evidence of this respect clearly suggests that Soma never want to stay at Bhawanipore house. Even though Uttam Kumar Chatterjee continued to stay at 3, Moira Street, yet Smt. Gouri Devi would become her mother if there was really the adoption. If there was consent of Smt. Gouri Devi it was natural and probable for Soma to visit her adoptive mother as a daughter would do. Shri Tarun Chatterjee who used to love Soma as her daughter and he maintained good relations with Supriya Devi all along has clearly stated that Soma never came to live at Bhawanipore house. Smt. Chapala Chatterjee never saw Soma. If Soma became adopted daughter of late Uttam Kumar Chatterjee, she would be introduced to Chapala because Chapala became her grand mother. But Chapala Devi admittedly never saw Soma. That evidence of Chapala in examination-in-chief was not challenged in cross-examination. Other relatives who have been examined also never saw Soma at Bhawanipore house. On behalf of the defendants it is also urged that the adoption was not a genuine one but only a paper transaction by way of a registered deed Ext. A only would be borne out by the subsequent conduct of Soma herself.
78. It is submitted that when Soma's marriage under the Hindu Marriage Act has been registered in January 1976 in the application for registration of marriage she describes herself as the daughter of Biswanath Choudhury. The application of registration of marriage Ext. 1/1 and 2/1 clearly proves that fact. In the application Soma actually described herself as the daughter of Biswanath Choudhury. It is also significant to note when she married for second time in 1982 i.e. after the filing of this suit, she described herself as the daughter of Uttam Kumar Chatterjee.

But as in the meantime the present suit has been filed, there was sufficient motive for Soma to create such evidence. But admittedly in 1976 she described herself as the daughter of Biswanath Choudhury. Even in the application for Passport Ext. 24, she described herself as the daughter of Biswanath Choudhury. Mr. Chakraborty on behalf of the plaintiff has drawn my attention to Section 12 and 15 of the Hindu Adoption and Maintenance Act and has urged that if there was valid adoption, Soma by her subsequent conduct could not avoid or nullify it. Section 12 nodoubt is the deeming provision which declares that an adopted child shall be declared to be the child of the adoptive father or mother for all purposes with effect from the date of adoption. Section 15 also declares that not only adoptive father or mother but also the adoptive child cannot renounce his or her status as such and return to the family of his or her birth.

79. But this pre-supposes a valid adoption. The learned Advocate for the defendants points out that he is showing these circumstances to prove that there was in fact no valid adoption because if there was valid adoption Soma would not have continued to describe herself as the daughter of her natural father Biswanath Choudhury.
80. I am of the view that if there was valid adoption, Soma's subsequent inconsistent conduct would not cancel such adoption. But when I have already indicated that the plaintiff failed to produce sufficient independent evidence to prove that the adoption was a valid one, these circumstances namely that she

LANDMARK JUDGMENTS ON ADOPTION

continued to remain a stranger to the family of her adoptive parents and she continued to describe herself as the daughter of Biswanath Choudhury establish that there was in fact no valid adoption of Soma by Uttam Kumar Chatterjee.

81. Therefore, the Issue No. 1 is answered in the negative.

Issue Nos. 4 and 5 : In view of my findings in issue No. 1, I am of the view that, the plaintiff is not the adopted daughter of Uttam Kumar Chatterjee and as such she cannot claim any share to the estate of Late Uttam Kumar Chatterjee as his adopted daughter. Her suit is, therefore, dismissed with costs.

□□□

MANICK CHUNDER DUTT VERSUS BHUGGOBUTTY DOSSEE

Calcutta High Court

(Before Hon'ble Mr. Justice R. Garth & Hon'ble Mr. Justice Markby)

Manick Chunder Dutt

Versus

Bhuggobutty Dossee

Decided on 11 February, 1878

It cannot be denied that there is some ground for saying that the rules of adoption are not strictly applied to Sudras as to the other classes of the community: one instance of relaxation has been mentioned below; we ought to be careful how we extend the list of such exceptions, and draw distinctions between the classes, for which there is no direct authority in the Hindu law. There is no slightest authority in any text-book for saying that there is any distinction in this respect between Sudras and the other classes ... (Para-32)

JUDGMENT

Hon'ble Mr. Justice Markby :—

1. In this case the plaintiff, appellant, claims to have been adopted by the late Rajkrishna Dutt in his lifetime, and he brings this suit to have it declared that this adoption is valid, and that as such adopted son he is sole heir to his adoptive father. Mr. Justice Kennedy held upon the authority of the case of Upendra Lal Roy v. Rani Prasannamayi 1 B.L.R. A.C. 221 (i) that the adoption, if made, was invalid, because the plaintiff, at the date of the alleged adoption, was the only son of his father, and (ii) that no adoption had in fact taken place.
2. The case comes before us upon appeal from this decision, and the first question for consideration is, whether the adoption of an only son is invalid under the Hindu law. If this question is answered in the affirmative, there will be no necessity for deciding the second, which is one of fact.
3. I have gone carefully through all the authorities that we were referred to and that I have discovered, and I am surprised to find, how much less decisive authority there is upon the point than would appear from some of the modern text-writers. Many of the decisions commonly referred to have no bearing at all upon the question; in others the point is referred to, but it is extremely difficult to ascertain whether it was really considered.
4. The earliest decision of the late Sudder Dewany Adawlut usually quoted on this point is that of Ranee Bhudorun v. Hemunchul Sing 2 Sel. Rep. 59, which was decided in 1813, but no question of adoption was really decided in that case at all. The respondent, in a suit brought against him to account for the profits of certain property, only alleged that he had been "merely" adopted by a previous owner, and what he really relied on was a temporary settlement made by Government with himself. The appellant, no doubt, objected that the respondent as an only son could not be adopted; and from a statement made in another case reported in the same volume, to which I am next about to refer, it is probable that the opinion of the pundits was taken upon this point, and that they thought such an adoption invalid (see p. 221). But no

opinion whatever was expressed upon this point either by the Provincial Court or by the Rudder Dewany Adawlut; the suit being decided in favour of the respondent upon the other ground.

5. In *Rajah Shamshere Mull v. Ranee Dilraj Konwur* 2 Sel. Rep. 169 there was, when tire suit was brought, only one adoption in dispute, that of the plaintiff's father by a widow of Rajah Bheem Mull. But on the death of the original defendant, his widow, Dilraj Konwar, adopted Tej Mull, the grandson of her husband's uncle, and continued the suit. The Zillah Court held that the adoption of the plaintiff's father was bad, not because he was an only son, which he was not, but because Rajah Bheem Mull had not authorized it; that consequently the plaintiff had no claim to be heir of Rajah Bheem Mull, and on this account the Zillah Judge dismissed the suit. On appeal to the Provincial Court of Benares, this decree was affirmed. On further appeal to the Suddor Dewany Adawlut, the pundits were asked as to the validity of both adoptions. They considered the adoption of the plaintiff's father illegal for the reason assigned; and the adoption of Tej Mull they also declared to be illegal he being the only son of his father, unless it could be supported as a dwayamushyayana adoption. But ultimately nothing was decided upon this point, because the Court agreed in the view that the adoption of the plaintiff's father was bad, and that therefore the plaintiff had failed to make out his title.
6. The next case is that of *Nundram v. Kashee Pandey* 3 Sel. Rep. 232 which is dated June 30th, 1824, but was really decided on June 30th, 1823. In that case the plaintiff claimed property which had belonged to Pullut Pandey by two titles, (i) as his heir by adoption, (ii) under a deed of gift. The adoption was disputed on the ground that the plaintiff was an only son; and the gift was disputed on the ground that the property was inalienable. The Zillah Court held that both the adoption and gift were valid. This judgment was reversed, on appeal, by the Provincial Court, where it was held that both the adoption and the deed of gift were invalid: the adoption upon the ground that the plaintiff was the only son, and the gift upon the ground that the property was inalienable. A special appeal was then admitted by the Sudder Court, and the pundits wore asked whether it is allowable, according to the law current in Tirhoot, to adopt an only son. A question was asked also as to the validity of the gift. The pundits declared both the adoption and the gift to be invalid, and after perusing this opinion the Court (Leycester and Dorin) dismissed the appeal.
7. This, it will be observed, is the earliest judicial authority upon the question in Bengal. It was necessary to determine the point, because the two titles, that by gift and that by adoption, were wholly independent, and the determination was against the validity of both titles. But the litigation in this suit was subsequently re-opened by an application for review, applied for on the ground that the vyavastha, upon the strength of which the appeal was dismissed by the Sudder Dewany Adawlut, had been obtained by bribery. The further report of the case is in 4 Sel. Rep. p. 89 (edn. 1870). The review was admitted, and fresh pundits were consulted by the Sudder Court upon the same two points as before. The same answers were given. Upon this Mr. Smith expressed the opinion that the plaintiff ought to get a decree. He considered that he was at liberty, on the re-hearing, to go into entirely new facts; and he thought it proved that the plaintiff was not an only son; he also thought that the gift was valid and he further said that "probably" the adoption even of an only son was valid. But Mr. J.H. Harrington and Mr. Martin held otherwise. They thought that the question as to whether plaintiff was an only son could not be re-opened, and taking him to be so, they held that his adoption was illegal: that the gift was also illegal: and they confirmed the decision originally passed by the Sudder Court.
8. It appears, therefore, that, in this case, which was twice heard, and in which the point expressly arose, four Judges, against the doubtful opinion of one, held that the adoption of an only son was invalid. There could not be a stronger authority against the validity of the adoption. How it is possible that Mr. Morley could have so far misunderstood this case as to represent it as a decision that the adoption of an only son once made could not be set aside, I cannot understand. This misstatement of tins important decision has no doubt led to considerable misconception.

9. In *Debee Deal v. Hur Hursing* 4 Sel. Rep. 320 the question was as to the validity of the adoption of the defendant. The defendant was the grandson of the paternal uncle of his adoptive father, and only son of his natural father. The adoption was established in the City Court of Benares, the objection that the defendant was the only son apparently not having been taken. On appeal to the Provincial Court it was objected that the plaintiff was the only son of his father, and the Court pundits signified their opinion that the adoption of an only son was invalid. But the respondent filed an opinion to the effect that a mother might give her son upon the special condition that he should be the son of two fathers (*dwaymushyaycana*). The Court pundits were thereupon again consulted, and they agreed that the adoption as stated by the defendants was legal. The Judge of the Provincial Court, evidently proceeding upon this view, assumed the adoption to have been in this form, and dismissed the appeal. The plaintiff then appealed to the Sudder Court, Mr. Smith (who had apparently therefore seen reason to doubt his former opinion) admitted the appeal and the pundits were again consulted. They thought that the adoption could not be supported, even as a *dwaymushyayana* one, because the natural father had not consented to it. On the authority of this opinion, Mr. Sealy and Mr. Leycester concurred in holding the adoption to be invalid, and they reversed the decree of both the lower Courts. There is no judgment given in the report, and we cannot, therefore, be quite sure what the opinion of the Judges was. It is most probable that they entirely agreed with the pundits; but it is also just possible that they may have considered the adoption invalid, simply on the ground that the natural father's consent had not been given. I do not, therefore, reckon this as a decisive authority on the question.
10. In the case of *Dullabh De v. Manu Bibi* 5 Sel. Rep. 50 the statement of the plaintiff was, that she and her husband were asked by the defendant to give their only son to her to be adopted, but they refused. The plaintiff was, however, then pregnant, and she and her husband promised that, if she were delivered of a male child, they would give that child to the defendant. A son was born to the plaintiff, and was accordingly given to the defendant, but owing to its tender age the child was returned to its natural mother. Some years afterwards, and after the child's elder brother had died, the defendant with due solemnities, including a sacrifice for male issue, "publicly constituted him her adopted son." The Judge of the Provincial Court of Dacca, after consulting the pundit of that Court, held the adoption valid. One of the Judges of the Sudder Court (Rattery) thought an appeal ought to be admitted, upon the ground that the suit was improperly framed; but two other Judges (Rose and Turnbull) thought otherwise; and "concurring in the facts and law as found and laid down by the lower Court," dismissed the appeal.
11. If it was intended in this case to lay down, as a general rule, that the adoption of an only son is valid, it is certainly very remarkable that no reference was made to the pundits of the Sudder Court, or to the previous decisions, one at least of which is a very strong one and distinctly contrary. But Mr. Morley (Digest, p. 18) does not understand this case as deciding anything more than that where the gift and acceptance of a second son preceded the death of an elder son given in adoption, then the full completion (i.e., after the death of the elder son) is legal." Possibly it may be so. It may have been thought that the gift, at the time there was an elder son living, being valid, the completion of the adoption by a performance of ceremonies was not illegal. Whether or no this would be a correct opinion I do not say. I am disposed to think it would not; but it seems to me more reasonable to suppose that this case was somehow distinguished than to suppose that the previous decision in *Nundram v. Kashee Pandey* 4 Sel. Rep. 70 which was so fully and carefully considered, was overruled.
12. No case bearing upon this subject in the Sudder Adawlut was produced, nor have I found any between this, which was decided in 1830 and 1859. In the latter year a suit came up on appeal from Cuttack, in which one of the plaintiff's made title as an adopted son. Both this Court and the Court below held that the plaintiff had failed to prove his adoption, and this is expressly made the ground of the judgment in the Sudder Court. But the Court (Trevor, Samuells and Bayley) thought fit also to express the opinion that the plaintiff as the eldest, not the only son of the adoptive father's brother, could not be adopted. If this wore good law, of course, a fortiori, an only son could not be adopted. But it is, I believe, the first

and only time that it has been held by any Court of Justice that an eldest son cannot be adopted; and the contrary has been laid down in two succeeding cases--Sheetaram v. Dhunnook Dharee Sahye 1 Hay 260 and Janokee Debea v. Gopaul Acharjea I.L.R. 2 Calc. 365. I think, therefore, that this case also ought not to be accepted as an authority.

13. These are all the cases I am aware of in the late Sudder Court. In the late Supreme Court, there is one case only--Joymony Dasse v. Sibosoondry Dasse Fulton 75--decided in 1837. There the adoption of an only son was held valid; but the report, which is exceedingly brief, leaves it very doubtful whether the ground of the decision was not that the adoption was a *dwaymushyayana*; and if so, it is, of course, not in point.
14. There are two cases in this Court, The first is that of *Mussamat Tikday v. Hurreelall* W.R. 1864 Gap. No. 133. I shall have to discuss that case very fully upon another point which arises in this case. It is sufficient to say now that there the adoption was in the *kurta* or *kritima* form. But a son adopted in the *kritima* form does not cease to belong to the family of his natural father (see *Sutherland in Stokes' Hindu Law*, pp. 668, 669, 676, 677, and 678). The cardinal reason, therefore, why an only son cannot be adopted,--namely, that the lineage of his family is thereby extinguished, and the ceremonies can no longer be performed which are necessary for the salvation of his ancestors,--does not apply. There cannot be a more complete case for the application of the maxim *cessante racione cessat et ipsa lex*. It is, I think, clear that no decision as to the validity of an adoption, where there is no extinction of lineage, can be used as an authority to support an adoption where such extinction takes place.
15. The other decision of this Court is that of Mr. Justice L. Section JACKSON and Mr. Justice D.N. Mitter in the case of *Raja Upendra Lal Roy v. Rani Prasannamayi* 1 B.L.R. A.C. 221. Most of the authorities were considered in that case, and it was expressly held that the adoption of an only son was invalid. The suit was dismissed upon that ground; and a decision of the Madras Court to the contrary, which I am about to notice, was expressly dissented from.
16. In the Madras Courts there are two decisions. In *Pillay v. Pillay* 1 Str. Notes of Mad. Cases 78, decided by Sir Thomas Strange whilst he was Recorder, the complainant, whose adoption was disputed, had an elder brother by a former marriage living at the time of the adoption (p. 106). No question therefore arose in this case as to the validity of the adoption of an only son. But Sir Thomas Strange thought fit, nevertheless, to express an opinion that the adoption of an only son was valid. But, as the learned Judge has elsewhere told us (*Strange's Hindu Law*, Vol. 1, p. 102,) he based this decision "upon comparatively imperfect materials;" and the decision has been criticized by Sir Francis Macnaghten (see *Considerations of Hindu Law*, pp. 147, 187). Its chief importance depends on the relation it contains of the case of the Raja of Tanjore (see p. 107 of the Report), from which it would appear that the pundits of Bengal (including Benares) and Madras had given an opinion that the adoption of an only son was valid. But it does not appear that those opinions were ever submitted to any Court, nor is it said upon what texts they are based, and I believe it to be a clear principle, understood and acted upon ever since our Courts have been established, not to accept as authority the opinions of pundits unconfirmed by judicial decision and unsupported by texts. Nor can I account for this unanimity of the Bengal pundits in favour of the adoption of an only son. They were very frequently consulted upon this point by the Sudder Dewany Adawlut and the Provincial Courts, and so far as appears from the Sudder Dewany Adawlut Reports, their opinions were unanimous the other way, except in one solitary instance, that of the Court pundit of Dacca, *Musst. Dullobh De v. Manu Bibi* 5 Sel. Rep. 52 and this pundit gives no authorities.
17. The other case in Madras is a decision of the late Chief Justice Sir Colley Scotland and Freere in *Chinna Gaundan v. Kumara Gaundan* 1 Mad. H.C. 54. There the adoption of an only son was distinctly held to be valid. The Chief Justice relies on the case of *Pillay v. Pillay* 3 Sel. Rep. 232 just referred to; another case of *Pillay v. Pillay* which I have not been able to see; *Nundram v. Kashee Pandey* 4 Sel. Rep. 70; and *Joymony Dasse v. Sibosoondry Dasse Fulton* 75 all of which he takes to be in favour of the validity of the adoption of an only son. I have already pointed out to what extent three of these cases are really

authorities for that proposition. It is clear that the Chief Justice was misled by Morley as to the true result of the case of *Nundram v. Kashee Pandey* 4 Sel. Rep. 70, which, as I have shown, was directly contrary to what the learned Chief Justice supposed.

18. Only one case has been quoted from Bombay. It would be possible to make some observations upon that decision as it appears in the report, which is not a satisfactory one, but it is impossible to deny that the two Judges who decided it (Warden and Gibbs, JJ.) thought that the adoption, which was of an only son, was legal.
19. It was stated in the argument that it had been hold that in the Punjab generally an adoption of an only son was legal, but we have not been shown any authority upon which that statement could be made. The only case to which we were referred to does not bear out that statement. In *Ajoodhia Pershaud v. Mussamut Dewan* 5 Punjab Record p. 56 Simson, J. hold in special appeal, that the adoption of an only son was valid; it having been found by the lower Court on the evidence "that by the usage in Delhi generally, and in respect of the caste of the litigants in particular, the custom is to receive an only son in adoption." A former decision was referred to, which was also a case from Delhi, in which the adoption of an only son had boon upheld. Lindsay, J. differed from Simson, J. but I confess I do not understand upon what grounds, for the adoption was clearly a legal one in Delhi. But the case is no authority as to the general law either of the Punjab or of any other part of India.
20. I now pass to the text-books by English writers.
21. Sir Thomas Strange, at Vol. I, p. 87 of his treatise on Hindu Law (London, 1800), says, "so with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are directory only; and an adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose, be good, according to the maxim of the civil law prevailing perhaps in no Code more than in that of the Hindus, *factum valet quod, fieri nan debuit.*" But in the Appendix, p. 107, he quotes the high authority of Mr. Colebrooke to the contrary. A pundit had given his opinion that "if a man have no male issue of his own, it is stated in many books that he may, under the pressure of distress, adopt the only son of a brother." Upon this opinion, Mr. Colebrooke made the following observations: "If a brother's only son be adopted, he need not be taken away from the family of his natural father, but may continue to perform the offices of a son, both to him and to his adoptive father. See notes to *Mitakshara* on Inheritance, ch. i, Section x, 1, and Section xi, 32. A valid adoption of an only son cannot otherwise be made, the absolute gift being forbidden."
22. The conclusions of Sir F. Macnaghten's *Considerations of Hindu Law*, p. 147 (Serampore, 1824), are thus stated: "The gift of an only son in adoption is absolutely prohibited; an only son cannot be given or received in adoption. The gift of an only son is considered to be an inexpiable piacle. It is indeed said that an only son may be so given; but it might be said in the same sense, that a man may perpetrate any wickedness if he be content to forego all hopes of salvation and be condemned to everlasting punishment."
23. By the gift of an only son, the very deficiency which the power of adoption is intended to prevent must necessarily be occasioned, Nothing in the Hindu law is more peremptorily interdicted than the gift of an only son in adoption. Even the gift of an eldest son is forbidden as sinful. The crime of giving an eldest has never boon considered so heinous, as that of giving an only son. In the one ease a Hindu retains, in the other he casts away, the means of salvation. Considering the precepts and injunctions, both positive and negative, upon this subject, we must be convinced that he who gives his only son in adoption is little loss than apostate from the Hindu religion."
24. Sir W. H. Macnaghten, in his *Principles and Precedents of Hindu Law*, speaking of the prohibition against adopting an only son, says, at p. 67 of Vol. I (Calcutta, 1829) in a note: "But this is an injunction rather against the giving than the receiving an only or elder son in adoption, and the transfer having been once made, it cannot be annulled. This seems but reasonable, considering that the adoption having once been

made, the boy ipso facto loses all claim to the property of his natural family." There is no doubt sometimes hardship upon the adopted son, if the adoption be held to be invalid; but he does not, as here stated, in that case lose all claim to the property of his natural father: *Bawani Sankara Pandit v. Ambabay Ammal* 1. Mad. H.C. Rep. 363. However, in Vol. II, p. 179, the same author expresses a contrary and, what I think must be considered, his final opinion. He quotes an opinion, of the pundits at p. 178 of Vol. II, that a gift of the survivor of two sons is invalid. Upon this he observes in a note; "It will be observed that the answer is not directly in point. The question was, is it legal to adopt a son under such circumstances? and the reply states that it is illegal, under such circumstances, to give away a son in adoption; but in fact the prohibitory injunction applies as well to the giving as to the receiving, the giver of an only son being considered as parting not only with the sole means of evading eternal torment himself, but as placing his ancestors in the same predicament, and as infringing, therefore, the interests of others whom the law will interpose its authority to protect."

25. Mr. Justice Strange, in his *Manual of Hindu Law*, pp. 18 and 19, contests the position that the adoption of an only son can be held valid. The passage is quoted at length in *Chinna Gaundan v. Kumara Gaundan* 1 Mad. H.C. Rep. 54. It is of little value, as it puts on a par the objection to the adoption of an eldest and an only son, which shows, to say the least, a want of discrimination.
26. Mr. Sutherland, in his *Synopsis* (Stokes' Collection of Hindu Law Books, p. 665), says: "An only son cannot become an absolutely adopted son (*sudha dattaka*), but he may be affiliated as a *dwaymushyayana* or son of two fathers. In this case, the reason of the prohibition,--viz., extinction of lineage to the natural father--would not apply."
27. It remains to notice the Hindu text-writers. The earlier Hindu text-writers are of course the source from which we ought ultimately to derive the law, and are, therefore, the most important authorities of all. Just the difficulty is in ascertaining what rule it was intended to lay down. There would indeed be less difficulty if the view of Mr. Justice Dwarkanath Mitter in *Upendra Lal Roy v. Rani Prasannamayi* 1 B.L.R.A.C. 221--224 could be accepted, that in the matter of adoption all distinctions between religious and legal injunctions are inapplicable. That distinction, however, is in my opinion too well established to be entirely put aside. Nor do I see any substantial ground why that distinction should not be applied in cases of adoption as well as in other matters of Hindu law, all of which are in a sense matters of religion. After full consideration Mr. Justice Romesh Chunder Mitter thought it right to apply that distinction in the case of an adoption of an eldest son--*Janokee Debea v. Gopaul Acharjea* I.L.R. 2 Calc 365 and I concurred in that view. No one disputes, however, that the authoritative text-books of Hindu law do, in fact, contain a prohibition against the adoption of an only son, and in order to arrive at a conclusion whether this prohibition invalidates an adoption actually made, I think we ought to consider at one view (1) the language of the prohibition itself, (2) the authoritative commentaries upon it, and (3) the decided cases; and that we ought to see whether, upon the whole, the adoption is, according to modern usage, to be considered as invalid. It was indeed argued that the language of the text-books themselves countenanced the view that the adoption of an only son, though blameable, was not invalid, because whilst the giving of an only son is forbidden, the receiving him is not; whereas if the adoption were illegal, both would have been forbidden. But this is not so as far as I have seen, it is certainly not so in the *Dattaka Mimansa*, the *Dattaka Chandrika*, or the *Mitakshara*. The authors of these treatises all quote the same text of the sage *Vashishtha*, which is the foundation of the whole doctrine. This text is quoted at length in *Colebrooke's Digest*, Vol. III, Book 5, v. 273, and I need not therefore repeat it here. It clearly prohibits both the giving and the receiving of an only son in adoption, and I do not find the slightest attempt to qualify this prohibition in any passage of these three writers. The first and, as far as I am aware, the only Hindu text-writer of authority who has suggested that this prohibition should be qualified is a much more modern one, namely *Jagannatha*, the author of the work popularly known as *Colebrooke's Digest*. He says in his note on the passage of *Vashishtha* above referred to (*Colebrooke's Digest ubi supra*) "As an only son should not be given, so he should not be sold or deserted. Sale is a great offence,

even though made in a season of calamity, when a maintenance cannot be provided; desertion is a great offence, because the family becomes thereby extinct. Thus the Pracasa--let no man accept an only son, because he should not do that whereby the family of the natural father becomes extinct: but this does not invalidate the adoption of such a son actually given to him." Opinions differ as to the precise value of, Jagannatha's authority, but though of course it is far inferior to that of the authors of the three more ancient treatises above referred to, it is certainly entitled to considerable weight.

28. Some attempt was made to show that Srinatha Bhatta, the author of the Dattaka Nirnaya, recognized the adoption of an only son as valid, and there is perhaps some countenance for this in the way this author is quoted by Sir E. Macnaghten at p. 126, but I should be very unwilling to draw any inference as to the opinion of any writer whose language I had not myself seen.
29. If this recapitulation of the authorities be carefully considered, I think it will be seen that there are only four cases in which it is clear that the point properly arose, and was decided: the case of Nundram v. Kaskee Pandey in the Sudder Dewany Adawdut the case of Raja Upendra Lal Roy v. Rani prasannamayi in this Court; the case of Goundan v. Gaundan in the High Court of Madras; and the case of Nimballear v. liamadim in the High Court of Bombay. Of these, the two Bengal decisions are against the adoption; the decisions of Madras and Bombay support it. Of the English text-writers, Colebrooke, the two Macnaghtens, Sutherland, and Mr. Justice Strange, all think the adoption illegal; there is only one English text-writer, Sir Thomas Strange, on the other side, backed no doubt by the important but solitary opinion of Jagannatha amongst the Hindu text-writers.
30. It appears to me, therefore, that the vast preponderance of authority, if not the entire authority in Bengal, is against the validity of the adoption of an only son; and if we were to hold the adoption of the plaintiff in this case to be valid, it would be necessary to overrule both the carefully-considered decision of Jackson and Dwarkanath Mitter, J.J. and the equally careful decision of four Judges of the Sudder Court. This of course could only be done by a Full Bench. But we could only refer the case to a Full Bench if there is a conflict of authority, or if we ourselves differ from those decisions. Having gone through all the cases with great care, I do not think it can be said that there is any such conflict of authority in Bengal as to justify us in referring the case to a Full Bench on that ground; and I am not prepared to refer the case to a Full Bench upon the ground that I myself think the adoption of an only son valid. On the contrary, on the best consideration I have been able to give to the authorities, I think such an adoption ought, in Bengal, to be held to be invalid, wherever the effect of holding such adoption to be valid, would be to extinguish the lineage of the natural father, and so to deprive the ancestors of the adopted son of the means of salvation.
31. Of course the question whether this particular case can be taken out of the general rule is a wholly different one; and the appellant before us has contended that, oven if, as a general rule, the adoption of an only son be invalid, still the rule does not apply to Sudras. No reason was given for excepting Sudras from the rule, and the principle upon which the rule is based,--namely, that a man shall not be allowed to extinguish, his lineage to the detriment, not only of himself, but of his ancestors, apparently applies just as strongly to Sudras as to other Hindus. The only decided case which lends any colour to a distinction in the case of Sudras is that of Mussamut Tikday v. Hurreelall W.R. 1864 Gap. No. 133 above referred to. But upon an examination of that case, I have come to the conclusion that it is no authority for drawing a distinction between Sudras and other classes of Hindus upon this point. No doubt, the parties in that case wore Sudras; and no doubt also this fact is noticed in the judgment, but, in my opinion, for another purpose. The case came up upon appeal from the Zillah Court of Patna. It appeared that one Nowrunghee Lall had two wives. By the first, whose name is not given, he had a daughter, Nuseebun but no son. The second wife, Mussamut Tikday, was childless. Mussamut Tikday survived her husband; the other wife died in his lifetime. During his lifetime Nowrunghee adopted his grandson, Hurree Lall, the only son of his daughter Nuseebun as a "kurta" or "kritima" son. After Nowrunghee's death, Mussamut Tikday brought a suit against Nuseebun and Hurree Lall to recover, as heiress to her husband, certain property which

had belonged to him; and it was in this suit that the question arose whether the adoption of Hurree Lall was valid. In the judgment of this Court, the Zillah Judge is stated to have held that, as the family were "Sudras, no exception could be taken to the selection of an only son as a kurta putro." I have referred to the judgment of the Zillah Judge, and I do not find that he said this. What he did say was, that a Sudra can adopt his sister's son or daughter's son, and for this there is good authority in the Dattaka Chandrika, Stokes' Hindu Law, 632, where Sudras are specially exempted from the rule which prohibits members of the other classes from adopting a daughter's or a sister's son. But the rule as to kritima adoptions is the same, as far as I am aware, for all the classes. It is a peculiar form of adoption which prevails in Mithila, whereby the adopted child does not cease to belong to the family of his natural father (see Sutherland in Stokes' Hindu Law in the passages already cited), and is not confined to any particular class. In point of fact, the Zillah Judge appears to have overlooked entirely that this was not a regular adoption, but a kritima one, and relying solely upon the first opinion of Sir. W. H. Macnaghten as quoted above, held that, as a general rule, the adoption of an only son could not be impeached. It was not until the case arrived in this Court that it was discovered that the adoption was in the kritima form, and I have no doubt that that was the substantial reason why in this case the adoption of an only son was held to be valid.

32. It cannot be denied that there is some ground for saying that the rules of adoption are not strictly applied to Sudras as to the other classes of the community: one instance of relaxation has been just now mentioned; but I think we ought to be careful how we extend the list of such exceptions, and draw distinctions between the classes, for which there is no direct authority in the Hindu law. I do not find the slightest authority in any text-book for saying that there is any distinction in this respect between Sudras and the other classes. If, therefore, the distinction exists at all, it rests solely upon the language used by the Judges in the case of *Mussamut Tikday v. Hurrelall W.R. 1864 Gap No. 133*. But as I have just now stated, I do not think that that decision, so far as it relates to the adoption of an only son, really proceeded upon any distinction between Sudras and other classes, and therefore, upon the ground that this is a general rule from which it is not shown that Sudras are excepted, I think we ought to hold that for all classes of Hindus in Bengal an adoption is invalid wherever the effect of the adoption, if valid, would be to extinguish the lineage of the natural father, and to deprive the ancestors of the natural son of the means of salvation.

Garth, C.J.

33. I quite agree in the conclusions arrived at in the very learned judgment of my brother Markby. I think the weight of authority in Bengal is decidedly in favour of the invalidity of the adoption of an only son; and I see no sufficient ground for making any distinction in this respect in the case of Sudras.
34. The appeal will be dismissed with costs on scale 2.

□□□

KAKCHINGTABAM IBOMCHA SHARMA VERSUS HEIRANGKHONGJAM NOYON SINGH AND ORS.

In the High Court of Gauhati at Imphal

RFA No. 9 of 2007

(Before Hon'ble Mr. Justice T. Nandakumar Singh)

Kakchingtabam Ibomcha Sharma ... Appellant;

Versus

Heirangkhongjam Noyon Singh and Ors. ... Respondents.

Decided on August 30, 2012

Civil Procedure Code, 1908, S. 96 — Appellate court duty bound to make a critical analysis of the matter before it — Appellate court cannot affirm or reverse the findings of the trial court without due and proper application of mind — Finding of fact of the trial court mainly based on oral evidence or documentary evidence, ordinarily not to be disturbed unless the trial court's approach in appraisal of the evidence appears to be materially erroneous. [Para 16]

Hindu law — Adoption — Giving and receiving of a boy is absolutely necessary to the validity of adoption — No requirement of a particular form so far as giving and acceptance is concerned — Requirement of valid adoption.

Under the Hindu Law, the giving and receiving of a boy is absolutely necessary to the validity of an adoption; they are the operative part of the ceremony being that part of it which transfer the boy from one family to another; but the Hindu law does not require that there should be a particular form so far as giving and acceptance are concerned and for a valid adoption all that law requires is that natural father shall be asked by the adoptive parent to give his son in his adoption and they boy shall be handed over and taken over for this purpose. [Para 19]

Hindu law — Adoption — Persons who seeks to displace the natural succession to property by alleging an adoption, must discharge the burden that lies upon him by proof of factum of adoption and its validity — Evidence in proof of adoption should be free from all suspicion of fraud — Evidence should be so consistent and probable as to give no occasion for doubting the truth. [Para 20]

Hindu Adoption and Maintenance Act, 1956 — Adoption — Void adoption — Void adoption shall neither create any right in the adoptive family in favour of any person which he or she could have acquired except by the reason of adoption nor destroys the right of any person in the family of his or her birth. [Para 26]

Hindu Adoption and Maintenance Act, 1956, Ss. 12 and 15 — Adoption — Adoption validly made cannot be cancelled by the adoptive father or mother or any other person (2005) 8 SCC 438 Adoptive child cannot renounce his status as such and return to the family of his birth. [Para 25]

Family settlement — Family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between various members of the family

— **Individuals having antecedent title to the property of the family can only be a party to the family settlement.** [Para 26]

Advocates who appeared in the case:

Mr. N. Kerani and Ms. Nandita, for the appellant.

Mr. Kh. Mani, for the respondents.

JUDGMENT AND ORDER

1. The unsuccessful plaintiff preferred this appeal against the judgment and decree of the learned trial court (Addl. District Judge, Fast Track Court), Manipur West dated 28.6.2007 dismissing the O.S. No. 6/2003/4/2006.
2. Heard Mr. N. Kerani, learned senior counsel assisted by Ms. Nandita, learned counsel for the appellant-plaintiff and Mr. Kh. Mani, learned counsel for the respondents-defendants. The crucial issue to be decided in the present First Appeal is "whether the appellant-plaintiff is the adopted son of one Shri Brahmacharimayum Nilamani Sharma". For deciding this issue, the concise pleaded case of the parties are to be looked into, and accordingly, briefly noted.
3. The appellant-plaintiff filed O.S. No. 6/2003 for the reliefs:
 - "(a) A decree for declaration of his title over the suit lands described in schedule A and B on the strength of the family arrangement.
 - (b) A decree for declaration that the plaintiff is the shebait of Radha Madhop Devata, which is worshipped inside the Suit Land-A.
 - (c) A decree for cancellation of the name of Radha Madhop Debata Shebait Committee, Keirak Awang Leikai, from the land record of the suit land.
 - (d) A decree for permanent injunction against the defendant Nos. 1 to 4 and their privies so as to restrain them to invade into the suit lands so that the plaintiff may enjoy the same peacefully and comfortably.
 - (e) Cost of litigation.
 - (f) Any other relief or reliefs which are appropriate and reasonable in the nature of the suit be awarded to the plaintiff."
4. The pleaded case of the appellant-plaintiff is that one Shri Brahmacharimayum Nilamani Sharma was the absolute owner and pattadar of the homestead measuring 1.15 acres, covered by Dag No. 88, of patta No. 425 corresponding to old patta No. 70 situated in revenue village No. 65 Keirak. Shri Brahmacharimayum Nilamani Sharma also owned and possessed paddy fields: (1) paddy field measuring an area of 1.43 acres covered by Dag No. 581 of new patta No. 421 corresponding to old patta No. 74 of revenue village No. 65 Keirak; (2) paddy field measuring an area of 1.29 acres covered by Dag No. 585 of new patta No. 421 corresponding to old patta No. 74 of revenue village No. 65 Keirak; (3) paddy field measuring an area of 1.15 acres covered by Dag No. 587 of new patta No. 422 corresponding to old patta No. 284 of revenue village No. 65 Keirak; (4) a paddy field measuring an area of 1.29 acres covered by Dag No. 588 of patta No. 422 corresponding to old patta No. 284 of revenue village No. 65 Keirak; (5) a paddy field measuring an Area of 1.39 acres covered by Dag No. 522 of new patta No. 419 corresponding to old patta No. 733/156, in revenue village No. 65 Keirak; and (6) a paddy field measuring an area of 1.43 acres covered by Dag No. 589 of new patta No. 422 corresponding to old patta No. 284 of revenue village No. 65 Keirak.
5. The said Shri Brahmacharimayum Nilamani Sharma, died in the year 1995 and during his lifetime he did not have a male issue (son) and he adopted the appellant-plaintiff as his son when the appellant-plaintiff was aged about four years. The appellant-plaintiff was aged about 32 years at the time of filing

the OS No. 6/2003. The pro forma respondent/pro forma defendant No. 5 is the wife and pro forma respondent/pro forma defendant Nos. 6 and 7 are the daughters of late Shri Brahmacharimayum Nilamani Sharma. At the time of adoption, the appellant-plaintiff was actually given by his natural parents to late Shri Brahmacharimayum Nilamani Sharma (adoptive father) in the presence of local elders. Shri Brahmacharimayum Nilamani Sharma and his wife, pro forma respondent/pro forma defendant No. 5 taken the appellant-plaintiff from his natural parents to become the adopted son of Shri Brahmacharimayum Nilamani Sharma. The appellant-plaintiff had been staying in the house of his adoptive parents till the death of late Shri Brahmacharimayum Nilamani Sharma. Shri Brahmacharimayum Nilamani Sharma brought up the appellant-plaintiff as his son and performed Nahutpa ceremony and Upanayan (lugun thangba)' ceremony of the appellant-plaintiff. On 26.9.1987 the appellant-plaintiff married with one Km. Tampakleima Devi and the marriage ceremony was performed by his adoptive father.

6. During the lifetime of late Shri Brahmacharimayum Nilamani Sharma, he constructed a pucca temple and katcha mandap on the eastern portion of his homestead and worshiped Radha Madhop Devata in the said temple and performed rituals of the deity. When his adoptive father became old and weak, the appellant-plaintiff performed the ritual for the deities and management of the affairs of the said deity. The appellant-plaintiff also resided on the western portion of the homestead land in a dwelling house constructed by late Shri Brahmacharimayum Nilamani Sharma. His adoptive parent also resided in the said house. The pro forma respondent/pro forma defendant Nos. 6 and 7 were already married before the adoption of the appellant-plaintiff and they lived with their respective husbands.
7. Before his death, late Shri Brahmacharimayum Nilamani Sharma on 8.7.1993 appointed the appellant-plaintiff as shebait of Radha Madhop Devata. On the same day, a family arrangement of his landed properties was also made amongst the appellant-plaintiff and the pro forma respondents. The said family arrangement was made in the presence of the local elders so as to avoid future litigations amongst the appellant-plaintiff and pro forma defendants. Under the said family arrangement, pro forma respondent/pro forma defendant No. 5, Smt. Angousana Devi (widow of late Shri Brahmacharimayum Nilamani Sharma) got the paddy field measuring an area of 1.39 acres covered by Dag No. 522 of new patta No. 419 corresponding to old patta No. 733/156 of revenue village No. 65 Keirak. The pro forma respondent/pro forma defendant Nos. 6 and 7 got the paddy field measuring an area of 3.87 acres covered by Dag Nos. 587, 588 and 589 of new patta No. 422 corresponding to old patta No. 284 of revenue village No. 65 Keirak. The pro forma respondent/pro forma defendant No. 6 also got a paddy field measuring an area of 1.29 acres covered by Dag No. 585 of new patta No. 421 corresponding to old patta No. 74 of revenue village No. 65 Keirak.
8. The appellant-plaintiff got a part of the homestead measuring an area of. 82 acre in which the said temple and mandap were constructed within the homestead measuring an area of 1.15 acres covered by Dag No. 88 of new patta No. 425 corresponding to old patta No. 70 of revenue village No. 65 Keirak and a paddy field measuring an area of 1.43 acres covered by Dag No. 581 of new patta No. 421 corresponding to old patta No. 74 of revenue village No. 65 Keirak. The pro forma respondent/pro forma defendant Nos. 5 to 7 got the remaining part of the homestead after exclusion of the shared portion of the appellant-plaintiff after the said family arrangement.
9. The respondent/defendant Nos. 1 to 4 are the villagers of the Keirak village who had no right and title over the suit land. Respondent/defendant Nos. 1 to 4 claimed themselves to be the members of the Radha Madhop Devata shevait committee of the said Radha Madhop Devata installed by the appellant-plaintiff's adoptive father late Shri Brahmacharimayum Nilamani Sharma. The said committee is a nonexistent and fictitious committee.
10. On 6.8.1999 when the appellant-plaintiff obtained a certified copy of jamabandi patta of the suit land, i.e., shared portion of the land of the appellant-plaintiff, i.e., Schedule-A a piece of homestead under Dag No.

88/589 covered by new patta No. 421, 425/589(1268) corresponding to old patta Nos. 70, 74 comprising an area of. 82 acre and Schedule-B, a paddy field covered by Dag No. 581 of new patta Nos. 421, 425/1268 corresponding to old patta Nos. 70, 74 comprising an area of 1.43 acres of revenue village No. 65 Keirak, from the Settlement Department, to his utter surprise, the name of the appellant-plaintiff was found cancelled from the relevant land records and name of the fictitious committee called "Radha Madhop Devata Shebait Committee" Keirak Awang Leikai and name of late Shri Brahmacharimayum Nilamani Sharma, was found recorded in the relevant land record of the suit land.

11. It was also learnt that late Shri Thouchom Sangai Singh in collusion with the respondent/defendant Nos. 1 to 4 produced a false and fabricated katcha Sale Deed purported to have been made by late Shri Brahmacharimayum Nilamani Sharma in favour of the said nonexistent committee before the Revenue Officers and thus, names of the appellant-plaintiff was cancelled from the revenue records of the suit land.
12. The appellant-plaintiff filed an application in the court of the learned AS and. SO-III Manipur for cancellation of the name of the adoptive father, late Shri Brahmacharimayum Nilamani Sharma and name of the said fictitious committee from the land record of the suit land. He also filed another application for mutation of his name in the revenue record of the suit land. Accordingly, name of the appellant-plaintiff was again recorded in the revenue record of the suit land vide order dated 15.11.1999 passed in Revenue Misc. Case No. 314 of 1999.
13. On 12.3.2003, around 10 a.m. the defendant Nos. 1 to 4 committed trespass to the suit land and they claimed that the suit land belong to the said committee. They warned the appellant-plaintiff to stop performance of ritual and management of the affairs of the Radha Madhop Devata. They forcibly tried to keep the said temple of the deity under lock and key. Therefore, the appellant-plaintiff has reasonable apprehension in his mind that the respondent/defendant Nos. 1-4 may, at any point of time invade the suit land and would keep the temple of the deity under lock and key by restraining the appellant-plaintiff from worshipping and performing the ritual of the Deity.
14. The respondent/defendant Nos. 1 to 4 filed joint written statement wherein they categorically denied that the appellant-plaintiff is adopted son of late Shri Brahmacharimayum Nilamani Sharma. The defendant/ respondent Nos. 1 to 4 also categorically denied that the appellant-plaintiff performed the ritual for the said deity and also managed the affairs of the deity and also further denied that the appellant-plaintiff resided in the dwelling house constructed by late Shri Brahmacharimayum Nilamani Sharma on the western portion of his homestead.
15. Respondent/defendant Nos. 1 to 4 further pleaded in their written statement that the appellant-plaintiff did not perform the shradha ceremony and annual shradha ceremony of late Shri Brahmacharimayum Nilamani Sharma and also that the appellant-plaintiff was never appointed as shebait of the said diety of Radha Madhop Devata of late Shri Brahmacharimayum Nilamani Sharma.
16. Respondent/defendant Nos. 1 to 4 further pleaded in their written statement that there was no family arrangement as alleged by the appellant-plaintiff in his written statement. The appellant-plaintiff is not a member of the family of late Shri Brahmacharimayum Nilamani Sharma and as such, there is no question of family arrangement with the appellant-plaintiff in the family of late Shri Brahmacharimayum Nilamani Sharma.
17. In their written statement, respondent/defendant Nos. 1 to 4 pleaded that the Radha Madhop Devata Shebait Committee, Keirak Awang Leikai, was formed by the villagers of Keirak Awang Leikaia for the welfare of Radha Madhop Devata and worshipped the diety according to the Hindu customs/law. The suit land had been recorded in the name of the said Radha Madhop Devata Shebait Committee, Keirak Awang Leikai since 21.7.1993. The suit land has been owned and in physical possession of the said Committee, i.e., Radha Madhop Devata Shebait Committee, Keirak Awang Leikai without any interference from

any quarter by constructing temple over the suit land and usufruct of the suit land was also used for the rituals of the deity. The pro forma respondents/pro forma defendants did not file written statement. 18. The learned trial court framed ten issues:

- "1. Whether late B. Nilamani Sharma was the original owner of the suit lands or not?
 2. Whether the plaintiff is the adoptive son of late B. Nilamani Sharma?
 3. Whether B. Nilamani Sharma before his death had appointed the plaintiff on 8.7.1993 as the shebait of Radha Madhop Devata?
 4. Whether B. Nilamani Sharma made any family arrangement on 8.7.1993 with regard to his landed properties amongst the plaintiff and the pro forma defendants in the presence of local elders? If so, whether the plaintiff got the suit lands as his share?
 5. Whether the so called Radha Madhop Devata shebait committee, Keirak Awang Leikai" is a fictitious Committee or not?
 6. Whether the plaintiff has been in physical possession of the suit lands since during the life time of late B. Nilamani Sharma?
 7. Whether the plaintiff has any locus standi to file the present suit?
 8. Whether there is any cause of action?
 9. Whether the suit is maintainable or not?
 10. Whether the plaintiff is entitled to the reliefs as claimed?"
19. The appellant-plaintiff, in support of his pleaded case for deciding the issues in his favour had examined six PWs, namely: (1) K. Ibomcha Sharma - PW1 (appellant-plaintiff), (2) N. Mani Singh, PW2, (3) L. Tomba Singh - PW3, (4) Th. Komol Singh-PW4, (5) A.K. Khomei Singh, PWS and (6) Y. Thambalyaima Singh-PW6; and exhibited 8 documents, i.e., (1) Ext. A/1-Jamabandi, (2) Ext. A/2-Jamalmndi, (3) Ext. A/3-Jamabandi, (4) Ext. A/4-Jamabandi, (5) Ext. A/5-Jamabandi, (6) Ext. A/6-Jamabandi, (7) Ext. A/7-Invitation Card and (8) Ext. A/8-Invitation Card. To the contra, respondent/defendant Nos. 1 to 4, in support of their pleaded case, had examined five DWs namely: (1) H. Noyon Singh, DW1 (respondent/defendant No. 1), (2) N. Bokul Singh, DW. 2 (respondent/defendant No. 2), (3) Th. Thonglen Singh, DW3 (respondent/defendant No. 3), (4) Th. Shadadas, DW4 and (5) Th. Biren Singh, DW5; and exhibited four documents, i.e., jamabandies.
20. The learned trial court after appreciation of the oral as well documentary evidences came to the finding that the appellant-plaintiff is not an adopted son of late Shri Brahmacharimayum Nilamani Sharma. The reasons for coming to such finding by the trial court are as under:

"The plaintiff is claiming that he is the adopted son of late Brahmacharimayum Nilamani Sharma and on the other hand the defendants are denying the fact of adoption of the plaintiff by late Brahmacharimayum Nilamani Sharma. The crux of the suit is as to whether the plaintiff is the adopted son of late Brahmacharimayum Nilamani Sharma as he is claiming that he becomes the owner of the suit lands as inherited from late Brahmacharimayum Nilamani Sharma being an adopted son of him. The plaintiff while examining as PW1 has stated that Brahmacharimayum Nilamani Sharma has no son and he and his wife Smt. Angousana Devi adopted him as their son since his childhood. He lived with the adoptive parents at their house, he was brought up and performed Nahutpa Ceremony and Lugun Thangba Ceremony and also married with his wife Tampaklcima Devi by the adoptive parents. In support of his claim the plaintiff produced a copy of invitation card (Ext. A/7) of his marriage invited by Brahmacharimayum Nilamani Sharma and Smt. Angousana Devi and a copy of invitation card (Ext. A/8) of his Upanyan (Lugun Thangba) invited by Brahmacharimayum Nilamani Sharma and Smt. Angousana Devi as their son. His such version is supported by Naorem Mani Singh (PW2), Teihaorungbam Tomba Singh (PW3),

Thongam Komol Singh (PW4), Akhom Khomei Singh (PW5) and Yambem Thambalyaima Singh (PW6). From the record, it is evident that the defendant No. 5 Smt. Angousana Devi, the alleged adoptive mother is still alive. She is the most competent person to give evidence that the plaintiff is their adopted son. But she is not examined as plaintiff's witness and there is no explanation why she is not examined as PW in case she is the adoptive mother. The defendants while examining as the DWs No. 1, No. 2, No. 3 and No. 4 have stated that late Brahmacharimayum Nilamani Sharma and his wife Smt. Angousana Devi never adopted the plaintiff as their son which is supported by Thongam Biren Singh (DWS). Interestingly, apart from oral evidence, one aspect ought to be considered is that though the plaintiff is claiming that he is an adopted son of late Brahmacharimayum Nilamani Sharma, in the cause title of the suit his name is shown as Kakchingtabam Ibomcha Sharma, s/o Kakchingtabam Nandalal Sharma quite different from his claiming to be the adopted son of late Brahmacharimayum Nilamani Sharma. Not only in cause title, in the certified copies of Jamabandi (Ext. A/1, Ext. A/2, Ext. A/3 and Ext. A/4) produced and filed by the plaintiff show the name of the plaintiff recorded as Kakchingtabam Ibomcha Sharma, s/o Kakchingtabam Nandalal Sharma. Admittedly, the plaintiff is a Hindu Brahmin governed by Dayabhagh System of Hindu Law. Under section 12 of the Hindu Adoption and Maintenance Act, it has laid down that

"Effect of adoption: An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided

- (a) the child cannot marry any person whom he or she had continued in the family of his or her birth;
- (b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligation, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;
- (c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

21. As such when a child is adopted by any person to be his child, the relationship of the adopted child with his natural parents shall be deemed to be severed at the moment when he is adopted and shall be deemed to be replaced by those created by the adoption in the adoptive family. As such, in case the plaintiff was adopted by Brahmacharimayum Nilamani Sharma and his wife Smt. Angousana Devi, he should be Brahmacharimayum Ibomcha Sharma s/o Brahmacharimayum Nilamani Sharma and should not be Kakchingtabam Ibomcha Sharma, s/o Kakchingtabam Nandalal Sharma. The plaintiff cannot retain his relationship with his natural father in case he was adopted by late Brahmacharimayum Nilamani Sharma as his son. Further, under section 15 of the Act, it has also laid down that

"No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth."

As such, even if, Brahmacharimayum Nilamani Sharma died, the plaintiff is debarred from renouncing to be the adopted son of him. He should remain as the son of Brahmacharimayum Nilamani Sharma has to look after the old aged alleged adoptive mother being her son. It is also evident from the record that Smt. Angousana Devi is not living with the plaintiff with the unexplained reason best known to the plaintiff. In such plausible circumstances, the claim of the plaintiff that he is an adopted son of Brahmacharimayum Nilamani Sharma is lack of trustworthy. As such the claim of the plaintiff to be the adopted son of Brahmacharimayum Nilamani Sharma is on the contrary of the prescribed statute. That cannot be acceptable in the eyes of law. Hence, this issue is decided against the plaintiff.

22. The pleaded case in the civil proceedings are to be proved by a preponderance of probabilities. In a civil suit the plaintiff is not expected to prove his title beyond any reasonable doubt. A high degree of probability of his case or his title would be enough to shift the onus on the defendant and if the defendant does not succeed in shifting back the onus, the plaintiff's burden of proof can safely be deemed to have been discharged.
23. The first Appellate Court is duty bound to make a critical analysis of the matter before it. It cannot make affirm or reverse the findings of the trial court without due and proper application of mind — Ref. State of Rajasthan v. Harphool Singh (/) through his LRs, (2000) 5 SCC 652. The finding of fact of the trial court mainly based on oral evidence or documentary evidence are not ordinarily be disturbed by the first appellate court unless the trial court's approach in appraisal of the evidence appears materially erroneous.
24. The Apex Court in Madhusudan Das v. Smt. Narayanibai (Deceased) by LRs., (1983) 1 SCC 35 held that:—
- "In an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence, it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies or the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises. This approach should be placed in the forefront in considering whether the High Court proceeded correctly in the evaluation of the evidence before it when deciding to reverse the findings of the trial court. The principle is one of the practice and governs the weight to be given to a finding of fact by the trial court."
25. This court, incidentally this very Bench, Justice T. NK Singh, in Jutika Paul v. Bhubaneswari Sheel, 2007 (4) GLT 26 held that judgment of the first appellate court must display conscious application of mind and record finding on all issues supported by reasons. Para 14 of the GLT in Jutika Paul's case (supra) read as follows:
- "14. The Apex Court in Santosh Hazari v. Purushotlam Tiwari, (2001) 3 SCC 179 held that the judgment of the 1st appellate court must display conscious application of mind and the record findings supported by reasons on all issues. The 1st appellate court being a final court of facts, the pure findings of fact by the 1st Appellate Court shall remain immune from challenging before the High Court in Second Appeal, the Apex Court in Santosh Hazari (supra) observed that—
- "The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court, expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (see Girijanandini Devi v. Bijendra Narain Choudhury). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived

at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies, on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See *Madhusudan Das v. Narayanibai*). The rule is and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See *Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh*). Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional" obligation cast on them by the scheme of the present section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenging before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one."

26. The Apex Court in *Rahasa Pandiani v. Gokulananda Panda*, (1987) 2 SCC 338 observed as follows:

"An adoption would divert the normal and natural course of succession. Therefore, the court has to be extremely alert and vigilant to guard against being ensnared by schemers who indulge in unscrupulous practices out of their lust for property. If there are any suspicious circumstances, just as the propounder of the Will is obliged to dispel the cloud of suspicion, the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt. In the case of an adoption which is claimed on the basis of oral evidence and is not supported by a registered document or any other evidence of a clinching nature, if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the court by the party contending that there was such an adoption."

27. The Apex Court also observed in *Kishori Lai v. Chaitibai*, AIR 1959 SC 504:

"As an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubting its truth. Failure to produce accounts, in circumstances such as have been proved in the present case, would be a very suspicious circumstance. The importance of accounts was emphasized by the Privy Council in *Sootrugun v. Sabitra* in *Diwarkar Rao v. Chandanlal Rao* in *Kishori Achariyav, Fakira Debya*."

28. Under the Hindu Law, the giving and receiving of a boy is absolutely necessary to the validity of an adoption; they are the operative part of the ceremony being that part of it which transfer the boy from one family to another; but the Hindu Law does not require that there should be a particular form so far as giving and acceptance are concerned and for a valid adoption all that law requires is that natural father shall be asked by the adoptive parent to give his son in his adoption and the boy shall be handed over and taken over for this purpose. The decision of the Apex Court in *L. Debi Prasad (Dead) by LRs v. Smt. Tribeni Devi*, (1970) 1 SCC 677 : AIR 1970 SC 1286 (para 7 and 8 of the AIR) read as follows:

"7. While considering the question of proof of the adoption pleaded, we must bear in mind the fact that the same is alleged to have taken place in 1892 nearly 54 years before the present suit was instituted. Therefore, naturally, it was extremely difficult for Shyam Behari Lai to adduce any oral evidence in proof of that adoption. All the persons who could have known about the adoption are likely to have died. Shyam Behari Lai himself could not speak to that adoption. His evidence is at best hearsay. It is true, as observed by this court in *Addagada Raghayamma v. Addagada Chenchamma*, (1964) 2 SCR 933; AIR 1964 SC 136) that it is settled that a person, who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity'. Again as held by this court in *Lakshman Singh Kothari v. Smt. Rup Kanwar*, (1962) 1 SCR 477; AIR 1961 SC 1378 that in order that an adoption may be valid under the Hindu law, there must be a formal ceremony of giving and taking. This is true of the regenerate castes as well as of the Sudras. Although no particular form is prescribed for the ceremony, the law requires that the natural parent should hand over the adoptive boy and the adoptive parent must receive him, the nature of the ceremony varying according to the circumstances. In the course of the judgment *Subba Rao, J* (as he then was) who spoke for the, court quoted with approval the following observations of *Gopalchandra Sarkar* in his book on Hindu Law, 8th edn.:

"The ceremonies of giving and taking are absolutely necessary in all cases. These ceremonies must be accompanied by the actual delivery of the child; symbolical or constructive delivery by the mere parol expression of intention on the part of the giver and the taker without the presence of the boy is not sufficient. Nor are deeds of gift and acceptance executed and registered in anticipation of the intended adoption nor acknowledgment, sufficient by themselves to constitute legal adoption, in the absence of actual gift and acceptance accompanied by actual delivery; a formal ceremony being essential for that purpose."

8. That is also the view expressed in *Mayne's Hindu Law* wherein it is observed that the giving and receiving are absolutely necessary to the validity of an adoption; they are the operative part of the ceremony, being that part of it which transfers the boy from one family to another; but the Hindu law does not require that there shall be any particular form so far as giving and acceptance are concerned; for a valid, adoption all that the law requires is that the natural father shall be asked by the adoptive parent to give his son in adoption, and that the boy shall be handed over and taken for this purpose."

29. A person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. Evidence in proof of the adoption should be free from all suspicion of fraud and so consistent and probable as to give no occasion for doubting its truth. The decision of the Apex Court in *Madhusudan Das v. Smt. Narayani Bai*, (1983) 1 SCC 35 : AIR 1983 SC 114 (paras 19 and 20 of the AIR) read as follows:

"19. It is well settled that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. *A. Rughavamma v. A. Chanchamma*, AIR 1964 SC 136. It is also true that the evidence in proof of the adoption should be free from all suspicion of fraud and so consistent and probable as to give no occasion for doubting its truth. *Kishori Lai v. Chaltibai*, (1959) Supp 1 SCR 698 : AIR 1959 SC 504.

Nonetheless the fact of adoption must be proved in the same way as any other fact.

20. For a valid adoption, the physical act of giving and taking is an essential requisite, a ceremony imperative in all adoptions, whatever the caste. And this requisite is satisfied in its essence only by the actual delivery and acceptance of the boy, even though there exists an expression of consent or an executed deed of adoption. *Shoshinath v. Krishnasunder*, (1980) 7 Ind App 250. In *Lakshman Singh v. Smt. Rupkanwar*, (1962) 1 SCR 447, 490 : AIR 1961 SC 1378 at p. 1381, this court briefly stated the law. Thus:

"Under the Hindu Law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it."

In some cases, to complete the adoption a "datta homam" has been considered necessary, but in the case of the twice-born classes no such ceremony is needed if the adopted boy belongs to the same gotra as the adoptive father. *Bal Gangadhar Tilak v. Shrinivas Pandit*, (1915) 42 Ind App 135 : AIR 1915 PC 7. In the present case, the appellant has pleaded the custom of his community that the act of giving and taking suffices to effect a valid adoption, and nothing has been shown to us to indicate that the further ceremony of "datta homam" was necessary." 30. The Apex Court also reiterated the essential requirements of valid adoption propounded by the Apex Court in *L. Debi Prasad's case* (supra) in *Madhusudan Das's case* (supra) that for a valid adoption physical act of giving and taking is an essential requirement; a ceremony imperative in all adoptions, whatever the caste. The Apex Court in *M. Gurudas v. Rasaranjan*, (2006) 8 SCC 367 : AIR 2006 SC 3275 reiterated the requirement of a valid adoption mentioned in *L. Debi Prasad's case* (supra) and *Madhusudan Das's case* (supra). Paras 27 and 28 of the AIR in *M. Gurudas case* (supra) read as follows:

"27. To prove valid adoption, it would be necessary to bring on records that there had been an actual giving and taking ceremony. Performance of datta homam was imperative, subject to just exceptions. Above all, as noticed hereinbefore, the question would arise as to whether adoption of a daughter was permissible in law.

28. In *Muila's Principles of Hindu Law*, 17th edn., p. 710, it is stated

"488. Ceremonies relating to adoption.— (1) The ceremonies relating to an adoption are—

- (a) the physical act of giving and receiving, with intent to transfer the boy from one family into another;
- (b) the datta homam, that is, oblations of clarified butter to fire; and
- (c) other minor ceremonies, such as putresti jag (sacrifice for male issue).

(2) Their physical act of giving and receiving is essential to the validity of an adoption;

As to datta homam it is not settled whether its performance is essential to the validity of an adoption in every case.

As to the other ceremonies, their performance is not necessary to the validity of an adoption.

(3) No religious ceremonies, not even datta homam, are necessary in the case of Shudras. Nor are religious ceremonies necessary amongst Jains or in the Punjab."

31. The statement of the adoptive son, i.e., PW1, regarding his adoption, while he was aged about four years, at the best is only hearsay. None of the PWs mention any sort of ceremony for physical act of giving of the appellant-plaintiff by his parent to the alleged adoptive father, late Shri Brahmacharimayum Nilamani Sharma. Further, none of the PWs stated that the natural father of the appellant-plaintiff was asked by the adoptive parent, i.e., late Shri Brahmacharimayum Nilamani Sharma to give his son (appellant-plaintiff) in adoption. Natural father of the appellant-plaintiff (Shri Kakchingtabam Nandalal Sharma) did not even come forward to give his statement as PW that the adoptive parent of the appellant-plaintiff (Shri Brahmacharimayum Nilamani Sharma) asked him for giving the appellant-plaintiff in adoption.

Over and above, the appellant-plaintiff's natural mother was not examined as PW. Since consent of the natural parents are essential in adoption of the appellant-plaintiff by the adoptive parent, late Shri Brahmacharimayum Nilamani Sharma, the parents of the appellant-plaintiff are very important witnesses. But no reason is given for not producing the appellant-plaintiff's natural parents as PWs.

32. It is well settled that if the best possible evidence which would have been produced by the appellant-plaintiff, is not produced, there should be adverse inference. Regarding this settled position of law it will be sufficient to refer to the decisions of the Apex Court in (1) M.S. Narayana Menon alias Mani v. State of Kerala, (2006) 6 SCC 39, (2) Ashok Kumar v. State of T.N., (2006) 10 SCC 157 and (3) State Inspector of Police, Vishakhapatnam v. Surya Sankaram Karri, (2006) 7 SCC 172.
33. In assessing the value of oral evidence a judge can call into aid of his experience of life: Ref: Chaturbhuj Pande v. Collector, Raigarh, AIR 1969 SC 255. Para 6 of the SCC in Chaturbhuj Pande case (supra) read as follows:

"6. But that is of no assistance to the appellants. As mentioned earlier, the High Court has refused to rely on the oral testimony adduced in support of the appellants' claim as regards the value of the orchard. It is true that the witnesses examined on behalf the appellants have not been effectively cross-examined. It is also true that the Collector had not adduced any evidence in rebuttal; but that does not mean that the court is bound to accept their evidence. The Judges are not computers. In assessing the value to be attached to oral evidence, they are bound to call into aid their experience of life. As judges of fact, it was open to the appellate Judges to test the evidence placed before them on the basis of probabilities."
34. It is also equally well settled; in order to determine whether a fact has been proved or otherwise, the court has to look the surrounding circumstances in addition to the evidence of witnesses. Ref.: L. Debi Prasad's case (supra). In the present case, surrounding circumstances to the statements of the witnesses (PWs) are against the appellant-plaintiff for the simple reason that the appellant had exhibited revenue records of the landed properties to show that those landed properties were inherited by him from late Shri Brahmacharimayum Nilamani Sharma (adoptive father); in those revenue records, name, surname and clan of the appellant's father are shown as 'Kakchingtabam Nandalal Sharma' but the surname and name of the adoptive father are 'Shri Brahmacharimayum Nilamani Sharma'.
35. The appellant-plaintiff did not even produce any public document or/reliable document, such as admission register of the School where he had undergone schooling or any School Certificate or any Certificate showing that the father of the appellant-plaintiff is his adoptive father, i.e. late Shri Brahmacharimayum Nilamani Sharma.
36. As discussed by the trial court in the impugned judgment and decree, the name of the appellant's father is shown as Shri Kakchingtabam Nandalal Sharma, i.e., his natural father having the surname "Kakchingtabam" different from that of "Brahmacharimayum" of the adoptive father, Shri Brahmacharimayum Nilamani Sharma. What is the effect of the adoption is mentioned in section 12 of the Hindu Adoption and Maintenance Act, 1956 and section 15 of the Hindu Adoption and Maintenance Act, 1956 clearly provides that "no adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adoptive child renounce his or her status as such and return to the family of his or her birth.
37. For the foregoing reasons and discussions, this court is in complete agreement with the finding of the trial court in the impugned judgment and decree that the appellant-plaintiff had failed to prove that he had been adopted by late Shri Brahmacharimayum Nilamani Sharma.
38. The surrounding circumstances, clearly negated the alleged adoption of the appellant-plaintiff by late Shri Brahmacharimayum Nilamani Sharma.

39. Section 5(2) of the Hindu Adoption and Maintenance Act, 1956 clearly provides that an adoption which is void shall neither create any right in the adoptive family in favour of any person which he or she could not have acquired except by the reason of adoption nor destroy the right of any person in the family of his or her birth. Family arrangement could only be amongst the members of the family for the property belonging to the family. Therefore, only the individuals having antecedent title to the property of the family can be a party to the family settlement. The appellant-plaintiff who utterly failed to prove that he is the adoptive son of late Shri Brahmacharimayum Nilamani Sharma, cannot be a party in the family settlement of the family of late Shri Brahmacharimayum Nilamani Sharma for the properties belonging to late Shri Brahmacharimayum Nilamani Sharma. The Apex Court in *Kale v. Deputy Director of Consolidation*, (1976) 3 SCC 119 : AIR 1976 SC 807 held that the family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family. The appellant-plaintiff, who is not a member of the family of late Shri Brahmacharimayum Nilamani Sharma, cannot be a party to the family settlement of members of the family. Paras 9 and 10 of the AIR in *Kale case* (supra) read as follows: "9 The object of the arrangement is to protect the family from long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and, therefore, of the entire country, is the prime need of the hour. A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administration of social justice. That is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successions so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. The law in England on this point is almost the same. In *Halsbury's Laws of England*, vol. 17, 3rd edn., at pp. 215-216, the following apt observations regarding the essentials of the family settlement and the principles governing the existence of the same are made:

"A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied.

Family arrangements are governed by principles which are not applicable to dealings between strangers. The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements."

10. In other words to put the binding effect and the essentials of a family settlement in a concretized form, the matter may be reduced into the form of the following propositions:

- (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
- (2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;
- (3) The family arrangement may be even oral in which case no registration is necessary;
- (4) It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and, therefore, does not fall within the mischief of section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;
- (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property. It which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;
- (6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement."

40. For the foregoing reasons the present appeal is devoid of merit, accordingly dismissed. The parties are to bear their own costs.

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W. PRIYOKUMAR SINGH AND OTHERS VERSUS WANGKHEIMAYUM ONGBI RANI DEVI AND OTHERS

Gauhati High Court

First Appeal No. 5 of 1972

(Before Hon'ble Mr. Justice Baharul Islam and Hon'ble Mr. Justice D. Pathak)

W. Priyokumar Singh and others ... Appellants;

Versus

Wangkheimayum Ongbi Rani Devi and others ... Respondents.

Decided on July 27, 1976

Manipur was integrated with the then Dominion of India on the 15th October, 1949. In exercise of the powers conferred by Sections 3 and 4 of the Extra - Provincial Jurisdiction Act, 1947 (46 of 1947) (now known as Foreign Jurisdiction Act, 1947) the Central Government issued the Manipur (Administration) Order, 1949, Paragraph 5 of this order provided that all laws in force in Manipur or any part thereof immediately before the commencement of that order shall continue in force until repealed or amended by a competent legislature or authority. This provision saved the Manipur Laws and Acts. On the passing of the Constitution of India, Manipur became a Part "C" State. The Acts and Ordinances specified in the Schedule to the Merged States (Laws) Act, 1949 (59 of 1949), with certain exceptions, were extended to Manipur by the Part C States (Laws) Act, 1950 (30 of 1950) (now known as the Union Territories (Laws) Act, 1950) which came into force on the 16th day of April 1950. This Act gives power to the Central Government to extend to Manipur or any part thereof, any enactment which is in force in a State. It is under this provision that a number of Acts in force in different States have been extended to Manipur by the Central Government (see preface to the Manipur Code Part I). The Merged States (Laws) Act, 1949, came into force on 1st January 1950. One of the Acts specified in the schedule to the Merged States (Laws) Act, 1949 is the Indian Registration Act, 1908. The Indian Registration Act, came into force in Manipur on April 16, 1950, under the provision of Part- C (Laws) Act, 1950. The Indian Registration Act, therefore, with effect from that date, became the Law of Manipur and any State Law of Manipur, or any customs even having the force of law in Manipur, if it conflicts with any provision of the Indian Registration Act, shall cease to have any effect in the State of Manipur. The relevant provision of the Indian Registration Act (S. 17 thereof) does not enjoin that for adoption by a Hindu a registered deed is necessary. As such, assuming that para 33 of Chapter V of "Manipuri Customs" had the force of law, it ceases to have any legal, effect after the coming into force of the Registration Act. We, therefore, hold that in Manipur a registered deed is not essential for the purpose of adoption and to that extent para 33 of "Manipuri Customs" records no validly extant custom. We, further, hold that for a valid adoption in Manipur, no registered deed is necessary; nor the factum of adoption need be in writing...{Para 17}

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Baharul Islam :— This appeal by the plaintiffs is from the judgment and decree of the Subordinate Judge, Manipur, in O. Suit No. 12 of 1965. The suit was for declaration that plaintiff No. 1 was the adopted son of late Iboyaima Singh and for partition by metes and bounds of the properties mentioned in the schedules to the plaint.

2. The facts of the plaintiffs' case may be briefly stated thus:

One Ningthemjao Singh was the predecessor-in-interest of the parties to the suit. He died in or about 1955, leaving behind him 3 heirs; two sons, (1) Ibohi Singh (defendant No. 2) and (2) Iboyaima Singh and (3) his widow, Keinyatombi Devi (plaintiff No. 2) as his heirs. About 12 years ago Iboyaima Singh and his wife Rani Devi (defendant No. 1) adopted Priyokumar Singh (plaintiff No. 1) who was the son of Ibohi Singh (defendant No. 2) as their son. Admittedly, the parties are Manipuri Hindus. According to the plaintiffs, the adoption was according to the Hindu Law. Iboyaima Singh died in the last part of 1961, leaving behind him his adopted son, plaintiff No. 1, his widow, Rani Devi (defendant No. 1) and his step-mother (plaintiff No. 2) as his sole heirs, and the properties mentioned in schedules "A", "C", "D," and "E," After the death of Iboyaima Singh the plaintiffs and the defendants Nos. 1 and 2 were in common enjoyment and possession of the properties. The defendant No. 1 however, made an application for grant of a Succession Certificate in the Court of the District Judge, Manipur, in respect of a sum of Rs. 10,838/- mentioned in schedule "E." The Succession Certificate case, at the relevant time, was pending in the Court of the Additional District Judge. In the original petition for Succession Certificate, defendant No. 1 cited plaintiff No. 1 as her adopted son, but by an application, the application for Succession Certificate was amended deleting the citation of plaintiff No. 1 as the adopted son. Defendant No. 3 claimed the truck mentioned in Schedule "C" claiming that he had purchased it from defendant No. 1.

3. As defendant No. 1, by her amendment of the petition for Succession Certificate denied plaintiff No. 1 to be the adopted son and refused the plaintiffs their shares in the suit properties, they were compelled to file the present suit for the reliefs mentioned above. Defendant No. 1 filed a written statement and contested the suit.

She has denied the plaintiffs' allegations that plaintiff No. 1 was the adopted son of Iboyaima Singh. She has admitted that the properties mentioned in Schedule "A," "C," "D" and "E" were the properties left by her husband, Iboyaima Singh. She has also admitted that Iboyaima Singh died in the last part of 1961, but she claims that she was his only heir, and has denied that the plaintiffs are heirs of late Iboyaima Singh.

4. Defendant No. 2 by a separate written statement has supported the claim of the plaintiffs.

5. The learned Subordinate Judge framed a large number of issues of which issues Nos. 4 and 5 are material for the purpose of this appeal and may be reproduced:

"4. Was the plaintiff No. 1 adopted by late Iboyaima Singh during the latter's lifetime.

5. Are the plaintiff No. 1, the defendant No. 1 and plaintiff 2 heirs of late Iboyaima Singh?"

6. After trial, the learned Subordinate Judge decreed the suit in respect of the "B" schedule property in favour of plaintiff No. 2 and defendants Nos. 1 and 2, but dismissed the plaintiffs' claim that plaintiff No. 1 was the adopted son of Iboyaima, holding that the plaintiffs failed to prove adoption failing to prove one of the essential ingredients of adoption, namely, "giving and taking." Hence this appeal.

7. The alleged adoption having taken place before 1956, admittedly the Hindu Adoptions and Maintenance Act, 1956, does not apply to the present case. Shri N. Ibotombi Singh, learned Advocate General, Manipur, appearing for the appellants, submits that "giving and taking" are not essential ingredients of a valid adoption; alternatively he submits that the plaintiffs have proved "giving and taking." Admittedly, there is no deed of adoption in this case. Shri T. Bhubon Singh, learned counsel for the respondent No. 1 submits that according to Manipuri customs adoption can be done only by a registered deed. In support of his submission he relies on para 33 of Chapter V of a printed booklet styled "Manipuri Customs."

8. "Manipuri customs" is the codification of the customs in Manipur by a Codification Committee. Paras 27 and 33 of Chapter V which deal with adoption may be reproduced:

"27. The following ceremonies are necessary for adoption - Sagei Chakhangba with Homa or without it or Datta Homa. Along with the above the ceremony of giving and taking in adoption of the boy is necessary.

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33. Apart from the customary rituals of giving and taking, Sagei Chakhangba or Datta Homa, the factum of adoption must be in writing and registered."
9. The following are essential ingredients of a valid adoption under the Hindu Law:
- (i) Capacity to take in adoption. Subject to the provision of any law for the time being in force, every male Hindu, who is of sound mind, and has attained the age of discretion, even though he may be a minor, may lawfully take a son in adoption, provided he has no son, grand-son, or great-grand-son natural or adopted, living at the time of adoption.
 - (ii) Capacity to give in adoption. The only persons who can lawfully give a boy in adoption are his father and his mother.
 - (iii) Capacity to be adopted. A male Hindu belonging to the same caste as his adopting father may be taken or given in adoption.
 - (iv) There must be a physical act of giving and receiving of the child to be adopted with intent to transfer the boy from the family of the natural father to the family of the adoptive father. (See Mulla's Hindu Law - 13th Edition - Sections 450, 474, 480 and 488).
10. In the instant case, there is no controversy that Iboyaima had the capacity to adopt; that Ibohi Singh natural father of plaintiff No. 1, had the capacity to give in adoption; and that plaintiff No. 1 had the capacity to be given and taken in adoption. The only controversy, is on the ceremony of adoption.
11. The purpose of the ceremony of adoption is to give publicity to the factum of adoption and as such the ceremony of giving and taking has assumed importance and become an essential ingredient of a valid adoption. In the case of Lakshman Singh Kothari v. Smt. Rup Kanwar, reported in, AIR 1961 SC 1378, their Lordships of the Supreme Court have observed:
- "Under the Hindu Law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporal giving and receiving in adoption is to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it."
12. The submission of learned Advocate General, therefore that giving and taking is not an essential ingredient of a valid adoption is untenable.
13. Let us now examine the contention of learned counsel for respondent No. 1 that a registered deed is essential for a valid adoption. Registration itself is notice of a certain transaction and is for the purpose of publicity of the transaction embodied in the document. The fact that the Hindu Law enjoins that giving and taking must be ceremoniously done to give due publicity negatives the contention that a registered deed is additionally essential for adoption.
14. The booklet, "Manipuri Customs," does not ex facie show in which year the customs were codified and under what authority. In a few decisions of the Court of the Judicial Commissioner of Manipur (AIR

1956 Manipur 18 and AIR 1964 Manipur 14) noticed some provisions of this booklet, though no judicial pronouncement has been made as to its legal value. It is not necessary for our purpose either to make any pronouncement on its legal value. We shall assume its validity and then examine paras 27 and 33 (supra).

15. Para 27 provides that for adoption 'giving and taking' is necessary; it also provides for Sagei Chakkhangba with or without Homa or Datta Homa. It has been agreed by counsel at the Bar that in Manipur Homa or Datta Homa is not necessary. In its place there must be Sagei Chakkhangba (a clan feast). In the instant case admittedly, the plaintiffs performed no Homa or Datta Homa. But the plaintiffs claim that Sagei Chakkhangba was given. Para 27 therefore is not in conflict with the law laid down by their Lordships of the Supreme Court in, AIR 1961 SC 1378. (supra). It correctly records a custom of Manipur.
16. What remains to be considered is whether the factum of adoption has to be done by a registered deed as required by para 33 (supra). Customs, in order to be valid, inter alia, must not conflict with the law of the land.
17. Manipur was integrated with the then Dominion of India on the 15th October, 1949. In exercise of the powers conferred by Sections 3 and 4 of the Extra - Provincial Jurisdiction Act, 1947 (46 of 1947) (now known as Foreign Jurisdiction Act, 1947) the Central Government issued the Manipur (Administration) Order, 1949, Paragraph 5 of this order provided that all laws in force in Manipur or any part thereof immediately before the commencement of that order shall continue in force until repealed or amended by a competent legislature or authority. This provision saved the Manipur Laws and Acts. On the passing of the Constitution of India, Manipur became a Part "C" State. The Acts and Ordinances specified in the Schedule to the Merged States (Laws) Act, 1949 (59 of 1949), with certain exceptions, were extended to Manipur by the Part C States (Laws) Act, 1950 (30 of 1950) (now known as the Union Territories (Laws) Act, 1950) which came into force on the 16th day of April 1950. This Act gives power to the Central Government to extend to Manipur or any part thereof, any enactment which is in force in a State. It is under this provision that a number of Acts in force in different States have been extended to Manipur by the Central Government (see preface to the Manipur Code Part I). The Merged States (Laws) Act, 1949, came into force on 1st January 1950. One of the Acts specified in the schedule to the Merged States (Laws) Act, 1949 is the Indian Registration Act, 1908. In other words, the Indian Registration Act, came into force in Manipur on April 16, 1950, under the provision of Part C (Laws) Act, 1950. The Indian Registration Act, therefore, with effect from that date, became the Law of Manipur and any State Law of Manipur, or any customs even having the force of law in Manipur, if it conflicts with any provision of the Indian Registration Act, shall cease to have any effect in the State of Manipur. The relevant provision of the Indian Registration Act (S. 17 thereof) does not enjoin that for adoption by a Hindu a registered deed is necessary. As such, assuming that para 33 of Chapter V of "Manipuri Customs" had the force of law, it ceases to have any legal, effect after the coming into force of the Registration Act. We, therefore, hold that in Manipur a registered deed is not essential for the purpose of adoption and to that extent para 33 of "Manipuri Customs" records no validly extant custom. We, further, hold that for a valid adoption in Manipur, no registered deed is necessary; nor the factum of adoption need be in writing.
18. Let us now proceed to examine whether the plaintiffs have been able to prove the ceremony of giving and taking. The evidence on this point is the evidence of P. Ws. 1, 2, 4, 5 and 6. P.W. 1 Madhu Singh deposes that he knew Iboyaima Singh and Ibobi Singh, the natural father of plaintiff No. 1. Iboyaima Singh was the younger brother of Ibobi Singh. He deposes that plaintiff No. 1 was adopted since his birth by Iboyaima Singh. Before the birth, he deposes, Iboyaima requested his brother, Ibobi, that if a male child was born to him, he would adopt that child as his son. Ibobi agreed. On the date of the birth of plaintiff No. 1, Iboyaima adopted him as his son. On the 6th day of the birth of plaintiff No. 1, Swasti Puja was performed by Iboyaima Singh. He further deposes that there was also a Sagei Chakkhangba and that he himself attended the Swasti Puja. He further deposes that plaintiff No. 1 was brought up by Iboyaima Singh at the latter's home. P.W. 5 Ibobi Singh is the natural father of the boy. He corroborates the evidence of P.W. 1 in toto. P.W. 2, who is a Sagei relation of the plaintiffs as well as defendants Nos. 1 and 2 also

corroborates the evidence of P.W.s. 1 and 5. P.W. 4 is Kulabidhu Singh. He is also a Sagei relation of the parties. He is also their neighbour. He too supports the plaintiffs' case in full. He further deposes that Iboyaima adopted plaintiff No. 1 as he and his wife Rani Devi had no child, although they had been married for seven years. P.W. 3 Jugeswar Sarma deposes that he acted as the Porohit in the Swasti Puja of Priyokumar Singh. He deposes that Iboyaima performed all the religious functions of P.W. 5. He further deposes that in that Swasti Puja, Iboyaima told him that he had adopted the child as his son and that the child was son of his brother, Ibohi Singh. We do not have any reason to disbelieve the evidence of the above witnesses. P. Ws. 2 and 3 are common Sagei relations of the parties; P. Ws. 1, 2, 3 and 4 were all disinterested witnesses. Nothing has been brought out in cross-examination to render their evidence incredible. We, therefore, hold that the Swasti Puja of plaintiff No. 1 and the Sagei Chakkhangba on the date of the Annaprasanna (Chaumba) were performed by Iboyaima. The learned trial Judge also has found that these ceremonies were performed by Iboyaima. Had the child not been adopted by Iboyaima, the latter would have no reason to perform the Swasti Puja of the child and to give the Sagei Chakkhangba on the above occasion.

19. The learned trial Judge has found that the plaintiffs have failed to prove the 'giving and taking' of the child. What law requires is that for valid adoption the child must be transferred from the family of the natural father to the family of the adoptive father; but the mode of transfer depends on facts and circumstances of each case. In the instant case, the adoption took place on the date of the birth of the child itself. It may not always be possible to transfer a child on the day of its birth from the home of his natural father to the home of his adoptive father. It is enough, in our opinion, for all intents and purposes, if there is a transfer of sonhood of the adopted boy from the natural father to the adoptive father. That the sonhood of plaintiff No. 1 was, in fact, transferred from Ibohi to Iboyaima can be inferred from the following circumstances:
 - (i) the plaintiff No. 1 was brought up in the family of Iboyaima,
 - (ii) that when Iboyaima was lying seriously ill and ultimately expired in the Dibrugarh Medical College Hospital, it was plaintiff No. 1, who attended him there. P.W. 5 has deposed that "plaintiff No. 1 was taken and brought up by Iboyaima Singh and he was residing with Iboyaima and Rani Devi." P.W. 6 (plaintiff No. 2) also deposed that "he was brought at the house of Iboyaima Singh." Defendant No. 1 (D.W. 6) simply denies adoption, but she has not denied the plaintiffs' evidence referred to above that plaintiff No. 1 was brought up by Iboyaima Singh at his home. Defendant No. 1 has admitted that when her husband Iboyaima died at Dibrugarh while taking treatment. Plaintiff No. 1 was with him
 - (iii) There is a third piece of circumstantial evidence furnished by Exts. A/1 and A/3. Exts. A/1 and A/3 are pattas in which the name of plaintiff No. 1 has been recorded along with the names of defendant No. 1 and plaintiff No. 2. In Exts. A/1 and A/3 - plaintiff No. 1 has been shown as the son of Iboyaima.
20. The D. Ws. give only negative evidence. D.W. 1 Tomba Singh, claims to be a Sagei relation of the parties. He deposes that he does not know that there was adoption of any son by Iboyaima. In cross-examination, he has gone so far to say that he does not know plaintiff No. 1 at all. This evidence is a complete lie. D.W. 1 being an elderly Sagei relation could not have any reason not to know plaintiff No. 1, adopted or not. The evidence of P.W. 2 is to the effect that he does not know of any adoption.
21. Learned counsel for respondent No. 1 refers to Exts. B/1, B/2 and B/3. Ext. B/1 is an L.P. School certificate of plaintiff No. 1. In that certificate the name of Ibohi Singh has been recorded as the father of plaintiff No. 1. Nobody denies that Ibohi was the 'father' of the boy, albeit natural. There is nothing to show that if a boy is adopted, the name of the adoptive father only has to be shown in School records. In fact, an adoptive father is not the 'father' of an adopted 'son'. He is the 'father' only by fiction of law for certain purposes. Ext B/3 is a copy of a form of an application for admission into the M.E. School filled up by a

teacher of the School. In that application the natural father's name has been recorded as the 'father' of the boy. On the basis of Exts. B/3. Ext. B/2 was issued. Ext. B/2 is identical with Ext. B/1. D.W. 5, a teacher of the M.E. School says that he filled up Ext. B/3 on his own, and not at the instance of either Ibobi or Iboyaima. Exts. B/1 and B/3 do not prove that plaintiff No. 1 was not adopted by Iboyaima Singh.

22. Another submission of Shri T. Bhubon Singh is that there was no reason for the alleged adoptive parents to adopt a son as they were yet young enough to have a son. That may be so, but the law does not enjoin that a person who has no possibility of having a son only can adopt. On the contrary, a male Hindu of discretion including a minor, may adopt. That apart, an explanation of the adoption is available. The explanation is that Iboyaima and defendant No. 1 did not have children, though they had been married for 7 years.
23. In the result, we hold that plaintiff No. 1 was physically transferred from the home of his natural father, Ibobi, to the home of Iboyaima, and that there was 'giving and taking' as required by law. We further hold that plaintiff No. 1 was validly adopted by Iboyaima Singh, deceased, as his son and that he is entitled to a share in the properties left by Iboyaima Singh.
24. The next question for our consideration is what will be the shares of plaintiff No. 1 and of plaintiff No. 2. Admittedly, Iboyaima died in 1961. So, the devolution of his property on his death will be governed by the Hindu Succession Act, 1956. Section 8 of the Hindu Succession Act provides:
"8. The property of a male Hindu dying intestate shall devolve according to the provisions of this chapter:
—
 - (a) firstly, upon the heirs, being the relatives specified in Class I of the schedule;
 - (b) secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in class II of the schedule;
 - (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
 - (d) lastly, if there is no agnate, then upon the cognates of the deceased."
25. In other words, the heirs of class I exclude the heirs mentioned in the other following classes and the heirs mentioned in class II exclude the heirs mentioned among agnates and the cognates.
26. In the instant case, plaintiff No. 1 is the son, and respondent No. 1 is the widow of the deceased, Iboyaima. They will inherit in equal shares, their names appearing among class I heirs. Plaintiff No. 2 is Iboyaima's 'father's widow.' Her name appears among class II heirs. So she is excluded by the class I heirs. The result is that the property left by Iboyaima will be inherited in equal shares by plaintiff No. 1 and defendant No. 1 and plaintiff No. 2 will not have any share.
27. This suit is for partition by metes and bounds as well as for a declaration that the plaintiff No. 1 was the adopted son of late Iboyaima Singh.
28. As the suit is for partition, a preliminary decree has to be passed. We direct that the learned Subordinate Judge will pass a preliminary decree in respect of the properties mentioned in schedules "A", "B", "C" "D" and "E" in accordance with law in the light of the observations made above.
29. The appeal of appellant No. 1 Priyokumar Singh is allowed. The appeal of appellant No. 2 Keinyatombi Devi is dismissed. The parties will bear their own costs.
30. **PATHAK, J.:**— I agree.
31. Appeal partly allowed.

□□□

CHAIRMAN, CHILD WELFARE COMMITTEE, ABHOYNAGAR AND ANR. VERSUS MADAN MOHAN SAHA AND ANR.

In the High Court of Gauhati Agartala Bench

CRP No. 04 of 2012

(Before Hon'ble Mr. Justice S. Talapatra)

Chairman, Child Welfare Committee, Abhoynagar and Anr. ... Petitioners;

Versus

Madan Mohan Saha And Anr. ... Respondents.

Decided on April 3, 2012

Constitution of India, Article 227 — Juvenile Justice (Care and Protection of Children) Act, 2000, S.41 — Hindu Adoption and Maintenance Act, 1956, S.9(4) — New born abandoned baby recovered by public authorities — None claiming to undertake medical treatment — Respondents undertaking to bear expenses for medical treatment of child — Hospital refusing to give custody of child in foster care of respondents and handing over child to 'Sishu Greeha' — Board to declare child for adoption — No child can be adopted unless declared free for adoption — Child to be declared free for adoption if all efforts to trace parents fails and sixty days period of for reclamation lapses — Child not declared free for adoption — Order for adoption passed by trial court set aside — Revision allowed.

Advocates who appeared in this case:

Mr. A. Pal, for the petitioners.

Mr. K. Roy, for the respondents.

JUDGMENT AND ORDER

1. Heard Mr. A. Pal, learned appearing for the petitioners as well as Mr. K. Roy, learned counsel appearing for the respondents.
2. The is a petition filed under article 227 of the Constitution of India challenging the order dated 20.12.2011 as passed by the learned District Judge, West Tripura, Agartala in Civil Misc. (Adoption) No. 208 of 2011. It appears that the main grievance of the petitioners is that the impugned order has been passed in contrast to the provisions of subsections (3) and (5) of section 41 of the Juvenile Justice (Care and Protections of Children) Act, 2000. Profitably the said sub-sections (3) and (5) of section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 are extracted hereunder:

"(3) In keeping with the provisions of the various guidelines for adoption issued from time to time by the State Government, the Board shall be empowered to give children in adoption and carry out such investigations as are required for giving children in adoption in accordance with the guidelines issued by the State Government from time-to-time in this regard (5) No child shall be offered for adoption —

- (a) until two members of the committee declare the child legally free for placement in the case of abandoned children,

- (b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and
- (c) without his consent in the case of a child who can understand and express his consent 3. In the present case, the respondents filed an application before the learned District Judge, West Tripura, Agartala under section 9(4) of the Hindu Adoptions and Maintenance Act, 1956 praying for giving adoption of an abandoned child and the respondents herein made the present petitioners as respondents in the said proceeding along with the Superintendent, IGM Hospital, West Tripura District.
4. The respondents stated before the learned District Judge that on 11.7.2011 they discovered a new born abandoned child in a bush near Trinath Mandir area, Assam Para under Ranirbazar PS. Immediately the respondent No. 1 informed the matter to the Officer-in-charge, Ranirbazar PS and the said information has also been recorded as Ranirbazar PG G.D.E. No. 788 dated 11.7.2011. The duty officer reached that spot and the baby was recovered and taken to the IGM Hospital for special care and treatment. Initially, there has been some hiccups regarding treatment of the abandoned child. However, when the respondents undertook to bear the expenses of medical treatment, the child was given the proper treatment. Since the Superintendent, IGM Hospital refused to give the abandoned child to the respondent Nos. 1 and 2, the child was handed over to the custody of 'Shishu Greeha', the registered child care home for care and custody. The said child is still under their custody. Thereafter, the respondents prayed to the child welfare Committee, West Tripura District, Agartala for foster care and adoption but they did not handover the custody of the child for care.
5. Ultimately the respondents filed the said petition for adoption stating that they have the financial capabilities though they have two daughters aged about eight and half years and four years respectively. The present petitioners objected against the adoption stating that at that stage the court could not give adoption to the child in view of sub-sections (3) and (5) of section 41 of the said Act.
6. Mr. Pal, learned counsel for the petitioner submits that the guideline's governing the adoption of children has been published by the Ministry of Women and Child Development by Notification dated 4.6.2011 as published in the Gazette of India, Extraordinary Issue. In the said guidelines clause 16 requires a declaration to the effect that the child is legally free for adoption, by the child welfare committee.
7. It is provided in the said clause 16 that if all efforts for tracing the parents of an orphan or an abandoned child, placed with a Specialised Adoption Agency for the intervening period, have failed, and, in case of surrendered children, if the reclaim period of sixty days is over, the particular agency shall approach the child Welfare Committee for declaring the child legally free for adoption.
8. In the case in hand, there was no such declaration by the Child Welfare Committee. In addition thereto, in clause 23 of the said guidelines it has been provided how the legal procedure has to be pursued.
9. Clause 23 of the said Notification provides that:
- "(1) The child can be legally placed for adoption with the PAP(s) by the competent court and for this purpose, the court having jurisdiction over the area where the Specialised Adoption Agency is located shall be the competent court.
- (2) The Specialised Adoption Agency shall file a petition in the competent Court of Jurisdiction for obtaining the necessary adoption orders under the Act within ten days of acceptance of referral by PAPs and shall pursue the same regularly with the court so that the process of legal adoption is completed at the earliest.
- (3) The adoption petition shall contain all requisite documents as per Schedule-VII.

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- (4) In accordance with the directions of the honourable Supreme Court of India the case of L.K. Pandey v. Union of India (WP No. 1171 of 1982), the competent court is required to disposed off the case within a maximum period of two months from the date of fi ling.
 - (5) For the best interest of the child, the competent court may, to the extent possible, dispose of the case in the first hearing itself.
 - (6) The Specialised Adoption Agency shall forward a copy of the court order and the adoption deed to the concerned SARA or ACA and the PAP(s)."
10. The grievance of the petitioner in this case, as stated is that the said procedure was not fallowed and as such there was violation of subsections (3) and (5) of section 41 of the said Act.
 11. On the other hand, Mr. Roy, learned counsel for the respondents submits that these are mere technicalities. Despite the respondents approached the Child Welfare committee time and again, they did not act in accordance with the guidelines and ultimately the respondents filed the petition before the learned district Judge, West Tripura, Agartala out of compassion and affection for the abandoned child. The petitioners cannot be allowed to take advantage of their lapse.
 12. Be that as it may, there is no room for any casual approach or for making departure from the statutory provisions or guidelines framed thereunder. The issue is very vulnerable and cannot be left with the unbridled discretion of the court. Since the learned District Judge has acted indisputable in contravention of the said statutory provisions, this court has been left with no alternative but to interfere the impugned order. Accordingly, the impugned order is set aside.
 13. There is no controversy regarding the jurisdiction of the court since the Specialised Adoption Agency is situated at Agartala and as such the learned District Judge has got the jurisdiction to decide the issue only after the due declaration as pointed out be made by the Child Welfare Committee concerned and the Specialised Adoption Agency makes an appropriate prayer before the court for adoption.
 14. In view of this, the petitioner are directed to make the necessary legal declaration within a period of fortnight from today since sufficient time has already been elapsed, if it is not already done. Thereafter, the specialized child agency shall make appropriate application within two weeks from such declaration without fail.
 15. Learned District Judge, West Tripura, Agartala shall make an attempt to dispose of the entire matter on its first hearing.
 16. With this observation and direction, this petition stands allowed to the extent as indicated above.
 17. Before parting with the records, it is necessary to note that as per direction of this court the Child Welfare Committee, West Tripura District has rejected the prayer of the respondents for the foster care and as such the custody of the child shall remain with the child welfare committee till the issue is decided by the learned District Judge, West Tripura, Agartala as per the procedure as prescribed. A copy of the communication dated 29.3.2012 be kept with the records marking the same as Annexure X.
 18. A copy of this order be furnished to Mr. Roy, learned counsel for the respondents.

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ABDUL MAJID VERSUS MST. DODALLY

Second Appeal No. 7 of 1988

(Before Hon'ble Mr. Justice V.K. Jhanji, A.C.J.)

Abdul Majid ...Appellant;

Versus

Mst. Dodally ... Respondent.

- The plaintiff, namely, the appellant herein, was the plaintiff in the civil original suit No. 9/1976 (1/86). In the suit, the appellant sought declaration to the effect that the registered deed dated November 26, 1975, executed by defendant No. 1, Abdul Razak, whereby the registered adoption deed dated July 27, 1973, Exhibit PI, was cancelled, be declared null and void, inoperative and ineffectual so far as the appellant was concerned. He further sought declaration to the effect that he continues to be adopted son of defendant No. 1 and entitled to half share of his estate in terms of the adoption deed.
- The substantial questions of law to be determined in this appeal are whether the trial Court was justified in treating adoption deed to be a gift deed and whether the 1st Appellate Court committed any error of law and/or fact in settingaside the finding of the trial Court in this regard.
- It is now well settled law that in determining the construction of a document, Court must look to the intention of the executant. The intention has to be ascertained from the language used in the document itself and the document has to be read as a whole for that purpose.
- It is true that by executing the adoption deed, Exhibit PI, the intention of the executant was not only to adopt the appellant as his adopted son, but also, that on his death, the property, to the extent of its half, should be inherited by him. However, the adoption deed came to be cancelled by a subsequent deed dated 27th July, 1975 and, on cancellation, the Will, if any, would be deemed to have been revoked. Otherwise too under Muslim Law, bequest in excess of one-third of estate cannot take effect unless such bequest is consented to by heirs after the death of the testator. In this case, the bequest was for more than one-third of the estate of the deceased, defendant No. 1, and there is no evidence that other heirs of the deceased consented to such a bequest. In fact, the appeal before the 1st Appellate Court was by defendant No. 2, respondent herein, who was the sole surviving heir of the deceased and she had challenged the very execution and validity of the adoption deed, Exhibit PI.

Decided on June 9, 2003

JUDGMENT

1. The plaintiff, namely, the appellant herein, was the plaintiff in the civil original suit No. 9/1976 (1/86). In the suit, the appellant sought declaration to the effect that the registered deed dated November 26, 1975, executed by defendant No. 1, Abdul Razak, whereby the registered adoption deed dated July 27, 1973, Exhibit PI, was cancelled, be declared null and void, inoperative and ineffectual so far as the appellant was concerned. He further sought declaration to the effect that he continues to be adopted son of defendant No. 1 and entitled to half share of his estate in terms of the adoption deed.
2. In brief, the facts are that Abdul Razak, defendant No. 1 in the suit, had two daughters, namely, Mst. Sakeena and Mst. Dodally (defendant No. 2). Mst. Sakeena was married to Abdul Majid, appellant, as a 'Khananishin' daughter. According to the appellant, he remained in the house of defendant No. 1 as

'Khana-damad' and fulfilled all the needs of life of the executant and his wife. Unfortunately, Mst. Sakeena — appellant's wife and defendant No. 1's daughter — died two years after the marriage and defendant No. 1, being an old man and weak in health and having no scope of having a male issue, adopted the appellant to be his adopted son vide registered adoption deed dated July 27, 1973, Exhibit PI. Further according to the appellant, he was adopted because defendant No. 1 was unable to manage the domestic affairs and he wanted the appellant to manage his domestic affairs and, on his death, to perform his last rites, besides perpetuating the name of the family. In the adoption deed dated 27th July, 1973, it was specifically mentioned, that the property of defendant No. 1, to the extent of its half, shall vest in the appellant and the remaining half shall vest in Mst. Dodally, defendant No. 2, namely, the respondent herein. According to the plaintiff-appellant, in the adoption deed, it was mentioned that Abdul Razak, defendant No. 1 shall have no right to cancel the adoption deed. It was also the case of the appellant that, because of the influence of the defendant No. 2, i.e. the respondent herein, defendant No. 1 cancelled the adoption deed 27th July, 1973. He pleaded that the cancellation of the adoption deed was illegal, null and void and not binding on his right in property which had already come to be vested in him.

3. Upon notice of the suit, the defendants, in their joint written-statement admitted that the appellant was married to Mst. Sakeena, but they denied that Mst. Sakeena was married as 'Khana-nishin' daughter or that appellant was brought as 'Khana-damad'. It was also averred that the adoption deed was a fake and fictitious document and that the same was got executed from defendant No. 1 while he was lying sick. Defendants further stated that the appellant did not render any service to defendant No. 1 and so he cancelled the adoption deed vide cancellation deed dated 26th September, 1975. In regard to the adoption deed, defendants further stated that the parties to the suit are governed by their personal law, i.e., Muslim law with regard to inheritance and that, there being no custom prevailing in the family where son-in-law could be adopted as adopted son after the death of his wife by the father-in-law, therefore, the adoption deed was invalid, inoperative and in-effectual against them.
4. On the pleadings of the parties, the trial Court framed as many as twelve issues. On the basis of the evidence led by the parties, the trial Court recorded a finding that the institution of adoption is not recognized by Islamic law governing the parties and that the custom of adoption of son-in-law by his father-in-law was non-existent in the families of the parties and was also immoral. The trial Court, however, did not accept the stand of the defendants that the adoption deed was a fake and fictitious document or that it was got executed when Abdul Razak, Defendant No. 1, was lying sick. In fact, the trial Court came to a finding that the adoption deed was executed out of love and affection by Abdul Razak, defendant No. 1, for the services rendered by the appellant while living as 'Khana-damad' to him and his wife. The trial Court treated the adoption deed in question as gift executed by defendant No. 1 in favour of the appellant and, accordingly, decreed the suit in favour of the plaintiff-appellant. It may be mentioned here that defendant No. 1, Abdul Razak, died during the pendency of the suit before the trial Court and information in this regard was conveyed to the trial Court by the parties.
5. In appeal by defendant No. 1, namely, the respondent herein, the 1st, Appellate Court has set aside the finding of the trial Court treating the adoption deed to be a gift deed and, resultantly, the suit has been dismissed. Hence the appeal by the plaintiff.
6. The substantial questions of law to be determined in this appeal are whether the trial Court was justified in treating adoption deed to be a gift deed and whether the 1st Appellate Court committed any error of law and/or fact in setting aside the finding of the trial Court in this regard.
7. I have heard learned counsel for the parties at length and have carefully gone through the record of this case.
8. It is now well settled law that in determining the construction of a document, Court must look to the intention of the executant. The intention has to be ascertained from the language used in the document itself and the document has to be read as a whole for that purpose. The recitals in the adoption deed

dated 27th July, 1973. Exhibit PI, indicate that Abdul Razak adopted the appellant to be his adopted son because of his old age and weak health and there was no hope of his getting any male issue. Therefore, in order to manage the domestic affairs and for providing service to him and his wife, as also for performing his last rites, he adopted the appellant. The recitals further show that, on the death of the executant, property was to vest in the appellant and respondent herein in equal shares; meaning thereby that the transfer of the property was to take effect after the death of the executant. Undisputedly, the adoption deed was cancelled by the executant, defendant No. 1, by a cancellation deed dated 26th November, 1975 and, on cancellation of the adoption deed, the property, which, on the death of the executant, was to vest in the appellant and the respondent, reverted back to the executant. In this view of the matter, the intention of defendant No. 1 conveyed in the document. Exhibit PI, even if it be assumed to have been one of vesting half of his estate, on his death, in the appellant on the latter's fulfillment of the conditions contained therein, pales into insignificance, since the sheet-anchor of the claim of the appellant was removed by none other than the defendant No. 1 himself.

9. That apart, under Muslim Law, gift or 'Hiba' is a voluntary transfer of property (moveable or immovable) or any rights therein, by the owner of the property to another person immediately, unconditionally, without an exchange and consideration. If there is a condition attached to the transfer of the property, it is not enforceable, as being repugnant to the gift. As per the adoption deed, Exhibit PI, the property was sought to be transferred to Abdul Majid, appellant, on the condition that he would manage the domestic affairs and perform the last rites of the executant and shall render every kind of service to the executant and his wife. The property was neither transferred immediately nor the transfer was unconditional and, therefore, the trial Court was not justified in treating the adoption deed to be a gift deed. The finding of the 1st Appellate Court, that the adoption deed could not be treated as a gift deed, is correct and the finding of the trial Court to the contrary has rightly been set aside by the 1st Appellate Court.
10. Faced with this situation, the learned counsel for the appellant submitted that, if the adoption deed, Exhibit PI, is not to be treated as gift deed, then the same may be treated as a Will as the intention of the executant was that, on his death, his property should be inherited by the appellant and respondent in equal shares.
11. It is true that by executing the adoption deed, Exhibit PI, the intention of the executant was not only to adopt the appellant as his adopted son, but also, that on his death, the property, to the extent of its half, should be inherited by him. However, the adoption deed came to be cancelled by a subsequent deed dated 27th July, 1975 and, on cancellation, the Will, if any, would be deemed to have been revoked. Otherwise too under Muslim Law, bequest in excess of one-third of estate cannot take effect unless such bequest is consented to by heirs after the death of the testator. In this case, the bequest was for more than one-third of the estate of the deceased, defendant No. 1, and there is no evidence that other heirs of the deceased consented to such a bequest. In fact, the appeal before the 1st Appellate Court was by defendant No. 2, respondent herein, who was the sole surviving heir of the deceased and she had challenged the very execution and validity of the adoption deed, Exhibit PI.
12. In view of the above, no case for interference with the judgment and decree of the 1st Appellate Court is made out. The appeal is, accordingly, dismissed.

Appeal dismissed.

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LANDMARK JUDGMENTS ON ADOPTION

LANDMARK JUDGMENTS ON

ROLE AND DUTIES

OF

FAMILY COURT

SUBARNA BHATTACHARJEE VERSUS SIDDARTHA BISWAS

In the High Court of Gauhati at Assam, Nagaland, Mizoram and Arunachal Pradesh

Tr. P. (C) No. 11/2017

(Before Hon'ble Mr. Justice Kalyan Rai Surana)

Subarna Bhattacharjee

Versus

Siddartha Biswas

Decided on September 12, 2017

Date of Hearing : 21.8.2017, 06.09.2017

In the overall view of the matter, as the case of Krishna Veni Nagam (supra) does not lay down a law prohibiting transfer of any case and instead follow the course of trial by video-conferencing, until some provisions are made in the Gauhati High Court Rules as well as Civil Court Rules & Orders of the Gauhati High Court in respect of full trial by video-conferencing, it would not be in the interest of the litigants of the State of Assam to mandatorily undertake a full length trial by videoconferencing as an alternative of transfer of suits. The provisions of Section 24 CPC having not been struck-off, the power of this Court to exercise jurisdiction under Section 24 CPC to transfer suits and proceedings cannot be taken away in appropriate cases. In light of the various orders passed by the Hon'ble Supreme Court of India in the various cases referred herein before, with greatest respect to the Hon'ble Supreme Court of India, as the case of Krishna Veni Nagam (supra) is under reconsideration of the said Hon'ble Court and as even in the said judgment, the matrimonial case was indeed transferred from Jabalpur to Hyderabad, in the absence of law laid down curtailing the power of this Court to exercise jurisdiction under Section 24 CPC, this court is inclined to continue to exercise jurisdiction under Section 24 CPC. (Para - 20)

Mr. M. Dutta, Mr. R. Sarma, Mr. B. Sinha, Mr. R.C. Paul, Mr. S. Alim, Mr. P.P. Borthakur, Mr. K.R. Patgiri, Mr. H. Sarma, Ms. N. Upadhyay, and Mr. S. Islam, Advocates.

For the respondent(s): Mr. S. Dutta, Senior Advocate, Mr. S. Kataki, Mr. S.K. Borkataki, Mr. A.D. Choudhury, Mr. P. Sen, Ms. D. Borgohain, Ms. S. Kanungoe, Mrs. S. Barpatragohain, Mr. A Ganguly, Mr. S.D. Purkayastha, and Mr. B. Pushilal, Advocates

JUDGMENT AND ORDER (CAV)

Hon'ble Mr. Justice Kalyan Rai Surana :— Heard Mr. P.K. Deka, Mr. K.K. Dey, Mr. C. Baruah, Mr. M.R. Adhikary, Mr. M. Dutta, Mr. R. Sarma, Mr. B. Sinha, Mr. R.C. Paul, Mr. S. Alim, Mr. P.P. Borthakur, Mr. K.R. Patgiri, Mr. H. Sarma, Ms. N. Upadhyay, and Mr. S. Islam, the learned Counsels appearing for the petitioners herein. Also heard Mr. S. Dutta, Senior Advocate, Mr. S. Kataki, Mr. S.K. Borkataki, Mr. A.D. Choudhury, Mr. P. Sen, Ms. D. Borgohain, Ms. S. Kanungoe, Mrs. S. Barpatragohain, Mr. A Ganguly, Mr. S.D. Purkayastha, and Mr. B. Pushilal, the learned Counsels appearing for the respondents herein.

2. These petitions have been filed under Section 24 of the Civil Procedure Code, by which cases relating to matrimonial disputes and/or Guardianship dispute pending in various courts are sought to be transferred from one District to another.

3. The reason for hearing all the matters together was deemed necessitated in view of the recent judgment delivered by the Hon'ble Supreme Court of India in the case of Krishna Vent Nagam v. Harish Nagam reported in (2017) 4 SCC 150. This judgment has been circulated to this Court by the Registry of the Hon'ble Supreme Court of India. It would be relevant to refer to paragraphs-13 to 20 thereof, which is extracted below:

"13. We have considered the above suggestions. In this respect, we may also refer to the doctrine of forum non conveniens which can be applied in matrimonial proceedings for advancing interest of justice. Under the said doctrine, the court exercises its inherent jurisdiction to stay proceedings at a forum which is considered not to be convenient and there is any other forum which is considered to be more convenient for the interest of all the parties at the ends of justice. In Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd. [(2003) 4 SCC 341] this Court observed:

"19. In Spiliada Maritime case [Spiliada Maritime Corpn. v. Cansulex Ltd., (1986) 3 All ER 843: 1987 AC 460: (1986) 3 WLR 972 (HL)] the House of Lords laid down the following principle:

"The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case could be tried more suitably for the interest of all the parties and for the ends of justice "

The criteria to determine which was a more appropriate forum, for the purpose of ordering stay of the suit, the court would look for that forum with which the action had the most real and substantial connection in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court, it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate, the court would normally grant a stay unless there were circumstances militating against a stay. It was noted that as the dispute concerning the contract in which the proper law was English law, it meant that England was the appropriate forum in which the case could be more suitably tried."

Though these observations have been made in the context of granting anti suit injunction, the principle can be followed in regulating the exercise of jurisdiction of the court where proceedings are instituted. In a civil proceeding, the plaintiff is the dominus litis but if more than one court has jurisdiction, court can determine which is the convenient forum and lay down conditions in the interest of justice subject to which its jurisdiction may be availed. [Kusum Ingots & Alloys Ltd. v. Union of India, (2004) 6 SCC 254, para-30].

14. One cannot ignore the problem faced by a husband if proceedings are transferred on account of genuine difficulties faced by the wife. The husband may find it difficult to contest proceedings at a place which is convenient to the wife. Thus, transfer is not always a solution acceptable to both the parties. It may be appropriate that available technology of video conferencing is used where both the parties have equal difficulty and there is no place which is convenient to both the parties. We understand that in every district in the country video conferencing is now available. In any case, wherever such facility is available, it ought to be fully utilized and all the High Courts ought to issue appropriate administrative instructions to regulate the use of video conferencing for certain category of cases. Matrimonial cases where one of the parties resides outside court's jurisdiction is one of such categories. Wherever one or both the parties make a request for use of video conference, proceedings may be conducted on video conferencing, obviating the needs of the party to appear in person. In several cases, this Court has directed recording of evidence by video conferencing. [State of Maharashtra v. Praful B. Desai, (2003) 4 SCC 601: 2003 SCC (Cri) 815; Kalyan Chandra Sarkar v. Rajesh Ranjan, (2005) 3 SCC 284: 2005 SCC (Cri) 705; Budhadev

Karmaskar (4) v. State of W.B., (2011) 10 SCC 283; (2012) 1 SCC (Cri) 285; Malthesh Gudda Pooja v. State of Karnataka, (2011) 15 SCC 330; (2014) 2 SCC (Civ) 473].

15. The other difficulty faced by the parties living beyond the local jurisdiction of the court is ignorance about availability of suitable legal services. Legal Aid Committee of every district ought to make available selected panel of advocates whose discipline and quality can be suitably regulated and who are ready to provide legal aid at a specified fee. Such panels ought to be notified on the websites of the District Legal Services Authorities/State Legal Services Authorities/National Legal Services Authority. This may enhance access to justice consistent with Article 39A of the Constitution.
16. The advancement of technology ought to be utilized also for service on parties or receiving communication from the parties. Every district court must have at least one e-mail ID. Administrative Instructions for directions can be issued to permit the litigants to access the court, especially when litigant is located outside the local jurisdiction of the Court. A designated officer/manager of a district court may suitably respond to such e-mail in the manner permitted as per the administrative instructions. Similarly, a manager/information officer in every district court may be accessible on a notified telephone during notified hours as per the instructions. These steps may, to some extent, take care of the problems of the litigants. These suggestions may need attention of the High Courts.
17. We are thus of the view that it is necessary to issue certain directions which may provide alternative to seeking transfer of proceedings on account of inability of a party to contest proceedings at a place away from their ordinary residence on the ground that if proceedings are not transferred it will result in denial of justice.
18. We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of defendant/respondent does not result in denial of justice. Order incorporating such safeguards may be sent along with the summons. The safeguards can be: —
 - i) Availability of video conferencing facility.
 - ii) Availability of legal aid service.
 - iii) Deposit of cost for travel, lodging and boarding in terms of Order XXV CPC.
 - iv) E-mail address/phone number, if any, at which litigant from out station may communicate.
19. We hope the above arrangement may, to an extent, reduce hardship to the litigants as noted above in the Order of this Court dated 9th January, 2017. However, in the present case since the matter is pending in this Court for about three years, we are satisfied that the prayer for transfer may be allowed. Accordingly, we direct that proceedings in Case No. 179A/2013 under Section 13 of the Act titled "Harish Nagam v. Krishna Veni Nagam" pending on the file of II Presiding Judge, Family Court, Jabaipur, Madhya Pradesh shall stand transferred to the Family Court, Hyderabad, Andhra Pradesh. If the parties seek mediation the transferee court may explore the possibility of an amicable settlement through mediation. It will be open to the transferee court to conduct the proceedings or record evidence of the witnesses who are unable to appear in court by way of video conferencing. Records shall be sent by court where proceedings are pending to the transferee court forthwith.
20. The Registry to transmit a copy of this order to the courts concerned. A copy of this order be sent to all the High Courts for appropriate action. "

4. On enquiry, this Court has been informed that save and except four districts of Assam, viz., N.C. Hills Autonomous District, Karbi Anglong Autonomous District, Baska District and Chirang District, all other District Courts have already set up with Video Conference facilities. Under the aforesaid background, this Court deems fit that analogous hearing of this cases be taken up so that there can be a threadbare discussion on the matter. The various counsels for the petitioner's side had voiced their grievance regarding the adoptability of the Video Conference facilities for the common public in the State of Assam, for which, the learned counsels for all the petitioners had argued in favour of transfer of the matrimonial proceedings instead of compelling the petitioners to accept the Video Conference facility for trial of cases.
5. The following causes for their concern have been cited by the learned counsels for the petitioners -
 - a. It is submitted that by and large in all cases, the wives who are in distress and who were either driven out from the matrimonial home or compelled to leave their matrimonial homes for variety of reasons, are the petitioners herein. The petitioners have prayed for transfer of the proceedings to the place where they are presently residing.
 - b. In majority of cases, the distressed wife, has no earning capacity. They claim to be either dependent to their parents or their brothers for their living. In many cases, the wives are also burdened to take care of their minor children, their education and healthy growth, etc. It is claimed that in many cases, the issue of maintenance have not been settled, and even if any maintenance is allowed from their estranged husband, the money awarded is a mere pittance, which is not sufficient to take decent care of themselves, not to speak of minor children.
 - c. It is submitted that being females, they have to face a great difficulty to travel from their parental home to attend the Court in a distant place away from their residence.
 - d. The counsels have also asked this court to take notice of the geographical situation of the State, further submitting that there are three corners of the State and in order to travel from one corner of the State to the other, it may take anything between 110-12 hours to 24 hours by bus and by train. It is also submitted that few Districts of the State stay inundated by flood water for 1-2 months in a year for which normal life is disrupted for a total of 3-4 months due to the annual calamity of flood. During these times, females not only feel insecure for travelling alone in nigh-super and in trains, but during these times of distress, as the male members of their parental family are already having difficult times, they cannot spare time to escort the females to court at a distant place.
 - e. It was submitted that the court should also take note of female literacy in the State as well as the educational background of the wives in each case before permitting trail by video-conferencing. It is submitted that the uneducated and not too much technology savvy ladies would find it difficult to conduct a trial under Video Conferencing unless they are assisted by the equally tech-savvy counsel. The ladies, who are left to be deprived without any legal support would find it very difficult to conduct a trial in Video Conferencing.
 - f. It is also submitted that if trial by video-conferencing is allowed, the ladies would have to bear with double financial burden, one for one set of counsel for representing them before the trial court, to file pleadings, petitions, documents, argument, and another set of counsels at the Town/City/Sub-Division, where there are presently residing to give legal counselling and to guide them through the entire proceedings, to prepare written statement, evidence-on-affidavits. She would have to keep constant touch with both sets of the counsel to keep herself updated about the dates posted in the case and to monitor the date-wise progress of the case.
 - g. It is submitted that even if trial is conducted by video-conferencing, there is no denial that the lady would still be compelled to travel from time to time to the town where the trial is taking place for the purpose of paying fees of the counsel as well as for filing various petitions requiring swearing

of affidavit in support of the petitions, unless this court completely waives the requirement of filing petitions with original signature.

- h. It is urged that a lady, who is financially starved and facing social stigma connected with a lady whose husband has left her, and lack of support from her own parental family, such a lady would be lucky if she can engaged advocates at both her nearest court as well as the town where litigation is filed. It would be still difficult to organize two sets of unknown counsel to work in the tandem with each other with the required coordination, because if the two sets of lawyers do not coordinate with each other then, there are no chances of getting a fair trial. There is a remote chance that a lady may get the service of a counsel, who is willing to take assignment only a date wise basis without any continuity of engagement, because it is a common practice that counsel is engaged for the entire life of litigation, and no good counsel with some reputation would consent to take steps only on as and when occasion arises. Therefore, if videoconferencing is allowed, there would be additional financial burden on the wife to engage counsel at two different places, keep travelling to and fro.
 - i. It is submitted that every lady is not staying in Towns/City/Sub-Divisional Towns, some of them would have to travel some distance from their villages to reach the nearest Court having Videoconferencing facilities,
 - j. It is further argued that it would be a risky affair for a lady to send the original documents by post to the town where litigation is going on as it may get lost during transit.
 - k. It is submitted that it would be equally risky for a lady to believe that pleadings or petitions sent by post would reach the Court on time and the office staff receiving post would promptly open postal envelopes and tag such pleadings and petitions on record on the date fixed. Therefore, unless the lady can successfully interact with Presiding Officer of Court at around 10.30 am, she would not know what would happen to her case in course of the day. Without permitting interaction at a fixed time, no court would adjourn a case merely because of postal delay.
 - l. The ground reality of lack of uninterrupted electricity supply, lack of uninterrupted internet connectivity must also be addressed, as to what would happen if on a particular day, due to mobile link failure, electricity failure and internet link failure a remote station litigant cannot get connected even over mobile phone to inform Court Managers about internet/mobile link failure. Examples were cited of link failure in banks which stops all transactions including ATM transactions, connectivity problems faced while e-filing of Income Tax returns and GST returns in recent times, which became news headlines.
6. It is also submitted that the judgment in Krishna Veni Nagam (supra) was by a Division Bench of the Hon'ble Supreme Court, which had not overruled various orders by co-ordinate Bench of equal strength, whereby the Hon'ble Supreme Court had deemed it fit to transfer matrimonial cases in the place of choice of the wife. It is submitted that if permitted, they are ready to refer to many cases where such cases were transferred. Hence, they submit that the case of Krishna Veni Nagam (supra) should be treated as a judgment per-incurium, which had not taken note of the previous orders by co-ordinate Benches of equal strength, allowing transfer of matrimonial cases.
 7. All the counsels for the petitioners' side are unison in submitting that trial by video-conferencing may be possible for some of the parties, but by and large, unless such trial is started at an experimental basis in one or two given case where parties are consenting, the permitting all trial by videoconferencing may not be the ideal solution for the State of Assam, which is technologically not so advanced like metropolitan cities like Mumbai and New Delhi.
 8. Mr. PK Deka, the learned counsel for one of the petitioner has submitted that the Hon'ble Supreme Court in the case of Krishna Veni Nagam (supra) did not disturb the power and jurisdiction of this Court

under Section 24 CPC to transfer a suit from one court to another within its jurisdiction in the State. He has submitted that the said judgment should be considered to be prospective because of what was stated in paragraph-18 thereof. It is submitted that in this particular paragraph-18, the Hon'ble Supreme Court was referring to incorporate safeguard for ensuring that summoning of defendants/respondents does not result in denial of justice and therefore, ordered for safeguards to be mentioned while issuing of summonses. However, in his case, the summons stage was over and the trial was going on. By citing various cases, where various High Courts in the Country as well as the Hon'ble Supreme Court of India had transferred matrimonial proceedings to the city/town where the wife was residing. He specifically relies on the following four cases:

- a. Rabindra Kaurv. Jitendra Singh, (2000) 9 SCC 375 : AIR 2000 SC 3403.
 - b. Sumita Singh v. Kumar Sanjay, (2001) 10 SCC 41 : AIR 2002 SC 396.
 - c. Durga Pandit v. Pradip Kumar Pandit, (2004) 1 GLT 440.
 - d. Pailavi Saikia v. Mriganka Bharali, (2006) SUPP GLT 425.
9. Mr. B. Chakraborty, the learned counsel appearing for one of the petitioner has submitted that the case of Krishna Veni Nagam (supra) may not be made applicable in these cases, firstly, because the Hon'ble Supreme Court was passing an order under Section 25 CPC and it was not deciding the matter under Section 24 CPC. Moreover, the consistent views of the Hon'ble Supreme Court of India as well as of the various High Court including this Court that in respect of matrimonial cases, about the theory of considering the convenience of wife had not been diluted in the case of Krishna Veni Nagam (supra).
 10. Mr. R. Sharma, the learned counsel appearing for one of the petitioner has submitted that the husband is a police at the district of Nagaon and therefore, he carries with him a clout in his hometown and therefore, out of fear of the police husband, her witnesses may not be inclined to give evidence at Nagaon and therefore, it is a fit case for transfer of the proceeding to Tezpur in the district of Sonitpur. He also relies on the case of Bharatiben Ravibhai Rav v. Ravibhai Govindbhai Rav decided on 05.05.2017 and reported in (2017) 6 SCC 785 to project that in the said case, the Hon'ble Supreme Court did not deem it fit to permit Video Conference and transfer the case from one district to another for the convenience of wife and also considering the fact that when another proceeding is pending between the parties in the courts where the wife is residing and in this connection, he has submitted that at present three separate proceedings initiated by the wife is currently pending at Tezpur.
 11. Per contra, arguing in support of the idea of trial by video conferencing, it is submitted that it is equally true for the husband to travel to the place of choice of the wife and to face trial at a distant place. It is submitted that the husband are engaged in some service, profession, business or other vocation to earn his livelihood. While it would not be inconvenient for the wife to travel, if she is unemployed, but it would be very difficult for the husband to avail leave to travel to attend matrimonial cases, which is likely to affect the service carrier, business, profession or vocation. It is submitted that in appropriate cases, if the problem faced by the wife is genuine, the courts may, on case to case basis, order a reasonable cost of litigation, travel, lodging and food for the wife, children (if any), and an escort.
 12. Mr. Sishir Dutta, the learned senior counsel for one of the respondent has referred to the case of M.N. Murthy v. State of Karnataka, (2003) 7 SCC 514 to argue that unless the order specifically provides for prospective overruling, all judgments are deemed to have retrospective effect and, as such, the argument by the learned counsel for the petitioners that the case of Krishna Veni Nagam (supra) has prospective application is not sustainable in view of the ratio laid down in the case of M.N. Murthy (supra).
 13. Mr. Saurav Kataki, the learned counsel for one of the respondent has submitted that Section 24 CPC is a procedural law and therefore, in a strict sense, Section 24 is not a statutory law but a procedural law. It is submitted that it is a well settled law that procedural law is a handmade of justice. However, when

the Hon'ble Supreme Court of India has given a direction as to what procedure should be adopted in case of transfer of matrimonial suit, in that case, the said decision becomes a law binding on all Courts and Tribunals under the provisions of Article 141 of the Constitution of India. Therefore, the discretion which was hitherto available to the High Court while deciding the application filed under Section 24 CPC is no longer available and a question of law will arise whether in light of the direction contained in the case of Krishna Veni Nagam (supra), whether this Court has the power or jurisdiction to carve out any exception. He further submits that all other cases including the case of Bharatiben Ravibhai (supra), cited by the counsels for various petitioners can be distinguished from the ratio of the case in Krishna Veni Nagam (supra), because all other cases are judgment in personam, but judgment in the case of Krishna Veni Nagam (supra), because of being circulated to all the High Courts, should be treated a judgment in rem and it should be mandatorily treated as a direction under Article 141 of the Constitution of India.

14. All the learned counsels for the parties have argued their respective arguments but their submissions are consonance with the submission already recorded above, it is not deemed necessary to reiterate those arguments to burden this order.
15. Having considered the arguments made by all the learned counsels in all the cases, this Court would like to state that it is not aloof from the realities of life and that it is insensitive with the various problems the wives have to face once they were driven out from the matrimonial house and the inevitable social stigma and financial and mental anxiety suffered by her to maintain a litigation as well as to minor children, if any, born out of the wedlock. However, the majority of objections raised by the learned counsels for the petitioners appeared to be answered by the Hon'ble Supreme Court of India in paragraphs-14 to 18 of the case of Krishna Veni Nagam (supra), which are already extracted above.
16. However, it must be noted that even in the case of Krishna Veni Nagam (supra), the Hon'ble Supreme Court of India deemed it fit to transfer the case of the husband, i.e. Harish Nagam from Jabalpur, Madhya Pradesh to Hyderabad, Andhra Pradesh. Therefore, the question arises, that when the Hon'ble Supreme Court of India in the said case of Krishna Veni Nagam (supra), did not deem it fit not to transfer the matrimonial proceedings by ordering trial by video-conferencing, and when the Hon'ble Supreme Court of India in the subsequent case of Bharatiben Ravibhai Rav (supra), where the matrimonial proceedings was transferred from Ahmedabad (Gujrat) to Dungarpur (Rajasthan), there is no doubt that the Hon'ble Supreme Court of India deemed it fit to exclude some cases from video-conferencing, where the parties did not consent for such trial. Hence, this Court is of the view that in cases, where the wife has reservations from trial on videoconferencing, it would be just and proper to transfer the proceedings from one place to another, instead of compelling a trial by video-conferencing.
17. This court has also taken note of the practical problems and difficulties expressed by the learned counsels for the petitioners. To mention a few, there is no provision under the Gauhati High Court Rules as well as Civil Court Rules & Orders of the Gauhati High Court relating to trial by video-conferencing. There are no provisions of sending petitions by e-mail and for its acceptance by Courts. There is no provision to empower a trial court to defer the proceedings merely because it receives communication over phone call to Court Manager of by e-mail that pleadings or petitions had been despatched by post. The subordinate Court staffs have not been sensitized to promptly open postal envelopes and urgently tag the petitions received by post in court record and to place them before the Court. The Presiding Officers of the Courts are not yet sensitized to wait till such time in the day till postal service is usually made to court premises, for which there is every possibility that a court may pass orders in first half of the day and the postal delivery containing petitions and pleadings being received after orders are passed. There is no provisions in Gauhati High Court Rules as well as Civil Court Rules & Orders of the Gauhati High Court about what would happen if a party agreeing for trial by video-conference sends a pleading, petition or document by post and the postal envelope is misplaced and what would be the procedure for reconstruction of documents not received by court, but lost in postal transit. There are no provisions in the Gauhati High Court Rules as well as Civil Court Rules & Orders of the Gauhati High Court to make a Court Manager

as an agent for the out-station litigant, so as to enable the Courts to accept submissions made by a Court Manager on the basis of telephonic message or e-mail received from a litigant, and to pass orders on the basis of any submissions made before the Court. The procedure of regular trial by Video-conferencing, in the opinion of this court, must be incorporated in the appropriate Rules governing trial like Gauhati High Court Rules as well as Civil Court Rules & Orders of the Gauhati High Court, because it is one thing to have an occasional session by Videoconferencing like delivering judgment, one or two session of cross-examination of accused who for various reasons like internal security, or to maintain peace and tranquillity, is not desired to be moved from prison, or video-conferencing with a hospitalized person, periodical viewing of under-trial accused lodged in jail by concerned Magistrates, etc., to name a few. Therefore, it is hoped that in future, some of the issues are addressed by this Court so that appropriate Rules are framed for facilitating videoconferencing, as suggested by the Hon'ble Supreme Court of India.

18. Moreover, in some cases, where there are pending litigations between the parties in the place where the wife is residing as was the facts in the case of Bharatiben Ravibhai (supra), where there was a pending litigation at Dungarpur (Rajasthan), for which the matrimonial proceedings was transferred or in one of the present case in hand, where the husband is a police personnel and the wife apprehends threat. This Court cannot shut its eyes to such practical ground realities.
19. Moreover, it has come to the notice of this Court that the Hon'ble Supreme Court of India in the case of Santhini v. Vijaya Venketesh by an order dated 09.08.2017 (Para-19), has referred the case of Krishna Veni Nagam (supra) to the Hon'ble The Chief Justice of India to consider referring the said case before a larger Bench. The outcome of such reference is not known. The relevant para of the said order is quoted below: —

"19. To what extent the confidence and confidentiality will be safeguarded and protected In video conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered. It is certainly difficult in video conferencing, if not impossible, to maintain confidentiality. It has also to be noted that the footage in video conferencing becomes part of the record whereas the reconciliatory efforts taken by the duty-holders referred to above are not meant to be part of the record. All that apart, in reconciliatory efforts, physical presence of the parties would make a significant difference. Having regard to the very object behind the establishment of Family Courts Act, 1984, to Order XXXIIA of the Code of Civil Procedure and to the special provisions introduced in the Hindu Marriage Act under Sections 22, 23 and 26, we are of the view that the directions issued by this Court in Krishna Veni Nagam (supra) need reconsideration on the aspect of video conferencing in matrimonial disputes."
20. Therefore, in the overall view of the matter, as the case of Krishna Veni Nagam (supra) does not lay down a law prohibiting transfer of any case and instead follow the course of trial by video-conferencing, this court is of the view that until some provisions are made in the Gauhati High Court Rules as well as Civil Court Rules & Orders of the Gauhati High Court in respect of full trial by video-conferencing, it would not be in the interest of the litigants of the State of Assam to mandatorily undertake a full length trial by videoconferencing as an alternative of transfer of suits. The provisions of Section 24 CPC having not been struck-off, the power of this Court to exercise jurisdiction under Section 24 CPC to transfer suits and proceedings cannot be taken away in appropriate cases. In light of the various orders passed by the Hon'ble Supreme Court of India in the various cases referred herein before, with greatest respect to the Hon'ble Supreme Court of India, as the case of Krishna Veni Nagam (supra) is under reconsideration of the said Hon'ble Court and as even in the said judgment, the matrimonial case was indeed transferred from Jabalpur to Hyderabad, in the absence of law laid down curtailing the power of this Court to exercise jurisdiction under Section 24 CPC, this court is inclined to continue to exercise jurisdiction under Section 24 CPC.

21. With the aforesaid observations, the individual cases are now taken up: —

- i. Tr.P. (C) No. 14/2017 - Smt. Subarna Bhattacharjee v. Sri Siddartha Bisw as - In this case, the petitioner-wife is seeking transfer of proceedings of F.C. (C) Case No. 77/2017 from the Court of Principal Judge, Family Court, Kamrup (M), Guwahati to the Court of Principal Judge, Family Court, Silchar. She is a Doctor and associated with works of National Rural Health Mission. She has a minor baby. Petitioner has no brother, but lives with aged parents. She claims that marriage was solemnized at Silchar and after marriage, she was living in their matrimonial home and Kolkata and the case was filed at Guwahati to harass her and the Court at Guwahati had no jurisdiction. In the affidavit in opposition, the respondent has not denied that after marriage at Silchar, their matrimonial home was not at Kolkata. Therefore, this court deems it fit to transfer the proceedings Of F.C. (C) Case No. 77/2017 from the Court of Principal Judge, Family Court, Kamrup (M), Guwahati to the Court of Principal Judge, Family Court, Silchar. The learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati shall transfer the records of F.C. (C) Case No. 77/2017 to the Court of Principal Judge, Family Court, Silchar. In this regard, it would be the duty of the petitioner to produce a certified copy of this order before the Court of Principal Judge, Family Court, Kamrup (M), Guwahati for transfer of the said proceedings. The parties, who are represented by their counsel, shall appear before the Court of Principal Judge, Family Court, Cachar, Silchar, on 03.11.2017 without any further notice for appearance and by producing certified copy of this order, shall seek further instruction from the said learned Court.
- ii. Tr.P. (C) No. 11/2017 - Maya Das (Thapa) v. Dipankar Das - In this case, the petitioner/wife is the defendant in FC (Civil) Case No. 309/16 pending before the learned Principal Judge, Family Court, Silchar, Cachar, which is a petition under Section 9 of the Hindu Marriage Act, 1955. The petitioner has prayed for transfer of the case from the Court of learned Principal Judge, Family Court, Cachar, Silchar to the court of learned Principal Judge, Family Court at Dimapur, Nagaland. In this case, this Court finds that this is a case for the transfer from one State to another. In this regard, this Court in the case of Pomi Sengupta v. Biswajit Sengupta, (2015) 6 GLR 396: (2016) 1 GLT 627, had discussed the jurisdiction of the Court under Section 24 CPC and had laid down that this Court does not have jurisdiction to make inter-State transfer of the suites and proceedings. Therefore, such transfer, in the considered opinion of this Court can only be made under Section 25 CPC. Therefore, by following the precedent of the case of Pomi Sengupta (supra), this Court is not inclined to transfer the suit to outside the State although subordinate courts in the State of Nagaland are within the jurisdiction of this Court, but still, it lies outside the State of Assam.

The parties, who are represented by their counsel, shall appear before the Court of Principal Judge, Family Court, Cachar, Silchar, on 03.11.2017 without any further notice for appearance and by producing certified copy of this order, shall seek further instruction from the said learned Court.
- iii. Tr.P. (C) No. 80/2016 - Mrs. Queen Hazarika Gogoi v. Sri. Uttam Gogoi - In this case, the petitioner/wife is the defendant in Misc. Case (G) No. 1/15 pending before the court of learned District Judge, Dibrugarh, which is a petition under Section 10 of the Guardians and Wards Act, 1890. The petitioner has prayed for transfer of the case from the court of learned District Judge, Dibrugarh to the court of learned District Judge, Sivasagar. The respondent/husband herein is reported to be a police personnel serving as a constable and the minor child (aged 4 years and 5 months, as no 16.02.2015, the date of filing of the guardianship petition) is now residing with the petitioner/wife. Moreover, the petitioner has claimed that she has become entitled to receive maintenance from the husband as Der the order Dassed by the learned Sub-Divisional Judicial Magistrate, Nazira in Misc. Case No. 2/2014 filed under Section 125 Cr.P.C. (at one place also mentioned as order passed by the learned Munsiff-cum-Judicial Magistrate, First Class, Nazira). It appears that the respondent had also instituted Criminal Revision No. 8(1)/2015 before the learned Sessions Judge, Sivasagar. Therefore, in this case, this Court finds that the ratio of the case Bharatiben Ravibhai

Rav (supra) is found to be applicable. Therefore, the proceedings of the Misc. Case (G) No. 1/15 under Section 10 of the Guardians and Wards Act pending in the court of learned District Judge, Dibrugarh is transferred to the learned District Judge, Sivasagar, who will have power to delegate it to another appropriate and competent court. The learned Court of District Judge, Dibrugarh shall transfer the records of Misc. Case (G) No. 1/15 to the learned Court of District Judge, Sivasagar. In this regard, it would be the duty of the petitioner to produce a certified copy of this order before the learned Court of District Judge, Dibrugarh for transfer of the said proceedings. The parties, who are represented by their learned counsels are directed to appear in person or through duly instructed pleader before the court of the learned District Judge, Dibrugarh on 03.11.2017 and by producing a certified copy of this order, shall seek further instruction from the said learned court

- iv. Tr.P. (C) No. 77/2016 - Kabita Baid v. Dharamchand Baid - The petitioner/wife is the defendant in T.S. (D) No. 17/2016, pending before the learned Court of District Judge, Bongaigaon, which is a petition under Section 13(l)(i-a) and (i-b) of Hindu Marriage Act, 1955, seeking dissolution of marriage by divorce and other reliefs. The petitioner has prayed for transfer of the said case from the learned Court of District Judge, Bongaigaon to the learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati. It is stated that the petitioner has shifted her residence from Kokrajhar to Guwahati for better treatment as she is suffering from "Prolapse Intervertebral Disc". She also had to shift her place of residence from her parental home because her status as a lady living separately from husband without any children is causing stigma to the family, which is hindering the marriage of her sister. The respondent has contested the case by filing Affidavit-in-opposition, stating that the petitioner is contesting Misc. Case No. 42/2016, which is an application under section 125 Cr.P.C. at Bongaigaon. It is also stated that the respondent is an orthopedically challenged person who cannot move without an escort and for the said purpose, the respondent has relied on a concession certificate annexed to his affidavit-in-opposition. Therefore, considering the un-denied statement that the petitioner is contesting Misc. Case No. 42/2016, under section 125 Cr.P.C. at Bongaigaon and that the respondent is an orthopedically challenged person, and on further considering the fact that the respondent has sought for transfer only because she has changed her residence, this Court is of the view that this is not a fit case for the transfer of the proceedings of T.S. (D) No. 17/2016, pending before the learned Court of District Judge, Bongaigaon. In this case, this Court finds that the ratio of the case Bharatiben Ravibhai Rav (supra) is found to be applicable as the petitioner is pursuing Misc. Case No. 46/2016 under Section 125 Cr.P.C. at Bongaigaon. Hence, this application stands dismissed.

The parties, who are represented by their learned counsels are directed to appear in person or through duly instructed pleader before the court of the Court of the learned District Judge, Bongaigaon on 03.11.2017 and by producing a certified copy of this order, shall seek further instruction from the said learned court.

- v. Tr.P. (C) No. 25/2016 - Sri Sumit Ranjan Nath v. Smt. Suchita Nath - The petitioner-husband is seeking transfer of the proceedings of TS 93/2013 from the learned Court of District Judge, Karimganj to the Court of Principal Judge, Family Court, Kamrup (M), Guwahati. It is projected that TS 96/2013 between the parties was compromised and disposed of by order dated 09.06.2014 passed by the learned District Judge, Karimganj, by which the parties agreed to live a conjugal life. But the same did not last. Thereafter, a decree of divorce was validly passed by the learned Court of Principal Judge, Family Court, Guwahati by order dated 08.09.2015 in F.C. (Civil) Case No. 148/15. However, despite the decree, the respondent-wife has filed Title (Restitution) Suit No. 14/2016 under section 9 of the Hindu Marriage Act, 1955 before the learned Court of District Judge, Karimganj, again seeking restitution of conjugal rights. The petitioner is a personnel of Sashastra Seema Bal (SSB). The respondent-wife has contested this application by filing Affidavit-in-Opposition, claiming that the decree of divorce was obtained by fraud. On perusal of the

petition for divorce, being F.C. (C) 148/2015 as well as the agreement dated 29.06.2015 for divorce, both filed by the respondent and copy of order dated 08.09.2015 passed in F.C. (C) Case No. 148/2015 that the respondent has not been paid any alimony or maintenance. The petitioner being a member of Sashastra Seema Bal, can undertake the journey to Karimganj, but it would be extremely difficult for the respondent to travel from Karimganj to Guwahati. Therefore, this court finds that this is not a fit case for transfer of the proceeding.

However, considering the submissions made by the learned counsel for the petitioner that there is a decree of divorce operating, the petitioner is permitted to move the learned Court of District Judge, Karimganj with an appropriate application for considering the maintainability of the Title (Restitution) Suit No. 14/2016. Till the decision thereon, the petitioner shall also be at liberty to move the said learned court for exemption from any personal appearance. With the aforesaid observation, this application stands dismissed.

- vi. Tr.P. (C) No. 34/2017 - Smt. Anamika Gogol v. Sr. Manoj Saikia - The petitioner/wife is the defendant in Mat. Suit (Restitution) No. 72/2016, pending before the learned Court of District Judge, Nagaon. The petitioner has prayed for transfer of the said case from the learned Court of District Judge, Nagaon to the learned Court of District Judge, Sonitpur, Tezpur. It is stated that the respondent is a police personnel and has sufficient clout at Nagaon, which is an intimidating factor for the petitioner to produce her witnesses at Nagaon. It is submitted that she has recently joined as a Teacher in Tezpur Govt. HS School and has taken up a rented accommodation at Tezpur and her minor daughter is also studying at Tezpur and she has no one to look after the minor daughter if she is to go to Nagaon to attend the case. On threat and assault received by her, she has instituted police case, which is now registered as GR Case No. 3262/16 - State v. Manoj Saikia, and is pending before the learned Court of Chief Judicial Magistrate, Tezpur. No one has entered appearance for the respondent although notice was served on his police station. Considering the statement that the respondent is a police personnel and the petitioner apprehends threat, and moreover, as GR Case No. 3262/16 is stated to be pending before the learned Court of Chief Judicial Magistrate, Tezpur, this court is of the view that the ratio of the case *Bharatiben Ravibhai Rav (supra)* is applicable. Therefore, the proceedings of Mat. Suit (Restitution) No. 72/2016, pending before the learned Court of District Judge, Nagaon stands transferred to the learned Court of District Judge, Sonitpur, Tezpur. In this regard, it would be the duty of the petitioner to produce a certified copy of this order before the learned Court of District Judge, Nagaon for transfer of the said proceedings. As the respondent herein has not entered appearance, the learned Court of District Judge, Nagaon, shall fix the date of appearance of the respondent (i.e. petitioner in T.S. (R) 72/16) before the learned Court of District Judge, Sonitpur on 03.11.2017.

The petitioner, who is represented by her learned counsel is directed to appear in person or through duly instructed pleader before the court of the learned District Judge, Sonitpur, Tezpur on 03.11.2017 and by producing a certified copy of this order, shall seek further instruction from the said learned court. The learned District Judge, Tezpur, would be at liberty to transfer the case before any other competent Court for trial.

- vii. Tr.P. (C) No. 26/2017 - Smt Dipannita Guha Das v. Sri. Bapan Das - The petitioner/wife is the defendant in T.S. (M) No. 7/2017. The petitioner has prayed for transfer of the said case from the learned Court of District Judge, Jorhat to the learned Court of District Judge, Hojai. It is submitted that the petitioner had filed an application under section 12 of the Protection of Women from Domestic Violence Act, 2005, being D.V. Case No. 12/2006, which is pending before the learned Court of Judicial Magistrate, 1st Class, Hojai, which is being contested by the respondent. It is submitted that the T.S. (M) 7/2017 was filed to harass her. It is submitted that the petitioner has no source of income and has no one to escort her to Jorhat. The respondent has filed an affidavit-in- opposition and has denied the allegations. Considering the statement that the petitioner is

having no source of income and no one to escort her to attend court proceedings at Jorhat, this Court is inclined to transfer the proceedings of T.S. (M) 7/2017 from the learned Court of District Judge, Jorhat to the learned Court of District Judge, Hojai. In this regard, it would be the duty of the petitioner to produce a certified copy of this order before the learned Court of District Judge, Jorhat for transfer of the said proceedings.

The parties, who are represented by their learned counsel are directed to appear in person or through duly instructed pleader before the court of the learned District Judge, Hojai on 03.11.2017 and by producing a certified copy of this order, shall seek further instruction from the said learned court. The learned District Judge, Hojai, would be at liberty to transfer the case before any other competent Court for trial.

- viii. Tr.P. (C) No. 44/2017 - Seema Mandai v. Ananda Mandai - The petitioner/wife is the defendant in T.S. (M) No. 8/2017. The petitioner has prayed for transfer of the said case from the learned Court of District Judge, Barpeta to the learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati. It is submitted that the petitioner is now residing at her parental home at Guwahati with her minor daughter. It is submitted that the petitioner had filed an application under section 498(A) of the Indian Penal Code, being C.R. Case No. 4213c/2009, which is pending before the learned Court of the Chief Judicial Magistrate, Kamrup (M), Guwahati. The petitioner had also filed F.C. (Crl.) Case No. 178/2010 for maintenance under Section 125 Cr.P.C. before Principal Judge, Family Court, Kamrup (M), Guwahati. On assurance that the petitioner would not be tortured and there would be no demand for dowry, the above two cases were closed. One again she was driven out from her house and she filed F.C. (Crl) Case No. 83/2011, which was again closed in view of compromise. She was again compelled to take shelter in her parental home and she filed F.C. (Crl) Case No. 126/2013 for maintenance. It is submitted that thereafter, the respondent had T.S. (M) 8/2017 was filed to harass her. It is submitted that the petitioner has no source of income and has no one to escort her to Barpeta and as her mother was old and ailing, there was no one to look after the minor son. The respondent has not contested the application. Considering the statement that the petitioner is having no source of income and no one to escort her to attend court proceedings at Barpeta, this Court is inclined to transfer the proceedings of T.S. (M) 8/2017 from the learned Court of District Judge, Barpeta to the learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati. In this regard, it would be the duty of the petitioner to produce a certified copy of this order before the learned Court of District Judge, Barpeta for transfer of the said proceedings. As the respondent herein has not entered appearance, the learned Court of District Judge, Barpeta, shall fix the date of appearance of the respondent (i.e. petitioner in T.S. (D) No. 8/2017) before the learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati on 03.11.2017. The petitioner, who is represented by her learned counsel is directed to appear in person or through duly instructed pleader before the court of the learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati on 03.11.2017 and by producing a certified copy of this order, shall seek further instruction from the said learned court. The learned District Judge, Hojai, would be at liberty to transfer the case before any other competent Court for trial.
- ix. Tr.P. (C) No. 47/2017 - Smt. Julie Rajbankhi v. Sri Indrajit Saikia - In this case, the petitioner/wife is the defendant in Misc. (G) Case No. 24/2017 pending before the court of learned Principal Judge, Family Court, Kamrup (M), Guwahati which is a petition under Section 7 of the Guardians and Wards Act, 1890. The petitioner has prayed for transfer of the said case to the Court of the learned District Judge, Jorhat. It is submitted that the marriage of the parties has been dissolved by judgment dated 26.05.2014, passed by the learned Court of District Judge, Jorhat in T.S. (M) 34/2013. The petitioner has filed a case for maintenance, which is registered as Misc. (J) Case No. 51/2014 arising out of TS (M) 34/2013, which is stated to be at evidence stage. It is stated that the petitioner has now received summons in the guardianship case. It is also stated that the petitioner

has no independent source of income and she and her minor son is living like a burden on her old and ailing parents. Her younger brother has to go out for business purpose. Hence, there is no one to escort her to attend court case at Guwahati. Therefore, in this case, this Court finds that the ratio of the case *Bharatiben Ravibhai Rav (supra)* is found to be applicable. The respondent is a govt, employee. Therefore, the proceedings of the Misc. (G) Case No. 24/2017, pending in the court of learned Principal Judge, Family Court, Kamrup (M), Guwahati is transferred to the Court of the learned District Judge, Jorhat, who will have power to delegate it to another appropriate and competent court. The learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati, shall transfer the records of Misc. (G) Case No. 24/2017 to the learned Court of District Judge, Jorhat. In this regard, it would be the duty of the petitioner to produce a certified copy of this order before the learned Court of District Judge, Dibrugarh for transfer of the said proceedings. As the respondent herein has not entered appearance, the learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati, shall inform the learned counsel for the petitioner in Misc. (G) Case No. 24/2017 that the date of appearance before the learned Court of District Judge, Jorhat is fixed on 03.11.2017.

The petitioner, who is represented by her learned counsel is directed to appear in person or through duly instructed pleader before the court of the learned Court of District Judge, Jorhat on 03.11.2017 and by producing a certified copy of this order, shall seek further instruction from the said learned court.

- x. Tr.P. (C) No. 3/2017 - Anu Pachani v. Chandan Siam - The petitioner/wife is the defendant in T.S. (M) No. 133/2016. The petitioner has prayed for transfer of the said case from the learned Court of District Judge, Tinsukia to the learned Court of District Judge, Lakhimpur, North Lakhimpur. The parties have one son and one daughter. It is submitted that the petitioner had filed a maintenance case, being Cri. Misc. Case No. 62/2015 before the Court of the learned Chief Judicial Maaistrate. LakhimDur. North LakhimDur and maintenance was allowed. Aaainst the said order, at present Crl. Revision Petition No. 8/2016 is pending before this Court. Then, the respondent filed T.S. (Judicial Separation) Case No. 4/2016 before the learned Court of District Judge, Lakhimpur, North Lakhimpur, which was dismissed by order dated 28.07.2016. Thereafter, the respondent has forcefully taken away their daughter from her custody. Thereafter, the present suit was filed by the respondent. It is submitted that the respondent is also a permanent resident of Village-Achuchawal Gaon, Dist. Lakhimpur. It is submitted that the petitioner has no independent source of income and has no one to escort her to Tinsukia. Therefore, in this case, this Court finds that the ratio of the case *Bharatiben Ravibhai Rav (supra)* is found to be applicable. Considering the statement that the petitioner is having no independent source of income and no one to escort her to attend court proceedings at Tinsukia, this Court is inclined to transfer the proceedings of T.S. (M) No. 133/2016 from the learned Court of District Judge, Tinsukia to the learned Court of District Judge, Lakhimpur, North Lakhimpur. In this regard, it would be the duty of the petitioner to produce a certified copy of this order before the learned Court of District Judge, Tinsukia for transfer of the said proceedings.

The parties, who are represented by their respective learned counsel are directed to appear in person or through duly instructed pleader before the court of the learned District Judge, Lakhimpur, North Lakhimpur on 03.11.2017 and by producing a certified copy of this order, shall seek further instruction from the said learned court. The learned District Judge, Lakhimpur, North Lakhimpur, would be at liberty to transfer the case before any other competent Court (if any) for trial.

- xi. Tr.P. (C) No. 27/2017 - Smt. Rashmi Rekha Chakraborty @ Rashmi Rekha Maitra v. Sri Subir Maitra - The petitioner/wife is the defendant in T.S. (M) No. 28/2017 under Section 13(l)(iii) of the Hindu Marriage Act, 1955 for dissolution of marriage on the ground of serious mental disorder of the petitioner. The petitioner has prayed for transfer of the said case from the learned

Court of District Judge, Sonitpur, Tezpur to the learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati. The parties have no issue. The petitioner is now living with her parents. It is submitted that the petitioner has no independent source of income and as her parents are aged, she has no one to escort her to Tezpur to attend the Court proceedings. Considering the statement that the petition for divorce is filed on the ground that the petitioner is not mentally sound, there is no doubt that the petitioner will face more difficulty in defending the case at Tezpur. Hence, this Court is inclined to transfer the proceedings of T.S. (M) No. 28/2017 from the learned Court of District Judge, Sonitpur, Tezpur to the learned Court of Principal Judge, Family Court, Kamrup (Metropolitan), Guwahati. In this regard, it would be the duty of the petitioner to produce a certified copy of this order before the learned District Judge, Sonitpur, Tezpur for transfer of the said proceedings.

The parties, who are represented by their respective learned counsel are directed to appear in person or through duly instructed pleader before the court of the learned Principal Judge, Family Court, Kamrup (Metropolitan), Guwahati on 03.11.2017 and by producing a certified copy of this order, shall seek further instruction from the said learned court. The learned Principal Judge, Family Court, Kamrup (Metropolitan), Guwahati would be at liberty to transfer the case before any other competent Court for trial.

- xii. Tr.P. (C) No. 56/2014 - Smt. Geetashree Goswami v. Sri Jadavananda Goswami - The petitioner/wife is the defendant in T.S. (D) Case No. 104/2013. The petitioner has prayed for transfer of the said case from the learned Court of District Judge, Nagaon to the learned Court of District Judge, Jorhat. The parties have no issues. It is submitted that the petitioner has no independent source of income and has no one to escort her to Nagaon. It is also submitted that the respondent is an influential person in Nagaon. Considering the said statements this Court is inclined to transfer the proceedings of T.S. (M) No. 104/2014 from the learned Court of District Judge, Nagaon to the learned Court of District Judge, Jorhat. In this regard, it would be the duty of the petitioner to produce a certified copy of this order before the learned Court of District Judge, Nagaon for transfer of the said proceedings.

The parties, who are represented by their respective learned counsel are directed to appear in person or through duly instructed pleader before the court of the learned District Judge, Jorhat on 03.11.2017 and by producing a certified copy of this order, shall seek further instruction from the said learned court. The learned District Judge, Jorhat would be at liberty to transfer the case before any other competent Court for trial.

- xiii. Tr.P. (C) No. 71/2016 - Smt. Pronoti Borkataki v. Sri Manash Jyoti Borpujari - The petitioner/wife is the defendant in F.C. (Civil) Case No. 748/2016 under Section 13(l)(i-a) of the Hindu Marriage Act, 1955 for dissolution of marriage. The petitioner has prayed for transfer of the said case from the learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati to the learned Court of District Judge, Jorhat. The parties have no issues. It is submitted that the petitioner has no independent source of income and has no one to escort her to Guwahati to attend the Court proceedings. It is also submitted that the petitioner is now pursuing her further studies in Library Science. Considering the said statements this Court is inclined to transfer the proceedings of F.C. (Civil) Case No. 748/2016 from the learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati to the learned Court of District Judge, Jorhat. In this regard, it would be the duty of the petitioner to produce a certified copy of this order before the learned Principal Judge, Family Court, Kamrup (M), Guwahati for transfer of the said proceedings.

The parties, who are represented by their respective learned counsels are directed to appear in person or through duly instructed pleader before the court of the learned District Judge, Jorhat, on 03.11.2017 and by producing a certified copy of this order, shall seek further instruction from the

said learned court. The learned District Judge, Jorhat would be at liberty to transfer the case before any other competent Court for trial.

- xiv. Tr.P. (C) No. 81/2016 - Smt. Dimpal Upadhyay v. Sri Meghraj Upadhyay - The petitioner/wife is the defendant in F.C. (Civil) Case No. 666/2016 under Section 13(l)(i-b) of the Hindu Marriage Act, 1955 for dissolution of marriage. The petitioner has prayed for transfer of the said case from the learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati to the learned Court of District Judge, Margharita. The parties have a minor girl child as their only issue, which is now living with the petitioner. It is submitted that the petitioner has no independent source of income and her old father is a retired school teacher and her mother is mentally sick and, as such, she has no one to escort her to Guwahati to attend the Court proceedings. The petitioner has filed a case for seeking maintenance, which is numbered as Misc. Maintenance Case No. 26/2016, which is pending for trial before the Court of Sub-Divisional Judicial Magistrate, Margherita. Considering the statements made by the learned counsels for both sides, this Court is inclined to transfer the proceedings of F.C. (Civil) Case No. 666/2016 from the learned Court of Principal Judge, Family Court, Kamrup (M), Guwahati to the learned Court of District Judge, Dibrugarh. In this regard, it would be the duty of the petitioner to produce a certified copy of this order before the learned PrinciDal Judae. Familv Court. KamruD (Ml. Guwahati for transfer of the said proceedings.

The parties, who are represented by their respective learned counsels are directed to appear in person or through duly instructed pleader before the court of the learned District Judge, Dibrugarh, on 03.11.2017 and by producing a certified copy of this order, shall seek further instruction from the said learned court. The learned District Judge, Dibrugarh would be at liberty to transfer the case before any other competent Court for trial.

- xv. Tr.P. (C) No. 30/2017 - Smt. Priyanka Killa Modi v. Sri Saurav Killa - The petitioner/wife is the defendant in T.S. (M) No. 29/2017 under Section 13(l)(i-a) and 13(l)(i-b) of the Hindu Marriage Act, 1955 for dissolution of marriage. The petitioner has prayed for transfer of the said case from the learned Court of Additional District Judge, Sonitpur, Tezpur to the learned Court of District Judge, Tinsukia. The parties have a minor girl child as their only issue, which is now living with the petitioner. It is submitted that the petitioner has no independent source of income and as her parents are aged, she has no one to escort her to Guwahati to attend the Court proceedings. Considering the said statements this Court is inclined to transfer the proceedings of T.S. (M) No. 29/2017 from the learned Court of Additional District Judge, Sonitpur, Tezpur to the learned Court of District Judge, Tinsukia. In this regard, it would be the duty of the petitioner to produce a certified copy of this order before the learned Additional District Judge, Sonitpur, Tezpur for transfer of the said proceedings.

The parties, who are represented by their respective learned counsels are directed to appear in person or through duly instructed pleader before the court of the learned District Judge, Tinsukia, on 03.11.2017 and by producing a certified copy of this order, shall seek further instruction from the said learned court. The learned District Judge, Tinsukia would be at liberty to transfer the case before any other competent Court for trial.

22. In summing up the entire deliberation, this Court holds that this Court has the jurisdiction to transfer the matrimonial cases filed under Section 24 of the Code of Civil Procedure. Transfer is refused in the case SI. No. (2) Tr.P. (C) No. 11/2017 (Maya Das (Thapa) v. Dipankar Das) and SI. No. (5) Tr.P. (C) No. 25/2016 (Sri Sumit Ranjan Nath v. Smt. Suchita Nath) and in all other cases transfer is allowed.
23. The stay order(s) passed earlier stands vacated.
24. The Parties to bear their own costs.

□□□

LEISHANGTHEM BIDYABATI VERSUS HEIGRUJAM RISAO BENSON SINGH

In the High Court of Manipur at Imphal

M.A.T. Appeal No. 13 of 2016

(Before Hon'ble Mr. Justice R.R. Prasad, CJ. and Hon'ble Mr. Justice N. Kotiswar Singh, J.)

Smt. Leishangthem Bidyabati, aged About 34 years, W/o Shri. Heigrujam Risao Benson Singh (and D/o L. Yaima Singh) of Khurai Kongpal Chingangbam Leikai, PO Lamlong, PS Porompat, Imphal East District, Manipur ...Appellant

Versus

Shri. Heigrujam Risao Benson Singh, aged about 36 years, S/o H. Labango Singh of Sagolband Nepra Menjor Leikai, PO & PS Imphal, Imphal West District, Manipur ...Respondent

Decided on January 24, 2017,

[Date of hearing:: 12.01.2017]

Section 23 of the Hindu Marriage Act, 1955, Section 89 and order XXXIIA of the CPC as well as Section 9 of the Family Court Act, 1984....section 89 has been inserted in the Code of CPC Amendment Act 1999 with a view to implement 129th reports of the Law Commission of India and to make conciliation scheme effective. By virtue of the said provision, it has now become obligatory for the court to refer the dispute for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties failed to get their disputes settled through anyone of the alternative dispute resolution mechanism, the court shall proceeding with the hearing of the suit (Para -12)..... the Court is now duty bound to make endeavour to have settlement in matrimonial dispute, it has become more onerous on the part of the court particularly in matrimonial dispute in accepting the service report when parties fail to put appearance upon issuance of summon. Only after being fully satisfied particularly in matrimonial matter that summon has been effected in terms of the relevant provisions relating to service of summon as enshrined under Civil Court Rules and Order of Gauhati High Court, one should accept service of the notice as valid service. (Para -14)

For the Appellant: Mr. N. Mahendra, Advocate

For the Respondent: Mr. Th. Mahira, Advocate

JUDGMENT & ORDER

Hon'ble Mr. Justice R.R. Prasad :— This Matrimonial Appeal filed u/s 19 of the Family Court Act, 1984 is directed against the order dated 10.5.2016 and decree dated 16.5.2016 passed by the Family Court, Manipur in Mat.(Decl) Suit No. 40 of 2014 whereby and whereunder the marriage in between the plaintiff-respondent and the defendant-appellant held on 17.2.2014 was annulled by the decree of nullity.

2. The defendant-respondent brought a Matrimonial Suit being Mat (Decl) No. 40 of 2014 against the plaintiff-appellant for annulling the marriage solemnised in between the defendant and plaintiff on 17.2.2014 by a decree of nullity by making out a case that the marriage is in contravention of the condition

specified in sub section (ii)(c) of Section 5 of the Hindu Marriage Act on account of the fact that the wife (defendant-appellant) was having recurrent attack of insanity.

3. Since the issue involved in this case is as such which does not warrant case of the plaintiff-respondent as made out, be narrated in detail. It would suffice to state that the plaintiff-appellant sought marriage solemnised in between the plaintiff and the defendant annulled on the ground that before and after the marriage, she has been suffering from mental illness and is having recurrent attack of insanity.
4. Upon institution of the suit, notice was issued to the wife-defendant appellant. The summon, as per the record, was served upon one Lilabati, sister in-law, as per the report of the Process Server, when the defendant-appellant was not found to be present in home. The said service of summon upon the wife-defendant was accepted to be valid and thereby the Court proceed with the matter ex parte when wife-defendant failed to appear in the case whereby the plaintiff adduced evidences. On closure of the case, the Family Court upon finding the case, made out of defendant having recurrent attack of insanity being proved, declared the marriage as annulled by a decree of nullity. The order and decree annulling the marriage in between the plaintiff and the defendant as nullity is under challenge.
5. Mr. N. Mahendra, learned counsel appearing for the appellant, by referring to the provisions of Section 23 of the Hindu Marriage Act, 1955, Section 89 and order XXXIIA of the CPC as well as Section 9 of the Family Court Act, submits that duty has been cast upon the Family Court to make endeavour to have settlement in between the parties in a matrimonial dispute and thereby it becomes quite onerous on the part of the Family Court to satisfy fully that the summon has been served when party failed to put appearance pursuant to summon issued to him/her. In the instant case, the Court seems to have had casual approach in accepting the service report as without ascertaining the relationship in between the person who received the summon on behalf of the defendant and the fact whether she was living in the house together or that whether the person received summon was an adult member accepted the service report and proceeded with the ex parte hearing and then passed the order and decree for annulment of the marriage and thereby it committed wrong.
6. Learned counsel, in this regard, further highlighted that service report shows that summon was served upon one Lilabati when the defendant was not found in home and said Lilabati is said to be the sister inlaw of the defendant but the defendant does not have any sister in-law named as Lilabati. In such event, any acceptance of service of notice and proceeding with the ex parte hearing was quite erroneous whereby it has resulted into miscarriage of justice and hence the impugned order and decree is fit to be set aside.
7. As against this Mr. Th. Mahira, learned counsel for the defendant submits that it is wrong on the part of the Process Server to record Lilabati as sister in-law of the defendant rather Lilabati residing in the same house happens to be the younger sister of the defendant and thereby the court rightly accepted the service of summon and proceeded with the ex parte hearing when the defendant failed to put appearance in the court and in that event impugned order and decree can never be said to be illegal, erroneous or without jurisdiction and hence it never warrants to be interfered with.
8. It be stated that the procedure of the matrimonial suit in comparison to other suit appears to be somewhat different whereby approach of a court of law in matrimonial matter is supposed to be much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire Matrimonial matters are required to be considered by court with human angle and sensitivity as delicate issue affecting conjugal relationship which need to be handled carefully and legal provisions should be construed and interpreted without being oblivious or unmindful of human weaknesses. Probably, this aspect has been kept in view by the Legislature in enacting sub section 2 of Section 23 of the Act by requiring a court to make all efforts to bring about reconciliation between the parties. Instead of referring only sub section 2 of Section 23 the other provision of sub section 1 of Section 23 of the Hindu Marriage Act, 1955 also

requires to be mentioned as it needs certain clarification. The aforesaid provisions, i.e. sub section (1) and (2) of Section 23 read as follows:

"23. Decree in proceedings.- (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 (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) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and
- (c) [the petition (not being a petition presented under section 11) is not presented or prosecuted in collusion with the respondent, and
- (d) there has not been any unnecessary or improper delay in instituting the proceeding, and
- (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) 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) or clause (vi) or clause (vii) of sub-section (1) of section 13.]"

9. In context of sub section 1 of section 23 of the Act, it be recorded that the conciliation is mandatory only in respect of 3 grounds under the Hindu Marriage Act namely-adultery, cruelty and desertion which are enumerated under section 13(1)(i), (ia) and (ib). But after commencement of the Family Court Act, 1984 conciliation has been made mandatory in all sorts of matrimonial disputes as the Family Court Act, 1984 has a overriding effect over all other laws notwithstanding anything inconsistent contained in such laws. The relevant provisions, section 20, of the Family Court Act reads as follows: —

"20. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

10. In such event, the Family Court is bound to make endeavour for conciliation and settlement in all sorts of matrimonial dispute. That is conceptual change brought out by the Family Court Act. The aforesaid proposition has been laid down by the Kerala High Court in a case of *Bini v. Sunderan K.V*, reported in AIR 2008 Kerala 84,

11. Likewise, by CPC (Amendment Act 1976) a new order XXXIIA has been inserted to deal with certain suit and proceedings concerning family court. Rule 3 of Order XXXIVA cast a duty on the court to make efforts for settlement. The said rule 3 of Order XXXIVA of CPC reads as under:

"R.3. Duty of Court to make efforts for settlement:

- (1) In very suit or proceeding to which this Order applies, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, assist the parties in arriving a settlement in respect of the subject matter of the suit.
 - (2) If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.
 - (3) The power conferred by sub-rule (2) shall be in addition to, and not derogation of, any other power of the Court to adjourn proceedings."
12. Again, section 89 has been inserted in the Code of CPC Amendment Act 1999 with a view to implement 129th reports of the Law Commission of India and to make conciliation scheme effective. By virtue of the said provision, it has now become obligatory for the court to refer the dispute for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties failed to get their disputes settled through anyone of the alternative dispute resolution mechanism, the court shall proceeding with the hearing of the suit.
 13. Keeping in view the provision, the Hon'ble Supreme Court and also the other Hon'ble High Courts have been pleased to hold that it has now become obligatory on the part of the court to make endeavour to have settlement of the matrimonial disputes before it proceeds with the hearing of the matter on merit. In this regard, following decisions have been referred to on behalf of the appellant:
 - i. Jagraj Singh v. Birpal Kaur AIR 2007 SC 2083
 - ii. Smt. Hina Singh v. Satya Kumar Singh AIR 2007 Jharkhand 34
 - iii. Raj kishore Mishra v. Smt. Meena Mishra AIR 1995 Allahabad 70.
 14. Under the circumstances stated above, when the Court is now duty bound to make endeavour to have settlement in matrimonial dispute, it has become more onerous on the part of the court particularly in matrimonial dispute in accepting the service report when parties fail to put appearance upon issuance of summon. Only after being fully satisfied particularly in matrimonial matter that summon has been effected in terms of the relevant provisions relating to service of summon as enshrined under Civil Court Rules and Order of Gauhati High Court, one should accept service of the notice as valid service. In the instant case, we, on examination of the record, do find that the summon has never been served upon the defendant rather it was served upon one Lilabati reported by the Process server to be the sister in-law though as per the counsel appearing for the respondent-plaintiff, she happens to be younger sister of the defendant but the process server has failed to mention that said Lilabati was an adult Member. In absence of that court, in terms of Rule 66 of the aforesaid Rules, should not have accepted the service of summon as valid service. That apart, summon by the process server does not seem to have been effected properly as it was never served in presence of witnesses though in terms of Rule 64(1) of the said rule, process server was required to effect service of summon in presence of two independent witnesses.
 15. In such event, we are constrained to say that the Court committed illegality in accepting the service of summon upon the defendant as valid service and thereby committed wrong in proceeding with ex parte hearing and then passing order and decree which in the circumstances stated above warrants to be set aside and accordingly it is set aside. Consequently, matter is remitted back to the Court concerned where the defendant appellant would put appearance immediately so that court may proceed with the hearing of the case in accordance with law.
 16. Accordingly, appeal stands allowed.
 17. Records be transmitted to the court concerned immediately.

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THOUDAM (N) KANGJAM (O) KUNJARANI DEVI VERSUS KANGJAM IBOYAIMA SINGH

Mat Appeal No. 1 of 2014

(Before Hon'ble Mr. Justice L.K. Mohapatra, C.J. and Hon'ble Mr. Justice N. Kotiswar Singh, J.)

*Smt. Thoudam (N) Kangjam (O) Kunjarani Devi aged about 55 years, W/o (L) Kangjam Biren Singh of Kodompokpi Mayai Liekai, P.O. Tulihal P.S. Nambol, Imphal West District, Manipur Appellant
Versus*

1. Shri Kangjam Iboyaima Singh aged about 75 years, S/o K. Thanil Singh of Kodompokpi Mayai Liekai, P.O. Tulihal, P.S. Nambol, Imphal West District, Manipur. 2. Shri Kangjam Angangcha Singh aged about 70 years, S/o K. Thanil Singh of Kodompokpi Mayai Liekai, P.O. Tulihal, P.S. Nambol, Imphal West District, Manipur. 3. Shri Kangjam Khema Singh aged about 75 years, S/o K. Thanil Singh of Kodompokpi Mayai Liekai, P.O. Tulihal, P.S. Nambol, Imphal West District, Manipur. 4. Naorem (N) Kangjam (O) Sanahanbi Devi aged about 58 years, W/o late K. Biren Singh of Kodompokpi Mayai, P.O. Tulihal, P.S. Nambol, Imphal West District, Manipur...Respondents

For the Appellant/plaintiff:: Mr. S. Sarat Advocate

For the respondents/Defendants:: Mr. Kh. Ajit and Mr. B. Surendra Sharma Advocates.

Consequently we allow the appeal, set aside the impugned judgment and order dated 08.07.2013 passed in Mat. (Dec) Suit No. 63-A of 2012 and remit the matter back to the learned Judge, Family Court for disposal of the Suit afresh by framing issues with reference to the pleadings of the parties specifically the plaintiff/appellant and defendant no. 4 and directed the parties to adduce evidence in support of their respective claims. Since the Suit is of the year 2012, steps may be taken by the learned Judge, Family Court to conclude the matter within six months from the date of communication of this judgment and order.

Decided on September 18, 2014

JUDGEMENT AND ORDER

Hon'ble Mr. Justice L.K. Mohapatra :—

This matrimonial appeal is directed against the judgment and order of the learned Judge, Family Court, Manipur in Mat. (Dec) Suit No. 63-A of 2012 dated 08.07.2013. The plaintiff before the Family Court is the appellant in this appeal.

- 1.1. The appellant had filed the Suit for declaration that she is the legally married wife of late Kangjam Biren Singh. Her case before the Family Court is that late Kangjam Biren Singh was working as Section Officer in IFCD, Electrical Mechanical Division of the Government of Manipur. Her, further, case is that she eloped with Kangjam Biren Singh sometime in 1989 and they stayed together as husband and wife by performing rituals as per the local custom and she was also recognized and acknowledged as the daughter-in-law by the father of late Kangjam Biren Singh. It is also the case of the appellant that in the year 2010, the father of late Kangjam Biren Singh expired whereafter both of them were being looked after by the brothers of the late father-in-law of the appellant. In the ceremonial functions and other religious functions, the appellant participated

as wife of late Kangjam Biren Singh and she was recognized as the daughter-in-law in the family of Kangjam. Out of the said wedlock, three daughters and a son were born. The further case of the appellant is that late Kangjam Biren Singh had abandoned his first wife and was staying with her. Towards the last part of the life of late Kangjam Biren Singh, he suffered from different ailments and was treated in the house of the appellant. It is alleged by the appellant that after the demise of late Kangjam Biren Singh, his first wife (i.e. defendant no. 4 in the Suit) had withdrawn the service benefits of late Kangjam Biren Singh by suppressing the fact that late Kangjam Biren Singh had married for the second time and the appellant, who is the second wife was still alive. Later on, there was an agreement between the appellant and the defendant no. 4 and under the said agreement, defendant no. 4 had agreed to share 50% of the pension with the appellant but she did not honour the said agreement. On these allegations the Suit was filed for a declaration as aforesaid.

- 1.2. The defendants 1, 2 & 3 filed the joint written statement admitting the claim of the plaintiff/appellant. Only the defendant no. 4 who is the first wife filed the written statement opposing the claim of the plaintiff/appellant. It is the case of the defendant no. 4 that she is the legally married wife of late Kangjam Biren Singh and the marriage took place on 9th June, 1978 as per the Hindu Customary Rights prevailing in the State. Out of their wedlock, four daughters and a son were born. It is the claim of the defendant no. 4 that the plaintiff/appellant is a concubine of late Kangjam Biren Singh and there was no marriage between the plaintiff/appellant and late Kangjam Biren Singh. It is also the case of the defendant no. 4 that her father-in-law (i.e. father of late Kangjam Biren Singh) and she were living together under the same roof along with late Kangjam Biren Singh. Her mother-in-law is still alive and is continuing to live with her along with the sister of late Kangjam Biren Singh even after the death of late Kangjam Biren Singh.
2. The learned Judge, Family Court dismissed the Suit on the ground that the plaintiff/appellant failed to establish her marriage with late Kangjam Biren Singh.
3. Mr. S. Sarat, learned counsel appearing on behalf of the appellant, Mr. Kh. Ajit, learned counsel appearing on behalf of respondent no. 1 as well as Mr. B. Surendra Sharma, referred to the custom prevailing in the State of Manipur in relation to marriage of Meiteis and submitted that as per the custom, there is no need for a regular proceeding for the purpose of divorce. Reliance was placed on a decision in the case of Puyam Likiai Singh Bhabando Singh v. Moirangthem Maipak Singh, reported in 1956 Manipur 18 (AIR V 43 C 8 July). According to the said decision, divorce or khainaba is permissible amongst the Hindus of Manipur and it can be from the husband's side or from the wife's side. There is no condition attached and it can be done at pleasure. It is done even at a slight pretext. Gandharva form of marriage is also recognized in Manipur. The union of a man with a divorced woman is also recognized as a local valid marriage. Referring to these customs and usages, it was contended on behalf of the appellant that abandonment of the first wife amounts to divorce and there was no necessity to prove the marriage between the appellant and late Kangjam Biren Singh in accordance with the Hindu Marriage Act considering the custom prevailing in the State of Manipur.
 - 3.1 It was contended by the learned counsel appearing on behalf of defendant no. 4 that the parties to the proceeding are governed by the provisions of Hindu Marriage Act and local custom cannot prevail over the statutory provisions. It was, further, contended that in the absence of any material to prove divorce between the defendant no. 4 and late Kangjam Biren Singh, the second marriage if any of late Kangjam Biren Singh with the appellant is a void marriage.
4. After hearing the learned counsel appearing for the parties on these issues, unfortunately we find that the learned Judge, Family Court has neither framed any issue with reference to the pleadings of the parties nor the parties had been allowed to adduce evidence. Documents had been filed before the learned Judge, Family Court and parties relied on the documents without the same being proved in accordance with law. We fail to understand as to how the learned Judge, Family Court has decided the Suit without

framing issues or directing the parties to adduce evidence when several disputed questions of facts and law relating to customs and usages prevailing in the State of Manipur had been raised. We, therefore, think it proper to remit the matter back to the learned Judge, Family Court for disposal of the Suit afresh by framing issues and directing the parties to adduce evidence.

5. Consequently we allow the appeal, set aside the impugned judgment and order dated 08.07.2013 passed in Mat. (Dec) Suit No. 63-A of 2012 and remit the matter back to the learned Judge, Family Court for disposal of the Suit afresh by framing issues with reference to the pleadings of the parties specifically the plaintiff/appellant and defendant no. 4 and directed the parties to adduce evidence in support of their respective claims. Since the Suit is of the year 2012, steps may be taken by the learned Judge, Family Court to conclude the matter within six months from the date of communication of this judgment and order.

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SABYASACHI DUTT VERSUS STATE OF MEGHALAYA

WP (Crl) No. 2/2015

(Before Hon'ble Mr. Justice Uma Nath Singh, C.J. & Hon'ble Mr. Justice T. Nandakumar Singh, J)

Dr. Sabyasachi Dutt, S/o Shri. J.B. Dutt, R/o Jatin Villa, Jail Road, Shillong-793001, East Khasi Hills District, Meghalaya Represented by his Attorney Shri. Bapi Rakshit S/o Shri. Ranjit Kr. Rakshit, R/o Elora Tower, Opp. Meghalaya Cooperative Urban Bank Ltd. Lower Jail Road, Shillong-793001, Meghalaya ...Petitioner

Versus

- 1. The State of Meghalaya, represented by the Chief Secretary.*
- 2. The Principal Secretary, Home Police, Govt, of Meghalaya.*
- 3. The Director General of Police, Govt, of Meghalaya, Shillong.*
- 4. The Superintendent of Police, East Khasi Hills District, Shillong.*
- 5. The Officer-in-Charge, Sardar Police Station, East Khasi Hills District, Shillong, Meghalaya.*
- 6. W.P./S.I. Kamini R. Marak, Sadar Police Station, East Khasi Hills District, Shillong, Meghalaya.*
- 7. Ms. Bonna M. Kharakor, Sadar Police Station, East Khasi Hills District, Shillong, Meghalaya.*
- 8. Mr. Niranjan Hajong, Sadar Police Station, East Khasi Hills District, Shillong, Meghalaya.*
- 9. The Officer-in-Charge, Rynjah Police Station, East Khasi Hills District, Shillong, Meghalaya.*
- 10. The Chief Registrar of Birth and Deaths, Department of Health & Family Welfare Lachumiere, Shillong, Meghalaya.*
- 11. The Registrar of Birth and Deaths, Department of Health & Family Welfare, Rynjah Dispensary, Rynjah, Shillong, East Khasi Hills District.*
- 12. Smti. B Syiem, presently serving as the Registrar of Birth & Deaths, Department of Health & Family Welfare, Rynjah Dispensary, Rynjah, Shillong.*
- 13. Smti. Susanne Farisha Syiem Dutt, D/o Pushpendra Mehra, C/o Party Decorators, Polo Hills, Shillong, Meghalaya ...Respondents*

For the petitioner: Mr. M. Haider, Adv

For the Respondents: Mr. K Paul, Adv. for respt. No. 13

..... that the appropriate forum for the remedy sought for in the present writ petition would be the suit or proceeding as contemplated under the Family Courts Act, 1984 before the concerned Family Court. Accordingly, the petitioner is directed to approach the Family Court. However, it is made clear that in the event of approaching the Family Court by the writ petitioner as directed by this Court, the concerned Family Court shall allow the petitioner to meet Master Joy Siddhartha Dutt (Master Elan Jayden Syiem according to the respondent No. 13) in the appropriate place/time to be fixed and decided by the Family Court till the suit or proceeding in relation to the Guardianship/or custody of Master Joy Siddhartha Dutt is finally decided by the Family Court. The learned Family Court is further directed to finally decide and dispose of the said suit or proceeding within 4 (four) months from the date of filing the same by the present writ petitioner. (Para- 28)

Decided on December 9, 2015

JUDGMENT AND ORDER

Hon'ble Mr. Justice T. Nandakumar Singh :— Heard Mr. M Haider, learned counsel for the petitioner and Mr. K Paul, learned counsel for the respondent No. 13.

2. The concise fact of the case sufficient for deciding the present writ petition for Habeas Corpus is recapitulated. The petitioner and the respondent No. 13 were married under the Special Marriage Act, 1954 and their marriage was registered on 15.12.2011 before the Marriage Officer, East Khasi Hills, Shillong, Meghalaya. Prior to the said marriage of the respondent No. 13 with the petitioner, the respondent No. 13 was married to one Shri. Namti Tariang and from their wedlock, a son namely Master Elhanan Jason Syiem was born. The marriage between the respondent No. 13 and the said Shri. Namti Tariang was dissolved by mutual consent vide order dated 15.06.2009 passed by the Judge, District Council Court. From the wedlock of the petitioner and the respondent No. 13, a son was born on 27.02.2012 at Bethany Hospital. The parties named the said son as Master Joy Siddhartha Dutt and obtained a birth certificate under the Registration of Births and Deaths Act, 1969 from Rynjah Dispensary, Rynjah, Shillong. The petitioner and the respondent No. 13 started residing at New Colony, Shillong in March, 2014. The parties had relocated to Kolkatta, West Bengal along with Master Elhanan Jason Syiem and Master Joy Siddhartha Dutt. Master Elhanan Jason Syiem assumed the petitioner's last name "Dutt" after the marriage of the petitioner and the respondent No. 13.
3. In the month of October, 2014, the respondent No. 13 on her own volition moved out from her matrimonial home along with Master Elhanan Jason Syiem Dutt and completely parted ways with the petitioner without any complaint with regard to the custody of the children. The petitioner remained in Kolkatta with Master Joy Siddhartha Dutt and took care of the minor child Master Joy Siddhartha Dutt without any interference from the respondent No. 13. The petitioner admitted his minor child Master Joy Siddhartha Dutt in a reputed school at Kolkatta, which was also known to the respondent No. 13. Master Joy Siddhartha Dutt was blooming with utmost care and the parental tutelage of the petitioner. The respondent No. 13 later moved to Shillong along with her son Elhanan Jason Syiem Dutt. As the welfare of their children being of paramount consideration, the petitioner and the respondent No. 13 had entered into a mutual understanding vide Mutual Settlement Agreement dated 29.11.2014. In that Mutual Settlement Agreement dated 29.11.2014, the parties mutually agreed to legally dissolve their marriage one year from the execution of the said agreement without any monetary claims from one another. Under Clause 2 of the said Mutual Settlement Agreement dated 29.11.2014, it was agreed that the respondent No. 13 would have sole custody of Master Elhanan Jason Syiem Dutt, who she bore from her previous marriage and the petitioner would have no right to his custody or any say or responsibility towards him and since Master Elhanan Jason Syiem Dutt was a baptized Christian his upbringing would be done in accordance with the said religion. Further, under Clause 3 of the said Mutual Settlement Agreement dated 29.11.2014, both the parties agreed that the petitioner would have sole custody of Master Joy Siddhartha Dutt and the respondent No. 13 would have no right to his custody or any say or responsibility towards his upbringing and since Master Joy Siddhartha Dutt was a Hindu, his upbringing would be done in accordance with the said religion. For convenience, the relevant portions of the said Mutual Settlement Agreement dated 29.11.2014 are quoted hereunder:-

"MUTUAL SETTLEMENT AGREEMENT

This mutual settlement agreement is signed on this 29th day of Nov. 2014 at 4Alf Glen Tower, Hiland Park, Kolkatta-700094, West Bengal between Dr. Sabyasachi Dutt as PARTY No. 01 and Mrs. Suzanne Farisha Syiem Dutt as PARTY No. 02 bearing Passport no. L2178222 and L 2190484 respectively.

That this mutual agreement is signed without any force, physical or mental abuse, trauma or any other reservations and both the PARTIES agrees in the best of health and spirits to abide to the points as mentioned herein in the event of Final Legal Separation/Divorce as established in the eye of Law of the land under the seal of the Competent Authority after 01 (one) year from the date of signing of this

mutual settlement agreement and no costs towards any Compensation, Alimony, Legal charges, etc. in whatsoever manner would be demanded by any PARTY to the other PARTY towards any present and or future claims.

Also it is agreed that both the PARTIES have without any force, physical or mental abuse, trauma or any other reservations in whatsoever manner have settled in Kolkatta from Shillong since Mar'14 for the purpose of effecting the best surrounding and atmosphere for the proper upbringing of both the children. Also enclosed Annexure I is the other reason for moving to Kolkatta and to encourage positive settlement of the disputes between the PARTIES. That this MUTUAL SETTLEMENT AGREEMENT and has been mutually signed in good faith, trust and accepted in free WILL and good mental state and being legally consenting two ADULTS who are HUSBAND AND WIFE.

- (2) That Master Elhanan Jason Syiem Dutt from the wedlock (Annexure-III) of PARTY No. 02 would stay with the PARTY No. 02 and further PARTY No. 01 would have no say, responsibility, access, custody or any demand in whatsoever manner at any point of time. That as Master Elhanan Jason Syiem Dutt is a baptized Christian and his upbringing shall be done in accordance to his assumed Religion and both the PARTIES agrees towards the same.
- (3) That Master Joy Siddhartha Dutt from the wedlock (Annexure-IV) would stay with the PARTY No. 01 and further PARTY No. 02 would have no say, responsibility, access, custody or any demand in whatsoever manner at any point of time. That as Master Joy Siddhartha Dutt is a HINDU and his upbringing shall be done in accordance to his assumed Religion and both the PARTIES agrees towards the same.

PARTY NO. 01

PARTY No. 02

Sd/-

Sd/-

Dr. Sabyasachi Dutt

Mrs. Suzanne Farisha Syiem Dutt"

4. To the utter shock and surprise of the petitioner, in the morning of 03.07.2015 at about 8:00 am, an investigation team from Shillong along with the Kolkatta Police raided the petitioner's house situated at 4, Al, Glen Tower, Highland Park, Kolkatta, West Bengal on the basis of the alleged warrant. The said team led by WP/S.I. Kamini Marak of the Sadar Police Station consisted of Ms. Bonna M. Kharakor and Mr. Niranjan Hajong of the Meghalaya Police i.e. respondents No. 6-8 herein assisted by 4 (four) male officers of the Kolkatta Police attached to Survey Park, Police Station, Kolkatta. It was alleged that the petitioner had unlawfully confined Master Elan Jayden Syiem, the minor son of the respondent No. 13 and they were to rescue the minor child and produce him before the court at Shillong. The petitioner had strongly protested that the name of the minor child was Master Joy Siddhartha Dutt and that he was not aware of any child by the name of Master Elan Jaden Syiem. WP/S.I. Kamini R. Marak showed a photo copy of the birth certificate of one Master Elan Jaden Syiem born on 27.02.2012 to the petitioner and the respondent No. 13. The said police team led by WP/S.I. Kamini R. Marak bluntly insisted that the minor child of the petitioner namely Master Joy Siddhartha Dutt was Elan Jaden Syiem and forcibly took away the petitioner's minor child Master Joy Siddhartha Dutt. Before forcibly taking away the petitioner's minor child Master Joy Siddhartha Dutt, the petitioner also produced the original birth certificate of his minor child Master Joy Siddhartha Dutt as well as his original Passport where his name appeared as Master Joy Siddhartha Dutt. In spite of repeated demand made by the petitioner, the said police team did not produce any warrant of any nature. WP/S.I. Kamini R. Marak of the Meghalaya Police produced the duplicate birth certificate of the petitioner's minor child Master Joy Siddhartha Dutt bearing the identical registration No. B/257/12 issued on 15.06.2015 by the Registrar of Births and Deaths, Govt, of Meghalaya, Rynjah State Dispensary, East Khasi Hills and that the duplicate birth certificate indicated that the child was born in Bethany Hospital on 27.02.2012 to the petitioner and the respondent No. 13

and registered with the name Elan Jayden Syiem. That duplicate birth certificate was a manufactured one issued by manipulating government records by the respondent No. 13 and her relative Smti. B. Syiem.

5. After forcibly taking away the petitioner's minor child Master Joy Siddhartha Dutt from his custody, the police team of Meghalaya had misguided the petitioner by informing him that they would be producing the minor child Master Joy Siddhartha Dutt at CWC, 89, Elliot Road, Kolkatta at 10:00 am, which was found to be locked when the petitioner visited. But somehow, the petitioner had located the police team of Meghalaya at Bengal Lockup at Alipore and the petitioner moved the learned Chief Judicial Magistrate of the Alipore District Court with a prayer that his minor child Master Joy Siddhartha Dutt be returned to him. The respondent No. 13 along with the Meghalaya police team were also present in the court premises along with the relatives of the respondent No. 13 namely Ms. Dephiene Syiem and Mr. Barikupar Syiem. Vide order dated 03.07.2015, the learned Chief Judicial Magistrate, Alipore permitted custody of the minor child Master Joy Siddhartha Dutt to be retained by the petitioner for the night with the arrangement that the petitioner shall travel to Shillong with the police team, the respondent No. 13 and their minor child Master Joy Siddhartha Dutt on the next day by flight. But on the prayer of the learned counsel for the respondent No. 13 that the petitioner may flee along with the minor child Master Joy Siddhartha Dutt, the learned Chief Judicial Magistrate, Alipore had directed the petitioner to deposit the Passports of the petitioner and the minor child in the Court. On the next day, the Meghalaya police team along with the petitioner's minor child Master Joy Siddhartha Dutt, the respondent No. 13 and her relatives reached the Kolkatta Airport late and were denied entry in the Airport due to non-availability of the valid photo identity proof by the Airport authority. The petitioner immediately moved the court of the learned Chief Judicial Magistrate at Kolkatta through his counsel and the learned Chief Judicial Magistrate, Kolkatta directed the Meghalaya police team to return to the Alipore court along with the minor child Master Joy Siddhartha Dutt so that the Passports would be released. The Meghalaya police team did not permit the petitioner to accompany them in their vehicle and drove to the Alipore court.
6. The Meghalaya police team appeared before the learned Chief Judicial Magistrate, Alipore and the learned Chief Judicial Magistrate, Alipore directed the parties to appear at 2:00 pm along with the minor child. The Meghalaya police team had disobeyed and disregarded the order of the learned Chief Judicial Magistrate, Alipore and fled away from the court premises along with the respondent No. 13 and the petitioner's minor child Master Joy Siddhartha Dutt. Vide application dated 04.07.2015, the petitioner had informed the learned Chief Judicial Magistrate, Alipore that the Meghalaya police team along with the respondent No. 13 and the his minor child Master Joy Siddhartha Dutt had left for Shillong and the learned Chief Judicial Magistrate, Alipore vide order dated 04.07.2015 had strongly deprecated the conduct of the officers of the Meghalaya police and the manner in which they had taken away Master Joy Siddhartha Dutt in disobedience of the order of the court (i.e. Chief Judicial Magistrate, Alipore).
7. It was the further case of the petitioner that the respondent No. 13 had lodged an ejahar dated 19.06.2015 against him making false allegation and on the basis of the false ejahar, the police registered an FIR being Shillong Sadar P.S. Case No. 197 (6) 2015 under Sections 341/342/365/498-A IPC. The petitioner filed another report on 20.06.2015 in continuation to the said FIR dated 19.06.2015 that the FIR did not allege that the petitioner took away the minor child from the lawful custody of the respondent No. 13 at any point. Therefore, the question of kidnapping of the minor child does not arise. WP/S.I. Kamini R. Marak had put up the said FIR dated 19.06.2015 on 20.06.2015. On 23.06.2015 WP/S.I. Kamini R. Marak prayed for treating the subsequent FIR dated 19.06.2015 as a supplementary FIR. The petitioner further learnt that on 23.06.2015, WP/S.I. Kamini R. Marak prayed the learned Chief Judicial Magistrate, Shillong for issuing search warrant under Section 100 of the Cr.P.C. so as to enable her to conduct house search of the petitioner to recover the minor child of the respondent No. 13 from the custody of the petitioner. But the WP/S.I. Kamini R. Marak never prayed the learned Chief Judicial Magistrate, Shillong for issuing search warrant under Section 97 of the Cr.P.C. For easy reference, Sections 97 and 100 of the Cr.P.C. are quoted hereunder:-

"97. Search for persons wrongfully confined. - If any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class has reason to 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; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

100. Persons in charge of doped place to allow search.-

- (1) Whenever any place liable to search or inspection under this Chapter is doped, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.
- (2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner provided by sub-section (2) of Section 47.
- (3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.
- (4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.
- (5) The search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.
- (6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.
- (7) When any person is searched under sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.
- (8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 of the Indian Penal Code (45 of 1860)."

8. On application filed by WP/S.I. Kamini R. Marak for issuing search warrant under Section 100 of the Cr.P.C, the learned Judicial Magistrate First Class, Shillong passed an order dated 23.06.2015. For easy reference, the said application dated 23.06.2015 filed by WP/S.I. Kamini R. Marak for issuing search warrant under Section 100 of the Cr.P.C. is quoted hereunder:-

"70,

The Chief Judicial Magistrate,

Shillong Court

(Through P/I Shillong Court)

Dated Shillong the 22nd June 2015. Sub: Prayer for issue of search warrant U/S 100 Crpc. Ref: Shillong SadarP.S. Case No. 197(6)15 U/341/342/365/498A IPC Sir,

With reference to the subject cited above I beg to report that on 19-6-15 received FIR from Smti. Suzanne Farisha Syiem D/o P. Mehra of Polo Hills Shillong to the effect that Smti. Suzanne F. Syiem and Dr. Sabyasachi Dutt got married in Shillong in the year 2011 and on frequent request of her husband they started living in Kolkatta since March 2014. He also promised her that he will start to work in some hospital at Kolkatta but months passed by he did not join any hospital nor start any work. Later she started confronting him to start work, but he got very rude and started physically and mentally torturing her and she was forced to live separately and was not allowed to meet her younger son Elan Jayden Syiem. The younger son named Elan Jayden Syiem was concealed, wrongfully confined and restrained her from meeting her younger son after separating. Due to this she is in state of trauma and depression. She wanted to take her younger son Elan Jayden Syiem with her but he started assaulting her and also threaten her to not to touch her younger son Elan Jayden Syiem. Hence the case.

During the course of investigation the complainant Smti. Suzanne Farisha Syiem was examined and the available witnesses also examined U/s 161 Crpc.

Under the above facts and circumstances I beg to request your Hon'ble Court to kindly issue a search warrant U/s 100 Crpc so as to enable me to conduct house search in the house of Dr. Sabyasachi in Highland park, Glen Tower 4/A/1 Chak Garia Kolkatta-700094 to recover the younger son of the complainant Mr. Elan Jayden Syiem - 3 yrs.

Submitted for favour of your kind information and necessary action.

Yours faithfully,

Sd/-

WP/S.I. K.R. Marak of Sadar Police Station Shillong."

9. It appeared that WP/S.I. Kamini R. Marak and the learned Judicial Magistrate First Class had not fully understood Sections 97 and 100 of the Cr.P.C. On the basis of search warrant under Section 100 of the Cr.P.C, the Meghalaya police had forcibly taken away the petitioner's minor child Master Joy Siddhartha Dutt from the custody of the petitioner who is the biological father and also lawful custodian of his minor child Master Joy Siddhartha Dutt under the Mutual Settlement Agreement dated 29.11.2014, relevant portion of which had been quoted above. The petitioner had challenged the said order dated 23.06.2015 and order dated 05.07.2015 of the learned Judicial Magistrate First Class and also prayed for quashing the said FIR by filing an application under Section 482 Cr.P.C. before this Court. The said application under Section 482 Cr.P.C. had been registered as Criminal Petition No. 19 of 2015. This Court is not making any observation regarding the merit of the Criminal Petition No. 19 of 2015. In the above factual backdrop, the petitioner filed the present writ petition for habeas corpus and the prayers sought for in the present writ petition read as follows:-
- i) issue notice upon the Respondents;
 - ii) issue a writ in the nature of habeas corpus commanding the respondent authorities, their man, agents, associates each of them, including the private respondents to show cause under which legal authority and sanction the Respondent No. 13 has taken custody of the minor son of the petitioner from his lawful custody and to produce the corpus of the minor son of the petitioner before this Hon'ble Court and to give custody of the minor son of the petitioner namely Joy Siddhartha Dutt in favour of the petitioner for welfare and wellbeing of the minor son by releasing him from illegal and unlawful detention of the Respondent No. 13;
 - iii) issue a writ in the nature of Mandamus commanding the Respondent authorities, their men, agents, associates, official, assigns and each of them to hand over the investigation in relation

to Rynjah Police Station Case No. 153(9) of 2015 under Sections 465, 468 of the Indian Penal Code corresponding to G.R. Case No. 710 (A) of 2015 to any independent, impartial and efficient investigating agency like C.B.I, for proper and adequate investigation;

- iv) Call for the records of the birth register for the year 2012 from the office of the Registrar of Births and Deaths, Department of Health, Respondent 11 herein;
 - v) Call for the register of births pertaining to the birth certificate bearing No. 257 dated 06.12.13 issued in the name of Master Joy Siddhartha Dutt by the Registrar of Birth and Deaths, Department of Health and Family Welfare, Government of Meghalaya, Rynjah Dispensary, Shillong, the Respondent No. 11 herein;
 - vi) Call for the periodical return required to be sent by the Respondent No. 11 to the Chief Registrar, Births and Deaths, the Respondent No. 10 herein, for compilation under Section 19 of the Act of 1969;
 - vii) Issue Rule upon the Respondents to show cause as to why an appropriate writ should not be issued setting aside and quashing the duplicate birth certificate bearing No. 257 dated 15.06.2015 in the name of Master Elan Jayden Syiem by the Respondent No. 11 and removing all manipulations made in the birth register and restoring the name in the said register as Master Joy Siddhartha Dutt and correcting all connected particulars therein;
 - viii) Pass an interim order restraining the private Respondent No. 13 from using the fake and forged birth certificate of the minor son of the petitioner namely Joy Siddhartha Dutt, till disposal of the present writ petition;
 - ix) And after cause or causes being shown and upon hearing the parties be pleased to make the rule absolute and be further pleased to pass such other orders as Your Lordships may deem fit and proper and for this the petitioner shall every prays."
10. Learned counsel for the respondent No. 13 strenuously contended that the present writ petition for habeas corpus is not maintainable. Accordingly, this Court had to decide if the present writ petition for habeas corpus for the prayer mentioned therein is maintainable or not? The writ of habeas corpus has always been given due signification as an effective method to ensure release of the detained person from unlawful custody. In *P. Ramanatha Aiyar's Law Lexicon* (1997 Edn.), while defining "habeas corpus", apart from other aspects, had stated:
- "The ancient prerogative writ of habeas corpus takes its name from the two mandatory words habeas corpus, which it contained at the time when it, in common with all forms of legal process, was framed in Latin. The general purpose of these writs, as their name indicates, was to obtain the production of an individual."
11. In *Secy, of State of Home Affairs v. O' Brien*: 1923 AC 603: 1923 All ER Rep 442 (HL), it had been observed that: (AC p.609)
- " It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by the courts of law as a check upon the illegal usurpation of power by the executive at the cost of the liege."
12. In *Ranjit Singh v. State of Pepsu*: AIR 1959 SC 843: 1959 Cri U 1124, after referring to *Greene v. Secy, of State for Home Affairs*: 1942 AC 284: (1941) 3 All ER 388 (HL), the Apex Court had observed that: {Ranjit Singh case: AIR 1959 SC 843: 1959 Cri U 1124, AIR pp.845-46, para 4}

- "4. the whole object of proceedings for a writ of habeas corpus is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible."
13. The Bench quoted Lord Wright who, in *Greene case*: 1942 AC 284: (1941) 3 All ER 388 (HL), had stated thus: (AC p. 302)
- " The incalculable value of habeas corpus is that it enables the immediate determination of the right to the applicant's freedom."
14. Emphasis was laid on the satisfaction of the court relating to justifiability and legality of the custody.
15. In *Kanu Sanyal v. District Magistrate, Darjeeling*: (1973) 2 SCC 674: 1973 SCC (Cri) 980, it was laid down that the writ of habeas corpus deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty.
16. Speaking about the importance of the writ of habeas corpus, the Apex Court in *Ummu Sabeena v. State of Kerala*: (2011) 10 SCC 781: (2012) 1 SCC (Cri) 426 had observed as follows: (SCC p.786, para 15)
- "15. the writ of habeas corpus is the oldest writ evolved by the common law of England to protect the individual liberty against its invasion in the hands of the executive or may be also at the instance of private persons. This principle of habeas corpus has been incorporated in our constitutional law and we are of the opinion that in a democratic republic like India where Judges function under a written Constitution and which has a chapter on fundamental rights, to protect individual liberty the Judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India. The most effective way of doing the same is by way of exercise of power by the court by issuing a writ of habeas corpus."
17. In the said case, a reference was made to *Halsbury's Laws of England*, 4th Edn., Vol.11, para 1454 to highlight that a writ of habeas corpus is a writ of highest constitutional importance being a remedy available to the lowliest citizen against the most powerful authority.
18. The writ of habeas corpus was devised for production of an individual in case of illegal restraint or confinement. It is of the highest constitutional importance to provide a swift and expedient remedy by determining the petitioner's right to freedom and to protect the individual's liberty against arbitrary action of the executive or by private persons. Its main objective is to release persons illegally detained or confined. It is a well-accepted principle that a habeas corpus petition cannot be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. The Court is required to scrutinize the legality or otherwise of the order of detention which has been passed. Unless the Court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of a habeas corpus cannot be granted. [Ref: *Manubhai Ratiiai Patei through Ushaben v. State of Gujarat*: (2013) 1 SCC 314].
19. The Apex Court in *Manubhai Ratiiai Patel's case* (Supra) further held that while remanding accused, it is obligatory on the part of the Magistrate to apply his mind to the facts and not to pass remand order in a mechanical manner. Paras 24, 25, 26 and 31 of the SCC in *Manubhai Ratiiai Patel's case* (Supra) read as follows:-
- "24. The act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand

is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner.

25. It is apt to note that in *Madhu Limaye, In re* (1969) 1 SCC 292 it has been stated that: (SCC p.299, para 12)

"12. Once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand the Magistrate directed detention in jail custody after applying his mind to all relevant matters."

26. In *CBI v. Anupam J. Kulkarni*: (1992) 3 SCC 141: 1992 SCC (Cri) 554: AIR 1992 SC 1768 it has been stated that: (SCC p. 153, para 7)

"7 '16 Where an accused is placed in police custody for the maximum period of fifteen days allowed under law either pursuant to a single order of remand or more than one order, when the remand is restricted on each occasion to a lesser number of days, the further detention of the accused, if warranted, has to be necessarily to judicial custody and not otherwise."*

(emphasis in original in *Anupam J. Kulkarni case*: (1992) 3 SCC 141: 1992 SCC (Cri) 554: AIR 1992 SC 1768).

Thus, the exercise of jurisdiction clearly shows that the Magistrate performs a judicial act. 31 It is well-accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. As has been stated in *B. Ramachandra Rao: Col. B. Ramachandra Rao v. State of Orissa*: (1972) 3 SCC 256: 1972 SCC (Cri) 481 and *Kanuy Sanyal: Kanu Sanyal v. District Magistrate, Darjeeling*: (1974) 4 SCC 141: 1974 SCC (Cri) 280, the court is required to scrutinize the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted. It is apposite to note that the investigation, as has been dealt with in various authorities of this Court, is neither an inquiry nor trial. It is within the exclusive domain of the police to investigate and is independent of any control by the Magistrate. The sphere of activity is clear cut and well demarcated. Thus viewed, we do not perceive any error in the order passed by the High Court refusing to grant a writ of habeas corpus as the detention by virtue of the judicial order passed by the Magistrate remanding the accused to custody is valid in law."

20. The writ of habeas corpus can be filed by wife against her husband for unauthorizedly taking away the child from her legal custody. But the question as to whether the husband had unauthorizedly taken away the child from the legal custody of the wife depends on the facts and circumstances of the case. In the present case, the Court is of the prima facie view that Master Joy Siddhartha Dutt, son of the present petitioner was in the authorized and lawful custody of the petitioner. The Apex Court in *Capt. Dushyant Soma! v. Smti. Sushma Soma!*: (1981) 2 SCC 277 held that Court can entertain the writ of habeas corpus under Article 226 of the Constitution of India despite availability of alternative remedy. The fact of the case in *Capt. Dushyant Soma!'s case* (Supra) was that the minor child was in the unauthorized custody of the appellant (Capt. Dushyant Soma!) and disregarded of the Court's order, the child was continued to be in his custody; the court had entertained the writ of habeas corpus under Article 226 of the Constitution of India filed by wife against her husband. Paras 4 & 7 of the SCC in *Capt. Dushyant Soma!'s case* (Supra) read as follows:-

"4. The submission made on behalf of the appellant-petitioner that a petition for the issue of the writ of habeas corpus was not appropriate in cases where he was also charged with a criminal offence, in respect of the very person in respect of whose custody the writ was sought is without substance. In support of this submission reliance was placed upon the following observation of Hidayatuiiah, J in Mohd. Ikram Hussain v. State of U.P.: (1964) 5 SCR 86: AIR 1964 SC 1625: (1964) 2 Cri U 590: "It is of course singularly inappropriate in cases where the petitioner himself is charged with a criminal offence in respect of the very person for whose custody he demands the writ." It is obvious that the submission made on behalf of the appellant-petitioner is based on a misunderstanding of what was observed by Hidayatuiiah, J. What Hidayatuiiah, J. pointed out was that it would be inappropriate to issue a writ at the instance of a person against whom an offence was alleged, in respect of the person detained. Hidayatuiiah J.'s observation was not about the issue of the writ to a person against whom an offence was alleged.

7. It was argued that the wife had alternate remedies under the Guardians and Wards Act and the Code of Criminal Procedure and so a writ should not have been issued. True, alternative remedy ordinarily inhibits a prerogative writ. But it is not an impassable hurdle. Where what is complained of is an impudent disregard of an order of a court, the fact certainly cries out that a prerogative writ shall issue. In regard to the sentence, instead of the sentence imposed by the High Court "

21. The Apex Court in Mohd. Ikram Hussain v. the State of Uttar Pradesh: AIR 1964 SC 1625 held that husband could file the writ of habeas corpus for production of his wife in a trial case but not in the cases where issues of fact first have to be established. Para 13 of the AIR in Mohd. Ikram Hussain's case (Supra) reads as follows: -

"13. Exigence of the writ at the instance of a husband is very rare in English Law, and in India the writ of habeas corpus is probably never used by a husband to regain his wife and the alternative remedy under S.100 of the Code of Criminal Procedure is always used. Then there is the remedy of a Civil suit for restitution of conjugal rights. Husbands take recourse to the latter when the detention does not amount to an offence and to the former if it does. In both these remedies all the issues of fact can be tried and the writ of habeas corpus is probably not demanded in similar cases if issues of fact have first to be established. This is because the writ of habeas corpus is festinum remedium and the power can only be exercised in a clear case. It is of course singularly inappropriate in cases where the petitioner is himself charged with a criminal offence in respect of the very person for whose custody he demands the writ."

22. For the foregoing reasons, we are of the considered view that the present writ petition for habeas corpus is maintainable.

23. It is well settled principle of law that in an application seeking a writ of habeas corpus for custody of minor children, the paramount consideration for the court is welfare and wellbeing of a minor child and not the legal rights of the parents. The Apex Court in Syed Saleemuddin v. Dr. Rukhsana: (2001) 5 SCC 247 clearly held that in a habeas corpus petition seeking transfer of custody of children from father to mother or vice versa, the paramount consideration should be the welfare of the children. The Apex Court in Syed Saieemuddin's case (Supra) held that the paramount consideration in habeas corpus petition for transfer of custody of children would be welfare of the children and directed the petitioner seeking writ of habeas corpus for custody of minor children to approach the Family Court, and till the Family Court disposes of the petition, father shall be allowed to visit the children. Para 11 of the Syed Saieemuddin's case (Supra) reads as follows:-

"11. From the principle laid down in the aforementioned cases it is clear that in an application seeking a writ of habeas corpus for custody of minor children the principal consideration for the court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that the present custody should be changed and the children should be left in the care and custody of somebody else. The principle is well settled that in a

matter of custody of a child the welfare of the child is of paramount consideration for the court. Unfortunately, the judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri. M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

24. The Apex Court had reiterated that the paramount consideration of the court in a habeas corpus petition for custody of the child, would be the welfare of the child in *Gaurav Nagpai v. Sumedha Nagpal*: (2009) 1 SCC 42. Para 30, 34, 43, 46, 47 & 50 of the SCC in *Gaurav NagpaTs* case (Supra) read as follows:-

"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"

34. In *Howarth v. Northcott*: 152 Conn 460: 208 A 2nd 540: 17 ALR 3rd 758 it was stated:

"In habeas corpus proceedings to determine child custody, 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," It was further observed:

"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 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." (emphasis supplied)

It was also indicated that 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.

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 v. Jacob A. Chakramakkal*: (1973) 1 SCC 840 this Court held that object and purpose of the 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 *Thirty Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka*: (1982) 2 SCC 544: 1982 SCC (Cri) 505, 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 a 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 Mausami Moitra Ganguli case: (2008) 7 SCC 673: JT (2008) 6 SC 634, 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."
25. The Apex Court in Gaytri Bajaj v. Jiten Bhalla: (2012) 12 SCC 471 held that:
- "14. From the above it follows that an order of custody of minor children either under the provisions of the Guardians and Wards Act, 1890 or the Hindu Minority and Guardianship Act, 1956 is required to be made by the court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the court."
26. For deciding the welfare, interest and desire of the child Master Joy Siddhartha Dutt, this Court required both oral and documentary evidence to be produced by the parties. Even if the present writ petition is maintainable, the writ proceeding is not the proper forum inasmuch as disputed fact is required to be decided after allowing the parties to produce both oral and documentary evidence in support of their respective case. Section 7 of the Family Courts Act, 1984, more-fully prescribed the jurisdiction of the Family Court. For easy reference, Section 7 of the Family Courts Act, 1984 is quoted hereunder:-
- "7. Jurisdiction.- (1) Subject to the other provisions of this Act, a Family Court shall-
- (a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and
 - (b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.
- Explanation.- The suits and proceedings referred to in this subsection are suits and proceedings of the following nature, namely:-
- (a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;
 - (b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
 - (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;
 - (d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;
 - (e) a suit or proceeding for a declaration as to the legitimacy of any person;

- (f) a suit or proceeding for maintenance;
 - (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.
- (2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-*fa*) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and (b) such other jurisdiction as may be conferred on it by any other enactment."
27. This Court is of the considered view that the appropriate forum for the remedy sought for in the present writ petition would be the suit or proceeding as contemplated under the Family Courts Act, 1984 before the concerned Family Court. Accordingly, the petitioner is directed to approach the Family Court. However, it is made clear that in the event of approaching the Family Court by the writ petitioner as directed by this Court, the concerned Family Court shall allow the petitioner to meet Master Joy Siddhartha Dutt (Master Elan Jayden Syiem according to the respondent No. 13) in the appropriate place/time to be fixed and decided by the Family Court till the suit or proceeding in relation to the Guardianship/or custody of Master Joy Siddhartha Dutt is finally decided by the Family Court. The learned Family Court is further directed to finally decide and dispose of the said suit or proceeding within 4 (four) months from the date of filing the same by the present writ petitioner.
28. With the above observations and directions, this writ petition is disposed of.

□□□

SMT. DIPIKA SHARMA (CHAKRABORTY) VERSUS SHRI SUDIP SHARMA

THE HIGH COURT OF TRIPURA AGARTALA

(Before Hon'ble The Chief Justice (Acting) Mr. T.Vaiphei & Hon'ble Mr. Justice S.C. Das)

(1) TRP (C) 9 OF 2015

Smt. Dipika Sharma (Chakraborty), W/o Shri Sudip Sharma, D/o Shri Nanu Chakraborty, Resident of Gandhigram, Madhyapara, P.O. Gandhigram, P.S. Airport, District-West Tripura. Petitioner.

- Vrs -

Shri Sudip Sharma, S/o Shri Dinesh Sharma, Resident of P.O. & Village Baruakandi, District-North Tripura. Respondent.

(2) TRP (C) 10 OF 2015

Smt. Munna Chakraborty (Bhattacharjee) W/o Sri Rupak Bhattacharjee, D/o Sri Nikhil Chakraborty of Village-Kariadepa, P.O. Melaghar, P.S. Melaghar, Dist. Sepahijala, State- Tripura, PIN 799 115. Petitioner.

- Vrs -

Shri Rupak Bhattacharjee, S/o Late Rakhil Bhattacharjee, Vill-Bhattapukur, P.O.-A.D.Nagar, Dist-West Tripura, Agartala, PIN—799003. Respondent.

(3) TRP (C) 11 OF 2015

Smt. Ruma Chakraborty Datta Chowdhury, W/o Sri Arun Datta Chowdhury, D/o Sri Narayan Chakraborty, C/o Mantosh Karmakar, Vill-Jagatpur, (Near AG Office), Kunjaban Colony, P.S.- Kunjaban, District-West Tripura. Petitioner.

- Vrs -

Sri Arun Datta Chowdhury, S/o Bimal Kanti Datta, Vill-Madhya Para Belonia, P.S.-Belonia, Belonia, District-South Tripura. Respondent.

(4) TRP (C) 13 OF 2015

Mst. Samarun Necha, W/o Md. Helal Uddin, D/o Late Suruk Ali, R/o Srinathpur (Burghat), P.O. Babur Bazar, P.S. Kailashahar, Dist. Unakoti. Petitioner.

- Vrs -

Md. Helal Uddin, S/o Md. Abdul Latif, R/o Latugoan, P.S. Dharmanagar, Dist. North Tripura. Respondent.

(5) TRP (C) 14 OF 2015

Smt. Nitu Rani Saha, W/o Sri Bibhu Saha, D/o Sri Biswambhar Saha, Resident of West Bank of Jagannath Dighi, P.O. & P.S. Radha Kishore Pur, District-Gomati, Tripura. Petitioner.

- Vrs -

Sri Bibhu Saha, S/o Late Nityananda Saha, Resident of South Mirzapur, P.O. Sarashima, P.S. Belonia,

SMT. DIPIKA SHARMA (CHAKRABORTY) VERSUS SHRI SUDIP SHARMA
District-South Tripura, Tripura. Respondent.

(6) TRP (C) 1 OF 2016

*Smt. Subarna Ghosh (Baidya), W/o Sri Janardhan Baidya, D/o Sri Brajendra Chandra Ghosh, C/o Sri Shyamal Kanti Majumder, A.D. Nagar, M.B.Tilla, Sukanta Lane No.6, P.S. Amtali, Dist. West Tripura
..... Petitioner.*

- Vrs -

Sri Janardhan Baidya, S/o Lt. Harendra kumar Baidya, Resident of Vill & P.O.- Kansari, P.S-Puran Raj Bari, Dist. South Tripura. Respondent.

TRP(C) 9 of 2015

For the Petitioner : Mr. H.K.Bhowmik, Mr. A. Deb, Advocates.

For the respondent : None.

In TRP(C) 10 of 2015

For the Petitioner : Mr. P.K. Pal, Advocate.

For the respondent : Mr. K.K.Pal, Advocate.

In TRP(C) 11 of 2015

For the Petitioner : Mr. K.N.Bhattacharjee, Sr. Advocate. Mr. P. Saha, Advocate.

For the respondent : Mr. R.G.Chakraborty, Advocate.

In TRP(C) 13 of 2015

For the Petitioner : Mr. R. Pal, Advocate.

For the respondent : Mr. A. Lodh, Advocate.

In TRP(C) 14 of 2015

For the Petitioner : Mr. S.C.Majumder, Advocate.

For the respondent : Mr. D. Sarkar, Advocate.

In TRP(C) 1 of 2016

For the Petitioner : Ms. S. Deb Gupta, Advocate.

For the respondent : Mr. Ratan Dutta & Ms. P. Ghatak, Advocates.

Section 7 ,section 8,section 10, of the Family Courts Act1984, Section,4 and section 24 of the Code of Civil Procedure, 1908....Whether petitions can be transferred from the Court of the District Judge to the Family Court in another District?.... Whether the proceedings pending before the Family Court in one District can be transferred to a District Judge in another District where there is no Family Court...(Para -1)..... ‘It cannot be said that once a proceeding from Family Court to a District Court is transferred, the parties will be deprived of the special provisions of the Family Courts Act. Be that as it may, the Family Courts Act has not as a whole excluded the application of CPC or Cr.P.C. The provisions of the procedural law prescribed in the CPC, Cr.P.C. or in the Evidence Act which is not in conflict and/or inconsistent with the provisions of the Family Courts Act shall apply in respect of proceedings to which the Family Court exercises jurisdiction. Once, the Family Court is also a Court subordinate to the High Court, the High Court’s power to transfer a proceeding from the Family Court to any other District Court or from the District Court to the Family Court cannot be said to have excluded or restricted. The High Court in exercise of power under Section 24 CPC, has the power to transfer matrimonial proceedings from Family Court to Family Court or Family Court to District Court or District Court to Family Court and similarly,

**the High Court has also the power to transfer a proceedings under Chapter IX of the Cr.P.C. from the Family Court to the Magisterial Court and from Magisterial Court to Family Court and vice versa”.....
(Para-34)**

Date of Argument : 08.09.2016

Date of delivery of : 16.09.2016

Judgment & Order

Hon'ble Mr. Justice S. C. Das :—

By a common order dated 17.11.2015, passed in TRP(C) 9/2015; TRP(C) 10/2015 and TRP(C) 11/2015, Chief Justice of this Court, while sitting in Single Bench, formulated the following two issues for decision by a Division Bench. The issues were—

1. Whether petitions can be transferred from the Court of the District Judge to the Family Court in another District?
2. Whether the proceedings pending before the Family Court in one District can be transferred to a District Judge in another District where there is no Family Court?
2. Subsequently three other transfer petitions i.e. TRP(C) 13/2015; TRP(C) 14/2015 and TRP(C) 1/2016, wherein also common questions were involved, tagged together with the aforesaid three transfer petitions for decision on the aforesaid two issues.
3. We have heard learned counsel of the parties on the above mentioned two issues at length.
4. In the State of Tripura, there are five judicial districts. Family Courts have been established in the head quarter of three Judicial Districts i.e. at Agartala in the West Tripura District, Kailashahar in the present Unakoti District and Udaipur in the present Gomati District. In the rest two Judicial Districts i.e. North Tripura and South Tripura, no Family court has yet been established. The local jurisdiction of the respective Family Courts set up at Agartala, Udaipur and Kailashahar has been notified.
5. The jurisdiction of the Family Court has been prescribed in Section 7 of the Family Courts Act, 1984 which reads thus—
 - “7. Jurisdiction—(1) Subject to the other provisions of this Act, a Family Court shall—
 - (a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and
 - (b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.”

Explanation.-The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

- (a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;
- (b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
- (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

- (d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;
 - (e) a suit or proceeding for a declaration as to the legitimacy of any person;
 - (f) a suit or proceeding for maintenance;
 - (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.
- (2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-
- (a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and
 - (b) such other jurisdiction as may be conferred on it by any other enactment.”
6. As prescribed under Section 8 of the Family Courts Act, the jurisdiction of the District Court and the subordinate civil Court was excluded in respect of the matters in which the Family Court was vested with the jurisdiction. Section 8 reads as follows:-
- “8. Exclusion of jurisdiction and pending proceedings—
- Where a Family Court has been established for any area,—
- (a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that subsection;
 - (b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);
 - (c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),--
 - (i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and
 - (ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established.”
7. It is, therefore, apparent that where a Family Court has been set up/established, the District Court or subordinate Civil Court or the Court of Judicial Magistrate cannot exercise jurisdiction in respect of the matters to which the Family Court is authorised to exercise its jurisdiction.
8. All the 6(six) transfer petitions pending before us were filed under Section 24 of the Code of Civil Procedure, 1908 seeking transfer of matrimonial proceedings from the District Court to Family Court and vice versa.
9. Learned Sr. counsel, Mr. K.N. Bhattacharjee appearing for the petitioner argued that the High Court has been vested with the power under Section 24 of the Code of Civil Procedure, 1908 (for short, CPC) to transfer any suit or proceeding of civil nature from one Court to another Court and since the Family Court is subordinate to the High Court, in exercise of that power, the High Court can transfer a proceeding

from Family Court to District Court and from District Court to Family Court or from District Court to District Court.

10. Ms. S. Deb Gupta, learned counsel, has also submitted that there is no bar imposed under the Family Court in transferring a proceeding from the Family Court to District Court or from District Court to Family Court in another District.
11. Learned counsel, Mr. A. Lodh and Mr. K.K. Pal submitted that the Family Courts Act is a special Law enacted by the Parliament to deal with the family disputes and the scheme of the Act is different than that of the normal procedure prescribed for dealing with a civil or criminal case. They referred to the object and reasons to the bill of the Family Courts Act and submitted that once a matrimonial dispute is taken up before the Family Court, it should not be transferred to any other Civil or Criminal Court in ordinary process. It is, however, submitted that there are many instances that the High Courts and the Supreme Court allowed transfer of the matrimonial proceedings from the Family Court to District Court and the District Court to Family Court in the particular facts and circumstances of the particular case.
12. Learned counsel of the parties referred various case laws which we will discuss later on.
13. Section 24 of the CPC empowers the High Court to withdraw and transfer any suit of civil nature from one Civil Court to another Civil Court from one District to another District within the jurisdiction of the High Court. For ready reference let us reproduce here Section 24 which reads as follows:-
 24. General power of transfer and withdrawal.—(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—
 - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or,
 - (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and—
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
 - (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.
 - (2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the court which [is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.
 - [(3) For the purposes of this section,—
 - (a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;
 - (b) “proceeding” includes a proceeding for the execution of a decree or order]
 - (4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.
 - (5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.]”
14. Section 10 of the Family Courts Act prescribes the procedure to be followed in the Family Court which reads thus:-

- “10. Procedure generally.-- (1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.
- (2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.
- (3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.”
15. Section 4 of CPC prescribes—
- “4. Savings.—(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.
- (2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.”
16. A careful reading of the above provisions, makes it abundantly clear that a proceeding before the Family Court shall be dealt with, as per the procedure prescribed in the Act itself. The procedural law so far prescribed in the Code of Civil Procedure which is not in conflict and/or inconsistent with the provisions of the Family Courts Act and Rules framed thereunder shall apply. Admittedly, in the scheme of the Family Courts Act, there is no provision of transfer of a proceeding from one Family Court to another Family Court or from a Family Court to a District Court and from a District Court to Family Court. Since there is no such provision prescribed in the Family Courts Act, the general provision prescribed under Section 24 of the Code of Civil Procedure in respect of all civil proceedings, in our considered opinion, shall apply.
17. A Family Court is also entrusted with the jurisdiction to deal with the petition seeking maintenance under Chapter IX of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.). A petition seeking maintenance under Chapter IX of Cr.P.C. is ordinarily dealt with by a Magistrate of the 1st Class. So, the matter which is ordinarily dealt with by a 1st Class Judicial Magistrate is also vested with the Family Court. The question, therefore, arose whether any such proceeding pending before the Family Court also can be transferred from the Family Court to Magisterial Court or from Magisterial Court to the Family Court. Though the issues formulated in the present transfer petitions are not regarding the maintenance matter under Chapter IX, but these points were also raised by the learned counsel of the parties while arguing on the issues formulated for decision in the context.
18. The Family Court is a creation of the statute to deal with the matrimonial proceedings which is ordinarily dealt with by the civil Court and the quasi civil /quasi criminal proceedings which is dealt with by Magisterial Courts. Certain procedure has been prescribed under the Family Courts Act to deal with such proceedings by the Family Court.

19. Section 407 of Cr.P.C. prescribes power of the High Court to transfer cases and appeals from one criminal Court to another criminal Court. That provision is also not inconsistent with the procedure prescribed under the Family Courts Act or Rules framed thereunder.
20. A Single Bench of the Madras High Court in the case of Usha @ Ramalakshmi & Anr. Vrs. P. Shanmugam in Tr.C.M.P.Nos.138 and 139 of 2006, decided on 30.08.2006 referring to numerous Apex Court decisions and High Court decisions, has observed that the power of the High Court to transfer cases cannot be whittled down so far as the matrimonial proceedings, initiated in the Courts subordinate to the High Court. The Court has observed that there is no provision in Hindu Marriage Act or the Family Courts Act ousting the power of the High Court under Section 24 of CPC.
21. A Single Bench of the Andhra Pradesh High Court in the case of P. Himabindu Vrs. P. Jayasimharaja in Tr.CMP. No.190/05, decided on 27-10-2005, in the given facts of that case has allowed transfer of a case from the Court of Principal Senior Civil Judge to the Family Court for trial and disposal.
22. The Gauhati High Court in the Case of Pallavi Saikia (Bharali) Vrs. Mirganka Bharali, reported in (2006) 2 GLR 135 in the given facts and circumstances of that case allowed transfer of a matrimonial petition from the Family Court, Gauhati to the Court of District Judge at Shibsagar.
23. A Single Bench of Andhra Pradesh in the case of V. Sailaja Vrs. Koteswara Rao, reported in AIR 2003 AP 178 has observed that under Section 24 of CPC, the High Court has got unquestionable power to transfer cases from one Court to the other Court. Similarly, as the Family Court is also a Court subordinate to the High Court and is subject to the provisions of the Code of Civil Procedure, the High Court is empowered under Section 24 of CPC to transfer cases from one Family Court to the other Family Court. The High Court has also observed that where a Family court has not been set up, the High Court in exercise of power under Section 24 can transfer a case from Family Court to other Court where no Family court has been constituted.
24. A Division Bench of the Alahabad High Court in the case of Munna Lal & etc. v. State of U.P. & Anr., reported in AIR 1991 Allahabad 189 has held that Family Court, when exercising power and jurisdiction relating to the matters referred to in explanation to sub-Section (1) of Section 7 of the Act, is a civil Court, and as such, High Court has the jurisdiction to transfer the cases from one Family Court to another under Sections 22, 23 and 24 of CPC. Similarly, when Family Court is exercising the powers and jurisdiction under Chapter IX of the Cr.P.C., it is criminal Court equivalent to the Magistrate 1st Class and High Court will have the power to transfer the case from one Family Court to another under Section 407 of Cr.P.C.
25. A Single Bench of Madras High Court in the case of K.R. Srinathi v. H. Ramakrishnan, reported in AIR 1990 Madras 330 has held that a proceeding pending before the Family Court can be transferred under Section 24 to any of the competent Civil Court subordinate to the High Court.
26. The case of Sumita Singh v. Kumar Sanjay, reported in AIR 2002 SC 396 is on a different context and it relates to transfer of case from the District Court under one High Court to the District Court in another High Court.
27. The case of Balwinder Kaur v. Hardeep Singh, reported in (1997) 11 SCC 701 has no relevance in the context of issues involved in this case.
28. In the case of Durgesh Sharma v. Jayshree (Civil Appeal No.5857/2008), the Supreme Court dealt with the issue of transfer from one District Court to another District Court under different High Court and has held that High Court has no power to transfer cases from a District Court of one High Court to the District Court of another High Court.
29. The provision prescribed under Section 24 of CPC authorizes the High Court to transfer any suit or proceeding from one Civil Court to another Civil Court under its jurisdiction. It is obvious that the High

Court cannot transfer a case from one subordinate Court to another subordinate Court under different High Courts and that power is vested to the Supreme Court under Section 25 of CPC.

30. While a Family Court is established as per the provisions of the Family Courts Act, it shall have jurisdiction to deal with the matters contained in Section 7 of the Act exclusively since the Act has overriding effect over any other law as prescribed in Section 20 of the Act.
31. The scheme of the Family Court has prescribed certain specific procedure such as taking of effort for settlement; taking of assistance of medical and welfare experts as well as consideration of the statement/document which is not otherwise admissible as per the Evidence Act. Those are some special features of the Family Courts Act. In the Family Court a representation by a legal practitioner is prohibited but the Family Court in the interest of justice may seek assistance of Amicus Curiae.
32. The Hindu Marriage Act also has embodied certain special provisions regarding trial and disposal of petitions under the Hindu Marriage Act, such as acceptance of documentary evidence and trial in camera etc. as contained in Section 21(b), 21(c) and 22 of the Act.
33. Order XXXII (A) of CPC has been inserted in the year 1976 incorporating therein the provisions relating to the matters concerning family. The provision prescribed under XXXII(A) is almost similar to that of the provisions prescribed in the Family Courts Act so far as the proceedings to be held in camera, the duty of the Court to make efforts for settlement, to take assistance of welfare experts, duty to enquire into the facts etc.
34. So, it cannot be said that once a proceeding from Family Court to a District Court is transferred, the parties will be deprived of the special provisions of the Family Courts Act. Be that as it may, the Family Courts Act has not as a whole excluded the application of CPC or Cr.P.C. The provisions of the procedural law prescribed in the CPC, Cr.P.C. or in the Evidence Act which is not in conflict and/or inconsistent with the provisions of the Family Courts Act shall apply in respect of proceedings to which the Family Court exercises jurisdiction. Once, the Family Court is also a Court subordinate to the High Court, the High Court's power to transfer a proceeding from the Family Court to any other District Court or from the District Court to the Family Court cannot be said to have excluded or restricted. The High Court in exercise of power under Section 24 CPC, in our considered opinion has the power to transfer matrimonial proceedings from Family Court to Family Court or Family Court to District Court or District Court to Family Court and similarly, the High Court has also the power to transfer a proceedings under Chapter IX of the Cr.P.C. from the Family Court to the Magisterial Court and from Magisterial Court to Family Court and vice versa.
35. In view of the discussions made above, the petitions seeking transfer of the proceedings from Family Court to District Court or from District Court to Family Court are, therefore, maintainable and the High Court has power to entertain such petition for transfer.
36. The reference made by the Single Bench is answered accordingly.
37. The transfer petitions may be listed for hearing on its own merit.

JUDGE CHIEF JUSTICE (ACTING)

□□□

PARVEENA AKHTER VERSUS ASHIQ HUSSAIN GANAIE

CTA No. 05 of 2010

(Before Hon'ble Mr. Justice Hasnain Massodi)

Parveena Akhter ...Petitioners

Versus

Ashiq Hussain Ganaie ...Respondents

Mr. G.N. Shaheen, Advocate Mr. M.A. Qayoom, Advocate

- The guardianship and custody of minor is directly and predominantly linked with welfare of the child. The courts whenever asked to appoint a guardian of a minor or to decide of his/her custody are required to give welfare of the child pivotal importance.
- The law makers having regard to sincerity of the matter, have conferred powers of appointment of guardian and to take decision regarding custody of a minor, to the senior most in hierarchy of courts in a District. The object is that such matters should be decided with utmost care and caution in a cool and detached atmosphere while parents of a child entangled in a dispute over guardianship and custody of a child, are two parties to the dispute.
- The court cannot at any stage effort to be unmindful of the fact that the child is the third party and the most insular, weak and vulnerable one.
- It is duty of the court as guardian of the minor not only make an effort to know the views of the minor as far as possible and respect such views but also to ensure that the opinion of the minor is volunteer and free from any element of fear or coercion or undue influence. Cases are conceivable where either of the parents having custody of the child victim of a broken family may be in a position to influence the child in such circumstances preferences shown by the child may have to be assessed in the background of surrounding circumstances. It is for a Judge to make use of his skill to neutralize the child from any kind of undue influence that works on his psyche and help the child to unburden himself/herself of the fear and give his preference free from any mental stress. The Judge can make use different techniques and tools. The Judge may call the minor for an interview to his chamber/retiring room, try to be affectionate and informer to the child and make an endeavour to give the child a free and fair opportunity to express himself/herself. The Judge may not restrict this exercise to one meeting but go for successive meetings without making things stressful for the child to free the child from any stress.
- In the present case Ld. Principal District Judge Shopian surprisingly has abdicated the role assigned to him and surrendered to the local Station House Officer. Ld. Pr. District Judge has allowed the Station House Officer to decide whether the baby child, having regard to her so called reaction to the suggestion, to go to her mother should be handed over to the petitioner.
- For the reasons discussed above the petitioner is held to have made a case for transfer of proceedings from the Court of Pr. District Judge Shopian to any court of competent jurisdiction.

Decided on July 29, 2010

JUDGMENT:

The petitioner seeks transfer of proceedings emanated from controversy over guardianship/custody of her minor daughter baby Arshe from the court of Principal District Judge Shopian to any court of competent jurisdiction. The petition has been filed against the following backdrop:-

The parties were married a few years back and were blessed with a girl child who is at present a little over five years of age. The marriage soon after birth of baby Arshe run into rough weather. The immediate cause according to the petitioner being second marriage contracted by the respondent. Be that as it may, the efforts of reconciliation did not bear any fruits and the marriage was formally dissolved. The petitioner after dissolution of the marriage, continued to have minor daughter in her custody. The petitioner thereafter filed an application under section 10 Guardian and Wards Act

19..... in the court of Pr. District Judge Shopian, praying therein that the petitioner be appointed as guardian of person and property of the minor girl. The Trial Court on 21.2.2009 allowed the petitioner to have custody of her minor daughter and restrained the respondent from taking away the minor from custody of the petitioner.

The parties on 5.3.2009 entered into a compromise and worked out a mechanism under which access and visitation rights were given to the respondents to the minor.

The application under section 10 Guardian and Wards Act was disposed of in terms of the compromise. The respondent in the compromise was given a right to have company of his minor daughter for one night after every two weeks. The respondent assured that his second wife would treat the minor as her own daughter. The mechanism worked well till the minor was taken by the respondent on the eve of Eid-ul-Fitr to his residence and not returned thereafter. The petitioner made efforts to get back custody of her minor daughter as was agreed upon by the parties in the compromise dated 5.3.2009 and reflected in the order of even date when the petitioner failed to persuade the respondent to return custody of the minor. The petitioner filed a contempt application before the Trial Court. This was followed by an application for return of custody which is at present awaiting disposal in the District Court Shopian.

The respondent also filed an application for modification of the order dated 5.3.2009.

The respondent has asked for removal of the petitioner as guardian and modification of the order dated 5.3.2009 on the grounds that the petitioner has contracted second marriage and is no more competent to continue as guardian of the minor. The petitioner has filed objections to the application. The application filed by the respondent is also pending disposal in the District Court Shopian. The matter, having regard to the controversy involved, is posted for recording evidence of the parties. The Ld. Pr. District in the meantime vide order dated 26.3.2010 has as a interim measure directed the respondent to handover custody of the minor to the petitioner for two days in a week. The Trial Court in effect has allowed the respondent to have custody of the minor for week days i.e Monday to Saturday and directed the respondent to allow the petitioner to have custody of the minor on week ends i.e Saturday after school hours till Monday morning. The court has further asked the parties to approach SHO Police Station Shopian in the event either of the parties violates the court order. It appears that the arrangement has not worked and the matter as directed by the Trial Court went to SHO Police Station Shopian who in his report dated 19th April 2010 expressed his inability to implement the order as according to the SHO, the minor was not ready to go to the petitioner. Resultantly the respondent continued to have custody of the minor and the petitioner in the circumstances has been denied access to her daughter since September 2009. The petitioner seeks transfer of the aforementioned proceedings on the grounds that the Trial Court has not taken any effective proceedings on the petitioner's application for initiation of contempt proceedings and the application for return of custody of her minor child. It is averred that the Trial Court is openly taking sides with the respondents and that the mode and manner in which proceedings are conducted has embolden the respondent to resort to violence. The petitioner complaints that she is being forced to withdraw/modify the compromise entered into by the parties on 5th March 2009. the petitioner states to have lost confidence in the court and to have become a patient of hot ailment due to mantle agony to which the petitioner is exposed

because of denying of access to her minor daughter. The respondent has resisted application on the grounds that the allegation leveled in the petition are baseless and unfounded. The respondent has in his objections narrated in detail the facts and events that have pushed the parties to the present imbroglio. The respondent have denied to have indulged in any violence and alleged to have been assaulted and roughed up by the petitioner and her relations inside and outside the District Court Shopian constraining the respondent to lodge a complaint with Police Station. It is stated that two cases bearing FIR Nos 312/2009 and 33/2009 stand registered at Police Station Shopian on the complaint of the respondent.

Heard and considered.

The guardianship and custody of minor is directly and predominantly linked with welfare of the child. The courts whenever asked to appoint a guardian of a minor or to decide of his/her custody are required to give welfare of the child pivotal importance.

The law makers having regard to sincerity of the matter, have conferred powers of appointment of guardian and to take decision regarding custody of a minor, to the senior most in hierarchy of courts in a District. The object is that such matters should be decided with utmost care and caution in a cool and detached atmosphere while parents of a child entangled in a dispute over guardianship and custody of a child, are two parties to the dispute. The court cannot at any stage effort to be unmindful of the fact that the child is the third party and the most insular, weak and vulnerable one. It is duty of the court as guardian of the minor not only make an effort to know the views of the minor as far as possible and respect such views but also to ensure that the opinion of the minor is volunteer and free from any element of fear or coercion or undue influence. Cases are conceivable where either of the parents having custody of the child victim of a broken family may be in a position to influence the of the child in such circumstances preferences shown by the child may have to be assessed in the background of surrounding circumstances. It is for a Judge to make use of his skill to neutralize the child from any kind of undue influence that works on his psyche and help the child to unburden himself/herself of the fear and give his preference free from any mental stress. The Judge can make use different techniques and tools. The Judge may call the minor for an interview to his chamber/retiring room, try to be affectionate and informer to the child and make an endeavour to give the child a free and fair opportunity to express himself/herself. The Judge may not restrict this exercise to one meeting but go for successive meetings without making things stressful for the child to free the child from any stress.

In the present case Ld. Principal District Judge Shopian surprisingly has abdicated the role assigned to him and surrendered to the local Station House Officer. Ld. Pr. District Judge has allowed the Station House Officer to decide whether the baby child, having regard to her so called reaction to the suggestion, to go to her mother should be handed over to the petitioner. The SHO has made full use of the powers delegated to him by Pr. District Judge decided not to handover the baby Arshe to the petitioner and in the process nullified the order dated 26.3.2010. The right course for the Ld. Pr. District Judge was to give an option to the petitioner to approach the court in the event the order date 20.3.2010 was not complied with and in the event it was so reported by the petitioner, ask the respondent to produce the child in the Court, meet the child in his Chamber/retiring room try to know his preferences and to satisfy himself that the child was not under any fear or undue influence and thereafter pass the orders warranted under facts and circumstances of the case. Ld. Pr. District Judge Shopian by delegating his powers to local Station House Officer has in effect shifted the proceedings from the court to Police Station has given a reason to the petitioner to nurse an apprehension that the petitioner may not get justice from the Court. This apart Ld. Pr. District Judge while passing the order dated 26.3.2010 has in effect rewritten the compromise dated 5.3.2009 on behalf of the parties, prejudged the matter while the proceedings were yet to be taken to its logical conclusion. If in the opinion of Ld. Pr. District Judge, custody of baby Arshe could be given to the petitioner for week ends, there was no reason for the Ld. Judge to deny the petitioner custody of the child and relegate the parties to the position as it obtained on 5.3.2010 till the respondent made application for modification/recalling the order dated 5.3.2010 was decided.

SMT. DIPIKA SHARMA (CHAKRABORTY) VERSUS SHRI SUDIP SHARMA

It appears that the respondent by his own admission got two criminal cases registered at Police Station Shopian alleging unruly behavior against the petitioner inside and outside the court room Shopian. This constitutes an added ground to shift the proceedings to cool and less surcharged atmosphere.

For the reasons discussed above the petitioner is held to have made a case for transfer of proceedings from the Court of Pr. District Judge Shopian to any court of competent jurisdiction. The nearest court of competent jurisdiction to the place of residence of the parties being court at Pulwama. The proceedings are withdrawn from the files of Principal District Judge Shopian and transferred to the Court of Principal District Judge Pulwama. The copies of the order be sent down to the trial Court as well as transferee court and the record is directed to be transmitted to the transferee court with due dispatch. The parties shall appear before the transferee court on 19.7.2010.

□□□

LANDMARK JUDGMENTS ON

STRIDHAN

(Property of Women)

SUKHAMAYEE BISWAS VERSUS MONORANJAN CHAUDHURY AND OTHERS

Calcutta High Court

Appeal No. 1389 of 1922

(Before Hon'ble Mr. Justice Greaves and Hon'ble Mr. Justice Cuming)

Sukhamayee Biswas ... Defendant Appellant;

Versus

Monoranjan Chaudhury and others ... Plaintiff s Respondents.

A suit for past profits in respect of the lands .. is a mere right to sue which cannot be transferred by the provisions of S. 6, CI. (e). An actionable claim is something entirely different and does not extend to claim for profits ...(Para-8)

Decided on March 4, 1925

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Greaves :— This is an appeal by the defendants against a decision of the Additional District Judge of Sylhet modifying a decision of the Munsif of the Second Court at Habigunge. The suit out of which this appeal arises was brought by the plaintiffs for declaration of their title to and for possession of certain property. He also claimed mesne profits which, I understand, were disallowed and in respect of which there is a cross-objection.

2. The case for the plaintiffs was that one Surjymani Sen was a jotedar; that he made during his lifetime a gift of the lands in question to his widowed daughter. The plaintiffs claimed to have purchased the lands in suit after the widowed daughter's death from Defendant No. 5 who, the plaintiffs alleged, was the heir of the widowed daughter being her sister's son. The defence of the defendant was this: that the property was streedhan property and that on the death of the widowed daughter it descended not on the sister's son but on the step-brother or half brother of the widowed daughter as her preferential heir. Both the Courts below have decided in favour of the plaintiffs' contention holding that on the death of the widowed, daughter the property descended to her sister's son and not to her step-brother. The lower appellate Court has relied on a decision of this Court in the case of Debi Prasanna Rai Chowdhury v. Harendra Nath Ghose[^]to which I shall have presently to refer.
3. Now four points have been urged before us by the learned vakil for the appellant.
4. First of all he contends by a reference to Ch. IV, S. 3 of the Dayabhaga, which relates to succession to separate property of a childless woman that his client is entitled as the preferential heir of widowed daughter and he seeks to establish this by a reference to Sloka 37 of Ch. 4 of S. 3. Now in S. 3 which, as I have already stated, deals with succession to separate property of a childless woman. Sloka 10 relates to 3, kinds of streedhan. The translation is as follows: "But wealth received by a woman after her marriage from the family of her father, of her mother or of her husband goes to her brothers as Yajnavalkya declares that which has been given be her by her kindred, as well as her fee or gratuity and anything bestowed after marriage, her kinsman take if she dies without issue. Then in the next sloka the property given by her kindred is dealt with and so on until we come to Sloka 19 which deals with suika or what is denominated

as a fee. The following slokas deal with various kinds of property of this nature and then we come to sloka 29 which is as follows: "Therefore, the property goes first to the whole brothers, if there be none to the mother if she be dead to the father; but on failure of all these, it devolves on the husband." Thus Katyayana says "that which has been given to her by her kindred goes on failure of kindred to her husband." Now the difficulty that faced the appellants, in this case was that if Sloka 29 applies to all the slokas from 10 onward he may be excluded from the inheritance by the fact that Sloka 29 says that the properties referred to in the previous slokas descend to the whole brother and no mention of a half-brother is made. Consequently it was argued before us that Sloka 29 did not apply to all the properties referred to in the slokas from 10 onward but merely to sulka which was dealt with in Sloka 19 and the following slokas. That is the first argument that is put forward and it is said that if this is so then the properties referred to in Sloka 10 or such property as is now in question before us comes under Sloka 37 and that, therefore, a half-brother is entitled to inherit in preference to the sister's son. Now this first argument was raised so long ago as the year 1873 and it was then negated by a decision of this Court which is reported under the heading of *Judoo Nath Sircar v. Bussunta Coomar Roy Chowdhury*. That was a case decided by Mr. Justice Jackson and Mr. Justice Dwarka Nath Mitter. The question in issue was as to the descent of property coming from the father to a daughter before her marriage under a testamentary devise. Of course the point that then arose is different from the point that arises in this appeal. But in the course of the argument the same argument with regard to Sloka 29 was addressed to the Court as has been addressed to us in this appeal and that argument was negated by the judgment of the Court which was delivered by Mr. Justice Dwarka Nath Mitter. He deals with Sloka 29 and says: "It has been argued that the reference is merely to that kind of streedhan only which is called sulka (fee or perquisite)." He says this argument is evidently founded on a mistake. He goes on to consider the provisions of the various slokas from Sloka 10 onward and he sums up his decision on this point at page 265 where he says: "It is clear, therefore, that the proposition laid down in CI. 29 is nothing but the final resume of the various matters discussed in the proceeding clauses, commencing from CI. 10, and its applicability to all the three kinds of streedhan mentioned in the text Yajanavalkya referred to in the last-mentioned clause is, consequently, beyond all dispute. It would be absurd to contend that the author of the Dayabhaga has laid down, in the case of property given by a woman's kindred a rule of succession different from that laid down by him in the case of sulka property, when it is beyond all question that both of those kinds of property are governed by the same text of Yajnavalkya which is cited by him at the very threshold of the discussion." A similar decision to the same effect is to be found in *Gopal Chandra Pal v. Ram Chandra Pramanik*¹. The judgment of the Court which consisted of Mr. Justice Banerjee and Mr. Justice Brett is to be found at pages 312 and 318. There the same contention as has been raised before us was raised and the learned Judges state that they are unable to assent to this contention as it is clearly opposed to the language of the Dayabhaga and opposed to the interpretation of the Dayabhaga as given in the case to which I have just referred. To the same effect is another decision of this Court in the case of *Debi Prasanna Rai Chowdhury v. Harendra Nath Ghose*² to which I have already referred. The same point was then taken before Mr. Justice Mukerjee and Mr. Justice Carnduff and at page 384 of the judgment it was held that Sloka 29 referred to all the slokas from 10 to 28 which preceded it. So much then for the first point that was urged.

5. The second point which was urged was that in any case even if Sloka 29 governed all the kinds of properties referred to in Sloka 10 even then a half-brother came in before sister's son, as it was argued that he could confer spiritual benefit on the lady and, therefore, he was entitled to inherit. This question was considered by this Court in the case in *Debi Prasanna Rai Chowdhury v. Harendra Nath Ghose*³ to which I have already referred and the contention was then negated. As is pointed out in the judgment of the Court, the word which is used in Sloka 29 is "sodara" which means "a uterine brother" and not the word "bhrata" or brother which might be taken to cover a brother and a half-brother as well. As has been pointed out at page 386 in the judgment in that case having regard to the use of the word "sodara," it cannot be contended that it can include a half-brother. It is significant that if you examine the various slokas of the Dayabhaga you will find that in some of them the word "bhrata" or brother is used. It seems

from this that where the word "sodara" or uterine brother is used it must be intended to refer to uterine brother only and not to include a half-brother as well. The use of the particular word "sodara" must be taken as an indication that for the purpose of inheritance a half-brother is not entitled to succeed. Then, thirdly, it was argued that the real test so far as inheritance is concerned is the possibility of conferring spiritual benefit upon the deceased, and it is said that inasmuch as half-brother is entitled by performing sradh and by offering funeral cakes to confer spiritual benefit upon the deceased, therefore he should not be excluded from inheritance and we were referred to the 4th Edition of Babu Goiap Chandra Sarcar's book on Hindu Law, page 464, as an authority for the proposition that in a property of this nature a half-brother is entitled to inherit. But it is noticeable that although in dealing with succession to Ayautuka (other than father's gift) a half-brother is included after a whole brother as the person possibly entitled to inherit the learned author states at the end of the paragraph that "a half brother's true position in the order is not free from doubt and difficulty." So at the most this can be taken as an authority for the proposition that possibly after the failure of a whole brother a half-brother is entitled to inherit but I do not think that can be taken as an authority for any further proposition. I may say here that although the learned author after dealing with succession to Ayautuka (other than father's gift) says at page 465 that the same rule of succession as is already laid down applies to father's gift in an ordinary case there is no separate rule of succession laid down in the Dayabhaga with regard to these gifts. Having regard, therefore, to the authorities to which I have already referred and notably on this point the authority in *Debi Prasanna Rai Chowdhury v. Harendra Nath Ghose*, we do not think that this point is well founded and the mere fact that a Half-brother can confer spiritual benefit as in a case of this kind does not necessarily mean that he is entitled to inherit.

6. The 4th point that was raised was with regard to a certain reading of Sloka 10 and it was attempted to give a narrower interpretation to the word gifts mentioned in Sloka 10 as meaning joint gifts by father and mother as well. But the same point was raised in the case of *Judoo Nath Sircar v. Bussunta Koomar Roy Chowdhury*- to which I have already referred and was then negated.
7. For the reasons, therefore, which I have indicated I think the decision of the Courts below is right and the appeal must fail and is dismissed with costs.
8. In the cross-objection the respondents claim profits in respect of the lands in suit for the year 1326. They purchased in May 1920 from the heir of the previous owner, who died in October 1919. By the conveyance the lands were sold to the respondents together with profits of any previous period and that is what they are now suing for. It is urged before us that this claim does not fall within the purview of Section 6(e) of the Transfer of Property Act, but is an actionable claim within the meaning of Section 3 of the Transfer of Property Act. I think this contention is clearly ill-founded. One has only got to state the fact as I here stated it to realize that this is a suit for past profits in respect of the lands and that it is a mere right to sue which cannot be transferred by the provisions of S. 6, Cl. (e). An actionable claim is something entirely different and does not extend to claim for profits such as is now sought to be established by the respondents. The result is that the cross-objection fails and is dismissed with costs.

CUMING, J.:— I agree.

9. Appeal and, cross-objection dismissed.

□□□

SMT. JAYASRI GUHA NEE GHOSH VERSUS SMT. SHUKLA GHOSH & ANOTHER

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION

Calcutta High Court

Smt. Jayasri Guha Nee Ghosh

Versus

Smt. Shukla Ghosh & Another

(Before Hon'ble Mr. Justice Sanjib Banerjee)

GA No. 1425 of 2006

GA No. 3701 of 2006

GA No. 396 of 2008

CS No. 104 of 2006

Decided on 30 April, 2008

Meaning of stridhana... In modern Hindu law, the term 'stridhana' denotes not only the specific kinds of property enumerated in the Smritis, but also other species of property acquired or owned by a woman over which she had absolute control; and she forms the stock of descent in respect of such property, which accordingly devolves on her own heirs. Properties gifted to a girl before the marriage, at the time of marriage or at the time of giving fare-well or thereafter are her stridhan properties. It is her absolute property with all rights to dispose at her own pleasure. Husband or other members of his family have no control over the stridhan property. Husband may use it during the time of his distress but nevertheless he has a moral obligation to restore the same or its value to his wife.

For the Plaintiff: Mr. Hirak Kumar Mitra, Sr. Adv.,

Mr. S. Mukherjee, Adv.,

Mr. Soumen Sen, Adv.,

Mr. M.K. Sil, Adv.

For the Defendant No. 1: Mr. Ranjan Deb, Sr. Adv.,

Mr. Ashish Kumar Chakroborty, Adv.,

Mr. S. Pranoy Shubhra, Adv.

Hearing concluded on: April 25, 2008.

Hon'ble Mr. Justice Sanjib Banerjee :—

Into the sixth decade of the statute and deep into the constitutional era, the plaintiff seeks to ascribe a meaning to Section 15(2) of the Hindu Succession Act, 1956 - one that the plaintiff says has not been considered in any

reported judgment - that it carves out an exception to the Hindu woman's absolute right to property recognised by Section 14 of the Act.

Three applications are being disposed of by this judgment. GA No. 1425 of 2006 is the plaintiff's principal interlocutory application in the suit. GA No. 3701 of 2006 is the plaintiff's subsequent application of similar import. GA No. 396 of 2008 is the first defendant's application for vacating an order of May 17, 2006 passed in GA No. 1425 of 2006 insofar as it relates to one of the three immovable properties which are the subject matter of the suit.

The plaintiff is the daughter of the brother of the first defendant's father-in-law and claims to be the only relevant heir of the first defendant's father-in-law.

The plaintiff traces the family tree from her paternal grandfather Ishan Chandra Ghosh. Ishan had two sons Anukul and Pratul. Anukul had two sons Hem Chandra and Narayan. Hem Chandra's son Asoke predeceased him in 1960 and first defendant Shukla is the childless widow of Asoke. Hem Chandra's wife also predeceased him. Plaintiff Jayasri claims to be the only heir of Hem Chandra's brother Narayan. Ishan's younger son Pratul had only one son, Jagadish, and second defendant Indrajit is his only son. According to the plaintiff all the relevant male members of the Ghosh family have died intestate except Indrajit who is alive.

It is averred in the amended plaint that Ishan owned an immovable property now numbered as 32/1, 32A, 32B and 32C, Lenin Sarani, Calcutta (the Dharamtala property). The plaintiff says that the parties are jointly interested in the Dharamtala property and in two other immovable properties at 161/2/1, Rashbehari Avenue, Calcutta (the Rashbehari property) and Ishan Kutir at Purandaha, Baidyanath, Deogarh in the State of Jharkhand (the Deogarh property).

The plaintiff claims that the first defendant has inherited her share in the properties from her father-in-law, Hem Chandra, and as such has limited interest in them which in law can only devolve upon the plaintiff as the plaintiff claims to be the only heir of the first defendant's deceased husband or the first defendant's father-in-law. The plaintiff suggests that the first defendant has no legal necessity to sell any of the properties that she has inherited from her father-in-law as even on a conservative estimate, the first defendant's monthly income is not less than Rs.30,000/- which she realises by way of rent and income from a dance school that she runs at the Rashbehari property. The plaintiff insists that the first defendant did not and does not have any power to alienate or transfer or encumber any of the properties and seeks the following reliefs after having obtained leave under clause 12 of the Letters Patent:

- "(a) A decree for permanent injunction restraining the defendant no. 1, her servants, agents and assigns, from selling or alienating or encumbering any of the properties mentioned in the Schedule below or any portion thereof in any manner whatsoever.
- (b) A declaration that the defendant no. 1 never had any right to enter into any of the purported agreements mentioned in paragraph 7 hereof;
- (c) A declaration that the purported agreements mentioned in paragraph 7 hereof are void, invalid, inoperative and are liable to be set aside;
- (d) A decree for delivery up and cancellation of the purported agreements mentioned in paragraph 7 hereof.
- (e) A decree for permanent injunction restraining the defendant no. 1, her servants, agents and assigns, from giving effect or further effect to the purported agreements mentioned in paragraph 7 hereof.
- (f) An enquiry into and a decree for damages against the defendant no. 1 as stated in paragraph 14 above.
- (ff) A decree for partition of the properties mentioned in paragraph 16A above and allotment and possession to the plaintiff of her share therein;
- (g) Receiver.

- (h) Injunction;
- (i) Costs;
- (j) Further or other reliefs."

On the plaintiff's interlocutory application immediately upon the institution of the suit an ad-interim order was made on May 12, 1996 in terms of prayer (a) of the notice of motion relating to GA No. 1425 of 2006. At that stage of the proceedings the second defendant had not been impleaded and there was the only defendant in the suit. Prayer (a) reads as follows:

"a. An order of injunction be made forthwith restraining the respondent, her servants, agents and assigns from selling of or alienating or otherwise encumbering the properties mentioned in Annexure "A" or disposing of any portion thereof in any manner whatsoever."

On the returnable date, May 17, 2006, the first defendant was represented. The court gave directions for filing affidavits in GA 1425 of 2006 and the order of injunction passed on May 12, 2006 was modified on the following lines:

"Order of injunction passed by me on May 12, 2006 is modified to the extent that such order of injunction would be restricted to Dharamtala property and Deogarh property.

It is made clear that in case the defendant wants to encumber the Rashbehari property she should obtain prior leave from the Court upon notice to the plaintiff.

This order is passed without prejudice to the rights and contentions of the defendant that this Court has no jurisdiction to entertain the suit in respect of Rashbehari property."

The first defendant preferred an appeal from the order dated May 17, 2006 and apparently mentioned the matter on grounds of urgency on June 15, 2006 after obtaining a pass-over of GA No. 1425 of 2006 before the Single Judge earlier on the same day. It is also not in dispute that till such date no affidavit had been filed on behalf of the first defendant to the plaintiff's principal interlocutory application. The appellate court took up the matter on July 16, 2006; recognised that the appellant could succeed in an appeal from an ad-interim order only if it demonstrated that even if all the averments in the petition before the trial court were taken to be correct no order could have been made; and, held in favour of the first defendant on a legal issue.

The plaintiff filed an application for special leave to appeal. The Supreme Court received the appeal and set aside the Division Bench order of June 16, 2006 on the ground that since the matter had ripened for hearing before the Single Judge, there was no urgency for which the appeal from the ad interim order should have been entertained. Without going into the merits of the decision of the appellate court, the order was set aside and the matter was remitted to be decided by the trial court. In view of the appellate court order being set aside, the injunction of May 17, 2006 revived. The plaintiff has sought to introduce better grounds to sustain the order by making the further application. The first defendant has applied for the order of May 17, 2006 to be vacated in respect of the Rashbehari property and an amendment application taken out by the plaintiff in the interregnum has been allowed but that is irrelevant in the context of the legal issue that falls for consideration in the present proceedings.

The first defendant says that a share in the Dharamtala and Deogarh properties devolved on her father-in-law from his father and after the death of her father-in-law she is exclusively entitled to his share as his only heir. She says that she should be left free to deal with the Rashbehari property as there is no dispute that such property was acquired by her father-in-law Hem Chandra. The first defendant says that it would make a mockery of Section 14 of the said Act of 1956 if the plaintiff's contention were to be accepted.

The plaintiff refers to the Hindu Succession Bill of 1954 and asserts that the Act of 1956 preserves the Hindu Shastric law as the Act amended and codified the law relating to intestate succession among Hindus. The plaintiff refers extensively to The Hindu Succession Act, 1956 by S.A. Kader (2004 Ed.). The plaintiff says that

clause 17 of the Bill later became Section 15(1) of the Act and clause 16 of the Bill is reflected in Section 14 of the Act, but there was nothing in the Bill in its original form that can be traced as the forerunner to sub-section (2) of Section 15 of the Act. The plaintiff shows that clause 16(1) of the Bill was substantially changed before it translated to Section 14(1) of the Act but it retained the essential phrase "full owner thereof and not as a limited owner." The plaintiff says that the opening words of Section 15(1) are materially different from clause 17 of the Bill and the expression "full owner" in the Bill was dropped in the process of the enactment. Clause 16(1) of the Bill and how such provision was subsequently reflected in the statute and a comparison of the opening words of clause 17 of the Bill and the opening words of Section 15(1) of the Act will appear from the following:

"16. Property of a female Hindu to be her absolute property. (1) Save as otherwise provided in sub-section (2), where a female Hindu acquires any property, movable or immovable, after the commencement of this Act, whether such property is acquired by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase, or by prescription, or in any other manner whatsoever, such property shall be held by her as full owner thereof and not as a limited owner.

Explanation. Any such property as it referred to in this sub-section shall also include property held by a female Hindu as her stridhana immediately before the commencement of this Act."

"14. Property of a female Hindu to be her absolute property. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation. In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act."

"17. General rules of succession in the case of female Hindus. The property of a female Hindu held by her as full owner, if she dies intestate in respect thereof, shall devolve according to the rules set out in section 18 -- "

"15. General rules of succession in the case of female Hindus. (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16, --"

The plaintiff relies on a passage at pages 349-350 of Kader's commentary and the quotation from Mulla on Hindu Law appearing thereat:

"Section 15(2)(b) Under this clause, the property inherited by a female Hindu from her husband or father-in-law, shall devolve in the absence of any son or daughter of the deceased including the children of any predeceased son or daughter not upon the other heirs referred to in sub-sec. (1) in the order specified therein but upon the heirs of the husband.

The question arises whether the heirs of the husband mentioned in this clause are heirs of the predeceased husband or the heirs of the husband whom she might have remarried after the death of the first husband. As pointed out by Mulla [18th Ed. vol. 2, p. 422], the heirs of the husband must mean the husband whose property she had inherited as his widow and in the case of property inherited from her father-in-law, the heirs contemplated are the heirs of the husband from whose father she had inherited the property. The following observations in Mulla's Hindu Law, 18th Ed., vol. 2, p. 423 may be relevant "It would perhaps seem that cl. (b) is redundant in this Section because the order of priority in Entries (a) and (b) of sub-sec. (1) would bring about the same result even in the absence of the clause. Entry (b) read with Entry (a) in effect declares that in case the intestate dies without leaving the husband and any issue the property will devolve upon the heirs of the husband. Nonetheless the clause has a place in this section because it is conceivable that the interest may have remarried after the death of her husband from whom she may have inherited property or after the death of the

father-in-law from whom she may have inherited property and may die without issue but leaving her second husband. In such a case, in the absence of the present clause the property so inherited would pass to the second husband. Such a case would not be governed by entries (a) and (b), but would be governed by the present clause which enacts that such property will not devolve upon the other heirs referred to in sub-sec. (1), which would include the second husband who survives her, but will devolve upon the heirs of the first husband. The clause is not elegantly drafted but it must follow from the language used that the expression heirs of "the husband" in the clause refers to the husband whose property had been inherited by the intestate and the reference to the property inherited from the father-in-law as the widow of a predeceased son also indicates that the heirs must be of "the husband" from whose father she inherited the property. This seems to be the speciality of the situation and it is submitted that the heirs of the husband contemplated by the clause are heirs of the husband who was the source of the inheritance or whose father was the source of the inheritance."

The plaintiff refers to a judgment reported at AIR 1966 Mad 369 (*Ayi Ammal v. Subramania Asari & anr.*) for the light that it throws on the expression "inherited" appearing in Section 15(2) of the Act. In such case K, a childless widow, died intestate and her sister applied for a succession certificate in respect of the gifts made to K by K's father. The Madras High Court said that gifts were not inherited by K from her father and the special direction of the estate as laid down in Section 15(2) of the Act would not apply. The plaintiff places the following passage which does not further her case:

"Prima facie, it looks that the exception engrafted seeks to retain in the father's family property inherited by the deceased lady from her parents and similarly seeks to retain in the husband's family property inherited from her husband or father-in-law. The word "inherit" is a word of known import and ordinarily cannot give any difficulty in understanding its content. To inherit is to receive property as heir, that is succession by descent. In *Aiyar's Law Lexicon* the word "inherit" is thus defined:

"To receive property as heir. 'Inherit' means succession by descent. To take by inheritance (48 Mad 1 - AIR 1925 Mad 497). To take, or to have; to become possessed of; to take as heir at law by descent or distribution; to descend. The words 'inherit' and 'heir' in a technical sense, relate to right of succession to the real estate of a person dying intestate".

In the *Shorter Oxford English Dictionary*, of the several meanings to the word "inherit", one finds the following:

"To take or receive as heir of the former possessor at his decease; to get by legal descent or succession".

There is nothing in the Act to suggest, as contended for the petitioner, that the word "inherited" has in S. 15(2) been used in a loose way and would include also receipt of property from the father or mother during their lifetime. Far from it, a reference to S. 14 clearly shows that the draftsman has used the word "inherit" with precision having in view the legal significance of the word. In the explanation to S. 14, which gives absolute right to a Hindu female in property possessed by her, one finds "property" thus defined:

(The definition of 'property' is set out from the Act) Thus, under S. 14 absolute title is given to the female Hindu in property possessed by her subject to the provisions in sub-section (2) of Section 14, in whatever manner the property had been acquired by the female. It is devolution of the property thus acquired that is provided for under S. 15 in a case where a female Hindu dies intestate. The explanation to S. 14 sets out the various modes in which property may be acquired by the Hindu female and S. 15(2) picks out therefrom property acquired by inheritance from certain specified persons for special provision in the matter of devolution on intestacy, when the female died childless. While S. 15(1) as already stated, provides for devolution generally, sub-section (2) makes an exception in regard to the devolution of property acquired by the female Hindu in particular circumstances. I see no reason whatsoever for departing from the common and ordinarily understood meaning of the word "inherited" set out above already."

The judgment reported at AIR 1983 Bom 156 (*Sonubai Yeshwant Jadhav v.*

Bala Govinda Yadav & ors.) is next placed by the plaintiff where Section 15(2) of the said Act was questioned as being violative of Articles 14 and 15 of the Constitution. The challenge to the sub-section was not on the ground that the Hindu woman had no right of disposition of the property that she inherited from her father or mother or from her husband or father-in-law, but on the ground that there was no similar rule limiting the right of disposition of property by the Hindu man. The matter directly in issue in the present case was not considered in the judgment, though the discussion relied upon by the plaintiff may be seen:

"19. It is this state of law which had the basic socio-legal recognition in the unity of the family, in the institution of marriage and out of which sprung the necessity of laying down the rules of inheritance and succession that provide the feedback to the present codifying legislation. It has recognised the same basic necessity to maintain the succession with the family, the unit which thrives and is furthered by marriage. It is significant that the Hindu Succession Act makes meaningful references to several relations that arise because of valid marriage within the social unit of the family. Otherwise uncodified dictionary of several terms that describe the relations in a kin group as contemplated by this law is a sure indication of the intention of the Legislature to fortify the institution of family by recognising marriage as basic and to continue the property entitlements on that basis. In this scheme 'wife' as a relative is a specified heir. No doubt, the present codification is not mere collection or arrangement of past parcels of precepts. There are clear departures from the history, one such being the conferring of full ownership upon a Hindu female with regard to the property acquired by her and thus putting her on par with other owners of the property in Hindu family. (Section 14 of the Act). That, however, is not intended either to affect her position as the 'wife' in the family or to affect the character of the family or property in her hand. On the other hand, the provisions like section 15(1) or 15(2) clearly show that when succession opens to her, rules are enacted with clear intent to keep up the continuity so that the property of the husband remains in his line, while that of parents follows their line. Both on the socio-juristic grounds, classification reasonably exists and is continued.

"20. Principally, law of succession is a law of entitlement. And also of status. These twin objects are achieved by laying down compact supportive schemes. It is self-evident that for achieving these objectives, the integral unity of the family is the point of legislative reference. That may be because of the socio-legal group governed by the tenets of personal law of Hindus wherein institution like marriage results in union and gives rise to different relations in turn strengthening structure of the family, a vital organism, in social web of associative existence. Property or acquisition offers and supports its continuity and unity. Family by that retains its economic as well juridical identity. Of course, marriage, by no means, is private property in wife nor an economic arrangement. It ever represents essential partnership of two human beings united as husband and wife, each of whom being and providing heirs to each other. All this matrix of relations is clear and reference to the definitions available in Section 3 of the Hindu Succession Act of the term like "heir" goes to highlight the same.

"21. "Heir" means a person, male or female, who is entitled to succession to the property of an intestate. The term 'intestate' indicates a person who is deemed to die intestate in respect of the property of which he or she had not made testamentary disposition. (Sections 3(f) and 3(g)). Leaving aside other terms, the definition of the word "relative" available in Section 3(j) also takes in the basis of legitimate kinship. Therefore, if the kinship is recognised by law and its terms entitle such a person, male or female by the rules of devolution to succeed to the property, then such a legal classification can hardly be said to militate against the interest of other heirs only because such heirs appear to be of other sex. It is interesting to observe in this context that several classes of heirs have been classified in the Schedule to the Act and the terms thereof are couched in descriptive manner indicating the natural and legal relations between the parties and particularly to the person whose succession is in issue. In the very nature of things, if the object is to further the institutional identity of the family along with its property, the same can well be conferred in favour of the class that comes closer to the family, such as those like husband and wife and their off-springs, than the other related but distant persons to that ground of which the husband and wife are the united members. By describing the heirs of husband, the heirs of wife are not excluded, for being a wife she is the member of her family. That is clear if a look is taken at the arrangement of different types of heirs and the classes thereof. If the property has come from the father or mother of a Hindu

woman dying intestate, the law in furtherance of the clear objective to continue the family unity directs that such property should go to the heirs of father and mother and not to the heirs of the husband. It is only when the property is inherited from the husband that the provisions require that it should devolve on the heirs of the husband. The supportive principle of both these provisions is the same. Sustaining the unity of the family and for that the entitlement to the property carved out in favour of closer relations than remote. Choose the core group and permit remote ones to come in only in case of its want, is the principle."

The plaintiff has relied on the judgment reported at AIR 1974 AP 266 (Bhimadas & ors. v. P. Kanthamma (died) & ors.) for the quotation with approval therein of a passage from the work of a renowned scholar of Hindu law at the following part of paragraph 2 of the report:

"2. ... Therefore a reasonable way of interpreting Section 15(2)(a) would be to supply what was not intended to be omitted. Prof. J. Duncan M. Derrett in his 'Introduction to Modern Hindu Law' in paragraph 622 says: "The exceptions to the general rule are motivated by a clear (and traditional) desire that the property shall not pass from family to family merely by a female's death intestate. Where property was inherited by her from her parent or parents, it shall not pass to her husband or to her husband's heirs where she dies without children or children of predeceased children. If such children or grand-children survive her there is no objection to the husband taking a share even in such property, otherwise he is excluded, and so are his heirs, and the property goes to the 'heirs of the father'.

The intelligent reader will at once exclaim, what will happen if the property was inherited by her from her mother, and her father survives her? Since the section provides that it shall pass to the heirs of a person who turns out to be alive (and so has no heirs), should it go to the Government under HSA. S. 29? The answer must be that here we have an example of the very rare phenomenon, the legislative provision which is absurd unless words are added. We are justified in reading 'upon the heirs of the father' as 'upon the father and in default of the father upon the heirs of the father', under the maxim of construing *ut res magis valeat quam pereat*."

The first defendant says that it is only upon death intestate of the Hindu woman that the property that she had inherited from her father or mother or from her husband or father-in-law that returns to the source or traces a new direction from the source, but Section 15(2) of the Act does not impinge on her right to deal with the properties that she comes to absolutely own. The first defendant relies on the judgment reported at (2006) 8 SCC 75 (Sadhu Singh v. Gurdwara Sahib Narike & ors.) and places paragraph 12 of the report:

"12. When a male Hindu dies possessed of property after the coming into force of the Hindu Succession Act, his heirs as per the Schedule, take it in terms of Section 8 of the Act. The heir or heirs take it absolutely. There is no question of any limited estate descending to the heir or heirs. Therefore, when a male Hindu dies after 17-6-1956 leaving his widow as his sole heir, she gets the property as Class I heir and there is no limit to her estate or limitation on her title. In such circumstances, Section 14(1) of the Act would not apply on succession after the Act, or it has no scope for operation. Or, in other words, even without calling in aid Section 14(1) of the Act, she gets an absolute estate."

The first defendant relies on the opening sentences of paragraph 12 of the judgment reported at (2008) 1 SCC 267 (Basanti Devi v. Ravi Prakash Ram Prasad Jaiswal) to assert that the entirety of Section 15(2) applies in case of intestacy and cannot denude the Hindu woman of her right to deal with the property during her lifetime, including the right to bequeath it by a testamentary document:

"12. Parliament enacted the Hindu Succession Act, 1956 to amend and codify the law relating to intestate succession among Hindus. Section 3(f) of the Hindu Succession Act defines "heir" to mean any person, male or female, who is entitled to succeed to the property of an intestate under the Act. ..."

The first defendant cites the judgment reported at (2008) 2 SCC 610 (Cherotte Sugathan (Dead) Through LRs. & ors. v. Cherotte Bharathi & ors.) and places paragraph 17 of the report where an earlier decision of the Supreme Court has been quoted from and approved:

"17. Yet again this Court in *Velamuri Venkata Sivaprasad v. Kothuri Venkateswarlu* [(2000) 2 SCC 139] held: (SCC p. 165, para 52) "52. Incidentally, Section 24 of the Succession Act of 1956 placed certain restrictions on certain specified widows in the event of there being a remarriage; while it is true that the section speaks of a predeceased son or son of a predeceased son but this in our view is a reflection of the Shastric Law on to the statute. The Act of 1956 in terms of Section 8 permits the widow of a Hindu male to inherit simultaneously with the son, daughter and other heirs specified in Class I of the Schedule. As a matter of fact she takes her share absolutely and not the widow's estate only in terms of Section 14. Remarriage of a widow stands legalised by reason of the incorporation of the Act of 1956 but on her remarriage she forfeits the right to obtain any benefit from out of her deceased husband's estate and Section 2 of the Act of 1856 as noticed above is very specific that the estate in that event would pass on to the next heir of her deceased husband as if she were dead. Incidentally, the Act of 1856 does not stand abrogated or repealed by the Succession Act of 1956 and it is only by Act 24 of 1983 that the Act stands repealed. As such the Act of 1856 had its fullest application in the contextual facts in 1956 when Section 14(1) of the Hindu Succession Act was relied upon by Defendant 1."

We respectfully agree with the said view."

The first defendant has referred to a judgment reported at (1978) 2 SCC 542 (*Bajaya v. Gopikabai*) but the Supreme Court merely decided in such case which of the limbs of Section 15(1) of the Act would apply. Though the decision implies that Section 15(2) of the Act would be an exception to the rule of inheritance laid down in Section 15(1), it does not address the legal issue that has been raised in the present proceedings.

The plaintiff says that she does not need to conclusively demonstrate that the legal ground that she canvasses has to succeed for her to obtain an order of injunction in respect of the Rashbehari property. The plaintiff relies on a judgment reported at (1986) 3 All ER 772 (*Films Rover International Ltd. and ors. v. Cannon Film Sales Ltd.*) for the principle that if there is a serious question raised, an injunction should necessarily follow and the property preserved till the trial. An earlier English decision reported at 1865 (1) LR PC 50 (*Walker v. Jones*) is cited for the same purpose.

The plaintiff urges that what has been preserved by Section 15(2) of the said Act is the life estate of a female Hindu with her right to sell the property that is covered by either clause therein only in case of legal necessity. The plaintiff traces the rights of a female Hindu under the Shastric law and says that prior to the Hindu Women's Right to Property Act, 1937, Hindu women has no right to property except her stridhana. The plaintiff says that a Hindu woman's earning through her mechanical exertion was also not her absolute property in the law as laid down in the scriptures. The plaintiff argues that since such was the state of the Hindu woman's right to property, that she had been granted some rights under the 1937 Act and more rights under the said Act of 1956, should not prompt the Court to conclude that the Hindu woman's right to disposition of property that she inherits is absolute or without any fetter.

What the plaintiff says is that after the 1956 Act the Hindu woman became absolute owner of the property that she inherited as the property could not remain in limbo, so to say. In law the Hindu woman remains the owner of the property that she inherits, according to the plaintiff, but she has no right to dispose of such property in view of Section 15(2) of the said Act. The plaintiff insists that there is reason for Section 15(2) not including the expression "dying intestate" and Section 15(2) ought really to be read as an independent section. In effect, the plaintiff argues that despite neither Section 14 carving out any exception to the absolute right to property of a female Hindu nor the non- obstante clause in the opening words of Section 15(2) covering no more than sub- section (1), Section 15(2) of the Act should be read as an independent provision preserving of the Shastric law just as some other sections of the Act did till the amendment of 2005 which showed that the Hindu female had lesser rights than the male. In support of the contention, the plaintiff refers to Section 4 of the Act and says that the removal of sub-section (2) thereof by the amending Act of 2005 is irrelevant. According to the plaintiff, Section 4(a) of the Act negates the effect of any text, rule or interpretation of Hindu Law or any custom or usage as part of that law only if there is specific provision made in that regard by the said Act. The plaintiff asserts

that Section 15(2) has expressly preserved the law of the scriptures as to the lesser rights of a female Hindu and Section 4 of the Act does not curtail its impact:

4. Overriding effect of Act.-- Save as otherwise expressly provided in this Act,--

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

On interpretation of statutes, the plaintiff refers to the judgments reported at (2003) 2 SCC 455 (Unique Butyle Tube Industries (P) Limited v. U.P. Financial Corpn.); (2005) 10 SCC 437 (State of Jharkhand v. Govind Singh) and (2004) 5 SCC 518 (Sakshi v. Union of India). In the Unique Butyle case the Supreme Court held that the Court cannot read anything into a statutory provision which is plain and unambiguous as a statute is an edict of the legislature. It said that a *casus omissus* should not be readily inferred or supplied by the Court except in the case of clear necessity and when the reason is found elsewhere in the Act. In the Govind Singh case the Supreme Court reiterated that attention should not only be paid to what has been said but also to what has not been said, for a Court can interpret the law but not legislate. In the Sakshi case the Supreme Court harped on the basic rule of interpretation, that of literal or strict construction, and warned against addition or rejection or substitution of words in a statute.

The plaintiff refers to Craies on Statute Law (7th Ed.) to suggest that only if the meaning of an enactment is not plain, light may be thrown upon it by assuming that certain words "have been designedly omitted" (page 107). The plaintiff cautions that it is not the court's exercise to ascertain the policy of the law and such a task is undertaken only when the statute under consideration is not explicit. The plaintiff submits that to adopt any other method of construction would be to impose upon the subject the views of the Judge, instead of construing the definite intention of the legislature (Craies, page 175).

The plaintiff says that the limited right granted under the Hindu Women's Rights to Property Act, 1937 has been considerably enlarged by the said Act of 1956. The Act of 1937, short as it is, is placed in its entirety:

"Whereas it is expedient to amend the Hindu law to give better rights to women in respect of property:

It is hereby enacted as follows:-

Section 1. - (1) This Act may be called the Hindu Women's Rights to Property Act, 1937.

(2) It extends to the whole of India, except Part B States.

Section 2. - Notwithstanding any rule of Hindu law or custom to the contrary the provisions of section 3 shall apply where a Hindu dies intestate.

Section 3. -(1) When a Hindu governed by the Dayabhaga school of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow, all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son;

Provided further that the same provisions shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

- (2) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.
- (3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.
- (4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Indian Succession Act, 1925, applies.

Section 4. - Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

Section 5. - For the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect."

The plaintiff suggests that the Hindu women's estate after the 1956 Act is not of life interest but is considerably more: she can alienate the property inherited on grounds of legal necessity if she is in distress or in discharge of her pious obligation for the spiritual betterment of the soul of the person from whom she inherits. The effect of Section 14 of the 1956 Act, according to the plaintiff, is to allow the female Hindu to pass on the property in case of legal necessity or in discharge of her pious obligation for unless she is absolutely seized of the entire interest in the property she cannot confer any to another.

The plaintiff refers to Section 6 of the Act as it stood prior to the 2005 amendment and Sections 23 and 24 of the Act that now stand omitted to suggest that the 1956 Act did not altogether obliterate the discrimination as to inheritance that the scriptures ordained. The plaintiff says that Section 15(2) may be a relic that has not been removed, but till such time it remains it cannot be wished away. The plaintiff submits that courts have inexplicably but consistently presumed that the expression "dying intestate" appears in Section 15(2) of the Act, though the argument made on her behalf here has not been recognised or considered in any judgment that is available.

The plaintiff relies on Mayne's Hindu Law and Usage (15th Ed.) and cites paragraphs 640 and 641 to demonstrate that the only real absolute right that the female exercises over any property is her stridhana:

"640. Women's peculium. - The subject of stridhana or woman's peculium occupies a large place in the Sanskrit lawbooks. It will be discussed in this chapter under four heads: (1) the meaning and scope of stridhana; (2) its divisions; (3) the power of disposition over it; and (4) its devolution.

It would appear that woman's separate property was, from the most ancient times, known as stridhana and Mr. Kane says that passages in the Vedas refer to it. The term 'stridhana' first occurs amongst the Smritis in the Dharmasutra of Gautama and literally means woman's property. The Mitakshara and the authorities that follow it take the term 'stridhana' in its etymological sense as including all kinds of property of which a woman has become the owner, whatever the extent of her rights over it. Jimutavahana restricts the term to that property of the woman over which she has absolute control even during the life of her husband. The Vyavahar Mayukha, while following the Mitakshara's comprehensive signification, makes a distinction between technical and non-technical stridhana for purposes of inheritance, designating all those kinds of stridhana that are enumerated in the Smritis as technical stridhana (paribhashika).

Meaning of stridhana. - In modern Hindu law, the term 'stridhana' denotes not only the specific kinds of property enumerated in the Smritis, but also other species of property acquired or owned by a woman over which she had absolute control; and she forms the stock of descent in respect of such property, which accordingly devolves on her own heirs. Properties gifted to a girl before the marriage, at the time of marriage or at the time of giving fare-well or thereafter are her stridhan properties. It is her absolute property with all rights to dispose at her

own pleasure. Husband or other members of his family have no control over the stridhan property. Husband may use it during the time of his distress but nevertheless he has a moral obligation to restore the same or its value to his wife.

"641. Recognised in early Hindu law. - A text of Manu states that a wife, a son and a slave can have no property and that the wealth which they earn is acquired for him to whom they belong. This did not mean that they could not own property, but as explained by Manu's commentators, they could not dispose of their property independently. This view receives support from Gautama who distinctly admits the right of a woman to hold separate property and provides for its succession. Apastamba says that the share of the wife consists of her ornaments and the wealth which she may have received from her relations. Naturally, a woman's property would commence at her bridal, and would consist of gifts from the bridegroom and his family and from her own family. The original bride-price payable to the parents appears to have become transformed into the dowry for the wife. There was evidently a usage that property upto the limit of two thousand panas should be given annually to the wife by the father, mother, husband, brother or kindred. This was exclusive of any immovable property, the gift of which was entirely optional. Besides gifts of affection from her parent's or from her husband's family, a married woman was at liberty to receive presents from strangers or make earnings by mechanical arts during coverture, but a restriction on her power of disposal was imposed upon her, lest she became too independent and neglected her marital duties and the management of household affairs. A test of Manu, which requires a righteous king to punish as thieves such relatives as appropriate the property of woman during their lifetime, is quoted in all the books. It is therefore quite clear that from early times, Hindu law recognised to the full the rights of women to hold separate property. Their rights of disposition over many and minor species of property too were admitted, though over others, restrictions were imposed on fairly rational grounds. This is not surprising when it is remembered that restrictions were imposed over males also in respect of dispositions of property and especially of immovable property. From the time of Gautama, the characteristic feature of woman's property was in the matter of succession, the preference given to the female over the male children - an obvious equitable rule. In the quaint phrasing of the Mitakshara, "Woman's property goes to her daughter because portions of her abound in her female children and the father's estate goes to his sons because portions of him abound in his male children"."

The plaintiff has also quoted copiously from Mulla's Principles of Hindu Law (19th Ed.). The plaintiff says that Section 14 of the Act is subject to certain qualifications and it is not impossible to conceive that it would be subject to the Shastric law as preserved under Section 15(2). The plaintiff relies on Articles 168 to 170, 172, 174 to 176, 178 and 180 from Mulla. The plaintiff particularly relies on the following sentences appearing at the head of Article 176:

"A widow or other limited heirs are not a tenant-for-life, but is owner of the property inherited by her, subject to certain restriction or alienation and subject to its devolving upon the next heir of the last full owner upon her death. The whole estate is for the time vested in her, and she represents it completely."

What the plaintiff fails to notice is that the entirety of Chapter XI and Articles 166 to 209 under that Chapter is the commentary on the law relating to property acquired by Hindu women by inheritance prior to the said Act of 1956. That will appear from the top of the Chapter and the table of contents. A general reading of the various articles under Chapter XI also unmistakably conveys that the entire Chapter deals with the law prevailing prior to the 1956 Act.

The plaintiff says that it was only after the original Hindu Succession Bill was amended by the joint committee that there was the genesis of what later became Section 15(2) of the Act in sub-section (2) being added to clause 17 of the amended Bill. The plaintiff places the following extracts from the Joint Committee report on the Bill quoted by Kader at page 61:

"Clause 16. In the opinion of the Joint Committee there is no reason why the Hindu Woman's limited estate should not be abolished even with respect to existing properties. Clause 19 has therefore been omitted and this clause has been suitably modified.

"Clause 17. While revising the order of succession among the heirs to a Hindu female, the Joint Committee have provided that properties inherited by her from her father reverts to the family of the father in the absence of issue and similarly property inherited from her husband or father-in-law reverts to the heirs of the husband in the absence of issue. In the opinion of the Joint Committee such a provision would prevent properties passing into the hands of persons to whom justice would demand they should not pass."

Section 14 of the said Act is the heart of the statute, continuing a conscious endeavour to remove the inequalities between the sexes in the Hindu law of inheritance. The same purpose is reflected in the amending Act of 2005 by which some of the provisions that maintained the imbalance were removed. To appreciate the argument of the plaintiff, Sections 14 and 15 of the Act need to be first seen:

"14. Property of a female Hindu to be her absolute property.--(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.--In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

"15. General rules of succession in the case of female Hindus.--(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16,--

- (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
 - (b) secondly, upon the heirs of the husband;
 - (c) thirdly, upon the mother and father;
 - (d) fourthly, upon the heirs of the father; and
 - (e) lastly, upon the heirs of the mother.
- (2) Notwithstanding anything contained in sub-section (1),--
- (a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter), not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and
 - (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

The life of law has not been logic, it has been experience (Oliver Wendell Holmes, *The Common Law* (1881), Lecture I). However, one cannot proceed on the basis that law is illogical or it is the perception drawn from experience that has more to do than the syllogism in determining the rules. Canons of interpretation, by whatever name called, are first founded on rationality. Strained principles of interpretation, laboured in their application can lead to an absurd construction. The rules of interpretation cannot then be faulted, their application may be.

Yet even by experience, the life of this body of law cannot lead to the interpretation that the plaintiff demands. In Hindu law the right to property had always been exclusively for the benefit of the man with the woman being treated as subservient and dependent on male support. Prior to the Act of 1956 Shastric and customary law governed the laws of Hindu succession, its variations appearing over different regions and even within the same region based on caste. Different schools of law existed in matters of succession: the Dayabhaga in Bengal and the neighbouring region; Mayukha in Bombay, Konkan and Gujarat and Marumakkattayam or Nambudri in Kerala and Mitakshara elsewhere in divergent India.

Fundamentally, in the Hindu scriptures a Hindu woman had a right to sustenance but the control or ownership of property did not vest in her. The Mitakshara law recognised inheritance by succession but only in respect of the property separately owned by an individual, male or female. Prior to the Hindu Law of Inheritance Act of 1929, the Bengal, Benaras and Mithila sub-schools of Mitakshara recognised only five female relations as being entitled to inherit - the widow, the daughter, the mother, the paternal grandmother and the paternal great grandmother. The Madras sub-school recognised the heritable right of a larger number of female heirs. The Bombay school, which was considered to be the most liberal to women, recognised an even larger body of female heirs. The Dayabhaga School did not accord a right by birth or by survivorship though it recognised a joint family and joint property. The Dayabhaga provided a single mode of succession and the same rules of inheritance applied whether the family was divided or undivided and whether the property was ancestral or self-acquired. In the Marumakkattayam law the lineage was traced through the female line.

With increasing social integration and the reform movements, there was a call for the amelioration of the woman's position in the Hindu society. The earliest legislation was in 1929 which conferred inheritance rights on three female heirs. The 1937 Act followed which brought about revolutionary changes in the Hindu law of all schools including in matters relating to partition, alienation of property, inheritance and adoption. The 1937 Act enabled the Hindu widow to succeed along with the son and take a share equal to the son's.

In the Constitutional era, Articles 14, 15(2) and 15(3) and 16 of the Constitution frown upon the discrimination and provide the State with the authority to accord protective discrimination in favour of women. The Directive Principles ordain that the state shall strive to ensure equality between man and woman.

The Act of 1956 gave substantial rights to women but did not give them as equal a right to property as it professed. The Hindu Code Bill was framed by the B.N. Rau Committee and piloted by Dr. Ambedkar but met substantial conservative opposition. Sita Ram S. Jajoo from Madhya Bharat expressed his anguish in the following words:

"Here we feel the pinch because it touches our pockets. We male members of this House are in a huge majority. I do not wish that the tyranny of the majority may be imposed on the minority, the female members of this House." (The Constituent Assembly of India (Legislative) Debates, Vol. VI, 1949, Part II) In the face of such history, it is not surprising that the plaintiff says that the conservative members of the Parliament succeeded in ensuring the tyranny of the majority by slipping in Section 15(2) to the final form of the 1956 Act when no trace of it is found in the original Bill. But to accept the argument would be to rely only on the experience of the Bill's passage amid resistance in Parliament and to defy logic.

There is nothing in Section 14 of the Act that would prepare one for the rude jolt that is the plaintiff's version of Section 15(2). Section 14 is unreserved in its first sub-section and the second sub-section merely clarifies that a property that is received by a Hindu woman by way of a gift or a Will or any other instrument or a decree or order or award will not be her absolute property if the devise by which she receives the property provides otherwise.

Sub-section (2) of Section 15 in its non-obstante clause limits the operation of the rule in sub-section (1) to the cases enumerated in sub-section (2). As much as the heading or the marginal note of a section cannot ordinarily be read to dilute or enlarge the plain words of the section, Section 15(2) of the Act is not a stand-alone provision. A non-obstante clause is sometimes appended to a provision in the beginning with a view to give the enacting part of the provision, in case of a conflict, an overriding effect over the provision referred to in the non-obstante clause.

A non-obstante clause is also a legislative device to curtail the ambit of the provision referred to therein. Section 15(2) has to be seen as an exception to the general rule recognised in Section 15(1) of the Act and necessarily applies to a female Hindu dying intestate. In the accurate expression of the non-obstante clause the operation of the sub-section is specified and the omission of the expression "dying intestate" is neither significant nor relevant as the parent provision that the sub-section operates on already contains the expression.

Section 15, in its entirety, sets down the rule of succession to the estate of the Hindu woman dying intestate. The plaintiff seeks to take advantage of the form of expression of the rule. Ordinarily, succession to the estate of the Hindu woman dying intestate would be as prescribed in sub-section (1). But to the extent that the source of a part of the estate (or the whole of it) can be traced to inheritance from the mother or father of the deceased, the direction of succession of such part of the estate (which may be the whole of it) is governed by clause (a) of sub-section (2); and, likewise if the source of a part of her estate (or the whole of it) can be traced to inheritance from the husband or the father-in-law of the deceased, the direction of succession of such part of the estate (which may be the whole of it) is governed by clause (b) of sub-section (2).

To move on from logic and return to experience, the amending Act of 2005 may also be of some relevance in the context. In its Statement of Objects and Reasons it expresses the intention of removing discrimination as contained in certain provisions of the parent statute. The amending Act makes no special case to justify the retention of Section 15(2) for an explanation was called for if the provision means as the plaintiff construes it. To accept the plaintiff's interpretation of Section 15(2) of the Act - which is simply an exception to the rule in Section 15(1) - would be to defy both experience and logic.

There are elements of gender discrimination that remain in the Act of 1956. There is discrimination apparent in the principle recognised in Section 15(2) of the Act in it attaching significance to the source of the estate of a Hindu woman dying intestate though elsewhere in the Act there is no corresponding provision for the Hindu man. This discrimination in principle may translate to discrimination in fact in an unlikely, but not altogether inconceivable, situation. One instance that comes to mind would be if a Hindu woman dying intestate has a son (or daughter) and husband as her only heirs. In accordance with Section 15(1)(a) read with the rules of the order of succession and manner of distribution in Section 16 of the Act, her estate would devolve on her son (or daughter) and her husband who would take simultaneously. If the son (or daughter) dies without marrying and without any issue prior to the husband dying, in the event of the husband dying intestate his estate would devolve on his heirs referred to in the Schedule to the Act and would pass on to his class II heirs. If the husband's father were alive the estate would pass on to him or if he were dead at the time of the husband's death, the estate would pass on to the brother and sister of the husband as per the second entry in class II. The property would then have passed to a beneficiary or beneficiaries unconnected to, and quite far removed from, the source. But this element of discrimination is lesser in degree than what the plaintiff canvasses that Section 15(2) of the Act perpetuates.

Section 15(2) of the Act may still come to the plaintiff's aid in respect of the same properties. But she appears to have jumped the gun. The provision will operate, and in favour of the plaintiff, if the first defendant dies intestate. The plaintiff then, as the best-placed heir of the first defendant's husband, would be entitled to launch this claim. If, however, the first defendant chooses to gift or sell or bequeath or otherwise deal with the properties that she has inherited from her father-in-law, the plaintiff has only to sit by and ponder as to what could have been.

There can be no impediment to the first defendant dealing with the Rashbehari property in its entirety and in the first defendant dealing with her undivided share in the Dharamtala and Deogarh properties that devolved on her from her father-in-law. There is no serious question on such score to go to trial with the first defendant being detained during the interregnum.

GA No. 396 of 2008 succeeds. GA No. 1425 of 2006 and GA No. 3701 of 2006 are dismissed and the first defendant is left free to deal with the entirety of the estate that she inherited from her father-in-law. For the plaintiff's labour she shall pay costs assessed at 3000 GMs to the first defendant.

Urgent certified photostat copies of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Sanjib Banerjee, J.) Later:

The plaintiff seeks a stay of operation of the order which, in the light of the view taken above, ought to be declined. However, considering that the limited injunction has remained in force in respect of the Rashbehari property for nearly two years, this order will remain stayed for a fortnight.

(Sanjib Banerjee, J.)

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TARUN CHANDRA GOSWAMI AND ANR. VERSUS JOYSHREE SARMA

In the High Court of Gauhati

Crl. Rev. No. 346 of 2013

(Before Hon'ble Mr. Justice C.R. Sarma)

Tarun Chandra Goswami and Anr. ... Petitioners;

Versus

Joyshree Sarma ... Respondent.

Decided on September 4, 2013

Protection of Woman from Domestic Violence Act, 2005, S. 12 — Return of streedhan property — No notice to show-cause or any opportunity of hearing given to the husband before directing to return the streedhan property — Order regarding return of streedhan property set aside [Para 8 to 10]

Advocates who appeared in the case:

Mr. B.K. Ghose, Mr. N. Chakraborty, Mr. C. Goswami and Mr. R.D. Sarma, for the petitioners.

None appearing, for the respondent.

JUDGMENT AND ORDER

1. Heard Mr. N. Chakraborty, learned counsel, appearing for the petitioner.
2. By this application, filed under sections 397/398 and 401, Cr. PC, the petitioner, namely, Sri Tarun Chandra Goswami, who is the husband of the respondent, has challenged the judgment and order, dated 7.8.2013, passed by the learned Sessions Judge, Darrang, Mangaldai, whereby the learned Sessions Judge set aside order, dated 27.5.2013, passed by the learned Judicial Magistrate 1st Class, Darrang, Mangaldai, in MR Case No. 157/2013, with regard to the payment of interim maintenance allowance and upheld the order, passed by the learned Judicial Magistrate 1st Class regarding return of streedhan property.
3. The respondent, claiming to be the wife of the petitioner No. 1, filed an application under section 12 of Protection of Woman from Domestic Violence Act, 2005 ('the Act') seeking relief under sections 19, 20 and 22 of the Act. On receipt of the said application, the learned Judicial Magistrate 1st Class, Darrang, by the impugned order, dated 27.5.2013, passed in MR Case No. 157/2013, granted ex parte monetary relief of Rs. 1,500 per month each in favour of the wife respondent and her minor child. The learned Magistrate, by the said order, also directed the petitioner to return the streedhan property, mentioned in the schedule of the application.
4. Aggrieved by the said order, the husband petitioner preferred an appeal before the learned Sessions Judge, Darrang, Mangaldai, on the grounds, amongst others, that the said order was passed without giving any notice to the petitioner.

LANDMARK JUDGMENTS ON STRIDHAN

5. Having heard the learned counsel, appearing for both the parties, the learned Sessions Judge, by the impugned judgment and order, dated 7.8.2013 aforesaid, set aside the order regarding payment of monetary compensation on the ground of not giving an opportunity of being heard.
6. However, the learned Sessions Judge maintained the order regarding return of streedhan. The respondent, in her application, under section 12 of the Act annexed the list of streedhan property and on the basis of the said list, the learned trial Judge directed the petitioner to return the said streedhan property.
7. From the record, it appears that the learned Judicial Magistrate 1st Class neither issued any notice to show-cause nor gave any opportunity of being heard to the accused/petitioner before directing him to return the streedhan property, in favour of the complainant, i.e., the respondent.
8. As the learned Sessions Judge has held that the order regarding payment of monetary relief was bad for not giving an opportunity of being heard, the same order regarding return of streedhan property also cannot be maintained on the ground that no opportunity of being heard to the husband petitioner. Before issuing the said order requiring the petitioner to return the streedhan property, the learned Magistrate ought to have given an opportunity to the husband petitioner. The order dated 27.5.2013 does not reveal that there was any urgency requiring a direction for return the streedhan property, that too without issuing any notice to the husband petitioner.
9. In view of the above, in my considered opinion, for ends of justice, the accused petitioner should have been given an opportunity of hearing before passing the order for return of streedhan property. Therefore, in my considered opinion, the impugned order regarding return of streedhan property cannot be maintained. Accordingly, the said order is set aside. However, the learned Judicial Magistrate 1st Class, Darrang, Mangaldai, is directed to pass necessary order regarding payment of interim relief and return of streedhan property, after giving notice to the accused petitioner.
10. With the above this criminal revision petition is disposed of.

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SMT PRAMILA PRADHAN VERSUS SUMANTA SEKHAR PRADHAN & OTHERS

Orissa High Court

RFA NO.158 OF 2004

(Before The Hon'ble Shri Justice B.K.Nayak)

Smt. Pramila Pradhan Appellant.

Versus.

Sumanta Sekhar Pradhan & others Respondents

For Appellant : Mr. K.R. Mohapatra.

For Respondents : Mr.S.P. Raju.

From the judgment dated 27.04.2004 and part decree dated 12.05.2004 passed by Shri G. Ch. Panigrahi, Civil Judge (Senior Division), Bhanjanagar in Title Suit No.9 of 2001.

Date of Hearing : 13.08.2014

Date of Judgment: 02.09.2014

Hon'ble Mr. Justice B.K.Nayak :— This appeal has been filed by the plaintiff challenging the judgment and part decree respectively dated 27.04.2004 and 12.05.2004 passed by the learned Civil Judge (Senior Division), Bhanjanagar in Title Suit No.9 of 2001.

2. The plaintiff-appellant filed the suit for partition of the suit properties and allotment of her legitimate share therein. Her case is that part of the suit properties stands recorded in the name of her mother, Sita Pradhan, which were her streedhan properties and the rest are the ancestral properties of her father, Prahalad. Prahalad and Sita had three daughters, namely, Chandrakala, Ahalya and Pramila (plaintiff) and had no male issue. Chandrakala is dead and defendant nos.3 and 2 respectively are her husband and daughter. Ahalya-defendant no.4 died during the pendency of the suit leaving behind defendant nos.4 (a) to 4(e), defendant no.7 and defendant no.1 as her sons and daughters. Defendant nos.5, 6, 8 and 9 are purchasers of some of the suit properties. It is averred by the plaintiff that during 1971, Prahalada executed an adoption deed in favour of defendant no.1 without the consent of his wife, Sita Pradhan. No adoption ceremony as required under Hindu Law was performed. Sita died in the year 1983 and Prahalad died in the year 1992. It is specifically alleged that defendant no.1 is not the adopted son of Prahalad Pradhan and Sita Pradhan, but he has sold away some lands out of the suit properties to defendant nos.5, 6 and 9 without the consent of the plaintiff and other LRs of Prahalad and Sita and, therefore, those sale deeds are void and not binding on the plaintiffs and other LRs of Prahalad. Defendant no.7 has also managed to record her name in respect of some part of the suit properties behind the back of the plaintiff. The plaintiff, therefore, sought for the relief of partition and allotment of legitimate share therein.
3. Defendant nos.2 and 3 filed a joint written statement supporting the case of the plaintiff and denying the adoption of defendant no.1 by Prahalad stating further that they had no objection for partition of the suit properties and allotment of 1/3rd share to them jointly.

4. Defendant nos.1 and 5 to 7 filed a joint statement stating that defendant no.1 was the adopted son of Prahalaad Pradhan and Sita Pradhan. He is the natural son of Ahalya Pradhan, who was the second daughter of Prahalaada Pradhan and Sit Pradhan. The adoption took place on the Sripanchamee day of the year 1965 in presence of friends and relation when defendant no.1 was only four years old. Giving and taking ceremony as well as other functions and feast were performed on the date of the adoption. Since the date of his adoption, defendant no.1 has been treated as the son of Prahalaad and Sita and is recognized as such by the plaintiff and all others. Defendant no.1 was given education by his adoptive parents and that Prahalaad has been described as the father of defendant no.1 in the records of educational Institutions. Subsequently, in the year 1971 Prahalaad executed a registered deed acknowledging previous adoption of defendant no.1 and all his daughters including the plaintiff have signed on the said deed. Prahalaad during his lifetime was managing the entire suit properties with the assistance of defendant no.1 and has gifted some of his properties to his three daughters through registered gift deeds and the daughters entered into possession of the gifted properties and therefore, they are not entitled to further share out of the suit properties. Defendant no.1 is the absolute owner of the suit properties after the death of Sita and Prahalaad and is in exclusive possession over the same. Sita Pradhan had no Streedhan Properties, but some properties were purchased in her name by Prahalaad, out of the income derived from the properties of Prahalaad, which was ancestral in nature and, therefore, the property recorded in the name of Sita Pradhan is to be treated as ancestral property of Prahalaad which devolved on defendant no.1 alone. Prahalaad and Sita had donated some lands to defendant no.7 with the knowledge of the plaintiff and her sisters and the said land now stands recorded in the name of defendant no.7, who is the owner in possession thereof. Defendant no.1 being the owner of the properties, had alienated some part of it and the purchasers are in possession over the same.

Though defendant no.4 did not file any written statement, but after her death defendant nos.4 (a) to 4 (e) adopted the written statement filed by defendant nos.1, 8 and 9.

5. On the pleadings of the parties, the trial court framed nine issues, out of which Issue Nos.4 and 5 relate to adoption of defendant no.1 by Prahalaad and Sita and the validity of the registered deed of acknowledgement of adoption. On consideration of the evidence, the trial court recorded the finding that defendant no.1 is the adopted son of Prahalaad and Sita and that the deed of acknowledgment of adoption is a valid deed. The trial court also came to hold that Prahalaad and defendant no.1 were the coparceners of the ancestral properties and all the three daughters of Prahalaad were already married and had been gifted away some of the ancestral properties. After the death of Prahalaad and Sita, defendant no.1 became the sole surviving coparcener. It was also found that during their lifetime Prahalaad and Sita gifted some lands to defendant no.7, which has been recorded in her name and that the sale of part of the suit properties made by defendant no.1 in favour of defendant nos.5 to 9 are valid. Ultimately, the trial court held that the lands recorded in the name of Sita Pradhan being her Streedhan Property shall be divided in equal shares amongst the branches of her three daughters and defendant no.1. So far as the suit ancestral properties are concerned, it was held that defendant no.1 was entitled to ten annas share by virtue of notional partition between Prahalaad and defendant no.1 on the death of Prahalaad and the plaintiff and branches of two other deceased daughters of Prahalaad are entitled to two annas share each. It was also directed that the properties already received by the plaintiff and her sisters from Prahalaad through registered gift deeds shall be adjusted towards their respective shares and the portion of the suit properties sold by defendant no.1 to defendant nos.5 to 9 shall be adjusted towards the share of defendant no.1.
6. In assailing the impugned judgment, the learned counsel for the plaintiff-appellant raises the following contentions :
- (i) that the finding of the trial court with regard to adoption of defendant no.1-Prahalaada is not correct in view of the evidence on record;

- (ii) that assuming that the defendant no.1 was the adopted son of Prahlada, in view of the amendment of Section 6 of the Hindu Succession Act in 2005, all the three daughters of Prahalaad including the plaintiff became coparceners with defendant no.1 and, therefore, the plaintiff is entitled to 1/4th share in the suit ancestral properties; and
 - (iii) that the gift in favour of the daughters by Prahalaad having been found to be valid and being not brought to the suit hotchpotch, the same cannot be adjusted towards the share of the daughters in partition.
7. Learned counsel for defendant no.1-respondent no.1, on the other hand, submits that there is no infirmity in the finding of the trial court about the adoption of defendant no.1 by Prahalaad and that devolution of ancestral properties having taken place on the death of Prahalaad in 1992 by operation of law, the amended provision of Section 6 of the Hindu Succession Act,1956 shall have no application and, therefore, the allotment of two annas share by the trial court to the plaintiff is justified.
8. With regard to the adoption of defendant no.1 by Prahalaad, it is seen that the evidence of DWs.2, 3, 4 and 5 is relevant. D.W.4 is a barber and D.W.5 is the cousin brother of Prahalaad. Both have clearly stated that Prahalaad had no male issue except three daughters including the plaintiff and so he adopted defendant no.1, natural son of Ahalya, on the Sripanchamee day in the year 1965. The adoption ceremony took place in the house of Prahalaad. The barber, priest and daughters of Prahalaad and other relatives were present, and that during the ceremony, the natural parents of defendant no.1 gave defendant no.1 in adoption and Prahalaad and Sita accepted him as their adopted son. Since the date of adoption, defendant no.1 stayed in the house of Prahalaad, who gave him education. Nothing substantial was brought out in the cross- examination of these witnesses to discredit their evidence. D.W.3 is the natural mother of defendant no.1 and the second daughter of Prahalaad. Her testimony is clear about giving defendant no.1 in adoption to Prahalaad. D.W.2 is defendant no.1 himself. He has also clearly stated about his adoption by Prahalaad. Evidence with regard to execution of the registered deed of acknowledgement of adoption of defendant no.1 in the year 1971 is quite clear to the effect that Prahalaad and all his three daughters signed on the deed. As against such evidence, the evidence of the plaintiff, who has been examined as P.W.1, is to the effect that without her knowledge Ahalya gave defendant no.1 in adoption to Prahalaad. It appears from her evidence that she was not present during the adoption ceremony. But at the same time, she did not raise any objection when she signed the deed of adoption. She states that she came to know about the adoption of defendant no.1 by Prahalaad only when she signed the adoption deed. It is also clear from her evidence that neither she nor anybody else questioned the adoption of defendant no.1 during the lifetime of Prahalaad and Sita. The evidence on record also clearly reveals that Prahalaad had gifted away some properties to all his three daughters and that defendant no.1 was staying in his house from the time of his adoption and has been looking after the properties after the death of Prahalaad. Defendant no.1 has also performed the funeral ceremony of his adoptive parents. It is thus clear from the evidence that the trial court has assessed the evidence properly and come to the right conclusion that defendant no.1 is the adopted son of Prahalaad.
9. With regard to the second contention of the learned counsel for the appellant that by virtue of amendment of Section 6 of the Hindu Succession Act,1956 in 2005, the plaintiff is entitled to 1/4th share in the suit ancestral properties, it is necessary to see the provisions of the original Section 6 and the amendment thereof effected in 2005. Section 6 of Hindu Succession Act,1956 prior to its amendment runs as under :
- "6. Devolution of interest in coparcenary property- When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act: Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative,

the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1- For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death irrespective of whether he was entitled to claim partition or not.

Explanation 2- Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

10. Section 6 of the Hindu Succession Act,1956 was in entirety substituted by Section 3 of the Hindu Succession (Amendment) Act,2005 (39 of 2005). The amended provision came into force with effect from 09.09.2005. Sub section (1) of amended Section 6, which is relevant for our purpose runs as under :
- "6. Devolution of interest in coparcenary property - (1) On and from the commencement of the Hindu Succession (Amendment) Act,2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-
- (a) by birth become a coparcener in her own right in the same manner as the son;
 - (b) have the same rights in the coparcenary property as she would have had if she had been a son;
 - (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son.

And any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub- section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th Day of December,2004."

11. Prior to enactment of Hindu Succession Act,1956, as per the old Hindu law the undivided interest of a coparcener in the Mitakshara joint family used to devolve on the surviving coparceners of the family.

Therefore, depending on the birth or death of a coparcener in the family, the interest of other surviving coparceners used to be decreased or increased, as the case may be. Section 6 of 1956 Act recognized that very principle of survivorship only with an exception to the effect that the undivided interest of the coparcener in the joint family dying intestate shall not devolved by survivorship upon the surviving members of the coparcener only if the deceased left a female relative in class-1 of the schedule of the Act or a male relative specified in that class, who claims through such female relative. The interest of such deceased coparcener was his share as per a notional partition at the time of his death as per Explanation-1 appended to Section 6 of 1956 Act. Devolution of the undivided interest of deceased coparcener takes effect immediately on his death by operation of Section 6 and the same is never postponed.

12. By virtue of 2005 amendment, Section 6 of 1956 Act has been totally substituted. Sub-section (1) of the amended Section 6 now gives the daughter of a coparcener in a Mitakshara Joint Hindu family the status of a coparcener which she did not have prior to the amendment. The Hon'ble apex Court in the case reported in (2009) 6 SCC 99: G. Sekar v. Geetha and others held as follows :

"30. Neither the 1956 Act nor the 2005 Act seeks to reopen vesting of a right where succession had already been taken place. The operation of the said statute is no doubt prospective in nature. The High Court might have committed a mistake in opining that the operation of Section 3 of the 2005 Act is retrospective in character, but, for the reasons aforementioned, it does not make any difference. What should have been held was that although it is not retrospective in nature, its application is prospective."

It is apparent from the opening words of sub section (1) of Section 6, as amended in 2005, that a daughter becomes a coparcener in the Mitakshara Joint Hindu family on and from the date of commencement of the amendment Act. Therefore, a pre-condition for the applicability of this new provision is that on the date of its commencement there must be a Mitakshara Joint Hindu family in existence. The proviso to amended sub-section (1) makes it clear that the right conferred on the daughter as a coparcener shall not affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004. This, in other words, means that where devolution of property of a deceased coparcener, has already taken place prior to the 20th day of December, 2004, such devolution would not be affected by conferment of status of coparcener on a daughter by virtue of the amendment. This view of mine gets support from a decision of the Madras High Court reported in AIR 2008 MADRAS 250: Smt. Bagirathi & Ors v. S. Manivanan & Anr. held as follows :

"13. A careful reading of Section 6 (1) read with 6 (3) of the Hindu Succession (Amendment) Act clearly indicates that a daughter can be considered as a coparcener only if her father was a coparcener at the time of coming into force of the amended provision. It is of course true that for the purpose of considering whether the father is a coparcener or not, the restricted meaning of the expression "partition" as given in the explanation is to be attributed.

14. In the present case, admittedly the father of the present petitioners had expired in 1975. Section 6(1) of the Act is prospective in the sense that a daughter is being treated as coparcener on and from the commencement of the Hindu Succession (Amendment) Act, 2005. If such provision is read along with Section 6(3), it becomes clear that if a Hindu dies after commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property shall devolve not by survivorship but by intestate succession as contemplated in the Act."

The Delhi High Court in the decision reported in AIR 2007 DELHI 254 : Brij Narain Aggarwal v. Anup Kumar Goyal & Ors. held as follows :

"8. The very opening words of S.6 (1) are "On and from..... in a Joint Hindu Family". Thus, sub-section (1) envisages existence of a Joint Hindu Family, when the amendment came into force and right of the daughter in the HUF coparcenary is to be determined if HUF is in existence. Thus, the very first condition of the application of this amended provision is that on the day when amended Act came into force, an HUF governed by Mitakshara law must be in existence. If Joint Hindu Family is in existence on that day, the daughter shall be a coparcener in the Joint Hindu Family like any other son and shall have same right in the coparcenary as that of a son and shall be subject to the same liabilities in respect of the said coparcenary property as a son would be. If no HUF is in existence on that day, when amendment came into force, the question of daughter being coparcener does not arise. "

13. In the case in hand, admittedly, Prahalad and defendant no.1 constituted a Mitakshara Joint Hindu family on the date of adoption of defendant no.1 in 1965. Undisputedly, Prahalad died in the year 1992 and his wife had pre-deceased him about ten years before and all the daughters of Prahalad including the petitioner had already gone on marriage prior to adoption of defendant no.1. On the death of Prahalad, the petitioner became the sole surviving male member and Prahalad's undivided interest in the suit coparcenary properties devolved by way of intestate succession on his legal heirs (his adopted son and three daughters) in accordance with un-amended provision of Section 6 of 1956 Act along with Explanation-1 thereof. On a notional partition taking place on the death of Prahalad in the year 1992 between him and defendant no.1, each of them would have been entitled to half share in the suit joint family properties and the half share of Prahalad would devolve in equal share on defendant no.1 and his three daughters as the daughters are Class-1 female heirs. Such devolution or disposition of property having already taken place by virtue of law existing prior to the amendment of Section 6 in 2005, such

LANDMARK JUDGMENTS ON STRIDHAN

devolution creates a vested right in the legal heirs, which cannot be re-opened after coming into force of the 2005 amendment.

14. In the aforesaid view of the matter, the decree of the trial court granting ten annas share to defendant no.1 and two annas share to each of the daughters of Prahalad or their branches including the plaintiff in the suit coparcenary properties is justified. Thus, the second contention of the learned counsel for the petitioner-appellant fails.
15. So far as the direction of the trial court for adjustment of the properties transferred by way of gift by Prahalad in favour of his daughters towards their shares is concerned, the same cannot be sustained inasmuch as the gifted properties were not the subject matter of the suit and that the daughters have already derived title to such properties. Therefore, the direction of the trial court for adjustment of the properties gifted by Prahalad to his daughters towards their shares is set aside.

The appeal is allowed only to this extent. No costs.

B.K.Nayak,J.

□□□

OTHER

LANDMARK JUDGMENTS

BHARAT KUMAR VERSUS SELMA MINI AND ANR.

IN THE HIGH COURT OF KERALA

W.P. (C) No. 33380 of 2005 (W)

(Before Hon'ble Mr. Justice Kurian Joseph and Hon'ble Mr. Justice K. Padmanabhan Nair)

Appellants: Bharat Kumar

Versus

Respondent: Selma Mini and Anr.

Decided On: 22.01.2007

For Appellant/Petitioner/Plaintiff: R. Manoj and Sindhu Manoj, Advs.

For Respondents/Defendant: Subal J. Paul and P.M. Ziraj, Advs.

Acts/Rules/Orders:

Family Courts Act, 1984 - Section 3, Family Courts Act, 1984 - Section 7, Family Courts Act, 1984 - Section 7(1); Code of Criminal Procedure, 1973 (CrPC)

Cases Referred:

Renubala Moharana v. Mina Mohanty (2004) 4 SCC 215 : 2004 (2) KLT SN 38 (SC) : AIR 2004 SC 3500

Disposition:

Petition Allowed

**Case Note:*

Family Courts Act, 1984 (Central Act 66 of 1984) - Section 7-- Jurisdiction of Family Court--Dispute as to paternity of a child born in an extramarital relationship cannot be adjudicated by Family Court-- Difference between paternity and legitimacy.

Petitioner, Respondent before Family Court, challenges jurisdiction of Family Court to entertain a petition seeking a declaration that Petitioner is the father of a child born in an extramarital relationship. Petitioner contended that the dispute is not one arising out of a matrimonial cause and hence Family Court has no jurisdiction to entertain the petition. Allowing the writ petition;

Held:

The jurisdiction conferred on the Family Court is settlement of issues arising out of marriage between husband and wife. Paternity and legitimacy are two different concepts. Paternity by itself may not, in all circumstances, be a matrimonial cause, as in the instant case. Paternity is the state or fact of being the father of a particular child. Legitimacy of a child is its right to be officially accepted as such. In the case before us the Petitioner before the Family Court, the first Respondent herein, does not have a case of marital relationship with the Petitioner herein. The case admittedly is of extramarital relationship. The dispute is with regard to the paternity of a child born in the said extramarital relationship. That is not a matter falling within the jurisdiction of the Family Court. Paternity of a child can be gone into as incidental to a dispute on the legitimacy arising only out of a claim on marital relationship between the parties. Such a question also may incidentally arise in deciding a guardianship petition. No such situation arises in this case.

JUDGMENT

Hon'ble Mr. Justice Kurian Joseph :—

1. Whether paternity of a child is an issue to be considered by the Family Court under Section 7(l)(e) of the Family Courts Act, 1984, without a matrimonial cause, is the question to be considered in this case.
2. The first respondent before the Family Court, Ernakulam, in O.P. No. 1234/2005 is the petitioner herein. The relief claimed by the first respondent herein before the Family Court reads as follows:

Therefore, it is humbly prayed that this Hon'ble Court be pleased to declare that Bharat Kumar K. Palicha (the 1st respondent) is the father of Bhagat Kumar B., aged 3 years (2nd petitioner) delivered by Selma Mini (1st petitioner) on 9th day of August 2002 at Lakshmi Hospital, Dewans Road, Ernakulam.

The second respondent is the husband of the first respondent at the relevant time. According to the first respondent she had developed extra marital relationship with the petitioner and that the child Bhagat Kumar is born in that relationship. Hence the petition for declaration that the petitioner herein is the father of the said child. The contention of the petitioner is that such a petition for deciding the paternity of a person is not maintainable before the Family Court, without a matrimonial cause.

3. The Family Courts Act, 1984 has been enacted mainly for settlement of "disputes relating to marriage and family affairs and for matters connected therewith". Section 3 deals with establishment of Family Courts for exercising the jurisdiction and powers conferred on the Courts under the Act. Section 7 deals with jurisdiction which reads as follows:

7. Jurisdiction :-- (1) Subject to the other provisions of this Act, a Family Court shall--

- (a) have and exercise all the jurisdiction exercisable by any District Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and
- (b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a District Court or, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation.-- The suits and proceedings referred to in this Sub-section are suits and proceedings of the following nature, namely:

- (a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;
- (b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
- (c) suit or proceeding between the parties to a marriage with respect, to the property of the parties or of either of them;
- (d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship.
- (e) a suit or proceeding for a declaration as to the legitimacy of any person;
- (f) a suit or proceeding for maintenance;
- (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family court also have and exercise --

- (a) the jurisdiction exercised by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and
- (b) such other jurisdiction as may be conferred on it by any other enactment.

We are concerned with explanation (e) of Section 7(1) -- for declaration as to the legitimacy of any person.

4. The jurisdiction conferred on the Family Court is settlement of issues arising out of matrimonial causes. Matrimonial cause is a cause relating to rights of marriage between husband and wife. Paternity and legitimacy are two different concepts. Paternity by itself may not, in all circumstances be a matrimonial cause, as in the instant case. Paternity is the state or fact of being the father of a particular child. Legitimacy of a child is its right to be officially accepted as such. Admittedly the petitioner is not the husband of the first respondent. According to the 1st respondent, she had only extra marital relationship with the petitioner. The second respondent herein is the husband. He did not have a case regarding legitimacy of the child.

The Family Court gets jurisdiction to go into the question of legitimacy of any person only if such a question arises in a matrimonial cause. An investigation on the paternity of a person is required only when the question of legitimacy of the person is to be decided by the Family Court. That question arises only out of a matrimonial cause where there is a claim on matrimonial relationship out of which the said person is born. It may also arise in situations covered by explanation (g) to Section 7(1), in the case of guardianship, as held by the Supreme Court in *Renubala Moharana v. Mina Mohanty* MANU/SC/0268/2004 : AIR2004SC3500 . It was also held by the Supreme Court in the said decision that the Family Court cannot entertain any proceedings for declaration as to the legitimacy of any person without any claim on marital relationship. In the case before us the petitioner before the Family Court, the first respondent herein, does not have a case of marital relationship with the petitioner herein. The case admittedly is of extra marital relationship. The dispute is with regard to the paternity of a child born in the said extra marital relationship. That is not a matter falling within the jurisdiction of the Family Court. Paternity of a child can be gone into as incidental to a dispute on the legitimacy arising only out of a claim on marital relationship between the parties. Such a question also may incidentally arise in deciding a guardianship petition. No such situation arises in this case.

5. Therefore, we allow the writ petition. O.P. No. 1234/2005 on the file of the Family Court, Ernakulam is struck off. However, we make it clear that the judgment will not stand in the way of the respondents approaching the Civil Court for the declaration on paternity.

□□□

PETER P.O. VERSUS SARA

Kerala High Court

AIR 2007 Ker 81

**(Before Hon'ble Mr. Justice V Bali, Hon'ble Mr. Justice K. Joseph and
Hon'ble Mr. Justice K. B. Nair)**

Peter P.O.

Versus

Sara

Decided on 27 September, 2006

- **A conjoint reading of section 41 (5) and Rules 25 (m) and Rule 33(3)(b) makes it crystal clear that when an abandoned child is offered for adoption, the Child Welfare Committee, which is a quasi judicial authority has to declare the child free for adoption, where-after the competent court has to pass necessary orders under section 41 allowing a child to be given in adoption**
- **It is only the Child Welfare Committee under the J.J. Act, who is authorized to declare a child free for adoption and law does not require any other agency, be it the State Council for Child Welfare or any other body, to have any say in regard to adoption.**
- **There was no scope on the part of the learned District Judge to call for a report from the Orissa State Council for Child Welfare, who in an evasive manner only stated in their report in one line that the petitioner no. 2 is not eligible to adopt two girl children under section 11 of the Hindu and Adoption and Maintenance Act, 1956**

Both the said children are in need of care and protection and as already held are required to be rehabilitated and socially reintegrated as early as possible within the period prescribed by placing them in the family by giving them in adoption to the petitioner no. 2 so that such children will feel themselves to be an integral part of the society and will not be looked down upon.

JUDGMENT

Hon'ble Mr. Justice Kurian Joseph :—

1. Adherence to precedent should be the rule and not the exception" says Benjamin N. Cardozo, Associate justice of the United States Supreme Court during 1932-38. "The labour of Judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.... We have had ten Judges, of whom only seven sit at a time. It happens again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the weekly changes in the composition of the Court were accompanied by changes in its rulings. In such circumstances there is nothing to do except to stand by the errors of our brethren of the week before, whether we relish them or not. The Nature of the judicial Process-third Indian edition-2001). In these days of frequent hesitation for the Judges to follow the track, these words of wisdom give us some good guidance. Not that there is no exception to this principle in the words of the same author, "when a rule,

after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment." With this prelude, we shall now discuss some general principles of judicial decorum and legal propriety in the background of the cases referred by a learned single Judge, despite there being binding decisions.

2. In the Family Court Revision Petition, R.P. (FC) No. 196/05, a minor child represented by her mother filed a petition before the Family Court, Ernakulam for enhancement of maintenance. The petition was dismissed for default. Steps were taken under Order IX, Rule 4 of the Code of Civil Procedure read with Section 7 of the Family Courts Act for restoration which was allowed by the order impugned in the revision petition. One of the main contentions taken in the revision petition is that in view of the Full Bench decision of this Court in Sathyabhama v. Ramachandran 1997 (2) KLT 503 : 1997 Cri LJ 4306 (FB) wherein it was held that proceedings under Chapter IX of the Code of Criminal Procedure are criminal proceedings, the restoration petition is not maintainable. It is seen that without reference to the Full Bench decision a learned single Judge of this Court in Kunhimohammed v. Nafeesa 2003 (1) KLT 364 : 2004 Cri LJ 1000 after referring to various decisions of other High Courts held that the proceedings under Section 125 of the Code of Criminal Procedure (Chapter IX) stands on a different footing and it is civil in nature. Therefore, the learned single Judge in these cases felt that there is an 'important question of law to be decided by a Larger Bench. The two relevant paragraphs in the reference order read as follows:

5. The question that arises for consideration, therefore, is, to meet the ends of justice and expediency of the proceedings under Section 125 Cr. P.C. whether a Family Court, while exercising the powers under Chapter IX of the Code of Criminal Procedure can restore a petition, which was dismissed for default, either exercising its inherent power, or applying the provisions under Section 10 of the Act.

This, in my opinion, is an important question of law, which is to be considered by a larger Bench, in view of the Full Bench decision in Sathyabhama v. Ramachandra cited above and the decisions of various other High Courts on the point. Hence, place this matter before the Hon'ble the Chief Justice for appropriate orders of posting.

3. At the outset, it has to be noted that the issue considered by the learned single Judge in Kunjimohammed's case 2004 Cri LJ 1000 (supra) had been considered by the Full Bench in Sathyabhama's case 1997 Cri LJ 4306 (supra) and it has been held by the Full Bench that (para 6 of Cri LJ):

There is a specific deeming provision which states that while exercising the jurisdiction under Section 7 (1), the Family Court shall be deemed to be a District Court or as the case may be a Subordinate Civil Court depending upon the nature of the suits or proceedings before it. There is also further deeming provision in Section 10(1) which states that while exercising jurisdiction under Section 7(1) Family Court shall be deemed to be a 'Civil Court' for the purpose of the provision of the Code and shall have all the powers of such Court. The restricted deeming provision in our view would clearly indicate that Family Court can be deemed to be a Civil Court only while exercising the jurisdiction conferred on it under Section 7(1) and disposing of suits or proceedings enumerated in the Explanation to Section 7(1), in accordance with the provision in the CPC. As a corollary we think, it must follow that while exercising jurisdiction under Section 7(2)(a) in accordance with the provisions of the Cr. P.C. Family Court cannot be deemed or treated as a Civil Court. Section 7(2)(a) of the Family Courts Act provides for the exercise of jurisdiction by the Family Court, of a Magistrate of the First Class under Chapter IX of the Cr. P.C. relating to maintenance. The provision reads as follows:

(7) Jurisdiction -- (2) Subject to the other provisions of this Act, a Family Court shall also have and exercise -

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure,

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1973 (2 of 1974)." Thus, it is patently clear that Kunhimohammed's case 2004 Cri LJ 1000 (supra) is an erroneous decision, rendered per incuriam and hence a precedent sub silentio. The same is not the law, in view of the Full Bench decision referred to above. Having come across such a decision, we overrule the decision of the learned single Judge in Kunhimohammed v. Nafeesa 2003 (1) KLT 364 : 2004 Cri LJ 1000. The proceedings for maintenance before the Family Court under Section 7(2)(a) of the Act is criminal in nature as held by the Full Bench in Sathyabhama's case 1997 Cri LJ 4306 (supra).

4. In the other set of cases, reference is on the disputed question as to whether ad valorem court-fee is payable in Land Acquisition Appeals. That also is a point no more res integra concluded by a Full Bench decision of this Court in Balakrishnan Nambiyar v. Madhavan 1979 KLT 843 : AIR 1979 Ker 40 (FB) wherein, in unequivocal terms it was held that court-fee is liable to be paid on an ad valorem basis on the compensation amount the appellant laid the claim in the appeal, under Section 51 of the Kerala High Court Fees and Suits Valuation Act, 1960. It is also to be seen that a Division Bench of this Court in Jose v. District Collector 2005 (4) KLT 207 : AIR 2006 Ker 45 after referring to the Full Bench decision in Balakrishnan Nambiyar's case (supra) has held that under Section 51 of the Kerala Court Fees and Suits Valuation Act, an appeal in terms of Section 54 of the Land Acquisition Act is chargeable with ad valorem court-fee. It is significant to note that the learned single Judge has referred to both the Full Bench as well as the Division Bench decisions referred to above, in the reference order and yet a doubt was entertained and that too in a case argued by the same learned Counsel on the very same point and lost before the Division Bench, as can be seen from the reference order itself. To quote-
 2. In a similar occasion, Adv. Mr. K. G. Balasubramanian has challenged that in a land acquisition appeal, no ad valorem court fee need be paid. Therefore, the matter was referred to the Division Bench. As per the order dated 30-8-2005, applying and accepting the principle contained in Balakrishnan Nambiyar v. Madhavan 1978 KLT 843 the Division Bench held that "the word 'awarded' occurring in Section 51 of the Court-fees Act has to be given a wide and generic sense as meaning "ordered to be paid". The Division Bench, therefore, further held that under Section 51 of the Kerala Court Fees and Suits Valuation Act, in short 'the Act', the appellant has to pay court-fee on the appeal, which shall have to be computed in terms of Article 1 in Schedule 1 of the Act." (The Division Bench order dated 30-8-2005 is the reported decision in Jose v. District Collector AIR 2006 Ker 45 (supra).
 3. When the matter came up before me, the learned Counsel submitted, relying on Section 8 of the Court Fees Act, 1870, which had been adopted in Section 61 of the Act, that the former is not a charging Section, and therefore, there being no schedule or article contained in it, no court-fee can be levied at the time of preferring a land acquisition appeal. The counsel relied on decisions reported in Aljaz Uddin v. Taxing Officer AIR 1966 Allahabad 227 : Hirji Virji Jangbari v. Government of Bombay AIR 1945 Bombay 348 : Moolesh Jain v. Imumuddin Ansari AIR 1968 Cal 364 in support of his contention which had not been considered by the Division Bench of this Court.

In that view of the matter, the learned single Judge was of the view that the issue requires consideration by a Larger Bench. The relevant paragraph 9 reads as follows:

9. Various High Courts of this Country, as discussed above, had held that Section 8 of the Court Fees Act, 1870, not being a charging section, as held in paragraph 7 in Sahadu Gangaram Bhagadi's case AIR 1971 SC 1897 supra, and there being no relevant provision for realisation of the fee, if Section 51 is construed as not a charging section, akin to that of Section 8 of the Central Act, the contention of the counsel that no court-fee is liable to be paid requires reconsideration. Therefore, despite the conclusion arrived at by a Decision Bench of this Court in Jose v. District Collector, Thrissur, as per the order dated 30-8-2005,

in an unnumbered L.A.A. I am of the opinion that the entire matter has to be gone through afresh, laying down an authoritative pronouncement on the subject.

Hence, I refer this matter for the consideration of the Honourable the Chief Justice, for placing before a Larger Bench of this Court for the discussions held above.

5. Adherence to precedents is a matter of judicial discipline. It is the linchpin of justice system. It is intended to secure uniformity and certainty on legal positions, based on the principle of judicial comity, otherwise it brings law as well as the system to disrepute, if not the Court. Thus ordinarily, a Court of coordinate jurisdiction is expected to follow the decision of a co-equal Bench. Refusal is only exception and to be exercised in exceptional circumstances, not merely because a different view is possible, but because the view expressed by the Court of coordinate jurisdiction is not merely wrong, but so clearly and seriously wrong that it cannot locally exist or when it is productive of public hardships or inconvenience, as observed by the Supreme Court in *M. Chhaganlal v. Greater Bombay Municipality* AIR 1974 SC 2009. Thus where a precedent is not followed and another decision rendered, in view of the conflicting position, the legal antinomy must be resolved by a Division Bench, Full Bench, Larger Bench, as the case may be, where one view would have to be formally overruled. Reversal occurs when the same decision is taken on appeal and is reversed by the appellate Court. Overruling occurs when the appellate Court/larger bench declares in another case that the precedent case was wrongly decided and hence not to be followed. A decision is confirmed by the appellate Court in the same case and a principle is affirmed when the same is referred before the appellate Court or before a Court consisting of larger strength in another case. Decisions of co-equal bench are either followed or distinguished. A decision is distinguished when a precedent is obnoxious or when the same is inapplicable to the fact situation arising in the case.

Thus by distinguishing the precedential value of the decision distinguished is not lost. However, as cautioned by Prof. P. J. Fitzgerald in the IVth edition of Salmond on jurisprudence, "Over-subtle distinguishing itself leads to uncertainty and brings the law into disrepute." Decisions of other Courts with persuasive force are either followed, or not followed for reasons to be noted in the judgment. Dissenting is an expression and process of disagreement with the view/reasoning in the same judgment either by the Bench partner or the minority.

6. Though there are several decisions with regard to the propriety of the single Bench and Division Bench making incompetent references to the Larger Bench, since certain fundamental questions are also raised with regard to the interpretation of Section 6 of the Kerala High Court Act, 1958, we shall examine the question on both aspects of propriety as well as legality. Section 3 of the Kerala High Court Act, to the extent reads as follows:

3. Powers of single Judge : The powers of the High Court in relation to the following matters may be exercised by a single Judge provided that the Judge before whom the matter is posted for hearing may adjourn it for being heard and determined by a Bench of two Judges. Section 4 of the Act dealing with the powers of the Bench of two Judges, to the extent relevant reads as follows:

4. Powers of a Bench of two Judges :- The powers of the High Court in relation to the following matters may be exercised by a Bench of two Judges, provided that if both Judges agree that the decision involves a question of law they may order that the matter or question of law be referred to a Full Bench....

Section 6 of the Act reads as follows:

6. Cases to be heard by Full Bench under direction by Chief Justice :- Notwithstanding anything contained in this Act, the Chief Justice may direct that any matter be heard by a Full Bench.

7. The expression 'adjourn' appearing in Section 3 has to be understood and given a narrow and restricted meaning as 'refer' as held by the Larger Bench consisting of seven Judges of this Court in the decision

reported in *Babu Premarajan v. Superintendent of Police* 2003 (3) KLT 177 : AIR 2000 Ker 417 (FB). It is also held that reasons are to be stated for such adjournment of the case by the single Judge for being heard by the Division Bench. Such a power under Section 3 is not intended to avoid an otherwise inconvenient situation requiring deeper analysis etc. lest it should amount to abdication of judicial functions as held by the Larger Bench in *Babu Premarajan's case* (supra). Merely because a question raised in a case is important, the same cannot be ordered to be placed before the Division Bench, the single Judge is empowered, expected and bound to deal with such questions also. The expression 'question of law' appearing in Section 4 in the matter of exercise of power by a Division Bench for referring a matter to the Full Bench, was considered by the Full Bench in the decision reported in *Cochin Malabar Estates and Industries v. State of Kerala* 2002 (1) KLT 588 (FB), wherein it has been held that the provision is not intended to enable the Division Bench to refer every question by agreement between the Judges to the Full Bench. On the contrary, "in our view, Section 4 of the Kerala High Court Act is intended to confer power on the Division Bench to refer a question of law to a Full Bench, where the Division Bench finds itself in a situation of being bound by the observations of an earlier Division Bench about the correctness of which it entertains serious doubt.... Another situation we may contemplate where a Division Bench may refer the matter to a Full Bench is when there are conflicting views expressed by Division Benches and the state of law has become uncertain." The Full Bench also in unmistakable terms clarified that merely because single Judge had expressed a different opinion, the Division Bench cannot refer the matter to the Full Bench. The Division Bench ought to overrule the decision, if required in such circumstances. To quote, it is an elementary proposition of the doctrine of precedents that law laid down by a single Judge is capable of being dissented from and overruled by a Division Bench. Thus, if a Division Bench comes across a proposition of law laid down by a single Judge, and if it differs therefrom nothing prevents the Division Bench from dissenting therefrom or overruling the judgment of a single Judge.

8. In *Kannappan v. R.T.O. Ernakulam* 1988 (1) KLT 902 a Division Bench of this Court considered the question as to whether the single Judge has power to refer a case to the Full Bench. It was held that, 2. There can be no "hesitation" for a single Judge to follow a Division Bench ruling binding on the single Bench for, he is bound in law to follow the Division Bench decision. The fact that the views of the learned Judge did not find acceptance at the hands of the Division Bench does not mean that whenever the identical question is raised before the learned Judge the matter has to be again referred to a Division Bench till the views of the single Judge are endorsed by a Division or Full Bench. Brought up in the highest traditions of judicial discipline, this court cannot at any time swerve from the path of judicial decorum and propriety....

4. Under Section 3 of the Kerala High Court Act, a single Judge may adjourn a case for being heard and determined by a Bench of two Judges. But a single Judge has no power to refer a case to a Full Bench for that power is expressly reserved to a Bench of two Judges under Section 4 of the Act....

Thus under Section 3 of the Kerala High Court Act, single Judge may adjourn a case for being heard and determined by a Bench of two Judges. But single Judge has no power to refer a case to the Full Bench and that power is expressly reserved to a Bench of two Judges under Section 4 of the Act. A conjoint reading of the Bench decisions in *Kannappan v. R.T.O., Ernakulam* (Division Bench) (supra), *Cochin Malabar Estates & Industries v. State of Kerala* (Full Bench) (supra) and *Babu Premarajan v. Supdt. of Police*. AIR 2000 Ker 417 (Larger Bench) (supra) the legal position is well settled that a single Judge cannot refer a matter to a Full Bench. Only in limited circumstances and that too stating the reasons thereof, a reference is competent to the Division Bench. Except in such a situation, a single Bench is normally bound by the decision of another single Bench and definitely bound by the Division Bench and Larger Bench decisions of the same Court. At the risk of redundancy we may state that merely because a learned single Judge/Division Bench entertains another view or merely because another view is possible, the judgment shall not be distinguished. If the situation is so compelling, a reference for reasons and coining the question to be decided

in reference can be made. It may be fruitful to note that the reference Court is free to answer the question and send back the case for appropriate orders on merits. The Supreme Court as early as in 1960, had occasion to deal with the issue. In *Mahadeolal v. Administrator General of W. B.* AIR 1960 SC 936 it has been held as follows (para 19):

We have noticed with some regret that when the earlier decision of two Judges of the same High Court in *Deorajin's case*, 58 Cal WN 64 : AIR 1954 Cal 119 was cited before the learned Judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring the question to a larger Bench. Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all Courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court.

In *Tribhuvandas Purshottamdas Thakkar v. Ratilal Patel* AIR 1968 SC 372 the Supreme Court held thus (Para 8):

Precedents which enunciate rules of law form the foundation of administration of justice under our system. It has been held time and again that a single Judge of a High Court is ordinarily bound to accept as correct judgments of Courts of Co-ordinate jurisdiction and of Division Benches and of the Full Benches of his Court and of this Court. The reason of the rule which makes a precedent binding lies in the desire to secure uniformity and certainty in the law.

To quote Blackstone, It is an established rule to abide by former precedents when the same points come again into litigation : as well to keep the scale of justice even and steady and not likely to waver with every Judge's new opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter or vary from according to his private sentiments.

9. Regarding reference to larger Benches also, the Supreme Court had occasion to consider the matter, in a recent case in *Pradip Chandra Parija v. Pramod Chandra Patnaik* 2001 (10) JT (SC) 347 : AIR 2002 SC 296 wherein it has been held that whether a decision requires reconsideration is itself to be first decided by the Bench of co-equal strength. In other words, a bench of smaller strength cannot bypass the bench of larger strength and make a reference to a bench of still larger strength. To quote, para 6 of AIR:

In our view, judicial discipline and propriety demands that a bench of two learned Judges should follow a decision of a bench of three learned Judges. But if a bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If, then the bench of three learned Judges also comes to the conclusion that the earlier judgment of a bench of three learned Judges is incorrect, reference to a bench of five learned Judges is justified.

10. Section 6 of the Kerala High Court Act confers on the Chief Justice being the master of the roster, to place any case before a Full Bench. That is a power to be exercised on the administrative side. It is not

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to be invoked on a reference. The plain purpose is only to enable the Chief Justice to place any matter before the Full Bench otherwise than on a reference, in the required contingencies like public interest, the interests of administration of justice, the exigencies of administration of the institution etc. It is the absolute prerogative of the Chief Justice to distribute the work in the High Court and post any case before any Bench, subject of course to the provisions in the High Court Act. That power cannot be compelled to be invoked on a reference.

11. Accordingly, we hold that the reference in all the cases is incompetent since there are binding Full Bench and Division Bench decisions on all the points in the order of reference. It is for the single Judge to consider the matters in accordance with the principles laid down by us above and render the decision on merits. Reference is answered as above.

□□□

Reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties.

Hon'ble Mr. Justice Kurian Joseph

Transfer Petition (Civil) No. 1278 of 2016

Santhini vs. Vijaya Venketesh



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