FAMILY LAW JUDGEMENTS

2024(2)FLJ521

IN THE SUPREME COURT OF INDIA

[From BOMBAY HIGH COURT]

[Before Pamidighantam Sri Narasimha; Pankaj Mithal]

Criminal Appeal No 4003 of 2024 **dated 25/09/2024**

Kailashben Mahendrabhai Patel & Ors

Versus

State of Maharashtra & Anr

QUASHING OF FIR

Indian Penal Code, 1860 Sec. 504, Sec. 34, Sec. 498A, Sec. 323, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 482, Sec. 178, Sec. 161, Sec. 179 - Protection of Women from Domestic Violence Act, 2005 Sec. 12 - Quashing of FIR - Appeal challenged FIR and chargesheet under IPC Sec. 498A, 323, 504, 506 read with Sec. 34 - FIR involved allegations of cruelty, dowry demands, and property disputes - High Court refused to quash FIR, holding a prima facie case was made out - Appellants argued FIR lacked specific details and was filed to further a civil property dispute between complainant's husband and his family - Supreme Court noted similar allegations were dismissed in Domestic Violence case and held FIR had predominating civil nature - FIR and chargesheet quashed - Appeal Allowed

Law Point: Criminal proceedings based on vague, general allegations, especially when rooted in civil disputes, amount to abuse of process and may be quashed to prevent injustice.

Acts Referred:

Indian Penal Code, 1860 Sec. 504, Sec. 34, Sec. 498A, Sec. 323, Sec. 506

Code of Criminal Procedure, 1973 Sec. 482, Sec. 178, Sec. 161, Sec. 179

Protection of Women from Domestic Violence Act, 2005 Sec. 12

Counsel:

Abhishek Manu Singhvi, Sidharth Luthra, Shrirang B Varma, Sanjeev Despande

JUDGEMENT

Pamidighantam Sri Narasimha, J.- [1] Leave granted.

[2] This criminal appeal is against the dismissal of a petition under Section 482 of the CrPC to quash the FIR and the subsequent chargesheet against the appellants herein. By order dated 01.05.2018, this Court issued notice in the Special Leave

Petition and stayed the criminal proceedings. The short and necessary facts for disposal of this criminal appeal are as follows.

[3] Respondent no. 2 is the complainant. She was married to one Niraj Mahendrabhai Patel in 2002, and he is not a party in these proceedings. On 01.03.2013, the complainant filed a complaint, pursuant to which an FIR was registered on 25.03.2013 at P.S. Jalna, Maharashtra under Sections 498A, 323, 504, 506 read with Section 34 IPC against the appellants, who are her step motherin-law (appellant no. 1), step brother-in-law (appellant no. 2), father-in-law (appellant no. 3), and the Munim (appellant no. 4). The chargesheet in this case was filed on 30.07.2013.

[4] A precise but accurate description of the allegations in the FIR are that, i) her husband is the son of the appellant no. 3 and his late first wife. Thereafter, the appellant no. 3 married appellant no. 1 and their son is appellant no. 2. She lived with her husband, son and daughter in Mumbai, from where her husband was managing the family business by giving complete accounts to the family, ii) at the time of marriage her father gave certain articles and cash as dowry, and iii) she also held a joint locker at a bank in Anand, Gujarat with appellant no. 1, keys to which were kept by appellant no. 1 alone. iv) At the time of the birth of her daughter, which was eight years before the complaint, appellant nos. 1 and 3 visited her at the hospital and threatened to deprive her of a share in the property and refused to return the gold and silver ornaments that were kept in the locker. v) About 2-4 months after the delivery, when she returned to her matrimonial house in Mumbai, appellant nos. 1 and 3 initially refused to take her and later deprived her of food and physically assaulted her. vi) Even when her son was born, which was four years before the complaint, appellants no. 1 to 3 visited her at Jalna and threatened to deprive her and her husband any share in the property. vii) She has also alleged that appellant no. 2 hindered her daughter's education by cancelling her school admission. viii) Against appellant no. 4, who is the Munim, she has alleged that he threatened her that the family property only belongs to appellant no. 2 and that the complainant, and her husband will have no share in it. ix) Under these circumstances, being frightened, she left the house of the appellants along with her husband and children and started living in Jalna, her parental home. x) Even at Jalna, the accused persons threatened her and asked her to bring Rs. 50,00,000/- for the future of her son and daughter. There is danger to her life and also to the life of her husband and children and therefore the complaint on 01.03.2013. The FIR was registered on 25.03.2013, and chargesheet came to be filed on 30.07.2013.

[5] The appellants filed a petition under Section 482 of the CrPC, 1973 for quashing the FIR dated 25.03.2013 and the chargesheet dated 30.07.2013. By the order impugned herein, the High Court held that a prima facie case of cruelty is made out under Section 498A. The High Court also observed that the complainant specifically referred to instances of cruelty and attributed overt acts to each appellant. Rejecting the contention of the appellants that neither the Police Station, nor the Courts will have

jurisdiction, the Court held that Jalna would have jurisdiction as per Sections 178 and 179 of the CrPC as some part of the offence was committed there.

[6] The appellants have preferred the present appeal against the High Court's order. While issuing notice on 01.05.2018, this Court also stayed further proceedings.

[7] We have heard Dr Abhishek Manu Singhvi and Mr Sidharth Luthra, learned senior counsels for the appellants and Mr. Shrirang B Varma, learned counsel for the State of Maharashtra and Mr. Sanjeev Despande, learned senior counsel for respondent no. 2.

7.1 The learned senior counsels for the appellants have contended that the allegations in the FIR are general and omnibus in nature and lack material particulars bereft of any details, rendering the complaint vague and obscure. There is an existing civil dispute between the father and the son and as such this FIR is an abuse of the process of criminal law. Further, Section 161 statements of witnesses are identical and are based on information from respondent no. 2. They are vague and do not have material particulars about the date and time of the incident. Our attention is also drawn to the judgment and order dated 16.01.2019, passed by the Judicial Magistrate First Class, Jalna dismissing identical allegations, but under Section 12 of the Domestic Violence Act. On the other hand, the learned counsel for the respondent supported the decision and reasoning adopted by the High Court.

[8] Analysis: After identifying certain allegations in the Complaint/FIR, the High Court came to a quick conclusion that there are specific allegations against each of the accused. After referring to certain precedents on the scope and ambit of the power under Section 482 CrPC, the High Court came to a conclusion that exercise of power under Section 482 for quashing an FIR/Complaint is not warranted in the facts and circumstances of the case. Beyond holding that there are specific allegations, there is no other analysis. The duty of the High Court, when its jurisdiction under Section 482 CrPC or Article 226 of the Constitution is invoked on the ground that the Complaint/FIR is manifestly frivolous, vexatious or instituted with ulterior motive for wreaking vengeance, to examine the allegations with care and caution is highlighted in a recent decision of this Court in Mohammad Wajid and Another v. State of U.P. and Others,2023 SCCOnLineSC 951:

> "34. At this stage, we would like to observe something important. Whenever an accused comes before the Court invoking either the inherent powers under Section 482 of the Code of Criminal Procedure (CrPC) or extraordinary jurisdiction under Article 226 of the Constitution to get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little more closely. We say so because once the complainant decides to proceed against the accused with an ulterior

> motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under Section 482 of the CrPC or Article 226 of the Constitution need not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in the course of investigation. Take for instance the case on hand. Multiple FIRs have been registered over a period of time. It is in the background of such circumstances the registration of multiple FIRS assumes importance, thereby attracting the issue of wreaking vengeance out of private or personal grudge as alleged."

8.1 Keeping in mind the broad principle as enunciated in the above referred precedent, we will now examine the Complaint/FIR challenged by the appellants in the Section 482 proceeding.

[9] The FIR in this case is rather unique, in as much as the complainant has chosen not to involve her husband in the criminal proceedings, particularly when all the allegations relate to demand of dowry. It appears that the complainant and her husband have distributed amongst themselves, the institution of civil and criminal proceedings against the appellants. While the husband institutes the civil suit, his wife, the complainant has chosen to initiate criminal proceedings. Interestingly, there is no reference of one proceeding in the other. On 27.02.2013, the husband filed the Special Civil Suit No. 35 of 2013 in Anand against the three appellants, i.e. his father, stepmother and stepbrother seeking for a declaration that the property is ancestral in nature and that the father has no right to alienate or dispose of the property. In that suit the husband also sought a declaration that he is entitled to use the trademark of the family business. Though the written statement filed by the appellants in the suit is brought on record, we are not inclined to examine the details of the civil dispute, but suffice to note the existence of a highly contentious civil dispute between the complainant's husband at one hand and her fatherin-law and others on the other hand.

9.1 While the husband chose to institute the civil suit on 27.02.2013, the complainant filed the present criminal complaint on 01.03.2013 alleging demand of dowry and threat by appellants that she and her husband will be denied a share in the

property. The provocation for the Complaint/FIR is essentially the property dispute between father and son.

9.2 Further, the rights and claims in the suit are the very basis and provocation for filing the criminal cases. The Complaint/FIR is replete with just one theme i.e. that the appellants are threatening them that they will deny share in the property. The Complaint/FIR is intended only to further their interest of the civil dispute. In **G. Sagar Suri v. State of U.P**, 2000 2 SCC 636. this Court cautioned that:

> "8. Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence.
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> Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

9.3 The duty of the court, when FIR has predominating and overwhelming civil flavour is also reflected in the opinion of this Court in Jaswant Singh v. State of Punjab,2021 SCCOnLineSC 1007. this court observed that:

> "19. From the above discussion on the settled legal principles, it is clear from the facts of the present case that there was a clear abuse of the process of the Court and further that the Court had a duty to secure the ends of justice. We say so for the following reasons;
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> a) The allegations made in the FIR had an overwhelmingly and predominatingly a civil flavour inasmuch as the complainant alleged that he had paid money to Gurmeet Singh, the main accused to get employment for his son abroad. If Gurmeet Singh failed the complainant could have filed a suit for recovery of the amount paid for not fulfilling the promise.
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> ...
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> 20. In our considered view, the High Court erred in firstly not considering the entire material on record and further in not appreciating the fact that the dispute, if any, was civil in nature and that the complainant had already settled his score with the main accused Gurmeet Singh against whom the proceedings have been closed as far back as 26.09.2014. In this scenario, there remains no justification to continue with the proceedings against the appellant."

[10] We will now examine the 'specific allegations' in the FIR/complaint. Firstly, the complainant referred to certain items which are said to have been given by her

father at the time of marriage. These items are (i) one Scorpio car; (ii) T.V.; (iii) fridge; (iv) DVD Tape; (v) silver utensils; (vi) 100 to 150 tolas gold; (vii) and Rs. 5 lacs. This allegation relates to the year 2002 and the present complaint is of the year 2013. It is important to mention at this very stage that identical allegations in a DV case filed by the complainant were taken up at trial and the Judicial Magistrate, First Class had disbelieved the complainant's version. We will be dealing with the judgment of the Judicial Magistrate, First Class in little more detail in the succeeding paras of the judgment. The second allegation relates to a bare statement that there exists a joint locker and that the keys of the said locker are with her stepmother-in-law, that is the appellant no. 1. Even on this, the Judicial Magistrate, First Class has observed that there are no details whatsoever, about the bank or the locker.

10.1 The tendency to make general, vague, and omnibus allegation is noticed by this Court in many decisions. In Usha Chakraborty v. State of W.B.,2023 SCCOnLineSC 90. this court observed that:

> "16... the respondent alleged commission of offences under Sections 323, 384, 406, 423, 467, 468, 420 and 120B, IPC against the appellants. A bare perusal of the said allegation and the ingredients to attract them, as adverted to hereinbefore would reveal that the allegations are vague and they did not carry the essential ingredients to constitute the alleged offences.... The ingredients to attract the alleged offence referred to hereinbefore and the nature of the allegations contained in the application filed by the respondent would undoubtedly make it clear that the respondent had failed to make specific allegation against the appellants herein in respect of the aforesaid offences. The factual position thus would reveal that the genesis as also the purpose of criminal proceedings are nothing but the aforesaid incident and further that the dispute involved is essentially of civil nature. The appellants and the respondents have given a cloak of criminal offence in the issue ..."

10.2 Similarly, dealing with allegations lacking in particulars and details, in **Neelu Chopra v. Bharti**, 2009 10 SCC 184. this court observed that:

> "7. ...what strikes us is that there are no particulars given as to the date on which the ornaments were handed over, as to the exact number of ornaments or their description and as to the date when the ornaments were asked back and were refused. Even the weight of the ornaments is not mentioned in the complaint and it is a general and vague complaint that the ornaments were sometime given in the custody of the appellants and they were not returned. What strikes us more is that even in Para 10 of the complaint where the complainant says that she asked for her clothes and ornaments which were given to the accused and they refused to give these back, the date is significantly absent."

[11] The third allegation is against appellant no. 1, the mother-inlaw, who is said to have threatened the complainant when she gave birth to a girl child. The threat is that the complainant will not get her gold and silver ornaments, and her husband will not get any share in the property. The allegations are again vague, lacking in basic details. The essence of the complaint is in the alleged threat to deprive the husband any share in the property with respect to which the husband has already filed the suit for declaration.

[12] The complaint also refers to a small incident where the complainant's brother accompanied her to the matrimonial house, when the appellants no. 1 and 3 are alleged to have refused to take her back but on persuasion by her brother, she was allowed to stay. There is also a vague allegation that, when the complainant gave birth to a second child, appellants 1 and 2 came and "quarrelled" with the complainant, her brother, parents and threatened them. This Court had occasion to examine the phenomenon of general and omnibus allegations in the cases of matrimonial disputes. In Mamidi Anil Kumar Reddy v. State of A.P.,2024 SCCOnLineSC 127. this Court observed that:

> "14. ...A bare perusal of the complaint, statement of witnesses' and the charge-sheet shows that the allegations against the Appellants are wholly general and omnibus in nature; even if they are taken in their entirety, they do not prima facie make out a case against the Appellants. The material on record neither discloses any particulars of the offences alleged nor discloses the specific role/allegations assigned to any of the Appellants in the commission of the offences.
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> 15. The phenomenon of false implication by way of general omnibus allegations in the course of matrimonial disputes is not unknown to this Court. In Kahkashan Kausar alias Sonam v. State of Bihar, this Court dealt with a similar case wherein the allegations made by the complainant-wife against her inlaws u/s. 498A and others were vague and general, lacking any specific role and particulars. The court proceeded to quash the FIR against the accused persons and noted that such a situation, if left unchecked, would result in the abuse of the process of law."

[13] There is also an allegation against the appellant no. 2 about which the complainant passingly mentioned that "my daughter's education disturbed since my brother-in-law Rahul cancelled her school admission by signing fraudulently". The complaint is again silent about when such an act was done, where was it done, which was the school in which the admission was cancelled, what documents were signed for such cancellation, and what is fraud played by him. It is impossible to conceive of any offence on the basis of such vague and unclear allegations. Lastly, there is an allegation against the appellant no. 4, the Munim against whom it is said "Vijay Ranchhodbhai Patel is telling stories to my in-laws against me, my husband and my children and making them to mentally torture us". The Munim is said to have

threatened them and ask them to go away as there is nothing left for them as the entire property belongs to Rahul, appellant no. 2.

13.1 In **Kahkashan Kausar v. State of Bihar**, 2022 6 SCC 599. this Court noticed the injustice that may be caused when parties are forced to go through tribulations of a trial based on general and omnibus allegations. The relevant portion of the observation is as under:

> "11. ...in recent times, matrimonial litigation in the country has also increased significantly and there is a greater disaffection and friction surrounding the institution of marriage, now, more than ever. This has resulted in an increased tendency to employ provisions such as Section 498-A IPC as instruments to settle personal scores against the husband and his relatives.
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> 18. ... upon a perusal of the contents of the FIR dated 1-4- 2019, it is revealed that general allegations are levelled against the appellants. The complainant alleged that "all accused harassed her mentally and threatened her of terminating her pregnancy". Furthermore, no specific and distinct allegations have been made against either of the appellants herein i.e. none of the appellants have been attributed any specific role in furtherance of the general allegations made against them. This simply leads to a situation wherein one fails to ascertain the role played by each accused in furtherance of the offence. The allegations are, therefore, general and omnibus and can at best be said to have been made out on account of small skirmishes... However, as far as the appellants are concerned, the allegations made against them being general and omnibus, do not warrant prosecution.
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> 21. ...it would be unjust if the appellants are forced to go through the tribulations of a trial i.e. general and omnibus allegations cannot manifest in a situation where the relatives of the complainant's husband are forced to undergo trial. It has been highlighted by this Court in varied instances, that a criminal trial leading to an eventual acquittal also inflicts severe scars upon the accused, and such an exercise must, therefore, be discouraged."

[14] One important event that gives us a clear impression that the criminal proceedings were instituted with a mala fide intention, only to harass the appellants, is the filing of the Domestic Violence case. After the institution of the Civil Case on 27.02.2013 and thereafter the present Criminal Complaint/FIR, respondent no. 2 filed a complaint under Section 12 of the Domestic Violence Act on 06.04.2013, based on similar allegations. The DV complaint refers to the same items, a Scorpio car, T.V., fridge, DVD Tape, silver articles, 100 to 150 tolas gold and cash of Rs. 5 lacs as dowry. Again, there is an allegation that the accused have threatened that she will not get a share in the property as she gave birth to a girl child. There are similar allegations against appellant no. 2 as well as the Munim, the appellant no. 4. The domestic violence complaint went to trial and culminated in a detailed judgment of the Judicial

Magistrate, First Class, Jalna dated 16.01.2019. We are informed that the judgment and order has become final as there was no appeal against the said order. While dismissing the domestic violence complaint, the learned judge observed as under:

> "19. During cross examination, the applicant admitted that the property dispute is going on in between her and respondents. Again, she voluntarily stated that the property dispute is pending in between her husband and parents in law. Moreover, the applicant appears deposed specifically that where ever Joint Bank Accounts are in the name of respondents, her and her husband, in such cases, respondents shall be prohibited from operation said accounts and she shall be allowed to operate. It further appears that the applicant family shall be provided same level of accommodation as holding by respondents.
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> 20. The above ocular evidence and admission are clearly suggesting that the applicant has brought the present application at the behest of her husband and with ulterior motive to grab property which the husband of the applicant may be entitled by other provisions of law. The wordings used in the application reveal selfish nature of the applicant. Hence, in the given circumstances, I am of opinion that it would be unsafe to rely on the sole testimony of the applicant without corroboration.
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> 21. It seems that the applicant has not brought any other cogent and reliable evidence in support of her said oral evidence. Moreover, it appears that the case filed U/s 498(A) of IPC bearing RCC No. 376/2014 is not yet concluded. There is no record showing that respondents have been held guilty till today in that matter. It means that said allegations are not yet proved and not available for corroboration purpose. Therefore, I am coming to the conclusion that there is no cogent and reliable evidence as to domestic violence and accordingly I record my finding to Point No. 1 as "No"."

[15] We are not referring to all the findings of the Court dismissing the domestic violence complaint. It is sufficient to note that identical allegations were examined in detail, subjected to strict scrutiny, and rejected as being false and untenable. This case is yet another instance of abuse of criminal process and it would not be fair and just to subject the appellants to the entire criminal law process. In Achin Gupta v. State of Haryana,2024 SCCOnLineSC 759. this court observed that:

> "20. It is now well settled that the power under Section 482 of the Cr. P.C. has to be exercised sparingly, carefully and with caution, only where such exercise is justified by the tests laid down in the Section itself. It is also well settled that Section 482 of the Cr. P.C. does not confer any new power on the High Court but only saves the inherent power, which the Court possessed before the enactment of the Criminal Procedure Code. There are three circumstances under which the inherent jurisdiction may be exercised,

namely (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and iii) to otherwise secure the ends of justice.

21. ...It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, the court would be justified to quash any proceeding if it finds that the initiation or continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

36. For the foregoing reasons, we have reached to the conclusion that if the criminal proceedings are allowed to continue against the Appellant, the same will be nothing short of abuse of process of law & travesty of justice. This is a fit case wherein, the High Court should have exercised its inherent power under Section 482 of the Cr. P.C. for the purpose of quashing the criminal proceedings."

[16] It is submitted on behalf of the respondent that after investigation, charge sheet has already been filed and that this Court should not interfere with the judgment of the High Court. The chargesheet is on record and we have examined it carefully, it simply reproduces all the wordings of the complaint. There is nothing new even after investigation, the allegations made in the FIR/complaint are exactly the allegations in the charge sheet. Even otherwise, the position of law is well entrenched. There is no prohibition against quashing of the criminal proceedings even after the charge sheet has been filed. In **Anand Kumar Mohatta v. State (NCT of Delhi)**, 2019 11 SCC 706.

"14. First, we would like to deal with the submission of the learned Senior Counsel for Respondent 2 that once the chargesheet is filed, petition for quashing of FIR is untenable. We do not see any merit in this submission, keeping in mind the position of this Court in Joseph Salvaraj A. v. State of Gujarat...

15. Even otherwise it must be remembered that the provision invoked by the accused before the High Court is Section 482 CrPC and that this Court is hearing an appeal from an order under Section 482 CrPC....

16. There is nothing in the words of this section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High Court can exercise jurisdiction under Section 482 CrPC even when the discharge application is pending with the trial court. Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered

with at the stage of FIR but not if it has advanced and the allegations have materialised into a charge-sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge-sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court."

Similar view is taken by this Court in **Joseph Salvaraj A. v. State of Gujarat**, 2011 7 SCC 59; A.M. Mohan v. State,2024 SCCOnLineSC 339; Mamta Shailesh Chandra v. State of Uttarakhand,2024 SCCOnLineSC 136.

[17] Having considered the matter in detail, we are of the opinion that none of the ingredients of Sections 498A, 323, 504, 506 read with Section 34 IPC are made out. We have no hesitation in arriving at the conclusion that if the criminal proceedings are allowed to continue against the appellants, the same will be nothing short of abuse of process of law and travesty of justice. Though the appellants have also argued on the ground that Jalna Police Station and the Chief Judicial Magistrate, Jalna did not have jurisdiction, we are not inclined to examine that position in view of our finding that the Complaint/FIR and the chargesheet cannot be sustained.

[18] For the reasons above mentioned, we allow the present appeal, set aside the impugned judgment and order of the High Court in Criminal Application No. 4015 of 2014 dated 05.05.2017, and quash FIR dated 25.03.2013 bearing Crime No. 81/2013 filed under Sections 498A, 323, 504, 506 read with Section 34 IPC at P.S. Jalna and the chargesheet dated 30.07.2013 bearing Chargesheet No. 123/2013 in the above FIR

2024(2)FLJ531

IN THE SUPREME COURT OF INDIA

[From KARNATAKA HIGH COURT]

[Before B V Nagarathna; Nongmeikapam Kotiswar Singh]

Criminal Appeal No 3989 of 2024 **dated 10/09/2024**

S Vijikumari

Versus

Mowneshwarachari C

MAINTENANCE ORDER CHALLENGE

Code of Criminal Procedure, 1973 Sec. 127, Sec. 125 - Protection of Women from Domestic Violence Act, 2005 Sec. 29, Sec. 25, Sec. 12 - Maintenance Order Challenge - Appellant challenged High Court's order remanding the case to Magistrate for reconsidering the maintenance order under Sec. 25(2) of Domestic Violence Act - Respondent claimed the order should be set aside due to misrepresentation by appellant - Court held respondent's application for revocation of maintenance was not maintainable since no change in circumstances was shown - Original order of

maintenance confirmed, respondent's application dismissed with liberty to file a fresh application in future if circumstances change - Appeal Allowed

Law Point: Applications under Sec. 25(2) of the Domestic Violence Act for revocation or modification of maintenance require proof of a change in circumstances - Previous maintenance orders cannot be set aside without such proof.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 127, Sec. 125

Code of Criminal Procedure, 1898 Sec. 489

Protection of Women from Domestic Violence Act, 2005 Sec. 29, Sec. 25, Sec. 12

Bharatiya Nagarik Suraksha Sanhita, 2023 Sec. 146

JUDGEMENT

Nagarathna, J.- [1] Leave granted.

[2] Being aggrieved by the order dated 06.04.2023 passed in Criminal Revision Petition No.674/2022 by the High Court of Karnataka at Bengaluru, the appellant who is the wife of the respondent has preferred this appeal.

[3] Briefly stated, the facts are that the appellant-wife had filed a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as "the Act"). The said petition, i.e., Criminal Miscellaneous No.6/2014 was allowed by the learned Magistrate by order dated 23.02.2015, granting Rs.12,000/- (Rupees Twelve Thousand only) per month as maintenance and Rs.1,00,000/- (Rupees One Lakh only) towards compensation. At this stage itself, it may be mentioned that the respondent-husband did not let in any evidence in the said proceeding. Being aggrieved by the order of the learned Magistrate, the respondent filed an appeal under Section 29 of the Act which was dismissed by the Appellate Court on the ground of delay. The aforesaid orders attained finality as they were not assailed by the respondent herein.

[4] Thereafter, the respondent filed an application under Section 25 of the Act before the learned Magistrate. The said application was dismissed. Being aggrieved, the respondent filed Criminal Appeal No.757/2020 under Section 29 of the Act before the Appellate Court. The said appeal was allowed and the matter was remanded to the learned Magistrate with a direction to consider the application filed by the respondent under Section 25 of the Act, by giving an opportunity to both the parties to adduce their evidence and to dispose of the same in accordance with law.

[5] Being aggrieved by the said order, the appellant herein filed Criminal Revision Petition No.674/2022 before the High Court, which, by the impugned order dated 06.04.2023 dismissed the same with a direction to the learned Magistrate to consider the application filed by the respondent under Section 25 of the Act, without being influenced by any observation made by the Appellate Court while disposing of

Criminal Appeal No.757/2020. Being aggrieved by the aforesaid orders, the appellantwife has filed this appeal.

[6] We have heard learned counsel for the respective parties at length.

[7] Learned counsel for the appellant, during the course of her submissions, drew our attention to the prayers sought for by the respondent in the application filed under Section 25 of the Act, in light of sub-section (2) of the said Section. She submitted that the application filed under the said provision could be by an aggrieved person seeking alteration, modification or revocation of any order made under the Act and for reasons to be recorded in writing, the learned Magistrate can pass such an order appropriate to the facts of the case. But in the instant case, the respondent is seeking setting aside of the order dated 23.02.2015 passed in Criminal Miscellaneous No.6/2014 and with an additional prayer for seeking return of the entire amount of maintenance paid by the respondent to the appellant on the ground of fraud. Learned counsel for the appellant submitted that such prayers are not maintainable. She contended that the aforesaid application is not for alteration, modification or revocation of an order made under the Act; it is in substance for setting aside of the order dated 23.02.2015 passed in Criminal Miscellaneous No.6/2014; that such an application is not maintainable at all.

[8] Learned counsel further submitted that the High Court as well as the Appellate Court were not right in remanding the matter to the learned Magistrate to consider the application filed by the respondent herein under sub-section (2) of Section 25 of the Act. She therefore submitted that the impugned orders may be set aside and the application filed by the respondent may be dismissed and consequently, the earlier order passed on 23.02.2015 in Criminal Miscellaneous No.6/2014 may be given effect to while sustaining the order dated 04.03.2020, by which the application under Section 25 of the Act was dismissed.

[9] Per contra, learned counsel for the respondent submitted that the reason as to why the application under Section 25 of the Act was filed was owing to the fact that the appellant herein had misrepresented the fact that she was in need of maintenance whereas she is an employed person and not at all in need of maintenance. The fact that she had said that she was unemployed goes to the root of the matter and hence, despite the order of the learned Magistrate awarding Rs.12,000/- (Rupees Twelve Thousand Only) per month as maintenance having attained finality, an application under Section 25 of the Act was filed seeking revocation of the said order and the Appellate Court as well as the High Court were justified in directing the learned Magistrate to consider the said application.

[10] We have considered the arguments advanced at the Bar in light of the facts of this case and Section 25 of the Act. For immediate reference, Section 25 of the Act is extracted as under:

"25. Duration and alteration of orders

(1) A protection order made under section 18 shall be in force till the aggrieved person applies for discharge.

(2) If the Magistrate, on receipt of an application from the aggrieved person or the respondent, is satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order made under this Act, he may, for reasons to be recorded in writing pass such order, as he may deem appropriate." On a reading of the same, it is evident that an aggrieved person or a respondent as defined under the Act can seek for alteration, modification or revocation of an order made under the provisions of the Act if there is a change in the circumstances as per sub-section (2) of Section 25 of the Act. This would indicate that after an order has been made, inter alia, under Section 12 of the Act, such as in the instant case granting Rs.12,000/- as maintenance per month, if there is any change in the circumstance, the same could be a ground for seeking alteration, modification or revocation of such an order. Such circumstances could be illustratively stated in the context of the present case as the wife on divorce having been given an alimony or the wife earning an amount higher than the respondent-husband and, therefore, not in need of maintenance or such other circumstances. The said change in the circumstance must occur only after an initial order is made under Section 12 of the Act and cannot relate to a period prior to the passing of an order under Section 12 of the Act.

[11] The Act is a piece of Civil Code which is applicable to every woman in India irrespective of her religious affiliation and/or social background for a more effective protection of her rights guaranteed under the Constitution and in order to protect women victims of domestic violence occurring in a domestic relationship.

[12] Section 25(2) of the Act contemplates an eventuality where an order passed under the Act can be altered, modified or revoked. Section 25(2) of the Act provides that the aggrieved person or the respondent, as defined under the Act, may approach the Magistrate by filing an application for alteration, modification or revocation of "any order" made under the Act. Thus, the scope of Section 25(2) of the Act is broad enough to deal with all nature of orders passed under the Act, which may include orders of maintenance, residence, protection, etc. If any such application is filed before the Magistrate by any of the two parties, i.e., the aggrieved person or the respondent, then the Magistrate may, for reasons to be recorded in writing, pass an order as he may deem appropriate. Thus, an order passed under the Act remains in force till the time that order is either set aside in an appeal under Section 29 of the Act, or altered/modified/revoked in terms of Section 25(2) of the Act by the Magistrate.

[13] However, the Magistrate while exercising his discretion under Section 25(2) of the Act has to be satisfied that a change in the circumstances has occurred, requiring to pass an order of alteration, modification or revocation. The phrase "a change in the

circumstances" has not been defined under the Act. The said phrase was present under Section 489 of the now repealed Code of Criminal Procedure, 1898, as well as under Section 127(1) of the Code of Criminal Procedure, 1973 (CrPC, 1973), now repealed, as is also found under Section 146(1) of the present Bharatiya Nagarik Suraksha Sanhita, 2023 (BNNS, 2023), but the legislature (Parliament) has intentionally not provided a definition for the same in the repealed Codes or the present Sanhita. Thus, the Magistrate has to adjudge the change in the circumstances based on the material put forth by the parties in a case and having regard to the circumstances of the said case. A change in the circumstances under the Act may be of either a pecuniary nature, such as a change in the income of the respondent or an aggrieved person or it could be a change in other circumstances of the party paying or receiving the allowance, which would justify an increase or decrease of the maintenance amount ordered by the Magistrate to pay or any other necessary change in the relief granted by the Magistrate including a revocation of the earlier order. The phrasing of the provision is wide enough to cover factors like the cost of living, income of the parties, etc. Further, a change in the circumstances need not just be of the respondent but also of the aggrieved person. For example, a change in the financial circumstances of the husband may be a vital criterion for alteration of maintenance but may also include other circumstantial changes in the husband or wife's life which may have taken place since the time maintenance was first ordered.

[14] However, for the invocation of Section 25(2) of the Act, there must be a change in the circumstances after the order being passed under the Act. Alexander Sambath Abner vs. Miron Lede,2009 SCCOnLineMad 2851 is also to the same effect. Thus, an order for alteration, modification or revocation operates prospectively and not retrospectively. Though the order for grant of a maintenance is effective retrospectively from the date of the application or as ordered by the Magistrate, the position is different with regard to an application for alteration in an allowance, which may incidentally be either an increase or a reduction - to take effect from a date on which the order of alteration is made or any other date such as from the date on which an application for alteration, modification or revocation was made depending on the facts of each case.

[15] The position is analogous to Sections 125 and 127 of the CrPC, 1973, wherein the legislature under Section 125(2) of the CrPC, 1973 had given power to the Magistrate to grant maintenance from the date of the application, but did not give any such power under Section 127 of the CrPC, 1973. Therefore, under the Act, the order of alteration or modification or revocation could operate from the date of the said application being filed or as ordered by the Magistrate under Section 25(2) of the Act. Thus, the applicant cannot seek its retrospective applicability, so as to seek a refund of the amount already paid as per the original order.

[16] The respondent herein has however sought the following prayers in the application filed under Section 25 of the Act, which read as under:

"WHEREFORE, the petitioner respectfully prays that this Hon'ble Court may be pleased to pass the following orders:

a) Set aside the order dated 23-02-2015 passed in Crl. Mis. 6/2014,

b) In pursuant of that direct the respondent to pay back the entire amount received by her by playing fraud on the court and on petitioner.

c) Direct the respondent to pay the cost of this litigation,

d) Grant such other relief or reliefs on this Hon'ble Court deem fit and proper in the circumstances of the case to meet the ends of justice."

What the respondent is seeking is in fact a setting aside of the order dated 23.02.2015 passed in Criminal Miscellaneous No.6/2014 and return of the amount paid by him to the appellant herein in terms of the said order by way of a restitution of the status quo ante.

[17] Learned counsel for the appellant rightly contended that the said order has in fact merged with the Appellate Court's order in the appeal filed by the respondent which was dismissed on the ground of delay and there being no further challenge to the said order. In fact, the order dated 23.02.2015 has attained finality. Therefore, there cannot be a setting aside of the order dated 23.02.2015 for the period prior to such an application for revocation being made. Unless there is a change in the circumstance requiring alteration, modification or revocation of the earlier order owing to a change occurring subsequent to the order being passed, the application is not maintainable. Thus, the exercise of jurisdiction under sub-section (2) of Section 25 of the Act cannot be for setting aside of an earlier order merely because the respondent seeks setting aside of that order, particularly when the said order has attained finality by its merger with an appellate order as in the instant case unless a case for its revocation is made out. Secondly, the prayers sought for by the respondent herein are for refund of the entire amount of maintenance that was paid prior to the application under sub-section (2) of Section 25 of the Act being filed and the order dated 23.02.2015 passed in Criminal Miscellaneous No.6/2014 being in fact revoked. The revocation of an order, inter alia, under Section 12 of the Act sought by a party cannot relate to a period prior to such an order being passed. We find that in the instant case the second prayer was not at all maintainable inasmuch as we have already observed that any alteration, modification or revocation of an order passed under Section 12 of the Act owing to a change in circumstances could only be for a period ex post facto, i.e., post the period of an order being made in a petition under Section 12 of the Act and not to a period prior thereto. Thus, such an application for alteration, modification or revocation filed under sub-section (2) of Section 25 of the Act cannot relate to any period prior to the order being passed, inter alia, under Section 12 of the Act.

[18] In the circumstances, we find that the prayers sought for by the respondent herein were not at all maintainable under sub-section (2) of Section 25 of the Act as they related to the period prior to 23.02.2015 when the original order was passed. In

fact, the prayers sought for by the respondent are totally contrary to the spirit of sub-section (2) of Section 25 of the Act. While making such a prayer, the respondent could not have sought in substance for setting aside of the original order dated 23.02.2015 passed in Criminal Miscellaneous No.6/2014 and seeking refund of the maintenance amount which was paid to the appellant pursuant to the said order. The respondent could not have also sought the aforesaid prayers: firstly, because he did not participate in the proceedings before the learned Magistrate; secondly, respondent belatedly filed an appeal before the Appellate Court which was dismissed and thirdly, when that appeal was dismissed on the ground of delay, he did not choose to assail the said order before a higher forum.

[19] In the circumstances, the orders of the High Court as well as the first Appellate Court are set aside and the application filed by the respondent is dismissed. However, liberty is reserved to the respondent herein to file a fresh application under Section 25 of the Act, if so advised. If such an application is filed by the respondent, the same shall be considered by the learned Magistrate having regard to the observations made above and on its own merits, which can be relatable to the period subsequent to the date of making the earlier order dated 23.02.2015 in the instant case. Any revocation of the order dated 23.02.2015 could be with effect from the date of the application, if any, to be made by the respondent herein or as ordered by the learned Magistrate.

[20] This appeal is allowed and disposed of in the aforesaid terms.

Pending application(s), if any, shall stand disposed of.

2024(2)FLJ537

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before Milind N Jadhav]

Miscellaneous Civil Application No. 252 of 2024 **dated 03/10/2024**

Sarita Rahul Sharma @ Sarita Santosh Nai

Versus

Rahul Udayraj Sharma

MATRIMONIAL CASE TRANSFER

Indian Penal Code, 1860 Sec. 498A - Hindu Marriage Act, 1955 Sec. 13 - Matrimonial Case Transfer - Appellant sought transfer of a divorce petition filed by Respondent under Sec. 13 of Hindu Marriage Act from Vasai to Bandra, citing difficulties in traveling with her infant daughter and financial constraints - Court noted appellant's severe hardship in managing travel with her child and her financial situation - Respondent's offer to cover travel expenses was deemed insensitive - Court granted the transfer and imposed Rs.1,00,000 costs on Respondent. - Petition Allowed

Law Point: In matrimonial disputes, the wife's convenience and hardships must be prioritized in transfer petitions - Financial constraints and care responsibilities for a minor child justify such transfers.

Acts Referred:

Indian Penal Code, 1860 Sec. 498A

Hindu Marriage Act, 1955 Sec. 13

Counsel:

Nazneen Contractor, R S Tripathi, Mohd Shahid

JUDGEMENT

Milind N Jadhav, J.- [1] Heard Ms. Contractor, learned Advocate for Applicant and Mr. Tripathi, learned Advocate for Respondent.

[2] This Miscellaneous Civil Application (for short **"MCA"**) is filed by Applicant - wife seeking transfer of Marriage Petition No.11 of 2024 filed by Respondent - husband in the Court of Civil Judge Senior Division, Vasai to the Family Court at Bandra, Mumbai.

[3] Applicant - wife is a resident of Mahim where she is residing with her retired father, homemaker mother and two unmarried brothers alongwith her minor daughter. The daughter is 15 months old and she is required to provide care and support for him. Presently, the expenses of the Applicant - wife and her infant / minor daughter are borne by her father and brothers.

[4] Ms. Contractor, learned Advocate for the Applicant - wife has taken me through the averments and pleadings made in the MCA and would contend that Applicant - wife is facing severe difficulty to travel from Mahim to attend the Marriage Petition proceedings in Vasai Court she spends 8 hours on an average for the traversing the distance. She would submit that it is impossible for the Applicant- wife to leave her infant / minor daughter at home and she is required to carry him alongwith her. She would submit that the said infant / minor daughter of the Applicant- wife was born prematurely, he is still bodily weak and requires regular and constant medication including substantial costs. In support of this submission, she has drawn my attention to the medical papers appended at Exhibit "C" collectively from page Nos.54 to 71 and after perusing the same, the case of Applicant- wife put forward by her Advocate cannot be disbelieved.

4.1. She would submit that Applicant's mother is old and does not keep good health, resultantly she is not in a position to provide care and support to Applicant's minor daughter, if he is left behind. In this regard, the medical papers of Applicant's mother have also been appended at Exhibit "D" collectively from page Nos.72 to 85. She would submit that for the Applicant, travelling all the way to Vasai Court is extremely difficult and traumatic.

4.2. She would submit that Applicant - wife has filed FIR under Section 498-A readwith other offences of Indian Penal Code, 1860 against Respondent - husband and his family members, inter alia, seeking return of her streedhan and articles, which is pending trial. She would submit that Respondent - husband and his family members have obtained anticipatory bail in that case.

4.3. Finally, she would submit that being completely helpless, Applicant- wife filed Petition No.E-324 of 2022 in the Family Court at Bandra, Mumbai inter alia, seeking maintenance as she has severe financial constraints to provide for herself and her infant / minor daughter. Hence, she would submit that this Court be pleased to allow the present MCA in the interest of justice.

[5] PER CONTRA, Mr. Tripathi, learned Advocate for Respondent - husband would vehemently oppose the present MCA on the ground that Applicant- wife can very well undertake the journey to Vasai which she has been attending till now and if so required, Respondent - husband would be ready and willing to bear the expenses that would be incurred by her to undertake and traverse the said distance. In the course of his reply, this Court has found that submissions advanced by Mr. Tripathi are utterly insensitive and inhumane qua the facts in the present case.

5.1. He has placed reliance on a decision of the Supreme Court in the case of **Shiv Kumari Devendra Ojha Vs. Ramajor Shitla Prasad Ojha & Ors.**, 1997 AIR(SC) 1036 and would contend that in that case the Supreme Court had rejected a similar plea of the Applicant therein seeking transfer of Succession Application when the other party had agreed to bear expenditure of travel and stay of the Applicant whenever she attended the Court. He would submit that in the present case, Respondent - husband is agreeable to bear the travel costs of the Applicant - wife and therefore the said ratio be applied in the present case.

[6] At the outset, I need to deal with this proposition which is vehemently argued by Mr. Tripathi for seeking rejection of the MCA. The cited case under reference was in respect of transfer of a Succession Application alongwith Miscellaneous Application pending in the Court of Civil Judge Senior Division, Valsad to the Civil Court in District Pratapgarh, Uttar Pradesh. It is seen that the facts in that case are entirely different from the facts in the present case. So also, the circumstances. In that case the only grievance of the Applicant was that she had great difficulty to meet the expenditure for travel from Uttar Pradesh to Valsad in Gujarat and under those circumstances the Supreme Court found that there was no justification for transferring the matter to Uttar Pradesh. The Supreme Court therefore determined and fixed an amount to be paid to the Applicant therein on each occasion in advance to enable her to travel and on that ground her transfer Application was rejected.

6.1. Such is not the case herein. This is a matrimonial dispute between husband and wife. The wife is having one infant / minor daughter to provide care and support including his medical needs. The Respondent - husband has not paid / is not paying a

single farthing to redress and ameliorate the difficulty faced by the Applicant - wife. That apart, to travel from Mahim to the Vasai Court would require the Applicant - wife to undertake the arduous journey in the local train from Mahim to Vasai Road Station, thereafter alight at Vasai Road Station and go to Vasai Road bus stand to take a bus to the Vasai Court which is situated in the interior at a distance of 6.7 kms. and would have to undertake the same journey while returning back from Vasai Court to her residence at Mahim. If Applicant - wife has to travel alongwith her infant / minor daughter, it would be all the more difficult for her to travel, since boarding and alighting from the local train on the western railway corridor at any given time during the day is an extremely difficult proposition considering that trains are overcrowded at all times. While undertaking the train journey, Applicant - wife would have to take care of her infact / minor daughter which would add to her degree of difficulty. That apart, from Vasai Road bus station to the Court and back, there are only two modes of public transport available namely the MSRTC buses which are always overcrowded and in the alternate auto-rickshaws which ply the said distance at an exorbitant cost.

6.2. In that view of the matter there is no comparison for applying the ratio of the Supreme Court in the case of Shiv Kumari Devendra Ojha (first supra) to the present case even if the husband agrees to bear the expenditure of travel of the Applicant - wife which is of no solace to her. Hence, the ratio of that decision cannot be ipso facto applied to the present case.

[7] Next, Mr. Tripathi has placed a decision of this Court passed by learned Single Judge (Coram: S. B. Shukre, J) in the case of **Supriya Vs. Kamlesh**, 2017 5 MhLJ 642 to contend that lack of funds and inconvenience by itself cannot be sufficient grounds for allowing transfer of proceedings. I have perused the said decision. It is seen that in the said case, the husband was suffering from a medical ailment and that was one of the reasons which persuaded the Court to reject the MCA filed by the Applicant - wife therein. However, as narrated hereinabove, the facts in the present case are completely dissimilar to the facts in the case of Supriya (second supra) which is relied upon by Mr. Tripathi.

[8] In the present case it is seen that the Respondent - husband is having three salons in Vasai and is rather earning very well. Financially, Respondent - husband is therefore well off. Merely due to that reason, Respondent - husband cannot insist that he will bear the travel cost of the Applicant - wife to attend the proceedings in Marriage Petition in Vasai. The submission made by Mr. Tripathi is without consideration of the Applicant's case altogether. Not once has Mr. Tripathi considered the fact that the Applicant - wife is required to support and care for her 15 month old infant / minor daughter and if she is to attend the proceedings in Vasai Court, how and who would take care of the child in her absence.

[9] In paragraph No.14 of the MCA, it is categorically stated by the Applicant that when she has travelled to Vasai in the past, she has spent 8 hours to and fro alongwith

her minor daughter who keeps on crying and when that happens it is very difficult to manage. It is also pleaded by Applicant - wife that requiring her to travel along with her minor daughter to the Vasai Court situated in the interior parts is an unsafe proposition. She would submit that there would be no prejudice and difficulty caused to the Respondent - husband if he is to attend the proceedings in the Family Court at Bandra as against the difficulty raised by Applicant - wife.

[10] In view of the above averments made in the MCA and the facts and circumstances in the present case, the ratio in the case of **N.C.V. Aishwarya Vs. A.S. Saravana Karthik Sha**, 2022 AIR(SC) 4318 as enumerated in paragraph Nos.9 and 10 has to be applied to the present case in favour of the Applicant- wife. The principles laid down therein with respect to matrimonial matters that whenever Courts are called upon to consider the plea of transfer, Courts have to take into consideration the economic soundness of both the parties, the social strata of the spouses and their behavioural pattern, their standard of life prior to the marriage and subsequent thereto and the circumstances of both the parties in eking out their livelihood and under whose protective umbrella they are seeking their sustenance in life squarely apply to the present case. The said principles squarely apply in favour of allowing the present MCA. As held by the Supreme Court, given the socio-economic paradigm in the Indian society, the inconvenience caused to the wife must be looked at whenever confronted with such an application for transfer.

[11] I uphold all submissions made by Ms. Contractor, learned Advocate for the Applicant - wife before me, as inconvenience caused to the Applicant - wife in the above facts of the present case is clearly evident and cannot be disregarded by the Court. Submissions made on behalf of Respondent - husband by Mr. Tripathi are rejected. Without even filing Affidavit-in-Reply to the MCA, Advocate for Respondent has successfully protracted the present MCA since April 2024. Even while conducting the matter before me, Advocate for Respondent - husband was not fair in making his submissions qua the facts of the present case on the ground of hardship.

[12] What is crucial is that the Applicant - wife due to her infant / minor daughter is undoubtedly faced with severe hardship on all counts at present. By not transferring the Application, we cannot add to the difficulty and woes of the Applicant - wife. The present MCA therefore deserves to be allowed immediately without any further delay. MCA therefore stands allowed in terms of prayer clause 'a' which reads thus:-

> "(a)That this Hon'ble Court may be pleased to transfer the marriage Petition No.11/2024 filed y/s 13(1), (i) (ia) of Hindu Marriage Act - 1955 filed and pending before the Court of Hon'ble 2 nd Joint Civil Judge Senior Division at Vasai to the Hon'ble Family Court at Bandra, Mumbai."

[13] Considering that the Respondent - husband's Advocate has argued the present MCA for a considerable length of time without even filing his Affidavit-in-Reply despite having been served as far back as in July 2024, I am not inclined to accept the

submissions made by Mr. Tripathi that the matter was referred to mediation in the interregnum and therefore the reply could not be filed. It is seen that Applicant - wife is a single mother requiring to take care of her infant / minor daughter who is born pre-term and is therefore facing constant health issues. The well-being of the daughter should undoubtedly be at the forefront and of paramount importance for the parents. However in the present case the entire responsibility is on the Applicant - mother and the Respondent - father has completely exonerated himself of his duty as a parent to the detriment of the mother and child. I can see no remorse or sympathy in the submissions made by Mr. Tripathi in the present case.

[14] Hence, in view of the above reasons, as also the fact that the Respondent - husband has vehemently contested this Application through his Advocate without even filing any Affidavit-in-Reply whatsoever, I am inclined to levy exemplary costs on the Respondent - husband of Rs.1,00,000/- to be paid to the Applicant - wife, who in my opinion has clearly endured suffering for the last 21 months from the date of birth of her daughter and further more from the date of filing of the Marriage Petition by the Respondent - husband in the Court of Civil Judge Senior Division, Vasai seeking a decree of divorce under Section 13(1)(i) and or Section 13(1)(ia) of the Hindu Marriage Act, 1955. In my opinion, Applicant - wife deserves the award of costs as it would go a long way in ameliorating her hardship and difficulty in the interest of justice.

[15] Costs as directed shall be paid by Respondent - husband to Applicant - wife within a period of two weeks from today. If the costs are not paid, the same shall be recovered as arrears of land revenue by the Collector, Palghar and paid over to the Applicant - wife. A copy of the receipt / acknowledgment of payment of costs shall be placed before the Transferee Court by the Respondent - husband.

[16] All concerned shall act on a server copy of this order.

[17] With the above directions, MCA stands allowed and disposed

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2024(2)FLJ542

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before Sharmila U Deshmukh]

First Appeal No. 1354 of 2016 **dated 01/10/2024**

Jamila Gulfam Desai; Kanij Fatima Alisaheb Mujawar; Alisaheb Sikndar Mujawar; Nayeem Alisaheb Mujawar; Sayeem Alisaheb Mujawar; Tajheen Sherkhan Pathan; Ruksana Ghudulal Bandar; Juber Abdulmujir Shile

Versus

Jamir Abdulmujir Shiledar; Khalil Kamalso Shiledar

WILL PROBATE AND ADMINISTRATION

Code of Civil Procedure, 1908 Sec. 96 - Evidence Act, 1872 Sec. 69, Sec. 68, Sec. 65 - Indian Succession Act, 1925 Sec. 232, Sec. 278, Sec. 222, Sec. 276, Sec. 2 - Will Probate and Administration - Appellant challenged the grant of Probate for a Will executed in 1956 - Appellant argued that Will was unproven due to lack of effort to trace attesting witnesses and absence of original Will - Court held secondary evidence of Will permissible as Will could not be traced, and evidence of legal heirs of the scribe and attesting witness was sufficient - Despite initial grant of Probate, Court corrected judgment, holding that only Letters of Administration with Will annexed could be granted as no executor was appointed - Appeal Dismissed

Law Point: Secondary evidence may be allowed when the original Will is lost, and if no executor is appointed, only Letters of Administration with Will annexed can be granted instead of Probate.

Acts Referred:

Code of Civil Procedure, 1908 Sec. 96

Evidence Act, 1872 Sec. 69, Sec. 68, Sec. 65

Indian Succession Act, 1925 Sec. 232, Sec. 278, Sec. 222, Sec. 276, Sec. 2

Counsel:

Chetan Patil, Ajit M Savagave, Kuldeep Nikam, Prasad Avhad, Om Latpate

JUDGEMENT

Sharmila U Deshmukh, J.- [1] The present appeal is filed under Section 96 read with Order 41 of the Code of Civil Procedure 1908 by the original Opponents against the judgment dated 29th May 2014 passed by the Civil Judge (Senior Division) Sangli, District Sangli in Miscellaneous Application No.67 of 2009 granting Probate of Will dated 30th July, 1956. For sake of convenience parties are referred to by their status before the Trial Court.

FACTUAL MATRIX:

[2] M.A. No.67 of 2009 was instituted under Sections 276 and 278 of the Indian Succession Act, 1925 by the Applicant in respect of Will dated 30th July 1956 of one Ibrahim @ Kamal Babaso Shiledar who expired on 21st February 1975. The Applicant is the grandson of deceased Ibrahim and Opponent Nos 5 10 are the family members being brothers, sisters and mother of the Applicant. The Opponent Nos 1 and 2 are children of the Applicant's deceased paternal aunt, Opponent No. 3 and 4 are the paternal aunt and paternal uncle of the Applicant respectively.

[3] The case in the Application was that the deceased Ibrahim during his lifetime had executed Will dated 30th July 1956 in respect of Annexure-A properties, which was registered at Serial No. 1249 with the Joint Sub Registrar, Miraj-1 District Sangli and noted in Index-III. At the time of death of said Ibrahim, Applicant was aged 4

years and was not aware of the execution of Will. After the death of Ibrahim, the Applicant's father and Opponent No 4 suppressed the original Will and mutated their names in the property cards. On 29th July 2005, the Applicant's father expired and while going through his documents, Applicant learnt about the registered Will dated 30th July 1956. Despite all efforts the original Will could not be found and on 15th September 2005 the Applicant obtained certified copy of the registered Will from the office of Sub Registrar, Miraj-1, District Sangli.

[4] Subsequently, the Applicant applied to the circle officer for mutating his name in the records in respect of properties mentioned in the Annexure-A to the Will in which notices were issued to the Opponents. The application came to be dismissed by the Circle Officer and then the SDO holding that the Applicant has to seek his remedies in the appropriate Court of law. As against this, Second Appeal No. 89 of 2008 was filed before the Collector which is pending.

[5] The deceased Ibrahim while executing the last Will dated 30th July 1956 was of sound and disposing mind. The attesting witnesses are Bapu Bala Jagtap and Sakha Hari Kulkarni who have signed in modi script. On 17th March 1989 Bapu Bala Jagtap expired and the other attesting witness Sakha Hari Kulkarni could not be found despite search. In Annexure A, the property was described as land Survey No.56/2, 56/1 which is now consolidated in Gat No. 233, Survey No. 80/7 consolidated in Gat No. 438 and Survey No. 341/5 consolidated in Gat No.77.

[6] The suit came to be resisted by the Opponent Nos.6 to 10 contending that the Applicant was residing with his father till 29th July, 2005 and if the Will was in the custody of his father, in the year 1975 itself the Applicant's father would have propounded the Will and mutated the name of Applicant in the revenue records. The Applicant's father had filed an application for legal heirship certificate which was granted on 31st March 1979 without production of Will. Subsequent to the death of Ibrahim in the year 1975, Mutation Entry No. 5059 was certified on 2nd November, 1988 mutating the names of legal heirs in revenue records without any objection from the Applicant's father and the Applicant had challenged the Mutation Entry before the Revenue Authorities after considerable delay about which the Deputy Collector has expressed suspicion and appeal filed before the Additional Collector has been dismissed. Since last 20 years the legal heirs of deceased Ibrahim are in occupation and cultivation of the properties to the knowledge of Applicant's father and without a declaration as to the ownership, the Letters of Administration cannot be granted. In respect of Gat No. 777 and Gat No. 898 Mutation Entry No. 2685 was certified on 24th November, 1981 bringing on record the legal heirs which has not been challenged by the Applicant's father. It was contended that after a period of 27 to 28 years, on the basis of suspicious and illegal Will no Letters of Administration can be granted to the Applicant. The original Will has not been produced and the application was opposed on ground of delay and laches.

[7] Parties went to trial. The Applicant examined himself, the son of the scribe of testamentary document, namely, Prakash Ramchandra Kulkarni (AW-2) and Sou. Prabhavati Sadashiv Kadam (AW-3) the daughter of Bapu Bala Jagtap-deceased attesting witness. The Opponents did not lead any oral evidence, however, filed on record certified copies of the relinquishment deed of the maternal aunt and the judgment and order passed by the revenue authorities in the proceedings initiated by the Applicant for recording his name on the basis of the Will.

[8] The Trial Court framed and answered the following issues:

S.N.	**Points**	**Findings.**
1.	Whether the testator was of sound and disposing state of mind when he made the Will ?	Yes.
2.	Whether the Will was duly executed and attested ?	Yes.
3.	Whether Applicant is entitled for letters of administration ?	No.
4.	What order ?	Petition is partly allowed as per final order.

[9] Broadly summarised, the findings of the Trial Court are as under:

[A] On secondary evidence:

AW-1 has specifically deposed that the original Will was not in his possession at any point of time, that he had no knowledge as to in whose possession the original document is and that he is not sure as to whether the Will has been lost or destroyed. Secondary evidence by production of certified copy of Will is allowed.

[B] On proof of execution of Will:

a] The evidence of son of scribe and the daughter of attesting witness proves the attestation and registration of the Will.

b] AW-1 has specificially deposed that the other attesting witness i.e. Sakha Hari Kulkarni could not be traced depsite search. Even the Opponents could have traced the attesting witness Sakha Hari Kulkarni to substantiate that the Applicant has deliberately not examined him which has not been done.

c] When both the attesting witnesses are not available the document has to be proved as it is an ordinary document.

[C] On the sound and disposing mind of testator:

Deceased Ibrahim had executed the Will in the year 1956. He expired in the year 1975 and in the year 1972 he had applied to the Tahsildar for deletion of the name of one Balekhan Mahammad Shiledar from the record of rights of CS No.56/2. Thus, till the year 1972 deceased Ibrahim was in fit state of mind and was performing all

ordinary functions. It can therefore be concluded that at the time of execution of Will, the deceased Ibrahim was in sound mental and physical state.

[D] On suspicious circumstances:

Delay:

a] Till the year 1976 the Applicant was residing with his father and thereafter from 1976 till 1992 he was residing separately and again with the father from 1992 till 2005. The Applicant has deposed that during this entire period his father or uncle did not inform him about the existence of Will nor they acted upon it.

b] The evidence of Applicant is that he learnt about the execution of Will from the chit found in the records of his father after his death in the year 2005.

c] Only because of delay, the Will cannot be ignored when it was found to be a genuine Will and the long standing possession of the heirs cannot come across the right of legatee flowing from the testamentary document.

d] The possibility of deliberate suppression by the father and uncle of the Applicant to secure their personal interests and the interest of other legal heirs of deceased Ibrahim cannot be ruled out.

Exclusion of other legal heirs:

The exclusion of other legal heirs without anything more cannot be a suspicious circumstance especially when the bequest is in favour of an offspring.

[F] On issuance of Probate:

a] The relief of grant of Letters of Administration cannot be granted as the properties have been administered by the legal heirs since the death of testator.

b] The Applicant is not entitled to the relief of Letters of Administration which will be in lieu of decree of possession.

SUBMISSIONS:

[10] Mr. Chetan Patil, learned counsel appearing for the Appellant would submit that the judgment is not sustainable on 3 counts. Firstly, the original Will-Deed was not produced and the ingredients of Section 65(c) of the Indian Evidence Act were not satisfied. Secondly, the Will is required to be proved as per Section 68 of the Indian Evidence Act and the daughter of the deceased attesting witness was examined and for the purpose of securing the presence of other attesting witness there are no steps which are shown to have been taken. Thirdly, Will is executed in suspicious circumstances as the properties are bequeathed in favour of only one grandson which suspicious circumstances has not been satisfactorily explained by the Applicant. Elaborating on his submissions, he canvasses that the case of Applicant was that upon the death of his father in the year 2005, while going through documents he learnt about the Will executed by Ibrahim, dated 30th July 1956 and admittedly certified copy of Will is produced and not the original Will. He would submit that in the cross-examination it

was brought on record that the Applicant has not seen the original Will nor he has called anybody to produce the same. He submits that clause (c) of Section 65 of the Indian Evidence Act permits secondary evidence where it is shown that the document is lost or destroyed. Pointing out to the findings of Trial Court, he submits that the Trial Court has held that the Applicant is not sure as to whether the Will has been lost or destroyed. He submits that as the requirements of Section 65(c) of the Indian Evidence Act are not met and it is not shown as to whether the Will is lost or destroyed, no secondary evidence could have been led.

[11] He would further submit that in respect of the attesting witnesses, the Respondent No 1 has deposed that attesting witness Sakha Hari Kulkarni was not found despite search. He submits that there is no deposition as to the efforts taken to trace the other attesting witness and in the absence of any such efforts being demonstrated, the Will cannot be held to be proved by relying upon the evidence of the daughter of deceased attesting witness.

[12] He would further submit that the Will is in respect of 3 properties and the same have been bequeathed to one grandson. He submits that the admitted position is that the wife of testator was alive and was dependent upon the testator and that in the cross examination the Applicant has admitted that there were other grandchildren also. He submits that there is no explanation as to why the Applicant had been bequeathed the property to the exclusion of wife and other heirs. He submits that it is admitted by the Applicant in the cross examination that the deceased had affection for all his children and grand children and in the year 1956, the deceased had 7 to 8 grand sons. He submits that it is further admitted that the deceased Ibrahim has not executed the Will in respect of other properties.

[13] He submits that in the application, relief sought was only about the Letters of Administration or Letters of Administration with Will annexed and no relief for Probate was sought. He submits that despite thereof, the Trial Court has granted Probate after observing that the Letters of Administration could not be granted. He submits that the relief not prayed for cannot be granted. He relies upon following case laws:

[a] **Banga Behera v. Braja Kishore Nanda**, 2007 9 SCC 728;

[b] Rakesh Mohindra v. Anta Beri,2016 SCC 483;

[c] **H. Siddiqui v. A. Ramalingam**, 2011 4 SCC 240;

[d] **Babu Singh v. Ram Sahai**, 2008 14 SCC 754;

[e] **Kavita Kanwar v. Pamela Mehta**, 2021 11 SCC 209; and

[f] **Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi**, 2010 1 SCC 234.

[14] Per contra Mr. Kuldeep Nikam, learned counsel appearing for the legal heirs of the deceased Applicant would submit that the present case is in peculiar facts where

there is considerable time gap of about 50 years from the date of execution of Will in the year 1956 till the application was filed upon discovery of the Will in the year 2005. He would further submit that the Will has been duly proved in accordance with Section 69 of the Indian Evidence Act as the legal heir of the scribe has identified the handwriting and signature of the scribe as well as the daughter of deceased attesting witness has identified the signature of attesting witness. He would further submit that the Trial Court has come to a specific finding that the testator was of fit and sound disposing mind at the time of execution of Will which fact has not been disputed by the Appellants.

[15] On the aspect of secondary evidence, he submits that the Will was a registered Will and the registration has not been disputed as held by the Trial Court in paragraph 26. He submits that the Will of the year 1956 was not traceable due to the time gap and therefore the certified copy was procured and secondary evidence was led. He would further submit that the suspicious circumstances put up by the Opponents was as regards the delay and the exclusion of other legal heirs. He submits that only 3 properties are given to the Applicant and it is the specific case of Opponents that other properties are not included on mentioned in the Will-Deed which shows that there are other properties involved which did not form part of Will.

[16] He submits that in the application the Applicant has prayed for Probate as well as the Letters of Administration which word "Probate" appears to have been scored out in the compilation of documents tendered.

[17] He would further submit that the Apex Court in the case of **Kavita Kanwar v. Pamela Mehta (supra)** relied upon by Mr. Patil has held that only because the respondent therein was not included in the process of execution of Will because of unequal distribution of assets etc., it cannot be the reason for viewing the Will with suspicion and what is required is the satisfaction of the Court that the document propounded as Will indeed signifies the last free wish and desire of testator and is duly executed in accordance with law and in such case the Will shall not be disapproved merely for one doubtful circumstance here or another factor there.

[18] In rejoinder Mr Patil submits that Section 69 of the Indian Evidence Act will not apply in the present case as it is only where the attesting witness cannot be traced despite diligent search that Section 69 the Indian Evidence Act can be applied.

POINTS FOR DETERMINATION:

[19] Following points arise for determination:

[i] Whether in the absence of deposition as regards the efforts taken to search the second attesting witness, the Will dated 30th July, 1956 executed by deceased Ibrahim could not be said to be proved.

[ii] Whether the evidence of the legal heir of one deceased attesting witness was sufficient to prove execution of the Will dated 30th July, 1956.

[iii] Whether the foundation had been laid for leading secondary evidence under Section 65(c) of Indian Evidence Act, 1872 and thus Will was proved by production of certified copy of Will dated 30th July, 1956 .

[iv] Whether the Applicant who is the propounder of the Will has discharged the burden of removing the suspicious circumstances surrounding the Will of deceased Ibrahim dated 30th July, 1956.

[v] Whether the Trial Court was right in granting Probate of the Will dated 30th July, 1956.

AS TO POINT NOS (i) AND (ii):

[20] Both the points are interlinked and are therefore considered together. The Applicant has examined the son of the scribe and the daughter of the one of the attesting witness to prove execution of the Will, both of whom were deceased. The contention of Mr. Patil is that the other attesting witness Shaka Hari Kulkarni was alive and there is no deposition to show that efforts were made to trace him.

[21] Section 68 of Indian Evidence Act, 1872 deals with proof of execution of document required by law to be attested and Section 69 governs the situation where no attesting witness is found and reads thus:

> "68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence."
>
> "69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness atleast is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

[22] The difference between Section 68 and Section 69 of Evidence Act is that in the former if there is an attesting witness alive, at least one attesting witness is required to be called to prove the execution whereas in the latter case it is must be proved that the attestation of one attesting witness at least is in his handwriting.

[23] In the present case the Applicant has deposed that the Will has been executed by his grandfather and has identified the signature of his grandfather occurring on start of page 1, end of page 2 and middle of page 3 of the Will. He has examined the son of scribe, i.e., Ramchandra Kulkarni who has admittedly expired. He has further deposed that he obtained information about the persons who have attested the Will in Modi script that one of the signature was of Sakha Hari Kulkarni and the other was of Bapu Bala Jagtap. He has further deposed that despite search he has not been able to obtain information about Sakha Hari Kulkarni. In cross examination he has deposed that he is not conversant with Modi script and obtained information about the signatures of the

attesting witness from person conversant with Modi script. He has further deposed that at that time he became aware that both the attesting witnesses have expired.

[24] In view of the deposition of the Applicant, it is evident that Section 69 of Evidence Act applies as one attesting witness has expired and other attesting witness cannot be found or is dead. It is not the case of the Opponents in the cross examination that Section 68 applies as the second attesting witness is alive. For satisfying ingredients of Section 69, it is sufficient if it is proved that the attestation of at least one attesting witness is in his handwriting. In case of **Babu Singh vs Ram Sahai**(supra), the Apex Court was concerned with the issue of Section 68 and Section 69 of Evidence Act where one attesting witness was dead and the other attesting witness was admittedly alive. As no efforts were made to compel the appearance of the second attesting witness who was admittedly alive, the Apex Court held that the Will was not proved. The facts of that case indicates that in that case Section 68 of Evidence Act was applicable as one of the attesting witness was admittedly alive. The Apex Court in that context considered that Section 69 will not apply. The said decision does not lay down any proposition of law sought to be canvassed by Mr. Patil that details of the search taken to trace the attesting witness are required to be deposed or established by the Respondent No 1. The facts of that case being clearly distinguishable are not applicable to the present case.

[25] Coming to the present case, the Will has been executed in the year 1956 and it is nobody's case that the Applicant was acquainted with the other attesting witness. The Applicant has proved the document as required by Section 69 of Indian Evidence Act, 1872 by examining the daughter of one attesting witness who has proved that the signature of attesting witness is that of her father. It is the specific case of the Applicant that despite search the other attesting witness could not be found and in the cross examination he has deposed that the other attesting witness has expired.

[26] Admittedly one attesting witness has expired and the other attesting witness was not known to the Respondent No 1 and it is suffice to depose that the person could not be traced in spite of taking efforts, in which case the provisions of Section 69 will be applicable and the attestation of atleast one attesting witness must be proved. It also needs to be noted that there was no reason for the Applicant to not take efforts to trace the other attesting witness as it would have made his task easier instead of examining the daughter of attesting witness who has expired. If the whereabouts of other attesting witness are not known to the Applicant, then it cannot be said that no efforts had been made to trace the other attesting witness.

[27] Considering the applicability of Section 69 of Evidence Act to the facts of the present case, in my view, the Will has been proved by proving the attestation of one attesting witness to be in his handwriting. Accordingly, I answer Point No (i) and (ii) in favour of the Respondent No 1.

AS TO POINT NO (iii):

[28] To address the objection of Mr. Patil that there is no foundation laid for leading secondary evidence as contemplated by Section 65(c) of the Indian Evidence Act, it will be necessary to take into consideration the time gap. The Will was executed on 30th July 1956 when the Applicant was about 4 years of age and in the application filed in the year 2009, it is the specific case of the Applicant is that it is only in the year 2005 upon the death of his father, while going through his documents, he became aware of the Will dated 30th July 1956. The original Will-Deed has not been produced by the Applicant and it is deposed that despite due search the original Will could not be found and therefore the certified copy of Will from the office of Sub Registrar Miraj No.1 District Sangli was obtained. Section 65 of Indian Evidence Act, 1872 provides for the cases in which secondary evidence may be permitted to be given of the existence, condition or contents of a document. Sub Section (c) of Section 65 reads thus:

> "(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time."

[29] Mr Patil, would lay emphasis on the observations of the Trial Court noting that the Applicant is not sure as to whether the Will is lost or destroyed to oppose applicability of Section 65(c). In the evidence the Applicant has deposed that after the death of his father on 29th July, 2005 while going through his documents he became aware of the registered Will dated 30th July, 1956. He has further deposed that despite due search the original Will was not found. It is therefore his specific case that the Original Will is not traceable. In the cross examination he has stated that he has not seen the Original Will or its photocopy. The suggestion was given to the Respondent No 1 that he has filed the present application on the basis that the original Will was in existence and has been lost, which was accepted by the Respondent No 1.

[30] Mr. Patil has not pointed out from the cross examination any admission of Applicant that he is not sure whether the original Will was lost or destroyed. On the contrary in the cross examination, it is the Opponents own case that the Applicant has filed the application on basis of certified copy of Will on an understanding that the Original Will is in existence and has been lost.

[31] Apart from the above, another reason to uphold the applicability of Sub-Section (c) of Section 65 of Indian Evidence Act, 1872 is the second clause of Section 65(c) which has been accepted by the Trial Court to admit secondary evidence. Section 65(c) of the Indian Evidence Act is not limited to cases only where the document is lost or destroyed but also applies to the cases where for any other reason the party is unable to produce the original document in reasonable time before the Court which reason is not arising from his own default or neglect. On a plain reading of Section 65(c), in my view, Section 65(c) consists of two clauses, which are independent of

each other. Where the party seeking to tender secondary evidence is unable to tender the original document as the same is lost or destroyed, the position is governed by the first clause. The second clause covers cases where the party offering evidence is unable to produce the original document within a reasonable time for any other reason "not arising from his own default or neglect". In event the first clause applies, the Court may admit the certified copy of original document as secondary evidence and where the second clause applies, the Court can allow the certified copy of the original document to be admitted into evidence on being satisfied that the non production of original document is not a result of the party's own default or neglect. In my view, in the instant case, both the clauses have been satisfied.

[32] Admittedly, in the present case the Will was not within the knowledge of Respondent No 1 and it is nobody's case that he was in possession of the original Will. In event the Applicant was in possession of the original and thereafter proposes to lead the secondary evidence then the burden would be upon him to show that the original has been lost or destroyed. The Trial Court though holding that the Applicant is not sure whether the Will has been lost or destroyed has considered the latter part of Section 65(c) of Indian Evidence Act and has permitted secondary evidence of the Original Will.

[33] In the case of **Banga Behera v. Braja Kishore Nanda** (supra) the respondent No. 1 therein had not stated how the Will was lost and after considering the provisions of Section 65(c) of the Indian Evidence Act, the Apex Court held that it was obligatory on the part of party to establish the loss of original Will beyond all reasonable doubt. The distinguishing feature in that case is that the respondent No. 1 therein had accepted in his evidence that he had obtained the registered Will from the office of Sub Registrar and after receipt of the same, he had shown it to one Sarujumani Dasi and thereafter had not tendered any explanation as to how the Will was lost and in fact had admitted that he cannot say as to where and how the original Will was lost. It was in the facts of that case the Apex Court held that it was obligatory to establish the loss of original Will beyond all reasonable doubt. In the present case it is the specific deposition that the Will was not traceable and certified copy was obtained therefore the expression "for any other reason" occurring in Section 65(c) of the Indian Evidence Act permitting the leading of secondary evidence would also apply in the present case.

[34] In **Rakesh Mohindra vs Anita Beri** (supra) the Apex Court considered Section 65 of the Indian Evidence Act and held that in cases where the original documents are not produced at anytime nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the Court to allow the party to adduce the secondary evidence. What the Apex Court has held is that the secondary evidence relating to the contents of document is inadmissible until non production of the original is accounted for so as to bring it within one or the other case provided for

in the Section. As noted above the Applicant has duly accounted for the non production of original Will permitting the leading of secondary evidence.

[35] In case of **H. Siddiqui (dead) By Lrs vs A. Ramalingam**(supra), the Apex Court was considering the issue of secondary evidence in context of denial of execution of power of attorney by one of the party and as to whether the power of attorney has been proved. In that context, the Apex Court held that mere admission of a document in evidence does not amount to its proof and admissibility of the document in secondary evidence has to be decided before making endorsement thereof. There is no quarrel with the said proposition of law, however, its relevance has not been demonstrated in the present case.

[36] Accordingly, I answer Point No (iii) in the affirmative.

AS TO POINT NO (iv):

[37] The suspicious circumstances raised by the Opponents has been summarised in paragraph 42 of the Trial Court's judgment i.e. delay of almost 50 years as Ibrahim expired in the year 1975 and no steps were taken by the Applicant or his father though they were residing together to propound the Will, there is no reason mentioned in the Will for excluding other heirs of deceased Ibrahim especially when there were other grandchildren apart from the present Applicant and that other properties are not included or mentioned in the Will.

[38] On the aspect of delay, the Applicant has specifically deposed that he became aware of the existence of the Will in the year 2005 after death of his father when he was going through his documents and thereafter certified copy was obtained. From the cross examination nothing has been pointed out to demonstrate that the Applicant was aware of the existence of the Will prior to the year 2005.

[39] Another circumstance which favours the acceptance of the explanation for delay is that there is no reason for the Applicant's father to not propound the Will on death of Ibrahim as the same would be more beneficial to the Applicant and his father by reason of bequest in favour of the Applicant. The fact that the Applicant's father did not propound the Will and instead permitted the properties to be mutated in the names of other heirs would in fact rule out the allegation of suspicious circumstances on ground of delay.

[40] In so far as the exclusion of other legal heirs is concerned, the properties bequeathed by the Will are Gat No 233, 438 and 77. In the cross examination of Applicant, the case of the Opponents is that the deceased owned properties bearing Survey No CTS No 959/1A, 959/1B, 668, 1978 and Gat No 308/1 and also CTS No 146, 446 and 680 and Gat Nos. 233, 438 and 77. Considering the specific case of the Opponents that the deceased was owner of several properties, the factum of bequest of some of the properties in favour of the Applicant cannot raise any suspicion as there were other properties for the benefit of the other legal heirs and thus there is no exclusion of other legal heirs.

[41] In **Kavita Kanwar vs Pamela Mehta** (supra), the Apex Court noted the principles summarised in **Shivakumar vs Sharanabasappa**, 2021 11 SCC 277 as under:

> "12.....12.1. Ordinarily, a Will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of Will too, the proof with mathematical accuracy is not to be insisted upon.
>
> 12.2. Since as per Section 63 of the Succession Act, a Will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.
>
> 12.3. The unique feature of a Will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last Will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a Will.
>
> 12.4. The case in which the execution of the Will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.
>
> 12.5. If a person challenging the Will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may give rise to the doubt or as to whether the Will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.
>
> 12.6. A circumstance is "suspicious" when it is not normal or is 'not normally expected in a normal situation or is not expected of a normal person'. As put by this Court, the suspicious features must be 'real, germane and valid' and not merely the 'fantasy of the doubting mind.'
>
> 12.7. As to whether any particular feature or a set of features qualify as "suspicious" would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an

unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the Will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances above-noted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the Will. On the other hand, any of the circumstance qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the Will of the testator is surrounded by suspicious circumstance(s). While applying such test, the Court would address itself to the solemn questions as to whether the testator had signed the Will while being aware of its contents and after understanding the nature and effect of the dispositions in the Will?

12.9. In the ultimate analysis, where the execution of a Will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the Court and the party which sets up the Will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the Will."

[42] The guidelines summarised above would indicate that an unfair disposition of property or unjust exclusion of the legal heirs and particularly of the dependents would amount to suspicion which depends upon the facts and circumstances of each case. In paragraph 28 the Apex Court has held as under:

"There is no doubt that any of the factors taken into account by the Trial Court and the High Court, by itself and standing alone, cannot operate against the validity of the propounded Will. That is to say that, the Will in question cannot be viewed with suspicion only because the appellant had played an active role in execution thereof though she is the major beneficiary; or only because the respondents were not included in the process of execution of the Will; or only because of unequal distribution of assets; or only because there is want of clarity about the construction to be carried out by the appellant; or only because one of the attesting witnesses being acquaintance of the appellant; or only because there is no evidence as to who drafted the printed part of the Will and the note for writing the opening and concluding passages by the testatrix in her own hand; or only because there is some discrepancy in the oral evidence led by the appellant; or only because of any other factor taken into account by the Courts or relied upon by the respondents. The relevant consideration would be about the quality and nature of each of these

> factors and then, the cumulative effect and impact of all of them upon making of the Will with free agency of the testatrix. In other words, an individual factor may not be decisive but, if after taking all the factors together, conscience of the Court is not satisfied that the Will in question truly represents the last wish and propositions of the testator, the Will cannot get the approval of the Court; and, other way round, if on a holistic view of the matter, the Court feels satisfied that the document propounded as Will indeed signifies the last free wish and desire of the testator and is duly executed in accordance with law, the Will shall not be disapproved merely for one doubtful circumstance here or another factor there."

[43] It is thus clear that individual factor may not be decisive but after all the factors are taken together if the conscience of the Court is not satisfied that the Will in question truly represents the last will of Testator, the Will cannot get approval of the Court. What is thus required is the satisfaction that the Will constitutes the last free wish and desire of the testator.

[44] In the present case, the Will has been executed in the year 1956 at the time when the Applicant was about 4 years of age and therefore there is no question of any undue influence or coercion exerted by the Applicant in execution of Will. It also cannot be stated that the Applicant's father had exerted any influence in the execution of Will for the simple reason that if that would have been the position, then the Applicant's father would have the knowledge about the Will and would have propounded the same as the same would be beneficial to the Applicant who was his son.

[45] The evidence brought by the Applicant makes it clear that he had no knowledge of the existence of the Will till the year 2005. The Will is in respect of part of the property of the deceased which he bequeaths to his grandson who at that time was about 4 four years of age. It is perfectly normal for a person to have some special affection for a particular grandson and would want to bequeath some part of his property exclusively to that grandson. In this case, considering that there were other properties left for the enjoyment of the other legal heirs, it cannot be said that there has been an unfair bequest raising suspicion about the authenticity of the Will.

[46] I have perused the Will, which is registered and has been attested by two witnesses. The testator has given the details of the properties and has further stated that the Applicant is his grandson and the property is bequeathed to him. As the Will speaks from the death of testator, heavy duty is cast upon the Court to be satisfied that the document propounded is the last Will and testament of the departed testator. In the present case, I have no doubt that the Will was the last Will and testament of the deceased Ibrahim who had made the same while in sound and disposing mind and there are no suspicious circumstances surrounding the Will. The Applicant has duly

proved the execution of the Will by examining the son of the scribe of the Will and the daughter of the attesting witness.

AS TO POINT NO (v):

[47] The contention of Mr. Patil is that a relief not prayed for has been granted by the Trial Court. Mr. Patil has tendered the certified copy of the M.A. No 67 of 2009 filed by the Applicant. To appreciate the submission of Mr. Patil, I have carefully perused the application. The title of the application shows that the application is filed under Section 276, 278 of Indian Succession Act. In paragraph 9, it is pleaded that properties in respect of which the Probate or Letters of Administration have been asked for are listed in the Annexure thereto. In paragraph 15, it is pleaded that the Applicant is ready to pay the Court fees for grant of Probate or Letters of Administration. In prayer clause (a), some words appear to have been scored off by using whitener and the prayer clause seeks letters of administration or letters of administration with Will annexed.

[48] In the impugned judgment, the Trial Court has observed that the Petition is for probate and letters of administration. While deciding Issue No 3, the Trial Court has considered whether probate or letters of administration ought to have been granted and has thereafter granted probate and rejected the prayer for Letters of Administration. The pleadings in the application when read as a whole alongwith the impugned judgment does not support the submission of Mr. Patil that no relief of grant of Probate was sought. There is nothing cogent brought to the notice of this Court that the application was restricted to grant of letters of administration. In light of the discussion above, the reliance placed by Mr.Patil on the decision of **Bharat Amratlal Kothari vs Dosukhan Samdkhan Sindhi** (supra) is clearly misplaced.

[49] Despite the above, the relief of grant of Probate needs to be interfered with for the reasons stated hereinafter. Chapter I of Part IX of Indian Succession Act, 1925 deals with grant of probate and letters of administration. The persons who can apply for grant of Probate and for Letters of Administration are set out in Section 222 and Section 232 of the Indian Succession Act, 1925 which reads thus:

> **"222. Probate only to appointed executor.-**(1) Probate shall be granted only to an executor appointed by the will.
>
> (2) The appointment may be expressed or by necessary implication."
>
> **"232. Grant of administration to universal or residuary legatees.-**
>
> When-
>
> (a) the deceased has made a will, but has not appointed an executor, or
>
> (b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or
>
> (c) the executor dies after having proved the will, but before he has administered all the estate of the deceased,

> an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered."

[50] The expression "Executor" has been defined under Section 2(c) as a person to whom the execution of the last Will of a deceased person, is by the testator's appointment, confided. The deceased Ibrahim had not appointed an executor of his Will dated 30th July, 1956. As Section 222 of Indian Succession Act, 1925 restricts the grant of Probate only to an executor granted by the Will, the Applicant was entitled to letters of administration with the Will annexed.

[51] In **Vatsala Srinivasan v. Narisimha Raghunathan**, 2011 AIR(Bom) 76, Division Bench of this Court held in paragraphs 17 & 18 as under:

> "17. Under the Indian Succession Act, 1925 the effect of the grant of letters of administration is to entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death. Under the Act, probate of a will, when granted establishes the will from the death of the testator and renders valid intermediate acts of the executor as such. Where an executor is named in the will probate can be granted only to an executor named in the will. On the other hand where the will does not appoint an executor a universal or residuary legatee may be admitted to prove the will. .....
>
> 18. Both a proceeding for the grant of probate as well as a proceeding for the grant of letters of administration with the Will annexed is initiated for protecting the interest of the legatees under the will. The essence of the enquiry in both the proceedings is the same and relates to the genuineness and authenticity of the will....."

[52] In the present case, the pleadings in the application seek both Probate or Letters of Administration. The Trial Court has failed to notice Section 222 and Section 232 of the Indian Succession Act, 1925 and has declined to grant letters of administration as the properties were being administered by the legal heirs of the deceased, their names have been recorded in record of rights and successive mutation entries have been certified. In view of the restriction under Section 222 of Succession Act, probate could not be granted to the Applicant. The Applicant was entitled to grant of Letters of Administration with Will annexed and therefore the impugned judgment will have to be modified to grant Letters of Administration with Will annexed. The Point No (v) is answered accordingly.

CONCLUSION:

[53] Having regard to the discussion above, the impugned judgment and order of the Trial Court is modified as under:

: ORDER:

(a) The impugned Judgment dated 29th May, 2014 is partly modified.

(b) The Applicant is granted Letters of Administration with Will annexed dated 30th July, 1956 of deceased Ibrahim alias Kamal Babaso Shiledar.

(c) The matter is remitted to the Trial Court only for the purpose of issuing the Letters of Administration with Will annexed in favour of the Applicant.

(d) The First Appeal stands dismissed with the above modification.

[54] At this stage, request is made for continuation of status quo order which is operating in favour of the Appellant for a period of 6 weeks. The said request is opposed. As the status quo order is operating in favour of the Appellant since long, I am inclined to continue the status quo for a period of 6 weeks from today

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2024(2)FLJ559

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before Milind N Jadhav]

Miscellaneous Civil Application No 134 of 2024 **dated 25/09/2024**

Sanjyot Nitin Telharkar

Versus

State of Maharashtra & Anr

TRANSFER OF MATRIMONIAL CASE

Hindu Marriage Act, 1955 Sec. 9 - Transfer of Matrimonial Case - Appellant sought transfer of Marriage Petition filed by Respondent under Sec. 9 of Hindu Marriage Act from Vasai to Panvel, citing health and financial difficulties - Respondent opposed, citing his mother's condition - Court held Appellant's hardships outweighed Respondent's objections - Case transferred to Civil Judge Senior Division, Panvel, noting the convenience of the wife is paramount in such transfer requests. - Petition Allowed

Law Point: In matrimonial cases, the wife's convenience takes precedence in transfer petitions - Factors such as health and financial difficulties of the wife are crucial in deciding such applications.

Acts Referred:

Hindu Marriage Act, 1955 Sec. 9

Counsel:

Amey S Ajgaonkar, Ashok S Gawai, Jayesh Gawde

JUDGEMENT

Milind N Jadhav, J.- [1] Heard Mr. Ajgaonkar, learned Advocate for Applicant, Mr. Gawde, learned Advocate for Respondent No. 2 and Mr. Gawai, learned AGP for State.

[2] At the outset, Mr. Ajgaonkar would draw my attention to prayer clause (B) of the Misc. Civil Application (MCA). He would submit that he has been appointed through Legal Aid to espouse the cause of Applicant - wife. He would submit that Applicant is residing in Kamothe near Panvel and therefore the correct jurisdictional Court for seeking transfer of Marriage Petition would be the Court of Civil Judge Senior Division at Panvel. He would submit that inadvertently when the MCA has been filed, in prayer clause (B) transfer is sought to the Family Court at Panvel. However, there is no Family Court at Panvel but there is Family Court at Belapur which is jurisdictionally a different Court. In that view of the matter, he seeks leave to amend the prayer clause (B) to amend the Application in that respect. Leave as prayed for is granted. Amendment is permitted to be carried out forthwith in the Court itself. Re-verification stands dispensed with in that view of the matter.

[3] Applicant is the wife who seeks transfer of Marriage Petition No. 71/2016 filed by Respondent - husband under Section 9 of the Hindu Marriage Act before the Civil Judge Senior Division, Vasai, Palghar to the Civil Judge Senior Division, Panvel.

[4] Applicant is residing in Kamote which is in Panvel. Respondent is a resident of Vasai. Apart from proximity of distance between the two destinations, it is seen that if the Applicant who is 53 years old and and is required to undertake the travel from Panvel to Vasai after taking break journey even if she has to travel by train or by road, she would encounter immense hardship. This Court is aware of the fact of travelling by local train in the city of Mumbai to travel the aforesaid distance between Panvel and Vasai, as also by road. Considering the difficulty that would be encountered by the Applicant and the imprimatur of the Supreme Court where convenience of the Applicant - wife will have to be looked into by the Court while considering such an Application for transfer, the hardship of the Applicant - wife is evident. It is stated in the Petition that there is an outstanding amount of Rs. 2.28 lacs due and payable to the Applicant. I am informed that in the interregnum certain cheques were paid but some of them were dishonoured. Be that as it may, it appears there is outstanding arrears. This also adds to the difficulty and hardship of the Applicant - wife. That apart medical exigency expressed by Applicant in paragraph No. 15 is also seen and considered by the Court. Further Applicant wife has filed D.V. Act proceedings which is pending in the Court of J.M.F.C. Panvel.

[5] PER CONTRA, Mr. Gawde, learned Advocate for Respondent No. 2 - husband has drawn my attention to the affidavit in reply dated 14.08.2024 and would contend that all objections against allowing the MCA are stated therein. He would submit that mother of Respondent is about 80 years old and for the last several years

suffering from paralysis and he is required to take care of her daily needs. He would submit that mother of Respondent is also having hearing deficiency which requires Respondent to take care of her and in the event if Marriage Petition is transferred out of Vasai, it would be difficult for Respondent to attend the matter in such a precarious condition. These are the only principal grounds of objection that can be seen from the affidavit in reply. All other grounds in the affidavit in reply are qua merits of the case between the parties relating to their marriage.

[6] After hearing Mr. Ajgaonkar and Mr. Gawai, learned Advocates appearing for the respective parties, I am of the clear opinion that the hardship that would be encountered by the Applicant - wife in this case would far outweigh the submissions made on behalf of Respondent. Whenever Application for transfer of the proceedings is required to be considered, the imprimatur of the Supreme Court in the case of **N.C.V Aishwarya Vs. A.S. Saravana Karthik Sha**, 2022 AIR(SC) 4318 and more specifically paragraph No. 9 thereof requires the Court to consider an array of factors impinging upon the hardship to the wife and more specifically in the prevailing socio-economic paradigm in the Indian Society, it is the wife's convenience which must be looked at while considering such a transfer. Considering that wife will have to undertake the journey between the two destinations to attend the proceedings at Vasai and back, it would undoubtedly expose her to severe hardship unlike that would be encountered by the Respondent - husband if Respondent is required to travel to Panvel. Respondent has also derelicted in not adhering to the orders passed by the Court and is admittedly in arrears of a substantial amount which adds to the hardship of the Applicant. Though that may not be a reason to be considered for transfer but still this non-payment of maintenance encounters severe difficulty to the wife who has been granted the said amount by virtue of orders passed by the Court. That apart, considering that the wife has also filed D.V. Act proceedings before the Court of JMFC, Panvel, it would be inappropriate to consider the request made by Respondent as stated in his affidavit in reply. In that view of the matter, I am not inclined to accede to the request made by Respondent and therefore present MCA deserves to be allowed in terms of prayer clause (B) which reads thus:-

> "(B) To pass an order or direction to stay and transfer the proceedings arising out of Marriage Petition No. 71/2016, Senior Division, Vasai. Mr. Nitin Telhalkar Vs. Mrs. Sanjyot Telhalkar filed by the Respondent herein under Section 9 of the Hindu Marriage Act, 1955 pending before the Hon'ble Principal Civil Judge Senior Division Court at Vasai, Palghar to be transferred to Civil Judge Senior Division at Panvel, Maharashtra."

[7] Both the concerned Courts shall take cognizance of a server copy of this order and shall not insist on a certified copy of the order and act accordingly for transfer and re-registration of the proceedings as expeditiously as possible and in any event within a period of two weeks form the date of presentation of a server copy of this order to the Courts by the Advocates for the parties.

[8] Considering that the Marriage Petition is of the year 2016 and eight years have been passed, learned Civil Judge Senior Division at Panvel is directed by this Court to expedite hearing of the Marriage Petition.

[9] During the course of arguments, Mr. Gawde would submit that both the parties are at advanced age rather have crossed their middle age, hence it would be prudent if the parties are referred for mediation since there is a realistic chance and possibility that the parties may reconcile. If that is the position, it would undoubtedly be in the interest of the parties. In view thereof, Respondent will be entitled to make an appropriate Application for seeking help of mediation before the concerned transferee Court and if any such Application is made, the same shall be considered by the said Court in accordance with law.

[10] I would like to place on record my appreciation for Advocate Mr. Ajgaonkar being appointed through Legal Aid for the Applicant who has ably assisted this Court. The Legal Services Authority shall make over the remuneration to him as per rules within a period of two weeks from today on presentation of a server copy of this order.

[11] At this stage, Mr. Ajgaonkar informs me that under the Government Resolution (for short **"GR"**) issued by the State Government pertaining to Honorarium (Professional Fees) payable to the Advocates on the Legal Aid Panel, the same stipulates different rates and categories of fee Schedule to be paid to the empanelled Advocate who is appointed through Legal Aid depending upon the trajectory and journey of the matter on the dates before the Court until it is disposed of. He would submit that the said GR clearly stipulates fees to be paid for effective and non-effective hearing before the Court with a maximum ceiling fee payable in respect of the cases heard and disposed of by the Court. However, he would submit that after the matter is over the Legal Aid Department does not adhere to the aforesaid fee structure and infact pays a lumpsum amount of Rs. 6,000/- per case to the concerned empanelled Advocate.

[12] At this stage, Mr. Bhujbal, learned Advocate sitting in the Court also interjects and seeks leave of the Court to address the Court on this issue, as this issue affects a large number of Advocates appointed through Legal Aid. This Court has permitted Mr. Bhujbal to address the Court. He has placed on record a Schedule of honorarium payable to the legal practitioners on the panel and others under Regulation 18(1) of the Maharashtra State Legal Services Authority Rules, 1998 to draw the attention of the Court to the issue raised by Mr. Ajgaonkar. He would submit that if the said chart / Schedule of fee is perused, it would be clear that fee of the Legal Aid Advocate is required to be paid as per the description of work and recommended fee Schedule stated therein. However, he would submit and join hands with Mr. Ajgaonkar to state that the said Schedule is not followed and fees are paid on a lumpsum basis at the rate of Rs. 6,000/- to the Advocate who completes the assignment of appearing

after disposal of the matter for which they are appointed through Legal Aid. I have perused the Schedule placed before me.

[13] The above issue is extremely vital and would affect a plethora of Advocates who are empanelled and appointed to represent and espouse the cause of deserving litigants through Legal Aid. Since the issue has been raised by the Advocates before me, all that I can do is to direct the concerned Legal Aid Department which is the High Court Legal Aid Services Committee to ensure that the said fee structure / Schedule of honorarium payable to the legal practitioners on the panel is followed in its true letter and spirit, if the same is not followed by them. If the fact that lumpsum payment is made to the Advocates is true, then it is extremely unfair to the Advocates who appear through Legal Aid, as from my experience of hearing matters in this Court, the Advocates appointed through Legal Aid are fully prepared on all dates of hearing and they do not seek adjournments at all. All empanelled Advocates who appear in this Court through Legal Aid perform and assist the Court to the best of their ability at all times.

[14] In that view of the matter, the grievance which is noted herein above shall be immediately looked into by the Secretary, High Court Legal Aid Services Committee, Mumbai. Request is made to the Secretary to ensure that the Schedule of fee structure is followed scrupulously and strictly in accordance with law and if any correction is required, the same shall be effected with immediate effect, in accordance with the Schedule of payment.

[15] One of the reason which compels me to pass this order is because Legal Aid is provided to litigants as an extension of access to justice to the marginalized sections of the Society and more specifically those sections which really deserve the same or otherwise they would go unrepresented in the Courts. In that view of the matter, it is our endeavour to ensure that Legal Aid empanelled Advocates who are appointed are paid the recommended fee as per the Schedule of payment according to the description of work done by them for the work done, for the effective and non-effective appearances strictly according to the Schedule, once they complete their assignment. Otherwise there will be dereliction and de-motivation on the part of the Advocates who will appear in Courts and it will percolate down to the representation for the litigants for whom they are appointed. This cannot be allowed to happen. Advocates at the bar who offer their services through Legal Aid are required to be motivated and their resolve is required to be strengthened. For this they should be paid their fees duly.

[16] For the sake of convenience, Schedule under Regulation 18(1) of the Maharashtra State Legal Services Authority Rules, 1998 which has been placed before me and also referred to and alluded to herein above is taken on record and marked "X" for identification. I am reproducing the said Schedule herein under for the benefit of the High Court Legal Aid Services Committee, Mumbai to consider the same strictly in accordance with law.

[17] A server copy of this order shall be placed before the Secretary, High Court Legal Aid Services Committee, Mumbai for information and necessary action.

[18] With the above directions, MCA is allowed and disposed.

2024(2)FLJ564

HIGH COURT OF ANDHRA PRADESH: AMARAVATI

[Before Venuthurumalli Gopala Krishna Rao]

First Appeal No 194 of 2007 **dated 24/09/2024**

P V Raghavulu S/o Mahalakshmi

Versus

Paramata Sripallavi D/o P V Raghavulu

DAUGHTER'S MAINTENANCE

Code of Criminal Procedure, 1973 Sec. 125 - Hindu Adoptions and Maintenance Act, 1956 Sec. 20 - Daughter's Maintenance - Respondent sought maintenance and marriage expenses from appellant father - Appellant contested, claiming respondent was not his legitimate daughter and her mother was a concubine - Trial court awarded Rs. 2,000 per month maintenance and marriage expenses, based on evidence of paternity - Appellant challenged the judgment - Court reduced maintenance to Rs. 1,000 per month until September 2009, when respondent secured government employment - Rs. 41,000 already paid to be deducted from arrears. - Appeal Partly Allowed

Law Point: A father is legally bound to provide maintenance to his children under Sec. 20 of the Hindu Adoptions and Maintenance Act, but maintenance can be reduced if the child becomes self-sufficient.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 125

Hindu Adoptions and Maintenance Act, 1956 Sec. 20

Counsel:

G Jayaprakash Babu, T V Jaggi Reddy, G R Sudhakar, K Satyanand

JUDGEMENT

Venuthurumalli Gopala Krishna Rao, J.- [1] The appeal is filed against the judgment and decree dated 12-12-2006 in O.S.No.35 of 2004 passed by the learned II Additional Senior Civil Judge (Fast Track Court), Rajahmundry, East Godavari District. The suit is filed for seeking **maintenance** of Rs.2,000/- per month and Rs.5,00,000/- towards marriage expenses under Section 20 of the Hindu Adoption and **Maintenance** Act, 1956, from the defendant and for a charge on the property of the defendant.

[2] The case of the plaintiff as narrated in the plaint, in brief, is as follows:

It is pleaded that the plaintiff is the daughter of the defendant born through his wife Smt. P. Vajram on 10-4-1980 and the marriage between the defendant and the plaintiff's mother had taken place about 30 years ago. Unfortunately, differences arose between them subsequent to the birth of the plaintiff and they are living apart since 1984. Ever since the plaintiff's mother brought up the plaintiff and she claimed **maintenance** for herself and children against the defendant. The plaintiff has been studying B.Sc., final year in Arts College, Rajahmundry and her mother is unable to maintain her. Now, the plaintiff is to be married. So far the defendant has not paid even a pie towards marriage expenses to the plaintiff despite plaintiff's mother protested many a times personally and through mediators. The defendant is an Ex-MLA as well as Ex-Minister and is getting pension and other allowances of Rs.20,000/- per month and also acquired several landed properties in Survey Nos.152 to 156 of Tandavapalli Village in an extent of about Ac.20-00 and also got a house bearing No.3-78 and also another land in an extent of Ac.5-00 in various Survey numbers of Tandavapalli Village and also owns another house in S.No.413/13 at Suryanagar, Amalapuram, which is worth about Rs.20 lakhs. As such, the plaintiff is constrained to file the suit against the defendant for **maintenance** as well as marriage expenses of Rs.5,00,000/-. Hence, the suit.

[3] Brief averments in the written statement filed by the defendant are as follows:

It is contended that the plaintiff's mother was concubine of the defendant long ago and there were no issues to her through the defendant. The plaintiff's mother along with her daughter, the plaintiff herein, filed a **maintenance** case against the defendant and out of humanitarian grounds, the defendant agreed to pay **maintenance** to them and accordingly paid **maintenance** to the plaintiff till she attained majority. The defendant is paying monthly **maintenance** to the plaintiff's mother. The defendant got children through his wife and he is living with them. He is getting a pension of Rs.1,200/- and he has to maintain his family. He has no movable or immovable properties. As such, the plaintiff had no cause of action for filing the suit. The plaintiff's mother got a terraced building at Vemagirigattu and Ac.1-00 of land and the plaintiff got half share in the same. He prayed to dismiss the suit.

[4] Based upon the pleadings of both the parties, the trial Court framed the following issues for trial:

(1) Whether the plaintiff is entitled for the relief of **maintenance** and marriage expenses as prayed for ?

(2) Whether the plaintiff's mother is the wife of defendant ? and

(3) To what relief ?

[5] During the course of trial, on behalf of the plaintiff, P.Ws.1 and 2 are examined and Exs.A-1 and A-2 are marked. On behalf of the defendant, D.Ws.1 and 2 are examined and Exs.B-1 to B-7 are marked.

[6] After completion of the trial and hearing the arguments of both sides, the trial Court decreed the suit with costs awarding Rs.2,000/- per month towards **maintenance** to the plaintiff payable by 5th of every succeeding month commencing from the date of filing of the suit and the defendant shall bear marriage expenses of the plaintiff at the time of her marriage.

[7] Aggrieved by the said judgment and decree of the trial Court in decreeing the suit, the defendant has preferred the present appeal.

[8] Heard Sri G.R. Sudhakar, learned counsel, representing Sri G. Jaya Prakash Babu, learned counsel for the appellant/defendant and Sri K. Satyanand, learned counsel, representing Sri T.V. Jaggi Reddy, learned counsel for the respondent/ plaintiff.

[9] The learned counsel for appellant would contend that the judgment of the Court below is contrary to law, weight of evidence and probabilities of the case and the Court below failed to consider that the appellant has contended that the respondent is not his daughter and there is no relationship of father and daughter and she is not a legal heir and is not entitled for any relief as there is no marriage between the appellant and P.W.2. He would further contend that the Court below ought to have considered that the plaintiff's mother is a concubine and there are no issues through the defendant and she lived at her choice and the defendant agreed to pay **maintenance** on humanitarian grounds and he would further contend that the trial Court came to wrong conclusion and decreed the suit and the appeal may be allowed by setting aside the judgment and decree passed by the trial Court.

[10] Per contra, the learned counsel for respondent would contend that on appreciation of the entire evidence on record, the learned trial Judge rightly decreed the suit and there is no need to interfere with the finding given by the learned trial Judge.

[11] Now, the points for determination in the present appeal are:

(1) Whether the trial Court is justified in decreeing the suit ? and

(2) To what extent ?

[12] Point No.1: Whether the trial Court is justified in decreeing the suit?

The case of the appellant/defendant is that the mother of the plaintiff was the concubine of the defendant long ago and there were no issues to her through the appellant and the mother of the plaintiff along with her daughter filed a **maintenance** case against the defendant and out of humanitarian grounds, the appellant agreed to pay **maintenance** to them and accordingly **maintenance** was paid to the plaintiff till she attained her majority and now the defendant is not paying **maintenance** to the plaintiff and the defendant is paying **maintenance** to the plaintiff's mother.

[13] The learned counsel for respondent/plaintiff would contend that the respondent is the daughter of the defendant born through his wife Vajram and the marriage between the defendant and the mother of the plaintiff had been taken place on 10-4-1980 and unfortunately differences arose between the plaintiff's mother and the defendant. He would further contend that now the plaintiff has been studying B.Sc., final year in Arts College, Rajahmundry and her mother is unable to maintain herself and now the plaintiff is to be married and so far as the defendant has not even paid a single pie towards marriage expenses of the plaintiff, despite the plaintiff's mother protested many a times personally and through mediators and that the plaintiff is constrained to file the suit.

[14] It is relevant to say that the plaintiff's mother filed a **maintenance** case against the appellant and the same was dismissed on a joint memo filed by the appellant and P.W.2 and the defendant had been undertaken to look after the welfare of P.W.2 and her children and later the **maintenance** amount was not paid to the plaintiff after she attains majority. The same is not at all disputed by the appellant herein. The contention of the appellant is also to be that since the plaintiff attained majority, he is not paying any **maintenance** to the plaintiff. As stated supra, the **maintenance** proceedings were ended with a joint memo filed by P.W.2 and the defendant, in which the defendant undertaken to pay the **maintenance** to the plaintiff herein till she attains majority and subsequently after the plaintiff attained majority, the appellant is not paying any **maintenance** to the plaintiff and that she was constrained to approach the Civil Court under Section 20 of the Hindu Adoptions and **Maintenance** Act for claiming **maintenance**.

[15] Section 20 of the Hindu Adoptions and **Maintenance** Act reads as follows:

> **"20. Maintenance of children and aged parents.-**(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.
>
> (2) A legitimate or illegitimate child may claim **maintenance** from his or her father or mother so long as the child is a minor.
>
> (3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.
>
> Explanation.-In this section "parent" includes a childless step-mother."

[16] As per the case of the plaintiff, she was totally neglected by the defendant. It is the specific case of the respondent/plaintiff that her welfare was looked after by her mother and at present she is studying B.Sc., final year and her mother is unable to maintain herself and that she filed the present suit for seeking **maintenance** from the defendant herein. It is not at all disputed that the plaintiff intended to pursue her

studies and she is unable to maintain herself, but the fact remains that the plaintiff's mother filed a **maintenance** case against the defendant and in view of the compromise between both the parties in the **maintenance** case, the defendant is paying **maintenance** to the plaintiff's mother. As noticed supra, after attaining the majority, the appellant is not paying any **maintenance** to the plaintiff and the same is admitted by the defendant himself. The paternity of the plaintiff is disputed by the appellant. The material on record shows that in Ex.A-1 Secondary School Certificate (SSC) of the plaintiff, name of the plaintiff's father is mentioned as "Sri P.V. Raghavulu" i.e., the defendant herein. The learned counsel for respondent would contend that the plaintiff has been selected in APPSC Group-II examinations and she was appointed as a Deputy Tahsildar in the month of October, 2009 and now she is working as a Tahsildar in Revenue service. A copy of the appointment order of the plaintiff is also placed on record. In the said proceedings also, the name of the plaintiff's father is shown as "P. Veera Raghavulu" i.e., the defendant herein.

[17] The plaintiff's mother is examined as P.W.2. P.W.2 is none other than the plaintiff's mother. As per her evidence, she preferred M.C.No.4 of 1988 on the file of II Additional Judicial First Class Magistrate's Court, Rajahmundry and **maintenance** was granted under Section 125 of Cr.P.C and subsequent to attaining majority by the plaintiff, the defendant is not paying **maintenance** to the plaintiff.

[18] To disprove the case of the plaintiff, the defendant relied on the evidence of D.Ws.1 and 2. D.W.1 is the defendant and D.W.2 is his wife. The evidence of D.Ws.1 and 2 goes to show that the defendant paid **maintenance** in view of the compromise in between both the parties in the **maintenance** case proceedings to P.W.2 and also paid to P.W.1 till she attained majority. The contention of the appellant is that on the advice of elders only, he agreed to pay **maintenance** to P.W.2 and also to P.W.1 till she attains majority. Admittedly, there is no evidence on record to show that on the advice of elders only, the defendant paid monthly **maintenance** to P.W.2 and her daughter till she attained majority. There is ample evidence on record to show that the defendant is paying **maintenance** to P.W.2 and also paid to P.W.1 till she attained majority and after attaining majority, the defendant is not paying monthly **maintenance** to the plaintiff which leads to institution of the suit by the plaintiff under Section 20 of the Hindu Adoptions and **Maintenance** Act. As per Section 20 of the Hindu Adoptions and **Maintenance** Act, a Hindu is legally bound to maintain his children whether legitimate or illegitimate, it is purely a moral obligation.

[19] By giving reasons, the trial Court ordered monthly **maintenance** of Rs.2,000/- per month to the plaintiff herein. As stated supra, it is brought to the notice of this Court by both the learned counsel on record that the plaintiff was selected in Group-II Service Examination conducted by the APPSC and was appointed as a Deputy Tahsildar in Revenue Service in the month of October, 2009 and now she is working as a Tahsildar. It is also not in dispute by both sides that the defendant paid an

amount of Rs.41,000/- to the plaintiff in execution proceedings towards arrears of **maintenance**. The learned counsel for appellant would contend that now the appellant/defendant is aged about 91 years and he is suffering with all old age ailments, which is not at all disputed by the learned counsel for respondent. The learned counsel for respondent would contend that the appellant is an Ex-MLA and Ex-Minister and he is liable to pay **maintenance** as ordered by the learned trial Judge till September, 2009, since the plaintiff secured employment in the month of October, 2009.

[20] As stated supra, the plaintiff is well settled now and she is working as a Gazetted Officer in Revenue Service of the State Government and the appellant is aged about 91 years, because of old age he is suffering with all old age ailments and therefore, it is desirable to modify the monthly **maintenance** of Rs.2,000/- granted by the trial Court as the plaintiff is entitled to monthly **maintenance** of Rs.1,000/- from the date of suit till September, 2009. It was admitted by both the learned counsel that the plaintiff received an amount of Rs.41,000/- towards arrears of **maintenance** from the defendant. Therefore, the said amount of Rs.41,000/- has to be deducted from out of total arrears of **maintenance** to be paid by the appellant, now modified by this Court.

[21] Point No.2:- To what extent ?

In the result, the appeal suit is partly allowed by modifying the judgment and decree dated 12-12-2006 in O.S.No.35 of 2004 passed by the trial Court as the plaintiff is entitled to monthly **maintenance** of Rs.1,000/- (Rupees one thousand only) per month from the date of filing of the suit till September, 2009 from the defendant. The rest of the judgment of the trial Court holds good. Pending applications, if any, shall stand closed. Each party is directed to bear their own costs in the appeal

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2024(2)FLJ569

IN THE HIGH COURT AT CALCUTTA

[Before Ajoy Kumar Mukherjee]

Cr R (Criminal Revision) No. 326 of 2024, 2554 of 2019 **dated 19/09/2024**

Kailash Prasad Yadav

Versus

State of West Bengal

INTERIM MAINTENANCE DISPUTE

Code of Criminal Procedure, 1973 Sec. 482, Sec. 125 - Interim Maintenance Dispute - Petitioner challenged an order granting interim maintenance to opposite party under Sec. 125 CrPC - Opposite party claimed to be the wife and provided a marriage certificate - Petitioner denied the marital relationship, stating he was already married

and had children from his first marriage - Court held that under Sec. 125, "wife" refers to a legally married wife and the petitioner raised a genuine dispute about the marriage - Court directed lower court to reassess the application after examining evidence from both parties - Interim maintenance order set aside. - Petition Allowed

Law Point: Maintenance under Section 125 CrPC can only be granted if the marital status of the claimant as a legal wife is established, even at the interim stage.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 482, Sec. 125

Counsel:

Bijay Adhikary, Sushmita Adhikari, Supriyo Ghosh, Kasiswar Ghosal, Kartik Kumar Roy

JUDGEMENT

Ajoy Kumar Mukherjee, J.- [1] The present application being CRR no. 2554 of 2019 has been preferred challenging the order dated 5th April 2019 passed by learned Judicial Magistrate, Bongaon in Misc. Case No. 161 of 2017, by which the court below has directed the petitioner to pay a sum of Rs. 4,000/- per month towards interim maintenance allowance to the opposite party no.2 herein. The other application being CRR 326 of 2024 has been preferred with a prayer for setting aside the order dated 6th January, 2024 passed by learned Judicial Magistrate Bongaon in M. Execution Case No. 54 of 2021 arising out of Misc Case No. 161 of 2017, wherein the same petitioner husband has challenged the executibality of the maintenance order passed in aforesaid Misc. Case no. 161 of 2017.

[2] The bone of contention of the petitioner in connection with the aforesaid applications is that opposite party no.2 herein, claiming herself as the wife of present petitioner preferred the aforesaid maintenance proceeding under section 125 of the Code of Criminal Procedure (in short Cr.P.C.) and the learned court below ignoring petitioners contention that opposite party no.2 herein is not the legally married wife of the petitioner, had awarded interim maintenance in favour of the opposite party no.2 herein. It is specific contention of the petitioner that the petitioner appointed the opposite party no.2 as his maid servant and that the petitioner was married with one Chinta Devi Yadav long back in 1979 and he is the father of two sons and one daughter who were born due to said wedlock. Petitioner's further contention is that the petitioner has already filed a civil suit being T.S. No. 116 of 2018 before civil Judge (Junior Division), Bongaon with a prayer for declaration and permanent injunction that the opposite party no.2 is not the wife of the petitioner and there is no marital relationship in between them. The further contention of the petitioner is that the court below ought to have recorded the evidence of the parties before passing any order of maintenance to the opposite parties and he ought not to have believed the purported

marriage certificate when the above mentioned civil suit is still pending. Petitioner further contended that the opposite party no.2 is the wife of one Satyajit Gharami and a citizen of Bangladesh and is a married lady and as such she is not entitled to get any amount of maintenance.

[3] Per contra it is submitted on behalf of the opposite party no.2 that the opposite party no.2 herein has adduced valuable and cogent document i.e. the marriage certificate in support of her marriage with the petitioner and the petitioner herein has specifically admitted in his objection before the court below that the petitioner and the opposite party no.2 herein filed a Mat Suit being Mat Suit no. 19 of 2016 with a prayer for passing decree of mutual divorce before the appropriate forum, which clearly shows that the marriage between the parties is undisputed. Further case of the opposite party no. 2 is that the petitioner had driven out the opposite party no.2 after long physical and mental torture, but with the intervention of local police station and neighbours the petitioner, voluntarily permitted the opposite party no. 2 to reside in her matrimonial house. Infact the petitioner at his own will left the said house and never mentioned before the opposite party no.2 that he has children or any wife, ever before marriage with the opposite party no.2. Further contention of the opposite party no. 2 is that the petitioner is a Government employee posted in the Indian Railway and as per salary slip, his monthly earning is Rs. 2,61,000/- and as such the order impugned passed by the court below in connection with the Application being CRR 2254 of 2019 and the order of continuance of execution proceeding in connection with other application being CRR 326 of 2024, does not call for interference.

[4] I have considered submissions made by both the parties.

[5] After going through annexed documents, it appears that while the petitioner/wife sought for interim maintenance on the basis of marriage certificate, the opposite party /petitioner herein filed an objection against the said prayer for interim maintenance, where the opposite party vehemently opposed alleged marriage with the petitioner/wife. In page 5 of his written objection opposite party/ petitioner herein has taken a specific plea that in the year 1979 he had married one Chinta Devi and due to said wedlock, two sons and one daughter were born and the age of the daughter is now 36 years and the age of two sons are 24 years and 23 years. He further stated that said marriage is still subsisting. In support of said contention petitioner herein filed certain documents like Aadhar card of said Chinta Devi and Aadhar card of sons and daughter, the school certificate of his sons and daughter, marriage invitation card of his marriage with Chinta Devi in the year 1979 and details of family members furnished by petitioner in his Eastern Railway office and also nomination form for gratuity showing Chinta Devi as his wife, joint bank account, recital in a deed of gift and some other documents in support of his said subsisting marriage with Chinta Devi.

[6] However while passing the impugned order court below held that "from the pleading and submission of the parties it is crystal clear that the marriage between the

parties and the separate living is not in dispute in the present case and this unchallenged facts themselves are sufficient at this stage to dispose of the said petition in favour of the petitioner".

[7] Such finding of the court below is contrary to the materials available in the record. Infact opposite party/petitioner herein has seriously disputed the marriage with the petitioner in his written objection.

[8] Needless to say that the expression "Wife" used in section 125 of the Code refers to legally married wife. Accordingly when the factum of marriage has been seriously disputed by the respondent, the marriage has to be established prima facie as a valid marriage, notwithstanding the fact that the petitioner has claimed that they resided a considerable period of time as husband and wife. It is true that strict standard of proof is not necessary as the proceeding under section 125 Cr.P.C is summary in nature and is meant to prevent vagrancy but still prima facie it is to be established before the court granting maintenance, be it in the nature of interim or final that the claimant is a legally married wife. Since the question as to whether opposite party no. 2 herein is a married wife of the petitioner is pre-eminently questions of fact, High Court would not be justified in expressing its own view on question of fact while exercising jurisdiction under section 482 of the Code.

[9] Since the order impugned suffers from perversity in view of the observation made by the court below that the marriage between petitioner and opposite party no. 2 is not disputed, the order impugned dated 05.04.2019 is hereby set aside. Learned court below is directed to hear opposite party no. 2's Application under section 125 Cr.P.C, seeking interim maintenance, afresh after giving both the parties opportunity to place all their documents and evidence (if any) in connection with the disputed issue of marital relationship between the parties and other questionable issues, if any, and thereafter to write an order afresh after giving opportunity to both the parties to contest, preferably within a period of eight weeks form the date of communication of this order, without being influenced by any observation made herein.

[10] Crr 2554 of 2019 is thus allowed.

[11] In view of setting aside the order dated 05.04.2019, the other Application being CRR 326 of 2024 is also allowed and thereby the impugned proceeding being M. Ex No. 54 of 2021 is hereby quashed. Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities

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2024(2)FLJ573

DELHI HIGH COURT

[Before Vikas Mahajan]

Testamentary Case No 78 of 2021 **dated 19/09/2024**

Rishi Kumar

Versus

State & Anr

LETTER OF ADMINISTRATION

Indian Succession Act, 1925 Sec. 228 - Letter of Administration - Petitioner sought letter of administration under Sec. 228 of the Indian Succession Act for a Will already proved in a previous probate case - Probate was granted by an Additional District Judge, but the court could not grant administration for certain assets as their value exceeded Rs. 10,000 outside its jurisdiction - Petitioner now applied to the High Court with an authenticated copy of the Will - Court granted the letter of administration, as the Will was already proven in the lower court. - Petition Allowed

Law Point: Letter of administration can be granted without further evidence if the Will has already been proven and authenticated by a court of competent jurisdiction under Section 228 of the Indian Succession Act.

Acts Referred:

Indian Succession Act, 1925 Sec. 228

Counsel:

Deva Nand, Pramod Kumar, Sarfaraz Khan, Mirza Amir Baig, Abdul Wahid Mashaal

JUDGEMENT

Vikas Mahajan, J.- [1] The present petition has been filed under Section 228 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Act') seeking letter of administration in respect of the Will dated 08.01.2013 executed by the testatrix late Smt. Ratna Devi.

[2] The learned counsel for the plaintiff submits that the probate has already been granted with regard to the said Will vide judgment dated 30.10.2019 passed by the Court of Additional District Judge - 05, Central District, Delhi.

[3] He invites the attention of the Court to the aforesaid judgment to contend that the letter of administration was however not granted to the petitioner for the reason that the estate affected was beyond the limits of the state and was exceeding an amount of Rs. 10,000/-. The relevant part of the judgment reads thus:

> "28.Though, according to Section 270 of the Indian Succession Act, it can be said that this court has the jurisdiction to entertain the present petition PC No.13/18 Rishi Kumar vs. State & ors. page 16 of 19 filed for seeking probate

(Letters of Administration) as the deceased Testator had a fixed place of abode in Delhi but Section 273 proviso provides that a District Judge can grant Probate or Letters of Administration as the case may be only in a case the value of property and estate beyond the limits of the jurisdiction of a court does not exceed Rs.10,000/. The said Section reads as under:

273. Conclusiveness of probate or letters of administration - probate or letters of administration shall have effect over all the property and estate, movable or immovable, of the deceased, throughout the State in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding properly which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted:

Provided that probate and letters of administration granted

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had a fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the State does not exceed ten thousand rupees, shall, unless otherwise directed by the grant, have like effect throughout the other States."

29. In view of the foregoing discussion, it can therefore be concluded that this Court does not have the jurisdiction to grant Letters of Administration to the petitioner in respect of the properties i.e. bank deposit and FDR in UCO Bank, Dhauli Piau Branch, Mathura, U.P. as referred to in the petition. I am accordingly declining to grant Letters of Administration in respect of the same.

[4] However, liberty was granted to the petitioner to approach the Court of competent jurisdiction for grant of letter of administration under Section 228 of the Indian Succession Act, 1925 on the basis of authenticated copy of the Will dated 08.01.2013. At the same time, an authenticated copy of the Will was directed to be provided to the petitioner for enabling the petitioner to approach the Court of competent jurisdiction.

[5] Sequel to above, the present petition has been filed by the petitioner under Section 228 of the Indian Succession Act, 1925. A perusal of paragraphs 18 and 19 of the aforesaid judgment shows that the Will has been proved by the Attesting witness. Even the finding has also been recorded in para 30 by the Additional District Judge that Will in question stands proved. The relevant paragraphs 18, 19 and 30 reads as under:

"18. Combined reading of the two Sections would show, for a Will to be executed it should be attested by two witnesses in the manner provided for in

> Section 63(c) of the Indian Succession Act. To prove the Will, however, examination of both attesting witnesses is not required, only one of the attesting witness may appear in court and depose as to the Will being executed in the manner prescribed under section 63 of the Indian Succession Act.
>
> 19.Testimony of one of the attesting witnesses i.e. PW3 Sh. Yogender Pal was recorded in the Court. Like it has been stated before, he had identified his signature on the Will Ex.PW1/1 at point A1 and that of deceased testatrix Smt. Ratna Devi at point B1. He had further deposed that the Will was signed by him as a witness along with another witness Sh. Hari Ram in the presence of late Smt. Ratna Devi and she had also signed her Will in their presence.
>
> xxx xxx xxx xxx
>
> 30. Though this Court may not have jurisdiction to entertain the present Petition to grant Letters of Administration in respect of the properties referred above but it may be stated here at the same time that it does not prevent the petitioner from approaching the court of competent jurisdiction for the grant of Letters of Administration u/s 228 of the Indian Succession Act on the basis of authenticated copy of the Will dated 08.01.2013, considering that it has been held that the said Will stands proved in this case."

[6] I have heard the submissions of the learned counsel for the petitioner. In view of the provisions of Section 228 of the Indian Succession Act, 1925 the letters of administration can be granted to the petitioner without leading any evidence. Section 228 of the Act reads as under:

> **"228. Administration, with copy annexed, of authenticated copy of will proved abroad.-** When a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the State, whether within or beyond the limits of 5 [India], and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed."

[7] The purpose of Section 228 is to dispense with the need to produce and prove the original Will when the same has already been proved and deposited in a Court of competent jurisdiction. Thus, Section 228 enables the Court to grant letters of administration with a copy of Will if the Will has already been proved and deposited in a Court of competent jurisdiction.

[8] In the present case the Will dated 08.01.2013 has been proved before the Court of Additional District Judge and the same is lying deposited in the said Court. Even the probate has also been granted with regard to the said Will vide aforesaid judgment dated 30.10.2019. Therefore, the present petition can be allowed and letter of administration can be granted to the petitioner on the basis of an authenticated copy of

the Will dated 08.01.2013 which has been filed by the petitioner alongwith the present petition and is available in the file of this Court.

[9] I am supported in my view by the decision of a coordinate bench of this Court in Dharamvir Sharma vs. State & Ors.,2008 SCCOnLineDel 205.The relevant part of the said decision reads as under:

> "7. The object of Section 228 is to dispense with the need to produce the original will owing to its deposit in some other Court. The order under this provision is not like Section 276; however, its ancillary to a grant made by a competent Court. Before making an order on such application, the Court has satisfy itself that the copy produced before it answers the description in Section 228."

[10] Likewise, in Narain Malik vs. State,2017 SCCOnLineDel 8744, this Court granted letter of administration without recording any evidence in respect of a Will for which the probate had been granted by a competent Court in the State of New Jersey, USA by invoking the provisions of Section 228 of the Act.

[11] In the light of above discussed facts and the legal position, this Court is of the view that the Will dated 08.01.2013 of late Smt. Ratna Devi satisfies the requirement of Section 228 of the Indian Succession Act, 1925. Hence, I accept the said Will for which probate has already been granted by the Additional District Judge-05, Central District, Delhi vide judgment dated 30.10.2019.

[12] Accordingly, the petitioner is granted letter of administration in respect of the two FDRs and one Saving Bank Account mentioned herein below, subject to the petitioner paying the requisite Court fee, on the basis of the valuation of the FDRs, as well as, the amount available in the said account:

(i) Saving Bank A/c Bearing No. 174401100000359, UCO Bank, Branch Dhauli Piau, Mathura, U.P. in the name of deceased Ratna Devi, total remaining balance upto 08.01.2018 is Rs. 28,076/-;

(ii)FDR under Kuber Yojna Deposit Scheme vide Receipt No. 17440310017692 dated 16.03.2012 amounting Rs. 1,64,766/- and the balance amount upto 01.02.2018 is approx. Rs. 2,50,000/- deposited in UCO Bank, Branch, Dhauli Piau, Mathura, U.P. in the name of deceased Smt. Ratna Devi; and

(iii) FDR under Kuber Yojna Deposit Scheme vide Receipt No. 17440310002063 dated 26.03.2010, amount Rs. 4,26,641/- and the balance amount upto 01.02.2018 is approx. Rs. 7,50,000/- deposited in UCO Bank, Branch, Dhauli Piau, Mathura, U.P. in the name of deceased Smt. Ratna Devi.

[13] The Registry is directed to issue the letter of administration with copy of the Will annexed to the petition. Since there is no other claimant and probate qua the said Will was granted as early as on 30.10.2019, the requirement of furnishing of administration bond and surety bond is dispensed with.

[14] The petition stands disposed of

2024(2)FLJ577

IN THE HIGH COURT AT CALCUTTA

[Before Suvra Ghosh]

Cr R (Criminal Revision) No 1509 of 2024 **dated 18/09/2024**

Nilanjan Mitra

Versus

State of West Bengal

QUASHING INVESTIGATION

Indian Penal Code, 1860 Sec. 201, Sec. 304B, Sec. 302, Sec. 306, Sec. 498A - Code of Criminal Procedure, 1973 Sec. 304B, Sec. 164, Sec. 311, Sec. 173 - Dowry Prohibition Act, 1961 Sec. 4, Sec. 3 - Quashing Investigation - Petitioner sought quashing of order denying further investigation in wife's death case - Alleged husband made a video call showing wife burning instead of helping her - Initial charges filed under dowry-related sections - Petitioner requested inclusion of murder charge - Court previously ordered investigation under Section 302 IPC but investigating agency failed to consider all evidence - Doctor's report indicated victim stated setting herself on fire - Opposite party accused of tampering evidence - Court allowed trial court to assess evidence and add murder charges if appropriate. - Petition Disposed

Law Point: Further investigation under Section 173(8) CrPC can be refused if investigation is deemed sufficient, but trial court can later consider new evidence for appropriate charges.

Acts Referred:

Indian Penal Code, 1860 Sec. 201, Sec. 304B, Sec. 302, Sec. 306, Sec. 498A

Code of Criminal Procedure, 1973 Sec. 304B, Sec. 164, Sec. 311, Sec. 173

Dowry Prohibition Act, 1961 Sec. 4, Sec. 3

Counsel:

Jayanta Narayan Chatterjee, Moumita Pandit, Supreem Naskar, Jayashree Patra, Ritushree Banerjee, Sreeparna Ghosh, Pritha Sinha, Bhaskar Mondal, Anasuya Sinha, Puja Goswami, Rajdeep Mazumder, Pritam Roy, Soewel Bhattacharjee, Triparna Roy

JUDGEMENT

Suvra Ghosh, J.- [1] The petitioner seeks quashing of the order passed by the Learned Additional Chief Metropolitan Magistrate II City Sessions Court, Calcutta presently re-designated as Learned Additional Chief Judicial MagistrateII, Calcutta on 1st April, 2024 in G.R. Case no. 933 of 2023 turning down the prayer of the petitioner for further investigation under section 173(8) of the Code of Criminal Procedure.

[2] Learned counsel for the petitioner has submitted that the victim who is his niece died by burn injuries and when the victim was ablaze, her husband who is the accused/opposite party made a video call to the victim's cousin and showed her the said scene instead of coming to her rescue. The said cousin Shukla Choudhary informed the incident to the family members and sent a car to take the victim to Belle Vue Clinic. The incident occurred on 24th November, 2023 and the victim succumbed to her injuries on 5th December, 2023. The petitioner requested the Investigating Officer to add section 302 of the Indian Penal Code to the penal sections in respect of which investigation was proceeding, but to no effect. Initially the case was registered under section 304B of the Code pursuant to which the petitioner filed a writ petition being W.P.A. 1238 of 2024 wherein this Court, by a judgment delivered on 31st January, 2024, held that section 304B of the Penal Code had no manner of application in the case as the incident occurred after seven years of marriage. Upon holding that the investigation was totally misdirected, investigation was transferred to the C.I.D. with a direction to conclude the same expeditiously in accordance with law. Since no charge under section 302 of the Penal Code was added despite the earlier observation of this Court, the petitioner approached this Court in W.P.A. 6984 of 2024 and by an order passed on 15th March, 2024 this Court directed the investigating agency to proceed with an open mind and consider all aspects before coming to a final conclusion. The investigating agency has not considered the conduct of the accused/opposite party and has submitted charge sheet under sections 498A/306/201 of the Penal Code and section 3/4 of the Dowry Prohibition Act. The petitioner submitted an application before the learned Magistrate under section 173(8) of the Code of Criminal Procedure seeking further investigation of the case which was refused by the order impugned.

[3] Learned counsel for the State has referred to the case diary including statement of witnesses recorded under section 164 of the Code of Criminal Procedure as well as the admission documents and post-mortem report of the victim. Learned counsel has submitted that the statement of the attending doctor indicates that the victim was alert, conscious and cooperative when she was brought to the hospital by her husband and stated before the doctor that she set herself ablaze and it was her husband who doused the fire.

[4] Learned counsel for the opposite party has placed reliance on the statement of Dr. Sanjit Dutta who was the attending doctor, Biswanath Shaw @ Bablu who was the

driver of the victim's father and who took her to the hospital and Sukla Choudhary who is the victim's cousin and has submitted that no material under section 302 of the Penal Code has transpired against the opposite party in course of investigation.

[5] Learned counsel has placed reliance on the authority in Pakala Narayana Swamy v/s. The King-Emperor,1939 SCCOnLinePC 1wherein it has been observed that under section 32 of the Indian Evidence Act, statement of relevant facts made by a person who is dead is a relevant fact when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

[6] I have considered the submission made on behalf of the parties and the material on record.

[7] It appears from the material on record, particularly the statement of Sukla Choudhary, cousin of the victim that the opposite party made a video call to her and turned the phone towards the victim when she saw that the victim was ablaze. The video call lasted for a minute. The opposite party chose to exhibit his burning wife before the cousin instead of rushing to her rescue which may have contributed to her fate. The charge sheet records that the victim walked to the vehicle which took her to the hospital and the opposite party accompanied her in his motorcycle. As stated by the opposite party, he cleaned the place of occurrence and threw away the wearing apparel of the victim in the dustbin for which the same could not be seized. The charge sheet also records that the statement of the victim could not be recorded since she was unconscious, disoriented and not in a position to give her statement.

[8] On the other hand, the evidence of the attending doctor recorded under section 164 of the Code of Criminal Procedure demonstrates that the patient was brought to the bed of the hospital in a wheel chair and she herself got up from the wheel chair and walked to the bed. She gave her statement before the doctor in presence of two nurses of the hospital. She stated that she poured kerosene on her person and set herself ablaze due to marital discord. On asking, she said that her husband doused the fire. The persons accompanying the victim told the doctor that it was an accidental burn and the victim caught fire while cooking in the kitchen. The admission documents describe the victim to be alert, conscious and cooperative at the time of her admission on 24th November, 2023 but the charge sheet indicates that Investigating Officer was unable to record her statement during investigation. In all probability the condition of the victim would have deteriorated by then.

[9] There are several such discrepancies in the evidence collected during investigation including statement of witnesses as well as the alleged version of the victim before the doctor. Though it is a fact that the order impugned turning down the prayer of the petitioner under section 173(8) of the Code is bereft of any reason whatsoever, directing further investigation of the case shall not serve any fruitful purpose, moreso, since the Investigating Officer, in submitting the charge sheet, sought

to continue investigation under the said provision which was allowed by the learned Magistrate. It is expected that in terms thereof, the Investigating Officer has been continuing further investigation of the case and shall submit supplementary charge sheet, if occasion so arises.

[10] The learned trial Court shall, in course of trial, consider whether charge under section 302 of the Penal Code is made out and shall take necessary steps in accordance with law in the event relevant evidence surfaces during trial. Since it is the case of the petitioner that some of the witnesses who may have supported the prosecution case have not been examined during investigation, if the names of any such witnesses transpire in course of trial, the learned trial Court shall be at liberty to invoke section 311 of the Code of Criminal Procedure upon consideration as to whether the evidence of such witnesses is required for arriving at a just decision.

[11] With the aforesaid observation and direction, the revisional application being C.R.M. 1509 of 2024 is disposed of.

[12] Case Diary be returned.

[13] All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

[14] Urgent certified website copies of this judgment, if applied for, be supplied to the parties expeditiously on compliance with the usual formalities

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2024(2)FLJ580

DELHI HIGH COURT

[Before Rajiv Shakdher; Amit Bansal]

Mat App (F C) (Matrimonial Appeal (Family Court)) No 305 of 2024

dated 17/09/2024

Jasmine Chadha

Versus

Tejpal Singh

MAINTENANCE EXECUTION

Code of Criminal Procedure, 1973 Sec. 125 - Protection of Women from Domestic Violence Act, 2005 Sec. 23 - Maintenance Execution - Appellant challenged the executing court's refusal to grant two separate maintenance payments under CrPC Sec. 125 and DV Act Sec. 23 - Orders from 2011 granted Rs. 30,000 per month maintenance, with both sides appealing - Appellant claimed entitlement to dual maintenance, while respondent's income ranged between Rs. 70,000-75,000 per month - Executing court held that appellant misinterpreted orders by claiming maintenance twice - Court refused to interfere, finding that financial considerations had already been addressed. - Appeal Dismissed

Law Point: Maintenance orders under CrPC and DV Act cannot be claimed separately if they cover the same financial support-courts will examine the respondent's financial capacity before finalizing maintenance amounts.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 125

Protection of Women from Domestic Violence Act, 2005 Sec. 23

Counsel:

Sandeep Aggarwal(Senior Advocate), M R Jagjit Singh, Preet Singh, Rahul Khan

JUDGEMENT

Rajiv Shakdher, J.- [1] This is an application moved on behalf of the appellant seeking permission to file a list of dates beyond the prescribed number of pages.

[2] Given the reasons articulated in the application, the prayer made therein is allowed.

[3] The application is, accordingly, disposed of.

MAT.APP.(F.C.) 305/2024 and CM APPL. 54127/2024 [Application filed on behalf of the appellant seeking condonation of delay of 18 days in filing the appeal]

[4] This appeal is directed against the judgment and order dated 15.05.2024 passed by the executing court in Execution Petition nos. 108/2019, 109/2019, 110/2019, 111/2019, 112/2019, 113/2019, 114/2019, 72/2021, 73/2021, 159/2022 and 131/2023 titled Jasmine Chadha v. Tejpal Singh.

4.1 The impugned judgment and order came to be passed by the executing court in the backdrop of the following broad facts.

[5] The appellant had triggered proceedings for grant of **maintenance** under Section 23 of the Protection of Women from Domestic Violence Act, 2005 [in short "DV Act"], and also under Section 125 of the Code of Criminal Procedure, 1973 [in short "Cr.P.C."].

[6] The concerned Judge passed two separate orders of even date i.e., 31.01.2011. In both orders, interim **maintenance** was granted to the appellant at the rate of Rs.30,000/- per month.

6. It is not in dispute that both sides carried the matter in appeal.

[7] The disputants preferred revisions/appeals against the order passed under Section 23 of the DV Act as well as the order passed under Section 125 of the Cr.P.C.

7. The learned Addl. Sessions Judge [ASJ], via two orders of even date, i.e., 14.12.2012, dismissed the revisions and appeals preferred by both disputants.

8. The appellant contends that she is entitled to two sets of **maintenance** at the rate of Rs.30,000/- per month.

9. The executing court has disagreed with this contention of the appellant.

10. The record discloses that both while passing the orders dated 31.01.2011 and the orders which were passed by the learned ASJ on 14.12.2012, the financial wherewithal of the respondent was gone into. Ultimately, a finding returned was that the income of the respondent ranged between Rs.70,000/- to Rs.75,000/- per month.

7.1. Given this position, the executing court, via the impugned judgment and order, concluded that the appellant was misreading the order dated 31.01.2011 by claiming **maintenance** twice.

[8] The appellant, who appears in person, submits that the executing court could not have gone behind the judgment and order dated 31.01.2011. In other words, the impugned judgment and order was without jurisdiction.

8.1 As per law, the appellant is correct that the executing court cannot go behind the judgment and order that it is called upon to execute. However, what cannot be disputed is that the same judge passed identical orders on 31.01.2011.

[9] As noted above, the ASJ in criminal revision which dealt with one of the orders i.e., the order passed under Section 125 of the Cr.P.C. sustained the view taken in the order dated 31.01.2011 passed in the said proceedings.

[10] Given the position that the financial wherewithal of the respondent is what is noted hereinabove, we are not inclined to interfere with the impugned judgment and order.

[11] The appeal is accordingly closed. The pending application shall also stand closed

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2024(2)FLJ582

DELHI HIGH COURT

[Before Rajiv Shakdher; Amit Bansal]

Mat App (F C) (Matrimonial Appeal (Family Court)) No 78 of 2024

dated 17/09/2024

Rita Nimesh

Versus

Anil Nimesh

INTERIM CHILD MAINTENANCE

Hindu Marriage Act, 1955 Sec. 24 - Interim Child Maintenance - Appellant challenged family court's order denying interim maintenance under Sec. 24 of the Hindu Marriage Act, citing her monthly salary of Rs. 53,000 - Respondent voluntarily agreed to pay Rs. 9,000 per month for both children - Appellate court upheld this arrangement pending further proceedings under the Domestic Violence Act - Family court to

finalize interim maintenance within four weeks without being influenced by earlier observations. - Appeal Dismissed

Law Point: Interim maintenance can be denied under Section 24 of the Hindu Marriage Act if the applicant has sufficient income, but courts may still direct child maintenance based on voluntary contributions or other relevant proceedings

Acts Referred:

Hindu Marriage Act, 1955 Sec. 24

Counsel:

Prateek Jindal, Sachin Kashyap

JUDGEMENT

Rajiv Shakdher, J.- [1] This appeal is directed against the judgement and order dated 03.02.2024 passed by the family court.

[2] Via the impugned judgement, the family court has disposed of the application preferred by the appellant under Section 24 of the Hindu Marriage Act, 1955 [in short "1955 Act"] on the ground that she was drawing salary amounting to Rs.53,000/- per month.

2.1 Interestingly, while disposing of the application, the family court also noted that the respondent was voluntarily willing to pay Rs.9,000/- per month qua the children. In fact, the respondent had been voluntarily paying Rs.4500/- per month to both the children.

[3] Notice in the appeal was issued when it came up for the first time on 07.03.2024.

3.1 The notice was made returnable on 03.05.2024.

[4] On 03.05.2024, the respondent was represented by his counsel, i.e., Mr Niket Kumar Singh, Advocate.

4.1 Mr Singh, on that date, on instructions of the respondent, had informed that the respondent would raise the amount to be paid for both the children to Rs.9000/- per month i.e., Rs.4500/- for each child.

[5] Since no direction was issued by the family court via the impugned judgement and order, we had issued a direction to the effect that the respondent would pay interim maintenance towards both the children, cumulatively @ Rs.9000/- per month.

5.1 This direction was triggered from the date of impugned judgement and order i.e., 03.02.2024.

[6] Mr Sachin Kashyap, learned counsel, who appears on behalf of the appellant, affirms that the respondent has been paying Rs.9000/- per month as interim maintenance to the children.

[7] We are also informed by Mr Kashyap that maintenance has been sought on behalf of the children and the appellant in the proceedings triggered under the provisions of the Protection of Women from Domestic Violence Act, 2005 [in short "2005 Act"].

[8] We are told that the said proceedings are listed before the concerned court on 03.10.2024.

[9] Given the fact that the concerned court is adjudicating the issue involving payment of interim maintenance, this appeal is closed with the following directions:

(i) As agreed, the respondent will continue to pay a cumulative amount of Rs.9000/- per month vis.-a-vis. the children till such time a determination is made by the concerned court dealing with the proceedings under the 2005 Act.

(ii) The concerned court dealing with the proceedings under the 2005 Act will not be influenced by the observations made hereinabove. The determination qua quantification of the interim maintenance will be made de hors the directions contained in the impugned judgement and order.

(iii) The concerned court will endeavour to conclude the proceedings on the issue of interim maintenance at the earliest, though not later than four (04) weeks commencing from 03.10.2024.

[10] The appeal is disposed of in the aforesaid terms.

[11] Parties will act based on the digitally signed copy of the order

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2024(2)FLJ584

IN THE HIGH COURT OF KERALA AT ERNAKULAM

[Before M A Abdul Hakhim]

R S A (Regular Second Appeal) No 960 of 2015, 868 of 2017 **dated 13/09/2024**

J Santhakumari; S L Rajendran; S L Chandrababu; S L Vijindrakumar; L J Sobhanakumari; B Jyanamma

Versus

Mohanan; Sasi; R Divakaran; Sarojam; Jaya; Lekshmanamma; L Vijayamma; K Thankamani; Daisy; Anil Jose; Ajith Jose; Arun Jose; Suma Satheesh; Sudharshavakumar M T; K Reghunathan

ANCESTRAL PROPERTY DIVISION

Hindu Succession Act, 1956 Sec. 6 - Ancestral Property Division - Appellant challenged trial court's preliminary decree dividing ancestral property under coparcenary rules - Argued that property lost its coparcenary status after partition - Respondents claimed birthright under Mitakshara law - Court held that property remained coparcenary even after partition - Decreed equal division among parties -

First Appellate Court confirmed decree with minor modifications - Final decree passed during the pendency of appeal - Both appeals dismissed, confirming the property as coparcenary. - Appeals Dismissed

Law Point: Property remains coparcenary even after partition unless proven to be self-acquired-birthright of coparceners continues in ancestral property until final partition.

Acts Referred:

Hindu Succession Act, 1956 Sec. 6

Counsel:

V Suresh, G Sudheer, Aswin P John, Thomas Abraham, Merciamma Mathew

JUDGEMENT

M A Abdul Hakhim, J.- [1] The above Regular Second Appeals arise from OS No.541/1987 of the Principal Munsiff's Court Thiruvananthapuram. OS 541/1987 was a suit for partition. RSA No. 868/2017 arises from the Preliminary Decree dt 30.08.1994 in the suit. RSA No. 960/2015 arises from the Final Decree dt. 06.12.2008 in I.A No. 5512/2005 in the suit. Both the Appeals are filed by the legal heirs of the Original 3rd defendant.

[2] The parties are referred according to their status before the Trial Court.

[3] The plaintiffs 1 & 2 filed the suit against the defendants 1 to 5 with the averments to the effect that the plaintiffs & the 2nd defendant are the sons of the 1st defendant, the 5th defendant is the daughter of the 2nd defendant, the 4th defendant is the Second wife of the 1st defendant. The plaintiffs and defendants 1,2, 4 and 5 are Hindu Nadars governed by the Hindu Mitakshara law of succession. The Plaint A Schedule Property having an extent of 44 cents is a portion of a larger extent having an area of 3.2 Acres, which originally belonged to Kutty Nadar, grandfather of the 1st defendant. The said Kutty Nadar had two sons, namely, Madan Nadar and Velayudhan Nadar. The 1st defendant is the son of Velayudhan Nadar. The property of Kutty Nadar was Hindu coparcenary property of which the plaintiffs are members. As per Ext.A1 Partition Deed dt. 18.05.1123 ME, the Plaint A Schedule Property having an extent of 44 cents was allotted to the 1st defendant. The 1st defendant took the property as belonging to the branch which he represented. The plaintiffs and the 2nd defendant have got equal right over the plaint schedule property by birth along with the 1st defendant. The 1st defendant gifted 10 cents in the plaint A schedule property to the plaintiffs' sister Vijayamma as per Ext.B8 dt 30.11.1961. Though the gift was made asserting the exclusive right by the 1st defendant the plaintiffs did not dispute the same since the 1st defendant did it in his capacity as the Manager of the family. The remaining property of 34 cents is in the plaint B schedule. As on the date of implementation of the Hindu Joint Family System Abolition Act there were four members in the coparcenary namely, the plaintiffs and the defendants 1 and 2. The 1st

defendant had created some documents in respect of plaint B schedule property in favour of the defendants 3, 4 and 5 by asserting exclusive right with him. The said documents are not binding on the plaintiffs and their share in the plaint schedule property. The 1st defendant is entitled to alienate only to the extent of his 1/4 share in the coparcenary property. The documents executed by the 1st defendant are null and void, and they are liable to be set aside. The prayer in the suit was for partition of the plaint B schedule property and to allot 2/4 share to the plaintiffs and to allot the share of the 1st defendant to the defendants 3,4, and 5 towards the properties alienated to them. Mesne profits @ Rs.500/- per annum was also claimed from the contesting defendants.

[4] After the institution of the suit, the first defendant died on 06.05.1987. The additional defendants 6 to 8 were impleaded and the plaintiffs and the 2nd defendant were recorded as the legal heirs of the deceased 1st defendant. The additional 6th defendant is the wife, and the additional 7th & 8th defendants are the daughters of the 1st defendant.

[5] Since 1/4 share of the 1st defendant in Plaint B Schedule Property devolved upon the plaintiffs, the 2nd defendant and additional defendants 6 to 8, the plaintiffs amended the prayer in the plaint for allotting 7/12 share to the plaintiff. A prayer to set aside all alienations created by the 1st defendant with respect to B schedule property beyond the extent of his 1/4 share was also included. The additional 9th defendant was also impleaded as per order in IA No. 511/1991 as the alienee of a portion of plaint B Schedule property.

[6] The 3rd defendant and the 4th defendant alone contested the suit.

[7] The 3rd defendant filed a Written Statement opposing the suit prayers, contending, inter alia, that the plaintiffs and the 2nd defendant are not the legitimate children of the 1st defendant. The mother of the plaintiff is one Lakshmi Amma, and she is residing with her husband Kesavan, and they have three children. The 1st defendant never married the 4th defendant. The sisters of the plaintiffs, namely, the 7th and 8th defendants, are also not the legitimate daughters of the 1st defendant. The 1st defendant got B schedule property allotted as per Ext.A1 Partition Deed in his exclusive share and he had got absolute right of ownership over the same. Neither the plaintiffs nor the 2nd defendant got any right of share in the plaint schedule property by birth as alleged. There was no coparcenary, as alleged in the plaint. There was no joint family consisting of the plaintiffs and defendants 1 and 2, and hence, the Hindu Joint Family System Abolition Act has no effect on the plaint schedule property. The plaintiffs and 2nd defendant had no authority to question the documents executed by the 1st defendant which are valid and binding. It is true that the 1st defendant had executed Ext.B8 to the 7th defendant. The 1st defendant had also executed a sale deed for 3.75 cents to the 9th defendant. The 1st defendant executed Ext.B4 mortgage deed with respect to 3 cents in favour of the wife of the 2nd defendant, which was assigned

by her in favour of the 3rd defendant as per Ext.B3. The 1st defendant executed Exts.A2/B5 and A3/B6 sale deeds in favour of the 3rd defendant selling 15 cents and 7 cents, thus the 3rd defendant is in absolute possession and enjoyment of the properties covered by the said documents. The 1st defendant also executed some fictitious documents in favour of the 4th defendant out of undue influence and coercion. The 3rd defendant is a bona fide purchaser for valuable consideration.

[8] The 4th defendant filed a Written Statement opposing the suit prayers, contending, inter alia, that she is the absolute owner in possession of 8 cents out of the Plaint B Schedule Property by virtue of two Gift Deeds Nos. 3236/1974 and 690/1982 executed by the 1st defendant, who was her husband. She had effected mutation and kept possession of the said 8 cents of property by paying land tax. At the instigation of the plaintiff, the 1st defendant ousted the 4th defendant from the house and restrained her from entering into the property. Though she filed OS 937/1986 for an injunction, the same was withdrawn to file a fresh suit. The plaint schedule property is not a coparcenary property, and the plaintiffs are not coparceners. It exclusively belonged to the 1st defendant, and he was keeping possession of the same as an absolute owner.

[9] The Trial court decreed the suit, declaring that Exts. B5 and B6 Sale deeds in favour of the 3rd defendant and, Gift deed No.3236/1974 and Settlement Deed No. 690/1982 in favour of the 4th defendant executed by the 1st defendant in respect of plaint A schedule property as void and passing a Preliminary Decree dividing the plaint B schedule property into four equal shares and allotting two of such shares to the plaintiffs, one share each to the 1st defendant and the 2nd defendant. It is ordered that out of 1/4 share of the 1st defendant in the Plaint B schedule Property, 3.754 cents covered by Ext.B7 sale deed shall be excluded in favour of the addl. 9th defendant and the remaining extent in the share of the 1st defendant shall be divided into six equal shares allotting two such shares to the plaintiffs, one such share to the 2nd defendant, and one such share to the defendants 6 to 8, subject to payment of mortgage debt of Rs.8,000/- due to the 3rd defendant as per Ext.B3. The defendants 4 and 5 have no right or interest in Plaint A or B schedule properties. The plaintiffs are allowed to realise mesne profits from the date of the suit till the recovery of shares from the 3rd defendant, the quantum of which is to be determined in the final decree proceedings.

[10] The legal heirs of the 3rd defendant filed AS No.116/1996 and the 4th defendant filed AS No. 125/1996 before the First Appellate Court challenging the Preliminary Decree passed by the Trial Court. The First Appellate Court dismissed AS No. 125/1996 and partly allowed AS No. 116/1996 modifying the Preliminary Decree passed by the Trial court that the alienations made by the 1st defendant with respect to Plaint B Schedule Property exceeding his 1/4 share therein are not valid and are not binding on the plaintiffs share in the Plaint B Schedule property; that the direction to divide 1/4 share belonging to the 1st defendant among his legal defendants is set aside; that alienations effected by Ext.B5 and B6 sale deeds shall be confined to the 1/4 share due to the 1st defendant and that when the partition is effected, care shall be taken to

include the properties covered by those title deeds in the share due to the 1st defendant.

[11] Rsa No. 868/2017 is filed by the legal heirs of the 3rd defendant challenging the Preliminary Decree of the Trial Court as modified by the First Appellate Court.

[12] The legal heirs of the 3rd defendant were impleaded as additional defendants 11 to 15 in the suit.

[13] The plaintiffs filed Final Decree Application as IA No.5512/2005 in OS No 541/1987 and the Trial court passed Final Decree dt. 06.12.2008 incorporating Ext.C1 and C1(a) Commission Report and Plan. As per the Final Decree, the 1st plaintiff, 2nd plaintiff, 2nd defendant and the legal heirs of the 3rd defendant are allotted plots having an extent of 5.680 cents each separately marked in Ext.C1(a) Plan. The defendants 11 to 15, who are the legal heirs of the 3rd defendant, filed AS No.46/2012 challenging the Final Decree before the First Appellate Court. The main contention in AS No.46/2012 was that the Trial Court ought not to have proceeded with the final decree proceedings when Regular Second Appeal against the Preliminary Decree is pending before this Court. The First Appellate Court dismissed AS No.46/2012 rejecting the said contention as per judgment dt. 14.07.2015, holding that the pendency of the appeal will not operate as an automatic stay of the proceedings.

[14] Rsa No.960/2016 is filed by the legal heirs of the 3rd defendant challenging the final decree passed by the Trial Court which is confirmed by the First Appellate Court.

[15] Both the RSAs are remaining unadmitted in this Court.

[16] Since the main challenge of the appellants in these Appeals is against the Preliminary Decree in the suit, RSA 868/2017 is taken as the leading case. The fate of RSA No. 960/2015 is dependent upon the result of RSA No. 868/2017.

[17] I heard the learned Counsel for the appellants Sri. V. Suresh and the learned Counsel for the respondents 1 to 3, 5, 8, 10, and 11, Sri. Thomas Abraham.

[18] The learned counsel for the appellants challenged the Preliminary Decree on three specific grounds.

[19] The first ground of challenge is that the plaint schedule property is not a coparcenary property. It was a coparcenary property of the coparcenary starting from the common ancestor Kutty Nadar. On execution of Ext.A1 partition deed 18.05.1123 ME, the character of the coparcenary property is lost and it became the individual property of the first defendant. Since it is the exclusive property of the 1st defendant, Exts.B5 and B6 documents executed by the 1st defendant in favour of the 3rd defendant is perfectly valid and legal. The plaintiffs and the 2nd defendant did not derive any birth right over the property covered by Exts.B5 and B6. The learned counsel for the appellants cited the decision of the Hon'ble Supreme Court in **Bhagwan Dayal and another v. Reoti Devi**, 1962 AIR(SC) 287 in support of his

contention that on partition the coparcenary character of the property is lost. The counsel cited the decision of the Hon'ble Supreme Court in **Kalyani v. Narayan**, 1980 AIR(SC) 1173 to substantiate the proposition that there would be disruption in joint family status on partition of the joint family property.

[20] The second ground of challenge is that the plaintiffs are not the children of the 1st defendant. Ext.A5 Extract from the School Admission Register would reveal that the father's name of the plaintiffs is not written in it, it was included by interpolation in a different handwriting. There is nothing on record to prove that the plaintiffs are the sons of the 1st defendant. Learned counsel cited the decision of the Hon'ble Supreme Court in **Madan Mohan Singh v. Rajni Kant**, 2010 9 SCC 209 to bring out the proposition that even if a document is admissible the Court can still examine whether the entry contained therein has any probative value. The learned counsel contended that the probative value of Ext.A5 could be considered by this Court even if the same is a Certified Copy of the Admission Register which is admitted in evidence. The learned counsel cited the decision in Doddanarayana Reddi v. Jayarama Reddi,2020 1 KerLTOnLine 1212 and contended that Ext.A5 could not be relied on without examination of the official from the school. The learned counsel contended that the plaintiffs ought to have examined the Headmistress who issued a certified copy of Ext.A5, especially when it contains interpolations.

[21] The third ground of challenge is that even assuming that the plaint schedule property is a coparcenary property, the Preliminary Decree is illegal and unsustainable in view of the amendment to section 6 of the Hindu Succession Act, 1956 by Hindu Succession (Amendment) Act, 2005, by which a daughter of a coparcener is made a coparcener along with the son. Learned Counsel pointed out that in view of sub-section (5) to S.6 and Explanation therein as interpreted by the Hon'ble Supreme Court in **Vineeta Sarma v. Ragesh Sarma and others**, 2020 9 SCC 1, the daughter gets right even in a case, where appeal against the preliminary decree is pending.

[22] With respect to the first ground of challenge, the counsel for the contesting respondents contended that the plaint schedule property is admittedly an ancestral property derived by the 1st defendant as per Ext.A1 Partition Deed and on the birth of the plaintiffs and the 2nd defendant, they became coparceners along with the 1st defendant. The alienation made by the 1st defendant as per Exts.B5 and B6 in favour of the 3rd defendant without the consent of the plaintiffs and the 2nd defendant are invalid. The learned Counsel cited the decision of the Hon'ble Supreme Court in **Rohit Chauhan v. Surinder Singh and others**, 2013 9 SCC 419 and **Arshnoor Singh v. Harpal Kaur and others**, 2020 14 SCC 436 in support of his contentions.

[23] With respect to the second ground of challenge that the plaintiffs are not the children of the 1st defendant, the learned counsel for the contesting respondents submitted that the Trial Court, as well as the First Appellate Court, considered the matter in detail and entered a specific finding that the plaintiffs are the children of the

1st defendant. The counsel invited my attention to the various Grounds raised and Questions of law framed in the Memorandum of Appeal and contended that no ground or question of law is raised challenging the finding of the Trial Court as well as the First Appellate Court that the plaintiffs are the children of the first defendant. In the absence of any challenge in the Appeal, the appellants could not argue that the plaintiffs are not children of the 1st defendant.

[24] With respect to the third ground of challenge, the learned Counsel for the contesting respondents contended that the same is not a ground available for the 3rd defendant. It is a ground available to the daughters of the 1st defendant. The appellants could not be in any way aggrieved by the division of shares among the coparceners.

[25] On considering the rival contentions raised by the counsels, I am of the view that the Second and Third grounds of challenge raised by the Counsel for the appellant do not deserve consideration. With respect to the contention that the plaintiffs are not the children of the first defendant, the Trial Court considered this contention after framing the necessary issues in this regard and made a categorical finding that they are the children of the first defendant after considering the pleadings and evidence in the case. The First Appellate Court also considered the legality of the finding of the Trial court and found that the plaintiffs are the children of the first defendant after reappreciating the pleadings and evidence in the case. It is a factual finding entered by the Trial court and the First appellate Court. As rightly pointed out by the counsel for the contesting respondents, the appellants have not raised any ground challenging the said findings of the Trial Court as well as the First Appellate Court. No question of law is framed with respect to the same. Even in the Statement of facts in the Memorandum of Appeal, no reference is made with respect to this contention. Appellants could not advance arguments on a ground which is not raised in the Appeal, unless the same is a pure question of law. In view of this, the appellants could not argue that the plaintiffs are not the children of the first defendant.

[26] With respect to the contention that shares out of the plaint schedule property were not allotted to the female children of the first defendant as per the amended Section 6 of the Hindu Succession Act treating them as coparceners along with sons, such a contention is not available to the appellants. It is a contention available to the daughters of the 1st defendant alone. They have not challenged the Preliminary Decree or Final decree. The First Appellate Court has found that the 3rd defendant is entitled to get 1/4 share of the first defendant. If the daughters of the first defendant are also included in the coparcenary, the share of the 1st defendant would be reduced to 1/6 consequently, the share of the 3rd defendant will also be reduced to 1/6 which would be detrimental to the appellants who are the legal heirs of the 3rd defendant. At any rate, the absence of allotment of shares to the daughters of the first defendant is a matter which is to be agitated by the daughters of the first defendant who are parties to the present proceedings.

[27] The only remaining ground of challenge raised by the Counsel for the appellant which deserves for consideration is the first ground that the plaint B schedule property is not a coparcenary property and it is the exclusive property of the first defendant and hence Ext.B5 and B6 alienations made by the first defendant in favour of the third defendant is perfectly legal and valid.

[28] The Mitakshara School of Law originated from Yajnavalkya Smrithi. The concept of coparcenary under the Mitakshara law is based on the religious duty of a man not to leave his family without means of subject. The concept is that " They who are born and they who are yet unbegotten and they who are still in the womb, require means of support. No gift or sale should there be made". " The ownership of father and son is coequal in the acquisitions of grandfather, whether land, corody or chattel." The Sale of coparcenary property is permitted only in the case of indispensable needs of the joint family.

[29] A coparcenary is a narrower body of person within a joint family consisting of father, son, son's son, son's son's son. The property inherited by a male Hindu from his paternal male ancestor shall be a coparcenary property in his hands vis-a-vis his male descendants up to 3 degrees below him. It includes four generations. Under the pristine Mitakshara Law, no female can be a coparcener. The Mitakshara coparcenary is based on twin notions of a son's birthright and devolution of property by survivorship. The first incident of coparcenary is that a coparcener has an interest by birth in the joint family property until partition takes place. It is a settled law that the interest of a coparcener is not specified or fixed and it varies in case of births and deaths in the family. This is an unpredictable and fluctuating interest which may be enlarged by the death and diminished by the births in the family. Every coparcener has a right to be in joint possession and enjoyment of joint family property. There is a community of interest and unity of possession in coparcenary property. If a partition takes place, the interest is fixed, taking into account the number of members in the coparcenary as on the date of partition. Of course, with respect to the selfacquired properties of the Mitakshara coparcener father, he has absolute power of disposition.

[30] It is a settled law that on partition, joint family status is dissolved. It severs unity of ownership among the family members. Nevertheless, the share of coparcenary property derived by each of the members of the joint family does not become his individual property. In the case on hand, it is true that on the partition of the coparcenary property as per Ext.A1, the members of the coparcenary, including the 1st defendant, got definite shares in the coparcenary property. Still, it will continue as ancestral property in his hands.

[31] Before the implementation of the Hindu Succession Act of 1956, the law applicable to the family of the 1st defendant was the Hindu Mitakshara law. The appellant has no quarrel with respect to this. In the case on hand, the 1st defendant got ancestral property as per Ext.A1 Partition Deed and admittedly, the plaintiffs were

born before the implementation of Hindu Succession Act. Such ancestral property could not be treated as his self-acquired property. The succession opened before the implementation of the Hindu Succession Act. The nature of the property will remain as coparcenary property even after the commencement of Hindu Succession Act in view of the Section 6 therein. After the Hindu Succession Act came into force, if a person inherits a property from his paternal ancestor, the said property becomes a self-acquired property and does not remain coparcenary property. In such case, as per Mitakshara law, the ancestral property derived by the 1st defendant as per Ext.A1 partition Deed is a coparcenary property, in which his sons will get birthright. It is true that the coparcenary pleaded in the Plaint is a coparcenary headed by the common ancestor Kutty Nadar and such coparcenary character is lost by Ext.A1 partition Deed as the unity of ownership and possession among the parties to Ext.A1 have come to an end. Still, the property derived by the 1st defendant would continue as a coparcenary property, and the 1st defendant and his male children would form a coparcenary. The question that arose in the suit is whether the plaint schedule property is a coparcenary property or not. The parties have joined on this issue by putting forward their respective contentions, and the Court adjudicated the question.

[32] My views in the preceding paragraph are fortified with decisions of the Hon'ble Supreme Court on the point which are discussed hereafter.

[33] It is apposite to quote the relevant portions in Paragraph 12 of the Three Members Judges decision of the Hon'ble Supreme Court in **C.N. Arunachala Mudaliar v. C.A.Muruganatha Mudaliar**, 1953 AIR(SC) 495.

> "12.....The property of the grandfather can normal vest in the father. as ancestral property it, and when the father inherits such property on the death of the grandfather or receives it, by partition, made by the grandfather himself during his lifetime. On both these occasions, the grandfather's property comes to the father by virtue of the latter's legal right as a son or descendant of the former, and consequently, it becomes ancestral property in his hands.
>
> But when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well. The interest which he takes in such property must depend upon the will of the grantor. A good deal of confusion, we think, has arisen by not keeping this distinction in mind. To find out whether a property is or is not ancestral in the hands of a particular person, not merely the relationship between the original and the present holder but the mode of transmission also must be looked to; and the property can ordinarily be reckoned as ancestral only if the present holder has got it by virtue of his being a son or descendant of the original owner. The Mitakshara, we think, is fairly clear on this point. It has placed the father's gifts under a separate

category altogether and in more places than one has declared them exempt from partition."

[34] It is useful to refer to the observations of another Three Members Judges decision of the Hon'ble Supreme Court in **N.V.Narendranath v.Commissioner of Wealth Tax, Andhra Pradesh**, 1970 AIR(SC) 14. After referring to the decision of the Judicial Committee in **Attorney General of Ceylon v.A.R.Arunachalam Chettiar**, 1957 AC 540 dealing with Mitakshara School of law, the Hon'ble Supreme Court held:

"9.....As pointed out by the Judicial Committee in **Arunachalam s case**, 1957 AC 540 (supra), it is only by analyzing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as "joint property of the undivided family." Applying this test it is clear that though in the absence of male issue the dividing coparcener may be properly described in a sense as the owner of the properties, that upon the adoption of a son or birth of son to him, it would assume a different quality. It continues to be ancestral property in his hands as regards his male issue for their rights, which had already been attached to it, and the partition only cuts off the claims of the dividing coparceners. The father and his male issue still remain joint. The same rule would apply even when a partition had been made before the birth of the male issue or before a son is adopted, for the share which is taken at a partition by one of the coparceners is taken by him as representing his branch....."

[35] In **Yudhishter v. Ashok Kumar**, 1987 1 SCC 204 the Hon'ble Supreme Court held:

"10. This question has been considered by this Court in **Commr. of Wealth Tax, Kanpur v. Chander Sen**, 1986 3 SCC 567: (AIR 1986 SC 1753), where one of us (Sabyasachi Mukharji, J.) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore, whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separate property or not, his son should have a share in that, and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by S.8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by S.8, he does not take it as Kar of his own undivided family but takes it in his individual capacity....."

[36] In **Shyam Narayan Prasad v. Krishna Prasad**, 2018 7 SCC 646 the Hon'ble Supreme Court held:

> "12. It is settled that the property inherited by a male Hindu from his father, father's father, or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great-grandsons of the person who inherits it acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property, and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship."

[37] In **Rohit Chauhan** (supra), the effect of partition of coparcenary property is considered. The facts are identical to the facts of the present case. The 2nd defendant (Gulabh Singh), who is the father of the plaintiff (Rohit Chauhan), got the property on partition of coparcenary property before the birth of the plaintiff. The 2nd defendant sold the property after the after the birth of the plaintiff. The plaintiff challenged the alienations by the 2nd defendant on the ground that it is the property of the coparcenary of the plaintiff and the 1st defendant. The Trial Court held that on the birth of the plaintiff, the property was coparcenary property. The First Appellate Court and the High Court found that on the partition, the coparcenary property loses its character, and it assumes the character of self-acquired property. The Hon'ble Supreme Court restored the judgment of the Trial Court after setting aside the judgments of the High Court and the First Appellate Court, finding that it was coparcenary property after the birth of the plaintiff. It is apposite to extract Paragraphs Nos. 11 and 14 of the said decision.

> "11. We have bestowed our consideration to the rival submission and we find substance in the submission of Mr. Rao. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned.

> But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener. .....
>
> 14. A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the plaintiff, was entitled to dispose of the coparcenary property as if it were his separate property. Gulab Singh, till the birth of plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of plaintiff, Rohit Chauhan, he was not competent to object to the alienation made by his father before he was born or begotten. But, in the present case, it is an admitted position that the property which defendant no. 2 got on partition was an ancestral property and till the birth of the plaintiff he was sole surviving coparcener but the moment plaintiff was born, he got a share in the father's property and became a coparcener. As observed earlier, in view of the settled legal position, the property in the hands of defendant no. 2 allotted to him in partition was a separate property till the birth of the plaintiff and, therefore, after his birth defendant no. 2 could have alienated the property only as Karta for legal necessity. It is nobody's case that defendant no. 2 executed the sale deeds and release deed as Karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire coparcenary property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of sale-deeds and release deed, the parties can work out their remedies in appropriate proceeding."

[38] In **Arshnoor Singh** (supra) also the effect of partition of coparcenary property is considered. The question considered was whether the suit property was an ancestral coparcenary property of the father of the plaintiff, Dharam Singh and the whether the sale deeds executed by him are valid. The Trial Court decreed the suit holding that the suit property was an ancestral coparcenary property of Dharam Singh and the plaintiff and hence the sale deeds executed by Dharam Singh are null and void. It was confirmed by the First Appellate Court. The High Court set aside the concurrent judgments holding that the coparcenary property ceased to exist after the father of Dharam Singh partitioned the property among his three children including Dharam Singh. The Hon'ble Supreme Court set aside the judgment of the High Court and virtually allowed the suit holding that the plaintiff being a male coparcener in the suit property, the sale deeds effected by Dharam Singh are null and void. It is specifically held that the suit property which came to the share of late Dharam Singh through partition, remained coparcenary property qua his son - the plaintiff, who became a coparcener in the suit property on his birth i.e. on 22/08/1985 and that Dharam Singh purportedly executed the two Sale Deeds on 01/09/1999 in favour of Respondent No. 1 after the plaintiff became a coparcener in the suit property.

[39] In view of the aforesaid discussion and the propositions of law laid down by the Hon'ble Supreme Court, the only possible conclusion is that the plaint B schedule property derived by the 1st defendant as per Ext.A1 Partition deed was a coparcenary property in the hands of the 1st defendant which is liable to be partitioned among the members of the coparcenary. No interference is required in the Preliminary Decree passed by the Trial Court which was modified by the First Appellate Court. RSA No. 868/2017 arising from the Preliminary Decree is liable to be dismissed. Since no additional contentions are raised in RSA No. 960/2015 arising from the Final Decree, it is also liable to be dismissed.

[40] Accordingly, both the appeals are dismissed

2024(2)FLJ596

HIGH COURT OF ANDHRA PRADESH: AMARAVATI

[Before Venuthurumalli Gopala Krishna Rao]

Trans Civil Misc Petition (Transfer Civil Miscellaneous Petition) No 55 of 2024

dated 13/09/2024

Killada Priyanka

Versus

Chotupalli Praveen Kumar

TRANSFER OF DIVORCE PETITION

Code of Civil Procedure, 1908 Sec. 24 - Divorce Act, 1869 Sec. 32 - Special Marriage Act, 1954 Sec. 27 - Transfer of Divorce Petition - Petitioner sought transfer of husband's restitution petition filed in Guntur to Srikakulam, citing difficulty in travel due to her employment - Husband, a medical officer, opposed the transfer citing inconvenience but requested dispensation of personal attendance if transferred - Court considered wife's convenience as priority in matrimonial matters - Petition allowed, with personal attendance of respondent dispensed except when necessary - Case transferred from Guntur to Srikakulam. - Petition Allowed

Law Point: In matrimonial disputes, the wife's convenience generally takes precedence over the husband's inconvenience when considering transfer requests under Section 24 CPC.

Acts Referred:

Code of Civil Procedure, 1908 Sec. 24

Divorce Act, 1869 Sec. 32

Special Marriage Act, 1954 Sec. 27

Counsel:

G Rama Gopal, Habibulla Shaik

JUDGEMENT

Venuthurumalli Gopala Krishna Rao, J.- [1] The petitioner/wife filed the present petition under Section 24 of the Code of Civil Procedure, 1908, seeking to withdraw D.O.P.NO.182 of 2023 on the file of the District Judge, Guntur and transfer the same to the Principal District and Sessions Judge, Srikakulam.

[2] The case of the petitioner in brief is as follows:

I. The petitioner is the wife of the respondent and the said marriage was not consummated for the reasons best known to the respondent/husband. The petitioner/wife pleaded that she was forced to file O.P.No.03 of 2023 on the file of the Principal District and Sessions Judge, Srikakulam, seeking divorce against the respondent/husband under Section 27 (1)(II) of the Special Marriage Act, 1954 and the same is pending. The petitioner contend that as a counterblast to the proceedings initiated by her, the respondent/husband, who is working as a Medical Officer, Community Health Centre at Bobili had filed D.O.P.No.18 of 2023 on the file of the District Judge, Guntur, under Section 32 of the Indian Divorce Act, 1869 seeking Restitution of Conjugal Rights without any justification. Learned counsel petitioner further pleaded that the petitioner is a woman and is working as a Junior Assistant in Irrigation Department at Rajam and it is very difficult for her to travel at a distance of 500Kms from Rajam to Guntur and that she was constrained to file the present petition against the respondent/husband seeking to withdraw D.O.P.NO.182 of 2023 on the file of the District Judge, Guntur and transfer the same to the Principal District and Sessions Judge, Srikakulam.

[3] Learned counsel for the respondent would contend that the responded/husband working as a District Coordinator for Hospitals at Bapatla District and in case if the D.O.P.NO.182 of 2023 on the file of the District Judge, Guntur is transferred to the Principal District and Sessions Judge, Srikakulam, it is very difficult for the respondent/ husband to go over to Srikakulam for attending the case on each and every adjournment and fairly requested that as the respondent/husband is working as District Coordinator for Hospitals at Bapatla and in such a situation of transfer the aforesaid case from the District Judge Court, Guntur to the Principal District and Sessions Judge Court, Srikakulam, at least the personal attendance of the respondent/husband may be dispensed with.

[4] Heard Sri.G.Rama Gopal, learned counsel for the petitioner and Sri.Habibulla Shaik, learned counsel for the respondent.

[5] The Apex Court in a case of N.C.V. Aishwarya Vs A.S.Saravana Karthik Sha,2022 LiveLaw(SC) 627 held as follows:

> "9. The cardinal principle for exercise of power under Section 24 of the Code of Civil Procedure is that the ends of justice should demand the transfer of the suit, appeal or other proceeding. In matrimonial matters, wherever Courts are called upon to consider the plea of transfer, the Courts have to take into consideration the economic soundness of both the parties, the social strata of

the spouses and their behavioural pattern, their standard of life prior to the marriage and subsequent thereto and the circumstances of both the parties in eking out their livelihood and under whose protective umbrella they are seeking their sustenance to life. Given the prevailing socio- economic paradigm in the Indian society, generally, it is the wife's convenience which must be looked at while considering transfer."

[6] On considering the submissions made by the learned counsel for the petitioner and in view of the ratio laid down in the aforesaid case law that in matrimonial proceedings, the convenience of the wife has to be considered than that of the inconvenience of the husband. But, on considering the submissions made by the learned counsel for the respondent, I found some subsistence in the contention raised by him and therefore, this Court is of the considered view that there are grounds to consider the request of the petitioner/wife to withdraw D.O.P.NO.182 of 2023 on the file of the District Judge, Guntur and transfer the same to the Principal District and Sessions Judge, Srikakulam by dispensing with the personal attendance of the respondent/husband in D.O.P.NO.182 of 2023 on the file of the District Judge, Guntur which is under the order of transfer to the Principal District Judge Court, Srikakulam, except on the days when his personal attendance is required.

[7] In the result, the present petition is allowed and the D.O.P.NO.182 of 2023 on the file of the District Judge, Guntur, is hereby withdrawn and transferred to the Principal District Judge Court, Srikakulam and the personal attendance of the respondent/husband in D.O.P.No.182 of 2023, which is under the order of transfer, is dispensed with before the Principal District Judge Court, Srikakulam, except on the days when his personal attendance is required. The District Judge, Guntur, shall transmit the case record in D.O.P.No.182 of 2023 to the Principal District Judge Court, Srikakulam duly indexed as expeditiously as possible preferably within a period of two (02) weeks from the date of receipt of a copy of the order. Both the parties are directed to appear before the Principal District Judge Court, Srikakulam on 28.10.2024, at 10:30 a.m. There shall be no order as to costs.

As a sequel, miscellaneous petitions, if any pending and the Interim order granted earlier, if any, shall stand closed

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2024(2)FLJ598

HIGH COURT OF ANDHRA PRADESH: AMARAVATI

[Before Ravi Nath Tilhari; Nyapathy Vijay]

Civil Miscellaneous Appeal No 407 of 2008 **dated 13/09/2024**

Koppuravuri Srinivasa Rao

Versus

Koppuravuri Venkata Savithri Devi

DIVORCE ON DESERTION

Hindu Marriage Act, 1955 Sec. 28, Sec. 13 - Divorce on Desertion - Appellant sought divorce on the ground of desertion, claiming respondent wife left the marital home in 2003 and did not return - Respondent alleged abuse and demand for additional dowry - Court found no reconciliation possible after more than 20 years of separation, considering it mental cruelty - Appellant granted divorce with Rs. 5 lakh alimony to be paid to the respondent within eight weeks, effective only after deposit. - Appeal Allowed

Law Point: Continuous long-term separation without reconciliation constitutes mental cruelty, justifying divorce, even if desertion is contested.

Acts Referred:

Hindu Marriage Act, 1955 Sec. 28, Sec. 13

Counsel:

G Jhansi

JUDGEMENT

Nyapathy Vijay, J.- [1] This Appeal is filed under Section 28 of the Hindu Marriage Act questioning the judgment and decree dated 06.11.2007 passed in HMOP.No.54 of 2005 on the file of Senior Civil Judge, Bhimavaram, West Godavari District.

[2] The brief facts are as under:

Appellant is the Petitioner. As per the petition, the marriage between the Petitioner and Respondent was performed on 09.04.2000 as per Hindu Rites and Customs at Arya Vysya Kalyana Mandapam in Akividu Village and Mandal, West Godavari District. After the marriage, the Petitioner took the Respondent to Bhimavaram, where they lived together. About three months after the marriage, the Respondent became pregnant and parents of the Respondent took her to their house. The Respondent thereafter gave birth to a baby boy. Even after five months after the delivery, the Respondent did not join the marital life with the Petitioner even though the Petitioner was requesting the parents of the Respondent and Respondent for the same. After repeated requests, it was stated that a condition was put that the Petitioner should take a separate residence and accordingly, the Petitioner took a separate residence in Bhimavaram to live with the Respondent. However, the Respondent used to neglect the Petitioner and used to go to her parents house without informing the Petitioner. On 20.02.2003, the Respondent without intimation to the Petitioner went to her parents place taking all the gold ornaments. In spite of repeated requests, the Respondent did not join the Petitioner. Hence, the application was filed for a decree of divorce on the ground of desertion under Section 13(1) (ib) of the Hindu Marriage Act, 1956.

[3] The Respondent filed counter pointing out various incidents of ill-treatment. However, it was admitted in para 6 of the counter that the Petitioner came to the

parents house of Respondent in May, 2002 and requested to send the Respondent and that he will take good care of her. It was pleaded that even though the Petitioner took a separate house, but failed to provide basic needs and used to take meals at his parents' house. It was stated that in July, 2002 the Petitioner abused the Respondent and left her. With nowhere to go, the Respondent called up her parents and even though the mother of the Respondent pleaded with the Petitioner to lead a happy married life, the Petitioner did not agree for the same and had abused the mother of the Respondent. It was further pleaded that the Petitioner demanded an additional dowry of Rs.1 lakh. Hence, sought for dismissal of the application.

[4] In the course of trial, the Petitioner examined five witnesses and marked Exs.A.1 and A.2 on his behalf. The Respondent got himself examined as R.W.1 and also examined her mother as R.W.2. The trial Court after hearing the respective parties, dismissed the O.P that no grounds are made out for grant of divorce. Hence, the present appeal is filed.

[5] In this appeal, though notices were issued to Respondent, at the time of filing of the appeal, the same was returned unserved with an endorsement 'door locked'. This Court on 08.07.2024 directed fresh notice to the Respondent. On 12.08.2024, a memo with proof of service was filed annexing the track consignment report and submitting that the item was delivered to the addressee.

[6] An affidavit was filed by the Petitioner on 19.08.2024 stating that since 20.02.2003, the Petitioner and Respondent are living separately and there is no communication between the parties. It was further stated in the affidavit that there is no possibility of staying together. The issue that falls for consideration in this appeal is, whether the appellant is entitled for divorce?.

[7] Learned counsel for the appellant relied on two judgments of Hon'ble Supreme Court i.e. Shri Rakesh Raman v. Smt. Kavita,2023 Livelaw(SC) 353 and Prakash Chandra Joshi v. Kuntal Prakashchandra Joshi @ Kuntal Visanji Shah, 2024 INSC 54 [2024 SCCOnlineSC 68] (neutral citation).

[8] In **Shri Rakesh Raman's** case, the Hon'ble Supreme Court granted divorce on the ground that the married couple had stayed together as couple only for a period of four years and lived separately for 25 years. The only difference in the cited case and the present case is that in the above cited case, there was no child born out of the wedlock, but in the present case, the parties have a son. Paras 18 and 19 of the said judgment reads as under:

18. We have a married couple before us who have barely stayed together as a couple for four years and who have now been living separately for the last 25 years. There is no child out of the wedlock. The matrimonial bond is completely broken and is beyond repair. We have no doubt that this relationship must end as its continuation is causing cruelty on both the sides. The long separation and absence of cohabitation and the complete breakdown of all meaningful bonds and the existing bitterness

between the two, has to be read as cruelty under Section 13(1) (ia) of the 1955 Act. We therefore hold that in a given case, such as the one at hand, where the marital relationship has broken down irretrievably, where there is a long separation and absence of cohabitation (as in the present case for the last 25 years), with multiple Court cases between the parties; then continuation of such a 'marriage' would only mean giving sanction to cruelty which each is inflicting on the other. We are also conscious of the fact that a dissolution of this marriage would affect only the two parties as there is no child out of the wedlock.

19. Under these circumstances, we uphold the Order of the Trial Court, though for different grounds given by us in our order, and we set aside the Order of the High Court and grant a decree of divorce to the appellant/husband. Their marriage shall stand dissolved.

[9] In **Prakash Chandra Joshi's** case, the Hon'ble Supreme Court exercised power under Article 142(1) of the Constitution of India to dissolve the marriage on the ground of irretrievable breakdown as the parties are not in contact for almost 13 years. The Hon'ble Supreme Court also noted the fact that Respondent/wife in the cited case was not even responding to the summons issued by the Court and it is apparent that she has no interest in continuing the relationship. Para 15 thereof reads as under:

15. Reverting back to the case in hand, to accord satisfaction as to whether the present is a fit case for exercise of power under Article 142 (1) of the Constitution of India to dissolve the marriage on the ground of irretrievable breakdown, we see that the parties are residing separately since February, 2011 and there have been no contact whatsoever between them during this long period of almost 13 years. The Respondent-wife is not even responding to the summons issued by the courts. It seems she is no longer interested in continuing the marital relations with the appellant. Therefore, we have no hesitation in holding that the present is a case of irretrievable breakdown of marriage as there is no possibility of the couple staying together.

[10] In this case also, the parties are not staying together as evident from the untraversed affidavit of the appellant from the year 2003. Further, the Respondent is not even responding to the notices issued. Therefore, this Court does not have any semblance of doubt that the marriage between the parties is beyond rapprochement and the appellant is entitled to divorce on account of long period of continuous separation which is treated as a mental cruelty as per the judgment of the Hon'ble Supreme Court in **Samar Ghosh v. Jaya Ghosh**, 2007 4 SCC 511

[11] The Civil Miscellaneous Appeal is therefore allowed and the judgment and decree dated 06.11.2007 passed in HMOP.No.54 of 2005 is set aside. The Petitioner is granted divorce and the marriage between the Petitioner and the Respondent is dissolved.

[12] As the appellant is working as a Clerk in a Nutrine Agency, the appellant shall deposit an amount of Rs.5,00,000/- (Rupees five lakhs) to the Respondent/wife as

permanent alimony. The amount of Rs.5,00,000/- shall be deposited in the name of Respondent within a period of eight weeks from today with the Registry of this Court. The decree of divorce shall be effective only from the date of such deposit.

[13] In the event of such deposit, the State Legal Services Authority shall reach out to the Respondent and after verifying the credentials of the Respondent/wife, shall disburse the amount without further reference to this Court. No order as to costs. As a sequel, the miscellaneous petitions, if any, shall stand closed

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2024(2)FLJ602

IN THE HIGH COURT AT CALCUTTA

[From JALPAIGURI BENCH]

[Before Bivas Pattanayak]

C O (Civil Order) No. 42 of 2024 **dated 12/09/2024**

Amrita Roy

Versus

Soumen Chaki

CUSTODY OF MINOR

Hindu Marriage Act, 1955 Sec. 13, Sec. 9, Sec. 26 - Custody of Minor - Petitioner challenged an order granting custody of minor daughter to father - Opposite party filed for restitution of conjugal rights and custody - Petitioner filed for divorce on cruelty grounds - Trial court allowed custody to father after interacting with child - Court noted that child expressed discomfort with mother's acquaintance and preferred staying with father - Mother alleged manipulation of child but court held child's statements credible - No visitation rights were granted to mother due to the child's expressed preference and welfare - Petitioner sought revision of the order. - Petition Dismissed

Law Point: Welfare of child is paramount in custody disputes - Child's expressed preferences, especially in cases of discomfort or influence by one parent, are crucial in determining custody.

Acts Referred:

Hindu Marriage Act, 1955 Sec. 13, Sec. 9, Sec. 26

Counsel:

Joyjit Choudhury, Ajay Singhal, Somraj Paul, Sunayana Paul, Milindo Paul, Nabankur Paul, Sutapa Sen Paul, Subham Das

JUDGEMENT

Bivas Pattanayak, J.- [1] This civil revisional application has been filed by the petitioner under Article 227 of the Constitution of India challenging Order No.89 dated

3rd February, 2024 passed by learned Additional District Judge, 2nd Court, at Siliguri in Misc. Case No. 1 of 2022 (arising out of Mat Suit No. 435 of 2021).

[2] The brief fact of the case is that the opposite party filed application under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights against the present petitioner being Mat Suit No. 435 of 2021. The opposite party also filed an application under Section 26 of the Hindu Marriage Act, 1955 being Misc. Case No. 1 of 2022 praying for custody of the minor daughter. The petitioner on the ground of cruelty filed an application for divorce under Section 13 of the Hindu Marriage Act, 1955 which has been registered as Mat Suit No. 114 of 2022. Upon joint prayers of the parties, both the suits being Mat Suit No. 435 of 2021 and Mat Suit No. 114 of 2022 were directed to be tried analogously. The application of the opposite party under Section 26 of the Hindu Marriage Act, 1955 was allowed on 3rd February, 2024 by the learned Trial Court directing that the custody of the minor child, who is presently residing with the father, shall continue with the father till she attains majority.

[3] Being aggrieved by and dissatisfied with the impugned order, the petitioner has preferred the revisional application.

[4] Mr. Joyjit Choudhury, learned advocate for the petitioner submitted that during the pendency of the application for custody of the minor child, the daughter expressed her willingness to spend few days with her father which was acceded by the petitioner voluntarily and accordingly, the daughter of the petitioner went to her father's house at Babupara on 23rd January, 2023. On a wrong submission made by learned advocate for the opposite party, an order was passed on 7th January, 2023 that the daughter Miss. Beshakha Chaki will continue to reside with the opposite party-husband. During her stay with her father, the daughter has been tutored by the opposite party for the purpose of getting her custody. Learned Trial Court failed to appreciate and consider that the custody of the daughter has previously been with the mother and taking advantage of the temporary stay, the opposite party has manipulated and tutored the minor daughter against the petitioner which is not a good parenting and the opposite party had also minimized the interaction of the petitioner with the minor daughter. This Hon'ble Court appointed a Special Officer in C.O. 82 of 2023 in which challenge was made to order dated 11th April, 2023 and the visitation of the mother was permitted in presence of a Special Officer appointed by the Court. However, at the time of final disposal of the application, no such report of the Special Officer was taken into consideration by the learned Trial Court. The learned Trial Court examined the child before passing such order. The Evidence Act though does not prescribe any particular age for a witness to be a competent one, yet it is incumbent upon a Court, prior to examining a child witness, to assess the competency of the child witness to testify. This precaution is necessary because child witnesses are amenable to tutoring and pliable and liable to be influenced easily, shaped and moulded. In the present context, no such precaution was taken by the learned Trial Court prior to examining the child. Therefore, what has been stated by the child before the Court cannot be

taken as sacrosanct to act upon. In support of his contention, he relied on the following decisions:

i. **S. Amutha versus C. Manivanna Bhupathy**, 2007 2 CTC 97]

ii. **Nivrutti Pandurang Kokate and Others versus State of Maharashtra**, 2008 12 SCC 565]

He further indicated that the Court while granting custody of the child failed to give any visitation right to the mother. Normally, if the parents are living in the same town or area, the spouse, who had not been granted custody, is given visitation right. However, the learned Trial Court failed to take into consideration such aspect of granting visitation to the mother. The child of tender years requires the love, affection, company, protection of both parents which is a basic requirement for a child to grow in congenial atmosphere. By the order impugned, the child is totally deprived of the love and affection of her mother. To buttress his contention, he relied on the decision of the Hon'ble Supreme Court passed in **Yashita Sahu versus State of Rajasthan and Others**, 2020 3 SCC 67].

Further though endeavour was taken by this Court to resolve the issue by mediation, however, the same could not be acted upon. In the order of the learned Trial Court, there is reference of presence of a male person along with the petitioner, when she along with her mother travelled outside. The child has made certain allegations against the third party. Be that as it may, one cannot be oblivious to the fact that, prior to staying with her father, the girl child spent substantial years with her mother and, therefore, in no stretch of imagination, it can be said that the girl child would be affected if she is allowed in the custody of the mother. In light of his aforesaid submissions, he prayed for setting aside the impugned order under challenge or in the alternative, allow visitation right to the mother to visit her daughter on such date and time as the Court may deem fit and proper.

[5] In reply to the contentions raised on behalf of the petitioner, Mr. Milindo Paul, learned advocate appearing for opposite party submitted that the welfare of the child is of paramount consideration while considering the prayer for custody of a minor child. In the present case at hand, the child is of 13 years which is a vulnerable age. Statutory stipulations cannot stand in the way of the welfare of a child. Before the learned trial court as well as before the mediator appointed by this Court, the minor child all along has stated that she wishes to stay with her father. The statements made by the minor child would show that there is presence of a male person with her mother due to which reason she was uncomfortable while being in the company of her mother. The statements of the child before the learned trial court also reveal that the child was uncomfortable due to the touch by the male friend of her mother. One cannot be oblivious to the fact that possibility of the girl of such tender age getting exploited by an outsider cannot be discarded. Further while residing with the father, the academic result of the child has improved. In an application for custody of the minor child, the

proposition as laid down by the Hon'ble Supreme Court is that the Court is to see what is conducive to the welfare of the minor. The wishes of the minor child are to be respected. In support of his contention, he relied on the following decisions:

i. **Vikram Vir Vohra versus Shalini Bhalla**, 2010 4 SCC 409]

ii. Selvaraj versus Revathi,2023 SCCOnLineSC 1644]

iii. Shazia Aman Khan and Another versus State of Orissa and Others,2024 SCCOnLineSC 225]

He further submitted that in Yashita Sahu (supra) the child was less than 3 years of age and the Hon'ble Court taking into consideration of such fact observed that if we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each, which is distinguishable with the case at hand. He further submitted that the proposition in Nivrutti Pandurang Kokate (supra) deals with corroborative value of child witness in criminal proceedings and, therefore, does not apply to the facts of the case. Distinguishing the decision in S. Amutha (supra), he submitted that the proposition deals with the competency of the child witness. The interaction with the child is a procedure and cannot be construed to be evidence. In light of his aforesaid submissions, he prayed that the order of the learned trial court should be affirmed.

[6] Having heard learned advocates for respective parties, the only issue which has fallen for consideration is that whether the learned trial court was justified in passing the said order granting custody of the child to the father.

[7] At the outset, upon going through the decisions of the Hon'ble Supreme Court in Vikram Vir Vohra (supra), Selvaraj (supra) and Shazia Aman Khan (supra), there cannot be any quarrel that so far as the dispute pertaining to custody of the child is concerned the paramount consideration is the welfare of the child.

[8] In the case at hand, the girl child is of 13 years of age and studies in Class VIII at St. Joseph's School. Upon perusal of the impugned order under challenge, it is found that the learned Trial Court, prior to passing of the order, has interacted with the child and it has noted as follows:

> " The girl child was introduced in the chamber when the girl child Besakha Chaki revealed that her mother was very much acquainted with one Mr. Sharma, and that Mr. Sharma and her mother visited Darjeeling, Lataguri, restaurant, cinema etc. together, and that said Sharma uncle tried to pull her hand while she was in room, and that she did not like the act. The following are the statements of Besakha Chaki during her interview, "Earlier I used to reside with my both parents, but after separation of my parents just before Durga Puja in the year 2019, I continued to reside with my mother. My mother used to roam around with one Sharma uncle and visited Darjeeling, Lataguri and also used to visit restaurant, cinema, etc. together. I have same liking for both of my parents. Sharma uncle tried to pull my hand at Lataguri

while I was playing badminton and my mother was in a room, and that I did not like the act of pulling by Sharma uncle. I do not like Sharma uncle. My mother forces me to talk with Sharma uncle and his daughter which I do not like. My mother is planning to send me to a boarding school which I do not want. Even my maternal grand mother does not like Sharma uncle and that there had been quarrels between my mother and my maternal grand mother because of Sharma uncle. I feel better and get better company while staying in my father and I like to say with my father. My mother once assaulted me and used to become angry when I refused to accompany her along with Sharma uncle. My mother came to the house of my father by six times after my last school examination result. My mother was invited to come and attend my birthday in the second half of the day but she refused to come on the pretext that she was busy elsewhere. Later my mother met me on the first day of the new sessions of my school and gave me chocolates. I told before the principal of my school that I wanted to stay with my father. On 05.03.2023 my mother tried to pull me and take me away, but I did not go. I wish to stay my parents if they stay together. If my parents do not decide to stay together then I wish and want to stay with my father. My mother and her sister did not allow my father to meet me at her house. My father used to meet me in absence of my mother at the house of my mother.""

[9] From the order of the learned trial court, it appears that there is one acquaintance of the mother of the girl child namely Mr. Sharma. The statements made by the girl child before the Trial Court divulge of certain acts caused at the instance of Mr. Sharma to which the girl child is not comfortable with. She also stated that she was once assaulted by her mother, who used to become angry when she refused to accompany her along with Mr. Sharma. Whereas on the other hand, she feels better in staying in her father's company. One cannot be oblivious to the fact that she is of a tender age at which mental perception of the environment and things around and the mental awareness develops. Bearing in mind the above, the uncomfortable aspect as stated by the girl child is concerning.

[10] Pursuant to the order of this Court dated 14th March, 2022, mediation was held by the mediator. From the report of the mediator, it manifest that the girl child, who is presently living with her father and ailing grandmother, expressed her desire to meet her mother, however, she stated to return back to her father's place at night.

[11] This Court has also interacted with the girl child. She clearly and in unequivocal terms stated that she wants to reside with her father. She also stated that she is comfortable living with her father and that he also looks after her studies. The growth of a child needs conducive and healthy environment. Since the girl child has herself stated that she is comfortable with her father, in the opinion of this Court it would not be appropriate to remove her from the custody of her father to the custody

of the mother keeping in mind the statements made by the child before the learned trial court as indicated above.

[12] It has been strenuously argued on behalf of the petitioner that the statements made by the girl child cannot be considered since the competency of the child witness to testify was not assessed by the Court prior to examining her, relying on Nivrutti Pandurang Kokate (supra) and S. Amutha (supra). In Nivrutti Pandurang Kokate (supra), competency of a child of tender age to testify and the question of acceptability of a child witness in criminal trial was before the Hon'ble Supreme Court. Therefore, the facts is distinguishable and does not apply to the present case. Similarly, in S. Amutha (supra) in a matrimonial suit, the minor son, as a witness, spoke against his mother which was objected to by the mother on the ground that the child witness was not competent to speak about the dispute between the wife and the husband and the minor child is not competent to swear affidavits as witness. The facts clearly differs from the case at hand and as such the ratio does not apply to the fact of the case.

[13] Mr. Choudhury, learned advocate for the petitioner relying on Yashita Sahu (supra) submitted that mother should be given a visitation right since the same is important for development of child. In the case before the Hon'ble Supreme Court, the child was less than 3 years of age. By birth, the child was a citizen of the USA. Her father was already working in the USA when he got married. The facts involved in the case is factually different. In the case at hand, the child is of 13 years of age and she has categorically stated that she wants to remain in the custody of the father and has also stated of certain uncomfortable situation while residing with her mother, at the instance of one male acquaintance of her mother. The mother assaulted the child and became angry when the minor girl child refused to accompany her along with the said male acquaintance.

[14] There can be no cavil that when a Court is confronted by conflicting claims of custody there are no rights of the parents which have to be enforced. The child is not a chattel or a ball that is bounced to and fro the parents. It is only the child's welfare which is the focal point for consideration (See **Roxann Sharma versus Arun Sharma**, 2015 8 SCC 318]).

[15] Another principle of law which is settled with reference to custody of the child is the wish of the child, if she is capable of, but then, the question as to 'what would be the best interest of the child' is a matter to be decided by the Court taking into account all the relevant circumstances. Reference can be made to **Rohith Thammana Gowda versus State of Karnataka and others**, 2022 AIR(SC) 3511]. It was held as under:

> "13. We have stated earlier that the question 'what is the wish/desire of the child' can be ascertained through interaction, but then, the question as to 'what would be the best interest of the child' is a matter to be decided by the court taking into account all the relevant circumstances. A careful scrutiny of the

impugned judgment would, however, reveal that even after identifying the said question rightly the High Court had swayed away from the said point and entered into consideration of certain aspects not relevant for the said purpose. We will explain the raison d'etre for the said remark."

[16] In the present case, material reveals that the girl child was assaulted by the mother and the mother showed anger when the child refused to accompany her along with her male acquaintance who, as per the child, did certain acts which she was not comfortable with. Thus, from the statement of the child as above there is insistence by the mother upon the child to accompany her along with her male acquaintance with whom the child is uncomfortable. It is a fact that learned trial court has granted custody of the child to the father without giving visitation right to the mother. However, bearing in mind the relevant circumstances, for the best interest of the child, this Court finds that the order passed by the learned Trial Court does not call for interference.

[17] Moreover, Mr. Paul, learned advocate for opposite party has rightly submitted relying on Vikram Vir Vohra (supra), Selvaraj (supra) and Shazia Aman Khan (supra), that welfare of the child is of paramount consideration.

[18] In view of the above discussion, the civil revision being **C.O 42 of 2024** stands dismissed. The Order No.89 dated 3rd February, 2024 passed by learned Additional District Judge, 2nd Court, at Siliguri in Misc. Case No. 1 of 2022 (arising out of Mat Suit No. 435 of 2021) is hereby affirmed.

[19] There shall be no order as to costs.

[20] All connected applications, if any, stand dismissed.

[21] Interim order, if any, stands vacated.

[22] Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of necessary legal formalities

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2024(2)FLJ608

DELHI HIGH COURT

[Before Subramonium Prasad]

Crl M C (Criminal Miscellaneous Case); Crl M A (Criminal Miscellaneous Application) No 6157 of 2022; 23031 of 2024 **dated 10/09/2024**

Amit Chandi

Versus

Aarti Chandi @ Aarti Khanna

MAINTENANCE AND COMPENSATION

Code of Criminal Procedure, 1973 Sec. 125 - Hindu Marriage Act, 1955 Sec. 24 - Protection of Women from Domestic Violence Act, 2005 Sec. 2, Sec. 3, Sec. 12 - Maintenance and Compensation - Petitioner challenged orders directing payment of Rs. 30,000 per month as maintenance to respondent wife and Rs. 5,00,000 as compensation - Respondent alleged domestic abuse, mental distress, and husband's affair - Petitioner denied legal marriage and produced documents showing respondent with another name - Court upheld maintenance and compensation considering petitioner's income and lifestyle - Court stated that under Section 125 CrPC, husband cannot escape responsibility to maintain wife even if she is capable of earning - Petition dismissed

Law Point: Husband's responsibility under Section 125 CrPC to maintain wife persists even if wife is capable of earning, especially when domestic abuse or neglect is proven.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 125

Hindu Marriage Act, 1955 Sec. 24

Protection of Women from Domestic Violence Act, 2005 Sec. 2, Sec. 3, Sec. 12

Counsel:

Sanjay Kumar Tiwary

JUDGEMENT

Subramonium Prasad, J.- [1] Petitioner has approached this Court challenging the Order dated 19.09.2022, passed by the learned Additional Sessions Judge-II, Saket Courts, in C.A. No.61/2019, upholding the Order dated 21.12.2018, passed by the learned Metropolitan Magistrate, Mahila Court, Saket, in CC No.461449/2016, fixing maintenance @ Rs. 30,000/- per month to be paid by the Petitioner herein to the Respondent herein. Vide Order dated 12.12.2018, the learned Metropolitan Magistrate has also directed the Petitioner herein to pay Rs.5,00,000/- to the Respondent herein towards injuries sustained by her, including mental torture, depression and emotional distress and further the Respondent herein was also awarded Rs.3,00,000/- as compensation, including Rs.30,000/- as litigation costs.

[2] The facts, with which the Respondent herein approached the Trial Court seeking maintenance, are that the marriage of the Respondent herein and the Petitioner herein was solemnized on 03.03.1998 according to Hindu rites and customs. It is stated that out of the wedlock there are two children. It is the case of the Respondent/Wife that the Petitioner/Husband used to return home late at night and used to abuse the Respondent/Wife physically, mentally and verbally. It is stated that noticing change in the attitude of the Petitioner/Husband, the Respondent/Wife made inquiries and found out that the Petitioner is having an extra-marital affair with another lade (hereinafter

referred to as "Ms. X?). It is stated that in March, 2010, the Petitioner herein/Husband brought Ms. X to the matrimonial house and introduced her to his parents and when the Respondent herein/Wife objected to the affair of the Petitioner, the Petitioner stopped coming to the matrimonial house. It is further stated that the parents of the Petitioner supported the Petitioner and threatened the Respondent/Wife not to take any action against the Petitioner/Husband else the Petitioner/Husband would stop the financial support to the Respondent and her kids. It is also stated that the Respondent/Wife came to know that the Petitioner/Husband got married to Ms. X and has a daughter with her. It is stated that having no other option, the Respondent/Wife had to leave the matrimonial house. In the complaint it is also stated that the Petitioner herein is carrying on the business in the name and style of M/s Amit Tent and Decorators. It is stated that the monthly income of the Petitioner/Husband from the said business if around Rs.2,50,000/-. It is further stated in the complaint that the Petitioner owns two cars and one flat in Noida and is maintaining several bank accounts. It is stated that the Petitioner also owns a warehouse in Sector 51 Noida and he is also a member of the Noida Golf Club, yearly membership of which is Rs.1,00,000/-. It is also stated in the complaint that the Petitioner has employed two part-time domestic helps at the matrimonial house and one full-time house help at his Noida house. On the other hand, the Respondent has stated that she is not employed. It is stated that the father of the Respondent/Wife has passed away and her mother is aged and has no financial support. It is stated that the Respondent/Wife was employed at a salary of Rs.15,100/- in February, 2023, however, due to lack of experience and education, the employment lasted only for a month.

[3] Evidence was led by both the parties before the Trial Court. The Trial Court held that though the Respondent herein has not been able to prove the marriage of the Petitioner herein with Ms. X, evidence on record shows that the Petitioner has a daughter from Ms. X. The Trial Court held that the fact that the Petitioner is living with another lady and has a daughter from her is sufficient to make out a case of domestic violence against the Petitioner. The Trial Court, after examination of the evidence, came to the conclusion that the Petitioner is not maintaining the Respondent and directed that the Petitioner must pay Rs. 30,000/- per month to the Respondent herein as maintenance. The Trial Court also directed the Petitioner to pay Rs.5,00,000/- to the Respondent herein towards injuries sustained by her, including mental torture, depression and emotional distress and further the Respondent herein. The Trial Court also directed the Petitioner to pay Rs.3,00,000/- to the Respondent herein as compensation, including Rs.30,000/- as litigation costs.

[4] Aggrieved by the said Order, the Petitioner filed an Appeal before the learned Additional Sessions Judge. In the Appeal, it was stated by the Petitioner that the Respondent has married some other man. To substantiate his claim, the Petitioner also produced the PAN card of the Respondent herein, which shows the name of the Respondent as "Aarti Khanna". In the Appeal it is also stated that the Petitioner was

not married to the Respondent as the marriage has not taken place in accordance with the customary ceremonies. It was also contended by the Petitioner before the Appellate Court that the Respondent had stated that her monthly expenditure is Rs.9,000/- and the Trial Court has erred in awarding Rs.30,000/- to the Respondent as monthly maintenance as it is more than the expenditure of the Respondent. The Petitioner also stated that the Respondent is an able bodied lady, who has worked in a boutique and, therefore, she cannot be allowed to become a parasite on the Petitioner by misusing the law. It was also contended by the Petitioner before the Appellate Court that the Petitioner has already paid Rs.14 lakhs to the Respondent in another proceeding initiated by the Respondent before other forums and that amount has not been taken into consideration while awarding Rs.30,000/- per month as maintenance to the Respondent. The Petitioner also contended that the Trial Court has not looked into the income reports filed by the Petitioner before the Trial Court.

[5] The Appellate Court rejected the contentions raised by the Petitioner regarding the name of the Respondent herein in her Pan Card by stating that the Respondent/Wife is the daughter of Mr. SK Khanna and Pan Card which indicates that the Respondent is the wife of Mr. SK Khanna is only a typographical error. The Appellate Court, therefore, dismissed the Appeal upholding the findings of the Trial Court.

[6] It is this Order which has been challenged by the Petitioner in the present Petition.

[7] Heard the learned Counsels for the parties and perused the material on record.

[8] Section 24 of the Hindu Marriage Act, Section 125 Cr.P.C and Section 12 of the Domestic Violence Act are all tools of social justice which have been enacted to ensure that the women and children are protected from a life of potential vagrancy and destitution. The Apex Court has consistently upheld that the conceptualisation of Section 125 was meant to ameliorate the financial suffering of a woman who had left her matrimonial home; it is a means to secure the woman?s sustenance, along with that of the children, if any. The statutory provision entails that if the husband has sufficient means, he is obligated to maintain his wife and children, and not shirk away from his moral and familial responsibilities.

[9] In **Bhuwan Mohan Singh v. Meena & Ors.**, 2015 6 SCC 353, the Apex Court examined the underlying purpose as well as social context of Section 125 of the Code, and observed as under:

> "2. Be it ingeminated that Section 125 of the Code of Criminal Procedure was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home forth e reasons provided in the provision so that some suitable arrangements can be made by the court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson

> to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created where under she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able-bodied. There is no escape route unless there is an order from the court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds."

[10] In **Kirtikant D. Vadodaria v. State of Gujarat**, 1996 4 SCC 479, while discussing the dominant purpose of Section 125 of the Code, the Apex Court has held as under:

> "15. While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents, etc. and to prevent destitution and vagrancy by compelling those who can support those who are unable to support themselves but have a moral claim for support. The provisions in Section 125 provide a speedy remedy to those women, children and destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation."

[11] The Apex Court in **Chaturbhuj v. Sita Bai**, 2008 2 SCC 316, has stated that 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 Apex Court has observed as under:

> "6. 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 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Veena Kaushal, 1978 4 SCC 70: 1978 SCC (Cri) 508: AIR 1978 SC 1807] falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in **Savitaben Somabhai Bhatiya v. State of Gujarat**, 2005 3 SCC 636: 2005 SCC (Cri) 787: (2005) 2 Supreme 503].

7. Under the law the burden is placed in the first place upon the wife to show that the means of her husband are sufficient. In the instant case there is no dispute that the appellant has the requisite means. But there is an inseparable condition which has also to be satisfied that the wife was unable to maintain herself. These two conditions are in addition to the requirement that the husband must have neglected or refused to maintain his wife. It has to be established that the wife was unable to maintain herself. The appellant has placed material to show that the respondent wife was earning some income. That is not sufficient to rule out application of Section 125 CrPC. It has to be established that with the amount she earned the respondent wife was able to maintain herself.

8. In an illustrative case where the wife was surviving by begging, it would not amount to her ability to maintain herself. It can also be not said that the wife has been capable of earning but she was not making an effort to earn. **Whether the deserted wife was unable to maintain herself, has to be decided on the basis of the material placed on record. Where the personal income of the wife is insufficient she can claim maintenance under Section 125 CrPC. 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**, 1975 2 SCC 386: 1975 SCC (Cri) 563: AIR 1975 SC 83] it was observed that the wife should be in a position to maintain a standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 CrPC."

(emphasis supplied)

[12] A perusal of the law laid down by the Supreme Court would indicate that the proceedings under Section 125 Cr.P.C have been enacted to remedy/reduce the financial sufferings of a lady, who was forced to leave her matrimonial house, so that some arrangements could be made to enable her to sustain herself. It is the duty of the husband to maintain his wife and to provide financial support to her and their children. The object of Section 125 CrPC and the provisions of DV Act which gives power to the Court to award maintenance have been used for the same purpose, viz., to reduce further financial sufferings of a lady who has been forced to leave her matrimonial house. A husband cannot avoid his obligation to maintain his wife and children except if any legally permissibly ground is contained in the statutes.

[13] The Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as "the DV Act?) was enacted to provide relief to an aggrieved woman who is subject to domestic violence. Aggrieved person is defined under Section 2(a) of the DV Act to mean 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. Domestic relationship, which is defined under Section 2(f) of the DV Act, 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. The term "Respondent? used in Section 2(a) of the DV act means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under the DV Act. Section 3 of the DV Act defines domestic violence and it includes physical abuse, sexual abuse, verbal and emotional abuse and economic abuse and all other forms of abuse which can be inflicted on a lady. The Petitioner is an aggrieved person who is entitled to maintain a claim under the DV Act.

[14] In the facts of the present case, the Courts below have come to the conclusion that the Petitioner/Husband is living with another lady and has a child through her. In the present Petition, the Petitioner has not provided any material to shock the concurrent findings of the Court. In the complaint filed by the Respondent/Wife, it is stated that she was subjected to physical and mental abuse by the Petitioner herein. No lady can tolerate that her husband is cohabiting with another lady and has a child from her. All these facts make the Respondent/Wife a victim of Domestic Violence. The contention of the Petitioner that the complaint filed by the Respondent/Wife does not come within the four corners of the DV Act cannot be accepted. The Respondent had to leave her matrimonial house because she was unable to tolerate the fact that her husband is living with another woman. Since the Respondent/Wife was not in a position to take care of her two children, she had no option to leave them with the parents of the Petitioner herein. Looking at the peculiar facts of the case, the action of the Respondent/wife cannot be found fault with.

[15] Looking at the financial status of the Petitioner, as has been found by the Courts below, and taking judicial notice of the cost of living, this Court is of the opinion that the amount of Rs.30,000/- per month awarded by the Trial Court to be paid by the Petitioner herein/Husband to the Respondent/Wife does not require any interference. The fact that the Respondent/Wife is capable of earning cannot work to her detriment.

[16] The Petitioner, who has abandoned his wife and children, is living with other women and has a child from her. As held by the Courts below, the Petitioner, who runs a business under the name M/s Amit Tent and Decorators, has a reported monthly income of approximately Rs. 2,50,000/- and in addition to his business earnings, he owns two cars and a flat in Noida. He also owns a warehouse situated in Sector 51, Noida, and he is also a member of the Noida Golf Club, which requires an annual membership fee of Rs. 1,00,000. The Petitioner has also employed two part-time domestic helpers at his matrimonial home and one full-time house help at his residence in Noida. The financial and asset profile of the Petitioner reflects a comfortable and affluent lifestyle and, therefore, is in a position to pay Rs.30,000/- per month to the Respondent/Wife as maintenance. Undoubtedly, the said amount will be taken into account by other Courts, which are considering the issue of maintenance, while fixing maintenance in the respective proceedings.

[17] The fact that the Respondent is able bodied and can earn a livelihood does not absolve a husband not to provide maintenance to his wife and children. Indian women leave their jobs to look after the family, cater to the needs of their children, look after their husbands and his parents. The contention that the Respondent is only a parasite and is abusing the process of law is nothing but an insult not only to the Respondent herein but to the entire women kind.

[18] In view of the above, this Court does not find any reason to interfere with the well-reasoned Orders passed by the Courts below.

[19] Accordingly, the petition is dismissed along with pending application(s), if any

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2024(2)FLJ615

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Karnik; Valmiki Menezes]

Criminal Writ Petition No 591 of 2024 **dated 09/09/2024**

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Versus

State; Police Inspector Womens Police Cell; XYZ

FALSE PROMISE OF MARRIAGE

Indian Penal Code, 1860 Sec. 90, Sec. 376, Sec. 420, Sec. 375 - Code of Criminal Procedure, 1973 Sec. 164 - False Promise of Marriage - Appellant sought quashing of FIR under Sec. 376 and 420 IPC, where the complainant alleged sexual relations on the false promise of marriage - Court observed that the relationship appeared consensual, as complainant willingly accompanied appellant on multiple occasions despite knowing complications related to marriage - No prima facie case of rape established as complainant's consent was not induced by deception - FIR and chargesheet quashed. - Petition Allowed

Law Point: Consensual relationships between adults do not constitute rape unless it is proven that consent was obtained through deception or a false promise of marriage from the outset.

Acts Referred:

Indian Penal Code, 1860 Sec. 90, Sec. 376, Sec. 420, Sec. 375

Code of Criminal Procedure, 1973 Sec. 164

Counsel:

Arun Bras De Sa, Kyle Dsouza, Mark Valadares, S G Bhobe, Rohan Desai, Ashay Priolkar, Pranav Pathak

JUDGEMENT

M.S. Karnik, J.- [1] Writ Petition No.546 of 2024 was wrongly tagged with Criminal Writ Petition No.591 of 2024(F). Detag Writ Petition No.546 of 2024 from Criminal Writ Petition No.591 of 2024(F). List the Writ Petition No.546 of 2024 on 18.09.2024.

[2] This petition seeks to quash and set aside FIR No.3 of 2024 dated 25.01.2024 lodged against the petitioner by respondent no.3 and the Chargesheet No.4 of 2024 dated 22.03.2024.

[3] The petitioner claims to be a reputed musician by profession. The complainant is aged 38 years and the petitioner 32 years. As per the complaint dated 25.01.2024 lodged by Ms XYZ to the Women's Police Station, it is alleged that the petitioner committed offences punishable under Sections 376 and 420 of IPC. It is alleged that she met the petitioner on 28.10.2023 at the October fest at Inox Panaji when she had gone for a show along with her friend. The petitioner was performing for an event at the October Fest. Since then they became friends and started chatting with each other on Instagram. On 07.01.2024, the petitioner told the complainant that he wants to talk to her grandmother and in front of the complainant the petitioner told her grandmother that he wants to marry the complainant but she was not ready. The complainant's grandmother told the petitioner regarding her past to which the petitioner said that her past does not

[4] On 08.01.2024, the petitioner took the complainant for dinner at his friend's restaurant. Since it was too late, the petitioner requested the complainant to stay at his flat. At night, the petitioner forcibly had sex with the complainant. The complainant was upset. The petitioner told her not to worry as he had promised her that he would marry her. The next day in the evening the petitioner dropped the complainant home.

[5] The petitioner informed the complainant that he had told his mother regarding their relationship and that she would accept their relationship. On 10.01.2024, the petitioner and the complainant went to the complainant's relative's place. The petitioner informed the complainant's relative that he wants to marry her and even if his family does not support him, he will go ahead with the marriage. On 11.01.2024 at 04.00 hrs. when the complainant was at her relative's place, the petitioner came into her bedroom and with consent had a sexual relationship.

[6] On 14.01.2024 at 23.00 hrs. the petitioner took the complainant to his flat and again with consent had sexual relationship. The complainant asked the petitioner whether he would marry her. The petitioner promised that he would marry the complainant. The petitioner had a sexual relationship with the complainant on as many as 7 occasions on the promise of marrying her.

[7] Since 19.01.2024, the petitioner started ignoring the complainant. He told her that his mother is not accepting their relationship. Since 23.01.2024, the petitioner had stopped talking to the complainant and was not receiving her calls. The complainant did a pregnancy test on 25.01.2024 at around 08.30 hours and found that she was pregnant. It is alleged that the petitioner cheated the complainant and raped her under the pretext of marriage. The statement of the complainant was recorded under Section 164 CrPC. The Chargesheet came to be filed on 22.03.2024 for the offences punishable under Sections 376 and 420 of IPC.

[8] This petition is filed for quashing the FIR and the chargesheet. The complainant has filed an affidavit in reply opposing the petition.

[9] Learned counsel for the petitioner, relying on the decisions in Deepak Gulati V/s. State of Haryana,2013 SCCOnLineSC 477, **Sonu V/s. State of UP & Anr.**, 2021 18 SCC 517, Pramod Pawar V/s. State of Maharashtra & Ors.,2019 SCCOnLineSC 1073, Dr. Dhruvaram Sonar V/s. State of Maharashtra,2018 SCCOnLineSC 1073, XYZ V/s. State of Maharashtra & Ors.,2023 DGLS(Bom) 1327 and **Shri Mahendra Ladu Sawant V/s. State & Ors.** [WPCR No.3 of 2020] submitted that the FIR deserves to be quashed and set aside. It is submitted that even if the allegations in the FIR and the materials in the chargesheet are taken at its face value and accepted in its entirety, even prima facie do not constitute any offence or make out a case against the accused. It is submitted that the FIR and the chargesheet disclose a consensual relationship between two adults not on the pretext of marriage.

[10] Mr S.G. Bhobe, learned Public Prosecutor for the State and Mr Rohan Desai, learned counsel for the complainant opposed the petition. It is submitted that a

chargesheet has been filed and, therefore, the petitioner's remedy is now to approach the Trial Court seeking appropriate reliefs. It is further submitted that on a false promise to marry the complainant, the petitioner took advantage of the complainant and had physical relationship with her. The petitioner always had an intention to cheat the complainant right from inception and, therefore, the ingredients of Sections 376 and 420 are clearly made out. Mr Desai relied upon a decision of the Hon'ble Supreme Court in **Yedla Srinivasa Rao V/s. State ofA.P.**, 2006 11 SCC 615 and that of this Court in Deepesh Bhaskar Arkashi &: Ors. V/s. State of Maharashtra and Anr.,2024 SCCOnLineBom 2362 in support of his submissions that in the present case, the petitioner made a false promise to marry the complainant, which he never fulfilled. It is further submitted that the decisions relied upon by the learned counsel for the petitioner are after the conclusion of the trial and, therefore, even in the present case having regard to the materials on record the petitioner should be made to face the trial.

[11] Heard learned counsel for the parties.

[12] Before we proceed to consider the submissions of learned counsel, it would be useful to refer to the judicial pronouncements on the subject. In Pramod Pawar V/s. State of Maharashtra (supra), the Hon'ble Supreme Court considered the decisions in Deepak Gulati V/s. State of Haryana (supra), Yedla Srinivas Rao V/s. State ofA.P. (supra), **Uday V/s. State of Karnataka**, 2003 4 SCC 46, Dhruvaram Murlidhar Sonar V/s. State of Maharashtra (supra) and **State of Haryana V/s. Bhajan Lal**, 1992 Supp1 SCC 335. Their Lordships considered the scope and ambit of the Court's power under Section 482 CrPC and in para 6 laid down as under:

> "Section 482 is an overriding section which saves the inherent powers of the court to advance the cause of justice. Under Section 482 the inherent jurisdiction of the court can be exercised (i) to give effect to an order under the CrPC; (ii) to prevent the abuse of the process of the court; and (iii) to otherwise secure the ends of justice. The powers of the court under Section 482 are wide and the court is vested with a significant amount of discretion to decide whether or not to exercise them. The court should be guarded in the use of its extraordinary jurisdiction to quash an FIR or criminal proceeding as it denies the prosecution the opportunity to establish its case through investigation and evidence. These principles have been consistently followed and reiterated by this Court. In **Inder Mohan Goswami V/s. State of Uttaranchal**, 2007 12 SCC 1, this Court observed:
>
> "23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent powers to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:
>
> (i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of the court, and

(iii) to otherwise secure the ends of justice."

[13] State of Haryana V/s. Bhajan Lai (supra), conducted a detailed study of the situations where the Court may exercise its extraordinary jurisdiction and laid down a list of illustrative examples where quashing of FIR may be appropriate. At this juncture, it would be pertinent to make a reference to some of the tests in paragraph 102 which are relevant to the present

> '102.....(1) Where the allegations made in the first irmation report or the complaint, even taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).
>
> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

[14] We must bear in mind that in deciding whether to exercise jurisdiction under Section 482, this Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The Limited question is whether on the face of the FIR and the materials on record even if accepted in their entirety constitute any offence. A profitable reference needs to be made to the observations in paragraphs 8 to 18 of Pramod Pawar V/s. State of Maharashtra & Ors. (supra) which read thus:

> "8. In deciding whether to exercise its jurisdiction under Section 482, the Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation oi competing evidence presented. The limited question is whether on the face of the FIR, the allegations constitute a cognizable offence. As this Court noted in Dhruvaram Murlidhar Sonar V/s. State of Maharashtra (supra):
>
> "13. It is clear that for quashing proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of its inherent powers."
>
> 9. The present proceedings concern an FIR registered against the appellant under Sections 376, 417, 504, and 506(2) IPC and Sections 3(1)(u), (w) and

3(2)(vii) of SC/STAct. Section 376 of the IPC prescribes the punishment for the offence of rape which is set out in Section 375. Section 375 prescribes seven descriptions of how the offence of rape may be committed. For the present purposes only the second such description, along with Section 90 IPC is relevant and is set out below:

"375. Rape - A man is said to commit "rape" if he - under the circumstances falling under any of the following seven descriptions-

Firstly -

Secondly. - Without her consent.

Explanation 2. - Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."

"90. Consent known to be given under fear or misconception - A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or"

10. Where a woman does not "consent" to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90 does not define the term "consent", a "consent" based on a "misconception of fact" is not consent in the eyes of the law.

11. The primary contention advanced by the complainant is that the appellant engaged in sexual relations with her on the false promise of marrying her, and therefore her "consent", being premised on a "misconception of fact" (the promise to marry), stands vitiated.

12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. In Dhruvaram Sonar (supra), which was a case involving the invoking of the jurisdiction under Section 482, this Court observed:

"15. .....An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason

coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of."

This understanding was also emphasised in the decision of this Court in **Kaini Raj an V/s. State of Keralr**, 2013 9 SCC 113

"12.... "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the significance of the moral quality of the act but after having fully exercised the choice between resistance and asset. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

13. This understanding of consent has also been set out in Explanation 2 of Section 375 (reproduced above). Section 3(1)(w) of the SC/ST Act also incorporates this concept of consent:

"3(1)(w)(i) intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent;

Explanation.-For the purposes of subclause (i), the expression "consent" means an unequivocal voluntary agreement when the person by words, gestures, or any form of nonverbal communication, communicates willingness to participate in the specific act:

Provided that a woman belonging to a Scheduled Caste or a Scheduled Tribe who does not offer physical resistance to any act of a sexual nature is not by reason only of that fact, is to be regarded as consenting to the sexual activity:

Provided further that a woman's sexual history, including with the offender shall not imply consent or mitigate the offence;"

14. In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In **Anurag Soni V/s. State of Chhattisgarh**, 2019 13 SCC 1, this Court held:

"12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and,

in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 of the IPC and can be convicted for the offence under Section 376 of the IPC."

Similar observations were made by this Court in Deepak Gulati v State of Haryana (supra):

"21.... There is a distinction between the each of a promise, and not fulfilling a promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused... "

15. In Yedla Srinivasa Rao V/s. State of Andhra Pradesh (supra) the accused forcibly established sexual relations with the complainant. When she asked the accused why he had spoiled her life, he promised to marry her. On this premise, the accused repeatedly had sexual intercourse with the complainant. When the complainant became pregnant, the accused refused to marry her. When the matter was brought to the panchayat, the accused admitted to having had sexual intercourse with the complainant but subsequently absconded. Given this factual background, the court observed:

"10. It appears that the intention of the accused as per the testimony of PW 1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent."

16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under

Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act. In Deepak Gulati (supra), this Court observed:

"21.....There is a distinction between the mere each of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently."

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her." (Emphasis supplied)

17. In Uday V/s. State of Karnataka (supra) the complainant was a college going student when the accused promised to marry her. In the complainant's statement, she admitted that she was aware that there would be significant opposition from both the complainant's and accused's families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The court observed that in these circumstances the accused's promise to marry the complainant was not of immediate relevance to the complainant's decision to engage in sexual intercourse with the accused, which was motivated by other factors:

"25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who

obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. 1 nere is nardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married."

(Emphasis supplied)

18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

[15] In the present case, we have carefully examined the allegations in the FIR, the statement of the prosecutrix recorded under Section 164 of CrPC and the other materials on record. At this stage, we have to be mindful that we cannot adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. We find that even if the allegations made in the complaint and the materials on record are taken at its face value, what is revealed from the statement under Section 164 is that on 08.01.2024, the complainant had gone out for dinner with the petitioner and as it was late, the complainant stayed in the flat of the petitioner. In the middle of the night, the petitioner entered the complainant's bedroom and had

forcible sexual intercourse with her. The complainant cried and asked him as to why he had committed this act, when he told her that he treats her like his wife and he had promised to get married with her. On the next day after lunch, the petitioner dropped the complainant home. From the allegations, it is seen that the prosecutrix did not consent to the sexual relationship. There was thus no consent or the promise of marriage.

[16] In the complaint, it is stated that on 11.01.2024 in the early morning at 04.00 am, when they had gone to her relative's place, the petitioner came to her bedroom and had sexual relationship with consent.

[17] Learned counsel for the petitioner submitted that there are several improvements in the statement recorded under Section 164. The complainant alleges that up to 19.01.2024, the petitioner had sexual relationship with the complainant on several occasions. The complainant stated that from 19.01.2024 the petitioner started ignoring her and saying that his mother is not ready for marriage on account of her past wherein a civil registration was done in the year 2013 with some other man which was cancelled after 5 to 6 years. On 23.01.2024 the petitioner told her that his mother is not ready for the marriage.

[18] On the basis of the allegations taken at its face value what transpires is that the petitioner had proposed marriage. To our mind, the first instance of the sexual relationship was not on account of a false promise to marry because it is the complainant's case that the petitioner had a forcible sexual relationship with her and then convinced her that, in any case, he is to marry her. Thus, there does not exist a situation where the consent was on the petitioner's false promise to marry the complainant.

[19] In the complaint, it is then stated that on the subsequent occasions, the sexual relationship was by consent. It is further material to note that the petitioner had indicated to the complainant that he had informed his mother regarding their relationship and that she would accept the relationship. It was only on 19.01.2024 that the petitioner told the complainant that his mother was not accepting the relationship. Thereafter, it is alleged that the petitioner started avoiding the complainant. Learned counsel for the petitioner submitted that there is a complete variance between what is stated in the complaint and the contents of the Section 164 statement. It may be so but it is not possible for us to adjudicate upon the veracity of the facts alleged.

[20] The Hon'ble Supreme Court has observed that in a case of this nature, two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. It is pertinent to note that at the relevant time, the complainant was 38 years of age. The complainant had willingly accompanied the petitioner who was 32 years of age to the locations

mentioned in the complaint and in the Section 164 statement. It is alleged that the petitioner had given her an assurance that he would marry her. On the first occasion, it is stated by the complainant that the petitioner had forcible sexual relations with her against her wish. The complainant had in close proximity thereafter voluntarily accompanied the petitioner on several occasions resulting in physical relations with the consent. The complainant though in her complaint says that on several occasions the physical relations was by consent, however, in the Section 164 statement she says that such consent was on the promise that the petitioner would marry her. The complainant is sufficiently mature to understand the consequences of such a relationship. The complainant says that the petitioner stopped meeting her after informing the complainant that his mother is opposing the marriage on account of a civil registration in 2013 with some other man which was cancelled.

[21] Section 90 provides that any consent given under a misconception of fact would not be considered valid so far as the provisions of Section 375 are concerned and thus such a physical relationship would be tantamount to committing rape. The physical relation between the parties had developed with the consent of the complainant and though she alleged that on the first occasion, the petitioner had forcible sexual relation, it is alleged that there were 7 instances when the petitioner and the complainant had sexual relations with consent. The complainant voluntarily stayed with the petitioner and even travelled with him to different places. Thus, the complainant had adequate knowledge and significant maturity to understand the consequences associated with the act she was consenting to. The complainant was capable of understanding the complications and issues surrounding her relationship with the petitioner. The petitioner informed the complainant that his mother was against the marriage where after the petitioner stopped meeting her. In the facts and circumstances of the present case, we fail to comprehend the circumstance of the charge of rape levelled against the petitioner. In any case, we are satisfied that on a careful study of all the relevant circumstances and upon viewing the totality of the sequence of facts commencing with the incident on 08.01.2024 culminating in the last incident on 19.01.2024, it appears to be a case of consensual relationship rather than forcible sexual relationship to constitute a charge of rape against the petitioner.

[22] The petition, therefore, succeeds and is allowed. The FIR No.3 of 2024 dated 25.01.2024 registered at Women's Police Station at Panaji and the consequent final report/chargesheet is quashed and set aside.

2024(2)FLJ627

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before Milind N Jadhav]

Miscellaneous Civil Application No 58 of 2024 **dated 04/09/2024**

Khanjan Hitendra Jasani

Versus

Krupali Khanjan Jasani and Anr

TRANSFER OF DV PROCEEDINGS

Code of Civil Procedure, 1908 Sec. 24 - Protection of Women from Domestic Violence Act, 2005 Sec. 23, Sec. 12 - Transfer of DV Proceedings - Appellant sought transfer of Domestic Violence proceedings initiated by Respondent-Wife from Girgaon Court to Family Court at Bandra for clubbing with divorce proceedings - Respondent opposed the transfer, citing statutory right to choose forum under the D.V. Act - Court considered convenience, proximity, and judicial efficiency, following Supreme Court guidelines on clubbing related matrimonial matters - Transfer granted with directions for expedited hearing of pending interim application by Family Court. - Transfer Petition Allowed

Law Point: When multiple proceedings involving common issues between spouses are pending, they may be transferred to a single court to avoid multiplicity and conflict of decisions - The wife's statutory right to choose the forum under the D.V. Act may yield to the need for judicial efficiency.

Acts Referred:

Code of Civil Procedure, 1908 Sec. 24

Protection of Women from Domestic Violence Act, 2005 Sec. 23, Sec. 12

Counsel:

Ashutosh Kulkarni, Gaurav Sharma, Rajnni Kuttyy, Avyuktaa Legal, Anoshak Davar, Raghavendra Mehrotra, Samrudhi Gholap, Lawkhart Legal, Uttam Rane

JUDGEMENT

Milind N Jadhav, J.- [1] Heard Mr. Kulkarni, learned Advocate for Applicant; Mr. Davar, learned Advocate for Respondent No.1 and Mr. Rane, learned Advocate for Respondent No.2.

[2] Miscellaneous Civil Application seeks transfer of C.C. No.400054/DV/2023, proceeding filed under the Protection of Women from Domestic Violence Act, 2005 (for short '**D.V. Act**') by Respondent - Wife before the Additional Chief Metropolitan Magistrate, 4th Court at Girgaon, Mumbai to the Family Court at Bandra, Mumbai and further direction to club both proceedings together and be heard together. Application is filed by husband.

[3] Mr. Davar would submit that he has instructions to oppose the Miscellaneous Civil Application. He would submit that there are four proceedings which are pending between parties. The first is Marriage Petition No.A-2787 of 2023 filed by Applicant - husband in the Family Court at Bandra. The second is a Civil suit seeking declaration against the Respondent - wife filed by mother of the Applicant - husband in the Bombay City Civil Court, at Mumbai with respect to a flat. The third is a Civil suit filed by the husband seeking restraint / injunction against Respondent - wife from interfering with his residence in Bangalore. The fourth is the complaint filed by Respondent - wife under the D.V. Act in the Court of the Additional Chief Metropolitan Magistrate, 4th Court at Girgaon, Mumbai.

[4] He would submit that three proceedings are filed against Respondent - wife as against the complaint under the D.V. Act filed by her against the Applicant. He would submit that the D.V. Act proceedings is at an advanced stage and the concerned Court is considering Interim Application filed by Respondent - wife and next date of hearing is on 10.09.2024. He would submit that on the previous date of hearing it was stated before this Court that the pending Interim Application be decided by the said Court hearing the complaint and only thereafter further proceedings under the D.V. Act be transferred to the Family Court.

[5] Another submission made by Mr. Davar to oppose the Miscellaneous Civil Application is on the basis of an incorrect statement made by Applicant in paragraph Nos.3.5 and 3.6 of the Miscellaneous Civil Application which states that Respondent No.1 had appeared through Advocate on 10.11.2023 and it is only merely to harass the Applicant and as a counter blast to the Applicant's divorce Petition filed in the Family Court that the Respondent has filed the complaint under the D.V. Act.

[6] Mr. Kulkarni appearing for Applicant refutes the submissions made by Mr. Davar. He would infact submit that the Marriage Petition was filed on 30.10.2023, which was immediately followed by filing of the suit for injunction by mother of Applicant on 08.11.2023. Thereafter he would submit that on 23.11.2023, statement was made by Respondent before the Bombay City Civil Court that she would not enter into the suit flat in respect of which injunctive relief was prayed. He would next submit that on 24.11.2023, that is immediately on the very next day, Respondent filed a complaint under the D.V. Act before Girgaon Court. Mr. Davar would submit that the statement made by Respondent on 23.11.2023 has been withdrawn by her on 11.12.2023.

[7] The sum and substance of the above submissions is that according to Respondent, Application for transfer of proceedings under the D.V. Act to the Family Court at Bandra should not be allowed and both proceedings i.e. Marriage Petition and D.V. Act proceeding should be allowed to be proceeded with in their respective Courts as they are. Mr. Davar has relied upon decision of this Court in the case of **Anuraag Agarwal V/s. Poonam Agarwal nee Mukim** [Miscellaneous Civil Application

No.159 of 2023 dated 09.07.2024.] (Coram: Arun R. Pednekar, J.) to contend that this Court has taken cognizance of various previous decisions passed by this Court as also the Supreme Court and has infact carved out a principle with respect to question of conflict between the proceedings under the D.V. Act and the Marriage Petition in the Family Court and has enumerated some principles in paragraph No.14 of the said decision. He has placed the said decision before me. I have perused the same. According to him, the D.V. Act proceedings give a statutory right to choose the forum to the Respondent - wife which cannot be taken away by the provisions of Section 24 of the Code of Civil Procedure, 1908 (for short "CPC").

[8] In the facts of the present case it cannot be said that exercising the decision of transfer under Section 24 of the CPC will take away the right of the wife to choose the forum under the D.V. Act, as also the exercise of power of transfer. What I find in the said decision is that the said decision has not considered the decision of the Supreme Court in the case of **N.C.V. Aishwarya Vs. A. S. Saravana Karthik Sha**, 2022 AIR(SC) 4318 which was infact available at that time. Incidentally it is seen that, some other decisions which are referred to therein of this Court have considered the above referred Supreme Court decision. The Supreme Court has in the shortest possible words etched out the principles underlying Section 24 of the CPC in paragraph Nos.9 to 12 of the said decision. Apart from enumerating the principles of transfer under Section 24 of the CPC, the Supreme Court has also touched upon and answered the question of clubbing the proceedings namely Marriage Petition and D.V. Act proceedings and more specifically in matrimonial matters and also directed the jurisdictional Court to try the said proceedings together and more so in the cases where proceedings under D.V. Act are required to be transferred to be decided together with the Marriage Petition by the Family Court which has the jurisdiction. Though the Supreme Court has also stated in the said decision that given the prevailing socio-economic paradigm in the Indian Society, generally it is the wife's convenience which must be looked at while considering such a transfer, but that would have to be looked in this case from the view point of proximity of distance and time as both proceedings in this case are tried in the Courts at Mumbai, one at Girgaon and the other at Bandra.

[9] In the present case that finding of the Supreme Court will not be applicable in view of the fact that proceedings are required to be transferred from Girgaon Court, Charni Road to Family Court at Bandra. This decision of the Supreme Court was not placed before the Court which decided the case of **Anuraag Agarwal V/s. Poonam Agarwal nee Mukim** (first supra).

[10] For the sake of convenience and reference, paragraph Nos.9 to 12 of the decision in the case of **N.C.V. Aishwarya Vs. A. S. Saravana Karthik Sha** (second supra) are reproduced hereinbelow:-

> "9. The cardinal principle for exercise of power Under Section 24 of the Code of Civil Procedure is that the ends of justice should demand the transfer of the

suit, appeal or other proceeding. In matrimonial matters, wherever Courts are called upon to consider the plea of transfer, the Courts have to take into consideration the economic soundness of both the parties, the social strata of the spouses and their behavioural pattern, their standard of life prior to the marriage and subsequent thereto and the circumstances of both the parties in eking out their livelihood and under whose protective umbrella they are seeking their sustenance to life. Given the prevailing socio-economic paradigm in the Indian society, generally, it is the wife's convenience which must be looked at while considering transfer.

10. Further, when two or more proceedings are pending in different Courts between the same parties which raise common question of fact and law, and when the decisions in the cases are interdependent, it is desirable that they should be tried together by the same Judge so as to avoid multiplicity in trial of the same issues and conflict of decisions.

11. As noticed above, the Appellant is a young lady aged about 21 years, staying alone along with her aged parents. Under the above circumstances, it is difficult for her to travel all the way from Chennai to Vellore to attend the court proceedings of the case filed by the Respondent seeking annulment of marriage. Further, it is also just and proper to club all the three cases together to avoid multiplicity of the proceedings and conflict of decisions. Therefore, the High Court was not justified in rejecting transfer petition bearing TR.C.M.P.No. 473 of 2020, filed by the Appellant herein.

12. Resultantly, the appeal succeeds and is accordingly allowed. The Order dated 19.11.2020 passed by the High Court in TR.C.M.P. No.473 of 2020 is set aside. We direct transfer of F.C.O.P. No.125 of 2020 pending consideration before the Family Court, Vellore to the jurisdictional Family Court at Chennai. We also direct the clubbing of the aforementioned three cases so that a common order may be passed by the concerned Family Court at Chennai."

[11] From the above, it is seen that the Supreme Court has held that in matrimonial matters whenever Courts are called upon to consider the plea of transfer it will have to take into consideration an array of factors as stated therein in order to decide the case. However, Supreme Court has also said that when two or more proceedings are pending between the same parties which raise common questions of fact and law and when the decision of the cases are interdependent, it is desirable that they should be tried before the same Judge so as to avoid multiplicity in trial of the said proceedings and conflict of decisions. In this regard, Supreme Court has also given its imprimatur to club both the proceedings together and to be tried together by the same Court. In the present case, undoubtedly it would be in the interest of justice if the proceedings / complaint filed under the D.V. Act by Respondent - wife is

transferred to the Family Court where the Marriage Petition is pending. I am inclined to follow the imprimatur of the Supreme Court which broadly encompasses the power of Section 24 of the CPC while considering the transfer Application under Section 24 of the CPC.

[12] The extent of power of the High Court under Section 24 of the CPC is explained by the Supreme Court in a later decision of the Supreme Court in the case of **Shah Newaz Khan and Ors. Vs. State of Nagaland and Ors.**, 2023 11 SCC 376 . That apart, power of the Family Court under the Family Courts Act, 1984 has been well explained by this Court in an unreported decision in the case of **Sandip Mrinmoy Chakraboarty Vs. Reshita Sandip Chakrabarty & Anr.** [Civil Writ Petition No.4649 of 2015 decided on 06.09.2018] wherein this Court has held that the Family Court is competent to exercise all 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 referred to in the explanation appended to Section 7 and for the purpose of exercising such jurisdiction under such law, is deemed to be a District Court or as the case maybe subordinate Civil Court for the area to which the jurisdiction of the Family Court extends. It would be helpful to reproduce paragraph Nos.12 and 13 of the said decision herein which would otherwise answer the apprehension of the Respondent. Paragraph Nos.12 and 13 of the said decision read thus:-

> "12. On having bird's eye view of the two Enactments, it is apparent that the two Enactments provide for overriding remedies and reliefs. The forum of Family Court established under Section 3 of the Family Courts Act, 1984 is competent to 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 referred to in the explanation appended to Section 7 and for the purpose of exercising such jurisdiction under such law, is deemed to be a district Court or, as the case may be, subordinate civil Court for the area to which the jurisdiction of Family Court extends. The suits and proceedings amenable the jurisdiction of the Family Court are the suits and proceedings between the parties to a marriage for a decree of nullity, or for restitution of conjugal rights or for judicial separation or dissolution of marriage. The Family Court would also exercise its jurisdiction over the property of the parties to a marriage, injunction for circumstances arising out of marital relationship, declaration as to legitimacy of any person, proceedings for maintenance, guardianship, custody of children, access of children etc. The Family Court thus exercises the powers of a civil Court and by virtue of Section 10 of the said Act, it is deemed to be a civil Court and has all the powers of such a Court. By sub-section (1) of Section 10 of the Family Courts Act, 1984, the provisions of the Code of Civil Procedure is made applicable to the suits and proceedings before the Family Court except

the proceedings under Chapter IX of the Criminal Procedure Code, 1973, which continue to be governed by the provisions of Code of Criminal Procedure, 1973.

As far as the conduct of proceedings under the Domestic Violence Act, 2005 is concerned, the proceedings are initiated on an application being preferred by an aggrieved person or a protection officer or any other person on behalf of the aggrieved person seeking various types of reliefs which the Magistrate is competent to grant under Chapter IX. Section 28 prescribes that all the proceedings under Section 12, 18, 19, 20, 21, 22 and 23 are governed by the Code of Criminal Procedure, 1973. It is, however, permissible for the Court to lay down its own procedure for disposal of an application under Section 12 or under sub-section 2 of Section 23. Since the Code of Criminal Procedure do not contain any provision to grant ex-parte and interim orders, the legislature deemed its fit and expedient to introduce Section 23 and confer the Magistrate with the specific power to pass such interim order as he deems fit and proper. The Family Court which exercises the jurisdiction of a Civil Court and which is deemed to be a Civil Court, would exercise all the powers of a Civil Court and it is needless to say that it would include the power to grant injunction or any interim orders of any nature by virtue of Order XXXIX Rules 1 and 2. It is also empowered to pass interlocutory orders so as to protect the subject matter of the proceedings. Thus, the Family Court which is deemed to be a civil Court posses all the powers of a civil Court including its inherent power to grant interim relief, and therefore, a Section analogous to Section 23 of the Domestic Violence Act, 2005 do not find place in the Family Courts Act, 1984.

13. Coming to the present controversy which this Court is called upon to deal with viz. relief that is sought for transfer of proceedings pending on the file of the learned Judicial Magistrate First Class at Cantonment Court, Pune to the Family Court at Pune, the apprehension expressed by the learned counsel for the respondents that the Family Court is not clothed with the powers as the one which is conferred on the Magistrate under Section 23 of the Domestic Violence Act, 2005 is misconceived and since it is already noted above that the Family Court which acts as a Civil Court and since it is vested with all powers of Civil Court which includes specific provision to pass interim orders, the said apprehension can be dispelled and it is to be noted that the Family Court is competent not only to deal with the application preferred under Section 12 and specifically in the light of the powers conferred by Section 26 of the Domestic Violence Act, 2005 the relief available under Section 18, 19, 20, 21 and 22 can be sought in proceeding before the Family Court and the Family Court being a Civil Court is empowered to exercise all

the powers of the Civil Court which would include a power to grant interim and ex-parte orders."

[13] That apart, the ground that proceedings at different stages as being one of the ground for objecting the transfer, is once again completely misplaced. On a reading of paragraph No.17 of the aforesaid decision which is reproduced hereinbelow, the said apprehension is also addressed squarely:-

17. On careful reading and an understanding of the scheme and the purpose of the two Enactments, I am of the opinion that in order to avoid the multiplicity of litigations and in the interest of the parties, it would be appropriate that the power under Section 24 can be exercised and the proceedings can be clubbed together. Though the learned counsel for the respondents has pointed out that the proceedings have moved ahead and now at this stage if the proceedings are transferred, it would cause prejudice, I am of the opinion that such apprehension is totally misfounded as the Family Court is competent in its jurisdiction to continue the proceedings from the stage at which it has reached and since under Section 10 of the Family Court is also competent enough to derive its own procedure, it will find out its way to ensure that the proceedings are tried in effective and expeditious manner. It would attempt an expeditious disposal of both the said proceedings which are pending since 2013 and 2014 respectively. Since the evidence of the respondent wife in the Domestic Violence proceeding is already over, the Family Court is directed to rely upon the said evidence recorded in the Domestic Violence proceedings by the learned Judicial Magistrate First Class at Cantonment Court, Pune and from that stage by taking the said evidence which is already recorded, the Family Court would proceed further and the Family Court would also take into consideration the averments that have been raised in the Domestic Violence application preferred before the learned Judicial Magistrate First Class at Cantonment Court, Pune. Whatever the interim reliefs are in operation would remain in force when the proceedings are pending before the Family Court."

[14] In that view of the matter, I reject the submissions made by Mr. Dawar.

[15] In view of the above, Miscellaneous Civil Application stands allowed in terms of prayer clause (b) which reads thus:-

"b. this Hon'ble Court may be pleased to transfer C.C.NO. 400054/DV/2023 filed under Section 12 r/w 23 of The Protection of Women from Domestic Violence Act,.2005, before he Learned Additional Chief Metropolitan Magistrate, 4 th Court at Girgaon, Mumbai to the Learned. Family Court at Bandra, Mumbai with the directions that same be heard along with Petition No. A-2787 of 2023;"

[16] There is one more request made by Mr. Davar which on consideration can be allowed in this case as the request prima facie appears to be genuine in the facts of this case. Respondent has filed Interim Application in the D.V. Act proceedings which has been numbered as Exhibit-7 and Exhibit-8 in 54/DV/2023 before the Additional Chief

Metropolitan Magistrate, 4th Court at Girgaon, Mumbai. When the proceedings under the D.V. Act will be transferred, it is directed that this particular Application shall be heard by the Family Court within a period of four weeks from today.

[17] Parties are directed to co-operate with the learned Family Court in that regard. Family Court is directed not to give adjournments to the parties and to give adjournments only if they are utmost necessary due to any emergency or exigency and it shall only be at the discretion of the Family Court. Mr. Kulkarni is gracious enough to not object to the Application.

[18] All concerned Courts shall act on a server copy of this order and not insist on the certified copy.

[19] With the above directions, Miscellaneous Civil Application is allowed and disposed.

2024(2)FLJ634

IN THE HIGH COURT AT CALCUTTA

[Before Debangsu Basak; Md Shabbar Rashidi]

W P A (Writ Petition); Ia No Can; Old No Can; C A N No 1098 of 2020; 1 of 2020; 3091 of 2020, 3093 of 2020, 3094 of 2020; 2 of 2020, 3 of 2020, 4 of 2024

dated 02/09/2024

Dr Gaurav Gupta

Versus

State of West Bengal

CHILD CUSTODY

Indian Penal Code, 1860 Sec. 34, Sec. 498A, Sec. 506 - Hindu Marriage Act, 1955 Sec. 9 - Guardians and Wards Act, 1890 Sec. 25 - Hindu Minority and Guardianship Act, 1956 Sec. 6 - Protection of Women from Domestic Violence Act, 2005 Sec. 12, Sec. 18, Sec. 19, Sec. 20, Sec. 21, Sec. 22, Sec. 23 - Child Custody - Father filed writ petition seeking habeas corpus against wife for custody of minor children - Alleged that children were wrongfully removed from Kolkata to Bhopal by wife without consent - Various legal proceedings filed between parties including restitution of conjugal rights and domestic violence allegations - Supreme Court transferred multiple cases to Nagpur Court - High Court found that ongoing legal proceedings were capable of resolving custody issues - Relegated parties to civil court - No special circumstances warranting habeas corpus intervention - Petition dismissed

Law Point: Habeas corpus for child custody is not maintainable when civil proceedings under relevant laws are already pending and capable of addressing custody disputes.

Acts Referred:

Indian Penal Code, 1860 Sec. 34, Sec. 498A, Sec. 506

Hindu Marriage Act, 1955 Sec. 9

Guardians and Wards Act, 1890 Sec. 25

Hindu Minority and Guardianship Act, 1956 Sec. 6

Protection of Women from Domestic Violence Act, 2005 Sec. 22, Sec. 19, Sec. 21, Sec. 20, Sec. 23, Sec. 18, Sec. 12

Counsel:

Partha Sarathi Sengupta (Senior Advocate), Ratnesh Kr Rai, Devanshi Deora, Sabyasachi Banerjee, Diksha Ghosh

JUDGEMENT

Debangsu Basak, J.- [1] Writ petitioner as father of two minor children has sought a writ of habeas corpus against the respondent No. 4, who is the wife and the mother of the two minor children.

[2] Learned Senior Advocate appearing for the writ petitioner has contended that, the minors were in the custody and control of the respondent No. 4 till they were illegally and wrongfully removed by the respondent No. 4 from Kolkata to presently at Bhopal. He has contended that, the present custody of the children with the respondent No. 4 is wrongful and illegal.

[3] Referring to the facts of the case, learned Senior Advocate appearing for the writ petitioner has submitted that, marriage between the writ petitioner and the respondent No. 4 took place on December 10, 2006 and solemnized under the Hindu Marriage Act, 1955. The first child was born on September 15, 2012 at England. Parents had thereafter relocated and settled in Kolkata. The first child had been admitted at a school in Kolkata and continues to be a student of such school. Second child was born on October 18, 2017 at Kolkata.

[4] Learned Senior Advocate appearing for the writ petitioner has contended that, disputes and differences arose between the writ petitioner and the respondent No. 4. Respondent No. 4 had taken the children from Kolkata to Mumbai without any intimation. Writ petitioner had travelled to Mumbai to meet his children and respondent No. 4 on October 27, 2019 when he was manhandled and not allowed to meet his children. The respondent No. 4 had subsequently shifted to Bhopal where she is presently residing. Respondent No. 4 has denied the writ petitioner all access to his children. Even access through virtual platform has either been denied altogether or monitored.

[5] Learned Senior Advocate appearing for the writ petitioner has submitted that, the writ petitioner travelled to Bhopal to attend family counselling when he was threatened by the then Director General of Police, Madhya Pradesh. Writ petitioner had filed Misc. Case No. 3021 of 2019 under Section 9 of the Hindu Marriage Act,

1955 seeking restitution of conjugal rights in the District Court at Alipur, South 24 Parganas. Respondent No. 4 had filed a criminal complaint at Bhopal on December 11, 2019. Writ petitioner had filed Misc. Case No. 181 of 2019 under Section 25 of the Guardians and Wards Act, 1890 read with Section 6 (a) of the Hindu Minority and Guardianship Act, 1956 before the District Judge, Alipore, South 24 Parganas on December 13, 2019. Thereafter, writ petitioner has filed the present writ petition.

[6] Learned Senior Advocate appearing for the writ petitioner has submitted that, the respondent No. 4 filed an application under Section 12 read with Sections 18 to 23 of the Protection of Women from Domestic Violence Act, 2005 against the writ petitioner and his family members on June 24, 2020. The respondent No. 4 had filed a Transfer Petition being 361-362/2020 seeking transfer of applications under Section 9 of the Hindu Marriage Act, 1955 and Section 25 of the Guardianship and Ward Act, 1890 from Kolkata to Bhopal.

[7] Learned Senior Advocate appearing for the writ petitioner has pointed out that, in this writ petition, an interim order was passed on February 3, 2020 directing the respondent No. 4 to deposit the passports of the children with the District Judge, Bhopal until further orders. Such order was challenged by a Special Leave Petition by the respondent No. 4 which was dismissed by an order dated June 19, 2020. He has pointed out that by an order dated March 4, 2020 Hon'ble Supreme Court directed the parties to mediate the disputes before the mediator in the Transfer Petition filed by the respondent No. 4. Such mediation however had failed and by an order dated February 8, 2020 Hon'ble Supreme Court disposed of Transfer Petition No. 361-362/2020 by transferring the proceedings under the Hindu Marriage Act, 1955 and the proceedings under the Guardians and Wards Act, 1890 to the Principal Judge, Nagpur, Maharashtra.

[8] Learned Senior Advocate appearing for the writ petitioner has submitted that, on June 30, 2020 respondent No. 4 filed Transfer Petition No. 683 of 2020 praying for transfer of the present writ petition to the Madhya Pradesh High Court at Jabbalpur. Respondent No. 4 had also filed for divorce in Bhopal, Madhya Pradesh which was also transferred to Nagpur by virtue of the order dated March 1, 2024.

[9] Learned Senior Advocate appearing for the writ petitioner has contended that, several orders were passed by this Court in the best interest of the children. The respondent No. 4 had acted in violation thereof. He has drawn the attention of the Court to the various acts of misdeeds of the respondent No. 4 vis- -vis children as also the orders passed by the High Court.

[10] Learned Senior Advocate appearing for the writ petitioner has contended that, the present writ petition is maintainable since, the respondent No. 4 removed the children born out of the wedlock by deceit and is illegally and unlawfully detaining them at Bhopal. He has relied upon (**Tejaswani Gaud & Anr vs. Shekhar Jagdish**

Prasad Tewari & Ors., 2019 7 SCC 42; (**Yashita Sahu vs. State of Rajasthan And Others**, 2020 3 SCC 67) in the regard.

[11] Learned Senior Advocate appearing for the writ petitioner has contended that, welfare of the children is of paramount importance and that, the children are at the risk of Paternal Alienation Syndrome owing to the malicious act of the respondent No. 4. He has submitted that Supreme Court recognized Paternal Alienation Syndrome to be a serious form of child psychological abuse. In support of such contention, he has relied upon (**Vivek Singh vs. Romani Singh**, 2017 3 SCC 231), (**Githa Hariharan & Anr. Vs. Reserve Bank of India**, 1999 2 SCC 228).

[12] Learned Senior Advocate appearing for the writ petitioner has relied upon (**Lahiri Sakhamuri vs. Sobhan Kodali**, 2019 7 SCC 311) and submitted that, best interest of the children is the paramount consideration in deciding custody of the children. He has pointed out that, the children would be better placed in the custody of the writ petitioner since the writ petitioner has evidently better maturity and judgement. He has contended that, writ petitioner is way better placed in respect of financial sufficiency, mental stability, and providing access to better school to the children. Moreover, children will develop better having a permanent residence as opposed to temporary residence. He has pointed out that the respondent No. 4 is living in a rented accommodation and forced to shift residence due to her financial condition and in fact shifted her residence. Consequently, he has submitted that, appropriate order be passed with regard to the custody of the two children involved.

[13] Learned Advocate appearing for the respondent No. 4 has submitted that, the respondent No. 4 was being tortured both physically and mentally and therefore, was constrained to remove the children to Bhopal as also remove herself from the writ petitioner and his family members. He has contended that, the writ petitioner is violent and abusive in nature. He has referred to the proceedings that the respondent No. 4 was constrained to initiate as against the writ petitioner. He has contended that, respondent No. 4 is sufficiently qualified and with sufficient financial capability to meet the needs of the children. He has pointed out that, both the children are now studying at Bhopal in one of the best schools there.

[14] Learned advocate appearing for the respondent No. 4 has relied upon **(Dr. (Mrs.) Veena Kapoor vs. Varinder Kumar**, 1981 3 SCC 92), (**Githa Hariharan & Anr. Vs. Reserve Bank of India**, 1999 2 SCC 228), (**Syed Saleemuddini vs. Dr. Rukhasana & Ors.**, 2001 5 SCC 247), (**Nil Ratan Kundu & Anr. Vs. Abhijit Kundu**, 2008 9 SCC 413), (**Ruchi Majoo vs. Sanjeev Majoo**, 2011 6 SCC 479), (**Nithya Anand Raghavan vs. State (NCT Delhi) & Anr.**, 2017 8 SCC 454), (**Tejaswani Gaud & Anr. Shekhar Jagdish Prasad Tewari & Ors.**, 2019 7 SCC 42), (Sushil Kumar Tiwari Vs. State of UP & Ors.,2021 SCCOnLineAll 882), (Rohit Thammana Gowda vs. State of Karnataka & Ors.,2022 SCCOnLineSC 937), (Rajeshwari Chandrashekar Ganesh Vs. State of Tamil Nadu & Ors.,2022

SCCOnLineSC 885), (Shradha Kannujia (Minor) & Anr. Vs. State of UP & Ors.,2022 SCCOnLineALL 955) and (Koushalya Das vs. State of Odisha & Ors.,2022 SCCOnLineOri 2008) with regard to nature and extent of order that may be passed in a writ petition relating to custody of children.

[15] As has been noted above, father has filed the present writ petition seeking a writ of habeas corpus in respect of the children born out of the wedlock between the writ petitioner and the respondent No. 4.

[16] Writ petitioner and the respondent No. 4 had filed a number of proceedings against each other. The following proceedings apparently have been filed by the parties against each other apart from the present writ petition:-

i. Misc. Case No. 302 of 2019 under Section 9 of the Hindu Marriage Act, 1955 seeking restitution of conjugal rights with the respondent No. 4 before the learned Judge, District Court at Alipore, South 24 Parganas by the writ petitioner.

ii. Respondent No. 4 lodged first information report bearing No. 2000 of 2019 at the police station, Mahila Thana, Bhopal inter alia under Sections 498A/34/506 of the Indian Penal Code, 1860

iii. Misc. Case No. 181 of 2019 under Section 25 of the Guardian and Wards Act, 1890 read with Section 6(a) of the Hindu Minority and Guardianship Act, 1956 before the learned District Judge, Alipore, South 24 Parganas filed by the writ petitioner.

iv. Proceedings under Section 12 read with Section 18 to 23 of the Protection of Women from Domestic Violence Act, 2005 filed by the respondent No. 4.

v. Respondent No. 4 filed Transfer Petition (Civil) No. 361-362/2020 seeking transfer of proceedings under Hindu Marriage Act, and the Guardians and Wards Act.

vi. Respondent No. 4 filed Special Leave Petition being SLP No. 7486/2020 challenging the order dated February 3, 2020 passed by the High Court in this writ petition.

vii. Respondent No. 4 filed Transfer Petition being TP No. 683 of 2020 seeking transfer of the present writ petition.

viii. Respondent No. 4 filed proceedings for divorce.

[17] By an order dated February 8, 2022, the Hon'ble Supreme Court transferred the proceedings under the Hindu Marriage Act, as also the Guardian and Wards Act to the Principal Judge, Nagpur, Maharashtra. Such proceedings are pending.

[18] Maintainability of the present writ petition has been questioned on behalf of the respondent No. 4. Respondent No. 4 has also questioned the need for passing further orders in this writ petition in view of the pendency of custody proceeding before the District Court.

[19] In **Dr. (Mrs.) Veena Kapoor (supra)** Supreme Court has noted that it was difficult to take evidence with regard to the issue as to whether the custody of the child

with the father was illegal or not. It has noted that, the paramount consideration is the welfare of the minor and not the legal right of any particular party, when it comes to the issue of deciding custody of a minor.

[20] In **Githa Hariharan & Anr. (supra)** the issue was not with regard to custody of a minor but, whether mother can act as the guardian of a minor particularly when, the father was agreeing on such issue, in relation of banking documents.

[21] In a habeas corpus writ petition of seeking transfer of custody of children from father to mother, Supreme Court in **Syed Saleemuddini (supra)** has observed that, the principle 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 the present custody to be changed and to be left in the care and custody of somebody else.

[22] Nil Ratan Kundu & Anr. (supra) has dealt with the issue of custody of minor in a proceeding under the Guardians and Wards Act, 1890. So also in **Ruchi Majoo (supra)** an order passed by the jurisdictional Court under the Guardians and Wards Act, 1870 had been challenged under Article 227 of the Constitution which order was in turn challenged before the Supreme Court.

[23] Nithya Anand Raghavan (supra) has deal with a habeas corpus writ petition filed under Article 226 of the Constitution of India. It has noted **Syed Saleemuddini (supra)**. It has noted that, the High Court while dealing with a writ petition for habeas corpus concerning a minor may direct return of the child or decline to change the custody of the child keeping in mind all facts and circumstances including the settled legal position. It has also noted that the remedy of writ of Habeas Corpus cannot be used for mere enforcement of directions given by the Foreign Court against a person within its jurisdiction and convert that jurisdiction into one of executing Court and that, the order of the Foreign Court must yield to the welfare of the child. It has observed in paragraph 47 as follows:-

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

[24] Tejaswani Gaud & Anr. (supra) has dealt with a writ of habeas corpus and observed that, habeas corpus proceedings are not to justify or examine the legality of custody. It has observed that, in child custody matters, the power of the High Court in granting a writ of habeas corpus is qualified only in cases where the detention of the minor is by a person who is not entitled to his legal custody. A writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law. Such writ also extends its influence to restore the custody of a minor to its guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to its legal custody is treated as equivalent to illegal detention for the purpose of granting writ directing custody of a child. It has noted that there are significant differences between enquiry under the Guardians and Wards Act, 1890 and the exercises of powers by a Writ Court which is summary in nature. It has held that, where Writ Court is of the view that a detailed enquiry is required, the Court may decline to exercise writ jurisdiction and direct the parties to approach the Civil Court. It is only in exceptional cases the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction in a petition for habeas corpus.

[25] Sushil Kumar Tiwari (supra), Shradha Kannujia (Minor) & Anr. (supra) and **Koushalya Das (supra)** have been rendered by other High Courts in Habeas corpus writ petitions.

[26] In **Rohit Thammana Gowda (supra)** a proceeding before the United States Court governing the minor was pending. The minor was also a naturalized US citizen with the parents holding permanent US resident cards. In such context direction was issued for return of the child to the United States of America.

[27] Rajeshwari Chandrashekar Ganesh (supra) has decided an Article 32 Writ petition. There, the minors were directed to stay with their mother in the United States of America as the minors were accustomed with the social and cultural milieu of that country. Supreme Court has noted that, the US Court issued directions with regard to the minors.

[28] While dealing with power to be exercised in a writ of habeas corpus, the Supreme Court in **Rajeshwari Chandrasekhar Ganesh (supra)** has held as follows:-

> "79. The exercise of the extraordinary jurisdiction for issuance of a writ of Habeas Corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a prima facie case that the detentions unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant becomes entitled to the writ as of right.
>
> 80. The object and scope of a writ of Habeas Corpus in the context of a claim relating to the custody of a minor child fell for the consideration of this Court in Nithya Ananda Raghavan (supra) and it was held that the principal duty of the court in such matters should be to ascertain whether the custody of the

child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over the care and custody of any other person."

[29] Rajeshwari Chandrasekhar Ganesh (supra) has also dealt with the issue of maintainability of a habeas corpus writ petition under Article 226 of the Constitution for custody of a minor, as follows:-

"82. The question of maintainability of a Habeas Corpus petition under Article 226 of the Constitution of India for the custody of a minor was examined by this Court in **Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari**, 2019 7 SCC 42, and it was held that the petition would be maintainable where the detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of Habeas Corpus can be availed in exceptional cases where the ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:

"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

xxx xxx xxx

19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case

> may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.""

[30] In the context of proceedings under the Guardians and Wards Act, 1890, Supreme Court in **Vivek Singh (supra)** has recognised a child might suffer from Paternal Alienation Syndrome should such child be denied access to one of the parents.

[31] In **Yashita Sahu (supra)** Supreme Court in a habeas corpus writ petition has held that, welfare of the child is the paramount consideration for the Court. Child has human right to have love and affection of both parents. Therefore, Court must clearly define the nature, and the specifics of visitation and contact rights of the parents. It has noted that, a child separated from one parent in custodial controversies faces adverse psychological impact and that, in order to minimise such impact, court should afford sufficient visitation rights to parent not given child custody so that the child may not lose social, physical and psychosocial contact with the other parent.

[32] In the facts of **Yashita Sahu (supra)** the mother of the child, the minor daughter had shifted from United States of America, where she was living with her husband and the child, to India, in violation of order of the US Court.

[33] Lahari Sakhamuri (Supra) has dealt with proceeding initiated under the Guardians and Wards Act, 1890 as well as habeas corpus writ petition seeking relief. In the facts of that case, the minor children were United States of America citizen and the parents had been residing in the United States of America since prior to solemnisation of marriage in India. Mother of the children had filed a proceeding for divorce before the US Court. An application for custody of the minor children before the US Court had been made by the mother. Thereafter, mother travelled with the minor children to India and filed proceedings under the Guardians and Wards Act, 1890 for custody of such children. In such context, Supreme Court had held that, the proceeding under the Guardians and Wards Act, 1890 in India was not maintainable as the children were ordinarily residents within the jurisdiction of the Court trying such proceedings. It has also upheld the order of the High Court directing return of the children to the United States of America.

[34] A writ petition seeking relief of issuance of a writ of habeas corpus for the custody of a minor is maintainable, subject to certain jurisdictional facts being established. Jurisdictional facts making such writ petition maintainable must exist for a Writ Court to assume jurisdiction in a writ petition of habeas corpus. The jurisdictional facts are, whether there exists any special circumstance which a Court exercising jurisdiction under the provisions of the Guardians and Wards Act, 1890 or under the Hindu Minority and Guardianship Act, 1956 cannot attend to and grant requisite relief in respect of the child concerned.

[35] It is only in exceptional cases that the rights of the parties to the custody of the minor should be determined in exercise of extraordinary jurisdiction on a writ petition for habeas corpus. In other words, when a Constitutional Court seeks to intervene in a writ of habeas corpus in respect of the custody of a child, such Constitutional Court needs to arrive at a finding that, the alleged detention is illegal and without any authority of law and that, the ordinary remedy provided by the law is either unavailable or ineffective. Once such findings are arrived at, does the Constitutional Court clothe itself with the jurisdiction to entertain and try a writ petition seeking relief of writ of habeas corpus in respect of the custody of a child. Even if such jurisdictional facts are established, a Constitutional Court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court, if the Constitutional Court is of the view that a detailed enquiry is required which is not possible on affidavit evidence or the summary procedure it usually adopts. See paragraphs 19 and 20 of **Tejaswani Gaud (supra)**.

[36] Once a Constitutional Court assumes jurisdiction in a writ petition seeking relief of writ of habeas corpus in respect of custody of a child, then, the Court is guided by the paramount consideration of the welfare of the child. While granting reliefs to the parties, the power of the Constitutional Court is not pursuant to but independent of any statute.

[37] In the facts and circumstances of the present case, the parties between themselves have filed various proceedings seeking diverse reliefs. Writ petitioner has filed a proceeding under the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 with regard to the custody of the children. No special circumstances has been established and in fact none exists which prompts a Constitutional Court to hold that, relief sought for by the writ petitioner in such proceeding is incapable of being granted by the Court deciding such proceeding or that, it would not be in the best interest of the children to have such proceeding decided by such court. Significantly, such proceedings have been transferred by the Hon'ble Supreme Court to the transferee Court where it is presently pending.

[38] In the facts and circumstances of the present case, a proceeding under the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 is pending. Affidavits disclosed in the present proceedings show that, there are a

number of allegations and counter allegations between the writ petitioner and the respondent No. 4. Such allegations should ideally be adjudicated upon after affording the parties an opportunity of hearing as envisaged in the procedure governing the proceeding under the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956.

[39] In such circumstances, we relegate the private parties to the proceeding for custody already pending. We clarify that, we have not decided upon any of the points raised with regard to the custody of the child and that, all observations made by us in this judgement and order are restricted towards determining our course of action in view of the pendency of the number of proceedings between the private parties. All points raised by the parties with regard to the custody of the children are kept open. The transferee court is at liberty to decide on the custody and visitation rights of the parents, in accordance with law.

[40] In view of the fact that we are not deciding on the visitation or the custody of the children, and relegating the parties to the civil court with regard thereto, we deem it appropriate not to deal with the authorities cited at the bar requiring the welfare of the children to be kept in mind in deciding custody proceedings.

[41] Wpa No. 1098 of 2020 along with all connected applications are disposed of accordingly without any orders to costs. Interim orders stand vacated.

[42] I agree

2024(2)FLJ644

DELHI HIGH COURT

[Before Anoop Kumar Mendiratta]

Crl M C (Criminal Miscellaneous Case) No 6894 of 2024 **dated 02/09/2024**

Dinesh & Ors

Versus

State Govt of NCT of Delhi & Anr

QUASHING OF FIR

Indian Penal Code, 1860 Sec. 34, Sec. 498A, Sec. 406 - Code of Criminal Procedure, 1973 Sec. 482 - Hindu Marriage Act, 1955 Sec. 13B - Dowry Prohibition Act, 1961 Sec. 4 - Quashing of FIR - Petition filed to quash FIR under Sections 498A/406/34 IPC and Dowry Prohibition Act - Parties amicably settled dispute through mediation, leading to mutual divorce under Section 13B HMA - Court found that no useful purpose would be served by continuing proceedings since chances of conviction were minimal - Respondent confirmed no further claims remain - FIR and all proceedings quashed in light of settlement. - Petition Allowed

Law Point: FIR under Section 498A IPC can be quashed if matrimonial disputes are amicably settled, and continuing prosecution would serve no useful purpose.

Acts Referred:

Indian Penal Code, 1860 Sec. 34, Sec. 498A, Sec. 406

Code of Criminal Procedure, 1973 Sec. 482

Hindu Marriage Act, 1955 Sec. 13B

Dowry Prohibition Act, 1961 Sec. 4

Counsel:

Manoj Sharma, Yagya Kumar Gautam, Laxmi Kant, Mayank Gautam, Meenakshi Dahiya, Rekha Sharma, Hitesh Sharma

JUDGEMENT

Anoop Kumar Mendiratta, J.- [1] CRL.M.A. 26373/2024

Exemption allowed, subject to just exceptions.

Application stands disposed of.

CRL.M.C. 6894/2024

1. Petition under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been preferred on behalf of the petitioners for quashing of FIR No.0281/2016, under Sections 498A/406/34 IPC & Section 4 of Dowry Prohibition Act, 1961 registered at P.S.: Aman Vihar and proceedings emanating therefrom.

[2] Issue notice. Learned APP for the State and learned counsel for respondent No. 2 along with respondent No. 2 in person appear on advance notice and accept notice.

[3] In brief, as per the case of the petitioners, marriage between petitioner No.1 and respondent No. 2 was solemnized according to Hindu Rites and ceremonies on 23.02.2012. No child was born out of the wedlock. Due to matrimonial differences, petitioner No.1 and respondent No. 2 started living separately. On complaint of respondent No. 2, present FIR was registered on 01.03.2016.

[4] The disputes are stated to have been amicably settled between the parties in terms of MOU dated 16.11.2018 arrived at Mediation Centre, Rohini District Court, Delhi. The marriage between petitioner no. 1 and respondent No. 2 has been dissolved by decree of divorce by way of mutual consent under Section 13B(2) of the Hindu Marriage Act vide judgment dated 29.07.2019.

[5] An amount of Rs. 60,000/- has been paid to respondent No. 2 today through DD No. 994802 dated 03.07.2024 drawn on State Bank of India, Paharganj, New Delhi in favour of respondent No. 2.

[6] Learned APP for the State submits that in view of amicable settlement between the parties, she has no objection in case the FIR in question is quashed.

[7] Petitioners and respondent No. 2 are present in person and have been identified by SI Sapna, PS: Aman Vihar. I have interacted with the parties and they confirm that the matter has been amicably settled between them without any threat, pressure or coercion. Respondent No. 2 also states that nothing remains to be further adjudicated upon between the parties and she has no objection in case the FIR in question is quashed.

[8] Considering the facts and circumstances, since the matter has been amicably settled between the parties, no useful purpose shall be served by keeping the case pending. It would be nothing but an abuse of the process of Court. The chances of conviction are bleak in view of amicable settlement between the parties. Consequently, FIR No.0281/2016, under Sections 498A/406/34 IPC & Section 4 of Dowry Prohibition Act, 1961 registered at P.S.: Aman Vihar and proceedings emanating therefrom stand quashed.

Petition is accordingly disposed of. Pending applications, if any, also stand disposed of.

A copy of this order be forwarded to learned Trial Court for information

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