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# FAMILY COURT JUDICIAL OFFICERS WORKSHOP 2015-16

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**DAY 1**

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# **Research Paper from Family Court Mumbai**

## **A: CHILD CUSTODY**

### **“ A burning issue of today ”**

1) While working as a Family Court Judge the most heart touching issue involving emotional trauma is that of a child custody. A child who is innocent having no fault theory in the legal battle of its parents is the actual sufferer. The parents who are full of ego and only have selfish attitude many times think about themselves only and are seen to be least bothered about their child. In fact they start using the child as a weapon to win their emotional desires and the legal battle. The minds of parents are influenced by the Advocates and relatives and in reality they stop using their brains and hearts. Instead of showing their true love on their children the parents try to show their dramatic love and they try to demonstrate the same by way of clicking photographs, doing video recordings, etc. trying to show how their child is happy with them, and how much they are concerned about their child. In fact it is found that they are trying to collect evidence to impress upon the Court and to prove their side. Child is a gift of God but the fighting parents forget the same and make the child suffer a lot.

2) I think that when fighting parents come before the Court it is the first duty of the Court to do proper counselling to them specially in respect of their children. The custodian parent specially should be made aware about the consequences which the child will face because of their fights. Instead of husband and wife, the parent inside them should be

awakened and touched. Surely the effect is seen because a husband and wife can be bad but basically and normally parents are never bad. So the counseling either by the

Marriage Counsellor or Court should be such that the parent inside the couple should be compelled to think about the true welfare of the child and not the dramatic welfare which they show before the Court. Parents firstly should be made aware that their true love towards their children is natural and accepted as a universal truth and they need not prove the same. When we are blessed with a child, the love and feelings naturally crop up within us in Godly way. They need not be purchased from outside. If this fact is known then they will be least bothered for the fact that they have to prove their love for their child and most probably then they will behave in a normal way. And if normal and true behaviour of the parents come before the Court then justice can be done to the child in really proper way. Otherwise merely paper orders and Judgments won't really give justice specially to a child who most probably does not even know the meaning of it.

3) Within the fabric of our society there seems to be an ideology about gender and child custody. This idea of class, power and relation relates directly the ability of the parent to be granted custody of the child. However, it is a tough job for a Judge to decide whom to give custody to..... But the question is how good can he or she raise their child ?

4) Men don't have a natural instinct like women do about their child. And most of the father's fight for the custody of their child because of their love for their children, their confidence in their parenting ability. But for breaking up is hard to do and it may be especially hard for kids.

Kids of divorce can feel they have been hit the hardest by the end of their parents relationship.

5) Many children carry the battle scars of divorce well into their adulthood. But broken up spouse can help stop the damage by managing their own behaviour before the ink dries on the divorce papers. A relationship with your kids as a parent is precious. But you need to get up in work and be there for them. When parents split they forget that they split in two different directions and to this the one who suffers is the poor child after having no fault of his or her. Parent need to give them time to heal. Need to understand to them. Need to love them.

Marriage is a rope, some are strong, some break.

Kids like diamonds last forever. And the influence makes the child sparkle.

6) Child custody not only involves the physical custody and control of your child, but the parental rights, privileges, duties and powers connected to child rearing. The " best interests of the child" is the universal standard in determining child custody issues. How child custody issues are treated by the Courts today reflects changes in the decisions issued by the Courts, States statutes, society and psychological research findings. A Court looks into the facts and circumstances of the case, presumes the child's best interests are served by granting custody to a parent and seeks to find custodian arrangements that best meets the child's physical, psychological and emotional needs.

7) One more thing which is usually noticed is the tutoring or mind poisoning done by the parents against the other one. They do not know that this causes great effect on the poor child, and the

effect is being continued for the child in future. Recently Hon'b'le Supreme Court in order passed in Criminal Appeal No.1683/2015 dated 09.12.2015 in the case of Ruchika Abbi and Anr. Vs. State of National Capital Territory of Delhi and Anr., has beautifully held that, "we hope trust and expect from the parents to co-operate with each other for the sake of their minor child's welfare and taking advantage of temporary custody of the child not to influence the innocent mind of the child by tutoring her and create hatred against other for their personal interest – a fact which we unfortunately noticed while interacting with the child. Indeed, we feel that such attempt on their part may do more harm to the child in long run. Both parties should realize such things for the welfare of their own child and make sincere efforts to come to mutual terms so that every one is able to live happily and enjoy family life, if taken, will always be in the interest of everyone including the child who needs – protection, guidance, care, love and affection of both her parents who are responsible to bring the child in this world".

8) Joint custody is the presumed or preferred form of child custody in many states. This preference reflects societal changes such as mother working outside of the home and father a more hands-on ride in child rearing. While joint custody can be simply defined as "shared custody" there are many forms of joint custody in which parents share both physical custody of the child and the legal rights connected to child rearing decisions. Even in the most bitterly contested cases, spouses generally have a sincere concern in reaching the custody and visitation arrangement that best serves the child.

9) There are several methods which are adopted by Courts :-

- 1) Court will often accept the custody plan fashioned by the parents in their separate agreement after reviewing the plan to ensure it serves child's best interests.
- 2) Proper mediation of custody issues avoid hostile, stressful and traumatic court battles over custody by giving the chance to both the parents to reach the common goal of serving your child's best interests in a civil manner.
- 3) Divorce is stressful for the couple, but it is just as stressful for the child, if not more so. It's the Court job to make sure that child gets the necessary physical and emotional care and support the child needs to survive the divorce and have full and happy childhood. It's a job the Courts take seriously and they'll make every efforts to make the right decision.
- 4) While determining the issue of custody the Court should take into consideration the wishes of the child's parents, wishes of the child, the child's relationship with each of parents, siblings, other persons who may substantially impact the child's best interests, the child's comfort in his home, school and community and the mental and physical health of the involved individuals.
- 5) Lastly the Court can also adopt the parenting plan which is issued as a guidance to the Court.

## **B: Law of custody and access**

10) While determining the question as to which parent's care and control of the child should be given, and the paramount consideration remains welfare and the interest of the child and not the rights of the parents

under statute. While determining the welfare of the child, the moral and the ethical welfare of the child must also weigh with the court as well as physical wellbeing. The child can not be treated as a property or a commodity and therefore, such issues have to be handled by the court with care, and caution, love and affection and the applying the human touch to the problems.

11) In various judgments the Apex court has held that, the welfare is paramount consideration for determining the issues of custody and access. The word "welfare" is not specifically define under the statutory provisions relating to custody. The Black Law's dictionary gives meaning of 'welfare" that means well do or wellbeing in any respect, the enjoying all health and common bless of the life, the exemption on any evil or calamity, property, happiness etc. The definition given by black Law dictionary shows that, the wellbeing of any kind and prevention from evil and calamity is material aspects of welfare. The word of wellbeing of all kind shows that, the issue of wellbeing the multi-angle issue. A word of welfare donates to prevent harms and to see the wellbeing of the minor.

12) It is necessary to consider what is welfare of the minor, which is paramount consideration while determining the issues of access and the custody. Can economical soundness is sole criteria for determination of welfare of the minor or can a love and affection of parents is sole criteria for determining above issues? The answer is negative. The issue of welfare covers

a) Economical capacity of the parents

b) Love and affection given and taken from the side of parents and the child.

- c) The suitability and the availability of parents and child.
- d) The residence's distance between residence of parents of the child.
- e ) The causes for separation between parents.
- f) The relevant factors which affects the health, safety and education of the child.
- g) The circumstances in which parents are living.
- h) The wishes of parents and of the child.
- i) The age and sex of the child.
- j) Authoritative and direction control and capacity of the parents.
- k) Nature of parents and child.
- l) Educational holidays etc.
- M) Choosing tendency of the child.

13) The above factors are playing the major role while determining all the issues of access and custody. So each and every aspects stated above is having its own value. Court shall not forget same while making determination of the issue of custody or access.

Always parents are worried about their rights but the issues of custody and access is connecting with the welfare of the minor. The rights of parents is not valuable or much important while deciding the issue of custody or access but type of wellbeing is necessary to determine the above facts.

## **C: Introduction of Parenting Plan**



### **Introduction :-**

14) Today parental roles are changing and the doctrine that because the woman is the mother, she must be the superior or de facto parent is starting to vanish. Now a days it is also recognized that the father may be equally able to fulfill the role of mother and vice-versa. When parents divorce and the children are in picture, many problems arise during the difficult process of determining custody. The process to get legal custody takes longer than anticipated and ultimately, it leaves the long and lasting impact on the relationship of the parents and the children. Divorce is difficult on all the parties involved in the process, including the children.

### **Need of Parenting Plan :-**

15) Parents of minor children can use the Parenting Plan to put their agreement about their children in writing. A Parenting Plan is a legal agreement between separated or divorced parents that sets out a specific schedule for the children as well as the parents. The plan gives outline, who, when and where of the visitation and living arrangement for children during and after the divorce. It is also an opportunity for parents to work together and come up with “Plan” for successful co-parenting.

16) It is an unfortunate fact that the warring couples do not think about the welfare and wellbeing of the child and makes the situation more complicated by filing repeated applications for custody and access to the child. This worst conflict can be avoided while satisfactory arrangements can be made to ensure the best possible outcome for them. They can seek the help from Marriage Counsellors to prepare the

parenting plan because for children the conflict between the parent is more harmful. Therefore, the Hon'ble High Court Bombay has approved the Parenting Plan which helps the parties to design their plan and make decisions about parenting time, holidays, festivals, maintenance, transportation and more to establish a routine that benefits the child. However, lot of parents go into the child custody hearing with the intention of seeking sole custody. This is because they believe that the other parent is 'unfit' to raise their child. However, it is also important to realize that the court's only goal is the best interest of the child. From the judge's standpoint, parents should not be 'trashing' one another during the child custody battle. Instead the parent seeking the sole custody should focus on proving that he or she is the better parent without attacking his or her counterpart. Parents should recognize that the 'shared parenting' or a 'joint custody' is not necessarily a loss. Actually the joint custody allows both parents to share equal responsibilities in the care of the child and helps facilitating a proper bond between the child and both parents. Parents should work together to determine a parenting schedule. It can be helpful to put their intentions down on paper and work together to establish a schedule that works for everyone involved.

17) Today the society is facing the increase in divorce rate. In such proceedings where the children are involved, it is a common practice among the couples to use the kids as pawn. Such kids suffer from many problems. The Parenting Plan in such cases has proved helpful to reduce the burden of the Courts. Standard Parenting Plan covers all the necessary elements considering the welfare of the child, such as the day-to-day schedule, residential parenting schedule, holidays schedule,

major decisions pertaining to child, financial support to the child and health insurance on the child etc. In view of the well settled principle of law that the welfare and well being of the child is the paramount consideration, both the parents are required to recognize the child's right such as, emotional and physical safety, stability and security and over all development of the child. For the aforesaid reasons, the Parenting plan has great importance to avoid conflicts in dealing with the responsibilities towards the children.

To conclude my paper, I would like to reproduce the thoughts of the Great Thinker Nicholas Sparks :

*“What it's like to be a parent : It's one of the hardest things you will ever do but in exchange it teaches you the unconditional love.”*

## **D: ENFORCEMENT OF ACCESS ORDER**

18) Granting an access of the child to the non custodian parent should be a rule and refusal an exception. After receiving an application for access to the child, an endeavour should be made to decide said issue with the consent of the parties by referring them to the Counsellor or may be by Court's intervention. Generally, it is observed that an order of access passed with the consent of the parties is being followed or complied in true sense, barring few exceptions. In the cases wherein parties failed to worked out the issue of access with consent, the Court has to pass the order. However, enforcement of access order is the

most difficult or challenging part in Family Court. In most of the cases, where the applications for child access are contested and decided by the Court, the common experience is that the order is not obeyed by the custodian parent on one or other excuse. The most common excuses put forth by the custodian parent are that the child is ill, having school or tuitions or extra curricular activities and the most dangerous weapon being used is that the child is not willing to meet the non-custodian parent. There may be some genuine cases wherein the excuses put forth are correct. However, our experience is that there are such few cases and most of the time the custodian parent try to avoid to give access of child to non-custodian parent on such lame excuses. Thus, it is the duty of the Court to separate the grains from the chaff and to ascertain the truthfulness of the excuses put forth by the custodian parent.

19) So far as enforcement of access order is concerned, there cannot be a straight jacket formula and it depends upon the various other circumstances of the case. Before passing any order for the enforcement of the access order, Court is supposed to weigh all those circumstances so that there should not be any harm to the welfare of the child which is the paramount consideration. There is no specific provisions either in Guardians & Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 for enforcement of the access order. In such circumstances, the Court has to take recourse of the general provisions of C.P.C. However, apart from the provisions of C.P.C., the Family Courts, which are radically different from the other regular Civil or Criminal Courts, are well equipped with extra ordinary power to laid down its own procedure for meeting the end of justice. As such, some

different orders than provided under C.P.C. for execution of the orders, can also be passed for enforcement of access order.

20) As stated above, there cannot be a straight jacket formula to be applied for enforcing the access order and Court has to apply its mind judicially, having regards to the peculiar circumstances of the case before it and to pass any of the following order, amongst the other, while enforcing the order of access.

A) **Imposing of cost** :-

If the custodian parent failed to obey the order of access that too, without reasonable excuse then the Court should impose cost upon him/her and to see that there should not be further default in complying the Court's order. If there appears subsequent default, then the Court should impose heavy cost so as to curb the tendency of disobeying the Court's order. Common experience is that this formula works effectively in some of the cases.

B) **Stopping maintenance** :-

If the wife is the custodian parent, then in case of willful default on her part in complying the access order, the Court may stop or cancel maintenance awarded in her favour so as to compel her to comply the order of access. This sort of financial penalty may also prevent the disobedience of the access order.

C) **Directing the defaulting party to do social service** :-

In appropriate cases, the custodian parent may be directed to serve the orphanage so as to sensitize him or her about the plight of the child who is not getting love and affection from non custodian parent. No doubt, there may be some issues again for implementing said order

as there would be nobody to supervise the compliance of such order still, in some cases, in order to sensitize the parties the Court may take recourse of such order.

D) **Dismissal of petition/striking of defence** :-

In case the above formulas does not work and there appears clear and continuous willful default in disobeying the order of access, the Court may also dismiss the petition or may strike out the defence of the custodian parent by taking recourse of the provisions of Order 39 Rule 11 of C.P.C. No doubt, the provisions of Order 39 Rule 11 of C.P.C. is not mandatory however, in appropriate cases, Courts are supposed to use said provision so as to keep check upon the defaulting parent. In recent Judgment, in the case of **“Kavita Krishnamurthy Vs. K.N.Krishnamurthy, reported in III (2015) D.M.C. 420(Bom.)** the Hon'ble Bombay High Court has held that,

*“Mere non-compliance of or mere breach of orders of Court not sufficient to pass drastic order of striking out defence or dismissal of proceeding, only in case of willful disobedience such a drastic order can be passed.”*

In para 6 of the Judgment it is further observed that, *“In a case wherein the breach is of an order of custody of minor or access to minor, the Court has to keep in mind that in some cases the compliance with the order depends on the inclination of the child.”*

The recourse to the provisions of Order 39 Rule 11 of C.P.C. may be somewhat coercive but its use by the Court, in appropriate case, is necessary so that the order of access is being followed in true sense and in fruitful way. In the battle of parents, the child is the sufferer and it

is for the Court to consider the child's welfare by providing him love and affection of non custodian parent which is his fundamental right.

E) **Attachment of property** :-

In a case where all above modes are applied by the Court but there is no fruitful result, the Court may also take recourse of attachment of properties of the defaulting party so as to mount pressure upon him/her to comply the order of access.

F) **Court contempt action/Civil prison** :-

In a case where there is a gross willful default in complying Court's order, the Court may also take recourse of initiating contempt proceeding or in some appropriate cases, the order of Civil prison can also be passed by taking the recourse of the provisions of Civil Procedure Code. This kind of coercive order may cause an apprehension in the mind of defaulting party and there is every likelihood of compliance of the access order. The object of the Court is to see that the order of access is being complied in true spirit and should not be floated without reasonable excuse. In case of "**Ashish Ranjan Vs. Anupama Tondon**" reported in (2010) 14 Supreme Court Cases 274, the Hon'ble Apex Court has observed that there was deliberate and willful default on respondent's part in not complying the terms of the consent order and she was guilty of committing contempt of Court, and even thereafter, the Hon'ble Court has further observed that imposing any punishment on the respondent would not serve any purpose nor it would serve in a better way to the welfare of the Child.

G) **Shifting of Child's custody** :-

In rare case, where there is extreme willful default in complying

Court's order of access, the Court may also pass an order of shifting child's custody from custodian parent to non-custodian parent. However, while passing any such order the Court has to keep in mind the welfare of the child which is paramount consideration.

21) The various modes mentioned above, are some of the measures which can be adopted by the Court for enforcing the order of access and Court may also pass any such order for facilitating the order of access which ultimately going to protect the welfare of the child. However, while passing any of such order, the utmost precaution has to be taken that there should not be any harm to the child's welfare and because of such order the child should not be put to uncomfot zone which is going to affect the child's welfare. In all such cases, firstly Courts have to rule out the possibility of tutoring by non-custodian parent, where the child is used as weapon for taking revenge from the other spouse. No doubt, in some cases, where the child is of teen age and able to make intelligent preference amongst either parent and may refuse to meet with non-custodian parent for the just reason, but Court has to ascertain the fact as to whether such preference, made by the child, is intelligent one or influential i.e. influenced by custodian parents. The object behind enforcing the access order by taking recourse to any of the above modes, should be that the child should get love and affection of non-custodian parent. It is not the rights of the parent but it is the right of the child. In some cases, where the child is deadly against meeting the non-custodian parent, the Court should refrain from passing any such order which is going to affect the child 's comfot zone, psychological and over all development. Now-a-days, children are very active and sensitive and in rare case, the possibility of taking wrong steps by the child cannot



be denied in case the child is forced to meet the non-custodian parent against his or her wish.

22) In sum and substance, it can be said that Court has to deal with each and every case as per the over all background and circumstances of said case and that there cannot be straight jacket formula for the same and ultimately, the child's welfare should be kept in mind while enforcing the access order.

**E: WHETHER ACCESS TO CHILD CAN BE DETERMINE  
IN A PROCEEDING U/S 125 CRPC**

23) Access is temporary custody of a child for limited period. In Family disputes the child is the real sufferer and can be termed as victim in matrimonial disputes. Now it is well settled law that access is the right of the child and not of the parents. Welfare of the child is paramount consideration.

24) Non custodian parents can claim custody and access of the child by filing petition for custody under the provision of Hindu Minority and Guardianship Act. In addition to that there is a special provision in Hindu Marriage Act u/s 26 in respect of interim custody and access of child.

25) There is no such special provision u/s 125 of CRPC to grant access to child. Summary procedure is to be followed for trial of petition u/s 125 of CRPC. The question of welfare of the child is to be decided for grant of access to child. Hence, technically speaking access to child can not be determined in a proceeding u/s 125 of CRPC.

26) However, as per section 21 of The Protection of Women from Domestic Violence Act, notwithstanding anything contained in any other law for the time being in force, the magistrate may at any stage of hearing of the application for grant of any relief, grant temporary custody of the child to the aggrieved person or to the person making an application on her behalf and specify the arrangements for visit of such child by the respondent. However, the magistrate may refuse to allow such visits if in his opinion such visits may be harmful to the interest of the child.

27) As per section 26 of The Protection of Women from Domestic Violence Act, any relief available under section 18 to 22 of the said act may also be sought in any legal proceeding before a civil court, Family Court or a Criminal Court, affecting the aggrieved person and the respondent. Any relief referred under this section may be sought for in addition to and alongwith any other relief that the aggrieved person may seek in such suit or legal proceeding before a Civil or Criminal Court.

28) As per the provisions of The Protection of Women from Domestic Violence Act the aggrieved person means any woman who is or has been in a domestic relationship with the respondent alleges to have been subjected to any act of domestic violence by the respondent. Therefore, in the light of the provisions of The Protection of Women from Domestic Violence Act, only the aggrieved person i.e. The woman can seek relief for custody and access of the child under section 125 of CRPC.

**F: The report of law commission No. 257 and changing face of custody law.**

29) In order to emphasize the “Welfare of child” as the paramount consideration in adjudicating custody and guardianship matters. The law commission of India decided to study the issue of adopting shared parenting system in India. The committee has outlined the nature and scope of the concept of shared parenting in India and identified the provisions in the current law that need to be amended. The views of the Commission centered around ;

- 1) Strengthening the welfare principle in the Guardian and Wards Act, 1890 and emphasize its relevance in each aspect of guardianship and custody related decision- making ;
- 2) Providing for equal legal status of both parents with respect to guardianship and custody.
- 3) Providing detailed guidelines to help decision-makers assess what custodial and guardianship arrangement serves the welfare to child in specific situations
- 4) Providing for the option of awarding joint custody to both parents in certain circumstances conducive to the welfare of the child.

30) The Law Commission found that in the existing legal framework there are certain problems with the concept of “Welfare of child”. There is disparity in different legislation. There is uncertainty and lack of judicial consensus. The legal framework is silent on how should custody issue be handled. The decision-making in this area is based on presumption that welfare of the child essentially lies in custody being awarded to any one of the parents.

31) After studying provisions in various laws governing custody/guardianship in India and various judicial interpretation. The commission found two problems. The first is superior position of the father in case of guardianship, though not necessarily in case of custody. The second is indeterminacy of the welfare of the child principle, despite its wide spread usage. The Law Commission has quoted that,

**" Equality between the parents is a goal that needs to be pursued and, indeed, the law should not make preferences between parents based on gender stereotypes. However, such equality cannot be only in terms of roles and responsibilities but must also be in terms of rights and legal position of the parents. Thus, the first step towards reform in this area is to dismantle the preferential position of the father in the HMGA, and make both the mother and father natural guardians".**

32) The Law Commission has also found that there is wide discretion available to the Judges under the welfare principle. It means that in certain issues that should merit consideration are not treated seriously while determining custody. The determinants of the welfare standard should therefore be clearly laid down so as to prevent Judges from disregarding certain issues while determining custody and access.

33) The Law Commission has further studied International Approaches to the joint custody concept and found that in several Western countries there is presumption in favour of joint custody and sole custody is awarded only in exceptional cases. The Law Commission has also studied Foreign Laws of Mediation in child custody cases and suggested time bound mediation in the child custody cases.

34) As the concept of welfare of child is nowhere defined the commission thought it fit to lay down guidelines for Judges about ;

- (A) Factors to consider for the best interest standard ;
- (B) Determining the preference of the child ;
- ( C) Access to records of the child ;
- (D) Grand parenting time ;
- (E) Mediation ;
- (F) Relocation ;
- (G) Decision making ;
- (H) Parenting plan ;
- (I) Visitation ;

35) The recommendation of the Law Commission in this report are captured in the Hindu Minority and Guardianship (Amendment) Bill 2015 and the Guardians and Wards (Amendment)

Bill 2015. The Bills respectively amend the said acts. The Law Commission has also made incidental reference to 83<sup>rd</sup> report as well as 133<sup>rd</sup> report. The Commission provides detailed legislative text by recommending the insertion of a new chapter IIA dealing with Custody, Child Support and Visitation Arrangements. The Commission also provides specific guidelines to assist the Court in deciding such matters including processes to determine whether the welfare of the child is met ; procedures to be followed during mediation ; and factors to be taken into consideration when determining grants for the joint custody.

36) Besides the amendment in Section 6(a) and Section 7 of Hindu Minority and Guardianship Act 1956 Commission has recommended amendments in Sections 17, 19 and 25 of Guardians and Wards Act 1890.

37) The most important part of the recommendations is the insertion of new Chapter IIA, Section 19A to 19(G). The Commission has also recommended a schedule to be annexed to the principle Act i. e. Guardian and Wards Act. In the schedule guidelines for custody, child support and visitation arrangements have been laid down. In the proposed Section 19A the objectives of the chapter have been laid down to ensure that welfare of the minor is met. The proposed Section 19B makes all provisions applicable to the proceeding in Indian Divorce Act, Parsi Marriage and Divorce Act and Hindu Marriage Act. This can be said to be a step towards making equal Civil Code governing all the religion equally. The proposed Section 19C defines "joint custody" and "sole custody". The proposed Section 19D is in respect of award of custody. While passing an order of joint custody or sole custody consistent with the welfare of the child. The Court shall have regard to the guidelines specified in the schedule. Further Section 19E empowers the Court to pass additional of incidental orders necessary to effectuate and enforce any order relating to the custody of the child. The proposed Section 19F is in respect of time bound mediation. This provision helps in early disposal of matters which is very important as the child for whom the legal battle is in progress grows day by day.

38) The proposed Section 19F is in respect of child support. This empowers the Court to pass appropriate orders for maintenance of the child having regard to the surrounding circumstances. This section empowers the Court to extend the period of maintenance till the child reaches 25 years of age or beyond such time in case of a child with mental and physical disability. It further makes the estate of deceased parent liable for the maintenance of the child .

39) In the schedule proposed by the Law Commission various factors have been minutely considered. What Courts shall take into consideration. The Court is empowered to direct the parents to conduct a annual review of the welfare of the child and the income of each parents and to file the same before the Court. This schedule further lays down various factors to be taken into consideration while determining preference of the child. While taking interview of the child the Court is allowed to decide who will be present. This provision protects the child from expressing his view in relation to any matter. The schedule further allows both the parents to access the record of the child generally. It further allows grand parenting time. Grand parents will get their right to apply to the Court for access under certain circumstances. This schedule makes provision of mediation. It also lays down procedure in case of relocation of the parents. In the proposed schedule it is made necessary on the part of Court to clarify the religious instruction of the child, attendance at the places of worship and related matters, choice of school, subjects, classes etc. Whether the child is to be hospitalized and whether a non emergency surgical procedure is to be performed on the child etc. This schedule lays down the provision of parenting plan to minimise the child's exposure to harmful parental conflict. It lays down how the parenting plan should be prepared for the welfare of the child. What the parents should mention in the parenting plan is exhaustively recommended by the Commission. The Commission has recommended some provisions about visitation considering the child's convenience of time and place.

40) The Law Commission has dealt with all relevant aspect and suggested amendment in Hindu Minority and Guardianship Act and the

Guardians and Wards Act . If the recommendations of Law Commission are accepted by the Central Government then there will be a great reform in the matter of child's custody. The proposed amendment will certainly assists the Judges while exercising "parens patriae" jurisdiction.

41) Here I would like to make a reference of a case. In the case of **Mr. S. Anand @ Akash Vs.Ms.Vanita Vijaya Kumar, Hon'ble Madras High Court in para 39** has observed that,

" In 90% of the cases which I have come to handle in the recent past, every other child refuses to go from the parent with whom he is residing, to the other parent. Unfortunately, in most of the cases, we, the Judges plead helplessness, whenever the children refused to go with one of the parents. This has happened especially in cases where the children are aged more than 5 years. Judges, who are not experts in child psychiatry, tend to believe the views expressed by children in their chambers as amounting to "intelligent preference, though at times they happen to be mere "intelligent manipulations".

42) The concept of joint custody, parenting plan and visitation rights proposed by the Law Commission would be very helpful to overcome all day to day practical difficulties. In case of refusal by the child to go to the non custodian parent, the Court can take assistance of psychologist, the mediator or any other specific person identified by the Court. This will certainly help the Court in determining preference of the child. Now the time has come to protect unrepresented child. The parties are represented by the Counsels. The Counsels protect their rights but no one is there to protect the interest of child. The child's needs can be brought before the Court. It will give real justice to the



child. Therefore, I wish the proposed amendments should be accepted by the Central Government.

# **Research Paper from Family Court PUNE**

## **(A) TOPIC- Circumstances in which a Foreign Decree in a matrimonial dispute can be challenged by way of a suit**

1. Now a days there is vast advancement in technology education etc. The people are moving through out the world for education, job, business, etc and many of them are settling in abroad also. They are using foreign court for deciding matrimonial discord/dispute.

2. The foreign court means a court situated outside India and not established or continued by the authority of Central Government. The foreign judgment means the judgment passed by the foreign courts. The foreign judgments and decrees are recognized subject to conditions. A foreign judgment may be enforced by proceedings in execution in certain cases. These are mentioned in Sections 44 and 44A of the Code of Civil Procedure. In other cases, a foreign judgment can be enforced by a suit on the judgment.

3. A foreign judgment which is conclusive as per Section 13 of the Code of Civil Procedure can be enforced on the basis of following ways.

(1) By instituting a suit on such foreign judgment, however such suit must be filed within 3 years from the decree of foreign judgment, and

(2) By filing execution proceeding in specific court mentioned in Sec. 44 and 44A of the Code of Civil Procedure.

4. The Foreign judgment shall be conclusive as to any matter thereby

directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except

(a) whether it has not been pronounced by a Court of competent

jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India, in cases, in which such law is applicable.

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained “by” fraud;

(f) where it sustains a claim founded on a breach of any law in force in (India).

5. As per Section 13 of the Civil Procedure Code, 1908 the foreign judgment and decree pronounced in matrimonial dispute can be challenged by way of a suit if (1) that judgment has not been pronounced by a Court of competent jurisdiction, (2) it has not been given on merits of the case, (3) if it is founded on in incorrect view of international law or refusal to recognize the law of India, (4) if the judgment was obtained, is opposed to the natural justice, (5) if the judgment is obtained by fraud and (6) if the judgment is founded on a breach of any law enforce in India.

6. A per Section 41 of the Indian Evidence Act, 1872 a final judgment or a decree granted by a competent court in exercise of matrimonial jurisdiction then that decree is conclusive proof regarding declaration of any legal character or accrual of legal character and ceasing of legal

character, etc are relevant. If any judgment, order or decree is not delivered by a competent court or if it was obtained by fraud or collusion then that judgment and decree can be challenged by a suit.

7. The judgment of the Hon'ble Apex Court reported in a case of **Satya Vs. Teja Singh, AIR 1975 S.C. 105** is required to consider. In the above authority the respondent (husband) married with the appellant (Smt. Satya) in February, 1955. Thereafter, he left for U.S.A. in 1955 and he lived in Utah as a student from 1960 to 1964 and thereafter, he was working there. Since 1965 he had been in Canada. He filed a petition for divorce in November, 1964 in Nevada, Court of U.S. The appellant did not appear in Nevada Court and she did not submit to its jurisdiction. Thereafter, the respondent obtained a decree of divorce against the petitioner in December, 1964. The appellant filed her maintenance application under Section 488 of the Code of Criminal Procedure, 1898 against the respondent in India, wherein the respondent appeared and contested the claim of the appellant relying on divorce decree granted by the Nevada Court. After hearing the parties, the trial Court granted order in favour of the appellant and that order was confirmed in the revision. Thereafter, the respondent challenged that order before the Hon'ble High Court. The Hon'ble High Court has relied on the decree granted by the Nevada Court of U.S. and dismissed the maintenance application filed by the appellant. Thereafter, the wife i.e. appellant challenged that judgment and order before the Hon'ble Supreme Court. The Hon'ble Supreme Court has held that the respondent has obtained a decree of divorce making declaration before the Nevada Court that he intend to stay at Nevada for indefinite period and after the decree he left

Newada. Therefore, Their Lordships have held that the respondent had obtained a decree of divorce by making misrepresentation that he would domicile in Newada. Therefore, the decree of Newada Court lacks jurisdiction and a decree granted without jurisdiction of the Court has no any recognition in Indian Courts. Therefore, the Hon'ble Apex Court has further held that the respondent had obtained a decree of divorce by trickery and, therefore, validity of the judgment and decree of Newada Court rendered in Civil Proceeding can be determined in terms of Section 13 of the Code of Civil Procedure. Therefore, Their Lordships have held that the foreign decree of divorce obtained by fraud is void and it has no binding force. Therefore, the Hon'ble Apex Court has set aside the judgment of the Hon'ble High Court and confirmed the order delivered by the trial Court.

8. A foreign judgment cannot be said to be conclusive if it is based on incorrect view of international law or refusal to recognize the Indian law. Such foreign decrees may be impeached on by filing suit. If a foreign decree is not passed without jurisdiction obtained by fraud not on merit can be challenged by way of a suit. The main reason for this is that conditions for divorce in Western countries are not as stringent as provided under Hindu Marriage Act, 1955, because the marriage under Hindu Marriage Act is not considered as contract, but it is sacrosant act. Therefore, the foreign judgment/ decree is not a conclusive if is passed on the ground not available under the Hindu Marriage Act, parties being Hindus a marriage was solemnized according to Hindu rights and rituals and the defendant (respondent)not submitted to the jurisdiction of foreign court.

9. In a case of ***Y. Narasimha Rao and other Vs. Y. Venkata Lakshmi and another (1991) 3 S.C.C.451*** both the parties married at Tirupati on 27<sup>th</sup> February, 1975. They separated in July, 1978. The husband filed a petition for dissolution of marriage in the Circuit Court at St. Louis Missouri of U.S.A. The wife sent her reply from here under protest. The Circuit Court of U.S.A. passed a decree of dissolution of marriage on February 19, 1980 in the absence of wife. In this authority it is observed that the husbands did not live there for more than 90 days. He was neither domiciled in State of Missouri nor he had intention to stay there. Neither the marriage was solemnized there nor they lastly stayed there. The ground of divorce shown is not available under Hindu Marriage Act nor it was on merit. The said foreign judgment was pronounced not by a court of competent jurisdiction nor on merits of the case as this (Indian) court will not recognize such type of judgment. The said foreign judgment is founded on a refusal to recognize the law of this country and if the said judgment is against the principle of natural justice and obtained by playing fraud then it is void and non-est. Hence, this type of judgments can be impeached.

10. It is settled law that the foreign judgment and decree obtained by fraud is impeachable in Indian Court and judgment cannot be enforced by action or operator as res judicata (AIR 1974 S.C. 1764).

11. An ex parte decree of foreign court is nullity, if the party against whom a decree is passed does not appear at all and does not take part in the proceedings of court. It is not submission to jurisdiction (AIR 1947

S.C. 164).

12. In a case of ***Dorothy Thomas Vs. Rex Arul II(2012) D.M.C. 217*** the Hon'ble Madras Court has held that the foreign judgment can be challenged in India.

13. In a case of ***Manoram Akkineni Vs. Jankiram Gondraraman II (2011) D.M.C. 43***. In the above authority both parties married in India on 11-06-1986 as per Hindu rites and customs and they got certification dated 28-09-1986 of the marriage between them in U.S.A. had been dissolved. The petitioner (wife) filed F.C.O.P.No.1886/2003 before the Principal Family Court, Chennai against husband for (i) dissolution of marriage solemnized between them on 11-06-1986, (ii) permanent custody of child and (iii) permanent alimony of Rs. One crore. The respondent filed written statement and challenged the petition of wife and contended that the superior Court of California has granted divorce. The Family Court of Chennai rejected original petition under Order 7 Rule 11 of the Code of Civil Procedure, alleging that (i) the parties have obtained divorce from a competent court of U.S.A. and (ii) no cause of action arose to file the petition. The wife challenged that order before the Hon'ble High Court by filing civil revision. Wherein His Lordships has allowed revision holding that such suits are maintainable before the Family Court.

## **CONCLUSION**

The foreign judgment/decrees pronounced in matrimonial dispute can be

challenged by way of a suit, if it is not conclusive.

## **(B) Execution of Foreign orders and Decrees in Respect of Custody and Access of Child .**

### **Introduction :-**

14) With Globalization becoming an established phenomenon, the world has really become a village with Many Indian crossing the shore for search of greener pastures. That quest for the better life has taken Indian to many remote corners of the world and in reverse brought world community to India. This unique situation has given rise to work related problems and also created personal relationship problems in some. That in turn has created a situation where one of the spouse seeking recourse to foreign courts. After passing of such orders by foreign court, it becomes a bone of contention as to which order to be followed, whether order passed by foreign court should be followed. Then the interpretation of Section 13 Of **The Civil Procedure code** and Section 44 A of **The Civil Procedure Code** comes in to question.

15) The Question of applicability of such foreign order came in case of Dr. Prithwiraj Choudhury-vs- State of West Bengal & Ors. <http://indiankanoon.org/doc/85865121>. The said court observed that the orders passed must be given importance to maintain comity of Courts. While doing so it goes without saying that the decree passed by the Foreign Court cannot be allowed to be shunned at this stage, till such time that it is set aside by a competent Court of law. It must be given due



respect and weight age as it is an order passed prior in point of time and taking into consideration the first strike principle which in this case is applicable. There must be a good reason for us to not show due respect or give weight to the decree of the Foreign Court. The issue of comity of court was referred by the Court to observe that the foreign decree can not be lightly set aside by a Domestic Court. It observed that, however, if there is a pre-existing order of a foreign Court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted the domestic court must take into consideration:

- a) The nature and effect of the interim or interlocutory order passed by the foreign court.
- b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.
- c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. In such cases, the domestic court is also obliged to ensure the physical safety of the parent.
- d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may

be well advised to conduct an elaborate inquiry".

So unless these points are taken in to consideration the decree of Foreign court need to be followed by Domestic court .

16) In case of Surinder Kaur Sandhu - Vs - Harbax Singh Sandhu (1984) 3 SCC 698 the principle of Comity of courts was referred. So also the "intimate contract" doctrine and the "closest concern" doctrine was also discussed. So when a child is in foreign country the decision of foreign court must be given appropriate weightage. The Supreme court held as follows,

".....very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. It is not appropriate that a domestic court having much less intimate contact with a child and having much less close concern with a child and his or her parents (as against a foreign court in a given case) should take upon itself the onerous task of determining the best interests and welfare of the child. A foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. This is a factor that must be kept in mind".

17) In case of Y Narsimha Rao Vs Venkata Laxmi J.T. 1991(3)SC 33 the issue as to problems facing NRI was dealt with. The Law Commission has taken this issue suo mottu. It was observed that Many a man and woman of this land with different personal laws have migrated and are migrating to different countries either to make their permanent abode

there or for temporary residence. Likewise, there is also immigration of the nationals of other countries. The advancement in communication and transportation has also made it easier for individuals to hop from one country to another. It is also not unusual to come across cases where citizens of this country have been contracting marriages either in this country or abroad with nationals of the other countries or among themselves, or having married here, either both or one of them migrate to other countries. There are also cases where parties having married here have been either domiciled or residing separately in different foreign countries. This migration, temporary or permanent, has also been giving rise to various kinds of matrimonial disputes destroying in its turn the family and its peace.

18) In *Y. Narasimha Rao vs. Y. Venkata Lakshmi*, the Supreme Court observed that no country can afford to sacrifice its internal unity, stability and tranquility for the sake of uniformity of rules and comity of nations which considerations are important and appropriate to facilitate international trade, commerce, industry, communication, transport, exchange of services, technology, manpower etc. This glaring fact of national life has been Recognized both by the Hague Convention of 1968 on the Recognition of Divorce and Legal Separations as well as by the Judgments Convention of the European Community of the same year. Article 10 of the Hague Convention expressly provides that the contracting States may refuse to recognize a divorce or legal separation if such recognition is manifestly incompatible with their public policy. The Judgments Convention of the European Community expressly excludes from its scope (a) status or legal capacity of natural persons, (b) rights in

property arising out of a matrimonial relationship, (c) wills and succession, (d) social security and (e) bankruptcy. A separate convention was contemplated for the last of the subjects. The Supreme Court referred to the 65<sup>th</sup> Report of the Law Commission on “Recognition of Foreign Divorces” and elaborately discussed the import of section 13 of The Code of Civil Procedure in the context of recognizing foreign matrimonial judgments in the country.

19) In the case of Y Narsimha Rao ( Supra ) the Supreme court further observed that further observed: “ The rules of Private International Law in this country are not codified and are scattered in different enactments such as the Civil Procedure Code, the Contract Act, the Indian Succession Act, the Indian Divorce Act, the Special Marriage Act etc. In addition, some rules have also been evolved by judicial decisions. In matters of status or legal capacity of natural persons, matrimonial disputes, custody of children, adoption, testamentary and intestate succession etc. the problem in this country is complicated by the fact that there exist different personal laws and no uniform rule can be laid down for all citizens. The distinction between matters which concern personal and family affairs and those which concern commercial relationships, civil wrongs etc. is well recognized in other countries and legal systems. The law in the former area tends to be primarily determined and influenced by social, moral and religious considerations, and public policy plays special and important role in shaping it. Hence, in almost all the countries the jurisdictional, procedural and substantive rules which are applied to disputes arising in this area are significantly different from those applied to claims in other areas.

20) The law Commission of India in its report has observed as follows ,Following rule can be deduced for recognizing foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the ground on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

21) The Law Commission in its report no 219 has given following recommendation in regards to custody of children.

I quote”E. In the area of inter-parental child abduction or removal of children to India from foreign jurisdictions against court orders, India must become a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, 1980. As of now, there is no international convention or treaty applicable in India since India is not a signatory to the said Convention and other than conventional procedures, there are no remedies for enforcing such rights. Till such time there is no signing of such treaty, the State Governments with high NRI population should permit liaison with foreign missions in India through whom courts should be assisted to ensure return of children to

the country of their foreign residence if they are removed in violation of foreign court orders. The administrative and police authorities in Indian States with high NRI population should give some uniform guidelines to observe to assist such parents in distress who often land in such States in India with no clue as to whom to approach for assistance.

22) **Conclusion**:- In the words of Law Commission of India I would say that , the Indian judiciary has made one thing very clear, i.e., the Indian Courts would not simply mechanically enforce judgments and decrees of foreign courts in family matters. The Indian courts have now started looking into the merits of the matters and deciding them on the considerations of Indian law in the best interest of the parties and children, rather than simply implementing the orders without examining them.

**(C) Subject – Mode of service of summons outside India.**

23) As we all know that the presence of defendant in a proceeding in the Court is necessary that means service to him is required to be done as per the procedure of law. In the Code of Civil Procedure there are provisions about service of summons to defendant who resides in India, so also there is a provision about the defendant who resides out of India. Therefore the legislature has taken care that everybody should be given a chance to answer the claim made against him by the other party. It is common knowledge that in the today's changing world especially the

electronic development in the world, the persons are shifting from countries for their livelihood. Therefore in the case of marriage, the other spouse who resides in India, if filed case against such spouse then the such spouse required to be served as per the provisions of Order V, Rule 25 & 26 of Code o Civil Procedure, 1908. Further in old days, the postal authority was trusted by the Court, but considering the change in society the courier service has been approved. Moreover, the fax messages and electronic mail have also been considered as valid services. In case of electronic mail it should be ensured that the said mail ID belongs to the said person and for that an affidavit of the person can be obtained. Therefore, the legislature amended the Code of Civil Procedure by the Code of Civil Procedure (Amended) Act, 1999, Sec. 15(viii) w.e.f 01/07/2002 and substituted as “by post or otherwise” in Order V, Rule 25. Further the said Order V, Rule 25 was again amended by the Code of Civil Procedure (Amended) Act, 1999, Sec. 15(ix) w.e.f 01/07/2002 for “by post”. Thus, now the said rule is to be read as “Where the defendant resides out of India and has no agent in India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him [or by post or by such courier service as may be approved by the High Court, by fax message or by Electronic Mail Service or by any other means as may be provided by the rules made by the High Court], if there is postal communication between such place and the place where the Court is situate”.

24) Further legislature has made provision to see that the defendant who resides in Bangladesh or Pakistan be served with the summons

together with a copy thereof by sending it for service on the defendant to any court in that country. Further, if defendant is a public officer in above said two countries i.e. in military, naval or air forces or is a servant of railway company or local authority, the summons be sent for service on the defendant, to such officer or authority in that country as the Central Government may by notification in the official Gazette, specified in this behalf.

25) The legislature has taken further care considering the fact that the defendant resides outside India and is not within the jurisdiction of Indian Court's service procedures. Therefore, it has considered that if the defendant resides in such country in which a political agent is appointed then the summons may be sent to such political person by post or otherwise, or if so directed by the Central Government through the Ministry of that government dealing with the foreign affairs, or in such other manner as may be specified by the Central Government for the purpose of being served upon the defendant and if the political agent returns the summons with an endorsement purporting to have been made by such political agent to the fact that summons has been served on the defendant in the manner herein before directed, such endorsement shall be deemed to be evidence of service.

26) Further, the service of summons in foreign territory through Court where the Central Government has by notification in the Official Gazette declared in respect of any Court situated in any such territory and not established or continued in the exercise of any such jurisdiction as



aforesaid that service by such Court of any summons or process issued under this Code by a Court in India shall be deemed to be valid service.

27) So also the legislature has made a provision in respect of service of summons to the defendant who resides in foreign country which has been declared in the Official Gazette by Central Government, then such summons may be sent to such officer of the Government of the foreign territory specified by the Central Government, through the Ministry of the Government of India dealing with foreign affairs or in such other manner as may be specified by the Central Government, and if such officer returns any such summons with an endorsement purporting to have been made by him that the summons has been served on the defendant, such endorsement shall be deemed to be evidence of service.

28) Therefore from the above it can be said that the legislature has taken care that no one should be escaped from the clutches of law who resides out side the territory of India. The relevant provisions in the Code of Civil Procedure, 1908 as under -

Order V, Rule 25 & 26 of Code o Civil Procedure, 1908 reads -

**29) 25. Service on defendant who resides out of India and has no agent** – Where the defendant resides out of India and has no agent in India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him [or by post or by such courier service as may be approved by the High Court, by fax message or by Electronic Mail Service or by any other means as may be provided by the rules made by the High Court], if there is postal

communication between such place and the place where the Court is situate :

[Provided that where any such defendant [resides in Bangladesh or Pakistan], the summons, together with a copy thereof, may be sent for service on the defendant, to any Court in that country (not being the High Court) having jurisdiction in the place where the defendant resides :

provided further that where any such defendant is a public officer [in Bangladesh or Pakistan (not belonging to the Bangladesh, or, as the case may be, Pakistan military, or naval or air forces)] or is a servant of a railway company or local authority in that country, the summons, together with a copy thereof, may be sent for service on the defendant, to such officer or authority in that country as the Central Government may, by notification in the official Gazette, specify in this behalf.]

**30) 26. Service in foreign territory through Political Agent or Court – Where -**

(a) in the exercise of any foreign jurisdiction vested in the Central Government, a Political Agent has been appointed, or a Court has been established or continued with power to serve a summons, issued by a Court under this Code, in any foreign territory in which the defendant actually and voluntarily resides, carries on business or personally works for gain, or

(b) the Central Government has, by notification in the Official Gazette, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any

summons issued by a Court under this Code shall be deemed to be valid service,

The summons may be sent to such Political Agent or Court, by post, or otherwise, or if so directed by the Central Government, through the Ministry of that Government dealing with foreign affairs, or in such other manner as may be specified by the Central Government for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement purporting to have been made by such Political Agent or by the Judge or other officer of the Court to the effect that the summons has been served on the defendant in the manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

**31) 26-A. Summonses to be sent to officers of foreign countries –**

Where the Central Government has, by notification in the Official Gazette, declared in respect of any foreign territory that summonses to be served on defendants actually and voluntarily residing or carrying on business or personally working for gain in that foreign territory may be sent to an officer of the Government of the foreign territory specified by the Central Government, the summons may be sent to such officer, through the Ministry of the Government of India dealing with foreign affairs or in such other manner as may be specified by the Central Government; and if such officer returns any such summons with an endorsement purporting to have been made by him that the summons has been served on the defendant, such endorsement shall be deemed to be evidence of service.

# **Research Paper from Family Court NAGPUR**

## **A: Jurisdiction of Family Courts under section 7 of Family Courts Act, 1984.**

### **INTRODUCTION.**

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

2] Family Courts are established in the State of Maharashtra in year 1989. The matrimonial litigation which was otherwise adjudicated by Civil Courts was diverted to Family Courts for adjudication. There are many disputes generated between spouses are to be governed by the Family Courts. The Family Courts Act has brought all type of Civil and Criminal litigation between the spouses to one forum which is the Family Court. The Family Court is empowered to deal with the disputes covered under following Acts ;

i] Hindu Marriage Act, 1955

ii] Special Marriage Act, 1955

iii] Hindu Adoptions and Maintenance Act, 1956

iv] Divorce Act, 1869

v] Christian Marriage Act, 1872

- vi] Dissolution of Muslim Marriage Act, 1939
- vii] Hindu Minority and Guardianship Act, 1956
- viii] Criminal Procedure Code, 1973, section 125 to 128
- ix] Guardians and Wards Act, 1890
- x] Protection of Women and Domestic Violence Act.

The Jurisdiction of Family Court is to decide matters relating to

- a] Marriage – validity, divorce, Judicial separation, restitution of conjugal rites
- b] Maintenance
- c] Legitimacy, guardianship and custody of children, property of spouses.

3] The jurisdiction of Civil Courts is ousted as far as the above matters are concerned if a Family Court is established in that jurisdiction. The Family Court is a special Court to deal with all types of matrimonial disputes including property of spouses.

4] Section 7 of the Family Court Act is reproduced for reference section 7 :

- 1] Subject to the other provisions of this Act, a Family Court shall -
  - a] have and exercise all the jurisdiction exercisable by any district Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

b] be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation :- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely :-

a] a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage.

b] a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

c] a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

d] a suit or proceeding for an order or injunction in circumstances arising out a marital relationship;

e] a suit or proceeding for a declaration as to the legitimacy of any person;

f] a suit or proceeding for maintenance;

g] a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

2] Subject to the other provisions of this Act, a Family Court shall also have and exercise -

a] the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and  
b] such other jurisdiction as may be conferred on it by any other enactment.

5] The nature of suit and proceeding over which Family Courts have jurisdiction is laid down in section 7 of Family Court Act. However, suit or proceeding will be regulated by the personal laws of the parties in dispute. The Hon'ble Bombay High Court full bench in the case of **Romila Vs. Jaidev, 2000(3) Mh.LJ 468** has held that except for the Parsi matrimonial Act all other matrimonial Acts, the jurisdiction is vested to the Family Court, it ousts jurisdiction of civil Court as far as the matter enumerated in explanation clause under section 7 of Family Courts Act.

6] Validity of the marriage can be challenged in the Family Courts. In case of **R.Durgaprasad Vs. Union of India, II(1998) DMC 45**, the Hon'ble Andhra Pradesh High Court has observed ,“ It has to be borne in mind that while interpreting the statute the specific provisions are to be read and understood and have to be interpreted in consistence with the language and intention of the legal provisions. If the language and intention of the legal provisions are clear and unambiguous then there is no need to take the aid of the preamble or statement of objections and reasons. In interpreting of statute, the caption given to the Act is of little significance. It is the express legal provisions which operate and the adjudication has to be made basing only upon the said express

provisions of the statute, unguided by the nature of the caption of the Act or the statement of objects and reasons or even the preamble thereto.

The Hon'ble Andhra Pradesh High Court has held that the phrase settlement of disputes relating to marriage encompasses not only issues regarding an admitted marriage but also disputes in connection with very existence of the marriage as dispute relating to marriage.

7] The Hon'ble Bombay High Court had occasion to deal with a question whether the court has jurisdiction under the Divorce Act 1869, to dissolve a Christian marriage not solemnized in India but in a foreign country between parties who are citizens of India and domiciled in India. In case of **Vincent Josef Conath and etc. Vs. Jacintha Anjela Vincent Conath, AIR 1994 BOMBAY 120**, the Hon'ble Bombay High Court has observed, "It must be stated for the sake of clarification that the Family Court has no jurisdiction to entertain such suits which fall exclusively within the jurisdiction of this court. I have expressed this opinion in my order dated 20<sup>th</sup> August 1993 passed in the case of **Iffat Ahmed Abdullah Vs. Ahmed Abdulla alias Bipin Khosla** (Plaint Lodging No.1712 of 1993). While expressing this view, I have interpreted and applied the ratio of the Division Bench judgment of our High Court in the case of **Kanak Vinod Mehta Vs. Vinod Dulerai Mehta** and taken the view that the Family Court has no concurrent jurisdiction with the High Court to hear the matters which lie exclusively within the jurisdiction of this Court. According to the above referred Division Bench judgment, the High Court sitting on the Original Side cannot be considered as a District Court within the meaning of the said expression used in the Family Courts Act, 1984.



8] Section 8 of Family Court Act excludes the jurisdiction of Civil Courts in matrimonial matters and of Criminal Courts in respect of maintenance cases under section 125 of Criminal Procedure Code. The Act does not award concurrent jurisdiction to district Court or any other Civil Courts. Once the Family Court is established, jurisdiction of district and subordinate Judges ceases and all suits or proceedings pending before Civil Courts and District Courts automatically stand transferred to the Family Court for settlement.

9] However, the position under the protection of Women from Domestic Violence Act 2005 is different. Section 26 of said Act gives concurrent jurisdiction to Family Courts and other Courts along with the magistrate Courts. The relief under the Act can be sought before Family Courts in pending petitions. Relief of injunction can be claimed in family courts under P.W.D.V.Act. In **Pramodini Fernandes Vs. Vijay (I) 2010 DMC 386**, The Hon'ble Bombay High Court has held that Family Court which has passed the initial order of protection has the same powers as the magistrate under section 31(2) of the Domestic Violence Act to impose penalty for breach of its order. The question before the Court was whether Family Court being Civil Courts, have power to exercise criminal jurisdiction which the High Court answered in the affirmative.

**“Jurisdiction in Issues relating to the properties”**

10] Explanation (c) & (d) to section 7 (1) of Family Court Act deal with property jurisdiction. Explanation (c) says that suit or proceeding between the parties to a marriage with respect to the property of the parties or either of them. Explanation (d) says that suit and proceeding or an order injunction in circumstances arising out of a marital relationship. By providing these two explanations, jurisdiction of Family Courts has been expanded to all issues concerning properties between the spouses. The family Courts have jurisdiction to entertain properties disputes either in the course of matrimonial litigation or in separate proceedings.

11] The parties can approach to the Family Court even if their marital tie is snapped and they are no longer husband and wife. In this regard reliance may be placed in case of **K.A.Abdul Jaleel Vs. T.A. Shahida 2003(4) Mh.L.J. 7**, wherein it has been observed by the Hon'ble Apex Court, "It is now well-settled principle of law that the jurisdiction of a court created specially for resolution of disputes of certain kinds should be construed liberally. The restricted meaning if ascribed to Explanation (c) to section 7 of the Family Courts Act, would frustrate the object wherefor the Family Courts were set up. The wording 'disputes relating to marriage and family affairs and for matters connected therewith' in the preamble must be given a broad construction. The statement of objects and reasons of the Act would clearly go to show that the jurisdiction of the Family Court extends, inter alia in relation to properties of spouses or of either of them which would clearly mean that the properties claimed by the parties thereto as a spouse of other, irrespective of the claim whether property is claimed during the subsistence of a marriage or

otherwise. Family Court has jurisdiction to adjudicate upon any question relating to the properties of divorced parties.

12] There was a question before the Hon'ble Kerala High Court whether the Family Courts have jurisdiction to entertain the suit filed by the husband for recovery of money as compensation and damages from his wife and father-in-law ? What are the requirements to invoke jurisdiction under section 7 (1) read with explanation (d) of the Family Courts Act ? What is meant by the expression, "in circumstances arising out of a marital relationship" used in explanation (d) of section 7(1) of the Act ? In case of **Leby Issac Vs. Leena M Ninan @ Lincy**, FAO No.33/2004 decided on 12<sup>th</sup> July 2005 the Hon'ble Kerala High Court has observed, "13. So, 'circumstances' in relation to a marital relationship will be those particulars which closely precedes , surrounds, accompanies and follows a marital relationship. That means, primarily those can be the marriage itself and the surrounding occurrences in connection with marriage. The main requirement is that such 'circumstances' must have a direct bearing on marriage, since the marriage precedes, the existence or origin of a 'marital relationship'. 'Circumstances' arising out of a marital relationship are therefore, 'occurrences or things which stand around or about, which attend upon, 'which closely precede or follow, which surround and accompany, which depend upon, or which support or qualify the principal event' of a marriage or marital relationship.

*18. In other words, it can be concluded that there was a "proceeding" before the family court for an "order" for recovery of compensation and damages from respondents 1 and 2 "in circumstances arising out of a*

*marital relationship” as stated in Explanation (d) to Section 7(1). Thus, all requirements under section 7(1) read with Explanation (d) of the Act are satisfied in the present proceeding. Hence, family court can exercise jurisdiction to entertain the petition/suit filed by appellant. But, court below lost sight of the relevant aspect and hence erred in holding that it has no jurisdiction to entertain the present suit.*

### **“Muslim parties and jurisdiction of Family Court”**

13] Muslim wife can approach to the Family Court for divorce in the provisions of Dissolution of Muslim Marriages Act 1939. Likewise Muslim spouses can file the petition of restitution of conjugal rights. The Muslim wife and children may knock the doors of Family Court for the maintenance of under section 125 of Cr. P.C. In case of **Shabana Bano Vs. Imram Khan, AIR 2010 SC 305**, it has been held that divorced Muslim lady can file petition under section 125 of Cr. P.C. in Family Court. It is made clear that the Family Court will continue to have jurisdiction to adjudicate over the rights of Muslim women even after divorce.

### **Jurisdiction-Proceedings for maintenance.**

14] In view of the explanation (f) of Section 7(1) of Family Courts Act the family court shall have jurisdiction to entertain, try and decide the applications and petitions for maintenance. In pending petitions under the provisions of Hindu Marriage Act, Special Marriage Act, Divorce Act

and Hindu Adoptions and Maintenance Act, the Family Court is empowered to grant maintenance pendente lite and litigation expenses to the applicants. Now under the provisions of Section 26 of Protection of Woman From Domestic Violence Act , the wife is entitled to claim monetary relief in pending proceedings. The wife is entitled to make applications to claim maintenance under different enactments however, while granting maintenance to such wife it is necessary to take into consideration maintenance, if any, granted in another proceeding under any enactment.

15] If the divorce petition filed by any spouse is dismissed on merit then the spouse is not entitled to get maintenance under the provisions of Section 25 of Hindu Marriage Act. When the relationship between the spouses is in existence then family court has no jurisdiction to grant maintenance/ permanent alimony to a spouse under the provisions of section 25 of Hindu Marriage Act. In this regard reliance may be placed in case of **Chand Dhavan Vs. Jawaharlal Dhavan, II (1993) DMC 110**, wherein it has been observed by the Hon'ble Supreme court, "*On the afore-analysis and distinction drawn between the for a and perceptives, it is difficult to come to the view that a claim which is ancillary or incidental in a matrimonial Court under the Hindu Marriage Act could be tried as an original claim in that Court; a claim which may for the moment be assumed as valid, otherwise agitable in the Civil Court under the Hindu Adoptions and Maintenance Act, 1956. As said before, these two enactments keeping apart, the remaining two i.e. Hindu*

*Succession Act, 1956 and Hindu Minority and Guardianship Act, 1956 are a package of enactments, being part of one socio-legal scheme applicable to Hindus. When distinctive claims are covered distinctly under two different statutes and agitable in the Courts conceived of thereunder. It is difficult to sustain the plea that when a claim is otherwise valid, choosing of one Forum or the other should be of no consequence. These are not mere procedural technicalities or irregularities, as termed by one line of reasoning by some of the High Courts. These are matters which go to the root of the jurisdiction. The matrimonial Court, a Court of special jurisdiction, is not meant to pronounce upon a claim of maintenance without having to go into the exercise of passing a decree, which implies that unless it goes onwards, moves or leads through, to affect or disrupt the marital status between the parties. By rejecting a claim, the Matrimonial Court does make an appealable decree in terms of Section 28 , but neither affects nor disrupts the marriage. It certainly does not pass a decree in terms of Section 25 for its decision has not moved or done anything towards, or led through, to disturb the marriage, or to confer or take away any legal character or status. Like a surgeon, the Matrimonial Court, if operating, assumes the obligation of the post operatives, and when not, leaves the patient to the physician.”*

## **CONCLUSION.**

16] This special Act is enacted to provide a special procedure to be adopted in matters concerning marriage, marital relationship and family. Though provisions are available in the Code of Civil Procedure itself

providing for settlement and conciliation by courts in matters concerning family, such provisions were found to be not quite effective. This is why, special provisions are brought in to the Act for settlement of family issues. Settlements of family courts are made easier and more effective, since intervention of social welfare agencies, counselors, experts etc. can be made available in a proceeding before family courts as per the provisions of the Act. The court is also permitted to adopt its own procedure as the court thinks fit in arriving settlements.

## **B: Jurisdiction of Family Court in cases of divorced wife in Muslim religion**

### **Introduction -**

17) To promote conciliation in and to secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith, the Parliament enacted the Family Court Act, 1984. (referred as 1984 Act hereinafter ). Section 7 and 8 of the 1984 Act confer jurisdiction to deal with suits or proceedings enumerated in clauses (a) to (g) of the explanation to the sub-section on the Family Court to exercise the same jurisdiction exercisable by the District or subordinate Civil Courts in respect of suits or proceedings enumerated in the explanation. For the purpose of this workshop paper, sub-section (2) is important. It runs as follows -

**“(2) Subject to the other provisions of the Act, a Family Court shall**

**also have and exercise -**

*(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX ( relating to Order for maintenance of wife, children and parents ) of the Code of Criminal Procedure, 1973 (2 of 1974); and*

*(b) such other jurisdiction as may be conferred on it by any other enactment. ”*

18) Section 8 of the 1984 Act, by clause (a) provides for exclusion of jurisdiction of the District Court or other subordinate Civil Courts in respect of Suits or proceedings of the nature referred to in the explanation to sub-section (1) of section 7, after establishment of the Family Court in that area. Clause (b) of Section 8 provides that all Suits or proceedings of the nature described in clauses (a) to (g) in Section 7 (1) and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 pending immediately before the establishment of such Family Court and which would have been required to be instituted before such Family Court, if a Family Court existed at the date of institution, shall stand transferred to such Family Court.

**Enactment of -  
the Muslim Women (Protection of Rights on Divorce ) Act, 1986.**

**19)** In 1986, to overcome the ratio in Mohd. Ahmed Kham Vs. Shah



Bano Begum & Others, AIR 1985 S.C. 945, a case dealing with maintenance to a divorced Muslim women under section 125 Cr.P.C., the Parliament enacted the Muslim Women (Protection of Rights on Divorce ) Act, 1986. (hereinafter referred as the Muslim Women Act). Section 3 of the Muslim Women Act declares certain rights of the Muslim divorced women and lays down the procedure for the remedy in case of infringement of those rights. The fourfold rights declared in Clauses (a) to (g) of sub-section 1 of section 3 are, right to a fair provision and maintenance for the self and child, right to Mahr or dower and right to properties given to the wife at or before the marriage by the husband, friend or relatives of the spouses.

Section 3(2) is important for the purposes and is quoted as under :

*“(2) where a reasonable and fair provision and maintenance or the amount of Mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or anyone duly authorized by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, Mahr or dower or the delivery, of properties, as the case may be.”*

20) The Family Courts Act, 1984 having been passed on 14th Day of September, 1984, does not, as it could not have, make any mention of the Muslim Women Act, 1986. No conflict can be read between the provisions referred to above from the two Acts. Therefore, section 20 of the Family Courts Act can not apply.

21) The Law as Interpreted by the various High Courts

(A) A Division Bench of the Allahabad High Court, in ***Amjum Hasan Siddiqui Vs. Salima, AIR 1992, All.322***, dealt with the question of jurisdiction of Family Court to entertain an application u/s 3 of the Muslim Women Act by a divorced Muslim women. The Division Bench considered the provisions of Section 7 of the Family Courts Act and Section 3 of the Muslim Women Act and answered unequivocally that, only the Magistrate and not the Family Court has jurisdiction to entertain and decide an application u/s 3(2) of the Muslim Women Act.

(B) A Division Bench of Kerla High Court, in ***Edavalath Avaran Koya Vs. Kunnoth Mariyam, 1993 Cri.L.J.1118***, decided the same question and agreed with the view in Amjum Hasan Siddiqui (Supra). The Division Bench even read the non-obstante clause with which Section 3(1) of the Muslim Women Act begins as covering not merely the substantive part of the provision but also the procedural part in sub-section (2),(3) and (4) of Section 3 of the Muslim Women Act.

(C) A Single Judge of the Orissa High Court, in ***S.K. Alauddin Vs. Shamima Akhtari, 1995 Cri.L.J. 228***, dealt with an application u/s 3 of the Muslim Women Act by a divorced Muslim Woman seeking maintenance, dower and gifts filed before the Sub-Divisional Judicial Magistrate. The application was transferred to the Family Court. The jurisdiction of the Family Court to entertain the application was challenged by the former husband. The proceedings ended in an ex-parte order against the former husband. The legality of the proceedings

before the Family Court was challenged before the High Court. The High Court answered the question of jurisdiction in these words -

*“ The Family Court, therefore, has no jurisdiction to deal with the matter, and the proceeding before it is misconceived. The orders passed in the proceeding are without jurisdiction. The matter shall be dealt with by the learned SDJM.”*

### **The Contrary View**

22) Contrary to what has been held by the High Courts of Allahabad, Kerla and Orissa, the Bombay High Court, in ***Allabuksh Karim Shaikh Vs. Noor Jahan, 1994 Cri. L.J. 2826***, hold that the Family Courts have jurisdiction to decide the matter of maintenance for divorced Muslim Women even after coming into force the Muslim Women Act. In that case, the application for maintenance was initially filed before the Metropolitan Magistrate, Bandra, but got transferred to the Family Court in purported exercise of power u/s 8 (c) of the Family Courts Act. Since the application was filed jointly by the divorced Muslim woman and her minor daughter, the Family Court granted maintenance only to the child and rejected that of the divorced Muslim woman. The divorcee did not file revision, but the former husband challenged the payment of maintenance to the child. The only question before the High Court was the correctness of the grant of maintenance to the child. Having answered the question in favour of the grant, the Division Bench also

considered the question whether the Family Court has jurisdiction to entertain and decide an application for maintenance filed by a divorced Muslim Woman. It was held that “ *a proceedings under Chapter IX of the Code is still available to a Muslim divorced woman in and before the Family Court, while the remedy under the Muslim Women Act is an additional remedy.*”

### **The Supreme Court in Danial Latifi Vs. Union of India**

(2001) 7 SCC 740.

23) The Constitutional Bench of the Supreme Court by judgment in Danial Latifi disposed of a bunch of Writ Petitions challenging the constitutional validity of the Muslim Women Act. The Supreme Court upheld the constitutional validity of the Muslim Women Act.

The Supreme Court further held that -

- (1) A Muslim Husband is liable to make reasonable and fair provision including payment of maintenance for the future of the divorced wife. Such provision extending beyond the period of iddat must be made within the period in terms of Section 3(1) of the Muslim Women Act.

(2) Liability of a Muslim husband to his divorced wife arising under Section 3(1) of the Muslim Women Act is not confined to the iddat period.

(3) A divorced Muslim woman who has not remarried and is unable to maintain herself can proceed against the State Wakf Board to obtain maintenance.

24) It is necessary to note that in para 18 of the Judgment, the Supreme Court listed the incidental questions arising in the Writ Petitions. -

(1) Whether the Muslim Women Act is retrospective in effect ?

(2) Whether Family Courts have jurisdiction to decide the issues under the Muslim Women Act ?

(3) What is the extent to which the Wakf Board is liable under the Muslim Women Act ?

In Para. 19 of the Judgment the Supreme Court held that -

*“We will decide only, the question of constitutional validity of the Act and relegate the matters where other issues arise to be dealt with by the respective Benches of this Court either in appeal or special leave petition or writ petition.”*

Thus, the question of jurisdiction, though argued before the Constitutional bench in Danial Latifi, was left to be decided by the

respective Benches.

However, in ***K. A. Abdul Jaleel Vs. T.A. Shahida (2003)4 SCC 166***, a Three Judge Bench of the Supreme Court considered the provisions of Section 7 of the Family Courts Act and Section 3 of the Muslim Womens Act in relation to a suit by a divorced Muslim woman against her former husband covered by the explanation to Section 7 of the Family Courts Act.

25) Recently in ***Noor Alam vs. state of Bihar and others, reported in III (2015) DMC, 561 (Pat)***, it was held that petition u/s 125 of Cr.P.C. is maintainable before Family Court as long as the woman does not remarry. The Maintenance amount u/s 125 can not be restricted for Iddat period only. Though the application u/s 3 of the Muslim Women Act is filed for claiming Mahr and expenses for Iddat Period, subsequent to an application u/s 125 of Cr. P.C., application u/s 125 is maintainable and such proceeding being pending can continue.

[Supreme Court in Shamima Farooqui v. Shahid Khan](#)

It is a petition for maintenance by a Muslim divorced wife under Section 125 of Cr.PC, which the SC of India allowed on 6th April, 2015. The judgment draws attention to an overwhelming aspect of maintenance litigations and is a landmark judgment. Relevant para is extracted here -

“In *Shamim Bano v. Asraf Khan (2014) 12 SCC 636*, this Court after referring to the Constitution Bench decisions in *Danial Latifi v. Union of India (2001) 7 SCC 740* and *Khatoon Nisa v. State of U.P. (2014) 12 SCC 646* had opined as follows:

13. The aforesaid principle clearly lays down that even after an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench opined that as the Magistrate could exercise power Under Section 125 of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate Under Section 125 of the Code and the effect of ultimate consequence.

14. Slightly recently, in *Shabana Bano v. Imran Khan* MANU/SC/1859/2009 : (2010) 1 SCC 666, a two-Judge Bench, placing reliance on *Danial Latifi* (supra), has ruled that:

21. The Appellant's petition Under Section 125 Code of Criminal Procedure would be maintainable before the Family Court as long as the Appellant does not remarry. The amount of maintenance to be awarded Under Section 125 Code of Criminal Procedure cannot be restricted for the iddat period only.

Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in *Khatoun Nisa* (supra).

In view of the aforesaid dictum, there can be no shadow of doubt that Section 125 Code of Criminal Procedure has been rightly held to be applicable by the learned Family Judge.”

### **Conclusion -**

26) Now in view of the landmark authorities of Danial Latifi and that of Khatoon Nisa and Shamima Farooqui, it can be said that a Muslim woman can claim relief u/s125 of the Cr.P.C. before the Family Court even after her divorce and the Family Court can entertain such petition and grant relief accordingly.

## **C: Can Family Court deal the issue of matrimonial property which is situated outside the jurisdiction of the Court.**

27) The property may be classified as tangible and intangible property. Tangible property includes the moveable and immoveable property. Intangible property includes copy right, goodwill, patent and trademark.

The term matrimonial property is not defined by the legislature but may be understood as;

i] As per Sec. 27 of Hindu Marriage Act:-

In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property



presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

ii] As per Sec. 3(1)(d) of Muslim Women (Protection of Right on Divorce) Act:-

A Muslim Woman on divorce shall be entitled to – all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

iii] As per Sec.40 of Divorce Act, 1869 :-

The District Court may, before passing a decree for dissolution of the marriage or a decree of nullity of marriage, inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders, with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children(if any) of the marriage, or of both children and parents, as to the Court seems fit. Provided that the Court shall not make any order for the benefit of the parents or either of them at the expense of the children.

iv] As per Sec.42 of Parsi Marriage And Divorce Act, 1936 :-

In any suit under this Act the Court may make such provisions in the final decree as it may deem just and proper with respect to property prescribed at or about the time of marriage which may belong jointly in both the husband and wife.

v] As per Sec.18(e) & 19(8) of Domestic Violence Act,2005.

Magistrate may pass protection order in favour of aggrieved person and prohibit the respondent from alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her *stridhan* or any other property held either

jointly by the parties or separately by them without the leave of the Magistrate

The Magistrate may direct the respondent to return to the possession of aggrieved person her stridhan or immoveable property or valuable security to which she is entitled to.

vi] As per Sec.7(1)(c) of Family Court Act, 1984

The Family Court has a jurisdiction to decide a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

**28]** Whether Family Court while deciding the matrimonial disputes between the parties, can decide the issue of matrimonial property which is situated outside the jurisdiction of the Court is the topic of discussion.

i] Family Court has a jurisdiction to decide matrimonial disputes as per Sec.7 of Family Court Act which reads as under :-

Sec.7(1) Subject to the other provisions of this Act, Family Court shall -

(a) have and exercise all the jurisdiction exercisable by any district Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation :- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature namely :-

- (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;
- ii] It is now a well-settled principle of law that the jurisdiction of a Court created specially for resolution of disputes of certain kinds should be construed liberally. The restricted meaning if ascribed to Explanation (c) appended to Section 7 of the Act, would frustrate the object where for the Family Courts were set up. The statements of Objects and Reasons, would clearly go to show that the jurisdiction of the Family Court extends, inter alia, in relation to properties of spouses or of either of them which would clearly mean that the properties claimed by the parties thereto as a spouse of other, irrespective of the claim whether the property is claimed during the subsistence of a marriage or otherwise. K.A. Abdul Jaleel .v. T.A.Shahida 2003(2) Bom CJ 641 SC :AIR 2003 SC 2525.
- iii] Jurisdiction of Family Court-Disposal of property. Wife seeking relief in written statement of return of ornaments and articles in petition for divorce of husband. City Civil Court granting decree of Judicial separation. After constitution of Family Court, it granting decree of divorce. Wife's claim for return of ornaments. Maintainability of. Held, Family Court has jurisdiction to decide suit or proceeding between the parties to marriage with respect to property of parties or either of them. Sangeta B. Kadam .v. Balkrishna Ramchandra Kadam 2005(2) Bom CJ 110.
- iv] By no stretch of imagination, can the Family Court assume jurisdiction, if there is a dispute between the brothers, sisters, mothers, fathets etc. concerning property and the case on hand being one such, the Family Court had clearly no jurisdiction P. P. Srihari .v. Kum P.Sukunda and another, 2002(1) Bom C.J. 797
- v] The above section is cannot cover the claim made by the mother over the property in the Family Court where only the claim to the property of either spouse can alone be considered. Suhas Kulkarni .v. Mrs Snehat Suhas Kulkarni 1994 Bom CJ 37.

**29]** The Civil Court has a jurisdiction as per section 16 of the Code of Civil Procedure to decide a suit in respect of immoveable property, which is situated within its local limits of territorial jurisdiction.

Section 16 of the Code of Civil Procedure is reproduced as under :-

Sec. 16:- Suits to be instituted where subject-matter situate – Subject to the pecuniary or other limitations prescribed by any law, suits -

(a) for the recovery of immoveable property with or without rent or profits.

(b) for the partition of immoveable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property,

(d) for the determination of any other right to or interest in immoveable property,

(e) for compensation for wrong to immoveable property,

(f) for the recovery of moveable property actually under distraint or attachment.

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

**Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.**

Explanation :- In this section 'property' means property situate in India.

As per proviso clause of section 16 of the Code of Civil Procedure, Civil Court may exercise a jurisdiction in respect of immoveable property which is situated outside its local limits, when the suit is for obtaining relief respecting or compensation for wrong to immoveable property held by or on behalf of the defendant where the relief sought can be entirely obtained through his personal obedience. That means when a monetary relief is claimed by the plaintiff in respect of immoveable property situated outside the local limits of Court, the Court has a jurisdiction to decide the suit as per proviso clause of section 16. The meaning is equity acts in personam. The Civil Court may compel the defendant to satisfy the decree or order for the relief in respect of immoveable property, though it is situated outside its local limits, by attaching the property of defendant within its local limits or by sending the defendant behind the bar.

The Family Court has jurisdiction of District Court and subordinate Civil Court as per section 7(1)(a)(b) of Family Court Act. The Family Court, therefore, has a jurisdiction to decide the issue in respect of matrimonial property, which is situated outside its local limits as per proviso clause of section 16 of the Code of Civil Procedure.

**30]** The section 18 of Family Court Act is reproduced here as under :-  
Sec.18 Execution of decrees and orders:-

(1) A decree or order [other than an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), passed by a Family Court shall have the same force and effect as a decree or order of a Civil Court and shall be executed in the same manner as is prescribed by the Code of Civil Procedure, 1908 (5 of 1908), for the execution of decrees or orders.

(2) An order passed by a Family Court under Chapter IX of Code of Criminal Procedure, 1973 (2 of 1974), shall be executed in the manner prescribed for the execution of such order by that Code.

(3) A decree or order may be executed either by the Family Court which passed it or by the other Family Court or ordinary Civil Court to which it is sent for execution.

As per section 18 of Family Court Act, Family Court may execute decree or order passed by it or may send for execution to other Family Court or ordinary Civil Court for its execution, where the immovable property or moveable property held by the defendant, is situated.

### **31] Section 27 of the Hindu Marriage Act reads as under :-**

Sec.27 Disposal of property:- In any proceeding under this Act, the Court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

The section 27 is regarding the disposal of the property while deciding any matrimonial disputes under Hindu Marriage Act. Family Court while disposing the property as per section 27 of Hindu Marriage Act shall consider two conditions.

(1) the property should have been presented, at or about the time of marriage and (2) it should be held jointly.

i] Section 27 is attached only when the property presented at or about the time of marriage is alleged to belong jointly to both the spouses. Section 27 can only relate to a limited class of property that is owned jointly by the spouses which has been presented at or about the time of

marriage. It is not permissible to bring in property brought after marriage as it would expand the scope of section 27. Held that jewellery presented at the time of marriage comes within section 27 of the Act but furniture brought after the marriage would not come within section 27 of the Act. Subhash Lata .v. V.N. Khanna, AIR 1992 Del 14 See also Sangeeta Balkrishna Kadam .v. Balkrishna Ramchandra Kadam, AIR 1994 Bom. 3.

ii] S. 27 of the Act dealing with 'disposal of property' is unambiguous and, therefore, marginal note of said section may not be used as an aid to its interpretation: Shakuntala .v. Mahesh Atmaram Badlani A.I.R.1989 Bom. 353.

iii] No order under S. 27 can be passed with respect to the property which exclusively belongs to the wife : Inderjit Singh .v. Manjit Kaur(1987) 2 Hindu L.R. 496: 1 D.M.C. 129 (P & H).

iv] Powers of Court under Section 27. Jurisdiction of family Court. Property which the husband and wife may acquire during the subsistence of the marriage out of their own efforts and not presented to them at the time of marriage would not fall under Section 27 of the Act. Family Court has no jurisdiction to pass any order granting relief regarding such property under Section 27 Kamlakar Ganesh Sambhus .v. Master Tejas Kamlakar Sambhus 2005 (1) Bom CJ. 24: 2004(4) Mh.L.J. 754 : 2004(6) Bom CR 587.

The property which is not presented at or about time of marriage and which is not held jointly by the spouses but the property is exclusively owned by the wife or the *stridhan* of the wife may be given to her by the Family Court as per sec.7(1), explanation (c) of Family Court Act, 1984 r/w sec.18(3).

**32]** As per section 26 of Protection of women from Domestic Violence Act, 2005, the Family Court may grant any relief available under section 18,19,29,21 and 22 of the said Act in any legal proceeding before Family Court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

Sec. 26 of the D.V. Act is reproduced as under :-

Relief in other suits and legal proceedings:-

(1) Any relief available under Section 18,19,20,21 and 22 may also be sought in any legal proceeding, before a civil Court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section(1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

This clause provides that any relief available under the proposed legislation may also be sought in any legal proceeding before a civil Court, family Court or a criminal Court and that any relief which may be granted under the proposed legislation may be sought for in addition to and alongwith reliefs sought for in a suit or legal proceeding before a civil or criminal Court. Sub-clause (3) lays down that the aggrieved person shall be bound to inform the Magistrate of the reliefs obtained by her in any proceeding other than proceedings under the proposed legislation.

The Family Court may decide the issue of matrimonial property and grant relief under Sec.18 of D.V. Act in any legal proceeding pending before it.

Family Court under section 18(e) of D.V. Act may pass a protection order in favour of aggrieved person and prohibit the respondent from alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her *stridhan* or any other property held either jointly by the parties or separately by them without the leave of the Magistrate and may direct under section 19(8) of the said Act the respondent to return to the possession of the aggrieved



person her *stridhan* or any other property or valuable security to which she is entitled to.

If such property situated out side to local limits of Family Court, then Family Court may direct the nearest Police Station to assist the Protection Officer in implementing the order in favour of aggrieved person. Sec. 19(7) of Domestic Violence Act is reproduced as

The Magistrate may direct the Officer-in- charge of Police Station in whose jurisdiction the Magistrate has been approached to assist in the implementation of Protection order.

From the above discussion it is concluded that Family Court can deal the issue of matrimonial property which is situated outside the jurisdiction of the Court.

## **Research Paper from Family Court** **AURANGABAD**

### **Various purposes for which maintenance can be granted**

Somewhere in the process of development of civilization it was understood that new born child needs continuous care at the hands of its mother. This realization slowly resulted in to division of responsibilities, whereby a man was considered as bread earner who was supposed to work outside the house to earn livelihood. A woman was supposed to look after the children and other family members who needed care and was thus supposed to be inside the house. A man therefore, was required to earn livelihood for entire family and provide the same to the family members. This division of responsibilities slowly as the rules of civilization developed was considered as moral and ethical obligation. And in turn they also become legal responsibilities. Where ever there is a duty corresponding right exists. Thus the right to get livelihood from the working man became right of the family members who were not in position to earn their livelihood on their own. This included a woman because she was supposed to be at home and discharge household responsibilities. This included children as considering their age they are dependent. This included aged parents as they cannot earn for themselves and this included infirm major children also.

As civilizations developed further, many religions and communities came in to existence. Depending upon the provisions in personal law the rules of maintenance developed.

Herein below is a short discussion about the concept of maintenance under old as well as present personal laws.

**Hindu law** – The Shastric Law casts duty on a man to provide maintenance to his children, parents, wife and even some other needy members of family like, daughter in law, sister, grand children etc. In old Hindu families a person who earned bread was supposed to maintain all the members of his joint family. This was moral and ethical responsibility which was been discharged in almost all the families.

**Muslim Law** – Under Muslim Law the person was supposed to maintain his wife, children and parents.

**Christian Law, Parsi Law and Jew Law**– Under these personal laws also a man was supposed to maintain his wife, children and parents.

If we consider the old personal laws we find that the obligation of maintenance is mainly on the man and not on the woman. A woman was supposed to maintain her children if circumstances required. But she was not supposed to maintain any other relations.

Under all the old personal laws the maintenance included provision for clothing, shelter, food and education. Thus it was confined only for subsistence of a person. However, under Muslim Law the maintenance of wife was never only subsistence of a lady but it was always has to be according to the standard of living to which she was accustomed.

From the point of view of old India we need to mainly take in to consideration two religions i.e. Hindu and Muslim. For both the religions a specific code of law was not in existence, before British rule. Therefore, we find that the obligation to maintain others was more ethical and moral. Rather both those systems of law are mainly based on ethics or moral oriented duties than that of rights. As mentioned above the duty to maintain was attached to many of the relations and therefore, it was customary to give the property to any female relative towards maintenance. We find mention that the *Sadar jaga sadi choli poti dili*. This is nothing but maintenance.

After independence the Hindu law was codified to great extent. Out of those codified laws, The Hindu Marriage Act, 1955 and The Hindu Adoptions and Maintenance Act, 1956, mainly deal with the provisions of the maintenance. The Hindu Marriage Act, 1955 introduced concept of divorce which was not known to old Hindu Law. While introducing this new concept of divorce the law also introduced one more novel concept wherein obligation to maintain the husband was put on wife. The Hindu Adoptions and Maintenance Act, 1956 also introduced few new concepts but as far as provisions of maintenance are considered they are more based on the old Hindu Law.

As all of us know the Muslim personal is not codified and therefore, till 1986, the entire issue of maintenance was dealt with based on unmodified personal Law and Shariat Act. For the first time a legislature came in to existence after the decision in famous Shahbano's case, i.e. Muslim Women (Protection of Rights on divorce) Act, 1986. This Act governs the issue of maintenance related to divorced wife.

The Parsi Marriage Act and Divorce Act, 1936, governs the issues related to maintenance between husband and wife and minor children in respect of persons who are Parsi and persons who married under that act.

The Divorce Act, 1869, governs the issues related to maintenance between husband and wife and minor children in respect of persons who married under that act.

Following are the secular laws on the issue of maintenance applicable to all the religions.

During the British rule, the Britishers enacted many laws for their convenience. Out of those laws the major law is Code of Criminal procedure. In the said code in section 488 they made provision for maintenance of dependents like children, wife and aged parents. This was the secular law which was applicable to all the religions. Here, a lady also was put under obligation to maintain her parents which was not known to Indian people.

After independence present Criminal Procedure Code came in to existence, wherein instead of section 488 corresponding section 125 was inserted. Section 125 is a measure for social justice to see to it that nobody dies out of starvation. The Section is in consonance with Article 15(3) and 39 of the Constitution.

Till 2005 as far as maintenance is considered only the Criminal procedure Code was the law which was applicable to all the people irrespective of their religion. In the year 2005 and enactment i.e. Protection of Women from Domestic violence Act, 2005 came to be

enacted, which is again applicable to all the persons irrespective of religion and contained many novel provisions to suit the changing needs of time.

### **Various purposes of granting maintenance :**

The various purposes of maintenance can be divided in to two categories. By taking in to consideration the literal meaning of word purpose. And by considering the word purpose in wider sense i.e.the categories of persons who are entitled to get maintenance.

It is to be noted that only Hindu Adoptions and Maintenance Act, 1956, has defined the word maintenance as -

- (i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;
- (ii) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage;

Thus when we discuss the word purpose in its literal meaning, purposes for which maintenance can be granted are Food, Clothing, Medication, Shelter and Education. Out of these purposes food, clothing, medication and shelter are bare minimum necessities of life which are required for existence. Education also, is a bare minimum necessity but it can be argued as to whether it's necessary for existence or not.

Depending on purposes mentioned above the provisions of various laws related to maintenance can be discussed as follows;

### **The Code of Criminal Procedure, 1973 :**

Section 125 – This provision has not specifically mentioned the purposes for which maintenance can be granted. It merely says any person having sufficient means neglects or refuses to maintain ..... Initially there was upper limit as far as grant of amount of maintenance under this provision i.e. Rs. 500/- (for State of Maharashtra Rs. 1,500/-). This upper limit was put for some reasons. The wording of section itself suggests that amount is to be decided by considering a case as summary case. So in real sense adjudication of rights or liabilities was not contemplated. Only consideration was nonpayment and capacity to pay. Entitlement to get maintenance was not to be discussed. Thus, this amount was to be given as necessity for existence, without adjudication for entitlement and therefore upper limit was put. (Inderjit Kaur Vs. Union of India (1990) 1 SCC 344) (AIR 2015 SC 554) But now there is no upper limit on grant of amount of maintenance. We see that the matters are conducted as civil trials and therefore, now there is a doubt as to whether it has to be considered as merely subsistence allowance or not. But yet the wording of section is not changed and it does not talk of adjudication of rights and liabilities. Thus it has become challenge to decide those cases.

As has been mentioned above the law has been enacted long back. As the personal laws were not codified, this provision was made. Therefore at the relevant time it was merely subsistence allowance. But now its nature has changed.

Section 127 talks about the alteration in allowance in changed circumstances.

**The Protection of Women from Domestic Violence Act, 2005** – This enactment covers provision for residence, compensation for loss of earnings, medical expenses, compensation for loss of property and maintenance. Section 20 (2) has clearly mentioned that the monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed. Thus the maintenance under this law cannot be treated as mere subsistence allowance. And as all of us know again in those proceedings also the entire trial is conducted.

**The Hindu Adoptions and Maintenance Act, 1956** – As mentioned above this enactment has defined the term maintenance and this is civil remedy wherein adjudication of rights and liabilities is contemplated. This right is not restricted merely as subsistence allowance but goes beyond it. Though this enactment is based on Shastric law, it is combination of right of life guaranteed by our Constitution and personal right of maintenance. Under this enactment a person is entitled to get maintenance as per the standard of living of person from whom maintenance is sought. This has been made very clear in *Rekha Malhotra vs. Deepak Malhotra* by the Hon'ble Bombay High Court. Thus under this enactment leave apart subsistence allowance, when it comes to wife, children and parents only sufficient amount is not the criteria but standard of living and status of the parties is criteria. Depending upon the status of the parties' maintenance has to be granted which can be far more than sufficient.

**The Hindu Marriage Act, 1955** – Again this is civil remedy wherein under section 25 and 26 adjudication of rights is contemplated. This right



is not restricted merely as subsistence allowance but goes beyond it. This enactment is combination of right of life guaranteed by our Constitution and personal right of maintenance. Under this enactment a person is entitled to get maintenance as per the standard of living of person from whom maintenance is sought. Thus under this enactment also leave apart subsistence allowance, when it comes to wife and children even sufficient amount is not the criteria but income and property of the parties become criteria. Depending upon the status of the parties' maintenance has to be granted which can be far more than sufficient.

However, an element of subsistence allowance can be seen in section 24. No doubt this section also takes in to consideration the standard of living before granting maintenance. However, this is right before final adjudication of rights and liabilities and in certain cases this can be considered as subsistence allowance wherein after final adjudication of rights and liabilities the maintenance can be denied also. This provision protects a person during pendency of the litigation and even the litigation expenses can be awarded under this section. (Bijlal P. Dave Vs. Parag L. Dave, AIR 1999, Bom 237)

**The Parsi Marriage and Divorce Act, 1936** – makes provisions for maintenance interim maintenance as well as permanent maintenance like that of Hindu marriage Act.

**The Divorce Act, 1869** - makes provisions for maintenance interim maintenance as well as permanent maintenance like that of Hindu marriage Act.

**Uncodified Muslim personal law** – A person is duty bound to maintain his children, aged parents and wife. This law also does not talk only about bare necessities of life but it does talk about the dignified living. Under this law there is a provision for Kharch – E – Pandan, to be paid to wife this provision is called as provision for mewakhori. Thus this law also though not codified takes care that mere animal existence is not sufficient for a human being and something more is required.

Apart from this the person is bound to pay maintenance to the divorced wife during iddat period. Here not the purpose but the time for which the maintenance is to be paid has been mentioned.

**Muslim Women (Protection of Rights on Divorce) Act, 1986** - All of us know the history behind this enactment. So it is not discussed. Though by way of this the enactment, the right of divorced Muslim lady to get maintenance has been restricted only during Iddat period, the Hon'ble Supreme Court has interpreted the law very clearly. This maintenance amount is not restricted only for a particular time or merely as subsistence allowance. In fact the standard of living of the person claiming maintenance is of prime importance. This enactment is novel from the aspect wherein after husband liability to maintain the destitute woman has been cast on some other relations also and at last on Wakf Board. Such provision we do not find in any other Law.

**Maintenance and Welfare of Parents and Senior Citizens Act, 2007** - This enactment takes care of needy aged persons. However, unfortunately machinery mentioned under the law is not in existence. We being family court, in my opinion we can handle those cases as per section 7 of the family courts act.

**Special Marriage Act, 1954** – Provision for maintenance of wife and minor children during pendency of litigation and afterward.

Thus the maintenance is supposed to be paid for various purposes mainly food, clothing, shelter, medication and education. Apart from this maintenance has to be paid to lead life of dignity and to lead life with certain standard of living.

**Now let's discuss the persons who are entitled to claim maintenance and against whom it can be claimed .**

From the very beginning a woman, minor children and aged parents are considered as vulnerable group of society and having this aspect in mind various provisions of maintenance are enacted.

**The Code of Criminal Procedure - Section 125** – Wife which would includes divorced wife against her husband.

minor son, major but infirm son, major but infirm or unmarried daughter from their father or mother.

Aged parents from their major son or daughter having no deformity.

**The Protection of Women from Domestic Violence act** – As has been mentioned above this is very novel enactment. Under this enactment a lady can claim maintenance for herself as well as her minor children. Purposefully, the word lady has been used as the enactment is not restricted only to wife but also covers the lady who is living in live in relationship as well as a lady living in domestic relationship. This enactment has been passed to suit the needs of the changing society.

**The Hindu Adoptions and Maintenance Act, 1956** – this enactment is restricted only to Hindus. As the enactment is based on Shastric Law, many persons are entitled to claim maintenance under this Act.

Wife – a wife can seek maintenance even though she is living separately from her husband. But for this separate staying some riders have been prescribed. Those riders have prescribed as a right to claim maintenance corresponds with the duty to give husband company and perform other obligations. As the obligation to maintain a wife is duty related to marriage, divorced wife is not entitled to claim maintenance under this enactment as no marital tie subsists.

Minor children – can claim maintenance from their father as well as mother.

Unmarried daughter - can claim maintenance from their father as well as mother. (Laxmappa Vs. Balawa Kom (1996) 5 SCC 458)

Aged parents-can claim maintenance from their son as well as daughter. Here mother includes the childless step mother also.

Widowed Daughter in law – she can claim maintenance from father in law, provided there is co parcenary property and the husband has not been given share in the same during his lifetime. The right to maintenance depends on earning or property of the person. In almost all the hindu co parceneries, the property is joint with other co parceners and unedr old law this property was to devolve by survivor ship and not by inheritance. Thus, a widow was not getting any property and therefore, this provision.

**The Hindu Marriage Act, 1955** - the only enactment for Hindus where a husband also can claim maintenance from his wife. Wife is needless to say entitled to claim maintenance. As the time has passed, the position of bread earner and home maker is no longer confined to a particular gender. Keeping this change in mind the provision wherein husband also can seek maintenance has been enacted. The wife or husband can also seek maintenance for minor children under this act.

**Parsi Marriage Act** - Husband as well as wife can seek maintenance from each other. The wife or husband can also seek maintenance for minor children under this act.

**Divorce Act** - A wife can claim maintenance for herself as well as minor children from her husband.

**Special Marriage Act, 1954** - A wife can claim maintenance for herself as well as minor children from her husband.

**Uncodified Muslim personal law** – parents, children and wife are entitled to get maintenance. Wife's entitlement to get maintenance is restricted only during Iddat period.

**Muslim Women (Protection of Rights on Divorce) Act, 1986** –  
Divorced wife and Children

**Maintenance and Welfare of Parents and Senior Citizens Act, 2007**  
– aged parents

Thus the obligation to maintain dependent is mainly based on existence of particular relationship. It is presumed that when a person acknowledges a relationship, he must discharge his obligations arising out of such relationship. He merely can not choose fruits of the

relationship. Therefore, while passing order of maintenance, capacity of a person to earn is considered. Whether he is earning or not is not important. This is exactly an able bodied person theory. A person if has taken some liability can not say that I am not earning and can not pay maintenance.

Thus under many enactments the vulnerable group of society can get maintenance as a social justice.

Though many laws are in existence, the main problem faced is in respect of execution of maintenance orders. In my opinion separate machinery with wide powers for execution of maintenance orders needs to be established for every Family Court. This in real sense will serve the purpose.

## **Research Paper from Family Court NASHIK**

### **Status of Woman in a live in Relationship.**

Law cannot be divided into “Law relating to men and law relating to women, as law of any country is applicable to all whatever applicable to men is also applicable to women equally. However, some enactments may be intended to exclusively women to uplift the dignity and status of women in society. Protection of women from Domestic Violence Act, 2005, is one of the enactment to uplift the dignity and status of women.

This Act secures the right of women whose marriages are not valid under the law or those who have never gone through a formal ceremony of marriage but have been living in marriage like relationships. Proof of a marriage is not required for filling proceedings under this Act. Prior to the

enactment of protection of Women from Domestic Violence Act, while determining the rights of women to maintenance, there was requirement of proving the validity of marriage. By taking away the necessity of proving of marriage, Domestic violence Act, lays down that even if there is no marriage or when a marriage cannot be proved or the marriage is not valid, the woman in such relationships would be entitled to her right under the Act. Thus, Domestic Violence Act, gives social status and legal rights to woman who lives in relationship. It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a share household and are related by consanguinity, marriage or through a relationship in the nature marriage or adoption.

### **The manner of implementing orders under the Protection of Women From Domestic Violence Act.**

For effective implementation of order under the protection of Women from Domestic Violence Act, MOHIM (Monitoring of hinsa (PWDV) Act, in Maharashtra) with collaboration between Women and Child Development & Majlis Legal Center, provided guidelines for best practices for each agency. Best practices are framed keeping in mind the spirit of the Act to bring clarity and bridge gaps within the existing provisions. Each stakeholder including the judiciary has formally approved those guidelines.

Under the provisions of Act, an aggrieved woman is entitled to specific reliefs which include; the right to reside in the shared household. The aggrieved woman shall have the right to reside in the shared household,

whether or not she has any right, title or beneficial interest in the same. The aggrieved woman shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

### **Protection Order [S.18]**

The Magistrate may on being prima-facie satisfied that domestic violence has or is likely to take place, pass a protection order in favour of the aggrieved woman and prohibit the respondent from committing any act of domestic violence; aiding or abetting in the commission of acts of domestic violence; entering the place of employment, school or any other place frequented by the aggrieved woman, attempting to communicate with the aggrieved woman, including personal, oral, written, electronic or telephonic contact; alienating assets, bank lockers, bank accounts or any property used/held/enjoyed by both the parties jointly or singly by the respondent, including her stridhan without the leave of the Magistrate; causing violence to a person who gives the aggrieved woman assistance to protect herself and her children from domestic violence; committing any other act as specified in the protection order.

### **Residence Order [S.19]**

On being satisfied that domestic violence has taken place the Magistrate may also pass a residence order. The aim of this order is to ensure that the woman has a shelter that is safe and free of violence. Restraining the respondent from dispossessing or disturbing the aggrieved woman



from the shared household, whether or not the respondent has a legal or equitable interest in the shared household; directing the respondent to remove himself from the shared household; however the same shall not be passed against any respondent who is a woman; restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved woman resides; restraining respondent from alienating/disposing off the shared household or encumbering the same; restraining the respondent from renouncing his rights in the shared household or; directing the respondent to secure alternate accommodation for the aggrieved woman at the same level as enjoyed by her in the shared household or pay rent for the same, if circumstances so require.

The Magistrate may impose additional conditions or direction necessary to protect or provide for the safety of the aggrieved woman or child of such aggrieved woman. S.19(2)]. The Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence. [S.19(3)]. The Magistrate may impose on the respondent, obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties. [S.19(6)]. The Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to. [S.19(8)].

### **Monetary Relief[S.20]**

The Magistrate may direct the respondent to pay monetary relief to meet the expenses of the aggrieved woman and any child of the aggrieved

person. S.2(k) defines “monetary relief” as compensation to the aggrieved woman at any stage during the hearing of an application, to meet expenses incurred and losses suffered by the aggrieved woman, which may include the loss of earnings; medical expenses; loss caused due to the destruction, damage or removal of any property from the control of the aggrieved woman; and maintenance for the aggrieved woman as well as her children, including an order under or in addition to an order of maintenance under S.125 Cr.P.C.or any other law for the time being in force. The monetary relief granted shall be adequate, fair and reasonable, and consistent with the standard of living to which the aggrieved woman is accustomed [S.20(2)]. The Magistrate shall order an appropriate lump sum or monthly payments of maintenance as the nature and circumstances of the case may require. [S.20(3)].

### **Custody Order [S.21]**

The Magistrate may grant temporary custody of her children to the aggrieved person at any stage during the hearing of an application seeking any relief under this Act. The Magistrate may also specify, if necessary, the arrangements for visit of such children by the respondent. Provided that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interest of her children, the Magistrate shall refuse to allow such visit. This is to prevent the children from being separated from their mother, and ensuring best interest of the children is taken into account. This order is temporary in nature, and does not affect rights under existing laws on custody and guardianship.

### **Compensation Order (S.22)**

The Magistrate may pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed, to the aggrieved person. This order is in addition to the monetary relief order.

### **Ad Interim / Interim and Ex parte Order (S.23)**

Ad Interim – Ex-Parte Order (Urgent Order): When there is an immediate/serious danger to the aggrieved woman or grave harm will be caused to the woman if the order is not passed immediately, the Magistrate may pass Ad Interim – Ex-Parte orders immediately after filing the case. The order will be served on the Respondent along with the application. Interim Order: This is to ensure that a woman's rights are protected during the course of the legal proceedings. S. 23(1) states that the Magistrate may pass interim orders as he deems just and proper. Ex-parte Order (interim/final): When the Respondent does not or refuses to appear in Court despite prior intimation given by the court, the Magistrate may grant an ex-parte (in the absence of the other party) order under S. 18 to 22 against the respondent. The order shall be served on the respondent. Any order made under this Act, shall be enforceable throughout India. [27 (2)].

### **Jurisdiction of the Court**

A woman can file an application within the local limits of which she permanently or temporarily resides or carries on business or is

employed; or the respondent resides or carries on business or is employed; or the cause of action has arisen [S.27].

### **Provide Information and Referral**

Section 5 states that the Magistrate shall inform the Aggrieved Person in a local language about her rights and reliefs available under the Act, the validity of services like Protection Officers, Medical, Shelter, Service Providers and Legal Aid, her right to file a complaint under S.498A IPC, wherever relevant.

All Magistrate Courts shall put up posters and distribute pamphlets with information on the Domestic Violence Act and contact numbers of agencies who provide service.

### **Magistrate shall not insist on Domestic Incident Report (DIR)**

When a woman files a application on her own, the Magistrate shall not insist on a DIR before passing an order. S.12(1) states that only if a Magistrate has received a DIR from the Protection Officer or the Service Provider he shall take the same into consideration before passing any order.

### **First Date of Hearing within 3 days**

Section 12(4) states that the Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the Court.

### **No Court fee stamp needs to be affixed**

No court fee stamp needs to be affixed on any application under the Act.

### **Ex-parte Ad interim Orders**

Section 23(2) and Form III states that if the Magistrate is satisfied that an application prima-facie discloses domestic violence he may grant an ex parte (ad interim) order before issuing notice to the Respondent.

### **Service of Notice**

Section 13 states that a notice of the next date of hearing issued by the Magistrate needs to be served on the Respondent within 2 days or within such reasonable time as may be allowed by the Magistrate. Section 28 states that all proceedings shall be governed by the provisions of the Code of Criminal Procedure, 1973(2 of 1974). Rule 12 states that service of notice shall incorporate principles from the CPC and the CrPC.

Magistrates shall direct the issuance of notice on the Respondent in an expeditious manner in any of the following ways as per the convenience of the Aggrieved Person. The aggrieved person herself through personal service or through RPAD, through the Protection officers, through the Protection officer with the assistance of the Police, through the police, as per the provisions under CPC and Cr.P.C. or as per the notice served by email/fax shall suffice and the printout/acknowledgement of the same shall be adequate proof of notice.

Important: The Magistrate shall not direct the aggrieved person to handover the notice to the PO or Police Officer. The notice should be directly sent by the Court to the PO or Police as the case may be.

### **Ex Parte Ad Interim Orders**

In case of grave urgency or grave danger the woman can press for ad interim reliefs. These reliefs are granted by the court even before the respondent is served notice and appears in Court or soon after the notice is served but before his reply is filed [Section 23(2)].

The Magistrate shall ensure that parties are directed for counselling only after an ad interim order/s specifically protection, maintenance and residence orders, if sought, have been passed.

### **Interim Orders**

The purpose of Act is to simplify procedures and ensure that women who are in need of immediate reliefs are able to secure the same within a short time. If the Magistrate is satisfied that an application prima facie discloses domestic violence he may grant an interim order. [S.23(2)].

### **Ex-parte Orders**

If the Magistrate is satisfied that an application prima facie discloses domestic violence he may grant an ex-parte order on the basis of the affidavit. [S.23(2)].

If the notice is duly served and the Respondent fails to appear or file his written statement, the Magistrate may pass an ex-parte order on the basis of the affidavit.

All orders of injunction are essentially Protection Orders.

**Orders passed under this Act are enforceable throughout India.**

Section 27(2) states that any order made under this Act shall enforceable throughout India.

### **Call out of cases in the Morning**

Matters shall be called out in the morning, to avoid hardship to women who have to wait the entire day. The matter may be listed in the afternoon only if the woman makes a request for the same.

### **Proceedings to be held in camera**

Section 16 states that if the Magistrate considers that the circumstances of the case so warrants, and if either party to the proceedings so desires, he may conduct the proceedings under this Act, in camera.

### **Adjournments**

The Magistrate shall avoid unnecessary adjournments to the Respondent that would delay the disposal of the case.

The Magistrate shall direct the parties for counseling with the consent of the aggrieved parties. The Magistrate shall ensure that parties are directed for counselling only after ad interim orders specifically interim protection, maintenance and residence orders, if sought, have been passed. The Magistrate shall not continue proceeding in the Court while counselling is in progress, until report from the counselor is received. The Magistrate shall pass an order on the settlement terms, if arrived at during counselling, to ensure that the consent terms are binding and enforceable. The Magistrate shall allow the case to be withdrawn only after consent terms are complied with and executed.

### **Magistrate can order Protection Officers to assist the Court.**

Section 9(1) states that the Magistrate can call upon the PO to assist in the discharge of his functions under the Act. Section 9(2) states that the PO shall be under the control and supervision of the Magistrate and shall perform the duties imposed upon him by the Magistrate. Rule 10 states that the Magistrate can direct the Protection officer by way of an order to conduct a home visit of the shared household premises before granting exparte interim relief; submit an economic condition report on the emoluments, assets, bank accounts or any other documents. The Magistrate to state the exact purpose and details of such report and specify the date for submission of the report. The Magistrate may also direct the Police to assist and accompany the PO in case the PO has any apprehensions.

### **Women can file an application for re;liefs under other proceedings**

Section 26 states that any relief available under the Act can be sought in any legal proceedings Civil, Family or Criminal Court affecting the aggrieved person. The reliefs sought may be in addition to and along (simultaneous) with any relief that the aggrieved person may seek. In case any order has been obtained in any other legal proceeding, the same shall be informed to the Magistrate.

### **While passing orders**

The Court shall follow summary procedure as prescribed under Sections 262-264 Cr.P.Code and record only the substance of evidence. The judgment shall contain a brief statement of reasons. While passing



orders the Magistrate shall state that the breach of every order shall be deemed to be a criminal offence under section 31 of the Act. The Magistrate may direct the concerned police station to give protection to the aggrieved person and her dependents. Section 19(3) states that the Magistrate may direct the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence. The Magistrate shall try breach of protection order summarily [Rule 15(6), Rule 15(7)].

### **Order Copies to be issued free of cost**

Section 24 states that order copies shall be issued to the parties free of cost.

### **Magistrate may direct the Protection Officer for Enforcement of Orders**

The Magistrate may direct the Protection officer for enforcement of all orders. Rule 10(1). The Protection Officer shall assist the court in enforcement of all orders. Rule 10(1)(e). The Protection Officer shall restore the possession of the personal effects including girls and jewellery of the Aggrieved Person and the shared household to the Aggrieved Woman. Rule 10(1)(c). The Protection Officer shall assist the aggrieved person to regain custody of children and secure rights to visit them under his supervision. Rule 10(1)(d). The Protection Officer shall assist in confiscating any weapon in the alleged domestic violence. The Magistrate can order the police to assist the Protection officer in doing

the same. Rule 10(1)(f). The Magistrate may direct the local police whenever required to assist the Protection Officer in enforcement of orders.

### **Procedure to be followed**

The procedure to be applied by Courts, in dealing with complaints and applications, is drawn from the Code of Criminal Procedure 1973 (Cr.PC) and the Code of Civil Procedure 1908 (CPC) and is detailed in the protection of Women from Domestic Violence Rules (PWDVR). The applicable procedure can be broadly divided into the following categories;

**Application** : the CrPC, particularly the procedure under section 125 is to be applied in dealing with applications under the Domestic Violence Act. The Court may also lay down its own procedure in dealing with such applications.

**Service of notice** : Rule 12 of protection of Women from Domestic Violence Rules provides a code that incorporates principles from the CPC and the Cr.P.Code.

**Counselling**: The procedure to be applied in Court directed counselling is detailed in Rule 14 of the protection of Women from Domestic Violence Rules.

**Enforcement of order**: The Cr.P.Code, particularly section 125 is to be applied in the enforcement of the orders of the Court. In addition, each of the provisions on remedies also provides powers to the Courts to issue additional orders to effect enforcement. The Courts may also

direct the Protection Officer and the police for assistance in ensuring the enforcement of orders. The breach of a protection order is a cognizable and non-bailable offence under the Domestic Violence Act.

**Procedure to be applied in cases of complaints of breach:** Warrants procedure prescribed under the Cr.P.Code, is to apply in cases of breach provided for in Section 31 of the Domestic Violence Act. This law can be used in addition of all other existing laws.

**Whether petition under Domestic Violence Act can be adjudicated before the Family Courts without seeking any matrimonial relief such as divorce, custody, restitution etc.**

In this respect section 26(1) of the D.V.Act, is very clear. As per section 26 of the Act, any relief available under section 18, 19, 20, 21 and 22, may also be sought in any legal proceeding before a Civil Court, Family Court, or a Criminal Court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

Sub-section 2 of section 26, lays down that any relief referred to in sub-section (1), may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a Civil or Criminal Court. Thus, without petition for any matrimonial relief aggrieved person cannot ask relief under D.V.Act, before the Family Court.

### **Important Relevant Case Laws.**

1] Mamta Rani V/s. Sudhir Sharma,  
I (2015) DMC 300 (Delhi).

2] D. Velusawmy V/s. D. Patchaiammal,  
II (2010) DMC 677 = AIR 2011 SC 479.

3] Indra Sarma V/s. K.V. Sarma,  
AIR 2014 SC 309.

4] Narayan Jangluji Thool V/s. Mala Chandan Wani,  
III (2015) DMC 220 (BOM).

5] Aardhana Walkade V/s. Chandrashekar Vaidya,  
III (2014) DMC 5 (BOM).

6] Chandrakant Nivrutti Wagh V/s. Manisha  
Chandrakant Wagh, I (2014) DMC 640 (BOM).