FAMILY COURT JUDICIAL OFFICERS WORKSHOP 2015-16

DAY 2

Research Paper from Family Court THANE

A) RELIEF OF INJUNCTIONS IN MATRIMONIAL PROCEEDINGS.

1. There is a saying, “where there is a wrong, there is a remedy”. The Courts impart justice on behalf of the sovereign. It is the duty of the Court to see that the aggrieved person is protected from the high-handedness of another person. We have inherited our legal system from British and British System is based on Common Law. Under Common Law, every wrong is compensated by money, but there are occasions when money cannot be a substitute for the wrong done, for eg., if a person claims a right of possession of a building and the building itself is destroyed, money may be physically attached, how can a person be compensated for his psychological trauma. Courts should, therefore, help to protect the building itself. Law of injunction is that branch of law which protects the rightful person and prevent complications.

2. In India, Law of Injunctions covers all branches of litigation. Even rights of persons in religious institutions are covered by Law of Injunctions. An injunction is defined as a Court orders that compels a party to take certain actions, or prohibits a party from taking certain actions. What is very necessary in such matter as are covered by law of injunction is that there should be quick decision. It is not proper that injunctions should continue for years. Delay in disposal of cases results in injustice.

3. **Basic Conditions-** The Judicial precedents have set up some basic conditions to be satisfied for the grant of preventive relief of injunction. They are, as stated above. (1) Prima facie case, (2) Irreparable injury, (3) Balance of convenience. The applicant must prove the existence of a prima facie right in his favour. The court must be satisfied that there is every probability tilting in his favour. The applicant must satisfy the Court that an order is highly necessary without which a right accrued in favour of the party concerned

cannot be protected from injury and which is also not compensable. The grant of injunction is purely discretionary. The court may grant or refuse to grant the same taking into account various factors like the balance of convenience, possibility of adequate relief by way of damages, the conduct of parties, and the possibility of enforcing its orders.

4. An injunction, as is well known is an equitable remedy and accordingly the maxim of equity that he who seeks equity must do equity is applicable to a case in which such an equitable remedy is prayed for.

5. Injunction may be granted in matrimonial matters in certain circumstances, till the final disposal of the case, in the interest of safety, security and peace of the parties. Thus a Court may restrain or injuct a party, to enter into a matrimonial home, or remarry until the case is decided, or also issue protection orders, against eviction from the matrimonial home., restrain from sending message, e-mails or making calls to the other spouse. Restrain the non-custodial parents from going to school and disturbing the child. Directing the husband to pay EMI of the matrimonial house, to pay society maintenance, to pay repairing charges etc.

6. An injunction is an order remedial the general purpose of which is to restrain the commission or continuance some wrongful act of the party enjoined. An injunction is a judicial process, by which one who has invaded or is threatening to invade the legal or equitable right of another is restrained from continuing or commencing such wrongful act.

7. Domestic violence has its domain not only India but has become worldwide phenomenon. In our country the right of protection of women from domestic

violence has been guaranteed under Articles 14, 15 and 21 of the Constitution of India and in pursuance of that guarantee this Act had been enacted for positive result of protection of constitutional rights of women. An injunction can be obtained as part of divorce proceedings or separately e.g. an order to stop her partner 'molesting' her or her children from committing domestic violence allowing her to stay in matrimonial house or to make provision for rental accommodation, provide for her daily needs and maintenance.

B] IS IT THE NEED OF THE HOUR TO REPLACE ONE COUNSELLOR WITH PSYCHOLOGIST

8. Most couples believe marriage is a guarantor of happiness. Unfortunately, the early fleeing moment of happiness experienced by couples are dependent upon various factors. It is said that, “Negative emotional reactions occur not due to other's actions but due to our unrealistic expectations and idiosyncrasies of our own psychology.” Most relationships are based on infatuations, which is the result of overworking hormones. But when the body's neurochemistry gradually regulates itself, the attraction fades. One stop idealising its partners and start seeing their faults.

9. Marriage an institution has become the subject of great judicial scrutiny. There are number of judicial provisions dealing with marriage and its various aspects. The result is that, in addition to the various advantages that these legal provisions may provide; the privacy of this institution has been threatened.

10. The Family Courts Act,1984 was part of the trends of legal reforms concerning women. Because of the building pressure from various institution lobbying for the welfare of women all over the country.

11. The Family Courts Act provided for the establishment of Family Courts with objective of ensuring the welfare of the family through a multi disciplinary approach of resolving family problems within the framework of the law. These Courts aimed at securing the legal rights of the individuals on the one hand while performing the role of guide, helper and counsellor on the other. The basic concept of Family Courts emerged from the conviction that the family being a social institution, disputes connected with family breakdown, divorce, maintenance, custody of children etc. needs to be viewed from the social rather than legal perspective.

12. **Procedure followed by the Family Court:-**

Advantage of a conciliatory approach by mediation and conciliation. This ensues that the matter is solved by an agreement between both the parties and reduces the chances of any further conflict.

The shackles of a formal legal system and the regular process of adjudication causes unnecessary prolonging of the mater and the dispute can worsen over time. This can be a very traumatic experience for the families and lead to personal and financial losses that can have a devastating effect on human relations as well. This again points to the importance of having guidance of counsellors and psychological experts to deal with such matters.

13. **Family Systems Theory:-**

It is presumed that dysfunctional marital relationship caused dysfunctional behaviour patterns in children. Children with behavioral or emotional problems were viewed as innocent victims of a “bad” parent or
of a “bad” relationship between the parents. Theory and therapy focused largely on identifying and treating the dysfunctional parent or parents, in order to relieve the child of emotional distress. In the past few 20 years, however family theorists and therapists have demonstrated unmistakably the circular nature of causality in family interactions.

14. The family is conceptualized as a cybernetic system in which the actions of each member influence the actions of each other member reciprocally. So, the child can create marital dysfunction as easily and commonly as the parents create dysfunction within the child, collusion between a child and a parent can create dysfunction within the other parent or sibling, or a dysfunctional relationship between two siblings can create dysfunction within a parent, which can subsequently create marital dysfunction, and so forth.

15. **Psychological influences on the legal divorce process :-**

Most of the interface between the divorcing couple and the helping professionals takes place during the legal divorce or litigation stage. It is during this period that the spouses contact attorneys and proceed, together, through the legal process. A number of psychological factors have major impact on the nature of quality of this process.

16. Marital conflict has deleterious effects on mental, physical and family health. It is linked to the onset of depressive symptoms, eating disorders, alcoholism, poorer health with specific illness such are cardiac disease and chronic pain. The psychological effects on children of divorce can be

devastating and many divorcing couples are completely oblivious to know their private “War of Roses”, has lasting effects on their children. It is said: “Children are always the losers in divorce”. The stress that this causes the children can lead to anxiety, depression, substance abuse, delinquent behaviour and teen pregnancy. Clinicians and Therapists say that the children caught in the middle of the parents' animosity during separation or divorce proceedings have attention and concentration problems; academic problems; anger problems and sleep disorders. Therefore, it behooves the parents to find ways to mediate and minimize the destructive effects on their children.

17. **What do Psychologist do:-**

Psychologist help to ensure the health and well-being of all people: individuals, families, groups and society as a whole. Psychologists are doctorally trained professionals who conduct research, perform testing and evaluate and treat a full range of emotional and psychological challenges.

The primary activity of clinical psychologist are psychological testing and evaluation, diagnosis of psychological difficulties, psychotherapy, research to discover ways to improve well-being, teaching and consultation. Clinical psychologist provide counselling and psychotherapy. They work with people who have adjustment problems and also with those who have emotional disorder or mental illness. They provide treatment for people of all ages and to families and groups, Psychologist provide treatment for depression, anxiety, phobias, panic disorders, eating disorders, stress related problems, relationship problems and severe mental disorders.

They provide diagnostic assessment or “testing services”. Using interviews, questionnaires and measurement tools, they can chart an individual's skills, personality features and personality style, emotional
status and emotional style, or problems they may be having in adjusting to life. These measurements are often essential for clarifying the diagnosis of a mental illness or an addiction.

18. Throughout the divorce process, each and every step which the client takes will have a psychological source or consequence to it. Even the decision to seek the advice or representation of counsel involves more than simply locating a skilled attorney. Depending on need, the client may make a conscious decision to choose a male or female attorney, an aggressive attorney, a strong attorney or a friendly attorney, on the assumptions that these are the most important qualities that are needed and that these qualities will make a difference.

19. The Family Court equipped with counsellors and psychologists ensue that the disputes are handled by experts who do not forget that while there may be core legal issues to be dealt with, there is also human and psychological dimension to be dealt with in these matters.

The Psychology of Divorce:-

In helping couples to successfully negotiate the ending of their marital relationship, it is vital for the Counsellor to understand the underlying dynamics of the family as a system and of the divorce process, the Counsellor must grasp how the divorce crisis influences and is influenced by both family structure and family process. The family going through divorce does not break up, rather is restructured and reorganized.

20. Unlike litigation, counselling creates a positive negotiation environment in which anxiety is significantly reduced and is replaced by a healthy concern for the issues which confront both parties and for the
decisions which each must make. Allowing the clients to express their emotions while keeping those emotions separate from their rights at law keeps the focus on the business side of the marital issues.

21. The major psychological consequences of a mediated approach is the empowerment of the parties. The ability of the parties to respect each other for the manner in which they are negotiating can become significant cornerstone for their ongoing relationship. The establishment of a successful communicate model provides a more optimistic outlook for their future contact.

. **CONCLUSION:-**

22. Although divorce is an experience of growth, change and positive individual development for some, it is a psychological and emotional death for others. For most, it certainly is a time of tremendous stress, disruption, chaos, uncertainty and craziness. With appropriate help from understanding and knowledgeable professionals, the process of divorce can be navigated successfully. However, without an understanding of the powerful dynamics of divorce, the Counsellor can become a misnomer, contributing unnecessarily to the escalation of negative emotions and negative interactions.

23. The mental health professionals have brought a new understand of the psychology of divorce to the legal professionals who practice in this area. At the same time, therapists have gained greater knowledge of the complex,

legal and practical problems which compound divorcing clients' psychological and emotional needs.

24.. The benefits of counselling or psychotherapy are immense for children from divorced homes. Psychologists, Social Workers and Marriage Counsellors can provide enormous benefits for children and adolescents suffering from low self-esteem, anxiety and depression. Psychologist render a valuable service when they provide competent and impartial opinions with direct relevance to the “psychological best interest” of the child.

25. For the State of Maharashtra, the Family Courts at Mumbai, Pune, Nagpur, Aurangabad has two Counsellors for every Court. At other places where there is only one Counsellor provided appointing a Pschologist for these Family Courts is the need of hour. The couples going through the divorce and the children involved therein are under tremendous psychological trauma. It is necessary that a psychologist is available for those couples to streamline their depressions and help them to reach an amicable decision. At major cities like Mumbai, Pune, Nagpur, Aurangabad as there are huge number of litigations pending, two Counsellors for every Court is a necessity. In addition to that, the appointment of Psychologist is urgent. In my view, for every Family Court, a Psychologist is necessary in addition to the counsellors and not by replacing one.

Research Paper from Family Court AKOLA

The Grounds on which marriage may be annulled by decree of nullity.

A marriage under the Hindu Marriage Act, 1955 is the voluntary union of one man with one woman to the exclusion of all others, which is duly solemnized as per the customary right and ceremonies. However, such a marriage to be valid must in any event fulfil three of the conditions enacted in S 5. The three conditions are :-

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

ii) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two ;

iii) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two (cl (iv)).

The non-fulfillment of any one of the aforesaid conditions as per Section 11 of the Hindu Marriage Act renders a marriage, solemnized after the commencement of the Act null and void from its inception and either party to such a marriage can obtain a decree of nullity from the court. It is also open to the parties to such a marriage to treat the same as a nullity even without recourse to the court. Such a declaration may be asked for precautionary purposes. A marriage which is void ab initio does

not alter or affect the status of the parties, nor does it create between them any rights and obligations which must normally arise from a valid marriage, except such rights as are expressly recognized by the Act.

Section 12 of the Hindu Marriage Act deals with the circumstances in which a marriage can be held to be voidable and therefore may be annulled by a decree of nullity.

There is a distinction drawn between a marriage which is void ab initio and a marriage which is voidable at the instance of one of the parties to the

same. A voidable marriage remains valid and binding and continues to subsist for all purposes, unless a decree is passed by a court annulling the same on any of the grounds mentioned in Section 12 of the Hindu Marriage Act. The said grounds involve the elements of incapacity of either spouse to consummate the marriage, want of mental capacity of the spouses, absence of free consent of the parties or of a guardian in marriage in case of a bride who had not completed the age of 18 years at the time of the marriage and the ground of a woman concealing the fact of being pregnant by some person other than her husband at the time of her marriage.

As already stated, impotency is one of the grounds on which the marriage may be annulled. A party to a marriage can be said to be incapable of consummating the same on account or of his or her mental health or due to physical consummation becoming practically impossible. Impotence as contemplated

under this section does not signify sterility or the incapacity to conceive but the incapacity to have sexual intercourse. Ordinarily and also as a matter of prudence courts will insist to prove the factum of impotency by leading medical evidence. As held in the ruling, Sharda -Vs.- Dharampal, AIR 2003 SC 3450, a matrimonial court has the power to order a person to undergo a medical test. However, the court should exercise such a power only if the person seeking the said order has a strong prima facie case and if there is sufficient material before the court to pass such an order. Such an order cannot be said to be violative of Article 21 of the Constitution of India. Where a husband or wife refuses to submit to such a test regarding consummation, the court may, if the facts and circumstances of the case so warrant, properly draw an unfavorable inference against the said party.

However, as held in Sunil K. Mirchandani -Vs.- Rina S. Mirchandani, A.I.R. 2000 Bombay 66, it is not necessary that in every case of annulment of marriage on the ground of non-consummation, the party pleading such non-consummation should besides his or her evidence, lead corroborative evidence in support of his or her own deposition. If the deposition of the party seeking annulment of marriage on the ground of non-consummation is capable of reliance and sufficiently establishes non-consummation, there may not be necessity of corroboration either by way of medical evidence or otherwise.

Similarly, as regards the capacity or otherwise of a party to a marriage to give consent to the same on the ground of his or her unsoundness of mind, or suffering from mental disorder of such a count or to such an extent as to be unfit for marriage and procreation, being subject to recurrent attacks of insanity, a court may declare on proof of such a fact, that the marriage of the said party was a nullity. As already stated, for reaching such a conclusion, a court has the necessary power to find out as to whether the person alleged to be mentally unfit is indeed so. A court can direct the medical examination of either party, which cannot be said to be an infringement of the right of privacy of any individual. It is also competent for a court to arrive at the necessary satisfaction even on the basis of the admissions of the parties alone. However, such admissions are to be ignored if found to be collusive.

As regards the other ground on which a marriage may be declared to be a nullity i.e. the fact of a wife at the time of her marriage being pregnant by some person other than the petitioner, it needs to be noted that the testimony of a doctor regarding pregnancy cannot be rejected on the

ground of she not having specialized in gynaecology. This has been held in Baldevraj Niglani -Vs.- Smt. Urmila Kumari, A.I.R. 79, SC 879.

Further, as held in Devendra Sharma -Vs.- Sandhya, AIR (2007) MP, 103, if a husband performs intercourse even after becoming aware about the fact of his wife being pregnant by

another person at the time of the marriage, the same would dis-entitle him from claiming the decree of nullity. Also, for claiming a decree of nullity on the ground of a wife being pregnant at the time of the marriage, a petitioner has to prove before the court that he was ignorant of the fact at the time of the marriage, that the said proceeding had been instituted within one year from the date of the marriage and that marital intercourse with his consent had not taken place since the discovery by the petitioner of such pregnancy.

As regards the marriages performed under the Special Marriage Act, Section 24 of the said Act states similar grounds as those mentioned in Section 11 and 12 of the Hindu Marriage Act for holding a marriage to be a nullity. This can be seen from the fact that the ground of either party to a marriage having a spouse living at the time of the marriage, of being of unsound mind and therefore incapable to give a valid consent to it, or being unfit for marriage and for procreation of children or being subject to recurrent attacks of insanity, of the parties being within the prohibited degrees of relationship, have been stipulated therein as the ground for declaring a marriage null and void. The other additional ground on which a marriage can be declared to be a nullity is the ground of a male not having completed the age of 21 years and the female not having completed 18 years of age.

The registration of a marriage under Chapter 3 of the Special Marriage Act may also be declared to be of no effect if the

said registration is in contravention of any of the conditions specified in Clause ' a to e' of Section 15 of the said Act. These conditions relate to the requirement of a marriage ceremony having been performed and the husband and wife living together as such ever since, neither party at the time of the registrtation more than one spouse living neither party being a lunatic at the time of registrtation, both the parties having completed the age of 21 years at the time of registrtation and not being within the prohibited degrees of relationship.

As per the provisions of the Indian Divorce Act, 1869, a husband or wife may present a petition for declaring their marriage null and void on the ground stated in Section 19 of the said Act. The said grounds are :-

1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit;

2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;

3) that either party was a lunatic or idiot at the time of the marriage;

4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Research Paper from Family Court AMARAWATI

Scope of Sec.23 of Hindu Marriage Act,

Petition by or against the person unsound mind,

Section 23 of Hindu Marriage Act: Decree in Proceeding,-

(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that -
(a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in sub- clause (a), sub-clause (b) of sub-clause (c) of clause (ii) of Section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief; and

(b) where the ground of the petition is the ground specified in clause (I) of sub- section (1) of Section13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty: and

(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence; and

(c) the petition not being a petition presented under section 11 is not presented or prosecuted in collusion with the respondent; and

(d) there has not been any unnecessary or improper delay in instituting the proceeding ; and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this act, it shall be the duty of the court in the first instance, in every case where it is possible to do so consistently with the nature and circumstances of the case,to make every endeavour to bring about reconciliation between the parties. Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clauses (i), (ii), (iii), (iv), (v), (vi) or clause (vii) of sub-section (1) of 13.

(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper to do so, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court a to whether reconciliation can be and has been, effected and the court shall in disposing of the proceedings have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of costs to each of the parties.

The initial words of the section adopts the well-established principles of matrimonial law that decrees of dissolution of marriage are to be made only upon strict proof. Apart from a case covered by S. 13B inserted by the Amending Act of 1976, which relates to decree of divorce by mutual consent in the manner provided in that sections, consent to a decree, direct or indirect, is not permissible. Proceedings under the Act are not of the character of ordinary units and the standard of proof required is that the court must be satisfied that the ground for relief is established beyond reasonable doubt. It makes no difference whether the proceeding is defended or not. The court provided in the section are duly observed. The language employed in sub-s (1) clearly shows that cll (b)-

(e) and the latter part of Cl. (a) lay down certain absolute bars to the granting of any relief under the Act. The words at the close of sub-s (1) 'then, and in such a case, but not otherwise, the court shall decree such relief accordingly' emphasise that relief in any proceeding under the Act can not be granted to a petitioner who is any way taking advantage of his or her own wrong or disability for the purpose of such relief. Such conduct or disability is an absolute bar to the petitioner's right to seek relief from the Court.

Sub-section (1) in effect lays down the following rules:

(i) A decree for restitution of conjugal rights, judicial separation, declaration of nullity or marriage, annulment of voidable marriage, or divorce can be granted only when any ground for granting the relief asked for is established to the satisfaction of the court.

(ii) No relief can be granted to the petitioner if any of the absolute bars apply to the fact of the case.

(a) The petition must be dismissed if the court is satisfied

that the petitioner, though able to establish the ground for granting relief, is in any way taking advantage of his or her own wrong or disability for the purpose of such relief as envisaged.

(b) The petition must be dismissed if the court is not satisfied that the petitioner has not in any manner been accessory to or connived at or condoned the act or acts of adultery where the petition on that ground, or has not in any manner condoned the cruelty where the petition is on the ground [Cl. (b)].

(c) The petition must be dismissed if the Court is not satisfied that there is no collusion between the parties as envisaged in Cl(c).

(d) The petition must be dismissed if the Court is not satisfied that there has not been unnecessary or improper delay in instituting the proceeding [Cl.(d)]

(e) The petition must be dismissed if there is any legal ground for not granting the relief [Cl.(e)].

Term - Whether defended or not :

A decree in any matrimonial proceeding under the Act is to be made only upon strict proof of the ground relied upon by the petitioner and it makes no differences whether the proceeding is defended or not. In an ex parte case, it is not enough for one of the parties to come forward and say something exactly following the terms of the Act.

The fact that by the proceedings to go undefended both the parties appear to be equally anxious to see that relief is granted is precisely a reason why the court should be strict as to proof. No consideration of saving time and trouble can be a legitimate ground for admitting evidence that is inadmissible.

Term – if the court is satisfied -

To see what should be standard of proof for satisfaction of Court, it is a firmly established rule that the ground of relief in a matrimonial cause should be strictly proved.

The standard of proof in case of all proceedings under the act is that the court must be satisfied on a preponderence of probability that the ground for relief is proved. Normally the court requires that the evidence of a spouse who charges the other spouse, with matrimonial offence

should be corroborated. The court would ordinarily be justified in requiring, not as a matter of law but as a rule of prudence, that where possible, corroborative evidence should be led, in order to satisfy the court that the allegations made are well founded.

In *Dastane V. Dastane,* the Hon'ble Supreme Court has held that proceedings under the Act, matrimonial offences being essentially of a civil nature, the word 'satisfied' in this section must mean 'satisfied on a preponderance of probabilities' and not 'satisfied beyond a reasonable doubt'. The satisfaction of the court must, be based on legal evidence.

Whether admission be accepted as wholesome ground for granting relief.

There is however, no absolute rule of law of evidence which precludes the court from acting on an admission but considerable caution is required and the court will act on any such admission only after ruling out the possibility of any collusion. The court should endeavour to examine that grounds for relief exists, even in case of admissions, and try to act under this Section 23 in order to corroborate any admission.

Term -Taking advantage of his own wrong or disability for the purpose of such relief.

Own wrong or disability is an absolute bar to the relief sought by the petitioner. In decision of *Dharmendra Kumar V Usha Kumar*, the Apex Court has observed -

In order to be a 'wrong' within the meaning of this clause I, the conduct alleged must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.

Term -Accessory to or connived the act complained of.

S. 23 (1)(b) of the Act prescribes that where the ground specified in clause (1) of sub-section (1) of S. 13, (which states that other party after the solemnisation of marriage, had voluntary sexual intercourse with any person other than his or her spouse). The petition is not in any manner been accessory or connived at and not otherwise the court shall grant relief.

Where the ground for relief is that adultery was committed by the respondent, it is the duty of the court to inquire, so far as it reasonably can, into the matter and satisfy itself that the petitioner was not an accessory to the offence and that there was no connivance on his part of the act or acts complained of. To constitute connivance, active corruption is not necessary but corrupt intention is essential. Mere intention, negligence, folly, dullness of apprehension, or imprudence are not connivance. If the petitioner deliberately fosters and encourages situations to arise and knows that adultery is likely to result, he is guilty of connivance and relief can not be granted.

Term - condoned the act complained of.

Adultery and cruelty are in terms stated in Cl (b) of this section are condonable marital offences.

Cl.(b) of sub-s. (1) in terms lays down the effect of the doctrine of condonation. It rules in substance that :

(i) a petition for judicial separation or divorce on the

ground of adultery specified in s. 13(1)(i), or

(ii) a petition founded on cruelty is 13(1)(ia) shall be dismissed unless the court is satisfied that petition has not in any manner condoned adultery and cruelty.

The generally accepted meaning of condonation is that it is forgiveness and reinstatement with knowledge of all material facts. It is regarded as forgiveness, express or implied, for a breach of a matrimonial offence with the implied condition that the offence will not be repeated. Condonation consists of a factum of reinstatement and *animus remittendi*.

Term –<u>When a divorce is sought on the ground of mutual consent and such consent has been obtained by force, fraud or undue influence Court can not grant.</u>

In the mandate of S. 23 satisfaction of the court would require that parties did not present the petition in collusion. The court must be satisfied that both the parties have freely agreed for dissolution of marriage. The court may refuse to grant a decree if did not satisfied.

Term - <u>Petition presented in collusion with opponent.</u>

It is the duty of the court to inquire, so far as it reasonably can, into the matter and satisfy itself that there is no collusion between the parties. If there is reason to suspect collusion between the parties, the court will examine the matter with anxious care because collusive bargains affecting matrimonial causes tend to pervert the course of justice and seek to prevent the court from retaining control in such matters which is duty of court.

Collusion may consist in an understanding, express or implied, that the court shall be deceived by misrepresentation, exaggeration or suppression of facts. There must be an element of corruption or

perversion of justice present. Such disclosure would disentitle parties from getting relief.

Term - <u>Unnecessary improper delay, -</u>

Different considerations may apply in dealing with the question of unreasonable delay in cases of desertion, cases of adultery or cruelty. Under Section 23, delay, if shown to the satisfaction of the court to be unnecessary or improper, in instituting any proceeding under the Act delay would be decisive factor. Though no period of limitation is prescribed for decree sought on the ground of impotence, it would depend upon the facts and circumstances of the case and the conduct of parties.

Term - <u>Legal ground why relief should not be granted, -</u>

The legal grounds contemplated by this clause and grounds which operate as bar to any relief under the Act are discussed supra.

Term - <u>Endeavor to bring for reconciliation, -</u>

Where it may appear to the court that there may be some chance of saving th marriage, to make every endeavour to bring about a reconciliation between the parties is duty of court.

Failure on the part of of the trial court to make any such attempt is serious omission but would not render the decree invalid.

<u>Petition by or against the person unsound mind,</u>

Order 32 of Civil Procedure Code prescribes provisions for suit by or against minors and persons of unsound mind.

It provides various provisions for filing of suit by minors through his next friend and fate of suit is instituted without next friend. It also specify requirements for appointment and removal of guardian for minor and unsound mind in a suit.

Order 32 Rule 15 of specifies that Rule 1 to 14 [except Rule 2-A] shall apply to persons adjudged to be of unsound mind before or during the pendency of the suit and shall also apply to persons though not adjudged are found by court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interests when sue or being sued. Provisions of Order XXXII CPC have been enacted to protect the interest of the minor, who is unable to protect it himself. Therefore, the court has to ensure that the person whom it proposes to appoint as his guardian to defend the suit on his behalf, he is capable of doing it. To achieve the object the procedure is laid down in Rule 3 and 4 which provides some important safe guard i.e. by issuing notice to natural or certified guardian of minor, if there is any, who is supposed to look after his interest for seeking his consent guardian be appointed. Any person whose interest is adverse to the interest of minor and person of unsound mind shall not be appointed as guardian of a minor.

To discuss the procedure summarily for appointment of guardian of unsound mind persons, matter of **C.S. Navmani Vs. C.K. Sivasubramaniam** reported in **2006 Mad Page No. 347**, may be referred, that when there is allegation of unsound mind or mental infirmity by any party it is duty of court to examine individual and if necessary seeks assistance of expert to adjudged as to whether the

individual is having unsound mind and capable of managing the affairs. As a precaution evidence of expert in medical profession will be useful in understanding the meaning and symptoms of any disease dealing with mental deterioration. In the instant case lower court has failed to apply principles and mechanically appointed the guardian even on previous occasion. The court ought to have summoned respondent and examine him to adjudge that he is not capable of defending himself. The reliance placed on medical certificate is also erroneous. Thus the order of lower court was set aside and lower court was directed to conduct judicial inquiry in accordance with principles stated above that by examining the respondent, whether he is capable of protecting his interest by reason of unsoundness of mind would have been decided.

Further reference of ratio laid down in matter of **Shakuntala Devi Vs. K.S. Naidu** reported in **AIR 2005 Madras 56** would be of great help. It is the definite case of the revision petitioner that her mother is insane and is suffering due to mental disease paranoid schizophrenia, which fact is denied by the first defendant by stating that the plaintiff is, in fact, keeping sound mind and is with the first defendant, it would be just and proper if direction is issued to the trial Court to hold judicial enquiry by examining the plaintiff and then to decide as to whether by reason of unsoundness of mind and mental infirmity, she is capable of protecting her interest in the suit. As per Order XXXII, Rule 15, CPC, persons of unsound mind or persons so adjudged in the same position as minors for the purpose of Rules 1 to 14 [except Rule 2-A] and for that purpose, the trial court should examine the alleged lunatic either in open court or in chambers and in the presence of the medical expert. The trial court

has got ample power to compel the attendance of the alleged lunatic, viz. Plaintiff, before it and to submit herself for medical examination.

In conclusion – I submit that the court is empowered to appoint a guardian in the event a person is adjudged to be of unsound mind. Order XXXII Rule 15 CPC, provides that even if a person is not so adjudged but is found by court on inquiry to be incapable of protecting his or her interest when suing or being sued by reason of any mental infirmity, an appropriate order of appointment of guardianship may be passed by availing procedure and safeguards as mentioned in Rule 3 and 4 of Order XXXII.

Research Paper from Family Court SOLAPUR

‘Circumstances in which divorce petition can be presented within one year of marriage’

INTRODUCTION :

1 In the beginning I would like to take this opportunity to wish the august gathering, a very very **Happy New Year-2016**. It is common knowledge that, object of The Hindu Marriage Act, 1955, (Herein after referred as ‘the Act’) was to strengthen Family institution. The scheme of the Act, is formulated in such a beautiful way, that it shall not be difficult for enforcing agencies to feel helpless to achieve the object in letter & spirit.

2. SUB TOPIC :

Sec. 9 of the Act, provides remedy of Restitution of conjugal rights. Giving priority to this remedy shows the wisdom & intention of legislation to strengthen Family Institution. There is no limitation to claim such relief. Sec. 10 of the Act provides the remedy of judicial separation on the similar ground provided U/s. 13 (1) & (2). However, Sec. 14 of the Act, put restriction on the Court to entertain any petition for dissolution of a Marriage by a ‘decree of divorce ‘ unless at the date of the presentation of the petition one year has elapsed, since the date of the marriage. This further clears that, there is no bar to entertain petition before one year from the date of Marriage, if the same is filed U/s. 11 or 12 the Act. Needless to mention Sec. 11 is regarding void marriage & Sec. 12 is regarding voidable marriage. It means divorce can be last resort.

3. It is the need of the sub topic allotted me, to reproduce the Sec. 14 itself. Some time there is no need to say further if the wording of the Act, Section, Sub-section or proviso is clear and self explanatory . In my humble opinion Sec. 14 of the Act, falls in this category.

“14. No petition for divorce to be presented within one year of

marriage –

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

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

(2) In disposing of any application under this section for leave to present a petition for divorce before the (expiration of one year) from the date of the marriage, the Court shall have regard to the interests of any children of the marriage, and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the (said one year)."

4. The above mentioned legal provision provides not only circumstances to entertain petition within one year of marriage, but also the procedure to be followed by the Court while using the discretionary power, provided under it. Those are : -

a. The case is one of exceptional hardship or
b. exceptional depravity on the part of respondent.

5. The term hardship is relative term. It depends on facts to facts case to case & person to person. There is no strait jacket formula to say which facts amounts to hardship & which may not. In the given facts & circumstances, if petitioner is likely to suffer more hardship then such power can be evoked to meet the ends of justice.

6. Marriage means, peace, harmony, trust, cohabitation is expected in normal course. If any party deprives the other from cohabitation without justifiable reason, it is dent on foundation of marriage instuition. No one has right to deprive the other from marital basis. If the marital ties are against interest of parties, such case may fall under this category.

7. Recently in a case law i.e. Dr. Rajasi @ Swapana W/o Shashank Dangle V/s. Dr. Shshank S/o. Vitthalrao Dangale, (2015 © Mh.L.J. 872, interesting issue arise before our Hon'ble High Court. Both parties were Doctors. The marriage was consummated. Within one month, wife went to her parental house. The husband and his family members found abnormal traits in the behavior of wife. There was a apprehension she would commit suicide any time. The wife gave written undertaking regarding proper behavior. Thereafter she tried to commit suicide. The husband filed a petition for nullity of marriage U/s. 12 (1) (c) on the ground of fraud that, if he would have been aware of suicidal traits in the wife, he would not have married her. In the same time, he alternatively prayed for grant of a decree of divorce on the ground of cruelty.

8. The trial Court allowed petition, thereby passing the orders of dissolution of the marriage between the parties on the ground of cruelty. The issue before Hon'ble High Court was maintainability of petition filed within one year of the marriage. It was held that, Court can entertain alternative prayer since it was neither contrary or inconsistent. Further caution is given that there should not be routine practice to file a petition for nullity with an alternative prayer for divorce U/s. 13 giving go bye to statutory provision U/s. 14 of Hindu Marriage Act.

9. The abovementioned legal provision and case law, guides us while entertaining petitions for dissolution of marriage within one year from its date. Marital dispute is purely human problem. The

greatness of our Country is in its diversity. The language, culture of every State is different. Within State itself there are differences regarding customs. It is difficult to include entire human conduct in few words. Therefore, the legislation, in its wisdom, has given ample power to the Court to find out appropriate solution in such diverce situation. Balance between hasty decision and genuine cause needs to be strike down.

CONCLUSION :

It can be conclude that, checks and balances are part of life. Hasty decisions in matrimonial disputes may be adverse to parties. Sec. 14 of the Act, is the important tool in the hands of Court to meet the ends of justice by sparingly use of discretionary power provided under it.

Research Paper from Family Court NANDED

i) Muslim women:- Issues relating to Maintenance, custody & access.

ii) Declaration & confirmation of Talaq pronounced before Qazi.

Introduction:-

"When centuries old obstructions are removed, age old shackles are either burnt or lost their force, the chains get rusted, and the human endowments and virtues are not indifferently treated and emphasis is laid on "free identity" and not on "annexed identity", and the women of today can gracefully and boldly assert their legal rights and refuse to be tied down to the obscurant conservatism, and further determined to ostracize the "principle of commodity", and the "barter system" to devoutly engage themselves in learning, criticizing and professing certain principles with committed sensibility and participating in all pertinent and concerned issues, there is no warrant or justification or need to pave the innovative multi-avenues which the law does not countenance or give its stamp of approval."

2. In a recent verdict in case of ***Shamima Farooqui vs. Shahid Khan in Criminal Appeal no.564-565 OF 2015*** the Honb'le Apex Court has observed as above on the changing scenario in Indian society particularly relating to the position of women. Law is dynamic. It changes

with time to cater the changing needs of the society. Thus, the subject needs to be discussed in the light of the social changes occurring in our society. So far as maintenance to Muslim women is concerned, it can be briefly termed as the journey from Shah Bano to Shabana Bano. Obligation of a husband to

maintain his wife arises out of the status of the marriage. Right to maintenance forms a part of the personal law.

Maintenance of wife under Muslim Personal Law:-

3. Arabic term “Nafaqa” literally means which a man spends over his family. Maintenance primarily comprehends food, clothes and shelter. It is incumbent on a husband to maintain his wife, whether she is Muslim or Kitabiya, poor or rich, young or old. The husband is bound to maintain his wife so long as she is faithful to him and obeys his reasonable orders. Where the marriage is valid and the wife is capable to render marital intercourse it is the duty of the husband to maintain his wife even though she may have means to maintain herself. But if she unjustifiably refuses to cohabit with her husband then she loses her right for maintenance. The right of maintenance would also be lost if the wife refuses to obey the reasonable commands of the Husband except if disobedience is justified by circumstances or if she is forced to leave husband’s house on account of cruelty. Where a wife is ill treated so as to make her impossible to stay or live together with her husband, or where the breach between the wife and husband is incorrigible she is

entitled to maintenance by living separate from him. To summarize, the wife looses the right to maintenance in the following circumstances:-

(i).She is minor, incapable of consummation. (ii).Refuses free access to the husband at all reasonable times. (iii). Is disobedient. (iv) Refuses to cohabit with him without reasonable excuse. (v). Abandons the conjugal home without reasonable reasons. (vi). Elopes with another person.

4. The husband and wife or their guardian may enter into agreement whereby the wife is entitled to recover maintenance from her husband, on the happening of some special event such as ill-treatment, disagreement,

husband's second marriage etc. but the agreement in the marriage contract that the wife would not be entitled to maintenance is void. The key consideration is that the agreement should not be opposed to the public policy and Muslim Law.

Muslim woman's right to maintenance on Divorce:-

5. Muslim marriage is defined to be a contract with an object of procreation and legalizing of children. Iddat is the period during which a woman is bound to remain in seclusion or abstain from marrying another husband in the event she is divorced or her marriage is dissolved. As per Section 279 of Mulla's Principles on Mohammedan Law, maintenance to Muslim woman must be paid only during iddat period.

6. The Hon'ble Supreme Court in ***Mohd Ahmed Khan Vs Shah Bano Begum AIR 1985 SC 945*** adopted a philosophy of universal justice and equality that section 125 of the Code of Criminal Procedure embodies the principle of maintenance which is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. Commenting upon the limit imposed on the maintenance period to iddat period as reiterated in Mulla and similar books, the Hon'ble Court observed,

'*These statements in the text book are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself."*

7. It was concluded that a divorced Muslim wife is entitled to apply for maintenance under Section-125 and that, Mehr is not a sum which, under the Muslim Personal Law, is payable on divorce. The maintenance amount should be paid even beyond iddat period and a reasonable amount of

maintenance must be paid under Section 125 Criminal Procedure Code.

Enactment of Muslim Women(Protection of Rights on Divorce) Act, 1986:

8. This Act was enacted to nullify the verdict in case of Shah Bano. This Act held the husband liable to provide maintenance to the wife only during the iddat period which lasted for a span of merely three months after the divorce.

The full Bench of Hon'ble Bombay High Court in case of ***Karim Abdul Rehman Shaikh Vs. Shehnaz Karim Shaikh others -2000(5) Bom CR758*****,** furthered the beneficial purpose of law by expansively interpreting the Muslim personal laws. In para 25 the Hon'ble Court observed, "*We must therefore so read the meaning of a statute as to advance its purpose and suppress the mischief according to the design of the statute. We must also not be oblivious of the fact that before us is a piece of beneficial legislation and we shall lean in favour of the beneficiaries to help them to get the maximum which this legislation purports to give them. We would be wary of overriding the personal law of Muslims, but we shall within its framework and without doing any violence to it reconcile it with the provisions of the Code if legally permissible. We shall also keep in mind the fact that our Constitution strives to preserve and enhance the dignity of women and therefore laws will have to be interpreted as far as practicable, possible and permissible with that end in view."*

9. The distinction between the word 'maintenance' and 'provision' was further elaborated by the Constitutional Bench of Hon'ble Supreme Court in ***Daniel Latifi Vs Union of India***. ***(2001) 7 SCC 740*** The Hon'ble Apex Court observed in para 44 that the husband's liability to pay maintenance to a wife ceases the moment iddat period gets over. He has to

pay maintenance to her within the iddat period. But he has to make reasonable and fair provision for her within iddat period, which should take care of her for the rest of her life or till she

incurs any disability under the said Act. The Court observed the standard of life enjoyed by her during her marriage and the means of her former husband will be considered while determining maintenance. The Hon'ble Supreme Court explained and detailed what could be the components of '***Reasonable and fair provision***' that must be provided to Muslim wives. It includes: a woman's residence, food, clothing and other articles. The Hon'ble Court further observed that the word "within" would mean "on or before", "not beyond" and, therefore, it was held that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife. Reasonable and fair provision should extend to the whole life of the divorced wife unless she gets married for a second time.

10. Consequent to this development, in ***Khatoon Nisa v. State of U.P. -2002 (6) SCALE 165***, the Hon'ble Apex Court ruled that a Magistrate is entitled to invoke his jurisdiction under Section 125 of the Code of Criminal Procedure to grant maintenance in favour of divorced Muslim woman without limiting itself to the condition precedent specified in Section 5 of the Act of 1986.

11. Thereafter, in case of ***Iqbal Bano vs. State of U.P. AIR 2007 SC 2215*** the Hon'ble Supreme Court decided that proceedings under Section 125 Criminal Procedure Code are civil in nature. Even if the Court notices that there was a divorced woman in the case in question, it

was open to treat it as a petition under the Muslim Woman (Protection of Rights on Divorce) Act, 1986 considering the beneficial nature of the legislation.

12. Recently, in case of ***Shabana Bano vs Imran Khan-(2010) 1 SCC 666*** the Hon'ble Court observed,

"It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry".

13. In **Shamima Farooqui Vs Shahid Khan Criminal Appeal no.564-565 OF 2015** the Hon'ble Supreme Court held,

"*In view of the aforesaid dictum, there can be no shadow of doubt that Section 125 CrPC has been rightly held to be applicable by the learned Family Judge*".

14. We cannot be oblivious to the happenings in the society. The observations in para 11 in the judgment of Daniel Latifi's case are extremely significant and need to be deeply imbibed while dealing with maintenance cases.

"In interpreting the provisions where matrimonial relationship is involved, we have to consider the Social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what

is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life a sacramental sacrifice of her individual self and is far too

enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on

considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints".

Custody and Access:-

15. The first and foremost right to have the custody of children belongs to the mother and she cannot be deprived of her right so long as she is not found guilty of misconduct. Mother has the right of custody so long as she is not disqualified. This right is known as right of "***hizanat"*** and it can be enforced against the father or any other person. The mother's right of hizanat was solely recognized in the interest of the children and in no sense it is an absolute right. The mother has the right of custody of her children up to the ages specified in each school, irrespective of the fact whether the child is legitimate or illegitimate. Mother cannot surrender her right to any person including her husband, the father of the child. Under the Shia school

    after the mother, hizanat belongs to the father. In the absence of both the parents or on their being disqualified the grandfather is entitled to custody.

Father's right of hizanat:- 16. All the schools of Muslim law recognize father's right of hizanat under the following two conditions:-

• on the completion of the age by the child up to which mother or other females are entitled to custody.

• In the absence of mother or other females who have the right to hizanat of minor children.

The Shia law lays down that a person who has ceased to be Muslim is

not entitled to the custody of the child. Also the mother who marries a person not related to the child within the degrees of prohibited relationship forfeits her right of hizanat. The cardinal principle of hizanat in Muslim law is the “welfare of the child”. The right of hizanat of a mother cannot be lost on account of her poverty or want of funds to maintain the child. Also neither the father nor the mother has the right to remove the child from the matrimonial home. A father may be deprived of the custody of the child if he is a minor or of unsound mind. Also a father who is leading an immoral life or who is sinful has no right to the custody of the child.

17. The issue of custody is dealt with by the Guardians and Wards Act of 1890, under which it is a well established principle that the welfare of the child is paramount consideration for deciding the custody. No matter what customs or personal law govern the parents regarding custody, any parent who wants custody and does not presently have custody has to seek custody from the Court under the Guardians and Wards Act, 1890. The welfare of the minor is very broadly defined and includes many diverse factors, notably: (i) the age, sex and religion of the minor, (ii) courts take into account the personal law of the father. (iii)The welfare of younger children is

generally regarded as being in the mother's custody. (iv) the character and capacity of the proposed guardian.(v) the wishes, if

any, of a deceased parent, for example specified in a will. (vi) any existing or previous relations of the proposed guardian with the minor's property. (vii) the minor's preference if she/he is old enough to form an intelligent preference. (viii) whether siblings would be divided (ix) whether either/both parents have remarried and there are step-children. (x) whether the parents live far apart. (xi) the child's comfort, health, material, intellectual, moral and spiritual welfare.

Declaration and confirmation of Talaq pronounced before Qazi.

18. Marriage, according to Muslim Law, is a civil contract, the object of which is to legalize sexual intercourse and the procreation of children. Divorce is the mode of dissolution of marriage by which the relationship of the husband and the wife terminated. Section 311 of Mulla's Principles of Mohammedan Law provides three modes of Talaq, namely Talaq Ahsan, Talaq Hasan, and Talaq-i-badai. A Talaq may be effected orally (by spoken words) or by a written document called a Talaqnama. A Talaqnama may only be the record of the fact of an oral Talaq or it may be the deed by which the divorce is effected. Section 313 in Mulla's Mohammedan Law provides that in the absence of words showing a different intention, a divorce in writing operates as an irrevocable divorce i.e. Talaq-i-bain, and takes effect immediately on its execution. Deed of Divorce in writing constitutes a valid divorce. Under Hanafi Law, divorce of wife by a written document is irrevocable. It is thus clear Talaqnama may be only the record of the fact of an oral Talaq or it may be the deed by which the divorce is effected.

19. The institution of Qazi, at one point of time, occupied a very pivotal position in the administration of Muslim Law. He was conferred with

adjudicatory and administrative powers, and endowed with religious duties and functions. With the advent of British Rule in India, the adjudicatory powers of Qazi came to be restricted, and appointment of Qazis was provided for under the Qazis Act,1880. The statement of objects and reasons of the Qazis Act, summarizes the nature of the powers of a Qazi, that existed earlier thereto.

"Under the Muhammadan Law the Qazi was chiefly a Judicial Officer. His principal powers and duties are stated at some length in the Hedaya, Book xx. He was appointed by the State, and may be said to have corresponded to our Judge or Magistrate".

20. Such was the position of the Qazi in this country before British Rule. On the introduction of the British rule, the judicial capacity of Qazi disappeared but the British Government did not abolish the office. By certain Regulations passed from time to time, the appointment of Qazi-ul-Kuzaat and Qazis by the State was provided for and the performance of their non-judicial duties was recognised by law. The duties of the Qazi under these Regulations comprised some or all of the following (1) preparing and attesting deeds of transfer and other law-papers; (2) celebrating marriages (3) performing various rites and ceremonies; (4) superintending the sale of distrained property and paying charitable and other pensions and allowances.

21. In case of ***Dagdu Chotu Pathan vs. Rahimbi- 2002 (3)Mh.L.J 602*** the full Bench of Hon'ble Bombay High Court held in para-16 & 17,

"*Under the Mohammedan Law the Qazi was chiefly a judicial officer and may be said to have duties corresponded to the present day judge or magistrate. In addition, however, to his functions under the Mohammedan Law, the Qazi in this country, before the advent of the British Rule, appears to have performed certain other duties partly of secular and partly of religious nature. On the advent of British Rule, judges and*

magistrates took the place of Qazis who, in his judicial capacity, disappeared. However, the office of the Qazi was not abolished even in the British regime. By certain regulations passed from time to time the appointment of Qazi-ul-Kuzzat and Qazis by the State was provided for and the performance of non-judicial duties was recognised by law. The duties of the Qazi, under these regulations, comprised some functions like celebrating marriages and presiding at divorces as well as performing various rites and ceremonies. Under these circumstances it appeared no longer necessary that the Government should appoint these officers. Qazis Act, 1864 was formulated and some provisions therein raised certain difficulties and, therefore, the Qazis Act, 1880 came to be enacted specifying the limited duties of a Qazi. Under the Wakf Act, 1954 as well as the amended Wakf Act, 1995 there is a provision for granting certificate of divorce and the divorce is registered at the office of Qazahat. The certificate is in the prescribed form and it

contains the columns for (1) reason of Talaq/ Khula (Divorce), (2) date of divorce/ Talaq/ Khula, (3) names of witnesses with fathers name, ages, residences and occupations, signature of divorcer, (4) certificate of Qazi or presiding officer of the Court, (5) name of wife with fathers name, age, residence and occupation etc".

22. The authority of Qazis to issue divorce certificate has been judicially recognized by the courts. In case of ***Mrs. Mehak Mohd. Tanveer vs. Mr. Mohammed Tanveer- Family Court Appeal No.55/2009*** decided on 18.09.2014, the appellant had asserted pronouncement of oral talaq evidenced by the Divorce Certificate issued by the Chief Qazi of Mumbai. The Hon'ble Bombay High Court in para no.2 has held,
" Clause (b) of the Explanation to sub-section 1 of section 7 provides for filing a suit for declaration as to matrimonial status af any person. Thus, the petition filed by Appellant will have to be treated as a suit or

proceedings for a declaration that the marriage between the Appellant and respondent stands dissolved by the confirmation of an oral talaq in writing dated 7th June,2006."

23. In short, a proceeding for confirmation of talaq pronounced before a Qazi is maintainable under Clause-(b) of the Explanation to section-7 of the Family Courts Act. But while dealing with such matters, in my opinion, certain precautions need to be kept in the back of the mind. Such a certificate would not have any probative or sacrosanct value. It will have to be proved like an ordinary document. Collusive litigation for

the purposes of Passport or benefits under Welfare schemes is possible. The certificate can not ipso facto dispense with the requirements of proof of a valid pronouncement of talaq.

Research Paper from Family Court KOLHAPUR

Whether in-laws can made party to matrimonial proceeding & third party can be allowed to intervene in matrimonial disputes.

Section 7 of the Family Courts Act limits the jurisdiction of the Family Court to the parties to a marriage. The explanation to clause 7 reads thus :

7. Jurisdiction :-

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

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

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

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

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

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

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

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

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

(f) a suit or proceeding for maintenance

g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to any minor. (2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

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

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

Though jurisdiction of the Family Court is restricted to the parties to a marriage, under sub section (2) of section 7, the jurisdiction of the Family Court is widened as the cases under Chapter IX of Criminal Procedure Code are also made triable before the Family Court; so also, under section 2(b) 'such other jurisdiction is conferred on it by any other enactment'. Thus, under clause (b) of sub section (2), if there is a specific provision under any other statute that such matters can also be entertained and tried by the Family Court, then the jurisdiction of the Family Court can be extended to that effect. Any relative of the husband is covered under the definition of respondent under section 2(q) of the D.V. Act. If the statute covers a particular person in the array of the respondent, then, the status and necessity of that person cannot be challenged under Order 1 Rule 10 of the C.P.C. Thus, this issue cannot be raised at all as the D.V. Act covers the relatives of the husband under the definition of respondent. Hence, in-laws can be brought under the definition of 'respondent' under the D.V. Act has to be adopted while granting relief and entertaining petition under the D.V. Act.

Under section 26 of the D.V. Act, if at all the jurisdiction to entertain and try matters under the sections specified therein is conferred to the Family Court, then it is to be conferred in entirety in respect of the reliefs

which are available and can be sought under the sections specified in the said section. The Legislature did not put any rider while invoking the reliefs under section 26 of the D.V. Act. Therefore, a meaning of 'respondent' has to be borrowed from section 2(q) of the D.V. Act for the proceedings under section 26 of the D.V.Act. Adding and reading such qualification will amount to illegal interpretation of the law.

The jurisdiction under section 7 of the Family Courts Act insofar as the parties to the proceedings are concerned, is limited to between the parties to the marriage. However, schope of the term 'respondent' is wider under section 2(q) of the D.V. Act. The D.V. Act takes care of any type of violence in the house and, therefore, the meaning of respondent is not restricted to only husband but his relatives are also included in the definition. It is possible that the same word in one statute may bear a different meaning in the other statute. The word 'respondent' if taken under the Family Courts Act, is restricted and so different than the word 'respondent' under section 2(q) of the D.V. Act. However, section 26 is an enabling section for a wife to seek remedy under the D.V. Act in the other proceedings pending under the Family Courts Act. The intention of the Legislature to allow to claim reliefs which are available under the D.V. Act in the proceedings pending under the Family Courts Act is to curtail the multiplicity of litigation, to save the time of the court and litigants, to avoid duplication of the evidence and so on. The Legislature did not use any language expressly or impliedly suggesting qualified use of the sections specified in the section 26. Thus, for the purpose of section 26 of the D.V. Act, a meaning of word 'respondent' under section 2(q) of the D.V. Act. Therefore, by plain interpretation of law, the word 'respondent' under section 2(q) is to be given the same meaning under

the sections which are specified under section 26 of the D.V. Act, which are triable by the Family Court. The relief cannot be prayed in piecemeal. If jurisdiction is widened under section 7(2) of the Family Courts Act, then, by applying rule of harmonious construction, the definition of the word respondent as contemplated under the D.V. Act. is necessarily be imported when the said proceedings are tried before the Family Court. Section 36 of the Family Courts Act reads that the Act shall be in addition to and not in derogation of the provisions of any other law, for the time being in force. Thus, section 26 is in fact in consonance with section 36 of the D.V. Act.

The provisions of D.V. Act i.e. the definition clauses, provisions of D.V.At, if read together with the Statement of objects and reasons under Bill No. 116 of 2005 for passing the D.V. Act makes it clear that the complainant shall be necessarily be a woman and the respondent also shall necessarily be a male except in cases where the complainant is a wife, the respondent may be a female relative of the husband or male partner.

Third party intervention :-

There is a marked increase in third parties being forced to become involved in financial proceedings as part of a divorce because they have an interest in a property or other assets which are in dispute. This involvement does not just relate to complex cases concerning businesses and trusts but in the everyday case. A common issue arises when a third party usually a relative has an interest or potential interest in property that forms part of the matrimonial pot of assets up for division.

The court can only deal with the third party's rights, if he or she is given notice of proceedings and has an opportunity to intervene in the proceedings. This gives them an opportunity to set out their case as to their interest in the property or asset in dispute. Without this intervention the Court will deal with the property to the extent that one spouse is entitled to it.

Section 23(2) of the Hindu Marriage Act, 1955 mandates the duty on the court that before granting relief under this Act the Court shall in the first instance; make an endeavor to bring about reconciliation between the parties, where it is possible according to nature and circumstances of the case. For the purpose of reconciliation the Court may adjourn the proceeding for a reasonable period and refer the matter to person nominated by court or parties with the direction to report to the court as to the result of the reconciliation.

The Family Court Act, 1984 was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith by adopting an approach radically different from the ordinary civil proceeding. Section 9 of the Family Court Act, 1984 lays down the duty of the Family Court to assist and persuade the parties, at first instance, in arriving at a settlement in respect of subject matter. The Family Court has also been conferred with the power to adjourn the proceedings for any reasonable period to enable attempts to be made to effect settlement if there is a reasonable possibility.

Conclusion :-

Thus considering provisions of S.7(2) of Family Courts Act as well as provisions U/S.2(q) and 26 of D.V. Act, it becomes clear that in-laws can be made party to matrimonial proceedings. Similarly, For the purpose of reconciliation the Court may adjourn the proceeding for a reasonable period and refer the matter to person nominated by court or parties with the direction to report to the court as to the result of the reconciliation. Therefore, ample discretion in given to court to allow third party intervention for the purpose of reconciliation. With this, I conclude my paper.

Questionnaire

1. After agreeing for parenting plan if the custodian parent reverts, can the petition be dismissed under Order 39, Rule 11 ?

2. What is the correct mode to deal with when there is admission given by respondent in a petition filed under Sec. 12 of Hindu Marriage Act ?

3. Does Family Court in India has jurisdiction to deal with a property of husband situated in a foreign country especially when both spouse have returned and settled in India ?

4. Can Family Court convert a petition u/sec.125 of Cr.P.C. into a petition under Protection of Divorced Muslim Women Act ?

5. Can Family Court pass anti-suit injunction restraining the husband from contesting a civil suit under Specific Relief Act pending in a civil court pertaining of a house which is a matrimonial house ?

6. Can Family Court pass anti-suit injunction against a stranger who is a genuine purchaser of matrimonial house from filing suit under Specific Relief Act against the husband ?

7. Whether a wife can intervene in a pending civil suit filed under Specific Relief Act by a purchaser of matrimonial house against the husband ?

8. If at a subsequent stage, the Court feels that the role of advocate is aimed to vex the legation or prolong it, can the permission for legal representation be cancelled ?

9. Whether an application for filing complaint under Section 340 of Cr. P.C. Can be entertained after 8 years of incident ?

10. Whether a lady can institute a suit for declaration of her status as wife against a person acquitted under Section 376 of I.P.C. Case as she begotten a child out of the incident?

11. Whether separate application under Domestic Violence Act, is necessary in the petition pending before Family Court to claim relief ?

12. Whether a petition filed by wife against her husband's relatives alone without making him a co-respondent, is maintainable?

13. Whether concubine or mistress who is living with a man for a considerably long period would be entitled to derive benefits of provisions of the Domestic Violence Act ?

14. Whether Ex-wife has right to claim relief under Domestic Violence Act ?

15. How to pass effective order under Domestic Violence Act ?