84/2015. HINDU MARRIAGE ACT, 1955 - SECTION 13

(i) Divorce on the ground of adulterous life style of the wife – Husband moved an application for DNA test of himself and the male child born to the wife – It would be most possible method for husband to establish and confirm the allegations levelled by him against his wife – As DNA Testing is the most legitimate and scientifically perfect method, application is allowed.

(ii) If wife declines for DNA test, the allegation would be determined by the court, by drawing a presumption provided under Section 114 (h) of the Evidence Act.

Dipanwita Roy v. Ronobroto Roy, AIR 2015 SC 418

It is borne from the decisions rendered by this Court in Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Woman and another, AIR 2010 SC 285 and NandlalWasudeoBadwaik v. LataNandlalBadwaik and another, AIR 2014 SC 932 that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril.The question that has to be answered in this case, is in respect of the alleged infidelity of the appellant-wife. The respondent-husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the appellant-wife. It is in the process of substantiating his allegation of infidelity, that the respondent-husband had made an application before the Family Court for conducting a DNA test, which would establish whether or not, he had fathered the male child born to the appellant-wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant-wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied, that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should

simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so.

We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:

> "114. Court may presume existence of certain facts – The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustration (h) – That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him."

This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved.

85/2015. HINDU MARRIAGE ACT, 1955 - SECTION 13

Divorce on the ground of mental cruelty – Whether refusal to have sexual intercourse for a long time without sufficient reason itself amounts to mental cruelty? Held, Yes [Samar Gosh v. Jaya Gosh, (2007) 4 SCC 511 (3-Judge Bench) followed].

VidhyaViswanathan v. KartikBalakrishnan, AIR 2015 SC 285

Undoubtedly, not allowing a spouse for a long time, to have sexual intercourse by his or her partner, without sufficient reason, itself amount mental cruelty to such spouse. A Bench of Three Judges of this Court in Samar Ghosh v.

Jaya Ghosh, (2007) 4 SCC 511 has enumerated some of the illustrations of mental cruelty. Paragraph 101 of the said case is being reproduced below:
Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

145/2015. HINDU MARRIAGE ACT, 1955 - SECTION 13

Dissolution of marriage as per custom, validity of – Dissolution of marriage took place with the permission of the Panchayat – It was permissible according to their caste – To such effect, during the proceedings of Panchayat certain documents were also executed and such documents were permitting remarriage of parties – Thereafter, the husband married another woman and both the parties were living separately – Held, a decree for dissolution of marriage can be granted as per the rites and custom of the parties.

Ranjit Singh v. Sugan Bai, 2014 (IV) MPJR 176 (DB)

Having considered the submissions made and the documents available on record, it is seen that the parties are living separately since 1990 and during this period the appellant husband is also married to another person and two children have been born out of his wedlock. One of the moot question warranting consideration is as to whether as per the rites and customs of the parties, a decision was taken in the panchayat as is indicated in the document Exhibit P/1 and P/2. P.W. 1 Ranjit Singh and his witnesses P.W.2 and P.W.3 testify with regard to execution of this document in the panchayat. Both P.W.2 and P.W.3 have stated that when the proceeding of the Panchayat were held on 4.3.90 respondent wife's uncle BapuBhura and her brother Puran were present and certain relatives of the appellant husband were also present before whom the decision was taken and the document Exhibit P/2 executed. P.W.4 Padam Singh Malviya who had conducted the proceedings of the Panchayat also testifies to the same. He also says that the persons who were present there had affixed their thumb impression or signature on the document Exhibit P/2. If the documents available on record Exhibit P/1 and P/2 are taken note of, it would be seen that in this document signature and thumb impression of various persons are present which include the signature of BapuBhura the so called uncle of Sugan Bai respondent wife and her brother Puran. At place marked as "C" to "C" is the signature of Bapu and portion marked as "G" to "G" is signature by Puran in Exhibit P/1. Similarly in Exhibit P/2 their signature marked at places 'A' to 'A' and 'B' to 'B' respectively. The respondent wife examined herself as D.W.1 and denied the proceedings held in the

Panchayat. She also produced her brother D.W.2 Moti to testify that he was not present in the panchayat. However, neither Moti nor the respondent wife say anything with regard to presence of Puran and BapuBhure in the proceedings of the Panchayat nor do they deny existance of such a custom in the community for separation. On the contrary P.W.2, P.W.3 and P.W.4 who were not members of the family testify to the execution of the document in the panchayat. When the appellant had come out with a specific case that in the proceedings of the Panchayat brother of the respondent Puran and her uncle were present as this proceeding was held as per the custom and usage prevailing in their community and when PW2 and PW3 say that they affixed their signature in the portion marked in the document. The respondent should have explained or produced either Bapu or Puran to deny their signature in the document. The evidence of witnesses does show that as per the custom prevailing in the caste to which the parties belong, certain proceedings of the panchayat took place and if documents Exhibit P/1 and P/2 are taken note of, it would be seen that this document speaks about breaking of the relationship, their separation, redistribution of their assets and payment of Rs.3,300/- by the respondent wife to the appellant. The document also says that now the parties can remarry and it is an admitted position that after execution of this document the appellant husband has married one Kalpana Bai and two children have been born out of this wedlock. From the evidence in this regard as is available on record it is clear that parties are living separately since 1990 and in certain proceedings of the Panchayat held on 4.3.90, they have decided to separate themselves and thereafter, the appellant husband got married and since 4.3.90 i.e. atleast from the date when the documents were executed, both the parties are living separately. That being so, it is a case where as per the religious custom and tradition applicable between the parties, a decision has been taken to separate themselves and the decision having been put to execution and the execution of the decision vide Annexure P/1 and P/2 having been proved from the evidence available on record, it is a fit case where a decree for dissolution of marriage should be granted. Accordingly, the appeal is allowed. The marriage solemnized between the parties is permitted to be dissolved. The decree be passed accordingly. The appeal is allowed in part.

243/2015. HINDU MARRIAGE ACT, 1955 - SECTION 13

Divorce petition on the ground of epilepsy, proof of – Burden of proving that wife was suffering from epilepsy even before the marriage and was disclosed by wife

only after marriage, is on the husband by adducing cogent evidence – Neuro physician cannot give a definite opinion about such ailment – Therefore, Trial Court exceeded in exercise of its jurisdiction in sending wife for medical examination.

Veenita Bai v. Dinesh Kumar, 2015 (2) MPLJ 576

It is not in dispute that the proceedings initiated by the respondent are to be tried as a civil suit. It is to be seen from the pleadings in the application for divorce that the allegations were made that the petitioner herein was suffering from epilepsy even before the marriage and this fact was disclosed by the petitioner herein to the respondent after the marriage. Certain incidents have been mentioned by the respondent and the allegation was made that petitioner was visiting her parents every month for the purposes of bringing the medicines for the said ailment. It is the allegation made in the application by the respondent that he took the petitioner herein to the doctors, get her examined and the doctors have opined that the petitioner was suffering from mental disorder. If that was the situation, the respondent was required to prove all those facts by adducing the evidence. Since it was stated that the respondent was not having good financial condition to get the petitioner treated, though he has tried his best, these aspects were required to be proved by the respondent himself. The burden of proving such allegation was on the respondent with full force because the petitioner herein has specifically denied all those allegations in her written statement filed before the Trial Court. To what extent the evidence was made available in this respect by the respondent has to be examined. If the documents filed along with the application for vacating interim stay are looked into, it would be amply clear that the petitioner was taken to the Medical Board even after filing of the suit for divorce. The suit for divorce was filed in the month of November, 2011, the petitioner was examined by the Medical Board on 19.11.2012 and from this it is clear that only this much was said that the petitioner can be referred to the Neuro Physician for the purposes of getting her medically examined. As alleged by the respondent, the EEG test of the petitioner was conducted on 28.02.2011 at Bhopal and in that report nothing was found, rather it was a note made in the said report that normal EEG does not exclude the epilepsy. This being so, the very object of writing a report on 19.11.2012 was not enough to hold that the petitioner was required to be put to such medical examination. Even otherwise it was the responsibility of the respondent to prove such fact and in the course of adducing evidence if it is found by the Trial Court that such medical examination of the petitioner is necessary, order in that respect

could be passed. The respondent has not started his evidence and at that stage it was not to be held that medical examination of the petitioner was necessary. In RekhaRavindra Kumar v. Ravindra Kumar Ramchandra, 1993 MPLJ 719, this Court while dealing with such circumstances has categorically held that the well settled law is that the alleged mental disorder must be proved to be existing on the date the suit was filed. If that mental disorder was not on the date when the claim was made, on that ground alone the decree of divorce cannot be granted. A Division Bench of the Chhattisgarh High Court in KhumeshDeshmukh v. Smt. PadminiDeshmukh, 2010 (5) MPHT 88 (CG), has held that the concept of proof beyond the shadow of doubt is to be applied only in the criminal trials and not to the civil matters and specially not to the matters to such delicate personal relationship, in terms of the law laid down by the Apex Court in Smt. Mayadevi v. Jagdish Prasad, AIR 2007 SC 1426. If it was a case of a fraud, it was the duty on the part of the respondent to establish that such fact of mental disorder, though was in existence in the petitioner much before the solemnization of marriage, was deliberately suppressed by the family members of the petitioner to get her married with the respondent. These aspects if are taken into consideration, it would be clear that in case such allegations were made by the respondent, at least he was to establish the case to that extent that in fact a fraud was committed with him by the family members of the petitioner. For that he was not required to obtain a report of subsequent ailment which the petitioner has developed. In fact he was required to prove that right from very beginning the petitioner was suffering from such ailment and for that reason since the marriage is said to be fraudulent one, the same was liable to be declared as null and void or a decree of divorce was to be granted to the respondent. Nothing is stated in the application so filed by the respondent before the Court below nor such application is placed on record. Even when the Chief Medical and Health Officer, Harda was directed to give such medical report, prima facie it was said that there was no symptoms available in the petitioner to show that she was suffering from Neurological ailment or epilepsy. The Neuro Physician, who has examined the petitioner on earlier occasion, himself could not give a definite opinion about such ailment as is clear from the report placed on record with the I.A. for vacating stay filed by the respondent himself, therefore, it was not open to the Trial Court to direct sending of the petitioner for medical examination. Merely because the petitioner was sent to the medical examination before the Medical Board, for the purpose of creating evidence, the petitioner was not required to be referred to medical examination at Indore. This view has been

expressed by the Apex Court in Sharda v. Dharmpal, (2003) 4 SCC 493, wherein it is held that the power of matrimonial Court is extended for issuance of such direction but that power is to be exercised only if prima facie case is made out and there is sufficient material before the Court, produced by the person claiming such medical examination.

In view of the aforesaid discussion, it is clear that the Court below has exceeded in exercise of jurisdiction in allowing the application of respondent by the impugned order. Therefore, the said order cannot be countenanced.

244/2015. HINDU MARRIAGE ACT, 1955 - SECTION 13(1)(IA)

Divorce on the ground of mental cruelty – If one spouse abuses the other as being born from a prostitute and summons the police on false or flimsy grounds, and makes it impossible for any close relatives to visit or stay in the matrimonial home, it cannot be termed as "wear and tear" of family life – Held, trial court rightly granted the decree of divorce on the ground of mantel cruelty.

Vinod Kumar Subbiah v. SaraswathiPalaniappan, 2015 (2) MPWN 44 (SC)

BRIEF NOTE

94/2016. HINDU MARRIAGE ACT, 1955 - SECTION 25

Whether decree passed by civil court prior to establishment of Family Court can be executed by Family Court? Held, No – The Court which passed the decree has jurisdiction to execute it – Rammana v. Nallaparaju, AIR 1956 SC 87 relied on.

Dinesh Sharma v. Jyoti Sharma, 2016 (1) MPLJ 465

Brief notes.

96/2016. HINDU MARRIAGE ACT, 1955 - SECTION 9 & 24

Husband filed a petition under section 9 of the Act – Wife filed written statement and also filed counter-claim to declare the alleged marriage as ab initio void on account of impotency of the husband – She filed an application under section 24 of the Act for interim alimony – Same was rejected by the Trial Court – Allowing the application, High Court held on the basis of counter-claim the spouse cannot be discriminated and deprived to extend the benefit of section 24 of the Act – Such provision is enacted by legislature to grant interim alimony for livelihood of the spouse if he/she did not possess any sufficient source of income to maintain the expenses of the litigation.

BeenaDehariya v. VimalDehariya, ILR (2015) MP 1175

Brief notes.

153/2016. HINDU MARRIAGE ACT, 1955 - SECTION 13-B & 23 (1) (BB)

(i) Doctrine of 'pre-existing duty', applicability of. Settlement agreement between husband and wife as to payment of Rs. 12,50,000/- towards alimony, as consideration for divorce, as wife was in need of money for treatment of breast cancer – Undue influence – Divorce by mutual consent, grant of – Held, it is pre-existing duty of husband to provide facilities for treatment to wife – Further held, the payment of amount ofRs. 12,50,000/- is not a valid consideration for the settlement and divorce cannot be granted on the basis of the settlement being based on undue influence.(ii) Hindu marriage, nature of – Explained.

VennangotAnuradha Samir v. Vennangot Mohandas Samir, 2015 AIR SCW 6524

From the admitted facts, it is evident that the petitioner needs sufficient amount of money for the treatment of breast cancer. Hence, it cannot be ruled out that in order to save her life by getting money, she agreed for a settlement of dissolution of marriage. On these facts, a question that came in our mind is as to whether the Court would be justified in granting a decree for divorce on the basis of settlement when the wife is suffering with breast cancer and is in need of money for her treatment and can that be the consideration for dissolution of marriage. Hindu marriage is a sacred and holy union of husband and wife by virtue of which the wife is completely transplanted in the household of her husband and takes a new birth. It is a combination of bone to bone and flesh to flesh. To a Hindu wife her husband is her God and her life becomes one of the selfless service and profound dedication to her husband. She not only shares the life and love, but the joys and sorrows, the troubles and tribulation of her husband and becomes an integral part of her husband's life and activities. Colebrooke in his book "Digest of Hindu Law Volume II" described the status of the wife thus:- "A wife is considered as half the body of her husband, equally sharing the fruit of pure and impure acts:- whether she ascend the pile after him or survive for the benefit of her husband, she is a faithful wife."Further Colebrooke in his book Digest of Hindu Law Volume-II quoted the Mahabharata at page 121 thus:- "Where females are honoured, there the deities are pleased; but where they are unhonoured there all religious acts become fruitless."This clearly illustrates the high position which is bestowed on Hindu women by the Shastric law. From the study of Hindu Law and different religious books, it cannot be disputed that after marriage law enjoins the corresponding duty on the husband to look after her comforts and not only to provide her food and clothes but to protect her from all calamities and to take care of her health and safety.In the peculiar facts of the present case if we consider the instant settlement, which is nothing but a contract to dissolve the marriage, the Court has to satisfy itself that the contract is legal and valid in the eye of law. From perusal of the facts of the case and the development which has taken place in the present case, it seems that the petitioner-wife agreed for divorce by mutual consent on the condition that the respondent-husband will pay her Rs.12,50,000/- as full and final settlement. The petitioner-wife is suffering from such a disease which has compelled her to agree for the mutual consent divorce. The fact that petitioner-wife is ready for the mutual consent divorce after knowing about her medical condition raises a suspicion in our mind as to whether the consent obtained from the petitioner-wife is free as required by law for granting the decree of divorce by mutual consent.If we consider the provisions of Indian Contract Act, it provides that consent is said to be free when it is not caused by

“undue influence” as defined in Section 16 of the Act. The contract is said to be induced by “undue influence” where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.One more doctrine is to be taken into consideration i.e. “Pre-existing duty doctrine”. It is a principle under the Contract Act that states that if a party to a contract is under a pre-existing duty to perform, then no consideration is given for any modification of the contract and the modification is therefore voidable. In the 13th edition of the Pollock &Mulla Indian Contract and Specific Relief Act in Vol.1, it is mentioned at page 101 about the Pre-existing obligation under law which provides that:-

> “The performance of what one is already bound to do, either by general law or by a specific obligation to the other party, is not a good consideration for a promise; because such performance is no legal burden to the promise, but rather relives him of a duty. Neither is the promise of such performance a consideration, since it adds nothing to the obligation already existing.”

We can apply this principle in the present case. As discussed above, it is a duty of the respondent-husband to take care of the health and safety of the petitioner-wife. In the instant case also it is a primary duty of the husband only to provide facilities for the treatment of the petitioner. This is a pre-existing duty of the husband, provided the husband has sufficient means and he is diligently doing his part in taking care of her. In the present case, by the settlement agreement the respondent-husband is promising to do something which he is already duty bound, is not a valid consideration for the settlement.