

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.01.2023

PRONOUNCED ON : 01.02.2023

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THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

C.R.P.Nos.3586 & 4156 of 2022

and

C.M.P.Nos.19041 & 21716 of 2022

... Petitioner
(in both C.R.Ps)


Vs.

... Respondent
(in both C.R.Ps)

Prayer in C.R.P.No.3586 of 2022: Civil Revision Petition is filed under Article 227 of the Constitution of India, to strike off the petition in OP No.2788 of 2022 pending on the file of the IInd Additional Family Court, Chennai.

Prayer in C.R.P.No.4156 of 2022: Civil Revision Petition is filed under Article 227 of the Constitution of India, to strike off the complaint made in DVC.No.116 of 2022 pending on the file of the Additional Mahila Court at Magistrate Level, Egmore, Chennai.

For Petitioner : Mr.G.Rajagopalan
Senior Counsel
For Ms.Sunita Kumari
(in both C.R.Ps)

For Respondent : 
[Party-in-Person]
(in both C.R.Ps)

COMMON ORDER

The Civil Revision Petitions in CRP Nos.3586 and 4156 of 2022 have been filed under Article 227 of the Constitution of India, to strike off the petition in OP No.2788 of 2022 pending on the file of the II Additional Family Court, Chennai, and to strike off the complaint made in DVC No.116 of 2022 pending on the file of the Additional Mahila Court, Egmore, Chennai.

FACTUAL BACKGROUND:

2. The marriage between the revision petitioner and the respondent was solemnised on 21.04.1999 at Vijay Shree Mahal, Anna Nagar, Chennai – 40, as per Hindu Rites and Customs in the presence of their relatives and friends. They started their matrimonial life initially in India happily and they have shifted to Virginia, United States of America

(USA). The revision petitioner and the respondent were working in United States of America (USA) and twin boys namely Tarun Chava and Tanush Chava were born on 16.04.2008 from and out of wedlock between the revision petitioner and the respondent. The twin children are now aged about 15 years. Both the revision petitioner and the respondent gets citizenship at United States of America (USA) by naturalisation. On 27.12.2020, the respondent came to India with the two children with return tickets dated 24.04.2021, which was further extended to August 2021. However, the respondent and her twin children have not returned back to United States and continued to reside at Chennai, India. During May 2021, the twin children were admitted in George Washington Online School and they were pursuing their school education.

3. The revision petitioner had sent a legal notice on 23.09.2021 to the respondent and the respondent through her Attorney had sent a reply notice. The revision petitioner moved a complaint for Divorce and Custody of Children before the Circuit Court of Fairfax County on 13.10.2021. The respondent filed OP No.719 of 2021 before the High Court of Madras on 25.10.2021 for Guardianship and Custody of the Children. The respondent filed OP No.2788 of 2022 under Section 9 of the Hindu Marriage Act, 1955

for the relief of Restitution of Conjugal Rights before the Family Court at Chennai on the ground that the marriage between the revision petitioner and the respondent was solemnised as per the Hindu Rites and Customs at Chennai and it was registered under the Hindu Marriage Act, 1955. The respondent initially participated in the proceedings in the United States Court virtually. The respondent / wife filed answers to the complaint for divorce through her Attorney. However, the respondent had not subsequently attended the United States Court proceedings and finally the United States Court passed an ex parte decree of Divorce and Custody of Children.

4. The OP No.719 of 2021 filed by the respondent / wife before the High Court of Madras was dismissed on 21.03.2022 mainly on the ground that the matrimonial proceedings between the revision petitioner and the respondent are pending before the United States Court and the parties are American Citizen and petitioner / husband has moved the American Court, which is pending and thus, liberty was granted to the respondent to work out her remedy in the case pending before the United States Court.

5. In March 2022, the United States Court ordered for the physical presence of the wife along with the twin children. However, the respondent stayed in India along with her twin children. She filed OSA No.102 of 2022 challenging the order passed in OS No.719 of 2021 dated 21.03.2022 and the said appeal was withdrawn by her. Subsequently, the respondent / wife filed Domestic Violence complaint on 16.06.2022 before the Protection Officer under the Protection of Women from Domestic Violence Act, 2005 against the revision petitioner.

6. The revision petitioner filed Habeas Corpus Petition in HCP No.1689 of 2022 on 22.08.2022 for production of the children for the purpose of taking them to United States of America (USA) and to resume their education in physical mode. When the HCP was pending before the High Court of Madras, the motion moved by the respondent was denied and the United States Court fixed 18.10.2022 as the date of hearing with a direction that the children to be present in the United States Court. Since the respondent and the twin children were not present, the order of custody originally passed was restored on 18.10.2022. On 02.12.2012, the United States Court granted Divorce Decree, which was solemnised at Chennai, India. On 03.01.2023, the Hon'ble Division Bench of the Madras High

Court disposed of the HCP No.1689 of 2022 and directed the respondent / wife to take immediate steps to return back to United States of America (USA) along with the twin children within a period of six weeks and resume their education in physical mode in United States of America (USA).

7. Presently, the twin children are aged about 15 years continued to reside at Chennai for more than two years. All the parties to the lis on hand are American Citizen and Overseas Citizen of India (OCI Card holders). The petitioner has filed petitions for divorce and custody before the United States Court and secured ex parte orders.

8. In the above circumstances, the revision petitioner / husband filed these Civil Revision Petitions in CRP Nos.3586 and 4156 of 2022 to “strike off” the petition in OP No.2788 of 2022 pending on the file of II Additional Family Court, Chennai, and the complaint made in DVC No.116 of 2022 pending on the file of the Additional Mahila Court at Egmore, Chennai. Both the OP and the DVC cases were filed by the respondent / wife seeking reliefs under the Acts concerned.

CONTENTION OF THE REVISION PETITIONER:

9. The learned Senior Counsel appearing on behalf of the revision petitioner mainly contended that the directions issued by the Hon'ble Division Bench of the Madras High Court in HCP No.1689 of 2022 to be taken note of and consequently, these Civil Revision Petitions are to be allowed by striking off the proceedings initiated by the respondent under Section 9 of the Hindu Marriage Act, 1955 and under the Protection of Women from Domestic Violence Act, 2005. The United States Court has already granted an ex parte decree of Divorce and Custody of Children. While so, the respondent has no option but to leave India and hand over the children to the revision petitioner / husband to continue their education and other activities in United States.

10. The respondent has made a reference about OP No.2788 of 2022 pending on the file of the Family Court at Chennai and DVC No.116 of 2022 pending before the Additional Magistrate, Egmore, Chennai, which caused certain complications between the parties and thus, the revision petitioner moved these present Civil Revision Petitions to strike off the litigations filed by the respondent.

11. The learned Senior Counsel appearing on behalf of the revision petitioner reiterated that it is not open to the respondent to argue because the directions issued by this court and trying to dilute the orders of the Hon'ble Division Bench of this Court will result in Contempt. In view of the findings in the HCP proceedings, the petition filed under Section 9 of the Hindu Marriage Act and the petition under the Domestic Violence Act are to be rejected.

12. The Hon'ble Division Bench of this Court had examined the minor children in HCP proceedings and therefore, this Court cannot examine the children once again for the purpose of ascertaining their choices and wishes. It is further contended that the minor children aged about 15 years are in complete control of their mother / respondent and this Court, in Habeas Corpus Petition, held it cannot decide the case based on what the children say, and the best interest of the children is to be decided by the Court. From the observation of the High Court, the children were tutored by the respondent and their statements cannot be taken into consideration before this Court as they are not relevant to the proceedings. The issue relating to the custody has become final because of the final order passed in United States Court.

13. The learned Senior Counsel appearing on behalf of the revision petitioner contended that all the parties are American Citizen and the revision petitioner and the respondent are foreigners for long time and do not have domicile in India and the respondent is staying in India as OCI Card holder. It is a nature of long term visa and does not confer any domiciliary right to the card holders and thus, the card holders for all purposes is considered as foreigners. In view of the said observation by the High Court, the respondent has no right to institute any matrimonial proceedings in Indian Courts under the Hindu Marriage Act, 1955.

14. The petition under the Domestic Violence Act, 2005 is an abuse of process of Court. The High Court of Madras in O.P.No.719 of 2021 granted the liberty to the respondent to approach the United States Court for redressal of grievances, if any and therefore, re-litigating the custody issue and petition for restitution cannot be entertained by the Indian Courts and thus, the Civil Revision Petitions are to be allowed by striking off the petitions filed by the respondent before the Family Court and Additional Mahila Court.

15. The learned Senior Counsel for the revision petitioner with reference to the scope of the provisions of the Domestic Violence Act, 2005, contended that all the allegations set out in the complaint by the respondent occurred in United States of America (USA) and no cause of action aroused in India and in respect of the allegations said to have been occurred in United States of America (USA). Indian Courts cannot invoke the Domestic Violence Act, 2005 and the petition has no cause of action and the same is to be strike off.

16. The learned Senior Counsel for the revision petitioner referred Section 27(2) of the Domestic Violence Act, 2005 and states that any order passed by the Court under the Act, cannot operate beyond territories of India and the petitioner is residing at United States of America (USA) and thus, the Act, does not apply to the facts of the case. The revision petitioner drew the attention of this Court with reference to the various judgments relied on by the respondent by stating that the facts are not comparable and in those cases, the parties were residing in India and no proceedings were pending in other country and thus, those judgments relied on by the respondent are of no avail to her for the purpose of maintaining the restitution petition and the DVC complaint.

REPLY BY THE RESPONDENT-IN-PERSON:

17. The respondent-in-person appeared and articulated her case by stating that the marriage between herself and the revision petitioner was solemnized as per the Hindu Rites and Customs at Vijay Shree Mahal, Anna Nagar, Chennai – 40, in the presence of relatives of both the family. Her parents gave her 100 sovereigns gold and other precious stone jewellery, silver articles weighing 2000 Gms, her father's Omega watch and one Ladies Omega watch. The petitioner was given a 5 Sovereigns gold chain, one Diamond ring and a gold wedding band. The marriage expenses amounted to Rs.15 Lakhs in the year 1999 and were fully borne by the parents of the respondent. They set up their matrimonial home at the petitioner's residential address at No.54, Raja Colony, Collector's Office Road, Cantonment, Trichy – 620 001. The revision petitioner and the respondent started their matrimonial life and thereafter went to Virginia, USA to begin their life together in her house in McLean, Virginia.

18. The respondent/wife raised several allegations against the revision petitioner/husband and she states that he was always interested in her money. The respondent/wife states that she owned a Computer Systems consulting business, which had established in December 1997. She started

her business as a Sole Proprietor and in July 2003, she incorporated the business as a Virginia S-Corporation with the name 'bMetrics Inc'. The respondent is the sole shareholder in 'bMetrics Inc.'

19. The respondent/wife states that in March 2020, when the Pandemic hit, the children's school transitioned to remote learning. She did not have business due to economic headwinds in the US. The respondent/wife raises several allegations against the revision petitioner/husband, stating that she was harassed and ill-treated. Not able to tolerate the harassments and ill-treatments, the respondent/wife along with her twin children, left for India on 27th December 2020 and arrived in Chennai on 30th December 2020. The respondent/wife states that the revision petitioner/husband never communicated with them for several months. The revision petitioner retained a US attorney, who sent an E-Mail notice to the respondent on 23rd September 2021. In the notice, she was asked to return the children to US by October 10, 2021 or face kidnapping charges. Since the respondent did not comply with the notice, the petitioner/husband filed a complaint for divorce in the Circuit Court of Fairfax County on 13th October, 2021. The respondent/wife states that on 31st December 2021, she wrote a letter to the Fairfax County Court to file an

objection to the venue/jurisdiction of the Fairfax County Court for the reason, amongst others that the marriage between the respondent and the petitioner had taken place in India and was registered in India under the Hindu Marriage Act. The respondent/wife states that the Court in India has got necessary jurisdiction over the subject matter regarding the marriage, children or financial settlement.

20. The respondent/wife states that she participated in virtual hearings on January 7, 13 & 14 of 2022, where she filed a motion to stay the proceedings and transfer jurisdiction to the Indian Court. The US Court ultimately decided that they had jurisdiction over the matter because “The extension of the airline tickets by Mother to August 2021 is circumstantial evidence of her intent to return to the United States. Mother's intention to remain in India began on August 31, 2021. Father did not sit on his rights and timely pursued his case”. The respondent states that the petitioner having filed the complaint of Divorce on 13th October, 2021, did not give her the requisite 6 months from August 31, 2022, in India to establish habitual residence, which would have allowed Indian jurisdiction in the case. The custody portion of the trial was set for 11th July to 13th July, 2022. The respondent contacted the Law Clerk of the Trial Judge on 6th July 2022

to inform him that she had contacted Covid and would be unable to travel to the US for the trial on July 11, 2022. The Court ignored the submissions of the respondent, conducted the trial and the trial judge gave sole custody of the minor children to the revision petitioner/husband and an award of attorney's fees from the respondent in the amount of \$47, 746. On 22nd July 2022, the respondent filed a motion in the US Court to set aside the above order, which is against natural justice. The Court order was suspended on 29th July, 2022. Thereafter, the custody trial was rescheduled on 18th October, 2022. The respondent developed post-covid complications and was unable to travel. The Court, however, declined to speak with the parties and passed an *ex parte* order to lift the suspension order and grant sole custody of the minor children to the petitioner and an additional award of attorney's fees from the respondent in the amount of \$12,829.56.

21. The respondent states that she and her children are Overseas Citizens of India or OCI cardholders. OCI cardholders are entitled to live, study, or work in India indefinitely. The legal position in this regard are settled by the Indian Courts. The OCI cardholders are having rights in India. In this regard, the respondent referred Section 7B of the Citizenship Act and the Notification issued by the Central Government.

LEGAL POSITIONS

**RIGHTS OF OVERSEAS CARD HOLDERS UNDER THE
CITIZENSHIP ACT.**

22. In the case of **Dr.Christo Thomas Philip vs. Union Of India & Others [2019 SCC Online Del 6426]** on, The Delhi High Court observed the provisions relating to Overseas Citizenship of India were introduced in the Citizenship Act, 1955 by the Citizenship (Amendment) Act, 2003 (Act No.6 of 2004). Section 7B of the Citizenship Act provides for the rights as available to an Overseas Citizen of India card holder. The said section is set out below: “7B. Conferment of rights on Overseas Citizen of India Cardholder:

- (1) Notwithstanding anything contained in any other law for the time being in force, an Overseas Citizen of India Cardholder shall be entitled to such rights, other than the rights specified under Sub- Section.
- (2) as the Central Government may, by notification in the Official Gazette, specify in this behalf.

23. An Overseas Citizen of India Cardholder shall not be entitled to the rights conferred on a citizen of India:

- (a) under Article 16 of the Constitution with regard to equality of opportunity in matters of public employment;

- (b) under Article 58 of the Constitution for election as President;
- (c) under Article 66 of the Constitution for election as Vice-President;
- (d) under Article 124 of the Constitution for appointment as a Judge of the Supreme Court;
- (e) under Article 217 of the Constitution for appointment as a Judge of the High Court;
- (f) under Section 16 of the Representation of the People Act, 1950 (43 of 1950) in regard to registration as a voter;
- (g) under Sections 3 and 4 of the Representation of the People Act, 1951 (43 of 1951) with regard to the eligibility for being a member of the House of the People or of the Council of States, as the case may be;
- (h) under Sections 5, 5A and section 6 of the Representation of the People Act, 1951 (43 of 1951) with regard to the eligibility for being a member of the Legislative Assembly or the Legislative Council, as the case may be, of a State;
- (i) for appointment to public services and posts in connection with affairs of the Union or of any State except for appointment in such services and posts as the Central Government may, by special order in that behalf, specify.

24. In the case of **Mr.Michael Graham Prince vs. Mrs.Nisha Misra** decided on **24 February, 2022**, reported in [**Manu/KA/06/11/2022**], the Karnataka High Court observed the following: it was held that “persons

holding Overseas citizen of India cards can seek matrimonial relief against persons holding similar OCI Cards, before the appropriate courts in India and rejected the petition of an estranged husband who had challenged the decision of a family court in Bangalore to entertain the matrimonial case instituted against him by his estranged wife”. Para 5 of the said judgment reads as under:

“5. Having heard the learned counsel for the parties and having perused the petition papers, this Court declines indulgence in the matter for the following reasons:

“(c) The first contention of the Petitioner that both the parties being foreign nationals, native Courts do not have jurisdiction over the subject matter, is bit difficult to countenance; foreign nationals they are, is not in dispute; however, admittedly the Government of India has issued OCI Cards to both of them; thus, they are not strangers to this country. Under the Notifications dated 11.04.2005, 05.11.2007 & 05.01.2009 issued by the Central Government u/s. 7B of the Citizenship Act, 1955, in many aspects the OCI Cardholders are treated on par with Non-Resident Indians (NRI): these notifications are superseded on 04.03.2021, is beside the point since it is prospective in operation; sub-section 2

of section 7B excludes certain rights from being granted to the OCI Cardholders. However, this exclusion does not cover the right to seek matrimonial reliefs at the hands of the native Courts; the subject statutory notifications do not in so many words vest in them such a right to litigate may be true; but, that per se does not divest them of such a right which otherwise avails even to the OCI Cardholders.

*(d) After all, ubi jus ibi remedium is the operational principle of our system; once lawfully admitted to a territory even the foreigners are entitled to certain essential rights that are necessary for a meaningful life vide Sarbananda Sanowla Vs. Union of India, 2005 (5) SCC 665. The constitutional guarantee under Articles 14 & 21 ordinarily extends to foreigners too vide **Hans Muller of Nurenburg Vs. Superintendent, Presidency Jail, Calcutta, AIR 1955 SC 367**; if aliens can have certain fundamental rights almost on par with the natives, it sounds abhorrent to the rule of law and notions of justice if ordinary legal rights are not conceded to them; an argument to the contrary would justify perpetuation of legal injury sans any remedy to an aggrieved foreigner residing on Indian soil.*

*(e) ...if marriage has taken place in India in which parties are ordinarily residing, the native Courts have substantive jurisdiction to adjudge matrimonial disputes parties cannot be asked to go to some other country to have redressal to their grievances; it is more so when the grieving party is the wife; this view gains support from several International Conventions. Articles 15(2) & 16(1)(c) of **The Convention on the Elimination of All Form of Discrimination against Women (CEDAW)** read as under:*

“15 (2): States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in Courts and tribunals.

16(1)(c): The same rights and responsibilities during marriage and its dissolution.”

*(f) It is relevant to state here that this Convention has been referred to by the Apex Court in **Shayara Bano Vs. Union of India, (2017) 9 SCC 1**; ordinarily, the International*

*Conventions inconsistent of the kind are treated as a source of law even in the domestic sphere if they are not inconsistent with existing corpus juris of our country, vide **Jolly George Verghese Vs. Bank of Cochin, AIR 1980 SC 470;***

(h) It is said tritely that the soundness of a proposition can be adjudged by contemplating consequences of the opposite; the contention of the husband that the wife should go to Courts in England to seek dissolution of the marriage that has been solemnized in India and in accordance with Indian Law, if countenanced, virtually amounts to denying matrimonial relief to her and thus compelling her to remain in the wedlock, which otherwise she could have worked out her remedy against; it has long been settled that the contention as to exclusion of jurisdiction of Courts is seen with jealousy and that a heavy onus lies on theasserter.”

25. In the case of **Neerja Saraph Vs. Jayant Saraph and Anr, [(1994) 6 SCC 461]**, the Hon'ble Supreme Court of India held that:

“Further, the following general rights are also available:

1. Right to get orders by Indian courts enforced
2. Right to approach the court for an injunction or interim orders against the husband travelling abroad or taking the children abroad (including impounding of passport).
3. Right to claim damages through a suit for damages.
4. Right to claim property shares from husband and in-laws”

26. In the case of **Muncherji Curestji Khambata Vs. Jessie Graant Khambata**, reported in **AIR 1935 BOM 5**, the Bombay High Court held that in the realm of private international law:

- i. the forms necessary to constitute a valid marriage and the construction of the marriage contract depend on the *lex loci contractus*,
- ii. on marriage the wife automatically acquires the domicile of her husband.
- iii. the status of the spouses and their rights and obligations arising under the marriage contract are governed by the *lex domicilii*, that is by the law of the country in which for the time being they are domiciled,
- iv. the rights and obligations of the parties relating to the dissolution of the marriage do not form part of the marriage contract, but arise out of, and are incidental to, such contract and are governed by the *lex domicilii*. But though these

propositions in themselves are not open to question, the application of them and even the meaning of them in some respects are not free from difficulty.”

27. In the case of **Mohd. Ahmed Khan v. Shah Bano Begum**, [(1985) 2 SCC 556], the Court held that Section 125 of the Cri.P.C. can be applied irrespective of citizenship and of personal law of the petitioner husband. Para 10 of the judgement reads as under:

“it shows unmistakably that Section 125 Cr.P.C. overrides personal law; if there is any conflict between the two”. Para 11 is also clinching enough in this context. The Supreme Court in this case wanted to set at rest, once and for all, the question of whether Section 125 would prevail over the personal law of the parties in all cases where they are in conflict.”

MAINTAINABILITY OF DVC PROCEEDINGS:

28. Regarding the domestic violence complaint filed by the respondent / wife, Section 3 of the Act defines Domestic Violence. Section 3(a) enumerates “harms or injuries or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends

to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse”. Sub Clause (d) to Section 3 states that otherwise injuries or causes harm, whether physical or mental, to the aggrieved person.

29. Section 3 Explanation Clause I (iv) defines “economic abuse” includes;

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a Court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, *stridhan*, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bond and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her *stridhan* or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restitution to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

30. Section 3 Explanation Clause II stipulates that “For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes “domestic violence” under this Section, the overall facts and circumstances of the case shall be taken into consideration”.

31. Section 20 contemplates Monetary reliefs which can be granted for the maintenance for the aggrieved person as well as her children. Section 20(2) stipulates that “The monetary relief granted under this Section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed”. Sub Section 3 states that “The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

32. Section 21 speaks about the Custody orders, which reads as under:

“Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent.

Provided that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.”

33. Section 27 of the Act provides Jurisdiction, which reads as under:

“(1) The court of Judicial Magistrate of the first class or the Metropolitan Magistrate, as the case may be, within the local limits of which-

(a) the person aggrieved permanently or temporarily resides or carries on business or is employed; or

(b) the respondent resides or carries on

business or is employed; or

(c) the cause of action has arisen, shall be the competent court to grant a protection order and other orders under this Act and to try offences under this Act.

(2) Any order made under this Act shall be enforceable throughout India.”

34. Section 27 unambiguously stipulates that aggrieved person temporarily residing or carrying out business or employed is also falling within the ambit of the Domestic Violence Act, 2005. Therefore, a person, who is temporarily residing in India or Overseas Citizen of India, if abused economically by the spouse, who is residing in other country, is entitled to seek relief under the Act. The cause of action arises in India, since the aggrieved person is residing in India.

35. In the case of **Robartonyaddu vs. State Of Rajasthan** on 20 November, reported in **Manu/RH/0800/221**, the Rajasthan High Court held : that as per section 2(a) of the Act of 2005, the definition of 'aggrieved person' is given and as per the definition itself, any woman including a foreign citizen who is subjected to domestic violence can maintain an

application before the trial court under the Act of 2005. Not only this, section 12 of the Act of 2005 provides that even an aggrieved person can prefer an application through protection officer seeking the relief under the Act of 2005.

36. The observations of the Supreme Court in the case of **Shyamlal Devda & Ors. vs. Parimala [AIR 2020 SC 762]** also fortifies the fact of maintainability of the application under section 12 of the Act of 2005 in the present case. Para 10 of the judgment rendered in the case of Shyamlal Devda (*supra*) is quoted as under:-

“10. Insofar as the jurisdiction of the Bengaluru Court, as pointed out by the High Court, Section 27 of the Protection of Women from Domestic Violence Act, 2005 covers the situation. Section 27 of the Act reads as under:-”

37. The above observation is also supported by the judgment of the Supreme Court in the case of **Chairman, Railway Board and Others vs. Chandrima Das (Mrs.) and Others [(2000) 2 SCC 465]**. The relevant paras of said judgment read as under:-

“19. It was next contended by the learned counsel appearing on behalf of the appellants, that Smt. Hanuffa Khatoon was a foreign national and, therefore, no relief under Public Law could be granted to her as there was no violation of the Fundamental Rights available under the Constitution. It was contended that the Fundamental Rights in Part III of the Constitution are available only to citizens of this country and since Smt.Hanuffa Khatoon was a Bangladeshi national, she cannot complain of the violation of Fundamental Rights and on that basis she cannot be granted any relief. This argument must also fail for two reasons; first, on the ground of Domestic Jurisprudence based on Constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948, which has the international recognition as the "Moral Code of Conduct" having been adopted by the General Assembly of the United Nations.”

MAINTAINABILITY OF A PETITION UNDER THE HINDU MARRIAGE ACT:

38. The Hon'ble Supreme Court of India took the view that: Recognition of decrees and orders passed by foreign courts remains an eternal dilemma inasmuch as whenever called upon to do so, courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 CPC. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. Judicial pronouncements on the subject are not on virgin ground. Since no system of private international law exists that can claim universal recognition on this issue, Indian courts have to decide the issue regarding the validity of the decree in accordance with the Indian law. Comity of courts simply demands consideration of any such order issued by foreign courts and not necessarily their enforcement. In that context, Supreme Court of India in **Prateek Gupta vs. Shilpi Gupta, [(2018) 2 SCC 309]**, balanced the foreign court order on custody by holding that it is one of the relevant factors without getting fixated therewith. Court

held that:

“32. ... while examining the question on merits, would bear in mind the welfare of the child as of paramount and predominant importance while noting the pre-existing order of the foreign court, if any, as only one of the factors and not get fixated therewith.

39. In the case of **Y Narsimha Rao and Ors vs. Y.Venkata Lakshmi [1991 (3) SCC 451]**, it was contended that foreign divorce decree was an ex parte decree wherein respondent could not contest. The said decree is not recognized in India, as such, petitioner is not entitled for any relief. The SC declined to give its imprimatur to foreign decree which did not take into consideration the provisions of Hindu Marriage Act under which the parties were married. The Supreme Court while interpreting Section 13 of CPC has held that unless the respondent voluntarily and effectively submitted to the jurisdiction of the foreign court and contested the claim which is based on the grounds available in the matrimonial law under which the parties were married, the judgment of the foreign court could not be relied upon. (para 12)..

40. Judgment passed by the Delhi High Court in **Harmeeta Singh vs. Rajat Taneia [2003 (2) RCR (Civil) 197]**, where the husband and wife were of Indian origin. The husband was serving in America. The marriage was solemnized in India and the decree of divorce was granted in USA. It was held that if, the decree is not recognized by Indian Court as per the provisions of Section 13 of Hindu Marriage Act, the husband will be guilty of bigamy if, remarries.

41. In the case of **Rupak Rathi vs. Anita Chaudhary [2014 (2) RCR (Civil) 697]**, wherein a Hindu couple was settled in foreign country. Foreign Court had granted decree of divorce on the ground of irretrievable breakdown of marriage. It was held that ground of irretrievable breakdown of marriage was not valid ground for divorce under Section 13 of the Hindu Marriage Act. Hence, the decree was not binding on the wife.

42. In the case of **Sandeep Kumar @ Sandeep Chugh vs. State of Haryana and Others**, the court held : As regards a previous order of a foreign court, it is only one factor to be taken into consideration. It cannot be determinative and must yield in favour of considerations of welfare of the child.

43. The Hon'ble Apex Court in **Lahari Sakhamuri vs. Sobhan Kodali [(2019) 7 SCC 311]**, in para 51, held: “The doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child, etc., cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.

44. In the case of **Shilpa Sachdev vs. Anand sachdev [2017 SCC Online BOM 8972]**, the Division Bench of Bombay High court observed the Apex court judgment in **M/s. International Woolen Mills vs. M/s. Standard Wool (UK Ltd.)**, wherein it has been held that the decision of a Court given ex-parte on the basis of the plaintiff's plea and the documents, without going into the controversy between the parties, would not be a judgment on the merits of the case. Hence it is not conclusive of the matters adjudicated therein and therefore not enforceable in India. Such a judgment would be in breach of the matrimonial law in force and will therefore be unenforceable under clause (f) of section 13 CPC. (Para 32)

DESIRE AND REASONABLE PREFERENCE OF THE CHILD:

45. In the context of the desire of the child, this Court has independently examined the twin children aged about 15 years and recorded their statements on 24.01.2023 as under:

“This Court while examining the minor boys, namely, Tanush Chava and Tarun Chava both aged about 15 years, the learned Senior Counsel appearing on behalf of the revision petitioner raised an objection. However, there is no impediment since the Civil Revision Petition is against the DVC case and Matrimonial case. Periodical assessment of matured minor boys and their choices and wishes are paramount important.

2. The minor boys, namely, Tanush Chava and Tarun Chava both aged about 15 years, present before this Court and this Court asked the following questions to them:-

Question No.1 – *Are you aware of the dispute between your father and your mother ?*

Answer : *Yes, we had on many occasions requested our dad not to harass our mom.*

Question No.2 – *How long and from when are you be with your mother ?*

Answer : Right from our birth we are living with our mother. Regarding our father, even in United States of America (USA) father used to come only during week end and leave early. Therefore, we did not have much relationship with our father and mother only used to take care of us. We used to spend time only with our mother even during holidays and our father used to be busy with his computer works always.

Question No.3 – *When you came to India ?*

Answer – In December 2020 and since then, we are residing at Chennai, India with our mother only. Our mother only taking care of us in all respects.

Question No.4 – *Do you have any difficulty in pursuing your education in India and why ?*

Answer – As of now, we want to complete our basic education by residing at Chennai, India. There is no difficulty for us in continuing our education from India and classes will be over by 10:30 P.M. and at later point of time, for higher studies, we may decide about pursuing of further higher education in any country, including USA.

Question No.5 – *To whom you want to live with ?*

Answer – We want to live with our mother only.

Question No.6 – *Do you have any wishes ?*

Answer – We want to stay along with our mother at Chennai, India and we used to meet our mother's relatives at Chennai, India and we want to mingle with them and doing

so, for the past about two years.

Question No.7 – Do you want to say anything more ?

Answer : Mother's family members are taking care of us. We are busy with our extra curricular activities like playing Basketball, Chess, Piano, swimming etc. We are busy with our social life and meeting our best friends frequently in Chennai.

Question No.8 – What about your father's character ?

Answer – Our father used bad words against our mother and he used to break things in the house. He also used to hit our mother. When we told our father not to do this, he used to threaten us and asked us to go to bedroom.

Question No.9 – What about your present relationship with your father ?

Answer – When we came to India and our father used to call us for sometime and for the past 6 to 7 months, he stopped calling us and not contacting us until now.

ANALYSIS:

46. In the present case, the respondent / wife along with her twin minor children aged about 15 years are residing at Chennai, India for more than two years and the respondent / wife is raising several allegations regarding 'mental harassment', 'economic abuse' against the revision petitioner / husband. The respondent / wife alleges that she and her twin

children are not supported by the respondent apart from mental harassments being caused to them by the revision petitioner / husband. Therefore, the respondent and her minor children are entitled to seek reliefs from the jurisdictional Court trying the DVC complaint filed by the respondent / wife.

47. That apart, both the petitioner and respondent were born and brought up in India and their marriage was solemnised at Chennai under the Hindu Marriage Act and thereafter, they went to United States of America (USA) and acquired American Citizenship. Now the respondent / wife along with her twin minor children have expressed their intention to reside at Chennai, India and the boys aged about 15 years are capable of deciding about their well being and matured enough.

48. Thus, the very contention of the revision petitioner that the alleged incidents occurred in the United States of America (USA) and therefore, the DVC complaint is not maintainable in India is untenable. After arriving Chennai in December 2020, the respondent / wife and her twin children alleged subsequent mental harassments and economical abuses, which all are to be adjudicated.

49. In the judgment of Rajasthan High Court in the case of **Robartonyaddu vs. State of Rajasthan decided on 20th November, 2021, [Manu/RH/0800/221]**, it has been held that “**any woman including a foreign citizen can be construed as an 'aggrieved person' under the provisions of the Domestic Violence Act**”. Under Section 27 of the Domestic Violence Act, protection is extended to the persons, who are temporary resident of India and Article 21 of the Constitution of India extends the benefit of protection not only to every citizen of this country, but also to a “person” who may not be a citizen of the country. Thus looking from any angle, the respondent, who is aggrieved, is entitled to get protection under Section 12 of the Domestic Violence Act, 2005.

50. The Supreme Court in the case of **Chairman, Railway Board and Others vs. Chandrima Das (Mrs.) and Others [(2002) 2 SCC 465]**, reiterated that right of a Foreign National on par with the Indian citizen under Chapter III of the Constitution of India, cannot be denied. The Domestic Jurisprudence is to be considered based on the constitutional provisions and also on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948, which has the

international recognition as the “Moral Code of Conduct” having been adopted by the General Assembly of the United Nations.

51. The various judgments considered in the aforementioned paragraphs would reveal that the American Citizen, who is an Indian Origin and the Overseas Cardholder is entitled to institute proceedings under the Domestic Violence Act, if she could able to establish cause of action.

52. In the present case, the children are pursuing their education by residing at Chennai. They are allegedly subjected to economic abuse and the children are not supported by their father for education and for other activities. While-so, they are entitled to institute proceedings under the Domestic Violence Act and the issues are to be adjudicated. Pertinently, the revision petitioner is a person of Indian Origin, who married the respondent at Chennai, India and thereafter acquired American Citizenship by naturalisation and frequently visiting India as Overseas Cardholder.

53. As India was a signatory to the Universal Declaration of Human Rights, the Fundamental Rights included in Part III of the Indian Constitution are consistent with the provisions of the UN Declaration of

Human Rights. These are the rights that can be directly enforced against the government if they are violated.

54. Additionally, the Convention on the Rights of the Child, 1989 is a binding agreement which expands on the rights contained in the Universal Declaration. The Convention on the Rights of the Child.

55. Part I, Article 3(1) states that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

56. Article 12 (1) states that “Parties shall assure to the child, who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

57. In view of the above provisions even under Section 21 of the Domestic Violence Act, the respondent is entitled to seek custody of minors, as the minors are found to be matured enough to depose before this

Court about their choices and wishes and capable of deciding what is good for their life. This Court has to borne in mind that the 15 year old twin children are not “mere minors”, but they are “matured minors” and answering the questions in a spontaneous manner with clear thoughts and thus they cannot be treated as properties for the purpose of handing over them to a person with whom the children are not willing to join and reside. Forcible handing over of the minor children aged about 15 years no doubt would result in psychological disadvantages and the minor boys may not be in a position to have peaceful life in the absence of their mother, who is spending her full time along with the children right from their birth.

58. When the 15 years old twin children emphatically state before this Court that they are willing to live along with their mother at Chennai, India, this Court is of an opinion that the said choice and wishes expressed by the minor children at present to be taken into consideration for the purpose of considering the orders of the US Court or the High Court in other proceedings. Thus, forcible handing over of the 15 year old twin minor children shall cause physical and psychological harm to the children. Within another three years, the minor boys will attain the age of majority. They have taken a strong decision to stay along with their mother at

Chennai. Destroying their choices and wishes at this juncture through any Court proceedings would be directly in violations of the judgments of the Hon'ble Supreme Court of India and the child rights recognised worldwide.

59. The observation of the Hon'ble Division Bench of this Court in the order dated 03.01.2023 in HCP No.1689 of 2022, reads as under:-

“12. We had an opportunity to interview the children and we realised that the children are under the complete control of the 1st respondent and they were willing to let go of all those facilities which they enjoyed and were expressing their intention to continue with online classes. In matters of this nature, the Court does not decide based on what the children say, since they are in the midst of a huge turmoil in their life and hence, the duty is cast upon this Court to decide based on best interest of the children.”

60. The Court held that the children are under complete control of the respondent-mother and they were willing to let go off all those facilities, which they enjoyed in United State of America and they expressed their intention to continue with online classes. Based on the said

observations, the Hon'ble Division Bench of this Court arrived a conclusion that the “Court does not decide based on what the children say, since they are in the midst of a huge turmoil in their life and hence, the duty is cast upon the Court to decide based on best interest of the children”.

61. As rightly pointed out by the learned Senior Counsel appearing on behalf of the revision petitioner that this Court cannot sit on appeal for reconsideration. However, this Court is duty bound to consider the binding precedents of the Supreme Court in the matter of custody of the children coupled with the welfare of the child along with their desire and reasonable preference and the right of Overseas Citizen of India (OCI) card holders and the right of OCI card holders to institute legal proceedings in Indian Courts.

62. As elaborately considered in earlier paragraphs, the United Nations Convention of Rights of Child, 1989 is an International Treaty and Article 12 of the said Convention states that “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the **age and maturity of**

the child”.

63. In the case of **Gaytri Bajaj vs. Jiten Bhalla [(2012) 12 SCC 471]**, the Hon'ble Supreme Court of India held that “**The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child** are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor. What must be emphasised is that while all other factors are undoubtedly relevant, it is the **desire, interest and welfare of the minor** which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.”

64. The Karnataka High Court in the case of **Smt.Savitha Seetharam vs. Sri Rajiv Vijayasarathy Rathnam [2020 SCC OnLine Kar 2747}** held that “A child's preference in matters of custody is generally taken into consideration if the child is sufficiently intelligent and mature”. Sub Section (3) of Section 17 of the Guardianship Act stipulates that “If the minor is old enough to form an intelligent preference, the Court may consider that preference”. **Thus, along with the concept of welfare of the**

minor, the inclination and opinion of the minor has assumed significance. If a minor is capable of understanding what is happening around him, his education and future prospects, his views and desires have to be given weightage and it is the responsibility of the Court to ascertain the desire in person. In the very same judgment, in paragraph-27, the Court held that greater economic prosperity of the father and his relatives is not a guarantee of the welfare of a minor and that it does not disturb the presumption in favor of the mother while deciding custody.

65. The Supreme Court in the case of **Smriti Madan Kansagra vs. Perry Kansagra [(2021) 12 SCC 289]**, ruled that “**to decide the issue of the best interest of the child, the Court would take into consideration various factors, such as the age of the child; nationality of the child; whether the child is of an intelligible age and capable of making an intelligent preference; financial resources of either of the parents which would also be a relevant criterion, although not the sole determinative factor**”.

66. In the case of **Nil Ratan Kundu vs. Abhijit Kundu [(2008) 9 SCC 413]**, the Supreme Court held that **“if the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well”**.

67. The Rajasthan High Court in the case of **Goverdhan Lal vs. Gajendra Kumar [AIR 2002 Raj. 148]**, reiterated that **keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to whom he or she wants to live.**

68. Foreign judgment is not the conclusive one and it is a factor to be considered, while considering the best interest of the child along with the wishes, more specifically, expressed by the Child of Intelligence of Maturity.

69. Looking into the various judgments of the Hon'ble Supreme Court of India and the judgment of the High Courts across the country, due weightage is given in respect of the choice and wishes of the children, who

are minors, but matured enough to express their desires. Considering those judgments of the Supreme Court and the spirit of the principles laid down, this Court is of the humble opinion that the directives issued in the Habeas Corpus Petition (HCP) proceedings are running counter to those principles laid down by the Hon'ble Supreme Court of India and the judgments of the Supreme Court are binding precedents as far as this Court is concerned. Thus this Court cannot solely consider the order passed in the HCP and strike off the petitions filed by the respondent-wife in the Indian Courts for restitution of conjugal rights and under the Domestic Violence Act, for various reliefs including custody of children. Thus, the directives in any other proceedings denuded to loose its status as binding orders, as far as the reliefs to be considered under the Domestic Violence Act and the Matrimonial Laws are concerned.

70. The rights of the parties to get reliefs under the Special Enactments / Personnel Laws need not be denied by the Courts. The Hindu Marriage Act and Domestic Violence Act are the welfare legislations for women and therefore, the respondent / wife need not be deprived off from getting reliefs under the Acts, for which, she is entitled. In the present case, the respondent and the twin children aged about 15 years are residing at

Chennai for more than two years and raising several allegations against the revision petitioner / husband and more so, the respondent alleges that they are being harassed by the revision petitioner, who is not maintaining the children as of now and further, economic abuse is also alleged. The nature and scope of Habeas Corpus Petition is incomparable with the proceedings under the Hindu Marriage Act and Domestic Violence Act. Thus, right to seek relief under the Special Enactments by the aggrieved woman shall not be taken away and in the event of preventing the woman, the same would result in infringement of her basic rights under the Constitution and the Special Enactments.

71. Domestic Violence Act provides various reliefs to the aggrieved woman under different circumstances. It is a continuing cause of action. The allegations relating to custody of children and matrimonial disputes are continuing cause and, therefore would not preclude the respondent from seeking reliefs under the Domestic Violence Act and Hindu Marriage Act, which is independent and the nature of proceedings and the procedures contemplated are distinct and different. Thus, the order passed in the Habeas Corpus Petition by this Court cannot be a bar for seeking further or other reliefs contemplated under the Domestic Violence

Act and the Hindu Marriage Act. Though facts are identical, the continuing cause of action are to be taken into consideration. In the present case, 15 years old matured twin children expressed their clear intention in a spontaneous manner that they are willing to live with their mother at Chennai and continue their education and other activities happily. When the matured minors, aged about 15 years are capable of taking a clear decision about their future, forcible handing over of the boys to the petitioner presently residing in United States of America (USA) undoubtedly would be detrimental to their interest and future life.

72. When the matured boys expressed their desires before this Court in unambiguous terms, this Court cannot blindly take a decision, since the cause for matrimonial disputes and domestic violence proceedings including the custody are continuing cause of action and therefore, the petitions filed by the respondent under the Special Enactments cannot be struck off. In the event of denying relief to an aggrieved woman under the Special Statutes enacted for the welfare of the women, it would result in miscarriage of justice and the basic right to life and liberty protected under the Indian Constitution and Special Enactments for women would be violated.

73. When Overseas Cardholders are entitled to live in India indefinitely for their lifetime, they cannot be forced to leave India along with the children, which is in violation of the Fundamental Rights guaranteed to the Overseas Cardholders under the Constitution of India.

74. In the present case, both the revision petitioner and the respondent born and brought up in India and they registered their marriage at Chennai under the provisions of the Hindu Marriages Act, 1955 and they acquired their American Citizenship by naturalisation and now on account of family dispute, the respondent along with the twin children aged about 15 years returned back to Chennai, India and they have taken a decision to reside at Chennai, India peacefully. All these factors plays pivotal role and the Court cannot compel any Overseas Cardholder to leave India except by an Authority of Law.

75. As far as the ex parte orders of US Courts are concerned, though the foreign judgments are not conclusive and it is only a factor to be decided, the facts and circumstances would reveal that the respondent as well as the twin children have taken a decision to reside at Chennai

peacefully and they are not interested to return back to United States as they are terribly afraid of going back, since they have no trust on the revision petitioner. In the event of sending them back to United States, forcibly, they will be practically on the streets in United States and the conscious of this Court does not permit to take such a decision, since the rights ensured under the Indian Constitution to the OCI Cardholders are to be protected.

76. Regarding the petition under the Hindu Marriages Act, 1955, ex parte decree of divorce granted by the US Court, cannot be a sole bar for the respondent to institute matrimonial proceedings in India. Thus, it is for the revision petitioner to contest the case instituted by the respondent before the Indian Courts and such petitions cannot be held as not maintainable, since the marriage between the petitioner and the respondent was solemnised at Chennai and it was registered under the provisions of the Hindu Marriages Act, 1955.

CONCLUSION:

77. In view of the principles laid down by the Hon'ble Supreme Court of India, as elaborately discussed in the aforementioned paragraphs and considering the deposition of the 15 year old twin children before this Court and also the decision of the respondent to continue to reside at Chennai, India as Overseas Cardholder, this Court has no hesitation in arriving a conclusion that the respondent is entitled to institute and maintain matrimonial proceedings, DVC proceedings and any other proceedings under the relevant Statutes in Indian Courts having jurisdiction for appropriate reliefs.

78. Thus, the contentions of the revision petitioner are devoid of merits and accordingly, the revision petitioner is at liberty to contest the litigations filed by the respondent. The respondent is at liberty to seek all necessary reliefs under the relevant provisions of the Statutes before the Court concerned. Considering the facts, circumstances and the statements made by the respondent and the deposition made before this Court currently by the twin minor children aged about 15 years, expressing their desires, this Court is inclined to grant Interim Custody of twin minors in favour of the respondent herein, until the matrimonial disputes and the

domestic violence proceedings are disposed of on merits and in accordance with Law.

79. Accordingly, CRP Nos.3586 and 4156 of 2022 are dismissed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petitions are also dismissed.

01.02.2023

Kak/Jeni/Svn

Index : Yes

Speaking order

Neutral Citation : Yes

To

1.The Judge,
II Additional Family Court,
Chennai.

2.The Judge,
Additional Mahila Court at Magistrate Level,
Egmore,
Chennai.

S.M.SUBRAMANIAM, J.

Kak/Jeni/Svn

C.R.P.Nos.3586 & 4156 of 2022

01.02.2023