Before K. Kannan, J.

DARSHAN KUMAR,—*Petitioner*

versus

PUSHAP LATA,—*Respondent*

FAO No.M-202 of 2002

17th May, 2011

Hindu Marriage Act, - S. 13 - Oath Act, 1969 - S.4 - Oath Act,1873- Ss.5 & 6 Petition for divorce on the grounds of cruelty - Dismissed - Court below allowed minor child to be administered the oath - Reliability of evidence of a child witness.

Held, That in matrimonial proceedings, it could be no more than to test the intelligent preference in custody matters. Any other situation is treading on slippery ground. A child is apt to tutored; It will carry predilections of the parent that it lives with. Dealing with matrimonial matters and the dangers involved in accepting evidence of the child that are inferential assessments of the child.

(Para 8)

Further held, that the child was tutored to say what she has stated in court and issue of evidence of husband's alleged misconduct to be established through the child's evidence cannot be taken.

(Para 11)

Further held, That all the references to Meenu Bala had been hearsay. The imputation of the child that her father had relations with her brother's wife was unfortunate. The brother himself had given evidence that the respondent's versions against his wife was untrue. No self respecting person would come to court to give evidence in favour of his brother, if the brother had any wrong attitudes or motivations against that person's wife. It is most undesirable that any parent could use a child's evidence against the other parent. Unless the children themselves are grown up, the use of evidence of a child in a tender age should at all times be averted. The issue is not merely to what extent the child could be relied upon. On the other hand, the issue is how a matrimonial discord could so seriously

impact a child's psyche and a create a serious trauma that could affect the perception of the institution of marriage itself.

(Para 16)

Dinesh Goyal, Advocate, *for the apellant.*

Piyush Kant Jain, Advocate and Sanjiv Ghai, Advocate, *for the respondent.*

K.KANNAN, J.

I. Trial Court: Husband's failed petition for divorce on ground of cruelty

(1) The appeal has been filed against the dismissal of the petition for divorce on the ground of cruelty under Section 13 of the Hindu Marriage Act. The petitioner had listed several instances of cruelty amongst which the foremost were that the wife was petulant and did not show interest in living with him and his parents and she insisted on setting up a separate home for themselves away from the parents. She had caused physical assaults on the husband. At the trial, the case obtained another focus to say that the wife was imputing extra marital relationships for the husband without any proof or justification and they constituted a grave act of mental cruelty. The trial Court rejected these contentions and upheld the defence of the wife that there had been no fault on her part of the wife and the husband had not established cruelty. The trial court skirted the allegation of cruelty by the wife in her imputations of extra-marital relationship, without a definite finding whether such allegations had been established or not.

II. The husband's grievances, instances of cruelty

(2) The admitted case is that the marriage had taken place between the parties on 19.10.1986, according to Hindu rites. The marriage had been a saga of discord between the parties and misery to both of them. The contention of the husband was that the behaviour of the wife was abusive, harsh and she was aggressive in nature and on some occasions, she had hurled utensils against her husband. She would starve the children out of the spite and beat them up just to make the husband unhappy. Amongst the instances of cruelty, the husband would recount that on an occasion in May, 1994, they were going to Ahmedgarh in a car and when they had

crossed Dhuri, the wife forcibly got down from the car and tried to jump into the nearby river. She had suicidal proclivities and attempted to immolate herself by pouring kerosene over her body. In Februrary, 1998 a theft had been committed in their house and the wife attempted to put the blame on his father, brother Tarsem Chand and his wife to lower the reputation of the members of his family in the eyes of the relatives. The wife was alleged to have made false imputations of illicit relations of her husband with his sister-in-law. Illustrative of the vagaries of ways of wife, the petitioner would state that on the eve of bhog ceremony, soon after the death of the mother on 25.1.1995, the wife left the house of the petitioner leaving the children behind. Their son Pavittar Singla was still in DAV School, Sunam and on 17.8.1995, the boy was illegally taken away from the custody without letting the petitioner know about it.

III. The wife's wholesome denials

(3) Everyone act of cruelty attributed to the wife was denied by the wife. She made counter allegations against the husband stating that the petitioner, his brother and other members of the family used to treat her with cruelty, but she was always ready to join the company of the husband and wanted to live a happy life with him. The children who had been for some time with the father came one by one. She stated that the boy Pavittar had come to her all alone with a head injury and the daughter came later on 14.9.1996. The boy was kidnapped again by the father after two years but he also returned to the mother after the institution of the petition and before trial. Both the children were living with her.

IV. The attempted substantiation of the husband's contentions

(4) At the trial, the petitioner had examined several witnesses in his attempt to prove the instances of cruelty which he was attributing to the wife. PW1 Ruldu Ram who was an acquaintance of both parties said that he had visited the house 5-6 times and during all those occasions, he had heard the wife telling her husband that he must set up a house separately from his parents. He also said that he was personal witness of several quarrels between the husband and the wife and he was a personal witness to an incident when the wife had quarreled with husband and left the house

even before the bhog ceremony soon after the death of his mother. PW3 Sanjay Kumar was the maternal uncle of the petitioner. He had said that he used to visit them when the parties were living together at Old Mandi, Sunam. He claimed that he had seen the wife throwing utensils on her husband and also witnessed to the wife causing physical assaults including catching hold of her husband's hair and pulling him. He also alleged that the wife had alleged illicit relations of the husband with the wife of his brother. PW4 was his brother Tarsem Chand who also spoke about the alleged improper conduct of the wife in refusing to cook food for her husband and the repeated quarrels that she used to pick up with her husband. Before the bhog ceremony the wife created a scene and blamed her husband as living with his (PW4's) wife and that she left the house saying that she would not live with them. He would corroborate the contentions raised by the husband relating to the false innuendos against the relations about the theft in the house and the instances when the wife had taken away children one by one without the consent of the husband. The petitioner relied on some of the letters written by the wife and since the wife refused to admit her signature in P 15, where she was reported to have made insinuations of theft of stridhan articles by the other relatives of the husband at home, the signatures were also attempted to be proved through the witnesses, PW5 and PW8.

V. Wife's imputation of matrimonial infidelity against husband through child

(a) Statement by the child, whether could be administered oath - No

(5) The wife who was denying that she was making any false imputations against her husband, however, allowed her daughter to be cited as a witness as RW1. She was 12 years of age and the trial Court recorded her evidence as follows:-

> *"Note:The witness is child and I have put her certain questions to know her and test her knowledge and I am satisfied that the child Loveleen Singla is able to appear as witness as she understands the sanctity of oath. She be administered oath.*

The issue of whether a child could be administered with oath was examined in the context of Indian Oaths Act, since repealed, in **Rameshwar S/o Kalyan Singh *versus* The State of Rajasthan (1).** Section 5 and the proviso are direct answers to the query. The proviso to Section 5 of the Indian Oaths Act, 1873, prescribes that -"Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 6 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth." This proviso is repeated in the Oaths Act, 1969 in section 4 and the position stands the same now that requires no oath to be administered to the child. In **Dattu Ramrao Sakhare and ors. *versus* State of Maharashtra (2),** it said**,**

> *"…In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored..."*

(b) Child witness generally, statutory prescriptions, court's duty, et al

(6) The reliance that could be placed on child's testimony is hemmed in with several cautious approaches. The Evidence Act does not place a bar but requires the Court to exercise due care:

> *"Who may testify.- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving*

(1) AIR 1952 SC 54
(2) (1997) 5 SCC 341

rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation.— A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

In **Nivrutti Pandurang Kokate & Ors. *v.* State of Maharashtra (3),** the Supreme Court cautioned the judge that places the child in a witness stand thus:

"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

It is not even necessary to administer oath to a child.

(7) In a judgment of the Supreme Court in ***State of M.P. versus Ramesh & Anr. Criminal Appeal No. 1289 of 2005, decided on March 18, 2011,*** the issue was the extent of reliability on a child witness, while dealing with a criminal case. The court set the boundaries thus:

".....It is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the

(3) (AIR 2008 SC 1460)

truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate...."

In **Mangoo *versus* State of Madhya Pradesh (4),** this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

8. In **Panchhi *versus* State of U.P. (5),** this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that "the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and *thus a child witness is an easy prey to tutoring.*"

9. In **Nivrutti Pandurang Kokate *versus* State of Maharashtra (6),** this Court dealing with the child witness has observed as under:

"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack

(4) AIR 1995 SC 959
(5) AIR 1998 SC 2726
(6) AIR 2008 SC 1460

of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

10. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. (Vide: **Himmat Sukhadeo Wahurwagh *versus* State of Maharashtra (7),"**

11. In **State of U.P. *versus* Krishna Master, (8)** this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully

(7) AIR 2009 SC 2292

(8) AIR 2010 SC 3071

and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

12. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide: **Gagan Kanojia *versus* State of Punjab (9).**

13. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

(c) If the child passes the test of suitability, it shall be evidence on what is direct evidence.

(8) A statement that is judgmental however is too risky to rely upon. Instances where courts have relied on by courts are in the context of criminal trials in what the child has been an eye witness to an incident. In matrimonial

(9) (2006) 13 SCC 516)

proceedings, it could be no more than to test the intelligent preference in custody matters. Any other situation is treading on slippery ground. A child is apt to tutored; It will carry predilections of the parent that it lives with. Dealing with matrimonial matters and the dangers involved in accepting evidence of the child that are inferential assessments of the child, the Calcutta High Court said **Smt. Ananta *versus* Ramchander (10) :**

> "*The child was then only about 7 years old. His deposition was* recorded in September, 2007. By that time, he was 11 years old. A child would not ordinarily lie. But being of tender age, the likelihood of he being tutored cannot be ruled out especially when he had been residing with his father since the alleged separation in 2003. Quite apart, it is unlikely that a child of 11 years would remember every minute detail of his early life that he would not be inclined to have his mother stay with him or his father. Whether the marriage had irretrievably broken down beyond repair is a question which has to be ensured having regard to the facts of the particular case. But the evidence on record would certainly not justify a decree of divorce..
>
> The evidence on which the ground of desertion has been found to be proved is that of the child. The statement made by the child that the appellant voluntarily left his father's house in the year 2003 although has weighed in the mind of the learned Trial court, however, has not inspired the confidence of this Court. A child of seven years is not so mentally developed so as to understand whether leaving the house by his mother was voluntary or not, particularly when he was not present in the house when she left the house which he noticed after returning from school. It is also impossible for such a child to acquire any knowledge at the age of seven years that it is his experience that his father was affectionate to his mother. Although we learned Trial Court has been impressed by the evidence of the child as one coming from the heart and ruled out that he was not a tutored witness, this Court is unable to share the same view. Evidence of a child witness has to be scrutinized carefully. A child witness is prone to be influenced by his elders and in a case of the present nature

(10) AIR 2009 Cal 167

where the appellant being a working lady had to detach herself from the family for official reasons, it is quite natural that being in the company of the father he may develop a predisposition of *giving a version favourable to him.*"

(9) In a judgment of the Madras High Court in a matrimonial dispute in **S. Amutha *versus* Manivanna Bhupathy (11)** beyond custody matters, the qualifications of relying on child's testimony was lucidly summarized:

"31. Therefore, after the journey into various binding decisions, the following legal prepositions emerge:

(i) There is no disqualification for a child witness;

(ii) The Court must conduct a preliminary enquiry before allowing a child witness to be examined;

(iii) The Court must be satisfied about the mental capability of a child before giving evidence;

(iv) While sifting the evidence, the possibility of a bias or the child being tutored should be taken note of;

(v) The evidence of a child witness should be corroborated;

(vi) The child cannot be administered oath or affirmation and it is incompetent to do so;

(vii) The Court cannot allow a minor to make an affirmation; [This will create difficulties for a child as in the Civil Courts in all the proceedings Order 18 Rule 4 CPC will have to be followed making it mandatory to file proof affidavits before cross examination]

(viii) The preference shown by a child is an important factor in child custody matters;

(ix) A child giving testimony in various fora is entitled to an extra care and special arrangements. In other words, a child friendly atmosphere must be created in Courts." Making reference to the impropriety of securing an affidavit *from a child, the court continued*:

(11) (AIR 2007 Mad 164)

"33. Further, the trial Court failed to see that when a child is incompetent to sign an affidavit and has also been in the custody of the respondent / husband for over one year before the date of filing the affidavit, it would likely to have been influenced by the respondent / husband and it would not have been an independent person in deposing before the Court. The fact that the affidavit filed by the minor Aravind contains more details than what has been found in the original petition filed by the respondent / husband clearly shows that the child was completely swayed by the father's influence. The fact that the child has spoken about the incidents over which it may not have any direct knowledge will clearly show that the said child witness was clearly tutored. In fact, the affidavit itself clearly shows that he was aware of the fact that his father was filing divorce application and using language, which are mainly legal in nature, is not expected of a child. The fact of ascertaining the mental capability of the child (which was 11 years old) at the time of examination by the trial Judge, cannot *take the case of the respondent any further.*"

Warning the subordinate courts of stretching the relevance of child's testimony beyond custody matters, the Court said,

"34. The present case is not one of custody petition or where the prosecution is trying to establish a crime against the child or a child witness being indispensable in dealing with a detection of a crime. It is a pure case of matrimonial discord of the husband with his wife and the husband having approached the Court on the ground of desertion for relief. For the child throughout his life, requires both the father and mother and in a dispute of this nature, he can never take any side which in the long run, may not be in the interest of the child, which the Courts often emphasize as being paramount importance in dealing with an issue of this nature.

36. As rightly portrayed, the bows are the parents and the children are the living arrows, which are sent forth by them and the bending in the archer's hand should be only for gladness and not for misery as in the present case, where the *husband wants to use the child against his mother.*"

(10) As powerful as the imagery of archer and the bow, the judgment in ***Anshuman Sharma v Monica Gupta*** brings out the adverse impact of matrimonial disputes on children and the drastic consequences thereof:

> "*For both parents and children, the most difficult and stressful* phase of the divorce process is usually the period leading up to and immediately following parental separation and divorce. In addition, the process of unraveling and family dissolution continues, coupled with numerous potentially life-altering transitions for children."
>
> In the ever increasing disputes in the matrimonies the worse sufferers are the children, who not only get deprived of love, care and affection of one of their parent but practically become target for the parties to score over one another in this mad race and obsession of winning possession, exclusive control and custody of the children. The children have practically no role in breaking of the marriage, but he or she suffers. The marital discord sometimes reaches a stage where the parties are unmindful of what psychological, mental and physical impact it has on children. Children whose parents divorce witness negative family interaction prior to a divorce and also experience many life transitions and strained familial relationships after divorce. Marriages that end in divorce typically begin a process of unraveling, estrangement, or emotional separation years before the actual legal divorce is obtained."

(d) The quality and content of child witness in this case

(11) Through her evidence it was attempted to show that on the bhog ceremony of her grandmother, she along with her brother were detained in a room and her mother was thrown out of the house. The child was told that the mother had gone to the market, but she never returned. The child stated that his father started living with Anuradha wife of elder brother of the father and that she used to give the entire domestic work to her and taunt her on her eating habits. The child also gave evidence to the effect that after she had come away from her father and living with her mother, Pavittar who was still living with his father used to come and meet them secretly. She claimed that her brother informed her that the father had

married a person Meenu Bala and that she used to harass Pavittar. The child had also given details of Meenu Bala as daughter of Faqir Chand of Sangrur. In this case, the child's evidence that her father was living with his brother's wife is discarded as judgmental and not a matter of act. Its evidence that her brother had told her that their father had married another woman by name Meenu is discarded as hearsay. The child in my view, was tutored to say what she has stated in court. At any rate, I cannot take the issue of evidence of the husband's alleged misconduct to be established through the child's evidence and I will look for corroboration.

VI. The evidence on the side of the wife

(12) RW2 Asha Rani who was an acquaintance of the wife gave evidence to the effect that in the year 1997 she had been a witness to an event when she was called by telephone by the respondent to say that she had been beaten by her husband and required an admission in the hospital. The cousin of the wife RW3 Ashok Kumar gave general evidence to the effect that a lot of money had been spent for the marriage of the petitioner with the respondent and dowry articles had been given that included a car. Mankar Garg was examined as RW4. He was the respondent's nephew and he had visited the parties at Ahmedgarh as well Barreily. He gave evidence to the effect that the petitioner used to harass the respondent at the instance of his brother and to his knowledge, the respondent had never tried to commit suicide. He also stated that the petitioner had extra-marital relations. RW5 Poonam Bansal was the sister of the respondent who also gave evidence with reference to the expenses incurred by the father in conducting the marriage on a grand scale and the periodical taunts which the petitioner was giving to the wife and the family members by demanding money for setting up some business. She also stated that the petitioner had married another woman by name Meenu Bala and though she had not actually seen her, the entire neighborhood knew about it. RW6 Jatinder Kumar was examined to speak about the extravagant marriage that the respondent's father had celebrated for her daughter. The respondent examined herself as RW7.

VII. A case made for the husband for granting the relief of divorce

(13) The events that were referred to in particular in the course of arguments by the learned counsel appearing for the appellant were: (i) The wife had committed cruelty by writing articles in a Punjabi journal in a

pseudonym that her husband was living with his brother's wife. This article was perceived by many as auto-biographical and people believed that the references to the husband of the author was indeed the petitioner himself and the insinuations were directed to him; There were untrue allegations of the wife and her witnesses about the husband having married another woman; (ii) The letters written by the wife to the petitioner and the members of the family contained references to the scandalous untrue allegation that the petitioner's husband had been guilty of theft; (iii) Several witnesses had been personal witnesses to the wife's general petulant ways of physical assaults on her husband.

(14) The articles written in Punjabi were exhibited as Ex.P1 to P4. The articles were narrations of travails of a woman by the cruel acts of her husband, who had extra-marital relations. The wife did not disown the articles at the trial, but she stated that it was written as fiction and there was no reason for any reader to believe that she was making any particular reference to the cruel acts of her husband. Learned counsel stated that the husband had given evidence to the effect that the insinuations contained in the article were of alleged harassment meted out by the husband to the wife and since they referred to him , they were *per se* libelous. The counsel stated that the attempt of the wife to say that they were merely fictional, could not be accepted since in the perception of any member of the public reading it, it would have definitely cast an impression that she was making a reference only to her husband and publication of such false materials against her husband would constitute cruelty. The articles found did not say that they were biographical accounts of the wife. They were written as stories and even the attempt of the petitioner's counsel was to say that car numbers hadbeen changed but with remarkable similarity to the actual car number. The names had also been changed, but phonetically similar names had been given only to make it appear as though they were stories of fiction. A reference to these stories by the counsel was to show that she had made definite allegations of extra marital relationship of her husband with his brother's wife. The counsel would argue that while she was interested in contending that she was not making any wild allegations against her husband, but she was just doing that through her articles. As regards the reference to the letters written by the wife and the cruelty alleged to have been meted out by her, it must be observed that in none of the letters was there any

allegation of the wife against the husband of extra marital relationship but they seemed more like wailings of a woman. These letters, the trial court reasoned, must be seen only as entreaties by a woman to her husband and relatives to mend their ways and accept her into their fold.

(15) In a matrimonial setting, the one weapon that can surely bring asunder the fabric of harmony between the spouses is to doubt the fidelity of the spouse and it if comes in open, it is undeniably a manner of bringing a denouement to a joint living. If such a statement were to be a false imputation, then it would indisputably be the most violent form of cruelty that one spouse can visit against the other. I am not prepared to place any reliance on the fictional references about matrimonial infidelity on her husband but that was exactly what she was doing though her own evidence and the evidence of the witnesses. She was speaking though her child to state that the child knew that her father was living with his brother's wife. The child's hearsay evidence of what she heard her brother say that the father had married another woman by name Meenu Bala. Both PW4 and PW5 said that the petitioner was having extra-marital relations but no one admitted to have any direct knowledge. The respondent herself gave evidence to the effect that she knew that the husband had married another person by name Meenu Bala and she had a son by name Rahul through her.

(16) All the references to Meenu Bala had been hearsay. The imputation of the child that her father had relations with her brother's wife was unfortunate. The brother himself had given evidence that the respondent's versions against his wife was untrue. No self respecting person would come to court to give evidence in favour of his brother, if the brother had any wrong attitudes or motivations against that person's wife. It is most undesirable that any parent could use a child's evidence against the other parent. Unless the children themselves are grown up, the use of evidence of a child in a tender age should at all times be averted. The issue is not merely to what extent the child could be relied upon. On the other hand, the issue is how a matrimonial discord could so seriously impact a child's psyche and a create a serious trauma that could affect the perception of the institution of marriage itself.

(17) If we must be looking at the evidence of RW1 only for the purpose of eliciting that whether the wife had proved a case of matrimonial wrong against her husband, then it is better to discard the whole evidence.

She has definitely made some inferences which may not be appropriate for her age. A man's proximity to a brother's wife could be seen in the Indian context treating her, *a la* his own mother. The hearsay evidence of what her brother told her about, namely, that the father had married a person Meenu Bala cannot also fit into the acceptable parameters of legal evidence. Section 118 of the Evidence Act must be used only to secure statements by a Court to frame its own opinion as corroborative to other facts already established. I would discard the evidence of RW1. Except to elicit intelligent preference in custody matters, it would be dangerous to enter findings of cruelty or matrimonial infidelity through the evidence of the child. I would cast no more value to the evidence of the child than her statement in Court that she wanted to live with both of them, her father and mother in the same house. I shall still use the evidence only for eliciting how the child was taking the separation between the father and mother. She was not prepared to discard her father as unworthy man. She was, however, trying to look for a life in future where she could live comfortably with both her parents living under the same roof.

VII. Court's power to give direction for permanent alimony.

(18) It is just not the issue of allegations of husband's alleged profligate ways. Witness after witness spoke about how the wife had hurled verbal epithets and physical violence on the husband. The wife had her own tales of woes as well, but I am of the view that the wife had brought the marriage to an unworkable situation. The marriage has gone through a virtual irreconcilable spin and there seems no prospect for a patch up. The wife has a professional career to mind; the children are with her to provide the emotional support. The husband is perhaps no paragon of virtue but I will not go as far as to say that he had brought the matrimonial discord to a point of no return. It was the wife's doing principally. The curtains down for the marriage ought to be through a decree for divorce. It becomes imperative to consider the terms for dissolution.

(19) In **Kuldip Chand Sharma *versus* Geeta Sharma (12),** the Court held that:

> "The provisions of Section 25 are ancillary to the main proceedings under the Act and must be liberally construed and the limitations

(12) AIR 1977 Delhi 124 = ILR 1976 Delhi 854

upon s the exercise of power are contained in the provision itself and need not be discovered outside the Act. This is clarified by the provisions contained in sub-Section (3) of Section 25 of the Act, where the circumstances in which the alimony is likely to be withdrawn are specified. In my opinion, there is no scope for enlarging the circumstances when alimony may not be granted and I have no doubt that the benefit of the provision is not to be denied to the parties who have suffered the misfortune to have their marriage dissolved by the decree of the court, merely on account of the passing of the decree, if they are otherwise entitled to the maintenance and it was certainly not the intention of the law that the parties to the dissolved marriage must suffer further misery of *starvation without grant of alimony.*"

Though there is no specific application for maintenance under Section 25, the appeal itself came to be listed for final hearing only when the wife appearing in person wanted immediate consideration of her appeal and to grant her maintenance.

(20) In **Umarani *versus* D.Vivekanandan (13),** it was held that :

"*It is true that Section 25 of the Act contemplates an* application for the said purpose. When the lower court has not disposed of Section 24 application in time and has disposed of along with the main application, it should have disposed of the application under Section 25 also. Therefore, one more litigation could be avoided and on the basis of very same order, the maintenance could be provided for the wife and child.... The Act also does not say that there should be a written application. It only says that an application made to it. It can also be on the basis of oral application. Under these circumstances, I feel that the order of the lower court requires modification when the averments in the affidavit remain *unchallenged. The quantum awarded is also not proper*."

(13) 2000(2) CTC 449 = II(2000) DMC 422 = (2000) II MLJ 234

(21) In **Rajan Vasant Revanka *versus* Mrs. Shobha Rajan Revankar (14),** the following observation with respect to Section 25 of the Hindu Marriage Act were made:

> "*As far as granting relief under Section 25 of the Hindu* Marriage Act is concerned, it contemplates that the Courts exercising jurisdiction under the Act may, at the time of passing any decree, pass an order for maintenance of the spouse awarding a monthly or periodical sum of money which can be directed to be paid having regard to the income of the parties, property held by them and the conduct of the parties *and other circumstances of the case*."

(22) In **Parvati Misra *versus* Jagatnanda Misra (15),** it was stated that:

> "*No arithmetic rule can be adopted as a matter of course in* fixing the amount. Several relevant aspects depending on the facts of each case have to be considered, e.g. income and properties of the husband, and income of the wife. Although Section 25 recognizes the right of the wife and the husband to be in equal jura in the matter of maintenance, when a decree is passed granting relief in any matrimonial cause, it is primarily intended to secure maintenance for the wife in whose favour is made granting any of the reliefs under the Act..... Means of the *parties and their conduct are the guiding factors.*"

(23) In **Chand Dhawan *versus* Jawaharlal Dhawan (16),** it was held that:

> "*We have thus, in this light, no hesitation in coming to the view* that when by court intervention under the Hindu Marriage Act, affection or disruption to the marital status has come by, at that juncture, while passing the decree, if undoubtedly has the power to grant permanent alimony or maintenance, if that power is

(14) AIR 1995 Bom. 246 = 1995(1) Bom. CR 47 = (1994) 96 BOMLR 592 = I (1995) DMC 532

(15) (1995) 1 DMC 77 (MP)

(16) 1993 (3) SCR 954 = 1993 SCC (3) 406

invoked at that time. It also retains the power subsequently to be invoked on application by a party entitled to relief. And such order, in all events, remains within the jurisdiction of that court, to be altered or modified as future *situations may warrant.*"

(24) In **Usha Tripathi *versus* Dinesh Kumar Tripathi (17),** it was stated that:

"*The concept of conduct of the parties must not be introduced* in Section 26 and for maintenance and education of minor child and right of children to get maintenance and education from the financially able parent is an absolute one, irrespective of the fact with whom they live. It is true that Section 25 does not speak of maintenance for children, but Section 26 does, and there is no bar under the law to give a consolidated amount to the mother of the children for herself and her *children, who live with her.*"

I X. P resent disposition

(25) The husband shall pay as permanent alimony Rs.7500 per month for the wife and her children from the date of this judgment. The wife shall be at liberty for modification of the quantum of maintenance by appropriate details and the educational needs of the children. The father shall have rights of visitation to the children during their minority during school holidays. The modalities could be worked out in independent proceedings by resort to the mediation centre attached to the court. If any petition is filed before the competent court, the same shall be attended to by meaningful intervention allowing for retention of custody by the mother with visitation rights to the father on dates that are fixed after eliciting the respective parties' views and the convenience of the children that does not affect their school schedule.

(26) The decision of the trial court is set aside and the appeal filed by the husband shall succeed. The appeal is allowed but subject to the directions for permanent alimony and for custody of children.

M. JAIN

(17) 2000(1) Femi Juris CC 211 (All)