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IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 24TH DAY OF FEBRUARY, 2022

BEFORE

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

WRIT PETITION NO.15356 OF 2020(GM-FC)

BETWEEN:

MR. MICHAEL GRAHAM PRINCE,
AGED ABOUT 49 YEARS,
S/O TERRY GRAHAM PRINCE,
R/AT A017, SOBHA CORAL,
JAKKUR, BANGALORE – 560 064.

… PETITIONER

(BY SRI.KIRAN SEBASTIAN ROZARIO, ADVOCATE)

AND:

MRS. NISHA MISRA,
AGED 51 YEARS,
W/O MR.MICHAEL GRAHAM PRINCE,
R/AT GA REGENCY ALANDON,
2 WARE ROAD, FRAZER TOWN,
BANGALORE – 560 005.

… RESPONDENT

(BY SMT. JAYNA KOTHARI, ADVOCATE FOR
SRI. ROHAN KOTHARI, ADVOCATE FOR C/R
(CP NO.10716/2020)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO SET ASIDE THE ORDER ON IA NO.4 DATED 25.9.2020 IN MC NO.1761/2018 PASSED BY THE HONBLE 1ST ADDL. PRINCIPAL JUDGE FAMILY COURT AT BENGALURU VIDE ANNEXURE-A AND ALLOWING THE PRAYER OF THE PETITIONER IN IA NO.4 IN M.C.NO.1761/2018 AND ETC.,

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDER, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

What Justice Oliver Wendell Holmes in his book '*The Common Law*' (1881) at the very first page had said, should prelude this judgment:

> *"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become..."*

2. The estranged spouses are fighting this legal battle. Respondent – wife has filed MC No.1761/2018 u/s. 27(1)(a) & (d) of the Special Marriage Act, 1954 r/w Sec.18 of the Foreign Marriages Act, 1969 seeking a decree for dissolution of marriage and for the retention of child custody. Petitioner – husband had filed application in I.A.No.4 u/s. 151 of CPC, 1908 "*to dismiss/reject the divorce petition*"; learned 1st Addl. Principal Judge, Family Court, Bangalore, dismissed the same vide order dated 25.09.2020 holding that the native court has jurisdiction to try the subject matrimonial cause. Aggrieved thereby, petitioner is knocking at the doors of Writ Court.

3. After service of notice, respondent – wife having entered appearance through her counsel has filed the Statement of Objections on 09.03.2021 resisting the Writ Petition. Learned Senior Advocate appearing for the respondent makes submission in justification of the impugned order and the reasons on which it has been constructed. Having argued additional reasons, she seeks dismissal of the petition as being devoid of merits.

4. FACTS IN BRIEF:

(a) Petitioner – husband, is a 'Christian by faith' and Respondent – wife is a 'Hindu by faith'; both they are British nationals; their marriage was solemnized on 20.02.2000 according to '*Hindu Arya Samaj rites & customs*', in the presence of family members & friends at Mumbai; subsequently, a civil marriage ceremony was undertaken on 18.03.2000 in United Kingdoms; a Certificate of Registration evenly dated has been obtained by them.

(b) For a few years, their married life went well and the couple begot a girl child namely Tiya on 21.04.2006 in UK; this child too happens to be a British national; after this new arrival to the family, the couple has been residing in India, is not in dispute. Both they are employed too; the respondent obtained '*Overseas Citizens of India Card*'

(hereafter OCI Card) on 27.06.2006 u/s. 7B of the Citizenship Act, 1955; similarly, petitioner also obtained OCI Card on 13.07.2017; the temperamental and other differences having cropped up between the couple, the respondent filed M.C.No.1761/2018 seeking a decree for dissolution of marriage on 03.04.2018. Petitioner had filed the subject application seeking dismissal of the M.C. on the ground of lack of jurisdiction contending that it is only the English Courts that have it; the same has been rejected vide impugned order.

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:

(a) What the Apex Court observed as under in **JOSEPH SHINE vs. UNION OF INDIA, (2019) 3 SCC 39** at page 76 has been profitably reproduced:

> *"…the essentiality of the rights of women gets the real requisite space in the living room of individual dignity rather than the space in an annexe to the main building. Individual dignity has a sanctified realm in a civilised society. Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity. And, it is time to say that a husband is not the master. Equality is the governing parameter…It is advisable to remember what John Stuart Mill had observed: "The legal subordination*

> *of one sex to another — is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a system of perfect equality, admitting no power and privilege on the one side, nor disability on the other." [John Stuart Mill, On Subjection of Women, Chapter 1 (1869).]""*

Our constitution provides for equal protection of the laws under Article 14, this also includes gender – equality, elimination of a gender-based differentiation in the pursuit of legal remedies, the right of non–discrimination on the basis of gender under Article 15 and the right to life under Article 21 that includes the right to live with dignity. Race, caste, sex, place of birth etc., manifest as organizing categories of an individual's life, the aim for egalitarianism as emanating from our constitutional paradigm places as an imperative *'the equal worth of liberty'* and *'truly fair equality of opportunity'*. In bringing about this conducive and egalitarian atmosphere for its citizenry, there exists a *positive duty upon the State as readily apparent in the context of welfare entitlements wherein the State must adopt affirmative steps to alleviate poverty and the major sources of economic and social non – freedom* vide **K.S PUTTASWAMY vs. UNION OF INDIA** (2017) 10 SCC 1.

(b) As a necessary corollary of the above, in matrimonial causes the precept of *'spousal–equality'* as a necessary facet of gender–equality enshrined u/a 14 of the

Constitution must be given due recognition i.e., '*truly fair equality of opportunity'* for both persons in the marriage in terms of opting into marriage & opting out, i.e., dissolution of marriage. Allowing the husband to curtail the *'exit'* option of the wife, on the ground of lack of jurisdiction or such other factors militates against our constitutional philosophy. It is also pertinent to state that the principle of *'spousal–equality'* is premised on the provision of *effective freedom* to both parties to determine the nature of their lives, different styles and ways of living. At this juncture it would be profitable to recall what Martha C Nussbaum in her book "*Woman and Human Development: The Capabilities Approach"* Cambridge University Press (2000) at page 69 states:

> *"…a theory of justice must be cognizant of the different situations of distinct lives, in order to distribute not only liberty, but also equal worth; not only formal equality of opportunity, but also truly fair equality of opportunity…We want an approach that is respectful of each person's struggle for flourishing, that treats each person as an end and as a source of agency and worth in her own right. Part of this respect will mean not being dictatorial about the good, at least for adults and at least in some core areas of choice, leaving individuals a wide space for important types of choice and meaningful affiliation. But this very respect means taking a stand on the conditions that permit them to follow their own lights free from tyranny …"*

(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) It is admitted in the pleadings that the parties have undergone marriage ceremony in accordance with the rites & rituals of Hindu Arya Samaj; thus, they acquired marital status in India and in accordance with *lex loci* i.e., the Arya Marriage Validation Act, 1937; Section 2 of this Act saves the marriage of the kind subsequently, they got registration of civil marriage in U.K. does not alter their spousal status; far from that it strengthens the same; a subsequent official ceremony of marriage that took place in their country would not replace the existing marital status in *rem* and create a new one; 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 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; at least, while construing the provisions of domestic law, they need to be adverted to; keeping this in mind, the word '*citizen'* occurring in Sections 4 & 18 of the Foreign Marriage Act, 1969, needs to be liberally construed to include a foreigner who holds OCI Card and resides in India. It is not prudent to insist that what the provisions of the statutes meant to the vision of its makers then, must mean to the vision of our time. They should be interpreted to meet and cover changing conditions of social and economic life. The law

states not rules for the passing hour but the principles for an expanding future. Otherwise, it will not be living law of the people but would remain as a black letter on a white paper. Such a purposive construction serves the Parliamentary object of this Act which vide Section 18 refers to certain provisions of the Special Marriage Act, 1954. The march of law and more particularly family law from April to May and to the June of its life, as of necessity happens in the judicial process in all civilized jurisdictions where boundaries of nations are loosing significance in a shrinking globe.

(g) The contention of learned counsel for the petitioner, that domicile being a pre-condition for the institution of matrimonial cases, the Court below could not have entertained the divorce petition of the wife, does not much come to his aid. Section 18 of the 1969 Act and Section 31 of the 1954 Act prescribe "residence" for invoking the jurisdiction of Family Court. The word 'residence' is not prefixed by the word 'ordinarily' and thus these provisions are a bit in variance with usual drafting. The absence of prefix gives an indication that the word 'residence' needs to be given an expansive meaning; after all, law is not the slave of dictionaries; words employed in a statute do not have a fixed meaning; the contours of their meaning vary with the run of time. Statutes do not suffer from *rigor mortis*. Admittedly, the respondent–wife has been

residing within the jurisdictional limits of the Court. Thus, these provisions are ***'citizenship neutral'*** but ***'domicile centric';*** it hardly needs to be stated the domicile involves the *factum* of residence and the intent to reside indefinitely; these ingredients galore in this case. It is profitable to advert to '**Halsbury's Laws of England**' (3rd Edn.) Vol. VII at paragraph 26: *"A person's domicile is that country in which he either has or is deemed by law to have his permanent home".*

(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 the asserter.

In the above circumstances, this Writ Petition being devoid of merits is liable to be dismissed and accordingly, it is, costs having been made easy.

Nothing observed hereinabove shall influence the trial of & decision making in the case.

Learned judge of the Court below is requested to try & dispose off the subject matrimonial case as expeditiously as possible.

This court places on record its deep appreciation for the able assistance rendered by the Law Clerk cum Research Assistant, Mr.Faiz Afsar Sait.

Sd/-
JUDGE

Snb/