
(2015) 05 RAJ CK 0158

In the Rajasthan High Court

Case No : Civil Writ Petition No. 14726/2013 and Civil Misc. Stay Application
No. 12315 of 2013

Vishal Kaushik

APPELLANT

Vs

Family Court and Others

RESPONDENT

Date of Decision : 26-05-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 19(2), 21, 227, 353
Evidence Act, 1872 — Section 122, 65, 65-A, 65-B
Family Courts Act, 1984 — Section 10, 11, 14
Hindu Marriage Act, 1955 — Section 13
Telegraph Act, 1885 — Section 5(2)

Citation : AIR 2015 Raj 146 : (2016) 1 RLW 693 : (2015) 3 WLN 526

Hon'ble Judges : Mohammad Rafiq, J

Bench : Single Bench

Advocate : Peush Nag, for the Appellant

Final Decision : Dismissed

Judgement

Mohammad Rafiq, J.—This writ petition has been filed by the petitioner, Vishal Kaushik, challenging order dated 26.07.2013, whereby seven applications filed by him, respectively on 15.06.2013 (Annexure-3), 21.06.2013 (Annexure-4 and 5); 28.06.2013 (Annexure-7); 19.07.2013 (Annexure-8, 9 and 10), were dismissed by Family Court, Ajmer (for short "the Family Court").

2. Briefly stated, the facts of the case are that the petitioner filed a divorce petition under Section 13 of the Hindu Marriage Act, 1955 before the Family Court, Haridwar (Uttarakhand) in September, 2008. In that application, the petitioner alleged that Respondent No. 2-wife (for short "respondent-wife") caused mental cruelty to him by different means, especially because she had extra marital affairs with a person named Kapil Rana, with whom she even had physical relationship. She used to constantly meet him at various places including at the flat of said Kapil Rana and petitioner's flat. Respondent-wife

contested the divorce petition by filing written statement wherein she denied all the allegations. Eventually, the divorce petition came to be transferred by order of the Supreme Court to Family Court at Ajmer, on the ground of convenience of the respondent-wife. Since the proceedings before the Family Court were getting delayed, the petitioner filed S.B. Civil Writ Petition No. 17485/2012 before this Court. On undertaking of the petitioner that he shall adduce his evidence within one month from the date next fixed before the Family Court, the writ petition was disposed of vide order dated 01.11.2012 with direction to the Family Court to give reasonable time to the respondent-wife, not exceeding three months and make efforts to decide the divorce petition at the earliest.

3. When evidence of the petitioner was concluded, the matter came up before the Family Court on 15.06.2013 for recording statement of the respondent-wife and her witnesses. She produced herself as NAW-1 on that day. The petitioner moved two applications on that very day. First application was filed for placing on record original cassette with a DVD, which was marked as Exhibit-1 and camcorder (Camera), on which recording was made, charger of camcorder and the bag in which camcorder, charger and cassette were kept. Second application was moved with the prayer that the original cassette (Exhibit-1) and DVD be sent for FSL examination to determine their genuineness. Family Court dismissed the first application without seeking reply from the respondent. With regard to second application, the Family Court directed the petitioner to furnish copy of the same to the counsel of the respondent, who was asked to file reply thereto. Respondent filed reply to such application on 21.06.2013 in which she stated that the DVD did not contain her voice. The petitioner then moved yet another application with the prayer that the respondent's voice sample may be recorded by some independent forensic organisation and the same should be matched with the voice in all the video and audio DVDs submitted by the petitioner as Exhibit-1, 4 and 5. Later on, the petitioner submitted one more DVD to be part of voice match exercise on 05.07.2013, which was titled as "Kapil Intro", reiterating his request for obtaining voice sample of the respondent to ascertain whether such DVDs contain her voice or not. Petitioner moved another application on 21.06.2013 to implead Kapil Rana, with whom the respondent-wife allegedly had extra marital relations, as party respondent. According to the petitioner, the Presiding Officer of the Family Court on receiving various applications of the petitioner observed that all those application would be decided on conclusion of evidence.

4. Cross examination of the respondent-wife resumed on 28.06.2013 on which date she again reiterated that she has not seen the video in Exhibit-1 DVD. The petitioner then again moved an application that he should be allowed to play DVD Exhibit-1 in the Court so that the respondent may watch DVD, recognize the contents of the same and acknowledge the conversation made therein, which would enable him to put proper question to her regarding contents of the same. The Presiding Officer of the Family Court did not allow him to do so and opportunity was granted to counsel of the respondent to file reply to the

application. The petitioner on 19.07.2013 moved one more application with the prayer that Exhibit-1, DVD be allowed to be played in the Court in presence of the respondent-wife and the petitioner be allowed to cross examine her in the light of the contents of the said DVD, Exhibit-1. It was thereafter that on 19.07.2013, the petitioner filed yet another application in the above series for keeping the DVDs in sealed packets, as he apprehended that some interpolation may be done in the contents of DVDs. He thereafter filed one more application on 19.07.2013 that on page No. 3 in line No. 15, the cross-examination of the respondent conducted on 21.06.2013 has not been correctly recorded. The Family Court dismissed all the applications vide order dated 26.07.2013. Aggrieved thereby, the petitioner has approached this Court by filing present writ petition.

5. Mr. Peush Nag, learned counsel for the petitioner has argued that the learned Family Court has failed to consider the application dated 15.06.2013 for FSL examination of Exhibit-1, 4 and 5, DVDs along with DVD titled "Kapil Intro" and another application for taking voice sample of the respondent-wife and to play DVD Exhibit-1 in the Court on 28.06.2013 for the purpose of her cross-examination. Family Court completely ignored contents of said DVDs in which illicit relationship of the respondent with the said Kapil Rana is clearly established. It is argued that the respondent-wife has in recorded conversation admitted her physical relationship with said Kapil Rana to her husband. It is also argued that there is no third party conversation involved in the matter, as the husband himself was recording conversation between him and his wife. The Family Court has failed to appreciate the fact that admissibility of the documents, electronic record or other evidence cannot be determined at the stage of admitting the document in evidence. The Family Court by way of impugned order has rejected all seven applications and has gone to the extent of deciding the admissibility of the documents, which are already marked as exhibits and has held that the contents of the said documents cannot be read into evidence. These observations and findings of the Family Court are perverse, illegal and unwarranted in the facts of the case. Learned counsel for the petitioner has argued that if voice in the DVD aforesaid is established as that of respondent-wife, entire proceedings would be frustrated. The Family Court committed grave illegality by keeping the applications pending till completion of cross-examination of respondent-wife and thereafter, when the petitioner moved application on 19.07.2013 to recall the said witness and permit him to play the DVD in the Court, said application was illegally rejected by the Family Court. The Family Court failed to appreciate that in reply to the application dated 28.06.2013, the respondent stated that DVDs in question have been fabricated by the petitioner so as to obtain divorce. To shatter the said contention, FSL Examination of the DVDs is essential. FSL Examination of DVDs and Audio CDs in question will not cause any hardship to the respondent, rather it will help establishing the contention of either of the parties.

6. Learned counsel has submitted that Section 14 of the Family Courts Act, 1984 (for short "the Act of 1984"), clearly provides that the Family Court may receive

as evidence any report, statement, document, information or matter, that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872. Thus, the technicalities and nuances of the procedure otherwise followed by the Civil and Criminal Courts are not applicable to the proceedings before the Family Court, as the legislature in its wisdom has decided to keep the procedural and legal aspect before the Family Courts very simple and non-complicated, particularly because the parties to the litigation are not represented before it through lawyers. On the scope of Section 14 of the Act, learned counsel for the petitioner has relied upon the decision of Orissa High Court in Sagrika Debata Vs. Satyanarayan Debata and Another, AIR 2010 Ori 58 : (2010) 109 CLT 665 : (2011) 1 DMC 82 : (2010) 1 OLR 986 Supp ; decision of Bombay High Court in Pramila Shankar Ghante v. Shri Shankar Vishwanath Ghante (Family Court Appeal No. 100/1996 decided on 23.07.2012); decision of Gauhati High Court in Akham Ibodi Singh and Another Vs. Akham Biradhwaja Singh and Another, (2006) CriLJ 3366 : (2006) 2 DMC 523 : (2007) 1 GLR 359 : (2006) 2 GLT 48 and Division Bench judgment of this Court in Manohar Lal Agrawal v. Santosh and Ors., II (1993) DMC 202.

7. Mr. Peush Nag, learned counsel further argued that overemphasis on the right to privacy, as claimed by the respondent-wife is misplaced because such right is not available to her in the facts and circumstances of the present case. Reliance has been placed upon the decision of the Supreme Court in Sharda Vs. Dharmpal, AIR 2003 SC 3450 : (2003) 2 CTC 760 : (2003) 1 DMC 627 : (2003) 3 JT 399 : (2003) 3 SCALE 475 : (2003) 4 SCC 493 : (2003) 3 SCR 106 : (2003) 2 UJ 870 : (2003) AIRSCW 1950 : (2003) 2 Supreme 962 wherein it was held that right to privacy is not a absolute right and it is subject to just exceptions. Even otherwise, in view of Section 11 of the Family Court Act, proceedings before the Family Court are "in camera" proceedings, therefore also, there is no threat of publication of the evidence brought on record by either party. If the DVD in question is not allowed to be played and voice sample of the respondent-wife is not allowed to be obtained for deciding the question whether contents of DVD are vague or not, this would defeat fundamental right of fair trial of the petitioner. The alleged right to privacy arising out of right to life of the respondent-wife cannot overshadow the right of the petitioner-husband to live with dignity, which also arises from the right to life as enshrined in Article 21 of the Constitution of India. Learned counsel for the petitioner has further argued that it would be mockery of justice as much as anomaly of law that if an offence is committed against a woman behind the closed doors of her matrimonial home, then presumption is read against the husband and his family, but when the wife commits adultery against her husband in the matrimonial home in his absence with her lover and husband exposes her, she is allowed to take shelter of right to privacy. If such double standards are followed and read under law, it will not only breach the fundamental right of equality before law and equal protection of law, but will result in complete collapse of the sacred institution of marriage, argued

the learned counsel. It is submitted that the Family Court has wrongly relied on the decision of Andhra Pradesh High Court in Rayala M. Bhuvaneswari Vs. Nagaphanender Rayala, AIR 2008 AP 98 : (2008) 2 ALD 311 : (2008) 1 ALT 613 : (2008) 2 DMC 327 , as the same is distinguishable on facts. In that case it was telephonic conversation of wife with some other person, which was being recorded by the husband and produced before Court to substantiate his case, which was held to be illegal. The Andhra Pradesh High Court held the said recording to be illegal and further held that it amounted to infringement of wife's right to privacy. In the present case, conversation between husband and wife was recorded by the husband himself, therefore, there should be no impediment in accepting the evidence as the right to privacy is not violated. Had the conversation of the respondent-wife with a third person been recorded by the petitioner-husband, then possibly, ratio of aforesaid judgment could have been applied.

8. Per contra, Mr. Vijayant Nirwan, learned counsel for Respondent No. 2-wife has opposed the writ petition and argued that despite undertaking of the petitioner before this Court in earlier writ petition that he would conclude his evidence within one month from the next date before the Family Court, the petitioner has been prolonging the proceedings by filing frivolous applications, one after another. Learned Family Court was perfectly justified in keeping all such applications pending for deciding with the divorce petition. It is denied that application dated 15.06.2013 was filed by the petitioner even before the statement of Respondent. In fact, the said application was filed soon after her cross-examination. The petitioner has wrongly stated that she during course of her cross-examination on 21.06.2013, stated that it is not her voice in Exhibit -1, DVD. In fact, she submitted in cross examination that she has neither seen nor heard Exhibit-1 DVD. Allegation of the petitioner that Presiding Officer of the Family Court did not allow the petitioner to ask any question regarding the transcripts of the DVD is nothing but an attempt to fill up lacuna by blaming the Presiding Officer. Learned counsel referring to Section 10 of the Family Court Act has argued that provisions of CPC have been held applicable to the proceedings before the Family Court. Reliance in this connection is placed upon the judgment of Allahabad High Court in Munna Lal and etc. v. State of U.P. and Another, AIR 1991 Allahabad 189. At the same time, however, it is argued that Section 14 of the Family Court Act has applied provisions of Indian Evidence Act, 1872 to the proceedings before the Family Court. In this connection, reliance is placed upon decision of Gauhati High Court (Agartala Bench) in Tania Kar v. Avijit Roy, (2011) 2 Gau LT 849 and it is argued that Act has not dispensed with requirement of adducing evidence by examining witnesses in support of claim or counter claim. Exhibit-1, original cassette with DVD, was alleged to contain conversation between the petitioner and the respondent and Exhibit1A was transcript of Exhibit-1. Exhibit-4 was audio CD containing alleged taped telephonic conversation of the respondent with one Abhishek. Exhibit-3 is the transcript of Exhibit-4 and Exhibit 5 was Audio CD containing alleged taped telephonic

conversation of the respondent with her parents. Exhibit-5A is the transcript of Exhibit-5. Recording all these conversations without consent or knowledge of the respondent-wife clearly violated the respondent's right to privacy.

9. It is argued that Judgment of Andhra Pradesh High Court in Smt. Rayala M. Bhuvaneswari (supra), which has been relied by the Family Court, is squarely applicable to the present case. Learned counsel argued that the petitioner has admitted in his cross examination that he has not produced any proof of FSL so as to rule out possibility of any editing or tampering DVD, Audio CDs. The petitioner has also admitted that he submitted copies of the alleged DVD, Audio CDs before the Court. That would mean that he has not submitted originals. Except marking of the DVD, Audio CDs and their transcripts as Exhibits, no evidence has been adduced by the petitioner to prove their contents and no evidence as per the requirement of Sections 65, 65-A, 65-B of the Act of 1872 has been adduced by the petitioner. The petitioner neither adduced any evidence in his examination-in-chief regarding the contents of the DVD, CDs or their transcripts, nor did he ask any questions regarding contents of the transcripts and CDs from the respondent. Learned Counsel relying on the judgment of Supreme Court in Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Satteyya and Others, AIR 1971 SC 1865 : (1972) 4 SCC 562 : (1971) 3 UJ 644 has argued that mere marking of a document as an exhibit does not dispense with its proof. Reliance has also been placed upon the judgment of the Supreme Court in U. Sree Vs. U. Srinivas, AIR 2013 SC 415 : (2013) 116 CLT 35 : (2013) 1 CTC 113 : (2013) 1 DMC 91 : (2012) 12 JT 358 : (2013) 1 RCR(Civil) 883 : (2012) 12 SCALE 98 : (2013) 2 SCC 114 : (2013) AIRSCW 44 wherein it was held that secondary evidence must be authenticated by foundational evidence that alleged copy is in fact a true copy of original. Learned counsel for the respondent has also relied upon the judgment of Delhi High Court in Sudir Engineering Company v. Nitco Roadways Ltd., 1995 IAD Delhi 189 to the effect that mere admission of document in evidence does not amount to its proof. Unless the original DVD and Audio CDs are produced, their copies cannot be taken as admissible on record as secondary evidence.

10. Mr. Vijayant Nirwan, learned counsel for the respondent has argued that the petitioner moved two applications on 15.06.2013. First application was to place on record original cassette from which DVD, which was marked as Exhibit-1, camcorder with cassette was formulated, charger of camcorder and the bag in which camcorder, charger and cassette were kept. The said application was dismissed by a speaking order by the Family Court. Said order was never challenged by the petitioner. It was only during the arguments, that the petitioner challenged the aforesaid order by way of filing S.B. Civil Writ Petition No. 3990/2014. Subsequently, the petitioner withdrew that writ petition which was accordingly dismissed vide order dated 02.07.2014, which means that original DVD is not on record. In fact, the Family Court in its order at page 58 of the paper book has categorically recorded that petitioner neither requested for playing CD/DVD during evidence, nor by playing the same himself, which could

prove that it is conversation of the petitioner with the respondent-wife. In fact, it is further observed by the Family Court that the cross-examination of the respondent took place on the basis of transcripts and thereafter application for sending the same to Forensic Science Laboratory was submitted. No other evidence with regard to voice of the respondent was produced or proved. Now evidence of both the parties is over. Learned counsel for the respondent has heavily relied on the judgment of Andhra Pradesh High Court in Smt. Rayala M. Bhuvaneshwari (supra) wherein it was held that the act of taping itself by the husband of the conversation of his wife with others was illegal and it infringed the right of privacy of the wife. Therefore, the taps, even if true, cannot be taken as admissible in evidence. Learned counsel has further relied upon the judgment of the Supreme Court in Tukaram S. Dighole Vs. Manikrao Shivaji Kokate, AIR 2010 SC 965 : (2010) 1 JT 631 : (2010) 2 SCALE 109 : (2010) 4 SCC 329 : (2010) 3 SCR 396 : (2010) 2 UJ 900 and argued that the Supreme Court in that case held that the standard of proof about its authenticity and accuracy has to be more stringent, as compared to other documentary evidence.

11. Regarding right to privacy as fundamental right being integral part of Article 21 of the Constitution of India, reliance has been placed upon the decision of the Supreme Court in Ramlila Maidan Incident V. Home Secretary, Union of India and Others, (2012) 5 SCC Page 1. Learned counsel for the respondent has also relied upon the judgment of Punjab and Haryana High Court in Deepinder Singh Mann v. Ranjit Kaur (CR No. 1734 of 2014 (O&M) decided on 07.03.2014) wherein it was held that in a private matter between the couples, the Court should not permit dirty linen to be washed openly in Court in the name of evidence. It is argued that when the evidence of the parties is over, number of applications filed by the petitioner was nothing but an attempt to fill up lacunae in the evidence, which cannot be permitted. Reliance in this connection has been placed upon the decisions of the Supreme Court in K.K. Velusamy V.N. Palanisamy, 2011 AIR SCW 2296 and Vadiraj Naggapa Vernekar (D) Through Lrs. Vs. Sharad Chand Prabhakar Gogate, AIR 2009 SC 1604 : (2009) 7 JT 202 : (2009) 4 SCALE 90 : (2009) 4 SCC 410 : (2009) 3 SCR 1071 . Lastly, reliance has been placed on judgment of the Supreme Court in Sadhana Lodh Vs. National Insurance Company Ltd. and Another, (2003) 1 ACC 33 : (2003) ACJ 505 : AIR 2003 SC 1561 : (2003) 6 JT 126 : (2003) 1 SCALE 739 : (2003) 3 SCC 524 : (2003) 1 SCR 567 wherein it has been held that the supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution of India is confined only to see whether an inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. High Court does not act as an appellate court or the Tribunal. This very view was reiterated by the Apex Court in Surya Dev Rai Vs. Ram Chander Rai and Others, AIR 2003 SC 3044 : (2003) 4 CTC 48 : (2003) 6 SCALE 133 : (2003) 6 SCC 675 : (2003) 2 SCR 290 Supp : (2003) WritLR 722 : (2003) AIRSCW 3872 : (2003) 6 Supreme 390 and Shree Gopal v. Additional Civil Judge (JD) NO. 8, Jodhpur, (2005) O Supreme (Raj) 22664. It is, therefore, submitted

that there is no merit in this writ petition and the same be dismissed.

12. I have given my thoughtful consideration to the rival submissions and perused the material on record.

13. Undeniably, the petitioner-husband taped conversation with his wife, when their marriage was subsisting. Such conversation was recorded without knowledge of the wife, let alone with her consent. It is, therefore, that the learned Family Court, while relying upon the judgment of Smt. Rayla M. Bhuvaneswari (supra), dismissed the applications filed by the petitioner. Andhra Pradesh High Court in that case held that Act of recording conversation without knowledge of wife amounts to infringement of her right to privacy and would be illegal. Such tapped conversation, even if true, cannot be admissible in evidence and wife cannot be forced to undergo voice test and expert cannot be asked to compare portion denied by her with her admitted voice. The petitioner has sought to distinguish the aforesaid judgment on the premise that the conversation which was recorded by the husband in the case of Smt. Rayla M. Bhuvaneswari (supra), was of his wife with third party and not with the husband and in this case, conversation has taken place between the husband and wife. It is argued that since the petitioner is raising allegation of infidelity, there is no way he could prove this fact except by whatever evidence is available with him, including the tap recorded conversation. Nearest judgment cited on the point is that of Bombay High Court in Mrs. Havovi Kersi Sethna Vs. Mr. Kersi Gustad Sethna, AIR 2011 Bom 283 : (2011) 2 ALLMR 577 : (2011) 3 BomCR 100 : (2011) 113 BOMLR 479 : (2011) 3 MhLj 564 , wherein parties were wife and husband and the wife was under cross-examination. The respondent-husband relied upon certain handwritten diaries of the wife as well as Compact Disc (CD) on which conversation between the wife and the husband was recorded by the husband on certain dates. The husband also produced transcript of the said conversation. The wife admitted handwriting in her diaries, but contested the claim of the husband to rely upon the tapped conversation, on the premise that original compact disc was not filed and instrument, on which such conversation was recorded, was not produced. The conversation could be recorded on a tape recorder, audio cassette, MP-3 Player, dictaphone, computer or even on mobile phone. By what mode it was recorded has not been produced. It was held by the Bombay High Court that if contents of CD are disputed, husband/defendant will have to prove the same. It was further held that the defendant-wife did not make statement of admission specifically before the Court with regard to tapped conversation made available on CD. In those circumstances, her cross-examination could not be delayed and would have to be undertaken. It would for her to admit or deny partly or fully the aforesaid averments. Bombay High Court relied on the judgment of the Supreme Court in R.M. Malkani Vs. State of Maharashtra, AIR 1973 SC 157 : (1973) CriLJ 228 : (1973) 1 SCC 471 : (1973) SCC(Cri) 399 : (1973) 2 SCR 417 wherein it was held that CD is considered as documentary evidence.

14. Andhra Pradesh High Court in the case of Smt. Rayla M. Bhuvaneshwari (supra), also relied upon its earlier judgment in Padala Kaniki Reddy Vs. Padala Sridevi, (2006) 5 ALD 322 : (2006) 5 ALT 762 . In Padala Kaniki Reddy (supra), petition was filed by the wife for dissolution of marriage on the ground of husband being of unsound mind and sexually impotent and also on certain other allegations, which were denied by the husband, who alleged that the wife had some problem with her uterus even before the marriage and for that reason, she cannot conceive and beget children. She was treated in England and finally various attempts to use the sperm of respondent proved futile in view of the condition of her uterus. In that case, application was filed by the husband to direct the wife to undergo medical examination by a qualified lady Gynecologist of Government Institutional Hospital. The application was resisted by the wife on the premise that it would defeat her right to privacy and personal liberty by reiterating the allegations aforesaid and making counter allegations and also on the ground that the virginity test cannot constitute the sole basis to prove consummation of marriage. The Andhra Pradesh High Court, relying upon various judgments of the Supreme Court and High Courts, held that it would be just and proper to direct the wife to submit to medical examination for the purpose prayed for, holding that it would not amount to infringement of her right to privacy and personal liberty.

15. Apparently, earlier judgment of Andhra Pradesh Court in Neera Agarwal Vs. Mahender Kumar Agarwal, (2009) 5 ALT 518 , wherein somewhat similar dispute was considered, was not noticed by that High Court in later case of Smt. Rayla M. Bhuvaneshwari (supra). In Neera Agarwal (supra), the petitioner-wife filed application under Section 151 CPC praying to send letter to a handwriting expert, audio cassettes and VCDs for verification. The Trial Court dismissed that application holding that there was no necessity for verification. The High Court had opportunity to appreciate these facts and held that act of tapping itself by husband of conversation of his wife with others was illegal and it infringed right of privacy of wife and therefore, the tapes, even if true, could not be admissible in evidence. The wife could not be forced to undergo voice test.

16. It is not doubt true that in a given situation, when there is conflict between fundamental rights of two parties, right of one party has to give way to the other, as has been held by the Hon'ble Supreme Court in Mr "X" Vs. Hospital "Z", AIR 1999 SC 495 : (1998) 7 JT 626 : (1998) 6 SCALE 230 : (1998) 8 SCC 296 : (1999) 1 UJ 232 . In that case, appellant's blood was to be transfused to another and, therefore, sample thereof was tested at the respondents' hospital and he was found to be HIV(+). On account of disclosure of this fact, the appellant's proposed marriage to one A, which had been accepted, was called off. Moreover, he was severally criticised and was also ostracised by the community. The appellant approached the National Consumer Disputes Redressal Commission for damages against the respondents on the ground that the information required, under medical ethics, to be kept secret, was disclosed illegally and that, therefore, the respondents were liable to pay damages to the

appellant. The Commission dismissed the petition on the ground that the appellant could seek his remedy in the civil court. However, the Supreme Court held that in the doctor-patient relationship, the most important aspect is the doctor's duty of maintaining secrecy. A doctor cannot disclose to a person any information regarding his patient, which he has gathered in the course of treatment, nor can the doctor disclose to anyone else the mode of treatment of the advice given by him to the patient. But that rule is not absolute. It is subject to certain exceptions in the sense that a person may have a right, but there may not be a correlative duty and the instant case falls within the exceptions. "Right" is an interest recognised and protected by moral or legal rules violation of which would be a legal wrong. Respect for such interest would be a legal duty. In order, therefore, that an interest becomes the subject of a legal right, it has to have not merely legal protection, but also legal recognition. The elements of a "legal right" are that the "right" is vested in a person and is available against a person, who is under a corresponding obligation and duty to respect that right and has to act or forbear from acting in a manner so as to prevent the violation of the right. Right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution relating to the Fundamental Rights read with the Directives Principles of State Policy. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy, which may sometimes lead to the clash of one person's "right to be let alone" with another person's "right to be informed". The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. Having regard to the fact that the appellant was found to be HIV(+), its disclosure would not be violative of either the rule of confidentiality or the appellant's right of privacy as A, whom the appellant was likely to marry was saved in time by the disclosure, otherwise, she too would have infected with the dreadful disease if the marriage had taken place and consummated.

17. This very view was reiterated by the Supreme Court in *Sharda* (supra) wherein it was held that if there were a conflict between fundamental rights of two parties, that right which advances public morality, would prevail. Aforesaid judgment arose out of divorce proceedings and the core question was that whether a party to a divorce proceedings can be compelled to a medical examination. High Court dismissed the revision petition filed by the appellant questioning the order passed by the trial court. It was held that medical examination of a party can be ordered by the Court either suo motu or instructions to a party. Such order would not violate and offend right to privacy and Article 21 of the Constitution. However, such power has to be exercised if the applicant has a strong prima facie case and there is sufficient material before the Court.

18. The Supreme Court in *People's Union of Civil Liberties (PUCL) Vs. Union of India (UOI)* and Another, AIR 1997 SC 568 : (1997) 1 JT 288 : (1996) 9 SCALE 318 : (1997) 1 SCC 301 : (1996) 10 SCR 321 Supp : (1997) 1 UJ 187 : (1997)

AIRSCW 113 : (1996) 8 Supreme 673 held that right to transmit telephonic message or hold telephonic conversation in privacy forms part of right to privacy protected by Article 21 as well as Article 17 of International Covenant on Civil and Political Rights. It is also covered by freedom of speech and expression under Article (19)(1)(a). Telephone tapping by Government under Section 5(2) of Telegraph Act amounts to infraction of these Fundamental Rights, hence it can be restored to only in accordance with procedure established by law, which must be just, fair and reasonable and should fall within the grounds of reasonable restriction permissible under Article 19(2) of the Constitution.

19. Neither Bombay High Court in the case of Mrs. Havovi Kersi Sethan (supra), nor even the Andhra Pradesh High in Smt. Rayla M. Bhuvanewari (supra), or Neera Agarwal (supra) noticed judgment of the Supreme Court on the subject in the case of M.C. Verghese Vs. T.J. Poonan and Another, AIR 1970 SC 1876 : (1970) CriLJ 1651 : (1969) 1 SCC 37 : (1969) 2 SCR 692 and analysed the effect of Section 122 of the Indian Evidence Act on admissibility of such recorded conversation. In that case, Rathi, daughter of M.C. Verghese, was married to T.J. Ponnann. Ponnann wrote certain letters to Rathi from Bombay, who was then residing with her parents at Trivandrum, which, it was claimed, contained defamatory imputations concerning Verghese. Verghese then filed a complaint in the court of the District Magistrate, Trivandrum, against Ponnann charging him with offence of defamation. Ponnann submitted an application raising two preliminary contentions, (1) that the letters which were inadmissible in evidence as they were barred by law or expressly prohibited by law from disclosure; and (2) that uttering of a libel by a husband to his wife was not "publication" under the law of India and hence cannot support a charge for defamation and prayed for an order of discharge and applied that he may be discharged. District Magistrate held that a communication by a husband to his wife or by a wife to her husband, of a matter defamatory of another person, does not amount in law to publication, since the husband and wife are one in the eye of law. Relying upon the judgment in Wennhak V. Morgan (1888) 20 QBD 635 it was held that communication was privileged and no evidence could be given in court in relation to that communication. District Magistrate accordingly ordered that Ponnann be discharged. In the revision petition filed by M.C. Verghese before the Court of Sessions, the order was set aside. The case was then carried to High Court of Kerala, which set aside the order of Court of Sessions and restored that of District Magistrate. This is how the matter reached the Supreme Court on challenge being made to the judgment of the High Court, which has dealt with the effect of application of Section 122 of Indian Evidence Act relating to privileged communication between husband and wife. By the time matter reached the Supreme Court, wife Rathi had obtained decree of nullity of marriage against husband Ponnann on the ground of his impotency. Argument was raised that now when the wife had obtained decree of nullity and marriage not being subsisting, the bar existing during the subsistence of marriage cannot be operated to render the wife as incompetent witness. Rejecting that ground, it

was held by the Supreme Court that:

"14. A prima facie case was set up in the complaint by Verghese. That complaint has not been tried and we do not see how, without recording any evidence, the learned District Magistrate could pass any order discharging Ponnan. Section 122 of the Evidence Act only prevents disclosure in giving evidence in court of the communication made by the husband to the wife. If Rathi appears in the witness box to give evidence about the communications made to her (by-Ed.) husband, prima facie the communications may not be permitted to be deposed to or disclosed unless Ponnan consents. That does not, however, mean that no other evidence which is not barred under section 122 of the Evidence Act or other provisions of the Act can be given.

15. In a recent judgment of the House of Lords *Rumping v. Director of Public Prosecutions*, (1962) 3 All ER 256 Rumping the mate of a Dutch ship was tried for murder committed on board the ship. Part of the evidence for the prosecution admitted at the trial consisted of a letter that Rumping had written to his wife in Holland which amounted to a confession. Rumping had written the letter on the day of the killing, and had handed the letter in a closed envelope to a member of the crew requesting him to post it as soon as the ship arrived at the port outside England. After the appellant was arrested, the member of the crew handed the envelope to the captain of the ship who handed it over to the police. The member of the crew, the captain and the translator of the letter gave evidence at the trial, but the wife was not called as witness. It was held that the letter was admissible in evidence. Lord Reid, Lord Morris of Borth-Y-Gest, Lord Hodson and Lord Pearce were of the view that at common law there had never been a separate principle or rule that communications between a husband and wife during marriage were inadmissible in evidence on the ground of public policy. Accordingly except where the spouse to whom the communication is made is a witness and claims privilege from disclosure under the Criminal Evidence Act, 1898, (of which the terms are similar to S. 122 of the Indian Evidence Act though not identical), evidence as to communications between husband and wife during marriage is admissible in criminal proceedings.

16. The question whether the complainant in this case is an agent of the wife because he has received the letters from the wife and may be permitted to give evidence is a matter on which no opinion at this stage can be expressed. The complainant claims that he has been defamed by the writing of the letters. The letters are in his possession and are available for being tendered in evidence. We see no reason why inquiry into that complaint should, on the preliminary contentions raised, be prohibited. If the complainant seeks to support his case only upon the evidence of the wife of the accused, he may be met with the bar of section 122 of the Indian Evidence Act. Whether he will be able to prove the letters in any other manner is a matter which must be left to be determined at the trial and cannot be made the subject-matter of an enquiry at this stage.

17. One more question which was raised by counsel for the appellant may be

briefly referred to. It was urged that since the matter reached this Court, Rathi has obtained a decree for nullity of marriage against Ponnann on the ground of his impotency , and whatever bar existed during the subsistence of the marriage cannot now operate to render Rathi an incompetent witness. But the argument is plainly contrary to the terms of section 122. If the marriage was subsisting at the time when the communications were made, the bar prescribed by S. 122 will operate. In *Moss v. Moss*, (1963) 2 All ER 829 it was held that in criminal cases, subject to certain common law and statutory exceptions, a spouse is incompetent to give evidence against the other, and that incompetence continues after a decree absolute for divorce or a decree of nullity (where the marriage annulled was merely voidable) in respect of matters arising during coverture time (coverture-Ed.).

18. Counsel for the appellant however urged that the rule enunciated in *Moss's* case, (1963) 2 All ER 829 has no application in India, because under Sections 18 and 19 of the Divorce Act no distinction is made between marriage void and voidable. By S. 18 a husband or a wife may present a petition for nullity of marriage to the appropriate court and the court has under section 19 power to make the decree on the following grounds:

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

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

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

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

Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud."

Marriage with the respondent who was impotent at the time of the marriage or at the time of the institution of the suit is not ab initio void: it is voidable. As stated in *Lately on Divorce*, 14th Edn., at p. 194, Art. 353:

"Where impotence is proved the ceremony of marriage is void only on the decree absolute of nullity, but then it is void ab initio "to all intents and purposes". Such a marriage "is valid for all purposes, unless a decree of nullity is pronounced during the life-time of the parties."

When the letters were written by Ponnann to Rathi, they were husband and wife. The bar to the admissibility in evidence of communications made during marriage attaches at the time when the communication is made, and its admissibility will be adjudged in the light of the status at the date and not the status at the date when evidence is sought to be given in court."

20. It would be apposite at this stage to note Section 122 of the Indian Evidence Act, 1872 which is extracted hereunder:-

"122. Communication during marriage.-No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person, who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime against the other."

21. Aforesaid provision consists of two parts, firstly that married person shall not be compelled to disclose any communication made to him during marriage by his spouse and secondly, that person shall be permitted to disclose any such communication, unless the person who made it or his representative in interest, gives consent thereto. Privilege about such conversation is not available and cannot be claimed "in suits between married persons", in other words, in the suit filed by husband against wife and vice-versa. In that case, the spouse can be "compelled to disclose any conversation made to him during marriage" by the other spouse. Such is not the complexion of evidence in the present case. Here although it may be that certain conversation was made by the wife with the husband, but what we are concerned with are the means adopted by the husband to achieve that end. If means are not permissible within the framework of the Constitution of India, by tape recording conversation by husband with his wife, without her knowledge and consent, evidence sought to be proved by producing such recorded conversation would be wholly inadmissible in evidence. This is because its recording has resulted in violating the wife's "right of privacy", a facet of personal liberty, guaranteed to every citizen vide Article 21 of the Constitution of India. In such a situation, same parameters of law, as laid down by their Lordships of the Supreme Court against state agencies, would also apply to husband guilty of recording conversation held in confidence between him and his wife, obtained by prompting/inducing/provoking or even instigating her, to make even such statements, which may or may not be fully true or may even be wholly untrue and yet go against her. Alleged telephonic conversation, even if true, would thus not be admissible/receivable in evidence and respondent wife cannot be otherwise required to admit or deny whether the DVDs in question contained her voice and also, she cannot be forced to provide her voice sample and experts cannot be asked to compare her voice with the voice in the subject DVDs.

22. Admittedly, in the present case when the conversation of wife was recorded by the petitioner, the marriage was subsisting and therefore, recording of conversation of the wife without her knowledge invaded her "right to privacy" as already held by the Supreme Court in R.M. Malkani Vs. State of Maharashtra, AIR 1973 SC 157 : (1973) CriLJ 228 : (1973) 1 SCC 471 : (1973) SCC(Cri) 399 : (1973) 2 SCR 417 , in para 30 thereof it was held:

"30. There is no scope for holding that the appellant was made to incriminate himself. At the time of the conversation there was no case against the appellant. He was not compelled to speak or confess. Article 21 was invoked by submitting that the privacy of the appellant's conversation was invaded. Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Courts will tolerate safeguards for the protection of the citizen to be imperiled by permitting the police to proceed by unlawful or irregular methods. In the present case there is no unlawful or irregular method in obtaining the tape recording of the conversation."

23. The Supreme Court in People's Union for Civil Liberties (PUCL) (Supra) in Para 18 held as under:

"18. The right to privacy-by itself-has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law."

24. The Supreme Court in Mr. "X" (supra) in Para 27 and 28 held as under:

"27. Right of Privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political. As already discussed above, doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of one person's "right to be let alone" with another person's right to be informed.

28. Disclosure of even true private facts has the tendency to disturb a person's tranquility. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the Right of Privacy is an essential component of

right to life envisaged by Article 21. The "right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others."

25. Aspect about admissibility of evidence with reference to provisions of Indian Evidence Act, 1872 has indeed been diluted by Section 14 of the Family Court Act. The question, which still arises in the present case, is whether conversation tape recorded by the husband without wife's consent or without her knowledge, can be received in evidence and be made use of against her? That question has to be answered in an affirmative "no", as recording of such conversation had breached her "right to privacy", one of the facets of her "right to liberty" enshrined under Article 21 of the Constitution of India. The exception to privileged communication between husband and wife carved out in Section 122 of the Indian Evidence Act, which enables one spouse to compel another to disclose any communication made to him/her during marriage by him/her, may be available to such spouse in variety of other situations, but if such communication is a tape recorded conversation, without the knowledge of the other spouse, it cannot be, admissible in evidence or otherwise received in evidence. The argument that this would defeat right of fair trial of the petitioner-husband, proceed on the fallacious assumption of sanctimony of the method used in such recording and in that process, ignores the right of fair trial of the respondent-wife. In a case like present one, husband cannot be, in the name of producing evidence, allowed to wash dirty linen openly in the Court proceedings so as to malign the wife by producing clandestine recording of their conversation.

26. In view of above, this Court is inclined to concur with the view taken by Andhra Pradesh High Court in Smt. Rayala M. Bhuvaneswari (supra) that recorded conversation between the petitioner and the respondent, even if true, cannot be admissible in evidence and that the respondent-wife cannot be forced to undergo voice test and expert cannot be asked to compare CDs, which conversation has been denied by her.

27. In view of above, writ petition is dismissed and impugned order is upheld. However, Family Court is directed to expedite the decision of the case, but not later than a period of two months from the date copy of this order is produced before it.

28. Stay application also stands dismissed.