

**Abdur Rahim Undre Vs. Padma Adbur Rahim Undre**

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**Court :** Mumbai

**Decided On :** Jan-30-1982

**Reported in :** AIR1982Bom341; 2(1982)DMC204

**Judge :** C.S. Dharmadhikari and;S.J. Deshpande, JJ.

**Acts :** Muslim Law; [Special Marriage Act, 1954](#) - Sections 1; [Constitution of India](#) - Articles 14 and 44; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 151 - Order 39, Rule 1

**Appeal No. :** Letters Patent Appeal No. 99 of 1981

**Appellant :** Abdur Rahim Undre

**Respondent :** Padma Adbur Rahim Undre

**Advocate for Def. :** Suresh Parekh,;Nanavati and;Y.E. Mooman, Advs.

**Advocate for Pet/Ap. :** N.A. Mody and;S.H. Karim, Advs.

**Judgement :**

Dharmadhikari, J.

1. The appellant-plaintiff Dr. Abdur Rahim under married Smt. Padma, respondent-defendant in the United Kingdom on 5th May 1966. At the time of marriage plaintiff Abdur Rahim was a Mohainmedan where as respondent Padma was a Hindu. Both of them were Indian citizens. Their domicile was India. Both of them held Indian passports. On 6th of May 1965 the plaintiff and the defendant went to the office of Registrar of Marriages at Weymouth. Before that a necessary notice of intention to marry was already given. There after on 6th May 1966 the parties went through the marriage ceremony before the Registrar and the said marriage was duly registered. The marriage certificate relating to this marriage duly authenticated and certified copy is also on record. From this certificate it appears that the marriage Act, 1949. After this marriage birth of Shabnam took place on 18th of May 1957. Of Shama on 19-11-68. Thereafter on 4th Apr., 1969 the plaintiff and the defendant with their children returned to India. After their return on 14th of Nove., 1969 Suhail, a boy was born. It is the case of the appellant-plaintiff that on 29th Dec., 1969 conversion of the defendant Padma took place and she was converted to Muslim religion. On the same day a Nikah ceremony was also performed. Thereafter on 21st of Nov., 1973 Sabir, a boy was born. Thereafter relations between the parties became strained and hence the plaintiff further alleged that he gave tala to the defendant Padma on 20-4-78. This talaq was given in the absence of defendant Padma. However, an oral intimation about it was given to her in paradise apartment on the same night. It is the case of the appellant that he was forced to give divorce in view of the extreme cruelty meted out to him by Smt. Padma. She had been carrying on a sustained and deliberate campaign of defaming him which resulted in causing acute mental tension as well as interference with his professional duties. He also alleged that due to the ill-treatment meted out by Smt. Padma and her indifferent attitude towards him and the members of his family, the marriage relationship had broken down beyond the scope of reconciliation and in these circumstances he dissolved the marriage by giving unilateral

talaq on 20-4-1978. After the divorce he told the respondent-defendant not to enter his residential premises. However, the respondent went to the said flat, broke it open and took away several things, articles, jewellery etc. About which the appellant had to lodge a police complaint. It is the case of the plaintiff that he was in exclusive possession and occupation of the flat at Nepean Sea Road. He also contended that the four children were living with him and were under his care and custody. As according to plaintiff he became apprehensive that the defendant was likely to enter upon and remain in the said flat with the help of hirelings and would also go to the extent of forcibly removing the children from his custody, he was constrained to file the present suit for a permanent injunction against the defendant. The suit was filed on 24th of Apr., 1978. On the same day an ex parte injunction was granted by the Court against the defendant. On 22nd of June, 1979 the said ex parte injunction was confirmed. Therefore, the respondent filed an appeal against the said order on 21st of July 1978 bearing A.O. No. 251 of 1978. Desai. J. Vide order dated 29th Aug., 1978 confirmed the order passed by the trial Court on certain terms. After the judgment in A.O. the plaint was amended and the plaintiff also sought a declaration from the Court that the defendant was not his wife. While amending the plaint the plaintiff alleged that on 29-11-1969 the respondent-defendant had embraced Islam and went through the Nikah ceremony at 303, Abdul Rahman Street at his father's residence and that on 20th Apr., 1978 he gave her talaq and thus dissolved marriage relationship. He alternatively contended that even assuming that the defendant was not a Muslim and was a Hindu as contended by her, still Muslim personal law was applicable to their relationship and the plaintiff was entitled to dissolve the marriage by giving talaq as per Mohammedan Law. Thus the suit filed by the plaintiff was one for declaration as well as for injunction.

2. The defendant denied various allegations made in the plaint and also filed a counter-claim. According to her the court had no jurisdiction to entertain and try the suit and the suit filed was misconceived and bad in law. She also contended that the plaintiff had not come to court with clean hands. According to her the marriage in England was under civil law of England She also contended that the flat in Paradise Apartment was secured out of their joint contribution and the said flat is also her matrimonial home. Therefore she is entitled to stay therein in her own right as wife as well as joint owner. She denied the factum of conversion or Nikah, and contended that the averments made in the behalf were wholly false. She also denied the factum of divorce of talaq. She maintained that all through she was a Hindu and continues to be a Hindu even today. According to her the marriage is not yet dissolved in accordance with law and, therefore, the plaintiff is not entitled to any declaration in that behalf. She denied the allegation regarding cruelty or that the children were under protection and custody of the plaintiff. She also denied that she had any intention to forcibly remove the children with the help of hirelings. She also denied that she had ever broken open the flat or had illegally entered in to the same. In the counter-claim she claimed that the flat is of joint ownership. The plaintiff filed his reply in reply to the counter-claim denying the allegations made therein. In view of the pleadings of the parties, the learned Judge of the Civil Court, Bombay framed the following issues:

1. Whether this Hon'ble Court has jurisdiction to try and entertain this suit in respect of prayer (b) of the plaint as alleged in para 1 of written statement?
2. Which law will apply to the parties as regard marriage and divorce?
3. Does the plaintiff prove that the defendant embraced Islam on 29-12-1969 and was a Muslim thereafter?
4. Does the plaintiff prove that the defendant went through Nikah ceremony with him on 29-12-1969?
5. Whether the plaintiff proves that the defendant has been duly divorced as alleged by the plaintiff?
6. Is it proved that the premises of flat No. 12-A, Paradise Apartments is the Matrimonial home of the parties?
7. If so, does the defendant further prove that she continues to be entitled to the user of the aforesaid premises for her residence?
8. Whether the plaintiff is entitled to any reliefs as prayed for and if so, what?

9. Is the counter-claim correctly valued for the purpose of Jurisdiction and court-fee?

10. Does the defendant prove that the marriage between her and the plaintiff performed on 6-5-1966 in England under the Civil Marriages Act, is still subsisting?

11. Does the defendant prove that the Talaknama is antedated and fabricated.

12. Is the defendant entitled to the declarations or any of them as prayed in clauses (b) and (c) of the prayers?

13. Is the defendant entitled to the orders of injunction as prayed in cls. (F), (G), (h), (I) and (j), of prayers in the counter-claim?

14. Whether the defendant is entitled to any relief and if so what?

3. In support of his case the plaintiff examined as many as 11 witnesses including himself whereas the defendant examined herself and two other witnesses. The parties also produced documentary evidence before the trial court. After appreciating all the evidence on record both oral and documentary the trial court came to the conclusion that the Special Marriage Act read with Foreign Marriage Act or English Law will apply to the parties as regards the marriage and divorce. He also found that the plaintiff has failed to prove that the defendant embraced Islam on 29th Dec., 1969 or was a Muslim thereafter. He also held that the plaintiff failed to prove that the defendant went through Nikah ceremony with him on 29-12-1969 as alleged. He also found that the plaintiff has failed to prove that the defendant has been duly divorced as alleged by him. So far as the flat in Paradise Apartment is concerned, the learned Judge came to the conclusion that the said flat is a matrimonial home of the defendant and the defendant is entitled to the user of the said premises for her residence, So far as the marriage in England is concerned, the learned Judge came to the conclusion that the marriage between the parties on 6th of May, 1966 in England was under the civil law of civil Marriage Act and is still subsisting. As a necessary consequence of these findings he (we?) dismissed the suit filed by the plaintiff.

4. Being aggrieved by the findings as well as the judgment and the decree passed by the City Civil Court, the plaintiff filed an appeal before this Court bearing First Appeal No. 307 of 1980. The said appeal was heard by Mody, J. Disposed of the appeal on a pure question of law by holding that the marriage in the present case was governed by the provisions of Foreign Marriage Act, 1969, and therefore in case of such a marriage the divorce can be obtained by husband only in accordance with the provisions of the said Act and not otherwise. He also came to the conclusion that the plaintiff is also not entitled to equitable relief in the nature of injunction having regard to the facts and circumstances of the case. Therefore, the learned single Judge dismissed the appeal filed by the plaintiff.

5. Being aggrieved by this appellate judgment dated 9th July 1981, the plaintiff filed the present Letters Patent Appeal. The said appeal was admitted on 22nd of July, 1981. But no stay was granted. Against the interim order refusing the stay the appellant filed a special leave petition before the Supreme Court. The Supreme Court refused to grant special leave vide order dated 31st of July, 1981 but asked this court to dispose of the appeal within one month. Thereafter on 4th Aug., 1981 the defendant wife came to live in the Paradise Apartment. When the appeal came up for hearing, a grievance was made before us that the learned single Judge committed an error in not deciding all the issues involved in the appeal, including the controversy based on facts viz. The alleged conversion, Nikah as well as talaq. Therefore, the parties filed before us on 3rd of Nov., 1981, a joint petition agreeing that all the questions and issues of facts and law, including that of jurisdiction whether decided by the First appellate court or not should be decided by this Court in the Letters Patent Appeal. In view of this joint petition, we have permitted the learned counsel appearing for both the sides to argue all the questions of law and facts. We have heard the learned counsel on all the issues in detail.

6. Shri Mody, learned counsel appearing for the appellant contended before us that the learned Judge of the first appellate court committed an error in coming to the conclusion that the marriage between the parties is

governed by the Foreign Marriage Act of 1969. According to Shri Mody the said Act is not retrospective and, therefore, the provisions of S. 18(1) of the Foreign Marriage Act are not applicable to the marriage which took place in the year 1955. He contended that the law applicable to the said marriage is the personal law viz., Muslim Law and according to the Muslim Law the plaintiff husband was authorised to give talaq ro hia wife without intervention of court., He also contended that in any case S. 18 of the Foreign Marriage the Mohemmedan Law Concurrently and, therefore, it was open to the plaintiff to give divorce to his wife as per his personal law. He also contended that even if is is held that the marriage between the parties which took place in the year 1966 in England was performed according to the British Marriage Act still on their return to India, as the parties were Indian citizens, they were governed by the law of domicile, which is the personal law of the husband viz., Mohammedan Law and, therefore, it was open to the plaintiff to give divorcee to his wife according to the provisions of Mohammedan Law.

7. Shri Mody, then, contended that the learned Judge of the City Civil Court committed an error in coming to the conclusion that the plaintiff has failed to prove conversion of the defendant as well as the subsequent Nikah. According to Shri Mody the said finding is wholly perverse and is liable to be set aside. In Mody that the marriage which took place in England was Nikah Fasid within the meaning of Mohammedan Law, From the evidence of the defendant itself it is quite clear that two Mohammedan witnesses were present at the time of the said marriage and in this view of the matter the said Nikah Fasid could have been dissolved by the plaintiff by giving talaq to his wife in accordance with the provisions of Mohammedan Law. In any case according to Shri Mody from the evidence placed on record it is quite obvious that the marriage between the plaintiff and the defendant had already broken down beyond any scope of reconciliation, The defendant had gone to the extent of making wild allegations against the plaintiff letter Exh. C. Inm these circumstances their living together under the same and was wholly impossible and therefore the plaintiff was entitled to an injunction as claimed by him qua the flat in the Paradise Apartment.

8. On the other hand it is contended by Shir Parikh, learned counsel appearing for the respondent-wife that the marriage in England was performed according to the British Marriage Act, 1949, The said marriage was a monogamous one and secular in nature. To such a marriage the Special Marriage Act 1954alone is applicable. Therefore, the marriage performed under the secular law of England cannot be dissolved under the personal law of the parties. According to Shri Parikh so far as secular marriages are concerned tex domicile in India is a Special Marriage Act. And not personal law of the parties. He then contended that all through the defendant continued to be Hindu and was never converted. According to him the evidence adduced by the plaintiff to prove conversion is wholly false and the learned Judge of the trial court was quire justified in coming to the conclusion that the plaintiff has failed to prove either conversion or Nikah. Shri Parish then contended that provisions of Mohammedan Law which provide for a unilateral talaq is no more good law as it is violative of Art. 14 of the [Constitution of India](#). So far as the provisions of Foreign Marriage Act are concerned, according to Shri Parikh the marriage between the plaintiff and the defendant which took place in the year 1966 is also converted by the provisions of S. 18(1) of the Foreign Marriage Act. The question of giving retrospective effect to the provisions of Foreign Marriage Act does not arise as divorce is not a part and parcel or incident of marriage. Nobody can claim any vested right in matters of divorce etc. Even according to the plaintiff divorce in this case took place after coming into force of the Foreign Marriage Act, 1965 and, therefore, the said marriage could have been dissolved as per the procedure prescribed by the Foreign Marriage Act and not otherwise. Therefore according to the learned counsel the marriage of the defendant with the plaintiff which took place in 1966 in England is still subsisting.

9. So far as the flat in the Paradise Apartment is concerned. It is contended by shri Parikh that a separate suit is pending between the parties in the High Court wherein the question of title qua the said flat is involved. In the said suit the plaintiff has prayed for a declaration as well as injunction, hence the plaintiff is not entitled to any relief in that behalf, in this suit, more so when it is the case of the defendant that the flat was purchased out of the joint funds of the plaintiff and the defendant and, the defendant has also claimed joint ownership in the said flat. In any case, as long as relationship of husband and wife, is subsisting the defendant is entitled

to five in her matrimonial home and, therefore, no injunction can be granted which will result in throwing her out of the said matrimonial being. Therefore, in substance it is contended by Shri Parikh that the judgment and decree passed by the City Civil Court as well as the single Judge in First Appeal is wholly justified and the plaintiff is not entitled to any reliefs.

10. So far as the marriage dated 6th May, 1966. Solemnised in England is concerned parties are not at issue. The defendant herself has given evidence that marriage was solemnized and plaintiff also admitted in his evidence that required ceremony and formalities were completed and he accepted the defendant as his wife in the presence of witnesses. Therefore, it must be held that marriage dated 6th of May, 1966 was performed in England according to the British Marriage Act, 1949, This position is also clear from the entry of marriage made pursuant to the provisions of Marriage Act, 1940. However, among the persons who attended the aforesaid marriage, there were two adult Mohammedans, one Dr. Amin and the other Dr., Khan, who were also physically present. At the time of solemnization of the said marriage defendant was admittedly a Hindu by religion. Mr. Mody has contended that the said marriage should be treated as 'Nikah Fasid' irregular marriage according to Mohammedan Law, It is not possible for us to accept this contention. No civil marriage validly performed and solemnized, according to any law in force can be treated as a religious marriage, by introducing elements of formalities of personal law. The presence of two witnesses of Mohammedan faith, cannot ipso facto convert any civil marriage into any other form of marriage much less a 'Nikah Fasi' As held by the Privy Council in AIR 1950 PC 31, Engene Berthine v. Dame Anne Marie Uvonne Dastous:

'If a marriage is good by the law of the country where it is effected it is good all over the world no matter whether the proceedings or the ceremony which constituted the marriage according to the law of place would not constitute marriage in the country of domicile of one or the other spouses.'

The character of marriage remains unaffected by such external factors. Because, a civil marriage validly performed, has an overriding effect on all other religious forms of marriages.

11. When the parties have solemnized a legal and valid marriage as per British Marriage Act, it is difficult to hold that the said marriage should also be treated as Nikah Fasid, When the parties with open eyes have chosen a specific form of marriage, it cannot be held that they concurrently also intended to enter into another form of marriage. To impute such an intention is contrary to well established principles of justice, equity and good conscience. This is more so, when the plaintiff himself does not say in his evidence that it was an irregular marriage within the meaning of Mohammedan Law of he intended to solemnize marriage according to the provisions of Mohammedan Law. In the context Shri Parekh has placed reliance upon the Rules 32, 35, 36 and 37 of Dicey & Mories Conflict of Laws. Rule 32 deals with the formal validity of the marriage. Rule 32 lays down that the capacity to marry is governed by the law of each party's antenuptial domicile. As per Rule 35, the marriage celebrated in a form which is monogamous under the law of the place of celebration is monogamous marriage. Whatever the personal law of the parties at the time of marriage or at any subsequent time. As per Rule 36 even the marriage celebrated in England in Muslim Mosques is also monogamous. Then comes Rule 3 which declares that a man or woman whose personal law does not permit polygamy has no capacity to contract a valid polygamous marriage. Admittedly at the time of the said marriage the defendant was a Hindu and therefore it is also doubtful whether a Nikah Fasid as per the Mohammedan Law was really possible. It was not disputed by Shri Mody that the marriage in England was a monogamous one. If this is so, how can a marriage be monogamous and polygamous at the same time. Therefore, having regard to the facts and circumstances of the present case it is not possible for us to accept the contention of Shri Mody that the marriage solemnized as per the procedure laid down by the British marriage Act could concurrently be treated as Nikah Fasid within the meaning of Mohammedan law. If such a contention is accepted then even a secular and monogamous marriage solemnised as per provisions of [Special Marriage Act, 1954](#) could be termed as 'Naikh Fasid' and a secular and monogamous marriage between the two muslim or between two muslim husband and non-muslim wife will become impossible even if they desire to solemnise such a secular and monogamous marriage.

12. Shri Mody, learned counsel appearing for the appellant husband then contended that the view taken by the learned single Judge that the present marriage is governed by the Foreign Marriage Act is wholly illegal and unjustified. It is contended by Shri Mody that the Foreign Marriage Act, 1969 is not retrospective in its operation and therefore cannot govern the marriage which took place prior to 1969. He also contended that under the Mohammedan Law husband had come vested rights. The Foreign Marriage Act cannot be interpreted to mean that the said vested rights have been taken away retrospectively. According to Shri Mody under the Mohammedan Law a husband has a vested right to have four wives, he has a vested right to give a unilateral lalaq and hence the provisions of the Foreign Marriage Act cannot be interpreted in such a way so as to affect else vested rights. Shri Mody also contended that is the context of the subject matter Mohammedan Law is a Special Act, whereas the Foreign Marriage Act is a general enactment. Mohammedan Law does not apply to all foreign marriages but applies to those foreign marriages only where the parties are Mohammedans. He also contended that if it is held that the provisions of the Foreign Marriage Act apply retrospectively, then disastrous effect are likely to follow because in that case the marriage already performed even before coming into force of the Foreign marriage Act is likely to be subject to penalties prescribed by Chapter V of the said Act. Therefore, according to the learned counsel the provisions of the Foreign Marriage Act will be applicable only to those marriages which are solemnised after coming into force of the Foreign Marriage Act. Shri Mody also contended that ever otherwise in view of the provisions of S. 18(2) of the Act the provisions of S. 18(1) will not apply to the present case as the Mohammedan Law provides for a grant of relief in respect of such marriage.

13. The special Marriage Act or Foreign Marriage Act do not require continuance of the original religion as a condition for getting relief of divorce. Section 18(1) of the Foreign Marriage Act provides for statutory rule. Sec 18 (4) is in the nature of proviso or exception and therefore will have to be strictly construed. The very wording of sub-sec (4) of S. 18 clearly indicated that it intends to take out something from Section 18(1). Therefore it can only take out some thing which is included in Section 18(1).

14. For property appreciating the controversy raised before us it will be worthwhile if a detailed reference is made to various provisions of the Foreign Marriage Act, 1989, hereinafter referred to as the said Act. It was enacted to make a provisions relating to the marriage of citizens of India outside India. The expression 'foreign country' is defined by S. 2(c) to mean a country or a place outside India chapter II deals with solemnisation of foreign marriages, Chapter III deals with registration of foreign marriages solemnised under other laws, They, by sub-sec (6) of S. 17 it is laid down that the marriage registered under S. 17 shall as from the date of registration be deemed to have been solemnised under deals with matrimonial reliefs in respect of foreign marriages. Section 18 in the said Chapter reads as under:

'18 (1) Subject to the other provisions contained in this section the provisions of Chapters IV, V, IV and VII of the [Special Marriage Act, 1954](#) shall apply in relation to marriages solemnised under this Act and to any other marriage solemnised in a foreign country between parties of whom one at least is a citizen of India as they apply in relation to marriages solemnised under the Act:

Explanation : In its application to the marriages referred to in this sub-section, S. 24 of the [Special Marriage Act, 1954](#) shall be subject to the following modifications, namely:

(I) the reference in sub-sec (1) thereof to clauses (a), (b), (c) and (d) of S. 3 of that Act shall be construed as a reference to clauses (a), (b), (b) and (d) respectively of S. 4 of this Act, and

(ii) nothing contained in S. 24 aforesaid shall apply to any marriage-

(a) which is not solemnized under this Act: or

(b) which is deemed to be solemnized under this Act by reason of the provisions contained in S. 17

Provided that the registration of any such marriage as is referred to in subclause (b) may be declared to be of

no effect if the registration was in contravention of sub-sec (2) of S. 17.

(2) Every petition for relief under Chapter V or Chapter VI of the [Special Marriage Act, 1954](#), as made applicable to the marriages referred to in sub-section (1), shall be presented to the district court within the local limits of whose ordinary civil jurisdiction -

(a) the respondent is residing at the time of the presentation of the petition. Or

(b) the husband and wife last resided together. Or

(c) the petitioner is residing at the time of the presentation of the petition, provided that the respondent is at that time residing outside India.

Explanation - In this section. ' district court' has the same meaning as in the Special Marriage Act. 1954.

(3) Nothing contained in this section shall authorise any court -

(a) to make any decree of dissolution of marriage, except where:

(I) the parties to the marriage are domiciled in India at the time of the presentation of the petition, or

(ii) the petitioner, being the wife, was domiciled in India immediately before the marriage and has been residing in India for a period of not less than three years immediately preceding the presentation of the petition:

(b) to make any decree annulling avoidable marriage, except where -

(I) the parties to the marriage are domiciled in India at the time of the presentation of the petition; or

(ii) the marriage was solemnised under this Act and the petitioner, being the wife, has been ordinarily resident in India for a period of three years immediately preceding the presentation of the petition:

(c) to make any decree of nullity of marriage in respect of a void marriage, except where:

(I) either of the parties, to the marriage is domiciled in India at the time of the presentation of the petition or

(ii) the marriage was solemnized under this Act and the petitioner is residing in India at the time of the presentation of the petition:

(d) to grant any other relief under Chapter V or Chapter VI of the [Special Marriage Act, 1954](#) except where the petitioner is residing in India at the time of the presentation of the petition.

(4) Nothing contained in sub-sec (1) shall authorise any court to grant any relief under this Act in relation to any marriage in a foreign country not solemnized under it, if the grant of relief in respect of such marriage (whether on any of the grounds specified in the [Special Marriage Act, 1954](#) or otherwise is provided for under other law for the time being in force.'

Section 18(1) takes in its import the marriage solemnized under the Act and any other marriage solemnized in the foreign country between the parties of whom one at least is a citizen of India thus, from the bare reading of S. 18(1) it is quite clear that it applies to all other marriages solemnized in a foreign country between the parties of whom one at least is a citizen of India. For properly appreciating the intention behind the said legislation it will be worthwhile if a reference is made to the 23rd report of the Law Commission which deals with the foreign marriage. It appears from the said report that the object of the legislation was to regulate marriages performed outside India when either of the parties thereto is a citizen of India, thereby filling a gap in the Special Marriage Act, which is limited in its application to the marriages between Indian citizens. After analysing different types of marriages which could be entered into abroad by the parties, one or both of

whom are Indian citizens. Para 3 of the report explains that the object of the legislation is not only to provide for solemnization of the marriages but also to enable the parties thereto to obtain proper matrimonial relief, such as, dissolution of marriage and so forth. The report also makes a reference to the rules of private international law on the subject so as to ensure as far as possible that the validity of the marriage can be recognised in other countries besides India. Then come paras 13 and 18 of the report which read as under:

'13. As already stated, we do not have in this country what may be called a *lex loci* dealing generally with matrimonial jurisdiction and if suitable provisions are not made in this behalf in respect of marriage solemnized under the proposed legislation, there will be a lacuna in the law. We have, therefore to depart in this respect from the English and Australian acts.

In our opinion the proposed law should contain an express provision regarding matrimonial causes. Further, it has been brought to our notice that difficulties are experienced by citizens of India who choose to marry abroad not under our laws but under foreign laws. In obtaining the appropriate matrimonial relief in our country in case the marriage unfortunately turns out to be a failure, in a recent case the Rajasthan High Court has held that where a person domiciled in India has contracted a marriage in England with an English Law he can obtain a divorce under the [Special Marriage Act, 1954](#) on the ground that Act is the general law of divorce in force in this country. Without entering into any discussion as to its correctness we think that the decision emphasises the need for making it clear by a statutory provision. We are, therefore, of the opinion that the provision about matrimonial reliefs to be included in the proposed legislation should also apply to a marriage performed in a foreign country under a foreign law where one of the parties to the marriage is a citizen of India. At the same time, care has to be taken to ensure that a marriage in a foreign country between parties, only one of whom is a citizen of India, solemnized under the provisions of the proposed law, is not held to be void on the ground that it contravenes one of the other than the provisions in the new law. Subject to this reservation, any other matrimonial relief available to a party who is married under this law should also be available to a citizen of India marrying a foreigner abroad under a foreign law.'

18. (A) Our recommendation being that we should on the several topics mentioned above draw from the provisions of the [Special Marriage Act, 1954](#), the question naturally arises as to how that could best be done. The proposed legislation can be framed in any one of the following four modes:

(I) We may draft a separate and self contained Act. This will deal both with marriage and with matrimonial causes, not by referring to the Chapters in the Special Marriage Act and the Christian Marriage Bill, by enacting the provisions therein full.

(II) We may draft a separate Act without making it self-contained and incorporate therein by reference the provisions relating to marriage in Chapters IV, V, VI, and VII of the [Special Marriage Act, 1954](#) this will be shorter than No. (I) above

(iii) We may insert a new Chapter in the Special Marriage Act: the Chapter itself would not be self contained, but would refer back to the provisions in other chapters relating to marriage as well as matrimonial causes.

(iv) A fourth course would be to amend S. 1(2) and S. 4(E) of the Special Marriage Act, so as to allow marriage in the Special marriage from where one party is a citizen of India. This would be shorter than No. (iii) above. Consequential amendments may be required to other sections also. After careful consideration, we have reached the conclusion that course No. (ii) above is the best. The usual objection to referential legislation - that it often leads to ambiguity - will not apply in this case for the purposes of matrimonial relief, there is hardly any difference between a foreign marriage solemnised under the proposed law and a marriage solemnised in India under the Special Marriage Act, 1954. This device has the additional advantage of avoiding unnecessary repetition of a major portion of the [Special Marriage Act, 1954](#), in the proposed law.'

The statement of Objects and Reasons attached to the bill also throws light upon the intention behind this legislation. The statement of Objects and Reason reads as under :

' This bill seeks to implement the twenty-third report of the Law Commission on the law relating to foreign marriages. There is, at present considerable uncertainty as to the law on the subject, as the existing legislation touches only the fringes of the subject and the matter is governed by the principles of private international law which are by no means well-settled, and which cannot be readily applied to a country such as ours in which different marriage law applies to different communities. The [Special Marriage Act, 1954](#) sought to remove the uncertainty to some extent by providing that marriages abroad between citizens of India who are domiciled in India might be solemnised under it.

In the course of the debate in relation to that Act in Parliament, it was urged that a provision should also be made for marriages abroad where one of the parties alone is a Indian Citizen. In this context, an assurance was given that government would, after careful consideration introduce comprehensive legislation on the subject of foreign marriages. The present bill is the outcome of that assurance.

2. The Bill is modelled on the Special Marriages Act, 1954 and existing English and Australian Legislation on the subject of foreign marriages subject to certain important modifications rendered necessary by the peculiar conditions obtaining in our country'.

Then the statement of objects and reasons dealing with S. 18 of the Act reads as under ' Clause 18 : sub-clause(1) applies the provisions of chapters IV to VII of the Special Marriage Act so as to -

(I) Define the consequences of marriage under the proposed law ; and

(ii) provide for matrimonial relief, Read with sub-clause (4), it covers also foreign marriages under the other laws for which matrimonial relief is not available in India under any other law. Sub-cl (2) is intended to define the district court which will have jurisdiction for granting relief and sub-clause (3) embodies the recognised principles of private international law as to jurisdiction of Indian Courts to grant matrimonial relief.

While providing for matrimonial relief in respect of foreign marriages under other laws, care has to be taken to ensure that :-

(a) the validity of such marriages is not affected by the provisions of the proposed law ; and

(b) even where such marriage is registered under this law its validity is not affected by the said provisions, the only relief available in such a case being cancellation of registration'

Therefore, from the Law Commission's report as well as the Statement of Objects and Reasons it is quite clear that the Foreign Marriage Act was intended as a piece of comprehensive legislation on the subject relating to foreign marriages. Hence it is a complete code in itself. S. 18 was intended to cover all foreign marriages. Expression used in S. 18(1) viz. ' to any other marriage solemnised in the foreign country' must take in its import all other marriages which are not covered by the first part of S. 18(1). The word 'solemnised' indicates that it applies to the marriages which are solemnised even prior to coming into force of the Act. This is further clear from the provisions of S. 17 of the Act which deal with registration of foreign marriages solemnised under other laws. S. 12(2) lays down that no marriage shall be registered under S. 17 unless at the time of registration it satisfies the conditions mentioned in S. 4. Then by sub-section (6) of S. 17 it is declared that the marriages registered under this section shall as from the date of registration be deemed to have been solemnised under the Act. If the form prescribed under the rule is read with section 17 of the Act, it is further clear that it takes in its import even the marriages already solemnised. Form prescribed under the Rule can be used as an aid to construction on the basis of principles of contemporary expositio which is a well-settled rule of interpretation of a statute. ( See K.P.Verghese v. I-T. Officer, Ernakulam, : [1981]131ITR597(SC) ). The expression ' any other marriage solemnised in a foreign country' therefore must take in its import all the marriages solemnised in a foreign country either before or after coming into force of the enactment. Looking to the words of the section and giving them their plain and natural meaning we find it impossible to hold that the foreign marriages solemnised prior to the coming into force of Foreign Marriage Act, 1969 are

not covered by S. 18(1) of the Act. To accept such a contention one has to read into the section additional words 'after the date of this act' after the word solemnised. If such a construction is not put up, the intention of the legislature in enacting a comprehensive legislation on the subject of foreign marriages will be frustrated.

15. It is also not possible for us to accept the contention of Shri Mody that in view of the provisions of sub-sec. (4) of S. 18 nothing contained in sub-sec (1) of S. 18 will apply to this case. In this context it was contended by Shri Mody that the Mohammedan law is a law for the time being in force which provides for grant of relief in respect of marriages within the contemplation of sub-sec (4) of S. 18. According to Shri Mody, the learned judge committed an error in construing the said provision. The learned judge in para 10 of his judgement has held as under :

' 10. To summarise, Section 18 of the Act applies to all marriages solemnized in a foreign country whether under the Act or registered under the Act or otherwise and one of the party to which is an Indian citizen. The consequences of such a marriage and reliefs respect thereof will be governed by section 18(1) read with the relevant provision of the Special Marriage Act in all cases except where any Indian Law, statutorily or otherwise provides for grant of relief. No law which is non-statutory presently comes to my mind which provides for grant of relief, that is a right to apply to some authority. There being no such provision in the Muslim law, so far as a husband is concerned, in case of a foreign marriage a divorce can be obtained by a husband only in accordance of the provisions of the said Act not otherwise.

11. Mr. Bhatt's contention that the Shariat Act is such an Act as is contemplated in S. 18(4) cannot be accepted. The Shariat Act was enacted to provide for governance of Muslim by law as laid down in Shariat Act in preference over customary law. The Shariat law therefore makes personal law applicable uniformly to all Muslims notwithstanding any custom or usage to the contrary. The Shariat Act does not contain any rule of law governing Muslims and less so provides for the grant of any relief, in respect of a marriage. The Shariat Act or the Shariat Act read with a Muslim personal law cannot be said to be the law in force contemplated in S. 18(4) of the Foreign Marriage Act'.

We are in general agreement with these observations of the learned single judge for more than one reason. Chapter IV deals with the matrimonial reliefs which could be granted by the court. Sub-sec (2) of section 18 deals with the procedure of filing of a petition for relief. Then in sub-sec (3) read with sub-cl (d) it is laid down that nothing contained in this section shall authorise any court to grant any other relief under Chapter IV or Chapter VI of the Special Marriage Act, 1954 except where the petitioner is residing in India at the time of the presentation of the petition. The word 'relief' is used in sub-sections (2), (3) and (4) of S. 18. Similarly expression 'grant relief' is also used in sub-sections (3) and (4) of S. 18. All these provisions of S. 18, will have to be read harmoniously, as every sub-section throws light on the another. The said expression will have to be understood to have the same meaning in all the sub-sections. So understood in our opinion the expression 'grant of relief in respect of such marriage' must mean a relief which could be granted by a court in respect of matrimonial matters. This expression cannot take in its import a voluntary and unilateral act of a husband of giving talaq to his wife which does not require any intervention of the court.

16. The provision of the Act as well as S. 18 will have to be construed harmoniously so as to discover the true intention of the legislature and to make law effective and not frustrate legislative intent in that behalf, While interpreting the words and expressions used in Section 18 it is necessary to have regard to the subject matter of the statute and the object which it is intended to achieve, While construing the words and expressions, the context in which the words occur, the object of the statute in which the provisions is included and the policy underlying the statute assume importance. The words and expressions while have to be construed in the light of their context rather than their etymological sense or their popular meaning apart from the context. It is a sound and indeed a well known principle of construction that the meaning of words and expression and in an Act must take their colour from the context in which they appear. If two interpretations are reasonably possible any construction will have to be avoided which would reduce the legislation to a futility because

Parliament is presumed to legislate only for the purpose of bringing about effective result. When the material words are capable of bearing two constructions the well settled principle is to construe such words in tune with the rule laid down in Haydon's case which has now attained the status of classic. The words will have to be construed in the light as to what was the common law before the enactment of the Act, what was the enactment of the Act, what was the mischief and defect for which the common law did not provide and what remedy the Parliament has provided to cure the said defect. A construction will have to be placed which will suppress the mischief and advance remedy. If the construction suggested by Shri Mody is accepted it will reduce the legislation to futility. From the bare reading of sub-section (4) it is clear that the said section is dealing with the authority of the Court to grant relief under the Act in relation to any marriage in a foreign country not solemnized under the Act, if grant of relief in respect of such marriage is provided for under any law for the time being in force. Therefore, the relief contemplated is in relation to a marriage and not regarding general relationship of husband and wife. The expression 'whether on any of the grounds specified in the [Special Marriage Act, 1954](#), or otherwise' makes this intention further clear. The words 'or otherwise' are referable to grounds. Prohibition is imposed upon a court to grant a relief under sub-sec (1) of Section 18 of grant of relief in respect of 1982 Bom./23 VIII G - 12 such foreign marriage is provided for under any other law for the time being in force. Thus the words 'grant of relief' as used in S. 18(4) obviously means grant of relief by an independent court, tribunal or authority which is available qua a foreign marriage obviously to both the parties. It cannot take in its import a unilateral voluntary act of husband of dissolving a marriage by oral talaq. For such a unilateral act it is not necessary for husband to approach any court, tribunal or authority, However, it was contended by Shri Mody that in a given case a declaratory suit could be filed before a Civil Court claiming a declaration that the marriage stands dissolved and such a suit is also covered by sub-section (4) of S. 18. It is not possible for us to accept this contention. In a declaratory suit only a declaration is sought for, regarding a thing which has already become effective on its own force and such a declaratory relief cannot be equated with a grant of relief in relation to any marriage which is provided for under a law for the time being in force. Moreover such a unilateral right of divorce is only conferred upon a husband by Mohammedan law and not on wife, Sub-sec (4) contemplates grant of relief at the instance of both the parties. A relief contemplated is a relief which could be granted by a court of law or independent tribunal or authority. Such a relief should be available qua particular marriage. Relief must take in its import obviously the grounds on which such a relief could be granted by an independent tribunal or authority. It cannot be forgotten that under the Mohammedan law defendant-wife who is a Hindu has no remedy to seek matrimonial relief. If the wife wants to seek a matrimonial relief qua foreign marriage which took place in the year 1966 as per the provisions of British Marriage Act, she has no remedy available under the Mohammedan Law. So far as she is concerned, Law available is obviously Foreign Marriage Act. This position becomes further clear from S. 29 of the Foreign Marriage Act by which the provisions of Special Marriage Act, 1954 stand amended. This is further clear from the statements of Objects and Reasons as well as the Law Commission's report. Therefore, it is not possible for us to accept the contention of Shri Mody that in view of the provisions of sub-sec (4) of S. 18. S. 18(1) of the Foreign Marriage Act. Is not applicable to the present case. In our view the taken by the learned single judge is the only view possible, and therefore, we agree with the findings recorded by the learned single Judge in that behalf.

17. Chapter V which deals with the penalties is obviously prospective. It applies to any person whose marriage is solemnized or deemed to be solemnized under the Act. S 17 deals with registration of foreign marriages solemnized under other laws and sub-sec. (2) of S, 17 lays down that no marriage shall be registered under this section unless at the time of registration it fulfils the condition mentioned in Section 4. From the phraseology used in sub-sec 17 (2) it is quite clear that conditions mentioned in S. 4 should be satisfied at the time of registration and not at the time of marriage itself. Chapter IV which deals with matrimonial reliefs. In respect of foreign marriages is in terms made retrospective, otherwise it was not necessary to use the words or expression 'any other marriage solemnized in a foreign country between the parties of whom one at least is a citizen of India.'

18.. In S. 18(1) the words used are 'other marriage solemnized' which must mean solemnized at any time.

Whenever legislature wanted that certain provision of the Act should apply to the marriage which are solemnized under the Act, the legislature has used the expression 'may be solemnized', 'is solemnized', 'to be solemnised' etc. Such an expression is not used in S. 18(1) As already observed S. 17 takes in its import the marriages already solemnized in accordance with the law of the country concerned. Therefore, in our opinion Chapter IV of the Foreign Marriage Act will apply to the present marriage, which is admittedly a foreign marriage.

19. It is also not correct to say that a Mohammedan husband has a vested right to marry more than one wife viz., to have four wives at a time. It cannot also be said that anybody has got a vested right in the matter of divorce. To say the least dissolution of marriage is not a part and parcel of the contract of marriage. Nobody has got any vested right in the matter of dissolution of marriage. So far as the polygamy is concerned, the provision of Mohammedan law is only permissible or optional in nature and not obligatory. It only lays down a ceiling on obligatory. It only lays down a ceiling on wives and does not lay down that every Mohammedan should have four wives as a matter of right. It is in a form of an exception. Therefore it cannot be said that Chapter IV or S. 19 which deals with matrimonial reliefs in respect of foreign marriages has affected any vested right of the appellant retrospectively. The said chapter deals with the events taking effect in future though based on an earlier incident viz., Foreign marriage. Only because it takes into consideration earlier event of marriage, it cannot be said that the provisions is retrospective is well settled that vested right is a right which has come into operation and is not a potential right, Mere right to take advantage of provision of law is not an accrued right. A statute cannot also be said to be retrospective 'because a part of the requisites for its action is drawn from a time antecedent to its passing' (see AIR 1984 SC 464. Sajnansingh v. State of Punjab and : AIR1980SC101 Zohrabai v. Arjuna).

20. As already held in the present case the marriage took place in England on 5th of May 1966. Therefore, it was a foreign marriage within the meaning of Foreign Marriage Act, 1969, The said marriage was solemnized under the British Marriage Act, 1949 and there is no statutory law in the field which provides for grant of matrimonial reliefs as contemplated by S. 18(4) of the Act. Therefore in our opinion the learned single Judge was right in coming to the conclusion that the marriage between the plaintiff and the defendant which took place on 5th of May, 1968 in England is governed by Chapter IV of the Foreign Marriage Act, 1969.

21. Once it is held that the relationship of the parties flowing from the marriage solemnized in England in 1966 is covered by the Foreign Marriage Act, 1969, in face it is not necessary to deal with any other contention raised by Shri Mody. It is also not necessary to consider the decision of this Court in Khambatta v. Khambatta : AIR1935Bom5 . Even otherwise in our opinion even *lex domicilli* so far as secular marriage of this type is concerned will be [Special Marriage Act, 1954](#) and not Mohammedan Law. It cannot be disputed that the marriage which was solemnized as per the provisions of the British Marriage Act, in 1966 in England was secular in form and content. It was a monogamous marriage. On the date of the marriage the defendant was a Hindu. Therefore, the marriage which took place in England was inter-religious marriage. In support of his contention Shri Perikh, learned counsel appearing for the defendant has placed reliance upon certain observations in 'Muslim Law of India by Dr. Taher Mohammad, 1980 edition, at pages 59 S. 2(6) page 13, and S. 19 page 188 of Tyabji's Muslim Law (1958 Edition) and has contended that even the Muslim Law stands modified in view of the Special Marriage Act as well as the [Constitution of India](#).

22. The legal system prevailing prior to Special Marriage Act clearly indicates that the Special Marriage Act clearly indicates that the Special Marriage Act of 1972 was not applicable to Indian Muslims, nor Indian Divorces Act was applicable if neither party was a Christian female known as Kitabity. The Special Marriage Act 1954 applies to all citizens irrespective of religion. Till 1969 it applied to all the Indian citizens marrying in foreign countries if they chose to marry under the Act. To some extent there was a choice open and the parties could have married under the secular system of marriage which provided for a monogamous form of marriage namely : union for life to the exclusion of others, and dissoluble only by a judicial authority. Admittedly the marriage which was solemnized in may 1966 in England under the British Marriage Act, 1949 was monogamous and secular in nature. Therefore it will have to be seen as to whether there is any Indian

law available in the field which can apply to such monogamous secular marriage. No such law was available till the [Special Marriage Act, 1954](#) was enacted. It appears to be well-settled principle of law that in the absence of anything to the contrary the rights under the marriage are to be governed by the law of domicilli. In the present case both the plaintiff and the defendant are Indian citizens. They came to India in 1969 and are living in India thereafter. Therefore it was contended by Shri Mody relying upon the decision of this Court in *Khambatta v. Khambatta* : AIR1935Bom5 that so far as *lex domicilli* is concerned, the present marriage will be governed by the personal law of the husband viz. Mohammedan law. In our view this is not the correct position today. Once it is held that the marriage which took place in England in 1966 was secular in the form and content and also monogamous and such a secular law is also available in India in the form of Special Marriage Act, 1954 then in our view even the *lex domicilli* in case of such secular marriage will be the Special Marriage Act and not the Personal Law of the husband. This is more so when one of the parties belonged to different religion and is not a muslim, After all there should be harmony between different personal laws so that the parties can live together.

23. It can safely be said that Special Marriage Act is in reality an Indian Marriage Act, which applies to all Indian Communities irrespective of caste, creed or religion. The concept of marriage under the said Act, is monogamous, that is union for life, dissoluble by judicial authorities, Under the said law all modern matrimonial reliefs are made available to both the spouses in the event of break down of marriage on an application to the Court of competent jurisdiction. Even the religious marriages can be registered under the said Act. On such registration the religious marriage can be converted into secular marriage. In this context it is also pertinent to note that between 1954 to 1969 two Indian citizens domiciled in India could have married under Special Marriage Act even outside India. A marriage which is monogamous in form continues to be so, where as original religious marriage can be converted into a secular marriage. However, a secular marriage cannot be converted into religious marriage. Therefore if there is in the field an Indian enactment which is applicable to all the citizens of India irrespective of their religion, then so far as secular marriages are concerned the said law will become *lex domicilli* of India for the purposes of matrimonial reliefs. Such an interpretation will be in tune with Article 44 as well as the preamble of the Constitution. It cannot also be forgotten that the establishment of a secular society is the aim and goal of Indian Constitution. Therefore in the area and field which is secular or nonreligious laws will have to be common for all citizens of India, and that is what has been done, though to limited extent by enacting Special Marriage Act at least leaves a choice open which is available to all the citizens of India irrespective of their caste, creed or religion. In Mohammedan Law Marriage is a Civil Contract. Hence so far as relationship flowing from contract of marriage is concerned, including its dissolution, the area and field is secular in nature.

24. In this context it will have to be remembered that if two interpretations are reasonably possible regarding the provisions of law, then the law will have to be interpreted and applied in the perspective of Part IV of the Constitution, which deals with directive principles of the State policy and benefit of reasonable doubt of law and fact, if there be such doubt must go to the weaker section in the present case to women (See : (1978)ILLJ322SC ). In the context a reference also could usefully be made to the decision of Karnataka High Court in Air 1976 Kant 200, *Raj Mohammad v. Saheeda*, wherein E. S. Vyankatamayya J. (As he then was), has observed that our notions of law will have to be altered in such a way as to bring them in conformity with modern social conditions.

25. Shri Parikh learned counsel appearing for the respondent-wife has also raised a contention that the provisions of the Mohammedan law read with Sheriyat Act are violative of Article 14 of the Constitution. Such a Contention is specifically raised by respondent in the memorandum of cross-objection. Shri Parksh further contended that full equality between sexes is hardly possible in a legal system which permits polygamy and unilateral talaq and the social system which tolerates it. He contended that in some of the Muslim countries polygamy has been prohibited and divorce is also regulated by statute. However denial of equality and social justice still continues in India and that too in spite of the directive principles of the State policy. Which also includes Article 44. Because of the system of unilateral talaq a muslim wife continues to be in a position of

legal inferiority and insecurity. He also contended that the trend in modern times is in favour of territorial laws in preference to contractual laws and Art. 44 is in tune with the said trend. In support of his contention he has placed reliance upon decisions of V. R. Krishan Lyer J. ( as he then was ) in 1970 Ket. LT 4. Shahulameedu v. Subaida Beevi, : AIR1971Ker261 Yusuf Rawthan v. Sowramma: 1972 Ker LT 512, Mohammad Haneefa v. Puthuman Beevi. Shri Parish also contended that the continuance of various personal laws which discriminate between men and women violates the fundamental rights and even the Preamble of the Constitution which promises equality of status to all citizens. It is also against the spirit of national integration secularism. He has placed strong reliance upon the following observations of V. Khalid J. In Mohd. Haneefa v. Pathumal Beevi viz.

'Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My Judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed. We respectfully share the feelings expressed by Kahlid J. Shri Parikh has also drawn our attention to the observations of the Supreme Court in AIR 1989 Sc 1930. Fuzlunbi v. K. Khader Vali, para 20 which reads as under: '20. Before we bid farewell to Fuzlunabi it is necessary to mention that Chief Justice Baharul Islam. In an elaborate Judgment replete with quotes from the Holy Quoran, has exposed the error of early English authors and judges who dealt with talaq in Muslim law as good even if pronounced at whim or in tantrum, and argued against the diehard view of Batchlor. J. ILR(1906) 30 Bom 537 that this view is good in law, though bad in theology' May be, when the point directly arises, the question will have to be considered by this court, but enough unto the day the evil thereof and we do not express our opinion on this question as it does not call for a decision in the present case.'

However, in the view which we have taken It is not necessary to decide this challenge based on Article 14 of the Constitution, and the same is kept open.

26. The next contention which requires consideration in this appeal is to find out as to whether the plaintiff has proved that the defendant-wife was converted to Islam and thereafter a Nikah ceremony took place.

27. It is a well known principle of civil law that a person born into or following one religion continues to belong to such religion subject to conversion to another religion. Conversion to another religion basically requires change of faith. To say the least it is a matter of conviction. According to Mulla's Principle of Mohammedan Law any person who professes Mohammedan religion that is, he acknowledges that there is but one God and that Mohammad is his prophet is a Mohammedan. Such a person may be a Mohammedan by birth or he may be a Mohammedan by conversion. It is not necessary that he should observe any particular rites or ceremony to be an orthodox believer in the religion, no Court can test or gauge sincerity of religious belief. It is sufficient if he professes Mohammedan religion in the sense that he accepts prophetic grant of Mohammedan (section 19, Chapter 2, page 19 of Mulla's Principles of Mohammedan Law). Thus the real test is of professing Mohammedan religion. As to when is the true import of the term profess fell for consideration of the Supreme Court in Punjabrao V. D. P. Meshram, : [1965]1SCR849 of the said decision the Supreme Court has observed as under:

'13. What cl. (3) of the Constitution (Scheduled Castes) Order, 1950 contemplates is that for a person to be treated as one belonging to a Scheduled Caste within the meaning of that Order he must be one who professes either Hindu or Sikh religion. The High Court, following its earlier decision in Narayan Waktu v. Punjabrao, : AIR1958Bom296 has said that the meaning of the phrase 'professes a religion' in the aforementioned provision is 'to enter publicly in to a religious state' and that for this purpose a mere declaration by a person that he has ceased to belong to a particular religion and embraced another religion would not be sufficient. The meanings of the word 'profess' have been given thus in Webster's New World Dictionary: ' to avow publicly, to make an open declaration of ..... to declare one's belief in : as to profess Shrist. To accept into a religious order' The meanings given in the Shorter Oxford Dictionary are more or less the same. It seems to us that the meaning 'to declare one's belief in : as to profess christ' is one which we

have to bear in mind while construing the aforesaid order because it is this which bears upon religious belief and consequently also upon a change in religious belief. It would thus follow that a declaration of one's belief must necessarily mean a declaration in such a way that it would be known to those whom it may interest. Therefore if a public declaration is made by a person that he has ceased to belong to his old religion and has accepted another religion he will be taken as professing the other religion. In the face of such an open declaration it would be idle to enquire further as to whether the conversion to another religion was efficacious. The word 'professes' in the Presidential Order appears to have been used in the sense an open declaration or practice by a person of the Hindu for the Sikh religion. Where, therefore, a person says, on the contrary that he has ceased to be Hindu he cannot derive any benefit from the order.'

Thus it appears that for a conversion there should be a declaration of one's belief and the said declaration should be in such a way that it should be known to those whom it may interest. If a public declaration is made by a person that he has ceased to belong to one religion and is accepting another religion, he will be taken as professing the other religion.

28. In *Rakeya Bibi v. Anil Kumar Mukherjee* ILR 1948 Cal 119, Calcutta High Court has on an occasion to consider this aspect of the matter in the context of conversion to Islam. Having held that the plaintiff in that case offered herself for conversion and went through the necessary formalities, the Calcutta High Court observed as under:

'The question, however, still remains whether her conversion was a bona fide one or a mere device adopted for the purpose of avoiding the marriage. Mr. Das, who appeared for her, contended on the authority of certain observations made by Ormond J. In the case of *Ayesh Bibi v. Subodh chandra Chakrabarti*. ILR (1945) Cal 405 : AIR 1949 Cal 436 that the question of bona fides was wholly irrelevant and, further that no court could determine the bona fides or otherwise of a person's change of faith. We entirely dissent from those propositions. It may be that a court cannot test or gauge the sincerity of religious belief, or that, where there is no question of the genuineness or a person's belief in a certain religion, a court cannot measure its depth or determine whether it is an intelligent conviction or an ignorant and superficial fancy. But a court can and does find the true intention of men lying behind their acts and one certainly find from the circumstances of a case whether a pretended conversion was really a means to some further end. We can see no reason to hold that it is in the nature of things impossible for a court of law to determine whether a conversion was bona fide. Nor can we agree that the question of bona fides is immaterial. In the case of *Skinner v. Skinner* ILR (1897) Cal 537 the Privy Council, while referring to the possibility that a change of religion on the part of both the spouses might have the effect of altering rights incidental to the marriage, was careful to add the qualification that such change must be made 'honestly' and 'without any intent to commit a fraud upon the law' Indeed, it seems to us to be elementary that if a conversion is not inspired by religious feeling and undergone for its own sake, but is resorted to merely with the object of creating a ground for some claim of right, a court of law cannot recognise it as a good basis for such claim but must hold that no lawful foundation of the claim has been proved. Where conversion gives a legal right, to go through a mock conversion and set it up as a basis of that right is to commit a fraud upon the law. We are clearly of opinion that were a party put forward his conversion to a new faith as creating a right in his favour to the prejudice of another, it is proper and necessary for a court of law to enquire and find whether the conversion was a bona fide one.'

Thus in case of a conversion there should be a change of heart and honest conviction in the tenets of new religion in lieu of tenets of the original religion. If a ceremony of conversion is gone into conscientiously after such an honest conviction, then alone there is a conversion of faith or it can be said that a person is professing another religion. In case of conversion from one religion to another a strict proof is required and it cannot be easily inferred. More so when a person converted denies even the factum of conversion. As to whether there in fact a conversion or not must depend on facts and circumstances of each case and not general rule can be laid down in that behalf.

29. To prove factum of conversion apart from himself the plaintiff has examined P. W. 3 Quazi Mohammad All

Paloba, (PW 4) Alli M. Shama (PW 5), Abdul Kadar Divekar, (P.W. 6) Yusuf Khan. (PW 7) Dr. Bailu, (PW. 9) Mrs. Parhat Qazi, (PW 10) Hussein Beg and (PW 11) Zafar Ali Mirjee. The plaintiff is also relying upon the documentary evidence viz., certain letters as well as the diary of the defendant and an entry in a register maintained by Quazi.

30. The trial court has considered in detail all this evidence and come to the conclusion that the plaintiff has failed to prove the factum of conversion. The trial Court has given good reasons for coming to this conclusion. As we are in general agreement with the views of the trial court it is not necessary to reproduce the whole evidence over again. (Sec : 1981CriLJ1016 , Ayodhya Dube v. Ram Sumder Singh). According to the learned Judge the following surrounding circumstances made the story of conversion highly impossible: (1) the first and the foremost circumstance is that the plaint as originally filed was totally silent about the alleged conversion: (2) there is no reference to the date of any marriage nor any details are given: (3) the plaintiff admitted in his evidence that he knew that there was a mosque in England and he had also Muslim friends there: there fore it would not have been difficult for him to have arranged for Nikah and conversion ceremonies while the parties were in England and one wonders as to why the plaintiff should wait till their return to India and no explanation is given by the plaintiff for this: (4) it is not pointed out that there was any pressing occasion or pressure which necessitated the conversion of the defendant and the subsequent Nikah; (5) if the father of the plaintiff was an orthodox, then the plaintiff ordinarily would have insisted on the defendant's conversion and would not have allowed his children to be born and brought up without the defendant's conversion to Islam: (6) though the plaintiff speaks about conversion, it is not his case that either his parents or his friends or anybody else had desired the Nikah also should be performed.

31. One is at a loss to understand as to what was the object or purpose or even propriety in performing the second marriage with the same wife over again after about three and hold years. No written invitations were issued about the so-called Nikah ceremony. The learned Judge in para 48 of his judgment has observed that the manner in which the ceremonies are stated to have taken place did not appear to him as natural. No Nikahnama is produced. There is no record of conversion. There are no photographs of the ceremonies viz. Conversion or Nikah. The entry dated 29-12-69 is practically at the end of the register and had not seen light of the day till it was produced in court and therefore in substance it is held by the learned Judge cumstances are relevant in appreciating the evidence both oral and documentary while deciding the issues of conversion and Nikah. The learned Judge of the trial court has considered the oral evidence in the light of these surrounding circumstances and in our view rightly, therefore, it is not possible for us to accept the contention of Shri Mody that the finding recorded by the learned Judge in that behalf is perverse. Apart from these circumstances. In our opinion there are certain other circumstances which made the story of conversion doubtful.

32. The Bombay Registration of Marriages Act, 1953 provides for registration of marriages. This Act came into force in the year 1964 and, therefore, the alleged Nikah which took place in 1969 should have been normally registered under the Bombay Registration Act. Absence of such a registration throws serious doubt on the factum of Nikah. It is pertinent to note that compulsory registration of marriages was recommended by the United Nations so as to have effective check on bigamous marriages. Apart from this registration also supplies reliable proof of marriages and ensures legitimacy etc. Such a provisions is also helpful to prevent take conversion to Islams to evade prohibition of higamy under other laws.

33. Apart from the fact there were no written wedding invitations, there is also no signed document in respect of Meher. No document bearing signatures of the parties and witnesses such as Nikahnama, is forthcoming. Apart from this subsequent events viz. Opening of a joint account in the Bank in the name of Padma, entry in the faction card, birth certificates, telephone application, insurance policies all show that in all these documents the defendant wife is described as Padma. This clearly negatives the story of conversion. Apart from this the circumstance that none of the defendant's personal lady friends or relatives were invited to the for itself. At the time when the alleged conversion and Nikah took place the last child of the defendant was a sucking child of less than two months old. Therefore, it appears to be a bit improbable that with a sucking

child in her arm the defendant will decide to enter into Islam. According to the plaintiff himself reason for conversion was orthodoxy of his parents and none else. Hence, the oral and documentary evidence produced by the plaintiff to prove the factum of conversion will have to be considered in the background.

34. The main witness to the conversion ceremony is Quzi Paloba. It is the case of the plaintiff that this witness has acted as Qazi and has conducted the conversion and Nikah ceremony. Qazi Paloba has filed an affidavit dated 12th June 1973 wherein he speaks about the certificate dated 5th May 1978, such is a certificate of marriage. In this affidavit he has not stated anything about conversion. So far as the factum or conversion is concerned, P.W 3 Quzi Mohamined Ali Paloba has stated as under:

'Whenever the parties come for Nikah I asked them their names. If I find that the party is non-muslim, I ask that person whether be or she was willing to embrace Lslam willingly, if that person consents the I makes him or her recite Kalma. This is my invariable practice in cases of non-Muslime coming for Nika' But for saying this he does not speak about the factum of conversion or the fact that in fact the defendant wife was asked to recite any Kalma or he had even asked her name. Thus his evidence is not direct evidence of conversion. Then he speaks about Nikah ceremony. However, in para 4 of his deposition he has stated that he does not remember whether by had prepared at that time Nikah. He admitted that he belonged to Konkani Jamat, which seems to be Jamat of the plaintiff. He is not aware of the existence of the Bombay Marriage Registration Act. He does not recollect what name was told to him by the defendant nor he is in a position to say definitely as to whether he had asked the defendant whether she was prepared to embrace Islam religion. In pare 7 of his deposition he stated that he cannot remember the place where Nikah took place and in the register the place of Nikah is not entered. He has admitted that so far as the rigister is concerned, some pages towards the end of the register are blank. He also admitted that he does not maintain any record about converting a person to Islam and he does not hold any Sanad of Qazi. He also did not remember time or the date on which Nikah of the plaintiff was performed. He then admitted that general practice is to keep a record, He also admitted that he takes signatures of both parties after preparing Nikahname. His attention was drawn to one of such Nikahnama Ex. 8 which related to other marriage. He also admitted in para 13 of his deposition that the column is provided for Nikah form where the Quzi makes entries such as whether bride is a widowed woman or is a divorcee etc. He also admitted that if bride or bridegroom had been converted to Islam before Nikah, he writes in the column serial number of the certificate issued by Nake Masjid about his or her conversion. He then admitted in para 17 of his deposition that the presence of Vakil is necessary at the time of Nikah to give consent of the bride besides fixing Meher etc. This witness was not to a position to remember anything about Nikah of Zubeda, sister of the plaintiff which took place in the year 1978, though he has tried to depose about Nikah which took place in the year 1969 about 10 years back. In this context it is also pertinent to note that Shri Abdul Aziz Murghey (P.W 2) who is Naib Qazi of Bombay since the last 35 years and who is examined by the plaintiff to prove. Talaqnama has stated in his deposition that his office maintains Nikahnama register which is in the nature of form. He also stated that as a rule he obtains signatures of both the parties to Nikah on the Nikahnama and normal to Nikah on the Nikahnama and normally parties do sign Nikahnama. Thus it appears that Nikahname is normally written. Therefore the learned Judge was quite right in discarding the evidence of Qazi Palobs. This is more so when there is no written record about the conversion and he does not speak about having made the defendant recite Kalma.

35. The other evidence on record viz. The evidence of (P.Ws. 4, 5, 6, 7 and 9) is at the most in the nature of corroboration to the evidence of Qazi (P.A. 3) Therefore if the main evidence of Qazi itself cannot be believed or is of little assistance for providing the factum of conversion and Nikah, then on the basis of other evidence on record it is not possible to record a conclusive finding in that behalf. All Shanmshi (p.W. 4) is the friend of the plaintiff. So far as his examination-in-chief is concerned, his affidavit dated 9-5-1978 was produced on record and he was tendered for cross-examination. He was stated in his deposition that he had gone alone to attend the marriage. He has stated in his deposition that he had gone alone to attend the marriage. He then stated that in fact Nikah was performed by Qazi in the evening and he does not remember the exact time. He also admitted that he is secretary of the Konkani Ambulance Society and director of Konkani Mercantile Bank

and it appears that the plaintiff is also associated with the said institutions. According to him it was Qazi Palobs who has conducted the conversion ceremony as well as the Nikah ceremony. Though he has stated that before Nikah, conversion ceremony had taken place, it was not possible for him to give the details. He also stated that as far as he remembers the plaintiff had not told him any time about his intention to divorce the defendant. Thus the evidence of this witness is also vague. Abdul Kadar Divekar (p. W. 5) is another witness who is also a friend of the plaintiff. According to him the defendant was made to recite calling at the time of conversion. He also stated that he had acted as Vakil at the time of Nikah. He then stated about the subsequent conduct of the defendant and has stated that she was behaving like a Muslim lady meaning thereby that she used to say 'salam'. 'Khuda Hafiz' ect. In para 13 of his evidence he stated that he may have signed on Nikahnama in both of his marriages. Then in para 14 he stated that as far as he remembers, at the time of Nikah of the plaintiff and the defendant a Nikahname as written and he had signed over it. He then stated that as far as his memory goes he had signed over only one Nikahnama form at that time. However, so far as the plaintiff is concerned in para 129 of his deposition he stated that he does not remember if he has signed on the Nikahnama at the time of Nikah. Qazi Paloba stated in his deposition that he does not remember whether he had prepared at that time any Nikahname. Then in para 12 of the deposition Divekar has stated that 10 years have passed, he does not remember all the details of the ceremony. This witness is alleged to have acted as a Vakil. However in para 15 of his deposition he had admitted that he has not acted as Vakil in any other Nikah except this. He also admitted that at the time of Nikah often bride and bridegroom are made to stay in separate rooms. He further admitted that ordinarily Vakil is a person from blood relation of bride. He also could not say whether it is a rule that the bride has to give consent or Vakil has to act on her behalf. It was also not possible for him to say as to who actually fixed Meher at the time of Nikah between the plaintiff and the defendant. Thus it is doubtful as to whether he had acted as a Vakil at all. To say the least his evidence is also beautifully vague. Yusuf Khan (P.W 6) is a relative of the plaintiff. He also speaks about the conversion and Nikah ceremony which were conducted by Qazi Paloba as well as the subsequent conduct of the defendant. In para 14 of his deposition he has stated that he does not remember whether he had signed over the Nikahnama on 29-12-1969. Then in para 18 he stated that he could not bear what exactly was spoken by Qazi and by the defendant between themselves as he was sitting in a soft voice. Therefore his evidence is to some extent based on his own guess-work. In para 19 of his deposition he admitted that in the marriage of Zubeda Nikahnama was made. He also stated that he could not say whether the Qazi who officiated at the Nikah of Zubeda. It was then suggested to him that the Qazi Paloba as he was Assistant Commissioner of Police (CID) and by using the said influence he has obtained certificate from Qazi. This suggestion was denied by the witness. Thus the evidence of this witness is also of little assistance. The evidence of other witness viz. P. W. 7 Dr. Baillur is also stereotypical. In para 7 he has stated that he was not aware of disputes between the plaintiff and defendant till filing of the suit. It was not possible for him to give details about the marriage ceremony of Farhad, the sister of the plaintiff, which was a recent one and he had attended the said marriage. This witness is a close friend of the plaintiff. P.W 9 Farhad is the sister of the plaintiff. At the time of alleged conversion and Nikah she was about 14 or 15 years of age. Initially in the examination-in-chief she stated that she does not aware of disputes between the plaintiff and defendant till filing of the suit. It was not possible for him to give details about the marriage ceremony of Farhad, the sister of the plaintiff, which was a recent one and he had attended the said marriage. This witness is a close friend of the plaintiff. P. W. 9 Farhad is the sister of the plaintiff. At the time of alleged conversion and Nikah she was about 14 or 15 years of age. Initially in the examination-in-chief she stated that she does not remember as to whether the plaintiff and the defendant were married again according to Muslim rites after their coming to India. Thereafter Interpreter was called and then the questions were again asked to her in Urdu. This witness has studied up to B.A. standard and therefore it cannot be said that earlier she could not understand the question. She had admitted that the marriage photographs were taken at the time of her marriage. She also stated that she does not know what customs the defendant wife was following prior to 29-12-1969 but according to her after that date she was following Muslim customs. She also stated in para 2 of her deposition that even prior to the conversion and Nikah ceremonies she herself and members of her family used to know the defendant as Pervin, From her evidence it is clear the photographs were being

taken at the time of marriages. Admittedly no photographs were taken when the marriage of the plaintiff and defendant took place in England. On record, there are one or two photographs of the father of the plaintiff. Therefore the absence of photograph at such an important function when both the plaintiff and the defendant are not only educated but were leading a modern life is a circumstance which is relevant for deciding the theory of conversion and subsequent. Nikah. So far as the plaintiff's evidence is concerned, it is obviously an interested testimony. To say the least the other evidence on record can only render corroboration to the evidence of Qazi Paloba who had conducted the conversion as well as Nikah ceremonies. Once his evidence is disbelieved, then obviously the other evidence is not of much assistance to prove the factum of conversion. We have also on record the earlier affidavits filed by plaintiff and his father, These affidavits were filed in the year 1978, The evidence of the defendant is obviously negative. However, it is pertinent to not relevant for deciding the question of conversion and Nikah. According to her there was no conversion and Nikah and the whole story is false. Further we do not find any good or compelling reason so that the defendant should decide to get herself converted to Islam. Her case of denial gets. Substantial corroboration in subsequent events manly the opinion of Bank account, entries in birth register and ration card wherein her name is still shown as Padma. Therefore, to us the whole story of conversion and subsequent Nikah sounds most improbable. It the said case of the plaintiff Is tested on the touchstone of probabilities, it will have to be hdl that the plaintiff has failed to prove conversion or Nikah. Therefore, if cumulative effect of all this evidence is considered together with surrounding circumstances, it cannot be said that the view taken by the trial Court is not the correct view of the evidence.

36. So far as the evidence relating to the subsequent conduct of the defendant is concerned, viz., her observing Muslim restively or her adopting certain modes of behaviour, which are consistent with Muslim form of behaviour, in our view that cannot change the complexion. After all the defendant wife had chosen to marry a Muslim husband. Her children were also Muslim. Most of the relatives and friends of the husband with whom the defendant has to associate and keep relations were Muslim culture. It is not disputed by Shri Mody that from this alone an inference of conversion cannot be drawn. On the other hand the other documentary evidence on record, namely the entry in the ration card, recitals in the application for telephone, entries in the birth certificates pertaining to birth of Sabir clearly indicates that there was no conversion. The learned Judge of the trial court has considered this aspect of the matter in paras 60 to 75 of his judgment and has rightly come to the conclusion that her said conduct does not lead to inference that she was converted to Islam or was professing Muslim religion. Even otherwise the alleged conversion was motivated by orthodoxy of plaintiff's parents and was not with noble sentiments. It does not show honest conviction or change of heart of faith in Muslim religion.

37. Once such a finding is recorded, then so-called talaq loses all its efficacy and, therefore, we do not propose to deal with the said evidence. Once it is held that the marriage between the defendant and the plaintiff solemnized in England in 1966 is governed by the Foreign Marriage Act, then obviously it cannot stand dissolved by unilateral talaq. It is rather surprising that though the marriage solemnized in England in 1986 is governed by the foreign Marriage Act, then obviously it cannot stand dissolved by unilateral talaq. It is rather surprising that though the marriage solemnized in England in 1966 was subsisting, the plaintiff has put up a story of second marriage in Nikah form with the same wife in December 1969, Even if it is assumed that the subsequent Nikah is established, earlier monogamous and secular marriage which took place in England in 1966 under British Marriage Act, 1949 is still subsisting as it has not been lawfully dissolved till today. Therefore we generally agree with the findings recorded by the learned trial Judge in this behalf.

38. In the view which we have taken it is not necessary to make any detailed reference to various decision cited at the Bar either for the plaintiff or the defendant.

39. However, it is contended by Shri Mody that even if it is held that the marriage of the plaintiff with the defendant case where injunction should be granted in favour of the plaintiff restraining the defendant from entering into the premises in Paradise Apartment. According to Shri Mody from the tenor of the evidence on record it is clear that their living together in the same house is an impossibility. The defendant has gone in

the extent of making false allegations against the plaintiff vide her letter was written by her in a feat of anger or it could be explained as abuses from an angry woman. According to Shri Mody, the wife who has gone to the extent of making such false allegations against her husband should not be permitted to live in the same house. Further the plaintiff husband had got a reasonable apprehension of danger to his life and to his reputation from her if she continues to live with him under the same roof. Shri Mody has also submitted that an injunction could be granted in favour of the plaintiff subject to certain terms and conditions and she could also be granted reasonable maintenance. According to Shri Mody in law wife has no specific right against her husband to be provided with any particular house nor she has a right to live in a particular portion of the house. He also contended that in the present case there is ample evidence on record to show that the defendant wife is motivated by desires of revenge, which is amply clear from the entries in her diary, as well as her letter Exh. C and therefore this is a fit case where an injunction should be granted in favour of the plaintiff on payment of certain amount towards maintenance. On the other hand it is contended by Shri Parkh that all though it is the case of the wife that the flat in Paradise Apartment is jointly owned by her or in any case is her matrimonial home. She has also pleaded that her articles including her telephone, is inside the matrimonial home. The defendant was residing in her matrimonial home till the date of institution of her suit and as long as the marriage is subsisting the husband has no right to throw his wife out of their matrimonial home. He also contended that the trial court as well as the first appellate court have exercised their discretion judicially and this court sitting in the Letters Patent appeal cannot make out an altogether new case in favour of the plaintiff nor the plaintiff can be permitted to make out an altogether new case in this appeal. According to Shri Parekh this is not a fit case wherein any interference is called for in this Letters Patent Appeal cannot make out an altogether new case in favour of the plaintiff nor the plaintiff can be permitted to make out an altogether new case in this appeal. According to Shri Parekh this is not a fit case wherein any interference is called for in this Letters Patent Appeal which is in substance a second appeal. He also contended that in the trial court no injunction was filed but at that stage the defendant had no opportunity to file a counter. He also contended that after the decision in the first appeal, the stay was refused by the High Court and the leave petition filed against it was also dismissed by the Supreme Court and since then the husband and wife are living in the same premises. No material is placed on record by the plaintiff husband to indicate that their living together is not peaceful, He also contended that during the course of the arguments in this Letters Patent Appeal the Court indicated to Mr. Karim, learned Advocate on record for the plaintiff that if he so desires, he can file an application indicating as to how the plaintiff will be providing an alternate accommodation and maintenance to his wife; but such an application is not filed. Therefore, according to Shri Parekh in the absence of any such application, the plaintiff is not entitled to any relief in this Letters Patent Appeal. It is also contended by Shri Parekh that the plaintiff's conduct all through was such that she cannot be heard in equity. It is also submitted by him that the plaintiff has filed a separate suit on the Original Side of this Court bearing Suit No. 1413 of 1978 wherein he has sought for a declaration that he is the absolute owner of the flat in the Paradise Apartment. He has also asked for a permanent injunction restraining the defendant wife from entering into the said premises, Thus the question of ownership of the flat is subjudice and until it is decided it cannot be assumed that the plaintiff is the sole owner. In the said plaint the plaintiff has made a reference to the injunction earlier granted by this Court in Appeal from Order No. 251 of 1978, therefore, if so advised, he can approach the High Court in the said suit for an injunction on terms or otherwise and in that case the defendant will have an opportunity to put forward her case. According to Shri Parekh Granting an injunction in the present case other on terms or otherwise will be most inequitable and will prejudice the case of the wife in the suit filed on the Original Side.

40. Having regard to the facts and circumstances of the present case. In our opinion, this is a fit case wherein an injunction subject to certain terms and conditions should be granted. From the bare reading of the letter, Exhibit 6. Wherein respondent wife has made an allegation against the petitioner husband about his incestuous relationship we are more than satisfied that their living together is an impossibility. Shri Mody is also quite justified in complaining that she is motivated by distress of revenge. He is supported in this contention in this behalf by the entries in her diary. It further appears that not only in the trial Court but even at the first appellate stage various efforts were made for reconciliation or settlement. Such efforts were also

made during the pendency of this Letters Patent Appeal also. However all these efforts failed. This clearly indicates that the relations between the parties are strained beyond repairs. In these circumstances it will not be in the interest of either parties to force them to live together. Assuming that the residence in the Paradise Apartment is matrimonial home of the respondent wife, the wife has no specified right against her husband to live in the whole of the house or in any particular portion of the house. The flat in Paradise Apartment is big enough to allow the parties to live there separately by effecting suitable partition. This will be also in interest of children who are away for education but come home in vacations. It is clear from the record that both mother and father have love and affection for the children. Therefore if the parties are allowed to live though separately in the same house, the children will be in a position to enjoy the company of their parents when they come home. Therefore in our opinion it will be just and fair if an injunction is granted to the plaintiff on the condition that he will effect a partition in the flat as suggested in the plan submitted by the learned counsel for the defendant wife and is also directed to pay her maintenance on an ad hoc basis. It is not disputed that the Court has jurisdiction to pass such a conditional order of jurisdiction to pass such a conditional order of injunction. In our view such an order is absolutely necessary in this case to do justice between the parties before us. The plaintiff is an eminent surgeon. Therefore he must have a peace of mind to enable him to discharge his duties as a surgeon more efficiently. Unless there is peace at home. Such a peace of mind is an impossibility. Therefore in our view this is a fit case wherein the plaintiff should be granted an injunction though on certain terms and conditions, till the matter is decided in the suit pending on the Original Side of this Court or in any other appropriate proceedings.

41. It is submitted by Shri Parekh that in case Court comes to the conclusion that it is necessary to grant interim injunction, then the defendant wife should be given a portion of the flat as outlined by him in red boundary in the map accompanying his written submissions on the conditions that the appellant plaintiff shall pay all outgoings and shall not effect any sale or create third party rights or tenancy in respect of the flat. He should also be directed to pay additional ad hoc maintenance per month to the defendant from the date of the order in this appeal as the Court considers proper quantum of maintenance is fixed by the order of the Court of competent jurisdiction in any other proceeding. In the plan submitted by Shri Parekh he has made a reference to points Nos. 1, 2, 3 and 4, which are doors and which will be closed and E 2 will be the defendant's entrance and at points 5 and 6 a notional or real partition will have to be created. E. 1 which is a servant's room or passage marked 'A' can become kitchen. The hall, dining room, bedroom, toilet and two balconies will remain with the plaintiff and the other smaller portion which is less than one-third could be allotted to the defendant wife wherein she can live separately Shri Parekh has further submitted that at points 5 and 6 where the partition will be constructed, the partition should have a door so that at least children can use both the parts of the flat. In our opinion the arrangement suggested by Shri Parekh in the plan attached to his written submission is most reasonable and if the plaintiff husband is granted injunction obviously subject to the decision or orders in suit bearing No. 1413 of 1978 pending on the Original Side. It will meet the ends of Justice. This will be subject to the further term of paying additional ad hoc maintenance of Rs. 7,000/- per month to the defendant by the plaintiff from the date of the order of this Court in this Letters Patent Appeal, till the quantum of maintenance is fixed by the Court of competent jurisdiction in any other proceeding instituted by either of the parties. To that extent the appeal deserves to be allowed.

42. In the result, therefore, the appeal is partly allowed and the defendant will be restrained from entering into the portion of the flat, which is outlined in the map kept on record and which is reserved for the residence of the plaintiff after he effects a notional or real partition at points 5 and 6 i.e door in between. The injunction will become operative from the date on which such partition is actually effected. The injunction will also be subject to the condition that the plaintiff shall pay to the defendant an amount of Rs. 1,000/- (one thousand) per month, on or before the 10th of each month, towards ad hoc maintenance subject to the fixation of the maintenance by a Court of competent jurisdiction in any other proceedings. The parties shall not effect any sale or create third party interest or tenancy rights qua the flat, of course subject to the order of the Courts of competent jurisdiction. The plaintiff will be liable to pay all outgoings including taxes etc, qua the portion of the flat in occupation of the defendant. Since we have decided major issues against the

appellant plaintiff in this appeal, on our opinion this is a fit case where the appellant husband should be directed to apy costs of this appeal to the defendant, which is quantified at rupees and thousand (Rs. 1,000/-) The map produced is taken on record. In the view which we have taken no order on cross-objection are necessary. Counter-claim as decreed stands modified in terms of our aforesaid final order.

43. Appeal partly allowed.

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