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Upendra Kumar Vs. Harpriya Kumar

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Court : Delhi

Decided On : Jan-19-1978

Reported in : ILR1978Delhi97

Judge : Prakash Narain, J.

Acts : Hindu Marriage Act, 1955; Marriage Laws (Amendment) Act, 1976 - Sections 19; Code of Civil Procedure (CPC), 1908 - Sections 20

Appeal No. : First Appeal No. 185 of 1976

Appellant : Upendra Kumar

Respondent : Harpriya Kumar

Advocate for Pet/Ap. : L.M. Sanghvi,; S.K. Sinha,; S.K. Verma,;

Judgement :

Prakash Narain, J.

(1) This appeal raises several questions oflaw. In order, however, to appreciate the contentions raised it is firstnecessary to notice facts.

(2) The parties hereto are Hindus. They were married on 11/03/1974 at Ram Nagar in Uttar Pradesh in accordance with Hindurites. After marriage the couple went to and resided at Buxar, theplace of the husband. They lived together as

husband and wife onlyfor two days for in the forenoon of 14/03/1974 the respondentleft for her parental home. The parties have never resided togetherat any place thereafter. On 18/09/1975 the appellantfiled a petition under Section 9 of the Hindu Marriage Act againstthe respondent praying for the grant of a decree for restitution ofconjugal rights. This petition was filed in the court of the DistrictJudge, Delhi. The respondent was served with the notice of THE petition. Appearance was put in on her behalf and on 13/11/1975 a request was made to grant time to file the written statementor reply to the petition under Section 9 of the said Act. Time wasgranted to the respondent and the hearing was adjourned to 5/01/1976. On 15/12/1975 an application was filed on behalfof the respondent for holding the proceedings in camera. On 5/01/1976 the respondent filed her written statement. The trial Courtthereafter fixed 30/04/1976 as the date for appearance of theparties in order to investigate the possibilities of reconciliationbetween the couple. Instead of appearing in person the respondent,however, moved the trial Court to fix a preliminary issue on thepoint of territorial jurisdiction of the District Judge, Delhi, to try THE petition under Section 9 of the Act. The point of jurisdiction, it maybe noticed, was not taken up at any time prior to this stage. Thetrial Court, thereafter framed the following issue:-'Whether this court has jurisdiction to try this petition ?'

(3) The appeallant's case before the trial Court was that the DistrictJudge, Delhi, had jurisdiction to try the petition because the appellant/petitioner was a permanent' resident of Delhi and was stillresiding in Delhi where the wife was bound in law to dischargeher marital obligations qua the husband. The respondent however,relied on Section 19 of the said Act and took up the plea that as neitherthe marriage was solemnised at Delhi nor the husband and wife everresided or last' resided at Delhi, the Courts a.t Delhi had no jurisdictionto entertain the petition.

(4) The trial Court came to the conclusion that it did not haveterritorial jurisdiction to entertain the petition. It repelled the contention that it had jurisdiction under Section 20 of the Code of CivilProcedure read with Section 21 of the Hindu Marriage Act. Accordingto the trial Court Section 19 clearly covered the point of territorialjurisdiction. It, thereforee, returned the petition to the appellant forbeing presented to the proper court. Aggrieved by the said order theappellant has

preferred the present appeal.Section 3(b) defines 'District Court' as under :-

"district court' means, in any area for which there is a citycivil court, and in any other area the principalcivil court of original jurisdiction, and includes any othercivil court which may be specified by the State Government, by notification in the Official Gazette, as havingjurisdiction in respect of the matters dealt with in thisAct;'

This definition is somewhat different from the definition of "DistrictCourt' in Indian Divorce Act, 1869. There the 'District Court' isdefined as under :-

"District Court' means, in the case of any petition under thisAct, the Court of the District Judge within the locallimits of whose ordinary jurisdiction, or of whose jurisdiction under this Act the husband and wife reside or lastI am referring to these two sections because some argument was made at the bar in considering which referenceto the different provisions in the two Acts would benecessary. It shall deal with the matter a little laterbecause first I will notice the other relevant provisionswhich arise for consideration in this case.'

Section 19 of the Hindu Marriage Act reads as under :-

'19.Every petition under this Act shall be presented to thedistrict court within the local limits of whose ordinaryoriginal civil jurisdiction the marriage was solemnisedor the husband and wife reside or last resided together.'

Section 19 of the Hindu Marriage Act, 1955 has been amendedby the Marriage Laws (Amendment) Act 68 of 1976 and the sectionnow reads as under :-

'19.Court to which petition shall be presented :-Every petition under this Act shall be presented to the districtcourt within the local limits of whose ordinary originalcivil jurisdiction:-(i) the marriage was solemnised, or(ii) the respondent at the time of the presentation of THE petition resides, or(iii) the parties to the marriage last resided together, or(iv) the petitioner is residing at the time of the presentation ofthe petition, in a case where the respondent is, at thattime, residing outside the territories to which 'this Actextends, or has not been heard of as being alive for aperiod of seven years or more by those persons whowould naturally

have heard of him if he were alive.'

Section 21 of the Hindu Marriage Act reads as under :-

'21.Subject to the other provisions contained in this Act andto such rules as the High Court may make in thisbehalf, all proceedings under this Act shall be regulatedas far as may be, by the Code of Civil Procedure,1908.'

Since reference has been made to the Code of Civil Procedure someof the provisions of the Code which are relied upon may also be read.Section 4 reads as under :-

'4.(1) In the absence of any specific provision to the contrary,nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or anyspecial jurisdiction or power conferred, or any specialform of procedure prescribed, by or under any otherlaw for the time being in force.

(2)In particular and without prejudice to the generality ofthe proposition contained in Sub-section (1), nothing inthis Code shall be deemed to limit or otherwise affect anyremedy which a landholder or landlord may have underany law for the time being in force for the recovery of rentof agricultural land from the produce of such land.'

Section 9 of the Code reads as under :--

'9.The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil natureexcepting suits of which their cognizance is either expressly or impliedly barred..Explanation.-A suit in which the right to property or to anoffice is contested is a suit or a civil nature, notwithstandingthat such right may depend entirely on the decision ofquestions as to religious rites or ceremonies.'

Section 20 of the Code reads as under :-'20. Subject to the limitations aforesaid, every suit shall beinstituted in a Court within the local limits of whosejurisdiction-

(A)the defendant, or each of the defendants where thereare more than one, at the time of the commencementof the suit, actually and voluntarily resides, or carrieson

business or personally works for gain; or

(B)any of the defendants, where there are more than one,at the time of commencement of the suit, actuallyand voluntarily resides or carries on business, or personally works for gain, provided that in such caseeither the leave of the Court is given, or the defendantswho do not reside or carry on business, or personallywork for gain, as aforesaid, acquiesce in such institution;

(C)the cause of action, wholly or in part arises.Explanation 1.-Where a person has a permanent dwelling atone place and also a temporary residence at another place,he shall be deemed to reside at both places in respect ofany cause of action arising at the place where he hassuch temporary residence.Explanation II.-A corporation shall be deemed to carry onbusiness at its sole or principal office in India or, in respect of any cause of action arising at any place where ithas also a subordinate office, at such place.'

(5) The first contention that has been made on behalf of the appellant is that by virtue of the provisions of Section 21 of the HinduMarriage Act the Code of Civil Procedure is made applicable toproceedings under the said Act and so, even if the petition wasnot maintainable under Section 19 of the Act it should have been heldthat the District Court in Delhi had jurisdiction to entertain the petitionby virtue of the provisions of Section 20 of the Code of Civil ProcedureThe contention is since the cause of action or a part of the cause ofaction, viz. the failure of the wife to discharge her marital obligationsto the husband at the place where the husband resides, arises at Delhi,the appellant being a permanent resident of Delhi, it should havebeen held that the Courts at Delhi have jurisdiction to entertain THE petition. Of this contention there were two facets. First, that byvirtue of Section 21 of the Hindu Marriage Act Section 20 of theCode of Civil Procedure stands incorporated in the said Act, andsecondly, the petition under Section 9 of the Act was a compositepetition or suit and could be treated either as a petition under theHindu Marriage Act implicate or a suit under Section 9 of the Codeof Civil Procedure.

(6) In my opinion, neither of the two facets of the contention putforward can be accepted. Section 21 of the Act, no doubt, providesthat all proceedings under the Act shall be regulated, as far asmay be, by the Code of Civil Procedure, all the

same the meaningof this provision is that the conduct of proceedings would be, asfar as possible, in accordance with the procedure prescribed by theCode. This section cannot be read to incorporate every provision ofthe Code of Civil Procedure in the Hindu Marriage Act. The legislature advisedly used the phrase 'all proceedings under this Act shallbe regulated'. A reading of this phrase makes it amply clear that IT is only the procedural aspect which would be controlled by the Codeof Civil Procedure and not the substantive aspect of things like jurisdiction. To take an example. Section 9 of the Code of Civil Procedurelays down that the Courts shall have jurisdiction to try all suits ofcivil nature. Which courts is not specified in the Code. In Delhi, thePunjab Courts Act lays down which courts will try matters of civilnature. Furthermore, the Delhi High Court Act also lays down whichmatters according to pecuniary jurisdiction would be tried on theoriginal side of the High Court. Now 'District Court' under theHindu Marriage Act means, as far as Delhi is concerned, the principal civil court of original jurisdiction or any other civil court whichmay be specified by the State Government by notification in theOfficial Gazette. These other courts which may be notified may notbe the ce court of the District Judge. For example, a Sub Judge may benotified as District Court within the meaning of Section 3(b) of thesaid Act. This would be different from the court postulated by Section 9 of the Code or under the Punjab Courts Act or the Delhi High CourtAct. As another example I may notice Section 28 of the HinduMarriage Act. This makes a specific provision among other thingsfor appeal. It cannot be said that the. appeal postulated by Section 28 of the Act is the same kind of appeal as is postulated by Section 96 of the Code or Section 104 of the Code. It is one of the settledcanone of interpretation that a special law overrides a general law.The Code of Civil Procedure is a general law. The Hindu MarriageAct is a special law. thereforee, it would be stretching one's imagination to say that the general law has been incorporated in the speciallaw in its entirety. I cannot persuade myself to give Section 21 of theinterpretation canvassed that by virtue of it the provisions of Section 20 of the Code can be incorporated in it. If that was so, there wasno need to enact Section 19 in the Hindu Marriage Act.

(7) My attention has been invited to a decision of the MadrasHigh Court in M. Gomathi v. S. Natarajan. : AIR1973 Mad247 . In this case the wife filed a petition under the HinduMarriage Act for judicial separation on the ground of cruelty

anddisertion in the Court of City Civil Court, Madras. Pending disposalof that petition the wife also prayed, for interim maintenance whichwas ordered. The respondent raised an objection that the City CivilCourt had no jurisdiction to entertain the petition as neither was themarriage solemnised nor the husband and wife reside nor last residedtogether within the jurisdiction of that Court. This objection waspressed by the husband in an appeal from the order granting interimmaintenance. The lower Appellate Court held that the question ofterritorial jurisdiction had necessarily to be decided first and the trialCourt could not proceed to order interim maintenance till that issuewas decided. From that order the wife went up in revision to theHigh Court. This was heard by a learned Single Judge of that Court.It was urged before the High Court that Sections 19 and 21 of theHindu Marriage Act cannot be construed as excluding the operationof the Code of Civil Procedure. Referring to Section 4 of the Codeof Civil Procedure the High Court held :-'The effect of the savings clause will be that the provisions ofthe Civil P. C. shall be deemed not to limit or otherwiseaffect any provision relating to jurisdiction provided undera special enactment. In other words, by application ofthe Civil P.C. the provisions of the special lawas to jurisdiction shall not be limited or otherwise affected. In this case, if the Civil P. C. is foundto be applicable the provisions of the special enactmentwill not in any way be limited or otherwise affected; onthe other hand, the jurisdiction of the Court extended.Now the question will be whether Section 21 of the HinduMarriage Act will have the effect of excluding the jurisdiction that is conferred under Civil P. C. As alreadystated the words used are 'subject to the other provistonscontained in this Act'. Neither Section 19 nor Section 21 limit the jurisdiction to that which is provided under section 19. thereforee Sections 19 and 21 cannot beconstrued as excluding the operation of the Civil P. C.I am fortified in this view by the wording of the Codewhich prohibits the limiting or otherwise affecting thejurisdiction conferred by the special enactment and docsnot bar conferment of an extended jurisdiction by theapplication of the Civil P. C. 'The language of Sec. 19 or Sec. 21 of the Hindu Marriage Act docs not excludethe application of the Civil P. C.'The learned Judge further went on to observe rejecting the contention on behalf of the respondent that Section 19 alone has to beread to find out territorial jurisdiction :-'. ....Though the wording might lend some support to thecontention raised on behalf of the

husband, it wouldrather be in keeping with the spirit of the section to confine the mandatory provision 'shall be presented to theDistrict Court' and read the later part as to jurisdictionas not mandatory but a provision conferring jurisdiction.Thus construed, the jurisdiction that is conferred by theCivil P. C. will not be excluded. A comparison of theprovisions of the Hindu Marriage Act with that of theIndian Divorce Act will show that under the IndianDivorce Act, because of the definition of 'District Court',the jurisdiction of Civil Courts as conferred by the CivilP. C. is barred. Section 3(3) of the Indian Divorce Actdefines 'District Court' as meaning in the case of anypetition under the Act, the Court of the District Judgewithin the local limits of whose ordinary jurisdictioaunder the Act, the husband and wife resided together.By the definition, if the husband and wife reside or have'not resided together' it will not be District Court underthe Act and under Sections 10 and 11 the husband orwife may present a petition to the District Court or to theHigh Court, the District Court being necessarily one thatcomes within the jurisdiction of the Act. Because of thedefinition which excludes District Court within whosejurisdiction the husband wife do not reside or have lastresided together and as the application is subject to theprovisions of the Indian Divorce Act, the provisions ofthe Civil P. C. conferring jurisdiction on the DistrictCourt where the defendant is residing cannot be maneapplicable.'It was finally held that reading Sections 19 and 21 of the HinduMarriage Act and Sections 4 and 20 of the Code of Civil Procedurethe Court would be justified in holding that the provisions of theCode are also applicable and the court within whose jurisdiction thedefendant is residing will have jurisdiction.

(8) With respect I am unable to subscribe to the view expressedin the decision of the Madras High Court. First of all, the Courtseems to have missed the last line of Section 3(b) of the HinduMarriage Act while comparing it with Section 3(3) of the IndianDivorce Act. We have already read Section 3(b) of the HinduMarriage Act. The last line, ' . . . as having jurisdiction in respect of the matters dealt with in this Act' would place Section 3(b) of the Act as par with Section 3(3) of the Indian Divorce ActSecondly, Section 19 of the Act is a special law while Section 20 ofthe Code is a general law and special law always overrides the general law. To bring to aid Sec. 21 of the Act will not be justified because, as I have pointed out earlier, in terms reference in it is to proceedings under the Act being regulated by the procedure prescribedby the Code. The word 'regulated' has a different connotation

from the word 'governed'. In any case, if it was the intention of thelegislature that Section 20 of the Code of Civil Procedure would alsobe attracted to petitions under the Act it would have incorporatedthose provisions in Section 19 of the Act and not left it to the courtsto indulge in guesswork or by construction to enact a provision whichdoes not exist. Indeed, the amended Section 19 of the Act justifiesthat conclusion.

(9) Learned counsel has submitted that Sections 19 and 21 of theAct supplement Sections 4 and 20 of the Code and not supplantthem. I cannot accept it for reasons already stated. Another errorwhich I find in the judgatent of the Madras High Court, and I sayso with respect, is that that court divided Section 19 of the Act intotwo portions, the mandatory and non-mandatory. When Section 19 refers to 'District Court' it is obvious that it is referring to the definition of the term 'District Court' as given in Section 3(b) of theAct.

(10) I may here also notice a decision of the Bombay High Courtwhich was relied upon in the above judgment of the Madras HighCourt. That case is Hariram Dhalumal v. Jasoti, : AIR1963 Bom176 . The Bombay High Court had observed that Section 20 of the Code can be resorted to if a particular case does not fallwithin the ambit of Section 19 of the Act. In my opinion, the observations cannot be considered as good law and must be restricted tothe facts of that particular cane. In that case the couple had gotmarried at Karachi prior to 1947 when Karachi was one of thetowns in undivided India. The parties separated in Karachi. Afterpartition they both came to India separately and lived separately. Thehusband was employed at Delhi and wife at Nagpur. The husbandfiled a petition under Section 19 of the Act for divorce in the NagpurCourt. Now, the Nagpur Court was one under whose jurisdictionneither was the marriage solemnised nor did the husband and wifereside nor did they last reside together. In these circumstances andbecause there was no place in India where a petition under the Actcould be filed, the Bombay High Court observed as under :--

'.....where the provision as to jurisdiction specifically contained in Section 19 of the Hindu Marriage Act viz., theplace of solemnisation of marriage or place of residenceof husband and wife, either separately or together, withinthe jurisdiction

of the Court is impossible of satisfaction,in my opinion, the provisions of Section 20, Civil P. C.are sufficient to create jurisdiction in the ordinary CivilCourt at a place where either the defendant resides orthe cause of action is said to arise.'

(11) I must respectfully say that the Bombay High Court wasrather swayed with the peculiar situation in which the parties wereplaced to make the observations that it did. Merely because therewas hardship caused to a particular couple and there was no provision in the legislation to meet with a contingency in which that couplefound itself cannot justify incorporating the provisions of Section 20 of the Code in the Act.

(12) Dr. Singhvi, learned counsel for the appellant, rightly saysthat the trial Court has erred in relying on the observations of theBombay High Court in the case referred to earlier. The trial Courtcould not rely on the case decided by the Bombay High Court andyet hold that the appellant's petition was not filed in a competentcourt. As I have noticed earlier, the legislative lacuna may, perhapscause hardship in some case like the case of the parties, referred toin the judgment of the Bombay High Court, which is .not covered bya legislation but that would not justify giving an extended meaningto a provision when it is not warranted.

(13) Kailasam, J. in the Madras case. referred to Section 4 of theCode and observed that the effect of the savings clause will be thatthe provisions of the Civil Procedure Code shall be deemed not tolimit or otherwise affect any provision relating to jurisdiction providedunder a special enactment. Thereafter he observed that the questionto be determined was whether Section 21 of the Hindu MarriageAct had the effect of excluding the jurisdiction that is conferred underthe Code of Civil Procedure. He came to the conclusion that neitherSection 19 nor Section 21 limit the jurisdiction to that which is provided under Section 19. As I have said earlier, I am in respectfull disagreement with these observations. Section 21 of the HinduI Marriage Act in terms makes the applicability of the provisions of theCode of Civil Procedure applicable subject to the other provisions ofthe Hindu Marriage Act and any rules that the High Court may makein this behalf. in other words, the provisions of the Code wouldbe attracted so far as they

are not In conffict with the provisions of the Hindu Marriage Act. Section 19 which sets out in clearterms that a petition under the Act can only be presented to thecourts specified in that section would thus make Section 20 of theCode wholly inapplicable. Section 4 of the Code would support thisinterpretation because it speaks of special jurisdiction to be providedfor or special powers conferred by any special law. The provision inSection 19 of the Act that a petition under the Act shall be presentedto the District Court within the limits of whose ordinary original jurisdiction the marriage was solemnised or the husband and wife resideor last resided together are really in the nature of conditions precedent to invoking the jurisdiction. Merely because the conditions cannotbe fulfillled in a given case or are inconvenient to be fulfillled is noground for holding that those conditions may not be fulfillled and abeneficial construction be given to enlarge the jurisdiction by readingSection 21 of the Act so as to incorporate the provisions of Section 20 of the Code. The Bombay decision which looked to the convenience ofthe parties who were unfortunately placed in a helpless situation cannotbe regarded as correct. This may be well-illustrated by R. v. Armitage(1872) L.R. 7 Q.B. 773. In that case there was a statutory provision that justices, at the hearing of a bastardy summons, 'shall hearthe evidence' of the mother and such other evidence as she mightadduce, , which authorised them to make an affiliation order 'If the mother's evidence be corroborated in some material particular byother testimony.' The evidence of the mother was made essential ora condition precedent to the exercise of jurisdiction and it was heldthat no order could .be made without it. even though the woman diedbefore the hearing. It is not for us to supply .a legislative lacuna andso, 1. must hold that Section 20 of the Code cannot be read as supplementingSection 19 of the Act.

(14) I am further persuaded to come to this conclusion because itI was to hold otherwise one may say that a party may either invokeSection 19 of the Act or if it so suits that party invoke Section 20 of theCode. Such an unsettled state of law pertaining to Jurisdiction couldnot have been contemplated by Parliament

(15) It was urged that restitution of conjugal right is .a civil rightand could be enforced by a civil suit filed under Section 9 of theCode. Reliance was placed on (1867) 11 M.I.A. 551. It was alsosaid that as it was the duty of a Hindu wife to live

with her husbandit gave rise to a corresponding right in the husband to enforce theobligation or discharge of the duty from the wife at the place wherehe resided. thereforee, the husband could bring an action at the placeof his residence because it was at that place that the wife is obligedto discharge her obligations.

(16) My attention was invited to a number of decisions. I neednot deal with this respect of the case. The petitioner may have acivil right which he may be able to enforce by filing a civil suit butthen he has chosen his remedy and filed a petition under the HinduMarriage Act which is a remedy different from a civil suit. Inasmuchas he has filed a petition under the Hindu Marriage Act the jurisdictional aspect has to be considered from the point of view of theprovisions of that Act and not by reference to any other statute.

(17) This brings me to the consideration of the other fact of thecontention that the petition presented by the appellant was a. compositepetition. It could be treated either as a petition under the HinduMarriage Act or & civil suit. I am afraid that is not possible. There areseveral reasons why I cannot accept this argument made at the bar.First, this was not the case of the appellant before the trial Courtand indeed is not even the case pleaded in the grounds of appealbefore me. Secondly, the two remedies, namely, that of a suit and apetition under the Act are entirely different remedies and have differentconnotations and results. A petition under the Hindu Marriage Actmay be drafted like a plaint in a civil suit but the question really iswhich jurisdiction is invoked. The contention that all the necessaryingredients of a plaint are there and the court which would have beenmoved in either case has been moved and so, the court may treatit either as a suit or a' petition is based on a fallacy. The 'DistrictCourt' or the principal civil court of original jurisdiction may bethe same but- may also not be the same. As a matter of law it cannotbe laid dawn that whenever a petition under the Hindu Marriage Actis moved the court dealing with it may either treat .it as a civilsuit or as a petition under the Hindu Marriage Act. Not every civilcourt would be empowered to entertain a petition under the HinduMarriage Act. It is only the designated courts which can do so and thedesignated courts would be the District Court within the meaning ofSection 3(b) of the Hindu Marriage Act. A civil suit, on the otherhand, can be entertained by any civil court depending on the pecuniaryand territorial jurisdictions provided by the

various laws in this behalf.That in the present case the principal civil court and the 'DistrictCourt' within the meaning of Section 3(b) of the Act happen to bethe same does not justify laying down a wrong principle of law. Divorce.judicial separation or even restitution of conjugal rights were notknown to Hindu law as such. These rights, at least those of divorceand judicial separation have been specially created in case of Hindumarriages by the Hindu Marriage Act. Special rights call for specialremedies. The legislature has provided for the same. The legislaturecould well have left these special rights to be enforcedby civil courts but in the context of benevolent legislation speedier remedy and special remedies have been provided. It is.therefore, not possible to mix up special jurisdiction with ordinaryjurisdiction. Indeed, a reading of Section 4 of the Hindu Marriage Actwould tend to suggest an overriding effect both in matters of substantive law and procedure. It is, however, not necessary for the purposeof this case to lay down as a firm rule whether the special law orproviding for a special remedy ousts a general law and general remedy.At the moment all we are only concerned with is whether these tworemedies could be claimed alternatively in the same petition. In myOpinion, these could not be so claimed and, indeed, have not beenso claimed. The arguments at the bar cannot cure the defect that nofoundation in facts has to be laid in the petition itself.

(18) As I have noticed earlier, civil suits in Delhi can be eitherfiled in the court of the District Judge or in the court of the SeniorSub Judge or in the High Court depending upon pecuniary jurisdictionof a particular suit. It is necessary to state these facts clearly in THE petition of plaint before a suit can be enterttined, this not having beenso stated, the foundation in facts has not been laid. Indeed, as far asthe territorial jurisdiction is concerned, what is stated is as follows :-

'THATthe petitioner and respondent have never cohabited, andthe petitioner is an (a) permanent resident of Delhi andstill resides within the jurisdiction of this Hon'ble Court,couple with the fact that the petitioner has apprehension,if he will institute at Varanasi, there is threat to his life,thus this Hon'ble Court has the jurisdiction to entertainthis suit.'

The averments as made cannot, thereforee, be regarded as sufficienteven for the purposes of Section 20 of the Code to give the courtsat Delhi territorial jurisdiction. I need not dilate on this aspect further and must reject the contention that the present petition be treated as a composite petition and if territorialjurisdiction under Section 19 of the Act is not available, THE petition may be treated as a civil suit and the petitioner be given thebenefit of Section 20 of the Code.

(19) It was next contended that on a true construction Section 19 should be read to give jurisdiction to a Court where either the husband or the wife resides and not where both reside. This could bedone if 'or' is read for 'and' in the phrase, 'the husband and wifereside'. Support for this contention was sought from a passage in theTwelfth Edition of Maxwell on Interpretation of Statutes at page 232.This passage reads as under :-

'INordinary usage, 'and' is conjuctive and 'or' disjunctive. Butto carry out the intention of the legislature it may benecessary to read 'and' in place of the conjunction 'or'and vice versa.'

The illustrations given by Maxwell of the Disabled Soldiers Act, 1601or Corruption Act, 1916 or the Mines and Quarries Act, 1954 etc.do not help in interpreting the provisions of Section 19 of the HinduMarriage Act. In those acts the conjunctive was read as disjunctive andvice versa to give a meaning to the Act as otherwise the Act wouldnot have any rationale behind its provisions. For example, 'sick andmaimed soldiers' postulated by the Disabled Soldiers Act obviouslyreferred to soldiers who were either sick or maimed and not only tothose who were both. In the present case there is no such difficulty inconstruing the provisions of Section 19 of the Act. The legislatureadvisedly gave the District Courts of the places where either the marriage was solemnised or where the husband and wife both reside orlast resided together jurisdiction to entertain petitions under the Act the conjunctive used does not make the provision unenforceable orunintelligible.

(20) It was urged that in a reformatory law like the Hindu MarriageAct the reading of the provisions should have flexibility of approach sothat disputes between husband and wife could be settled. To gain support reliance was placed on R. v. Oakes 1959 (2) A.E.R. 92. Thedecision of the Court of Appeal is really not of much

help in furtheringthis contention. In the case relied upon unless the disjunctive wasread for the conjunctive, it was held, Section 7 of the Official SecretsAct, 1920 could not be given an intelligible meaning. I find no suchdifficulty in the present case. The flexibility canvassed cannot mean disregard of the legislative intent if it is clear, and, in my opinion, inthe present case it is absolutely clear. It is indeed with the idea ofexpeditious disposal of matrimonial disputes that only those DistrictCourts have been given jurisdiction to hear petitions under the Actunder whose jurisdiction either the marriage was solemnised or thehusband and wife reside or last resided together. This was obviouslywith the intention of having evidence available expeditiously at placesof marriage and subsequent residence of the couple during marriage.

(21) The phrase as used in Section 19 is not new. It has existedfrom 1869 since the enactment of Indian Divorce Act. The Parliamentunderstood it well. thereforee, it must be held that Parliament deliberately enacted Section 19 as it was and did not intend to incorporate Section 20 of the Code or any other provision. Indeed, onemay note that the beneficial nature of the legislation which modifiesthe ancient Hindu law is yet controlled by certain amount of conservatism which may be read in Section 23 of the Hindu Marriage Act. I, find myself unable to hold that in Section 19 of the Act anywords other than those which have been enacted be read or substitutea disjunctive for a conjunctive, as contended.

(22) Lastly, it has been urged that the respondent waived the plearegarding territorial jurisdiction and must be deemed to have submittedto jurisdiction. It is submitted that in that view of the matter shecannot be heard to challenge the territorial jurisdiction of the DelhiCourts. I may recollect some of the facts. On 30/11/1975 therespondent took an adjournment to file written statement On 15/12/1975 she applied for holding the proceedings in camera.On 5/01/1976 she filed a written statement without taking anobjection as to territorial jurisdiction. It is only after she was orderedto appear in person that an application was moved questioning theterritorial jurisdiction of the trial Court. The question before us iswhether this conduct would amount to acquiescence and submissionto jurisdiction and whether that was possible.

(23) In Ledgard and another v. Bull, 13 Indian Appeals 134(5),relied upon by the learned counsel for the appellant, the plea' as tojurisdiction was. rejected. This case, however, is of Bo help to theappellant. What was said in this case was that there are numerousauthorities which establish that when, in a cause which the Judge iscompetent to try, the parties without objection join issue, and go totrial upon the merits, the defendant cannot subsequently dispute hisjurisdiction upon the grounds that there were irregularities in theinitial procedure, which, if objected to at the time, would have ledto the dismissal of the suit. The principle of law is that if a pattytakes the chance of winning on merits after joining issues it cannotlater on plead want of jurisdiction. In the present case not even theissues have been settled and indeed the case was at the initial stage ofpleadings. Had the parties joined the issue and the matter gone totrial, perhaps, the situation might have been different.

(24) Learned counsel relied on Ramanlal and another v. Ramgopal A.I.R. 1954 Raj 135 , V. Subramania Aiyar v. S. C. AnnasamiIyer and others Air 1948 Mad 203 , Achut Anant Pal v.Governor General-in-Council, : AIR1955 Cal331 andHira Lal Patni v. Sri Kali Nath, : [1962]2SCR747 .

(25) In the Rajasthan case a bench of that court held that whenthe defendant appears not only to protest jurisdiction but he alsopleads to the merits, such an appearance amounts to voluntary submission on his part and his protesting the jurisdiction in such a. casewhen he also pleads to the merits does not detract from the principle ofsubmission in any way. These observations were made on the basisof the well-known principle that if a court has jurisdiction in an actionover any person who has by his conduct precluded himself fromobjecting to the juriadiction of the court, he cannot later be allowedto resile. Such a situation may occur when a person voluntarily submits to a jurisdiction. It may also occur where defendant takes achance to succeed on merits and later on when he loses raises theplea of jurisdiction or presses the plea of jurisdiction taken earlierbut not pressed. That is precisely what happened in the Rajasthan caseand let their Lordships to hold in that particular case that the defendant was debarred from agitating want of jurisdiction. The observationsin the Rajasthan case about estoppel by pleading were, however, heldto be rather wide in a later decision of the same High Court in

PremierAutomobiles Ltd. Bombay, v. Laxmi Motors Co., Jodhpur, .

(26) In the Madras case also the plea of jurisdiction was not allowedto be pressed after the defendant had submitted to the jurisdictionand gone to trial.

(27) In the Calcutta case the objection as to jurisdiction, was notraised till the final hearing and in those circumstances it was heldthat the defendant had waived his right to object to jurisdiction.

(28) In Town Municipal Council, Athani v. Presiding Officer,Labour Court, Hubli and others etc. Air 1969 SC 199 , the Supreme Court held that objection regarding territorialjurisdiction does not go to the root of jurisdiction and is not on thesame footing as an objection to the competence of a court to try acase. Competence of a court to try, a case goes to thevery root of the jurisdiction and where it is lackingit is a case of inherent lack of jurisdiction. On the other hand, an.objection as to the local jurisdiction of a court can be waived andthis principle has been given a statutory recognition by the enactmentof Section 21 of the Code of Civil Procedure. This rule is not attracted to the facts of the present case. Here, there is no waiver as Isee it. The proposition that there is a waiver by pleading as in Ledgard's case 13 Ind. App. 134 cannot be accepted in view ofprovisions of Section 21 of the Code' of Civil Procedure. The contention that moving of an application to hold the proceedings incamera amounts to waiver is untenable. Such an application couldbe moved at any stage of the hearing of the petition, even at thefirst hearing. The waiver pleaded really amounts to invoking a principle in equity. Unless detriment is proved there can, be no estoppel.In case of ordinary estoppel, though detriment may not be necessaryto prove yet the conduct of the parties is to be seen. I cannot agreewith the contention that submission once made cannot be revoked orrescinded or that such a submission is to be gleaned from the filingof the written statement without any objection as to territorial jurisdiction. As I have said earlier, this objection can be raised at anystage. Furthermore, in my opinion, Section 19 does not refer onlyto territorial jurisdiction but to conditions precedent on which I havealready dilated earlier.

(29) I may with advantage refer to M/s. Mazda Theatres PrivateLtd. and another v. M/s. New Bank of India Ltd. and others I.L.R.1975 (1) Delhi . In that case a bench

of this court was concerned With construing the provisions of Sections 2(ll)(a) and 10(1)(a) of the Companies Act as well as Sections 391 and 392 of thatAct. It) was held that the concept of jurisdiction is divisible into twodistinct parts, namely, the territorial and pecuniary jurisdiction onthe one hand and jurisdiction over the subject-matter or the personon the other. The objection as to territorial and pecuniary jurisdiction can be waived by a party but not the other. On a construction of the sections it was held that it was the competenceof the court which was attracted and not the territorialjurisdiction of the court in that case. In, my view. Section 19 notonly enacts the rule as to territorial jurisdiction but also the competence of the court entitled to deal with a petition under the Act the contention, thereforee, that there is waiver or acquisence has tobe negatived because even, if the appellant's contentions are accepted,the respondent could not give to the District Court at Delhi jurisdicdiction in the sense of competence to try the position contrary to thelegislative intent of Section, 19 of the Act the result is that the appeal is dismissed with costs.

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