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DISTANCE PARTICIPATIVE LEARNING PROGRAMME

FOR

FAMILY COURTS

(For private circulation only)

Prepared by :-

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Question 1:

Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the Family Courts. Discuss the impediments and possible remedies.

Answer :

The Family Courts Act 1984 was enacted with an object for speedy disposal of cases by providing the opportunity of conciliation to the litigants. Earlier the matrimonial matters were being taken up by regular courts dealing with civil suits and sessions cases. The jurisdiction of family court is guided by section 7 of the Family Courts Act and it includes cases for dissolution of marriage, restitution of conjugal rights, decrees of nullity of marriage, guardianship, maintenance etc. There are several reasons for delay in disposal of matrimonial matters, but the first and foremost reason is the very inherent nature of case as the non-applicant party always wants to delay the proceedings. In many cases, the marital disputes are so intractable that parties are not even ready to participate in conciliation or mediation proceedings.

The preamble of the Family courts Act clearly provides that it is an Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. Different provisions have been made to prevent the final rupture of marital relationship and to preserve the institution of family. The delays in such matter further exacerbate the agonies of those driven apart in marital disputes. It was for this reason that in ***Shamima Farooqui v. Shahid Khan*****, (2015) 5 SCC 705,** the Apex Court observed that delay in disposal of the application, is an unacceptable situation. It is to be noted that litigations related to matrimonial disputes can really corrode the human relationship and can have a long lasting impact for years to come on the parties as well as it has the potentiality to take a toll on the society.

In ***Bhuwan Mohan Singh v. Meena ,(***2015) 6 SCC 353, the Hon'ble Apex Court expressed its anguish by observing that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. Also, dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the *lis* before him pertains to emotional fragmentation and delay can feed it to grow.

The tools and techniques to be adopted by the Family Court for speedy disposal of matrimonial case can only be situation specific and it cannot be reduced to strait-jackets and much in real will depend on the temperament, skill and sensitivity of the Presiding officers of the family Courts, yet we are trying to sum up some of them :-

- Sensitization of member of Bar for mediating the matter between the parties before moving to court at their instance or to take assistance of Mediators, Conciliators, psychologists for restoration of peaceful marriage life.
- The multiple cases of the same parties that are filed on similar points should be clubbed together or heard together and decided accordingly.
- In view of Section 9 of the Family Courts Act, in which a duty is cast on the Family Courts to make efforts for settlement, it is incumbent for the Court to hold first hearing under Order X Rule 1 before referring the matter for mediation or conciliation. This is the stage where the Court gets an opportunity to have direct interface with the parties before the matter is referred for mediation or conciliation. This will be in tune with Section 89 of the Code of Civil Procedure, where the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations, the court may reformulate the terms of a possible settlement and refer the same for mediation or conciliation. An intervention at

this stage by the Court can have the desired result of settlement or even if the matter is not settled, it will serve as a preparatory exercise before it is referred for mediation or conciliation. It has been held by the Hon'ble Delhi High Court in ***Manju Singh v. Ajay Bir Singh***, AIR 1986 Del 420, that before filing the written statement, an effort shall be made by the Court for reconciliation. To sum up, instead of mechanically referring the parties for mediation at this stage, a sensitive handling of the matter by the Presiding Officer can yield positive results.

- In all cases of mediation / conciliation the Court must be vigilant that only reasonable and essential time be granted for the process.
- When parties are undergoing mediation or conciliation, the Courts should avoid passing orders in relation to the filing of pleadings, reply or written statement.
- Family Court has power to allow or disallow appearance of lawyer in Court and exercising that power it can regulate all the delay tactics and techniques like praying for unnecessary adjournments, filing of lengthy and frivolus petitions, disturbing of the smooth functioning of court.
- The Family Court holds both the criminal as well as civil power, so the provision of Section 309 of the Cr.P.C. can be applied in matters related to proceeding under Section 125 of the CrPC and in all other matters, the provisions enumerated in Order XVII of the Code of Civil Procedure, 1908 must be applied and heavy costs also may be imposed by invoking the provisions, in appropriate cases.

  The Interlocutory Applications for maintenance can be decided on the basis of evidence on affidavit without entering into a full-fledged enquiry and on the basis of the evidence on the point, an interim order can be passed. Particularly where the Opposite Party is a salaried employee, the same can be accepted on affidavit and necessary orders can be passed. The Hon'ble High Court of Delhi, in ***Kusum Sharma v. Mahinder Kumar Sharma*** reported in 2015 SCC OnLine Del 6793 and in ***Kusum Sharma v.***

Mahinder Kumar Sharma reported in 2017 SCC OnLine Del 11796 has laid down similar guidelines, as follows :-

- A comprehensive affidavit of assets, income and expenditure should be filed by the both the parties at the very threshold in all matrimonial cases to enable the Courts to determine the maintenance on the basis of true income of the parties.
- The affidavit of assets, income and expenditure by the parties at the very threshold of matrimonial litigation has following advantages:-
    - The parties will have to disclose their true income, assets and expenditure.
    - ***The maintenance order can be passed expeditiously without any delay on the basis of the affidavit.***
    - Substantial judicial time would be saved.
    - The maintenance would be fixed by the Court on the basis of true income of the parties.

- The Court wherever applicable should take evidence on affidavit and in ordinary course should limit the calling of witnesses in Court if their presence is not required. The Courts can even fix time limit for the filing of such affidavits. In case if they are called, then no lengthy cross examination should be allowed.
- Depositions if recorded should be in form of brief memorandum of substance and not word by word of the witnesses.
- In order to expedite the service of notice, the same can be issued under Order V simultaneously both by the process of the Court and by Registered post. This will cut short the time that is normally taken for the receipt of the service report by the normal process. Further, Order V Rule 9(3) has made provision for the service of notice by email and the parties can be asked to furnish their email IDs or even the telephone no. The telephone no. can be used for sending normal text message or a message through mobile Apps such as Whatsapp. The Hon'ble Bombay High Court, in ***Dr. Madhav Vishwanath Dawalbhakta (Dead) through LRs. Dr. Nitin M. Dawalbhakta & Ors. v. M/s. Bendale Brothers***, reported in 2018 SCC OnLine Bom 2652, interpreting the words

"such other manner as the Court thinks fit" in Order V Rule 20, stated that the Court can take into account the modern ways of service which are available due to internet connection. It can be served also by courier or by email or by WhatsApp etc.

- In case of outstation witnesses, video-conferencing can be used for recording of evidence. Regarding the same, the Hon'ble Apex Court, in ***Santhini v. Vijaya Venkatesh,*** 2018 (1) SCC 1, has held as follows :-

> "Once a settlement fails and if both the parties give consent that a witness can be examined in videoconferencing, that can be allowed. That apart, when they give consent that it is necessary in a specific factual matrix having regard to the convenience of the parties, the Family Court may allow the prayer for videoconferencing. That much of discretion, we are inclined to think can be conferred on the Family Court. Such a limited discretion will not run counter to the legislative intention that permeates the 1984 Act. However, we would like to add a safeguard. A joint application should be filed before the Family Court Judge, who shall take a decision. However, we make it clear that in a transfer petition, no direction can be issued for videoconferencing. We reiterate that the discretion has to rest with the Family Court to be exercised after the court arrives at a definite conclusion that the settlement is not possible and both parties file a joint application or each party filing his/her consent memorandum seeking hearing by videoconferencing."

- Evidences be recorded and completed within a prefixed time period. Before commencement of evidence, Court with the consent of the parties, considering their reasonable difficulties, prepare a time table for it, religiously stick on the same and conclude the evidence within that period.
- The same should be the procedure for final arguments. If the parties show any difficulties they were directed to file their written submissions and that having only relevant points.
- Court must write a concise Judgment with reasons on the issues. Unnecessary dealing of statements of witnesses or documents, not relevant to the issue, should be avoided.

- The interlocutory application like interim maintenance u/s 125 of Cr.P.C. and 24 of Hindu Marriage Act should be disposed of without any delay.

Impediments & Remedies

1. **Difficulty in service of notice:** Due to several reasons such as incorrect address of the opposite party notices or summons cannot be generally served through post or even through substituted service.

   Remedy - The advancement of technology ought to be utilized also for service on parties or receiving communication from the parties in light of the provisions of Order V Rule 9(3), Order V Rule 20 and various judgments on this point. Administrative instruction for directions can be issued to permit the litigants to access the court, especially when litigant is located outside of the local jurisdiction of the court.
2. **Personal appearance of parties:** Parties residing outside jurisdiction, women and women with children, persons in temporary job having no provisions of leave are facing serious problem when directed to appear in person in different stages more so when legal practitioners are barred by the Court.

   Remedy is to permit legal practitioner at least for purposes of appearance if not to conduct the case. Even they may be allowed to appear on behalf of parties initially at first instance at process of conciliation and mediation. Amicus/legal aid can also be provided for conducting cases of such litigants to help them out under strict monitoring of the Court to safeguard their interest.
3. **Interlocutory Applications:** The major area of concern is the filing of Interlocutory Applications. The frequently filed petitions are that of the petitions for interim maintenance, interim custody of the child and return of articles. In certain cases, the need of the spouse for interim maintenance would be inevitable and such claims are made in desperate situations, but in most of the cases, where the husband has filed the main petition for

divorce and the wife opposes it, the petition for interim maintenance is filed by wife despite having sufficient means to maintain herself, with an only motive to either harass the husband, or to prolongs the litigation on the firm belief that the husband would rejoin her. But a psychological approach would make us to understand that the husband gets annoyed on such petitions for interim maintenance as he knows the financial capacity of the wife and moreover, these unnecessary applications in many cases prolong the litigation to indefinite period.

Remedy - The filing of the interlocutory applications has to be approached in a sensitized way by the advocate, who has to advise his client accordingly. Instead, more counseling sessions, or mediation sessions could be encouraged. The court should be ready to concede to such requests of reference to counseling sessions, or mediation. Though it may be a genuine need of the wife, the Lawyer has to carefully analyze the circumstance before filing such interim petition such that the main objective of the litigant is not defeated.

It is also invariably seen that the filing of petitions for interim relief contains lengthy pleadings and include every averment of the original petition which is totally unwarranted. The crux of the petition alone could be explained in the affidavit. Thus, the Lawyer has to be very much sensitized so that he realizes his social responsibility than that of the legal obligation.

The Interlocutory Applications for maintenance can be decided on the basis of evidence on affidavit without entering into a full-fledged enquiry and on the basis of the evidence on the point, an interim order can be passed. Particularly where the Opposite Party is a salaried employee, the same can be accepted on affidavit and necessary orders can be passed. The Hon'ble High Court of Delhi, in ***Kusum Sharma v. Mahinder Kumar Sharma*** reported in 2015 SCC OnLine Del 6793 and in ***Kusum Sharma v.***

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- A comprehensive affidavit of assets, income and expenditure should be filed by the both the parties at the very threshold in all matrimonial cases to enable the Courts to determine the maintenance on the basis of true income of the parties.
- The affidavit of assets, income and expenditure by the parties at the very threshold of matrimonial litigation has following advantages:-
    - The parties will have to disclose their true income, assets and expenditure.
    - ***The maintenance order can be passed expeditiously without any delay on the basis of the affidavit.***
    - Substantial judicial time would be saved.
    - The maintenance would be fixed by the Court on the basis of true income of the parties.

4. **Petitions for DNA test:** Another area of concern is the filing of interlocutory applications for conducting of DNA tests for determination of paternity of the child, both in the matrimonial matters where the marriage is denied and also in the cases of maintenance.

   Remedy - So far as interlocutory applications for DNA test are concerned, it is noteworthy that the Indian Evidence Act has no role to play in Family Court matters. In case of expert opinion like DNA test, the invoking of the provisions under section 45 of the Evidence Act is unwarranted. Section 12 of The Act (r/w rule 14 of The Jharkhand Family Courts Rules, 2018) , deals in respect of approaching an expert to assist the court. Hence the courts as well as the Lawyers should be sensitized to settle the issue at the very budding stage itself by adopting subtle methods.

5. **Unnecessary adjournments:** Seeking of unnecessary adjournments by the Advocates is another area of concern for the courts.

   Remedy – While granting adjournments the Family Courts should keep in mind the concerns expressed by Hon'ble Apex Court over prolonged proceedings in Family Courts in the case of ***Bhuwan Mohan Singh v.***

Meena, (2015) 6 SCC 353, ***K.A. Abdul Jaleel v. T.A. Shahida***, (2003) 4 SCC 166, ***Farooqui v. Shahid Khan***, (2015) 5 Supreme Court Cases 705. Thus it becomes the duty of the Judge of the Family Court as well as the Lawyers to ensure that there is no miscarriage of justice on account of delayed adjudication and by virtue of mechanical and unnecessary adjournments. The other dilatory tactics by the parties should be dealt with by the court by encouraging them with positive persuasion or else by discouraging them by imposing costs.

Question 2:

In what manner and to what extent the procedure in family courts can be evolved for speedy disposal of cases? Explain with reference to the relevant provisions of the family Courts Act and Rules.

Answer:

Procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. A Procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

- Sambhaji and Ors. v. Gangabai and Ors., (2008) 17 SCC 117

The Family Courts Act, 1984 was enacted with the object of promoting conciliation in and of ***securing speedy settlement of disputes relating to marriage and family affairs*** and for matters connected therewith. By virtue of the powers conferred under Section 21 of the Act, the Hon'ble Jharkhand High Court has framed The Family Courts (Jharkhand High Court) Rules, 2004 in order to facilitate the effective implementation of the provisions of the Act and the smooth functioning of Family Courts. To achieve the objective of speedy disposal of matrimonial disputes, the provisions of the Act and the Rules have made several modifications in the procedural aspects related to a case and have ensured that the procedures do not become a hindrance in the timely adjudication of the cases, rather they aid in the speedy disposal of the cases.

For the speedy disposal of the cases, the Act and the Rules have not only laid down special provisions and relaxations in procedures but have also given the Courts discretion with respect to the procedures that the Court may seem to be appropriate in a given case, as can be seen from the provisions mentioned hereunder.

- **Duty of Family Court to make efforts for settlement – Section 9**
    - ***In the first instance***, endeavour shall be made by the Family Court, where it is possible to do so consistent with the nature and

circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, ***follow such procedure as it may deem fit.***

- **Procedure generally – Section 10**
  - The provisions of the CPC and the CrPC ***generally*** are applicable, as the case may be, in matters before the Family Courts. However, Section 10 (3) also states that the Family Court ***is not prevented from laying down its own procedure*** with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.
  - **Rule 36 of the Family Courts (Jharkhand High Court) Rules, 2004**
    - According to the provision, the proceedings before the Court shall be heard and disposed of as expeditiously as possible, preferably ***within 3 months***,
    - In achieving this objective, the ***rules or procedure may not rigidly be adhered to***.
  - **Rule 31 of the Family Courts (Jharkhand High Court) Rules, 2004**
    - A proceeding before the Family Court shall not become invalid by reason only of non-compliance with any of the procedural requirement prescribed in the Rules.
  - **Rule 22 of the Family Courts (Jharkhand High Court) Rules, 2004**. ***Adjournment by the Court*** - The petition so fixed shall not be adjourned by the Court unless there are circumstances justifying such adjournment and to meet the ends of justice. The Court shall record its reasons for adjourning a matter. (***Please Note*** **– Order XVII, Code of Civil Procedure; Section 309 of the Criminal Procedure Code)**
  - ***Anuradha Ashok Naik v. Ashok Sagun Naik,*** **2011 SCC OnLine Bom 177 – Relaxation of strict adherence to procedures in matrimonial disputes (***including Interlocutory Applications***)**

- "It may be mentioned that the Judges of the Family Court must keep in mind the object and spirit of sections 14 and 15 of the Family Courts Act. These sections essentially apply to the petitions filed before the Family Court for the main reliefs. Even in the case of those petitions, only a memorandum of evidence is required to be recorded and not the entire evidence at length. Even in those matters any report, statement, document, information or material can be considered by the Court even if it is inadmissible in evidence or irrelevant to the issues. ***For an innocuous application such as the one for condoning delay of 10 or 14 days, the learned Judge could have only seen the appearance of the aforesaid person before the Court and the reliance upon the copy of the Family Court decree therein***. Nevertheless she has proceeded to record evidence, consider precedents and then give a judgment. In the ultimate exercise the application is rejected. The parties cannot be heard on merits. Spirit of the Family Courts Act is not respected."

- **Assistance of medical and welfare experts – Section 12**
  - The assistance of the experts not only assists the Court in effective adjudication of the dispute but also saves the time of the Court.
- **Evidence – Sections 14, 15, 16 of the Family Courts Act read with Rule 23 of the Family Courts (Jharkhand High Court) Rules, 2004**
  - A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, ***whether or not the same would be otherwise relevant or admissible*** under the Indian Evidence Act, 1872.
  - In suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be

recorded, a memorandum of the substance of what the witness deposes.

- The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court.
- ***Tania Kar v. Dr. Avijit Roy*, 2011 SCC OnLine Gau 372 – Section 14 (*pre-requisite*) discussed**
  - A careful reading of the said provision of the statute, makes it no difficult to understand that any report, statement, documents, information or matter, even if such items are found to be irrelevant or inadmissible, under the Indian Evidence Act, 1872, can be received as evidence, if the concerned Family Court forms an opinion to the effect that such report, statement, documents or information or matter will assist it to deal effectually with a dispute before the court. ***Therefore, the primary pre-requisite of receiving such items as evidence is "formation of an opinion by the court"***.
  - A Family Court, in order to exercise the discretion provided by section 14 of the Act for receiving report, statement etc. as evidence, must form an opinion that such statement, report, papers will assist in deciding the dispute effectually. Therefore, in the absence of such opinion, no report, statement, paper, if irrelevant or inadmissible, under the Evidence Act, can be received as evidence.
- **Electronic evidence in Matrimonial disputes – *Deepali Santosh Lokhande v. Santosh Vasantrao Lokhande*, 2017 SCC OnLine SC Bom 9877**
  - In matrimonial cases, the Family Court is expected to adopt standards as to how a prudent person would gauge the realities

of life and a situation of commotion and turmoil between the parties and applying the principle of preponderance of probabilities, consider whether a particular fact is proved. Thus, the approach of the Family Court is required to be realistic and rational to the facts in hand rather than technical and narrow. A conjoint reading of the provisions related to evidence along with Section 20 of the Family Courts Act would lead to a conclusion that ***even if there is any electronic record for which certificate under section 65-B of the Evidence Act is necessary, it would not preclude the learned Judge of the Family Court to exhibit such documents and receive such documents in evidence, on forming an opinion as to whether the documents would assist the Court, to deal effectively with the dispute in hand***.

- **Act to have overriding effect — Section 20**
    - The provisions of the Family Courts Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.
- **Rule 3 (iii) of the Family Courts (Jharkhand High Court) Rules, 2004**
    - The Judges may, for expedience, hold proceedings of the Court beyond the working hours as prescribed in sub-rule (ii) of Rule 3, and even on holidays:

      Provided no such proceedings shall be held except with the consent of the parties to the proceeding.

Question 3:

In matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband? Whether the limitation of cooling off period apply in such cases?

Answer:

Situation 1:

- Husband files matrimonial suit for divorce on the grounds of cruelty and desertion.
- Wife (respondent) *admits* desertion
- Wife (respondent) makes *counter allegation* of cruelty.

Situation 2:

- Husband files matrimonial suit for divorce on the ground of cruelty and desertion.
- Wife (respondent) *admits* desertion
- Wife (respondent) does not make *counter allegation* of cruelty.

Before going into the question whether the suit can be decreed on admission, it is pertinent to mention the following provisions of law related to admissions:-

- **Section 21** of the Indian Evidence Act requires that admissions are relevant and may be proved against the person who makes them.
- According to **Section 58** of the Indian Evidence Act, is that an admitted fact need not be proved though the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.
- **Order XII Rule 6** of the Civil Procedure Code, empowers the Court to make such order or give such judgment as it may think fit, at any stage of the suit, having regard to the admissions made by the parties.

In ***Situation 1***, the suit cannot be decreed *only* on the basis of admission made by the wife because according to explanation to **Section 13 (1)** of the Hindu Marriage Act, the expression "desertion" means the desertion of the petitioner by the other party to the marriage ***without reasonable cause*** and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly. In this case, even though the wife admits the fact of desertion, she also makes a counter allegation of cruelty, which gives the wife a reasonable cause to live separately from her husband and therefore, *desertion* as required under Section 13 to be a ground for divorce is not satisfied.

However, the plea of cruelty, as raised by the wife (respondent) needs to be proved and only then it shall be construed as being a reasonable cause for desertion. **If she fails to prove cruelty on the part of the husband (petitioner), the Court may decree the suit in favour of the husband on the ground of the admitted fact of desertion.**

If the wife (respondent) proves the fact of cruelty on the part of her husband (petitioner), desertion will not be a ground for granting divorce to the husband. If cruelty is proved against the husband, the suit cannot be decreed in his favour because the wife had a reasonable cause for desertion as per the Explanation to Section 13(1) of the Hindu Marriage Act and *secondly*, because the husband (petitioner) cannot take advantage of his own wrong or matrimonial offence, as held by the Hon'ble Apex Court in ***Savitri Pandey v. Prem Chandra Pandey*** reported in **(2002) 2 SCC 73**. Since, he has also taken the ground of cruelty on the part of his wife (respondent), the Court may proceed to adjudicate the suit on this ground, and if cruelty is proved on the part of the wife (respondent), the Court may decree the suit in husband's favour.

It is also pertinent to mention here that according to **Section 23A** of the Hindu Marriage Act,

> *in any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.*

Therefore, if cruelty on the part of the husband (petitioner) is proved and the wife (respondent) has made prayer for any relief or any claim the Court may grant her *any relief under the Act to which she would have been entitled if he or she had presented a petition seeking such relief on that ground.*

In ***Situation 2***, since the grounds for divorce taken by the husband (petitioner) is desertion and cruelty on the part of his wife (respondent), **the Court can decree the suit in favour of the husband on the basis of the wife's (respondent's) admitted fact of desertion.**

In any case, before relying on the admission of desertion made by the wife (respondent), the Court shall look into the fact whether the fact of desertion qualifies the legal definition of *desertion* as required under Section 13 (1) (*ib*) of the Hindu Marriage Act.

As far as the question of the application of cooling-off period is concerned, technically cooling-off period applies in cases where a petition for mutual divorce is filed under Section 13B of the Hindu Marriage Act. A normal suit for divorce on the ground of desertion can be filed under Section 13 (1) (*ib)* of the Hindu Marriage Act only after 2 years of the marriage. The law on this point has been further laid down in ***Amardeep Singh v. Harveen Kaur***, reported in (2017) 8 SCC 746. The ratio of the decision is that Section 13 B (2) is not mandatory. The cooling-off period can be waived in following conditions :-

1. The statutory period of 6 months specified in Section 13B (2), in addition to the statutory period of 1 year under Section 13 B (1) of separation of parties is already over before the first motion itself;
2. All efforts for mediation, conciliation including efforts in terms of Order XXXII A Rule 3 of the CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;
3. The parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties. The waiting period will only prolong their agony

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Question 4:

Due to strained relation between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objectives considerations to be kept in mind in awarding "Shared Parenting" orders. Discuss in the light of latest case laws on point.

Answer :

If we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each.

~Yashita Sahu v. State of Rajasthan

In ***Vivek Singh v. Romani Singh***,[1] the Apex Court observed that due to the strained relations between her parents, a child feels tormented and ideally needs the company of both of them but it becomes a difficult choice for the court to decide as to whom the custody should be given.

The Apex Court also took notice of the fact that a child in such situation may be affected by what psychologists term as the Parental Alenation Syndrome. The Apex Court stated that it has at least two psychological destructive effects:

(*i*) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.

(*ii*) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone

[1] (2017) 3 SCC 231

who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality.

Sheoli Hati v. Somnath Das[2]

In this case, the Hon'ble Apex Court upheld the order of the Jharkhand High Court.

The Hon'ble Jharkhand High Court in its judgment[3] has emphasized on the fact that the minor child ideally needs the company of both the parents, however strained relationship between the parents has the effect of stress and tension on the upbringing of the child.

The High Court referred to the judgment in the case of ***Vivek Singh* v. *Romani Singh***[4], wherein the Apex Court held that there are twin objectives to be served in furtherance of the principles that the welfare of the minor child is the first and paramount consideration in such cases. In the first instance, it is to ensure that the child grows and develops in the best environment. Second justification behind the "welfare" principle is the public interest that stands served with the optimal growth of the children. However, as observed in this case at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts.

But the High Court said that the court has to be guided by objective considerations in order to see that the child gets a neutral environment to grow up with the best of education affordable in the country where the effect of these inter se litigations and tense atmoshphere in the family do not leave an everlasting impact on the psyche of the child at such an impressionable age. Therefore, in totality of the facts and circumstances , the High court acceded to the request of the father to allow the child to be admitted to a reputed Boarding School in class-v in the coming session. The mother was asked to cooperate with the interview and admission process. The

[2] 2019 SCC OnLine SC 847
[3] *Sheoli Hati v. Somnath Das,* 2018 SCC OnLine Jhar 2242
[4] (2017) 3 SCC 231

mother and father were allowed to visit the child in the school once in two months alternatively.

Recently, in ***Yashita Sahu v. State of Rajasthan***,[5] the Hon'ble Apex court was of the view that a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

There can be various other considerations while deciding matters related to custody, such as:

- If the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only.
- In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks
- In such cases the visitation rights must be given over long weekends, breaks, and holidays
- In addition to 'Visitation Rights', 'Contact rights' are also important for development of the child specially in cases where both parents live in different states or countries.
- The concept of contact rights in the modern age would be contact by telephone, e-mail or video calling.
- With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible.
- Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes everyday. This will help in maintaining and improving

[5] 2020 SCC OnLine SC 50

the bond between the child and the parent who is denied custody. If that bond is maintained the child will have no difficulty in moving from one home to another during vacations or holidays.

Question 5:

What are the practical difficulties in execution of an order for grant of maintenance u/s 125 CrPC? Discuss the available options in law before a family judge for the realisation of the maintenance amount awarded u/s 125 CrPC with special reference to the case laws.

Answer:

The most common practical difficulties in execution of an order for grant of maintenance are-

1. The DW issued by the court is hardly ever executed in letter and spirit, in as much as never ever moveable property of the opposite party is attached, sold and the amount realized paid to the petitioner. Normally the opposite party is arrested and produced before the court.
2. The opposite party normally is reluctant in paying the entire dues amount of arrears of maintenance. The court should be reluctant in releasing him upon payment of a token amount as arrear and normally should bargain hard, on behalf of the petitioner who is the poor wife of the opposite party, considering the social benevolent nature of the provision. If at all, a compromise agreement is arrived at between the parties, the court should insist on filing of an affidavited compromise petition laying down the details regarding mode and manner of payment of the arrears still remaining due and would become due in future. In view of the fact that now everybody has a bank account in the nature of Jan-Dhan Khata the court should insist deposit of the arrears/current maintenance amount directly in the bank account of the petitioner, which helps transparency, leaving no room for dispute, and also minimizes pilferages at multiple levels.
3. Normally the respondent is made to understand that he can get away without paying the arrear of maintenance due by serving imprisonment for a month

only. The court should be clear and candid enough on this point, so that the opposite party realizes that this is not the actual legal position.

4. There is a general legal misconception that the opposite party is exonerated from his liability to pay arrears of maintenance due once he has undergone the imprisonment.

Discussion on relevant legal provisions:-

Section 125 (3) of the Cr.P.C provides as follows :

> "If any person so ordered fails without sufficient cause to comply with the order, any such magistrate may, **for every breach of the order**, issue a warrant for levying the amount due **in the manner provided for levying fines**, and may sentence such persons, for the whole or any part of each month's allowance for maintenance or interim maintenance and expenses of proceedings, as the case may be, remaining unpaid after the execution of the warrant, imprisonment for a term which may extent to one month or until payment if sooner made"
>
> "Provided that no warrant shall be issued for recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it became due"

A plain reading of the provision above made makes it clear that :

1) For every breach of the order, warrant for levying the amount due can be issued
2) The due amount has to be recovered in the manner provided for levying fines, which is prescribed in section 421 Cr.P.C
3) The non-petitioner may be sentenced to imprisonment which may extend to one month for the non-compliance of the order of maintenance.
4) No warrant can be issued for recovery of any amount due unless an application is made to the court for such amount within a period of one year from the date on which it became due.

Section 421 Cr.P.C provides for issuance of warrant for levy of fine and speaks of either or both of the ways to be taken recourse to by the court concerned.

421(1) (a) provides for issuance of warrants for levy of the amount by attachment and sale of **any movable property** belonging to the opposite party. Form no. 43 of the second schedule of the Cr. P.C provides a format for issuance of warrant u/s 421 (1)(a) to levy a fine by attachment and sale. **Such warrant can be addressed to any police officer or other person/s**, but in practice normally this warrant commonly called distress warrant is issued in the name of the Officer-in-charge of the concerned Police Station or /and The Superintendent of Police of the concerned District. Section 421(1)(b) provides for issuance of **warrant to the collector of the District**, authorizing him to **realize the amount as arrears of the land revenue from movable or immovable property**, of the defaulters. Section 421(3) Cr.P.C further mentions that where the court issues a warrant to the collector under clause (b) of Sub Section (1), the collector shall realize the amount in accordance with the law relating to arrears of land revenue, as if such warrant were a certificate issued under such law. "provided that no such warrant shall be executed by arrest or detention in prison of the opposite party."

Upon analyzing the provisions above referred following conclusions can be drawn:

1) The arrear of maintenance or amount due u/s 125 Cr.P.C can be realized by issuing DW in form 43 by attachment and sale of the movable property of the opposite party.
2) It can also be realized by issuing warrant for recovery in Form 44 of the second schedule of the Cr.P.C addressed to the Collector of the District to be realized from movable or/and immovable property of the opposite party as arrears of land revenue. The amount due is considered as the certificate amount under Public Demand Recovery Act.
3) The **Court can exercise either or both the mechanisms available** and discussed above, as per the facts and circumstances of the case.
4) Generally, the DW issued in form no. 43 for attachment and sale of movable property of the opposite party is executed by producing the opposite party

before the court after he is arrested by the Police, without mentioning a word about any step taken by the concerned Police Official to locate, attach or sale the movable property of the opposite party, though the form speaks about it very clearly. Orally, it is submitted that the opposite party does not have any movable property. In my view this is not sufficient compliance and the court should insist on proper compliance of the DW by the concerned Police Official.

5) The court must remind itself that salary, pension, bank balance etc. of the opposite party, all comes within the definition of movable property and Form no 43 for attachment and sale of movable property can be issued to any person or persons, *for eg*:- the head of the office in which the opposite party works, the drawing and disbursing authority of the opposite party's establishment responsible for payment of pay and pension to him. Such instruction can also be given to the concerned Bank Manager, directing him to deduct the due amount, either lump sum or in periodic instalments from the account of the opposite party to the bank account of the petitioner.
6) The court may sometimes receive a response from certain DDOs that after digitalization, they did not have the requisite software/authority etc. to deduct the ordered amount from salary/pension of the opposite party. Without giving any opinion on the reason/excuse above made, the court can still ensure realization of the due amount by directing the DDOs to issue and standing instruction to the concerned Bank Manager, who in turn would do the needful. In appropriate cases the Bank Manager can directly be also directed to make necessary deductions from opposite party's account and get the same deposited in petitioner's account.
7) In absence of any immovable property belonging to the opposite party, the only option left before the court is to pass elaborate order giving summary of the facts of the case, categorically mentioning the amount of arrears of maintenance/cost etc. due on the date of passing of the order and annexing a copy of the concerned order; send the same to the Collector of the concerned

District where the opposite party's immovable property is located. It is important to note that the detailed address of both the parties must be mentioned clearly so that the Collector/Certificate Officer can initiate appropriate proceeding against the opposite party and realize the due amount from the immovable property of the opposite party and get it paid to the petitioner.

8) Section 128 Cr.P.C commands that a copy of the maintenance/interim maintenance/ expenses order is to be given to the person to whom the amount is to be paid without any cost and such order may be enforced by any magistrate in any place where the person against whom it is made may be, on such magistrate being satisfied to the identity of the parties and nonpayment of dues amount.

Legal position on period of Default Imprisonment

The question whether the opposite party can get away after serving the imprisonment due to non-payment of the arrear of maintenance etc., is settled way back by the Supreme Court in ***Kuldeep Kaul vs Surendra Singh,*** AIR 1989, SC 232 ***wherein it was held that "Mere going to jail does not satisfy the order of maintenance."*** A distinction has to be drawn between mode of recovery of maintenance amount on one hand and effecting actual recovery of the amount of allowance which has fallen in arrear on the other. **Sentencing person to jail is mode of enforcement and it is not a mode of satisfaction of the liability. The liability can be satisfied only on the payment of the arrears**. The whole purpose of sending to jail is to oblige a person liable to pay the maintenance allowance who refused to comply the order without sufficient cause to obey the order and to make payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. A person ordered to pay maintenance amount can be sent to jail only if he fails to pay maintenance amount without sufficient cause and fail to comply with the order. A sentence of jail is no substitute for recovery of the amount of monthly allowance which has fallen due.

As regard the question as to whether the court in execution proceeding for realization of arrears of maintenance u/s 125(3) Cr.P.C could send the non-applicant/opposite party to jail for a period of more than one month in one go. The Apex court in ***Shahada Khatoon vs Amjad Ali and Ors***, (1999) 5 SCC 672, has held that "*Language of 125(3) is quite clear and it circumscribes the power of the magistrate to impose imprisonment for a term which may extend to one month or until the payment, if sooner made. This power of the magistrate cannot be enlarged and therefore only remedy would be after expiry of one month, when, for breach of non-compliance of the order of the magistrate the wife can approach to the magistrate for similar relief. By no stretch of imagination the magistrate can be permitted to impose sentence of more than one month.*"

The Apex Court in another case decided on 6th May, 2005 ***Shantha alias Usha and Another vs B.J. Shivnajappa***, (2005) 4 SCC 468, where the question was as to whether for realization of arrears of maintenance accrued during the pendency of the case, separate petition is required to be filed by destitute wife and daughter? Answering this question in negative, the Hon'ble Supreme Court has held that "*It must be borne in mind that Section 125 Cr.P.C is a measure of Social Legislation and it has to be construed liberally for the benefit of wife and daughter. It is unreasonable to insist on filing successive applications, where the husband is liable to pay the maintenance, as per order passed u/s 125(1) Cr.P.C which is a continuing liability.*"

Conclusion:-

To our understanding, there is no apparent conflict between the ratio in ***Shahada Khatoon*** (supra) and that in ***Shantha alias Usha*** (supra). There is an abiding concern of the Hon'ble Apex Court in both the cases for expeditious payment of the maintenance amount to destitute wives and daughters. The interdict of one month imprisonment for default of payment of maintenance for breach of non-compliance of the order in ***Shahada Khatoon*** case is with respect to each default. If there is further breach, the petitioner will move the Court concerned by filing an application. The meaning of application in ***Santha alias Usha*** case is with regard to a fresh application for maintenance, which is not required meaning thereby

a fresh case under Section 125 is not required for each default but intimation for each default needs to be filed before the Court. Considering the discussions made hereinabove particularly with reference to the judgment of the Hon'ble Apex Court pronounced in ***Shahada Khatoon v. Amjad Ali and others*** **reported in (1999) 5 SCC 672**, the legal position on section 125(3) Cr.P.C. is summarized as follows:-

a. The opposite party can be sent to jail for one month if the maintenance/allowance mentioned in the Distress Warrant is not paid.
b. However, in case an application is filed by the petitioner for payment of arrears of maintenance adding the maintenance amount for a month falling due after issuance of the DW, on the basis of which the opposite party has been sent to jail, he may be called upon to reply on the said new petition (by issuance of a production warrant) and upon refusal to pay may be sentenced for another one month for the said default. This sequence may be repeated, subject to fresh application filed by the petitioner for arrears of maintenance becoming dues on monthly basis.
c. No warrant can be issued for recovery of any amount due for more than a year. But this provision is not applicable if the arrear has accrued during the pendency of realization/execution petition filed by the petitioner.
d. As already discussed, the opposite party serving jail sentence would not exonerate him from paying the arrears of maintenance due to the petitioner, which shall be realized in terms of the provision contained in section 421 Cr.P.C. above discussed.
e. When the DW issued against the opposite party led to submission of the report that he does not have any movable property or despite attachment and sell of the movable property the arrears of maintenance could not be satisfied and/or the opposite party has also served imprisonment, the court should take recourse to section 421 (1)(b) Cr.P.C. and pass an order quantifying the arrears due to the petitioner and send the order to the

collector so that the quantified amount could be realized from the opposite party's moveable property as arrears of land revenue and handed over to the petitioner. However, the legal provision contained in section 421 Cr.P.C. gives the court option to exercise power of issuance of warrant for attachment and sell of both moveable and immovable property of the opposite party simultaneously as well.

Question 6:

What are the principles of computation of maintenance in a case u/s 125 CrPC? How will the quantum of maintenance vary in case the competent court has awarded maintenance under Domestic Violence Act and/or under section 24 of the Hindu Marriage Act.

Answer:

The Principles for computation of maintenance in a case under section 125 Cr.P.C. can be understood by a perusal of the cases discussed hereinunder.

As stated in ***Jasbir Kaur Sehgal v. District Judge, Dehradun and others***, (1997) 7 SCC 7, no set formula can be laid for fixing the amount of maintenance and it has to depend on the facts and circumstances of each case. However there can be some considerations such as, the court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions.

Also, the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate.

In ***Harminder Kaur v. Sukhwinder Singh***, 2002 SCC OnLine Del 17, the Hon'ble Delhi High Court stated that the income has to be equitably apportioned for maintenance of wife and the child. Therefore the High Court divided the income of the husband in five units, two units for adults (i.e. husband and wife) and one unit for young child.

In ***Annurita Vohra v.Sandeep Vohra***, 2004 SCC OnLine Del 192**,** the Hon'ble Delhi High Court stated that the court must first arrive at the net disposable income of the

Husband or the dominant earning spouse. If the other spouse is also working these earnings must be kept in mind. This would constitute the Family Resource Cake which would then be cut up and distributed amongst the members of the family. The apportionment of the cake must be in consonance with the financial requirements of the family members, which is exactly what happens when the spouses are one homogeneous unit.

The High Court was reluctant to restrict maintenance to 1/5th of the Husband's income where this would be insufficient for the Wife to live in a manner commensurate with her Husband's status or similar to the lifestyle enjoyed by her before the marital severance. The High Court found that a satisfactory approach would be to divide the Family Resource Cake in two portions to the Husband since he has to incur extra expenses in the course of making his earning, and one share each to other members.

The second limb of the question can be answered in two parts.

In case the competent court has awarded maintenance under Section 24 of the Hindu Marriage Act, the quantum of maintenance under section 125 Cr.P.C. can be decided according to the following cases:

In ***Sangeeta Kumari v. State of Jharkhand and another***, 2017 SCC OnLine Jhar 3046,the Hon'ble Jharkhand High court referred to the decision of the Hon'ble Apex court in ***Sudeep Choudhary* v. *Radha Choudhary*** (1997) 11 SCC 286 wherein it has been stated that the amount awarded under Section 125 of the Cr. P.C. for maintenance was adjustable against the amount awarded in the matrimonial proceedings and was not to be given over and above the same. The High Court also referred to *Sanshya Kumari* v. *State of Bihar* reported in 2000 (1) PLJR 1066 wherein it has been held that amount of maintenance allowed under the provisions of Hindu Marriage Act is subject to adjustment of the amount granted in terms of sec. 125, Cr.P.C. Therefore, the High Court concluded that although the provision for

granting maintenance under Section 125 Cr.P.C. and Section 24 of the Hindu Marriage Act are different, the husband is not obliged to pay maintenance twice rather he is only required to pay higher amount amongst the two.

Now regarding the second part of the second limb of the question, perusal of the following judgment is required:

In an order passed on 10.1.2020 in the case of ***Amit Chaudhary v. State of U.P.***, the Apex court speaking through the Bench of Hon'ble Justice M.M.Shantanagoudar and Hon'ble Justice R. Subhash Reddy was of the opinion that the amount paid as maintenance in the proceedings arising out of the Domestic Violence Act, 2005 needs to be adjusted while computing the maintenance arising out of the proceedings under section 125 Cr.P.C.

Question 7:

What is the difference in jurisdiction of courts under the Guardians and Wards Act and the Hindu Minority and Guardianship Act in appointment of Guardians of a minor?

Answer:

The Hindu Minority and Guardianship Act, 1956 is supplemental to the Guardians and Wards Act, 1890 (*hereinafter* referred to as "the Act of 1890"). As the very name suggests, the Hindu Minority and Guardianship Act, 1956, *hereinafter* called "the Act of 1956" applies exclusively to Hindus including Buddhists, Jains or Sikhs, by religion. On the other hand, the Act of 1890 is a secular legislation which lays down the basic principles for the appointment of guardians. Section 7 of the Act of 1890 puts the welfare of minor as paramount importance for appointment of guardian of the person or of property or of both of a minor. Section 9 of the Act of 1890 deals with the jurisdiction of the Court which can entertain applications for guardianship.[6] In case of the person of a minor, the jurisdiction lies with the District Court having jurisdiction in the place where the minor ordinarily resides whereas in the case of property of the minor, the District Court where the minor resides or he has property, has the jurisdiction.

The Act of 1956 mainly deals with the guardianship of a Hindu minor's person as well as property excluding his undivided interest in the Joint Family property.

Despite the fact that the subsequent legislation on Guardianship is supplemental in nature, the main difference in the jurisdiction of the Court arises depending on whether the application is made for the guardianship of the person, or property or both of the minor. As far as, the person of the minor is concerned, such an application will lie with the Family Court in terms of **Section 7 (1) (g)** of the Family Courts Act read with **Rule 5** of the Family Courts (Jharkhand High Court) Rules,

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[6] *See* generally, *Annie Besant v. G. Narayaniah,* AIR 1914 PC 41, which related to the custody and guardianship of the famous Indian philosopher, Jiddu Krishnamurthi, and the matters related to the territorial jurisdiction of the Court competent to try the case.

2004. According to Section 7 (1) (g), ***a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor*** shall lie before the Family Court constituted under the Family Courts Act. Similarly, Rule 5 (d) (iv) of the Family Courts (Jharkhand High Court) Rules, 2004 empowers the Family Court with the jurisdiction over an application with respect to guardianship of the ***person or custody of or access to any minor*** under the Hindu Minority and Guardianship Act, 1956. Section 7 which provides for the jurisdiction of the Family Court, does not include property in Section 7(1) (g) and, therefore, wherever any application for guardianship with respect to property is made, the same will lie before the District Court and not before the Family Court. Let us take a hypothetical problem of three orphan Hindu minor children, where the matter is related to the withdrawal of amount from the Bank account of their deceased father. In such a case, Succession Certificate cannot be issued in favour of the minors and the other option will be for the appointment of a guardian of the minor. The question that will arise is whether such an application can be filed before the Principal District Judge under Section 9 of the Act of 1890 or before the Principal Judge, Family Court under Section 6 of the Act of 1956. The law on this point has been succinctly laid down by the Hon'ble Jharkhand High Court[7] in ***Devilal Bhagat v. Rekha Bhagat*** reported in 2007 SCC OnLine Jhar 372 wherein it had been held as follows :-

> "As noticed above, the petition for appointment of Guardianship was originally filed by the petitioner in the Court of District Judge, Bokaro at Chas. In my considered opinion, the first error committed by the District Judge is to transfer the proceeding to the Family Court although proceeding was for appointment of Guardian of person and property of minor. The District Judge appears to have not applied his mind before transferring the case to the Court of Principal Judge, Family Court, Bokaro. The Family Court has also committed serious error of law in dismissing the case as not maintainable. The only course available to the Family Court was to transfer tack the case to the District Judge from where case was transferred to him holding that it has no jurisdiction to here the suit or proceeding for appointment of Guardian in

[7] *Dharma Dutta Chaturvedi v. Principal Judge, Family court and Anr*, 2014 SCC OnLine SC 15202; *Vimalashram Gharkul of Amprapali Utkarsha Sangh v. Jyoti Banson Joseph*, 2006 (4) Mh LJ 692;

> respect of both person and property of minor. The impugned order passed by the Family Court is, therefore, illegal and wholly without jurisdiction."

Therefore in light of the provisions of the Family Courts Act and the Family Courts (Jharkhand High Court) Rules and the judgment of the Hon'ble Jharkhand High Court, the question related to the jurisdiction of Courts in relation to the appointment of guardian a minor can be answered as follows :-

- If the application is for the appointment of guardian of the person of a minor, the same shall lie before the Principal Judge, Family Court.
- If the application is for the appointment of guardian of the property of a minor, the same shall lie before the Principal District Judge.
- If the application is for the appointment of the guardian of both the person and the property of a minor, the same shall lie before the Principal District Judge.

Question 8:

What are the major differences in procedure for adoption by Indian Prospective Adoptive Parent living in India and inter-country adoption? What are the eligibility criteria for prospective adoptive parents? Discuss with relevant provisions of law and latest case laws?

Answer :

The above question can be answered with a holistic understanding of the following:

- Juvenile Justice (Care & Protection of Children) Act, 2015 (JJ Act) -Came into effect from 15 January 2016
- Model JJ Rules, 2016 -Came into effect from 21 September 2016
- Adoption Regulations, 2017-Came into effect from 16 January 2017

Applicability in cases of orphan, abandoned and surrendered children

Section 56 (1) of the Juvenile justice Act,2015 states that in cases of orphan, abandoned and surrendered children, Adoption shall be resorted to as per the provisions of the JJ Act, the rules made there under and the adoption regulations framed by the Central Adoption Resource Authority.

Child should be declared legally free for adoption

In cases of ***surrendered child***, they are to be declared legally free for adoption after the expiry of 60 days from the date of surrender as prescribed by Rule 19, sub-rule 23 of the JJ Model Rules,2016 read with section 38 (2) of the JJ Act. Regulation 7 of the Adoption Regulations,2017 provides for the procedure relating to a surrendered children.As per section 59 of the JJ Act, it is only when the child could not be placed with an Indian or non-resident Indian Prospective parent in the next 60 days after being declared legally free for adoption that such child shall be free for inter country adoption.

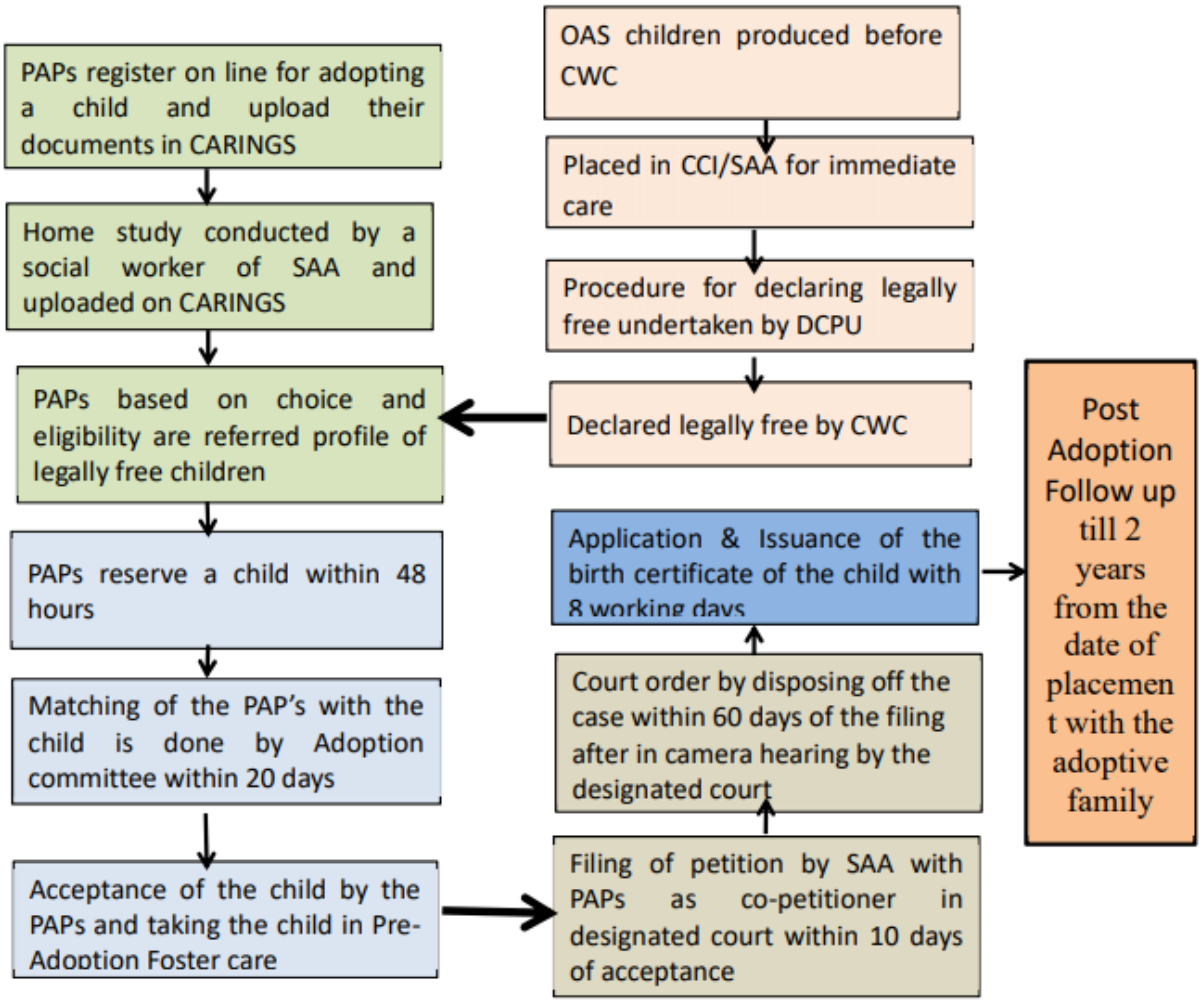
In cases of ***orphan or abandoned child***, they are to be declared legally free for adoption if after the completion of inquiry by the Committee in order to trace the parents or guardians of the child, it has been established that the child is either an orphan or abandoned as prescribed by rule 19, sub-rule 24 of JJ Model Rules, 2016 read with section 38(1) of the JJ Act. As per section 38(2) such declaration shall be made within two months from the date of production of the child in case of children who are upto 2 years of age and in case of children above two years of age such declaration has to be made within four months from the date of production of the child. Regulation 6 of the Adoption regulations,2017 provides for the procedure for the orphan or abandoned children. As per section 59(1), it is only after such declaration has been made and the orphan or abandoned child could not be placed with the prospective adoptive Indian or non-resident Indian parents within 60 days of such declaration, that the child could be declared free for inter –country adoption.

Further, Regulation 8 of the Adoption Regulations, 2017 provides :

> **8. Availability of child for adoption**.- As soon as a child is declared legally free for adoption by the Child Welfare Committee, such child shall be allowed to be given in adoption to a resident Indian or non-resident Indian parents:
>
> Provided that such child shall be allowed to be given in inter-country adoption.-
>
> a) after sixty days, if the child is below five years of age;
> b) after thirty days, if the child is above five years of age or is a sibling;
> c) after fifteen days, if the child has any mental illness or physical disability as listed in Schedule XVIII.
>
> Explanation.- For the purposes of this regulation, it is clarified that the time limits specified in the proviso shall be calculated from the date, the certificate issued by the Child Welfare Committee declaring the child as legally free for adoption, is uploaded in Child Adoption Resource Information and Guidance System.

All Inter-country adoptions shall be done as per provisions of the JJ Act & Adoption Regulations framed by the Authority (Sec 56(4) of the JJ Act)

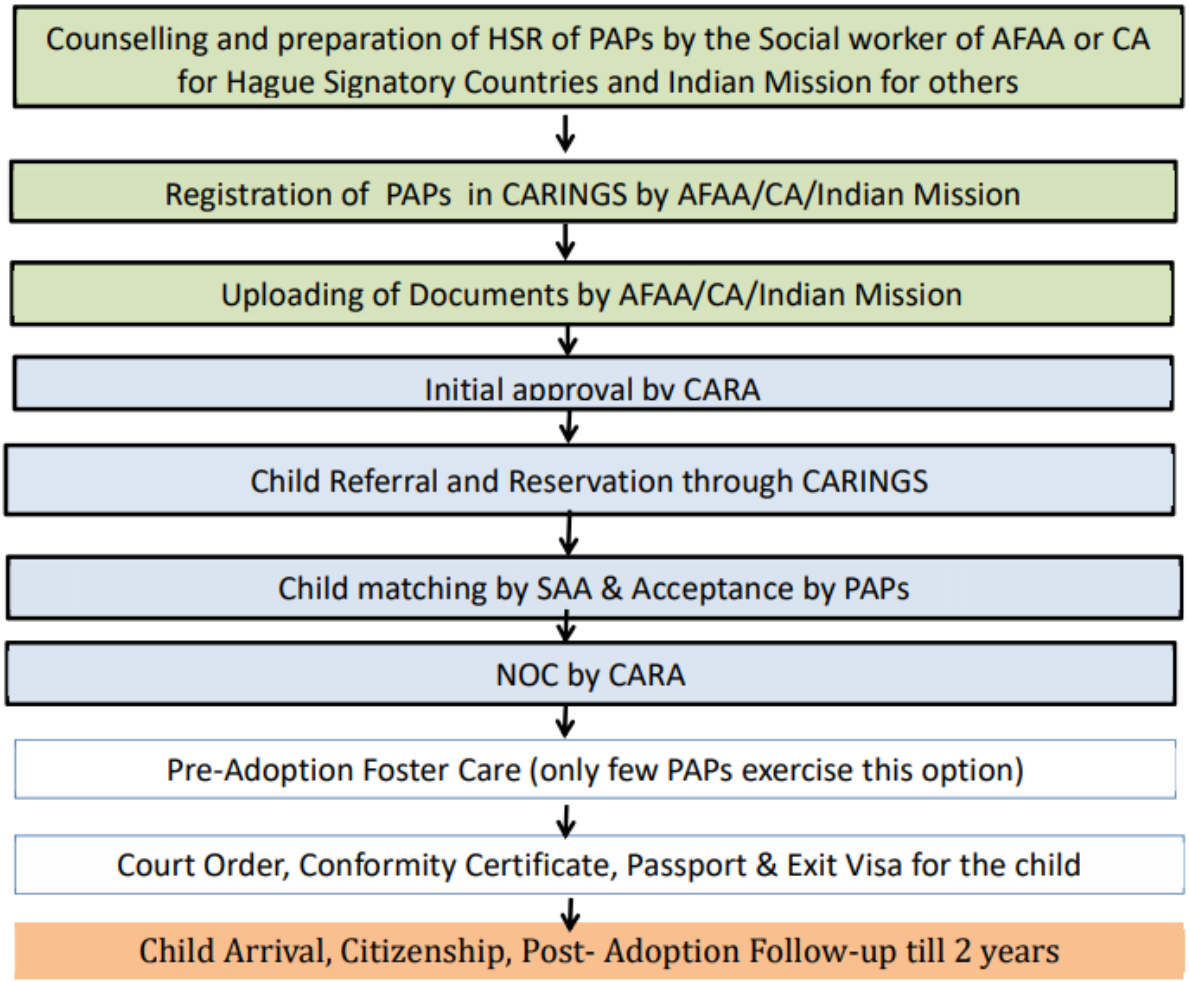
In- Country Adoption of OAS Children



Source: Bench book for Adoptions

Abbreviations:
OAS- orphan, adopted or surrendered children
CWC-Child Welfare Committee
CCI-Child Care Institutions
SAA-Specialized Adoption Agency
DCPU-District Child Production Unit
PAPs-Prospective Adoptive Parents
CARINGS- Child Adoption Resource Information & Guidance System

Inter - Country Adoption of OAS Children



Source: Benchbook for adoptions

Abbreviations:
HSR-Home Study report
PAPs- Prospective Adoptive Parents
AFAA-Authorised Foreign Adoption Agency
CARINGS- Child Adoption Resource Information & Guidance System
CARA- Central Adoption Resource Authority
SAA- Specialized Adoption Agency
NOC-No Objection Certificate

Section 57 of the JJ Act,2015 read with Regulation 5 of the Adoption Regulations 2017 provides for the eligibility criteria for prospective adoptive parents.

5. Eligibility criteria for prospective adoptive parents.-

(1) The prospective adoptive parents shall be physically, mentally and emotionally stable, financially capable and shall not have any life threatening medical condition.

(2) Any prospective adoptive parents, irrespective of his marital status and whether or not he has biological son or daughter, can adopt a child subject to following, namely:-

a. the consent of both the spouses for the adoption shall be required, in case of a married couple;
b. a single female can adopt a child of any gender;
c. a single male shall not be eligible to adopt a girl child;

(3) No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship.

(4) The age of prospective adoptive parents, as on the date of registration, shall be counted for deciding the eligibility and the eligibility of prospective adoptive parents to apply for children of different age groups shall be as under:-

Age of the child	Maximum composite age of prospective adoptive parents (couple)	Maximum age of single prospective adoptive parent
Upto 4 years	90 years	45 years
Above 4 and upto 8 years	100 years	50 years
Above 8 and upto 18 years	110 years	55 years

(5) In case of couple, the composite age of the prospective adoptive parents shall be counted.

(6) The minimum age difference between the child and either of the prospective adoptive parents shall not be less than twenty-five years.

(7) The age criteria for prospective adoptive parents shall not be applicable in case of relative adoptions and adoption by step-parent.

(8) Couples with three or more children shall not be considered for adoption except in case of special need children as defined in sub-regulation (21) of regulation 2, hard to place children as mentioned in regulation 50 and in case of relative adoption and adoption by step-parent.