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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 03.05.2023

Date of Decision: 10.05.2023

+ CM(M) 64/2023, CM APPL. 2082/2023 (stay) & CM APPL. 6247/2023 (vacation of stay)

..... Petitioner

Through: Ms. Preeti Singh, Mr Sunklan Porwal, Ms. Saumya Dwivedi, Ks. Kmkum Mandhanya and Mr Rishabh Munjal, Advs.

versus

..... Respondent

Through: Mr. Prabhjot Jauhar with Ms. Rosemary Raju, Ms. Ajunee Singh, Mr. Ranveer Talwar, Advs.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J

JUDGMENT

1. The right of privacy claimed by the husband vis-à-vis the prayer of the wife to seek assistance of the Court for production of records to substantiate her charge of adultery levelled against the husband in her petition seeking divorce is the question before this Court.
2. The present petition under Article 226 of the Constitution of India, preferred by the husband, who is the respondent in HMA No. 1724/2022, instituted by the wife, seeks to assail the orders dated 04.07.2022 and

14.12.2022 passed by the learned Family Court. Vide its order dated 04.07.2022, the learned Family Court allowed the application preferred by the respondent seeking preservation of the CCTV footage of Hotel Fairmont, Jaipur for the period between 29.04.2022 to 01.05.2022. However, after it was reported that CCTV footages were not preserved for more than 30 days and were therefore not available at that stage, the respondent moved an application under Order XVI of the Code of the Civil Procedure (hereinafter, CPC) seeking summoning of the record regarding room No. 219 of Hotel Fairmont Jaipur for the period between 29.04.2022 to 01.05.2022 as also the Call Detail Records (CDRs) of the petitioner's two mobile nos. 9811484848 and 9310484848 for the period between 01.06.2021 to 30.06.2022. This application has been allowed by the learned Family Court vide its impugned order dated 14.12.2022 and the record in terms of the application was directed to be sent to the Court in a sealed cover.

3. Before dealing with the rival submissions of the learned counsel for the parties, the brief factual matrix, as is necessary for adjudication of the present petition, may be noted.

4. The marriage between the parties, having been solemnized on 04.12.1998 according to Hindu rites and rituals, they were on 15.07.2000, blessed with a daughter. Even while both the parties continued to reside in the same shared household, disputes arose between them and the respondent served a legal notice upon the petitioner on 24.05.2022 wherein she besides alleging cruelty and domestic violence on the part of the petitioner, stated that he had indulged in adulterous acts with a woman outside their marriage. The respondent thereafter filed a petition seeking divorce under Section 13(1)(i) of the Hindu Marriage Act on the ground of adultery and cruelty on

the part of the petitioner. It was the respondent's specific case that, the petitioner between 29.04.2022 to 01.05.2022 was staying with a lady along with her daughter in the same room at Hotel Fairmont, Jaipur.

5. In order to substantiate her allegations of adultery against the petitioner, the respondent approached Hotel Fairmont, Jaipur with a request to provide her with the booking details of room no.219 between 29.04.2022 to 01.05.2022 where the respondent claims, the petitioner was residing with the lady whose particulars are not known to her, alongwith the identity proofs (ID) of persons staying therein as also the details of the mode of payment of the room rent. Upon the said request being denied by the hotel authorities, the respondent preferred an application before the learned Family Court seeking preservation of the CCTV footage of room no.219 by the hotel authority for the aforesaid period. The learned Family Court, while allowing the said application on 04.07.2022, granted liberty to the respondent to move a fresh application for summoning the CCTV footage, booking details and reservation records of room no.219, Hotel Fairmont.

6. The respondent then preferred an application before the learned Family Court under Order XVI, CPC read with Section 14 of the Family Courts Act, seeking a direction to Hotel Fairmont, Jaipur to produce the booking details, reservation records and ID proofs of persons staying in Room No. 219 or of any other room in which the petitioner stayed during the period between 29.04.2022 to 01.05.2022. The respondent also sought directions to the concerned mobile agencies for preservation of CDRs of the petitioner's mobile nos..... for a period of one year.

In support of her application, the respondent relied on certain photographs of

the petitioner with the said lady in the hotel. The prayers made by the respondent in her application read as under:-

"A. Direct the Fairmont Hotel, Jaipur to produce the booking details of Room No. 219 of the hotel from 29.04.202201.05.2022of the Fairmont Hotel, Jaipur or any such room the respondent stayed in.

B. Direct the Fairmont Hotel, Jaipur to produce the reservation details such as the check-in check out register at the reception and copies of ID cards submitted with Hotel Fairmont, Jaipur for Room No. 219 for 29.04.202201.05.2022by all the occupants or any such other room the respondents stayed in.

C. Direct the Fairmont Hotel, Jaipur to produce the payment made for Room No. 219 of the hotel from 29.04.202201.05.2022of the Fairmont Hotel, Jaipur or any such room the respondent stayed in.

D. Summon and direct the Nodal Officer of the Airtel and Vodafone Company to preserve and furnish the Mobile Call Records of the Number bearing 9811484848, 9310484848of the Respondent for the period of 1 year."

7. In his reply to the application, the petitioner besides refuting the allegations of adultery and cruelty levelled against him, contended that he merely met one of his friends who along with her daughter, was at the same time, coincidentally staying at the same Hotel Fairmont where he was staying. Furthermore, the photographs relied upon by the respondent only showed that the petitioner had met his friend in the public area of the hotel in broad daylight and therefore, the allegations of adultery levelled against him on the basis of these photographs, were liable to be rejected. It was further averred that the application preferred by the respondent, if allowed, would amount to infringement of the right to privacy not only of the petitioner but also of the

lady, who was happily married to a third party as also of her minor daughter who were both not connected to the disputes between the parties.

8. After considering the rival submissions of the parties, the learned Family Court, passed the impugned order dated 14.12.2022 directing Hotel Fairmont, Jaipur to preserve the documents relating to the reservation details, payment details and ID proofs of room no.219 for the period between 29.04.2022 to 01.05.2022 and send the same to the Court in a sealed cover. A direction was also issued to the concerned mobile agencies to preserve all the CDRs in respect of mobile nos.9811484848 and 9310484848 for the period between 01.06.2021 to 30.06.2022 and send the same to the Court in a sealed cover. While passing the impugned order, the learned Family Court opined that the documents being sought by the respondent were necessary to prove the charges of adultery and cruelty levelled against the petitioner by her.

9. Being aggrieved, the petitioner has approached this Court by way of the present petition. On 17.01.2023, when the petition was taken up for preliminary consideration, this Court, while issuing notice in the petition, had stayed the operation of the impugned orders to the extent it directed Hotel Fairmont to send the reservation details of Room No. 219 and the mobile agencies to send the CDRs to the learned Family Court. The Court, however directed the aforesaid hotel as also the concerned mobile agencies to ensure that records in terms of the impugned orders are preserved. Consequently, the records in terms of the impugned orders have been duly preserved in accordance with this Court's directions.

10. In support of the petition, Ms. Preeti Singh, learned counsel for the petitioner begins by contending that the learned Family Court has failed to

appreciate that no *prima facie* case of adultery against the petitioner was made out thereby warranting issuance of directions to Hotel Fairmont to send the reservation details of the petitioner's stay or to the mobile agencies for sending his CDRs in sealed cover. She contends that the learned Family Court has proceeded to pass the impugned order solely on the basis of bald allegations of adultery and cruelty levelled by the respondent against the petitioner without appreciating the fact that no material was brought on record by the respondent to establish adultery on the petitioner's part. The petitioner went to Jaipur for some official work and happened to coincidentally meet his friend, who was also staying in Hotel Fairmont at the same time when the petitioner visited Jaipur. Merely because the petitioner was found sitting with his friend in the common areas of the hotel could not, in any manner, be construed as adultery being committed by him. She contends that it was incumbent upon the respondent to first establish a *prima facie* case for adultery, which she failed to do. The learned Family Court has passed the impugned orders without even discussing as to how a *prima facie* case was made out against the petitioner and has gone ahead to accept the respondent's meritless plea that these documents were necessary for proving the charge of adultery and cruelty against him. In support of her plea that such directions could not have been passed without the respondent establishing a *prima facie* case she seeks to rely on a decision of the Apex Court in ***Sharda v. Dharampal, (2003) 4 SCC 3450.***

11. By drawing my attention to the prayers sought by the respondent in her application, she contends that vide the said application, the respondent had sought directions to preserve the reservation details and CDRs of Room 219 or of any such room the petitioner stayed in. This, she contends, was

indicative of the fact that respondent herself was not sure about the petitioner staying in Room No. 219 or of his staying with his friend in the hotel and indulging in adulterous acts with her. The respondent clearly failed to conclusively demonstrate that the petitioner was staying with his friend in Room No. 219. Furthermore, the photographs, on which heavy reliance has been placed by the respondent, itself showed that the petitioner was in the company of his friend and her daughter in public areas of the hotel and that too in broad daylight. She thus contends that once there was no proof that the petitioner had been staying in the hotel room with his lady friend, the Court could ought not to have directed a roving and fishing enquiry so as to collect evidence for the respondent. In support of her plea, she seeks to place reliance on the decisions of the Apex Court in *Sharda (supra)* and *Martin Burn Ltd. v. R.N. Banerjee (1958) SCR 514*.

12. Ms. Singh next submits that directions issued by the learned Family Court for preserving the CDRs in respect of mobile nos. 9811484848 and 9310484848 for the period between 01.06.2021 to 30.06.2022 were also wholly without any basis. She submits that no useful purpose would be achieved by calling for the CDRs as same cannot in any manner, establish that the petitioner had indulged in acts of adultery and cruelty. Adultery, she contends is an offence punishable by law wherein a person indulges in sexual intercourse outside marriage and in order to prove the said offence, there has to be conclusive proof of the person indulging in such sexual acts. The same would therefore require much more than summoning of the CDRs. Calling for the records of the aforesaid mobile nos. of the petitioner would, at best, reflect his tower location, individuals whom the petitioner contacted either in the regular course or for the purposes of his business as also the

duration of his calls. Furthermore, even if it were to be found that the petitioner had contacted his friend during the course of his stay at Hotel Fairmont, Jaipur, the same would not, by any stretch of imagination, be construed as indulging in an act of adultery by him.

13. She further submits that the directions issued by the learned Family Court also amount to infringement of the right to privacy, not only of the petitioner but also of his friend and her daughter, who are not at all connected with the *lis* between the parties. If the prayer of the respondent were to be allowed by this Court, the same would cast grave aspersions not only on the repute and character of the woman whom the petitioner coincidentally met at the hotel but would also put a question mark on the legitimacy and paternity of the minor child, which she contends should not be permitted in any manner. Furthermore, as per Section 112 read with Section 4 of the Indian Evidence Act, 1872, the birth of a child during the continuance of valid marriage is treated as conclusive proof of the child being legitimate. The object of the said provision is to accord undisputed legitimacy to a child born out of a valid marriage and to prevent an unwarranted inquiry into the paternity of the child whose parents, at the relevant time, had access to each other. Such a presumption can be rebutted only by strong, conclusive and clear evidence to the contrary. She, therefore, contends that once there is neither any dispute regarding the validity of the marriage of the woman whom the petitioner met at Hotel Fairmont, Jaipur nor has any evidence been led by the respondent to show that the marriage of the woman with her husband was invalid, the child born out of that marriage would, by virtue of Section 112 of the Evidence Act, in itself be considered as a legitimate child of that woman. However, the

respondent has repeatedly, without any basis, sought to urge that the child was born out of an adulterous relation between her mother and the petitioner. This she contends, is wholly impermissible and would cause grave and irreparable loss to the child as there would be a lifelong stigma on her existence. Such aspersions regarding the legitimacy of the child should not be permitted by the Court in any manner. In support of her plea, she seeks to place reliance on the decision of the Apex Court in *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia, (2023) SCC Online SC 161*.

14. Her next submission is that the details of the CDRs sought to be summoned by the respondent would not serve any purpose but would instead arm the respondent with information regarding the petitioner's business deals and would therefore be used as a tool to defame him and tarnish his reputation in the society. The only aim and motive of the respondent is to defame the petitioner and his family members as is evident from her past conduct wherein she had filed numerous complaints against the petitioner and his family members. In fact, even as on date, 8 criminal complaints are pending adjudication, causing grave hardship not only to the petitioner but also his family members who are being unnecessarily harassed by the respondent. The petitioner has been socially boycotted from the society which has resulted in a situation whereby he has been left with no household staff to take care of his aged parents and look after the daily chores. She, therefore, submits that the learned Family Court has failed to appreciate that the issuance of directions as sought by the respondent would only be used to defame the petitioner and tarnish the reputation not only of the petitioner but also of his family members.

15. Ms. Singh further submits that merely because the petitioner is assailing the directions issued by the learned Family Court to preserve the reservation details and CDRs on the ground that the same amounts to infringement of his privacy, an adverse inference cannot be drawn against him. She submits that as per Section 114 of the Indian Evidence Act, if a man refuses to answer a question, which he is not compelled by law to answer but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked, the Court may not draw an adverse inference against him. In the present case, if the directions issued by the learned Family Court are allowed to stand, the same would have far reaching consequences for the petitioner as the same would not only amount to infringement of his privacy but will also gravely affect his relationship with his friend, his business colleagues and with every individual associated with him in life. She, therefore, submits that merely because the respondent, in the present case which is purely civil in nature, has approached the Court contending that the petitioner had indulged in acts of adultery without leading any *prima facie* evidence whatsoever in this regard, no adverse inference against the petitioner for assailing the directions issued by the learned Family Court ought to be drawn by the Court.

16. In support of the aforesaid submissions, learned counsel for the petitioner has additionally sought to place reliance on the following decisions:

- (i) ***A.L. Kannan vs. Panjavarnam (2018) SCC Online Mad 12071***- The necessity and relevance for getting the call detail records must first be ascertained by the Court and summons to a third party must only be

issued when the Court is satisfied that production of a document is material and relevant.

(ii) *Rayala M. Bhuvaneswari vs. Nagaphanender Rayala (2007) SCC Online AP 892.*

The telephone conversations are an important facet of a person's private life and therefore, the right to privacy would certainly include telephone conversations in the privacy of one's home or office.

(iii) *Surjit Singh Thind vs. Kanwaljit Kaur 2003 SCC Online P&H 555, Vishal Vashisht v. Natasha Sharma CR No 4408/2022, order dated 10.11.2022 of the Punjab and Haryana High Court, Vishwas Shetty vs. Preethi K Rao and Anr. W.P.(C) 13165/2019 order dated 30.11.2022 of the Karnataka High Court and Harpreet Singh and Gurpreet Kaur CR No. 5092/2022, order dated 11.11.2022 of the Punjab and Haryana High Court-* Privacy of a third party cannot be permitted to be violated on the basis of a suspicious plea of a party that her/his spouse is involved in an illicit relationship. An order which directs tower details of a party to be placed before a Court in a proceeding in which he is not involved would amount to violation of his informational privacy. Furthermore, the same would amount to the petitioner leaning on the Court for collecting evidence which is not permissible.

(iv) *Veeraman v. Shaitan Bai FA No.355/2004, judgment dated 13.10.2022 of the Madhya Pradesh High Court and Jayantibhai Shravanbhai Rajput v. Minor Nayra Jayantibhai Rajput Crl Rev. Appl. No.1213/2022 Gujarat High Court*

Merely roaming around with any male/female other than one's own husband/wife would not lead to a presumption of adultery and mere

production of photographs before the Court to this effect would not be sufficient to show adultery.

(v) ***Neha and Ors. vs. Vibhor Garg, 2021 SCC Online P&H 4571.***

Merely because the Family Court is not bound by the strict rules of evidence does not imply that it would be at liberty to accept a CD in evidence which would amount to clear violation of the right to privacy of an individual.

(vi) ***Sangeeta vs. Shushil and Anr.- 2016 SCC Online Bom 13928***

The charge of extra marital relationship is a serious charge that casts aspersion on the character of a spouse and therefore the charge needs to be proved beyond reasonable doubt with the help of cogent evidence that would lead to an irresistible conclusion that the spouse had indulged in voluntary sexual intercourse with person of opposite sex.

(vii) ***Gayatri @ Gadigevva v. Vijay W.P. No. 102933/2021, order dated 03.12.2021 of the Karnataka High Court***

Divorce proceedings being adversarial in nature, the Courts must exercise their power to direct the medical/legal practitioners to divulge secrets only in rare and exceptional circumstances. The endeavour of the Court should be to protect the families from being broken rather than igniting issues in settled families.

17. She, therefore, prays that the impugned orders be set aside.
18. *Per contra*, Mr. Prabhjot Jauhar, learned counsel for the respondent, while supporting the impugned orders submits that once the respondent was able to establish a strong *prima facie* case against the petitioner indulging in acts of adultery and cruelty, the learned Family Court was justified in

issuing the directions for preservation of booking details, payment receipts and ID proofs of the stay in Room No. 219 as also the CDRs of the petitioner's mobile phones. He contends that the respondent had approached the learned Family Court not on the basis of mere speculations as alleged by the petitioner but with conclusive proof of her husband staying in Hotel Fairmont, Jaipur with another woman outside their marriage for a specific period, i.e., from 29.04.2022 to 01.05.2022 and had also filed photographs to show that her husband was in the close company of another woman during the said period. The establishment of a *prima facie* case against the petitioner is also evident from the fact that the petitioner has neither denied staying in the said hotel with his friend from 29.04.2022 to 01.05.2022 nor has till date, willingly produced the hotel booking records which are in his possession. He, therefore, submits that the learned Family Court was justified in issuing the directions for sending the reservation details and call detail records to the Court in a sealed cover.

19. He next submits that while issuing the impugned directions, the learned Family Court was well aware of the fact that the reservation details and call detail records being sought by the respondent were necessary for adjudication of the *lis* pending between the parties. The respondent has filed the petition for divorce against the petitioner on the grounds of adultery and cruelty and the documents being sought would be crucial in establishing the said charges against him. The petitioner deliberately made hotel reservations with the intention of indulging in adulterous activities with his friend and as per the respondent's information stayed in the same room with her in Hotel Fairmont, Jaipur from 29.04.2022 to 01.05.2022. The summoning of the reservation details would therefore be necessary to establish the charge of

adultery. Furthermore, the call detail records would also be relevant to prove the proximity of the relationship between the petitioner and his female friend; the frequency and duration of the calls made by the petitioner to his friend would be instrumental in determining the degree of closeness between them. Moreover, in his written statement filed before the learned Family Court, the petitioner had taken a totally contrary stand claiming that he had gone to Jaipur on an official trip along with his female colleague for which purpose two rooms were reserved in Hotel Fairmont. This in itself, he contends is sufficient to *prima facie* show that the petitioner in order to conceal his adulterous acts is trying to take contradictory stands before the learned Family Court to somehow prevent disclosure of the details regarding his stay in the hotel being well aware that this disclosure would in itself show adultery on his part. In support of his plea, he seeks to place to reliance on a decision of the Andhra Pradesh High Court in ***Civil Revision Petition No.2385 and 2466 of 2018*** titled ***K Srinivas Rao vs Nalam Naga Kamala.***

20. Mr. Jauhar next submits that even otherwise, under Section 14 of the Family Courts Act, the learned Family Court is vested with powers to receive as evidence any report, statement, documents etc. which, in its opinion, may assist it in effectively dealing with a dispute irrespective of whether the same would be relevant or admissible under the Indian Evidence Act. The only threshold required to be met is that in the opinion of the Family Court, the evidence sought to be summoned would help in the effective adjudication of the matter. Whether the evidence would ultimately be accepted as a proof of fact is irrelevant at this stage. He submits that, in the present case, the reservation details and the Call detail records being

summoned by the learned Family Court are quintessential in adjudicating the disputes between the parties and would certainly help the respondent in proving the charges of adultery and cruelty. The summoning of this record therefore squarely falls within the ambit of Section 14 of the Family Courts Act.

21. He further submits that the petitioner's plea that the summoning of the reservation details and the call detail records amounts to infringement of his right to privacy, is wholly misconceived and without any merit. Even though the right to privacy of an individual is an intrinsic part of right to life and personal liberty under Article 21 of the Constitution of India, the said right is not an absolute one and is subject to certain reasonable restrictions in cases where public interests are involved. By placing reliance on the decision of the Apex Court in *Mr.X v. Hospital Z(1998) 8 SCC 296*, he submits that in cases where there is a clash between the right to privacy and a right that would advance public morality or public interests, the right to privacy should pave way for the latter as moral considerations cannot be ignored by the Courts. He further submits that the Courts must ensure that right to fair trial, which involves public justice and has wider ramifications should not suffer at the expense of right to privacy and therefore a proper balance is required to be struck between the two rights. In the present case, the offence being alleged is that of adultery, which involves public morality and a legitimate/larger public interest. The petitioner, therefore, cannot take defence of infringement of his right to privacy so as to curtail the respondent's right to fair trial as the cause of public justice would suffer if the petitioner's prayers are allowed. In support of his plea, he seeks to place reliance on the decisions of the Apex Court in *Diapnwita Roy v. Ronobroto*

Roy, (2015) 1 SCC 365, Joseph Shine v. Union of India (2019) 3 SCC 39 and of a Co-ordinate Bench of this Court in *Deepti Kapur v. Kunal Julka, (2020) SCC Online Del 672*. He, therefore, submits that the respondent should be accorded a fair chance to seek the documents which would be necessary for her to establish the charge of adultery against the petitioner.

22. Mr. Jauhar next submits that the petitioner cannot be permitted to take defence of plea that the directions to summon the reservation details and call detail records amounts to infringement of privacy of his friend or would bring the legitimacy of the minor child in question. By drawing my attention to the reply filed by the petitioner to application filed by the respondent, he submits that the petitioner had stated that the directions issued by the learned Family Court would be perceived as a doubt upon the character and chastity of the petitioner's friend. This, he contends, is indicative of the fact that the petitioner is himself pre-supposing that he stayed with his friend in the same room in the hotel and indulged in adulterous acts with her. The petitioner is well aware of the consequences that the documents summoned would disclose the true state of affairs and is therefore, taking a bald defence that the summoning of the documents would infringe his friend's right to privacy. In support of his plea, he seeks to place reliance on a decision of a Coordinate Bench in *Linda Constance Edwards v. William Edwards & Anr., (2000) SCC OnLine Del 933*.

23. He further submits that the plea that the directions issued by the learned Family Court would cast aspersions on legitimacy of the minor child is equally without any merit. Neither before the learned Family Court nor before this Court has the respondent sought a declaration to the effect that the minor child be declared as an illegitimate child nor is she seeking a

paternity test of the minor child. Infact, the respondent is till date not even aware of the name of either the lady or of the minor child. He, therefore, submits that once the respondent has not sought any declaration regarding the legitimacy of the minor chid, the directions issued by the learned Family Court would not, in any manner, cast aspersions on the paternity of the child as is sought to be contended by the petitioner. Furthermore, the respondent is not seeking any details of the room where the petitioner's lady friend stayed but only of the room where the petitioner stayed between 29.04.2022 to 01.05.2022 and therefore, there is no question of infringement of privacy of the petitioner's lady friend.

24. He, therefore, prays that the petition be dismissed.

25. Before dealing with the rival submissions of the parties, it would be apposite to note the statutory provisions relating to this specialised branch, i.e., Family Law which specifically provide that the Family Courts are not bound by the restrictions imposed by the Indian Evidence Act. I may, therefore, first note the Statement and Objects of Reasons (SOR) of the Family Courts Act which lay down the very purpose of the enactment. The same reads as under:-

“several associations of women, other organizations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family, the Court ought to adopt an approach radically different from that adopted ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of

the trial. ""

26. I may now refer to Section 14 of the Family Courts Act which reads as under:-

"14. Application of Indian Evidence Act, 1872.-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 (1 of 1872). -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 (1 of 1872).""

27. These provisions have been extensively dealt by a Coordinate Bench of this Court in ***Deepti Kapur (supra)*** wherein the Court was dealing with the question of admissibility of evidence before the Family Court which evidence was perhaps not admissible before the regular Civil Court. The Court opined that Section 14 creates a special dispensation to the Family Court receiving evidence to effectively decide dispute before it. It was also emphasised that the proceedings before a Family Court stand on a different footing from a proceeding before a regular Civil Court where the provisions of the Indian Evidence Act are fully applicable. It would therefore, be useful to refer to the observations in ***Deepti Kapur (supra)*** as contained in paragraph nos.34, 35 and 36 (c) of the decision which reads as under:

34. To address the aspect whether ethical and moral considerations should be factored-in to decide admissibility of evidence, attention may be drawn to the observation of the Supreme Court in Pooran Mal (supra), where the court said that when there is no express or specifically implied prohibition in the

Constitution, it is uncalled for and unwarranted to invoke the spirit of the Constitution to exclude evidence. Equally so, in the face of the settled rule of evidence as augmented by section 14 of the Family Courts Act, it would be unwarranted to bring into the picture subjective and undefined ethical and moral values or considerations, to decide if evidence should even be receivable by a Family Court. Without at all denigrating the importance of ethical and moral considerations, in the opinion of this court, to say that a Family Court should shut-out evidence at the very threshold on the basis of how it is collected, would be (i) in breach of section 14 which unequivocally expresses the intention of the Legislature; (ii) in breach of settled principles of evidence; and (iii) in breach of the enunciation by the Supreme Court that though the right to privacy is a fundamental right, it is not absolute and must be placed in the context of other rights and values. Such construction would have more potential for mischief than possible salutary effect.

35. If it were to be held that evidence sought to be adduced before a Family Court should be excluded based on an objection of breach of privacy or some other cognate right, then in many a case the provisions of section 14 would be rendered nugatory and dead-letter. It must be borne in mind that Family Courts have been established to deal with what are essentially sensitive, personal disputes relating to dissolution of marriage, restitution of conjugal rights, legitimacy of children, guardianship, custody, and access to minors; which matters, by the very nature of the relationship from which they arise, involve issues that are private, personal and involve intimacies. It is easily foreseeable therefore, that in most cases that come before the Family Court, the evidence sought to be marshalled would relate to the private affairs of the litigating parties. If section 14 is held not to apply in its full expanse to evidence that impinges on a person's right to privacy, then section 14 may as well be effaced from the statute. And yet, falling back upon the general rule of evidence, the test of admissibility would only be relevance; and accordingly, even ignoring section 14, fundamental considerations of fair trial and public justice would warrant that evidence be received if it is

relevant, regardless of how it is collected. No purpose would therefore be served by emasculating the salutary provisions of section 14 of the Family Courts Act by citing breach of privacy. Looking at it dispassionately, even assuming evidence is collected in breach of privacy, at best and at worst, it is the process of collection of evidence that would be tainted not the evidence itself.

36. *The sequitur to the aforesaid constitutional and legal landscape is that:*

(c) The limited threshold test of 'relevance' ensures that the right of a party to bring evidence to court, and thereby to a fair trial, is not defeated. What weight is to be given to evidence so brought-in, and whether or not the court ultimately relies upon such evidence for proof of a fact-in-issue or a relevant fact, is always in the discretion of the court. This, a court may do on other considerations, including considerations of justice and fair play. We must be clear that the test of admissibility is only a 'threshold test', which opens the doors of the court, as it were, so that relevant evidence brought by a litigating party is permitted entry into the court records. It does not bind the court to treat such evidence as proof of a fact-in-issue or relevant fact. Section 14 of the Family Courts Act makes this threshold test even less stringent, in that the Family Court may receive evidence, whether or not it would otherwise be relevant or admissible under the Evidence Act, provided in its opinion such evidence would assist it in effectively dealing with the dispute;

28. Since learned counsel for the petitioner has placed heavy reliance on Section 112 of the Indian Evidence Act, I may also note the provisions thereof at this stage. The same read as under:-

"112. Birth during marriage, conclusive proof of legitimacy.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man,

unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”

29. The aforesaid provision undoubtedly declares that the factum of a child being born during the continuance of a valid marriage between his/her mother and a man would be conclusive proof of the legitimacy of him/her being a legitimate child of the man. However, in the facts of the present case nothing turns upon this provision. As rightly contended by the learned counsel for the respondent, the paternity of the child is not at all being assailed by the respondent, who has infact, not even given her particulars either in the petition seeking divorce or in the application leading to the impugned orders. All that has been alleged by the respondent is that her husband is in an adulterous relationship with a lady from which relationship, they have an illegitimate child. At the cost of repetition, it may be noted that there is no prayer whatsoever regarding the legitimacy of the child or regarding the validity of the marriage between her mother and the man with whom she is stated to be presently married.

30. Having dealt with the statutory provisions, I may now proceed to deal with the other contentions of the parties. The primary plea of the petitioner, as noted hereinabove is that the respondent has not been able to establish a *prima facie* case of the petitioner indulging in acts of adultery and the documents sought by her would not at all be relevant to prove her baseless allegations of cruelty and adultery. The petitioner has also urged that the disclosure of this information would amount to infringement of not only his right to privacy but also that of his friend and her minor daughter who are not connected with the *lis* in any manner. On the other hand, the plea of the

respondent is that the documents being sought by her are crucial for her to prove adultery on her husband's part and this information as summoned by the learned Family Court, would fall within the ambit of Section 14 of the Family Courts Act. It is her case that from the photographs placed on record, she has been able to clearly prove a *prima facie* case against the petitioner and if this information was not called for, she may not be able to prove the serious charges of adultery against the husband. Furthermore, she was seeking information only about her legally wedded husband and not about a third party as she had neither sought the details of the room where the lady was staying, nor asked for the paternity test of the minor child; her prayer being simply for collecting all the details regarding the room where her husband was staying between 29.04.2022 to 01.05.2022 at Hotel Fairmont, Jaipur. It is her plea that even if this information were to incidentally disclose the details of the room where the lady was staying, the respondent's right to seek this information about her husband's whereabouts for this period could not be curtailed.

31. From these rival submissions of the parties, it emerges that two primary issues arise for consideration of this Court. The first being as to whether the respondent has been able to make out a *prima facie* case and the information sought by her can be said to be relevant for determining the *lis* between the parties. The second question which needs to be answered is as to whether the information sought by the respondent would amount to infringement of the right to privacy of the petitioner or of his lady friend or that of the minor child and in the event the answer to this question is in the affirmative, whether this right must give way to the respondent's right to fair

trial by seeking to procure evidence which would fall within the ambit of Section 14 of the Family Courts Act.

32. Having noted the two issues which arise for my consideration, I may begin by dealing with the first issue. The petitioner has vehemently urged that the respondent has not been able to make out a *prima facie* case against him and the information sought by her is not at all relevant for proving the charge of adultery. I am, however, unable to agree. It is an admitted position that the respondent has not only placed a number of photographs showing the petitioner in close proximity with his lady friend but has also provided the details of the room and the dates on which according to her, her legally wedded husband was staying with the lady. Even though, learned counsel for the petitioner is right in urging by relying on *Jayantibhai Shravanbhai Rajput (supra)* and *Veeraman (supra)* that the photographs produced by the respondent where the petitioner is seen sitting in public area with his friend, do not by themselves establish adultery, it cannot be said that they do not even point towards a *prima facie* case. Furthermore, what needs to be noted that the petitioner has taken contradictory stands regarding the presence of his lady friend in the hotel. While in his written statement he has stated that he was on an official trip to Jaipur, along with his female colleague and therefore, two rooms were booked for them in Hotel Fairmont, in response to the application he has claimed that he met the lady friend by chance in the hotel as she was also co-incidentally staying there. The respondent is the estranged wife of the petitioner who obviously does not have any direct evidence of her husband indulging in acts of adultery. By resort to Section 14 of the Family Courts Act, she is, only trying to seek production of evidence which she reasonably believes will prove her charge of adultery.

which by its very nature can be inferred only from circumstances. In this regard, reference may be made to the observations of the Coordinate Bench of this Court in *Linda Constance Edwards (supra)* which reads as under:-

“20. It is said that the adultery is committed in darkness and secrecy and, therefore, it is difficult to provide a direct proof. Rather eyewitness account or photographic account of evidence of intercourse is taken as offending. A celebrated jurist Raydon in Raydon on Divorce observes that a direct evidence is rather apt to be disbelieved as it smacks of manipulation. It is rare that the parties are surprised in direct act of adultery. In the opinion of Sir William Scott in Lovedon v. Lovedon, 2 Hagg Con, 1810 Australian Family Law 455), “the only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion, for it is not to lead a harsh and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man.”

21. Thus the adultery is to be inferred from circumstances which must indicate inclination, guilty intention and opportunity to commit adultery. Bed room evidence is one of such strong circumstances as way back in 1909 in Kerr v. Kerr, 114 App. Div. 1421, it was observed that where man and a woman who are not husband and wife have bed room privacy, there is strong inference of adultery as they do not sing prayers there”

33. There can therefore be no gainsaying that direct evidence of adultery can rarely be available. I am therefore of the considered opinion that the respondent has not only been able to make out a *prima facie* case against the petitioner but also that the information which she is seeking would definitely be relevant for proving the charge of adultery which she has levelled against

her husband. The payment and reservations details along with the ID proofs of the occupants of the room will surely throw light on this crucial issue as to whether the petitioner was indeed staying with a lady other than his wife in the same room. Similarly, the call details will surely be indicative of the fact as to whether the conversations of the petitioner with the lady were of such duration and frequency as is not expected between colleagues. The respondent is seeking to prove the charge of adultery against the petitioner and therefore, it cannot be said that this information would not be relevant.

In *A.L.Kanan (supra)*, on which heavy reliance has been placed by the petitioner, the Court was dealing with a situation where adultery was not even a ground for divorce and therefore, the said decision is not applicable to the facts of the present case, where adultery is a specific ground urged by the respondent. On the other hand, the decision of the Andhra Pradesh High Court in *K Srinivas Rao (supra)* relied upon by the respondent deals with a similar situation wherein the High Court allowed a similar application under Order XVI, CPC, preferred by the husband for production of records from the hotels where he had claimed his wife was staying with her paramour.

The relevant extract of the said decision reads as under:

Further, when the petitioner-husband specifically sought divorce on the ground of adultery, the subject documents may be crucial to establish the alleged adulterous relationship between the first respondent-wife and the second respondent. Though photocopies seem to have been procured by the petitioner husband of some of the incriminating documents, the original record summoned from the hotels concerned would be important primary evidence. Therefore, the learned Family Court Judge ought not to have brushed aside the plea of the petitioner-husband for summoning of these documents despite his power to do so under Order 16 Rule 6 CPC.

The orders under revision are accordingly set aside and the civil revision petitions are allowed. The learned Judge, Family Court, Ranga Reddy District at L.B.Nagar, shall issue summons to the management of both the hotels concerned for production of the documents sought by the petitioner-husband and thereafter proceed in the matter in accordance with law.

34. At this stage, I may also refer to the decisions in *Vishal Vashisht (supra)* and *Harpreet Singh (supra)* relied upon by the petitioner to contend that it is not permissible for a party to lean on the Court to collect evidence as it is for the party to prove his/her case by leading cogent evidence. There can be no quarrel with the well settled principle that generally it is for the party approaching the Court to lead evidence in support of its case but what needs to be appreciated is that when the Court is dealing with this special law relating to family matters, Section 14 of the Family Courts Act is carved in a slightly different manner giving very wide powers to the Family Court in matters of receiving evidence. It is therefore, open for the Family Court to receive any evidence which may assist the Court to effectively deal with the dispute irrespective of whether the said evidence is relevant or admissible under the Indian Evidence Act. As held in *Deepti Kapur (supra)*, the proceedings before a Family Court stand on a different footing from the proceedings before a regular Civil Court where the provisions of the Indian Evidence Act are fully applicable. In the present case, once the learned Family Court was satisfied that the respondent had been able to make out a *prima facie* case, it was justified in directing the production of the records sought by her which will definitely assist the Court in coming to a correct conclusion as to whether the petitioner, as alleged by the respondent, had

indulged in adultery. I am, therefore, of the view that the decisions in *Vishal Vashisht (supra)* and *Harpreet Singh(supra)*, relied upon by the petitioner are not applicable to the facts of the present case.

35. I have also considered the petitioner's plea that the direction to produce the records sought by the respondent would amount to roving and fishing inquiry by the Court but do not find any merit in the same. At the cost of repetition, I may observe that it is not as if the respondent is seeking information about any stranger staying in the hotel, her plea is only for records pertaining to her legally wedded husband, who she has a reason to believe is indulging in adultery with a particular lady in a particular room. The respondent has sought details of her husband's stay in a particular hotel during a specific time period and not of his friend or the friend's daughter. Similarly she has also sought the call details of her husband alone, whose phone numbers she has provided. Once the respondent is seeking specific information regarding her husband's stay during a specific period at a specific hotel, it cannot be said that the respondent is indulging in any roving and fishing inquiry. None of the respondent's prayers, therefore, seek any information about any stranger or about any vague incident or period. The decision in *Sharda (supra)* relied upon by the petitioner is, therefore, not applicable to the facts of the case.

36. Now coming to the petitioner's plea that the divulgence of this information to the respondent, even though, initially being sought in a sealed cover would be violative of his right to privacy or the right of his lady friend or that of her minor child. While Ms. Singh is correct in urging that even a legally wedded wife may not have a fundamental right to know every minor detail about her husband or to seek information as to with whom he talks on

his mobile phone and therefore the production of information as directed under the impugned order may amount to infringement of privacy of the petitioner husband, what cannot be ignored is that the respondent is the legally wedded wife who has a reasonable apprehension that her husband is indulging in adultery for which she has filed a petition seeking divorce under Section 13(1)(i) of the Hindu Marriage Act. She has pleaded before the learned Family Court that she has no other means to prove except by securing information from the hotel and the mobile agencies, which plea has been accepted by the learned Family Court. Can it be said that the learned Family Court, in the light of the documents already placed on record, was unjustified in coming to her aid, is the question which needs to be answered by this Court. As held in *Linda Constance Edwards (supra)* rarely would there be direct evidence of adultery. I am therefore of the considered view that when in a case like the present, when a wife seeks the help of the Court for procuring evidence which would go a long way to prove adultery on the part of her husband, the Court must step in; this would be in consonance with Section 14 of the Family Courts Act which gives a leeway to the Court to consider evidence which may be not admissible or relevant under the Indian Evidence Act.

37. What therefore needs to be determined is as to whether, in the facts of the present case, the right of privacy claimed by the petitioner/husband should be permitted to prevail over the right of the respondent/wife to seek redressal under the provisions of the Hindu Marriage Act. Notably, the petitioner, who is harping on his right to privacy, as on date, continues to be in a subsisting marital relationship with the respondent, having a grown-up daughter out of the said wedlock. As held by the Constitution Bench in *K.S.*

Puttuswamy vs. Union of India, (2017) 10 SCC 1 the right to privacy, though a constitutionally protected right, is not an absolute right. This right of privacy under Article 21 of the Constitution of India, has to be necessarily subject to reasonable restrictions especially when the restrictions are in public interest. The Hindu Marriage Act specifically recognises adultery as a ground for divorce and therefore, it would not at all be in public interest that the Court should on the ground of right to privacy, come to the aid of a married man who, during the subsistence of his marriage, is alleged to have indulged in sexual relationships outside his marriage. In this regard, reference may be made to the observations of the Coordinate Bench in paragraph nos.22 to 24 of its decision in **Deepti Kapur (supra)**. The same read as under:-

22. It is crucial to note however, that at the time that the decisions in M.P. Sharma v. Satish Chandra and subsequently in Pooran Mal (supra) were rendered, privacy was not recognised as a fundamental right under the Constitution, as indeed no such right had been expressly enunciated by our Founding Fathers. Today however, in Puttaswamy (supra), our Supreme Court has recognised privacy as a fundamental right, while qualifying it to say that the right to privacy is not absolute but is subject to exceptions, limitations and contours; and must be placed in the context of other rights and values. However, even at the time of M.P.Sharma (supra) and Pooran Mal (supra), Articles 14, 19(1)(f), 19(1)(g), 20(3) and 31, under which these cases arose, were very much in Part-III of the Constitution dealing with fundamental rights; and yet the Supreme Court opined that merely because a search or seizure was illegally conducted and may amount to breach of a fundamental right, that would not make the search or seizure invalid in law. Applying the same principle, this court is of the view that although today, privacy is

recognised as a fundamental right, that alone would not make evidence collected in breach of that right, inadmissible. Muchless would it negate the specific statutory dispensation contained in section 14 of the Family Courts Act, which says that evidence would be admissible, whether or not the same is otherwise relevant or admissible under the Evidence Act.

23. While a litigating party certainly has a right to privacy, that right must yield to the right of an opposing party to bring evidence it considers relevant to court, to prove its case. It is a critical part of the hallowed concept of fair trial that a litigating party gets a fair chance to bring relevant evidence before court. It is important to appreciate that while the right to privacy is essentially a personal right, the right to a fair trial has wider ramifications and impacts public justice, which is a larger cause. The cause of public justice would suffer if the opportunity of fair trial is denied by shutting-out evidence that a litigating party may wish to lead at the very threshold.

24. Since no fundamental right under our Constitution is absolute, in the event of conflict between two fundamental rights, as in this case, a contest between the right to privacy and the right to fair trial, both of which arise under the expansive Article 21, the right to privacy may have to yield to the right to fair trial. Reference in this regard may be made to the observations of a 5-Judge Constitution Bench decision of our Supreme Court in Sahara India Real Estate Corporation Limited v. Securities and Exchange Board of India²⁵, where the court observes thus:

“..... It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under of Constitution, probably, no values are absolute. All important values,

*therefore, must be qualified and balanced against other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of freedom of expression as it is for other values. Consequently, free speech, in appropriate cases, has got to correlate with fair trial. It also follows that in an appropriate case one right (say freedom of expression) may have to yield to the other right like right to a fair trial. Further, even Articles 14 and 21 are subject to the test of reasonableness after the judgement of this Court in *Maneka Gandhi v. Union of India*.”*

38. At this stage, it would be useful to also refer to the decision in ***Joseph Shine (supra)*** wherein the Constitution Bench emphasised that the freedom to have a consensual sexual relationship outside marriage by a married person does not warrant protection under Article 21 of the Constitution of India. The relevant observations of the Apex Court as contained in paragraph no.278 of the said decision read as under:-

“278. The petitioners have contended that the right to privacy under Article 21 would include the right of two adults to enter into a sexual relationship outside marriage. The right to privacy and personal liberty is, however, not an absolute one; it is subject to reasonable restrictions when legitimate public interest is involved. It is true that the boundaries of personal liberty are difficult to be identified in black and white; however, such liberty must accommodate public interest. The freedom to have a consensual sexual relationship outside marriage by a married person, does not warrant protection under Article 21.”

39. From the aforesaid, it is evident that it has been repeatedly held by the Apex Court that the right to privacy, as enshrined under Article 21, is not an absolute right. In the present case, the Court has on the one side, a husband

who is taking contradictory stands in his pleadings and has, for the reasons best known to him, not come forward to voluntarily disclose the details about the occupants of Room no.219 in Hotel Fairmont, where his legally wedded wife has reason to believe that he was staying with a lady friend. On the other hand, is the wife who is already before the Court seeking divorce on the ground of adultery and cruelty against her husband pleading that unless the information as directed by the learned Family Court is brought on record, she may not be able to prove adultery on the part of her husband. This Court, therefore, has to necessarily strike a balance between these two conflicting rights. Should the Court discard the respondent's plea as being those of a suspicious wife and accept the petitioner's plea of his right to privacy, is what needs to be determined.

40. In this regard, I may refer to the decision in *Hospital Z (supra)* wherein the Apex Court while dealing with a conflict between fundamental rights of two parties, the right to privacy of one and the right to healthy life of the other, held as under:-

"44. Ms 'Y', with whom the marriage of the appellant was settled, was saved in time by the disclosure of the vital information that the appellant was HIV(+). The disease which is communicable would have been positively communicated to her immediately on the consummation of marriage. As a human being, Ms 'Y' must also enjoy, as she obviously is entitled to, all the Human Rights available to any other human being. This is apart from, and in addition to, the Fundamental Right available to her under Article 21, which, as we have seen, guarantees "right to life" to every citizen of this country. This right would positively include the right to be told that a person, with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Since "right to life" includes right to

lead a healthy life so as to enjoy all the faculties of the human body in their prime condition, the respondents, by their disclosure that the appellant was HIV(+), cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy. Moreover, where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellant's right to privacy as part of right to life and Ms 'Y's right to lead a healthy life which is her Fundamental Right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day". (See: Allen: Legal Duties)"

41. Having given my thoughtful consideration as to whose right should prevail in the facts of the present case, I am inclined to accept the respondent's plea. The petitioner's claim is based solely on the right to privacy which, as held in **K.S. Puttuswamy (supra) and Joseph Shine (supra)** is not an absolute right; on the other hand, the respondent's prayer is based not only on morality but also on specific rights granted under the Hindu Marriage Act and the Family Courts Act. I, therefore, have no hesitation in holding that the respondent's right must prevail and therefore, find no reason to interfere with the impugned orders. The learned Family Court by way of the impugned orders has sought records which pertain only to the respondent's husband and not to his friend or her daughter. There is, therefore, no question of their right of privacy being violated in any manner.

42. Before I conclude, I may also refer to the decisions in **Surjit Singh (supra)** and **Vishwas Shetty (supra)** but find that the same are not applicable

to the facts of the present case. In *Surjit Singh (supra)*, the Punjab and Haryana High Court, after noting that the virginity of wife was not in issue in the matter, declined to interfere with the Family Court's order rejecting the husband's prayer to get his wife medically examined to prove her virginity by holding that this would amount to holding a roving inquiry. In the present case, the respondent has not only raised a specific plea of adultery against the petitioner but even otherwise, she has sought only specific information regarding the details of the room where her husband was staying during a specific period as also his call records alone. The decision in *Surjit Singh (supra)* would therefore not be applicable to the facts of the present case. In *Vishwas Shetty (supra)*, the Court was dealing with the husband's prayer seeking call details not only of his wife but also of her alleged paramour. The Court rejected the prayer seeking call details of the wife's paramour by holding that the same would amount to infringing his right to privacy. In the present case, the respondent has admittedly not sought any details regarding the petitioner's friend or her daughter and therefore this decision would also not forward the case of the petitioner in any manner.

43. I have also considered the decision in *Sangeeta (supra)*, relied upon by the petitioner and find that the same would also not be applicable to the present case. In *Sangeeta (supra)*, the Bombay High Court was dealing with a standard of proof required to establish the charge of adultery. The impugned orders passed by the learned Family Court only pertain to the production of records and do not in any manner deal with the question as to whether the said record would in itself be sufficient to prove the charge of adultery against the petitioner. In the present case, the stage to determine the

sufficiency of evidence is yet to arrive. The decision in *Sangeeta (supra)* is therefore clearly distinguishable.

44. For the aforesaid reasons, I find no merit in the petition which is, accordingly, dismissed with all pending applications. Consequently, all interim orders stand vacated.

(REKHA PALLI)
JUDGE

MAY 10, 2023
Acm/kk

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