REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

TRANSFER PETITION (CIVIL) NO.1278 OF 2016

Santhini …Petitioner(s)

Versus

Vijaya Venketesh …Respondent(s)

WITH

TRANSFER PETITION (CIVIL) NO. 422 OF 2017

J U D G M E N T

Dipak Misra, CJI. [For himself and Khanwilkar, J.]

A two-Judge Bench in ***Krishna Veni Nagam v. Harish Nagam***[1], while dealing with transfer petition seeking transfer of a case instituted under Section 13 of the Hindu Marriage Act, 1955 (for brevity, 'the 1955 Act') pending on the file of IInd Presiding Judge, Family Court, Jabalpur, Madhya Pradesh to the Family Court, Hyderabad, Andhra

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1 (2017) 4 SCC 150

Pradesh, took note of the grounds of transfer and keeping in view the approach of the Court to normally allow the transfer of the proceedings having regard to the convenience of the wife, felt disturbed expressing its concern to the difficulties faced by the litigants travelling to this Court and, accordingly, posed the question whether there was any possibility to avoid the same. It also took note of the fact that in the process of hearing of the transfer petition, the matrimonial matters which are required to be dealt with expeditiously are delayed. That impelled the Court to pass an order on 09.01.2017 which enumerated the facts including the plight asserted by the wife, the concept of territorial jurisdiction under Section 19 of the 1955 Act, and reflected on the issues whether transfer of a case could be avoided and alternative mode could be thought of. Dwelling upon the said aspects, the Court articulated:-

> "In these circumstances, we are prima facie of the view that we need to consider whether we could pass a general order to the effect that in case where husband files matrimonial proceedings at place where wife does not reside, the court concerned should entertain such petition only on the condition that the husband makes appropriate deposit to bear the expenses of the wife as may be determined by the Court. The Court may also pass orders from time to time for further deposit to ensure that the wife is not handicapped to defend the proceedings. In other cases, the husband may take proceedings before the Court in whose jurisdiction the wife resides which may lessen inconvenience to the parties and

avoid delay. Any other option to remedy the situation can also be considered."

As the narration would exposit, the pivotal concern of the Court was whether an order could be passed so as to provide a better alternative to each individual who is compelled to move this Court.

2. The observation made in ***Anindita Das v. Srijit Das***[2] to the effect that on an average at least 10 to 15 transfer petitions are on board of each Court on each admission day was noticed. The learned Judges apprised themselves about the observations made in ***Mona Aresh Goel v. Aresh Satya Goel***[3], ***Lalita A. Ranga v. Ajay Champalal Ranga***[4], ***Deepa v. Anil Panicker***[5], ***Archana Rastogi v. Rakesh Rastogi***[6], ***Leena Mukherjee v. Rabi Shankar Mukherjee***[7], ***Neelam Bhatia v. Satbir Singh Bhatia***[8], ***Soma Choudhury v. Gourab Choudhaury***[9], ***Rajesh Rani v. Tej Pal***[10], ***Vandana Sharma v. Rakesh Kumar Sharma***[11] and ***Anju Ohri v. Varinder Ohri***[12] which rest on the principle of "expedient for ends of justice" to transfer the proceedings. It

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2 (2006) 9 SCC 197
3 (2000) 9 SCC 255
4 (2000) 9 SCC 355
5 (2000) 9 SCC 441
6 (2000) 10 SCC 350
7 (2002) 10 SCC 480
8 (2004) 13 SCC 436 : (2006) 1 SCC (Cri) 323
9 (2004) 13 SCC 462 : (2006) 1 SCC (Cri) 341
10 (2007) 15 SCC 597
11 (2008) 11 SCC 768
12 (2007) 15 SCC 556

also adverted to ***Premlata Singh v. Rita Singh***[13] wherein this Court had not transferred the proceedings but directed the husband to pay for travelling, lodging and boarding expenses of the wife and/or person accompanying her for each hearing. The said principle was also followed in ***Gana Saraswathi v. H. Raghu Prasad***[14].

3. The two-Judge Bench, after hearing the learned counsel for the parties, the learned Additional Solicitor General and the learned Senior Counsel who was requested to assist the Court, made certain references to the doctrine of 'forum non conveniens" and held that it can be applied to matrimonial proceedings for advancing the interest of justice. The learned Additional Solicitor General assisting the Court suggested about conducting the proceedings by videoconferencing. In that context, it has been held:-

"14. One cannot ignore the problem faced by a husband if proceedings are transferred on account of genuine difficulties faced by the wife. The husband may find it difficult to contest proceedings at a place which is convenient to the wife. Thus, transfer is not always a solution acceptable to both the parties. It may be appropriate that available technology of videoconferencing is used where both the parties have equal difficulty and there is no place which is convenient to both the parties. We understand that in every district in the country videoconferencing is now available. <u>In any case, wherever such facility is available, it ought to be fully utilised and all the High Courts ought to</u>

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[13] (2005) 12 SCC 277
[14] (2000) 10 SCC 277

issue appropriate administrative instructions to regulate the use of videoconferencing for certain category of cases. Matrimonial cases where one of the parties resides outside court's jurisdiction is one of such categories. Wherever one or both the parties make a request for use of videoconferencing, proceedings may be conducted on videoconferencing, obviating the needs of the party to appear in person. In several cases, this Court has directed recording of evidence by video conferencing[15].

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> 16. The advancement of technology ought to be utilised also for service on parties or receiving communication from the parties. Every District Court must have at least one e-mail ID. Administrative instructions for directions can be issued to permit the litigants to access the court, especially when litigant is located outside the local jurisdiction of the Court. A designated officer/manager of a District Court may suitably respond to such e-mail in the manner permitted as per the administrative instructions. Similarly, a manager/information officer in every District Court may be accessible on a notified telephone during notified hours as per the instructions. These steps may, to some extent, take care of the problems of the litigants. These suggestions may need attention of the High Courts."
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> [Emphasis added]

4. After so stating, the two-Judge Bench felt the need to issue directions which may provide alternative to seeking transfer of proceedings on account of inability of a party to contest proceedings at a

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[15] *State of Maharashtra* v. *Praful B. Desai*, (2003) 4 SCC 601 : 2003 SCC (Cri) 815; *Kalyan Chandra Sarkar* v. *Rajesh Ranjan*, (2005) 3 SCC 284 : 2005 SCC (Cri) 705; *Budhadev Karmaskar (4)* v. *State of W.B.*, (2011) 10 SCC 283 : (2012) 1 SCC (Cri) 285; *Malthesh Gudda Pooja* v. *State of Karnataka*, (2011) 15 SCC 330 : (2014) 2 SCC (Civ) 473

place away from their ordinary residence which will eventually result in denial of justice. The safeguards laid down in the said judgment are:-

> "(*i*) Availability of videoconferencing facility.
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> (*ii*) Availability of legal aid service.
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> (*iii*) Deposit of cost for travel, lodging and boarding in terms of Order 25 CPC.
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> (*iv*) E-mail address/phone number, if any, at which litigant from outstation may communicate."

Be it stated, the Court took note of the spirit behind the orders of this Court allowing the transfer petitions filed by wives and opined that the Court almost mechanically allows the petitions so that they are not denied justice on account of their inability to participate in proceedings instituted at a different place. It laid stress on financial or physical hardship. It referred to the authorities in the constitutional scheme that provide for guaranteeing equal access to justice[16], power of the State to make special provisions for women and children[17], duty to uphold the

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dignity of women[18] and various steps that have been taken in the said direction[19].

5. In the said case, the Court transferred the case as prayed for and further observed that it will be open to the transferee court to conduct the proceedings or record the evidence of the witnesses who are unable to appear in court by way of videoconferencing. The aforesaid decision was brought to the notice of the two-Judge Bench in the instant case by the learned counsel appearing for the respondent who advanced his submission that there is no need to transfer the case and the parties can be directed to avail the facility of videoconferencing. The two-Judge Bench, after referring to the Statement of Objects and Reasons of the Family Courts Act, 1984 (for brevity, 'the 1984 Act'), various provisions of the said Act, Sections 22, 23 and 26 of the 1955 Act, Rules 2, 3 and 4 of Order XXXIIA which were inserted by the 1976 amendment to the Code of Civil Procedure (for short, "the CPC"), the concept of reconciliation, the role of the counsellors in the Family Court and the principle of confidence and confidentiality, held:-

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> "19. To what extent the confidence and confidentiality will be safeguarded and protected in video conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered. It is certainly difficult in video conferencing, if not impossible, to maintain confidentiality. It has also to be noted that the footage in video conferencing becomes part of the record whereas the reconciliatory efforts taken by the duty-holders referred to above are not meant to be part of the record. All that apart, in reconciliatory efforts, physical presence of the parties would make a significant difference. Having regard to the very object behind the establishment of Family Courts Act, 1984, to Order XXXIIA of the Code of Civil Procedure and to the special provisions introduced in the Hindu Marriage Act under Sections 22, 23 and 26, we are of the view that the directions issued by this Court in Krishna Veni Nagam (supra) need reconsideration on the aspect of video conferencing in 12 matrimonial disputes."

Being of this view, it has referred the matter to be considered by a larger Bench. That is how the matter has been placed before us.

6. We have heard Mr. V.K. Sidharthan, learned counsel for the petitioner and Mr. Rishi Malhotra, learned counsel for the respondent. We have also heard Mr. Ajit Kumar Sinha, learned senior counsel who has been requested to assist the Court.

7. Before we refer to the scheme under the 1984 Act and the 1955 Act, we think it apt to refer to the decisions that have been noted in ***Krishna Veni Nagam*** (supra). In ***Mona Aresh Goel*** (supra), the three-

Judge Bench was dealing with the transfer of the matrimonial proceedings for divorce that was instituted by the husband in Bombay. The prayer of the wife was to transfer the case from Bombay to Delhi. The averment was made that the wife had no independent income and her parents were not in a position to bear the expenses of her travel from Delhi to Bombay to contest the divorce proceedings. That apart, various inconveniences were set forth and the husband chose not to appear in the Transfer Petition. The Court, considering the difficulties of the wife, transferred the case from Bombay to Delhi. In ***Lalita A. Ranga*** (supra), the Court, taking note of the fact that the husband had not appeared and further appreciating the facts and circumstances of the case, thought it appropriate to transfer the petition so that the wife could contest the proceedings. Be it noted, the wife had a small child and she was at Jaipur and it was thought that it would be difficult for her to go to Bombay to contest the proceedings from time to time. In ***Deepa****'s* case, the stand of the wife was that she was unemployed and had no source of income and, on that basis, the prayer of transfer was allowed. In ***Archana Rastogi*** (supra), the Court entertained the plea of transfer and held that the prayer for transfer of matrimonial proceedings taken by the husband in the Court of District Judge, Chandigarh to the Court of District Judge, Delhi deserved acceptance and, accordingly,

transferred the case. Similarly, in ***Leena Mukherjee*** (supra), the prayer for transfer was allowed. In ***Neelam Bhatia*** (supra), the Court declined to transfer the case and directed the husband to bear the to-and-fro travelling expenses of the wife and one person accompanying her by train whenever she actually appeared before the Court. In ***Soma Choudhury*** (supra), taking into consideration the difficulties of the wife, the proceedings for divorce were transferred from the Court of District Judge, South Tripura, Udaipur (Tripura) to the Family Court at Alipore (West Bengal). In ***Anju Ohri*** (supra), the Court, on the foundation of the convenience of the parties and the interest of justice, allowed the transfer petition preferred by the wife. In ***Vandana Sharma*** (supra), the Court, taking note of the fact that the wife had two minor daughters and appreciating the difficulty on the said bedrock, thought it appropriate to transfer the case and, accordingly, so directed.

8. Presently, we think it condign to advert in detail as to what has been stated in ***Anindita Das*** (supra). The stand of the wife in the transfer petition was that she had a small child of six years and had no source of income and it was difficult to attend the court at Delhi where the matrimonial proceedings were pending. The two-Judge Bench referred to some of the decisions which we have already referred to and

also adverted to ***Ram Gulam Pandit v. Umesh J. Prasad***[20] and ***Rajwinder Kaur v. Balwinder Singh***[21] and opined that all the authorities are based on the facts of the respective cases and they do not lay down any particular law which operates as a precedent. Thereafter, it noted that taking advantage of the leniency shown to the ladies by this Court, number of transfer petitions are filed by women and, therefore, it is required to consider each petition on merit. Then, the Court dwelled upon the fact situation and directed that the husband shall pay all travel and stay expenses to the wife and her companion for each and every occasion whenever she was required to attend the Court at Delhi. From the aforesaid decision, it is quite vivid that the Court felt that the transfer petitions are to be considered on their own merits and not to be disposed of in a routine manner.

9. Having noted the authorities relating to transfer of matrimonial disputes, we may refer to Section 25 of the CPC which reads as follows:-

> "**Section 25. Power of Supreme Court to transfer suits, etc.-** (1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of

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justice, direct that any suit, appeal or other proceedings be transferred from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State.

(2) Every application under this section shall be made by motion which shall be supported by an affidavit.

(3) The court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either re-try it or proceed from the stage at which it was transferred to it.

(4) In dismissing any application under this section, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum, not exceeding two thousand rupees, as it considers appropriate in the circumstances of the case.

(5) The law applicable to any suit, appeal or other proceeding transferred under this section shall be the law which the court in which the suit, appeal or other proceeding was originally instituted ought to have applied to such Suit, appeal or proceeding."

10. Order XLI Rule 2 of the Supreme Court Rules, 2013 which deals with the application for transfer under Article 139A(2) of the Constitution and Section 25 of the CPC is as follows:-

"1. Every petition under article 139A(2) of the Constitution or Section 25 of the Code of Civil Procedure, 1908, shall be in writing. It shall state succinctly and clearly all relevant facts and particulars of the case, the name of the High Court or other Civil Court in which the case is pending and the grounds on which the transfer is sought. The petition shall be supported by an affidavit.

2. The petition shall be posted before the Court for preliminary hearing and orders as to issue of notice. Upon such hearing the Court, if satisfied that no prima facie case for transfer has been made out, shall dismiss the petition and if upon such hearing the Court is satisfied that a prima facie case for granting the petition is made out, it shall direct that notice be issued to the parties in the case concerned to show cause why the case be not transferred. A copy of the Order shall be transmitted to the High Court concerned.

3. The notice shall be served not less than four weeks before the date fixed for the final hearing of the petition. Affidavits in opposition shall be filed in the Registry not later than one week before the date appointed for hearing and the affidavit in reply shall be filed not later than two days preceding the day of the hearing of the petition. Copies of affidavits in opposition and in reply shall be served on the opposite party or parties and the affidavits shall not be accepted in the Registry unless they contain an endorsement of service signed by such party or parties.

4. The petition shall thereafter be listed for final hearing before the Court.

5. Save as otherwise provided by the rules contained in this Order the provisions of other orders (including Order LI) shall, so far as may be, apply to petition under this Order."

The purpose of referring to the same is that this Court has been conferred with the power by the Constitution under Article 139A(2) to transfer the cases and has also been conferred statutory jurisdiction to transfer the cases. The Rules have been framed accordingly. The Court has the power to allow the petition seeking transfer or to decline the

prayer and indubitably, it is on consideration of the merits of the case and satisfaction of the Court on that score.

11. Having stated thus, it is necessary to appreciate the legistative purpose behind the 1984 Act. The Family Courts have been established for speedy settlement of family disputes. The Statement of Objects and Reasons reads thus:-

"Statement of Objects and Reasons

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 in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

2. The Bill *inter alia*, seeks to—

(a) provide for establishment of Family Courts by the State Governments;

(b) make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million;

(c) enable the State Governments to set up, such courts, in areas other than those specified in (b) above.

(d) exclusively provide within the jurisdiction of the Family Courts the matters relating to—

(i) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person;

(ii) the property of the spouses or of either of them;

(iii) declaration as to the legitimacy of any person;

(iv) guardianship of a person or the custody of any minor;

(v) maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure;

(e) Make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply;

(f) provide for the association of social welfare agencies, counselors, etc., during conciliation stage and also to secure the service of medical and welfare experts;

(g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the court may, in the interest of justice, seek assistance of a legal expert as *amicus curiae*,

(h) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute;

(i) provide for only one right of appeal which shall lie to the High Court.

3. The Bill seeks to achieve the above objects."

12. The preamble of the 1984 Act provides 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.

13. Presently, we may recapitulate how this Court has dealt with the duty and responsibility of the Family Court or a Family Court Judge. In ***Bhuwan Mohan Singh v. Meena and others***[22], the three-Judge Bench referred to the decision in ***K.A. Abdul Jaleel v. T.A. Shahida***[23] and laid stress on securing speedy settlement of disputes relating to marriage and family affairs. Emphasizing on the role of the Family Court Judge, the Court in ***Bhuwan Mohan Singh*** (supra) expressed its anguish as the proceedings before the family court had continued for a considerable length of time in respect of application filed under Section 125 of the Code of Criminal Procedure (CrPC). The Court observed:-

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> "It has come to the notice of the Court 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. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. 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."

And again:

> "We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the Objects and Reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc."

14. The said passage makes it quite clear that a Family Court Judge has to be very sensitive to the cause before it and he/she should be conscious about timely delineation and not procrastinate the matter as

delay has the potentiality to breed bitterness that eventually corrodes the emotions. The Court has been extremely cautious while stating about patience as a needed quality for arriving at a settlement and the need for speedy settlement and, if not possible, proceeding with meaningful adjudication. There must be efforts for reconciliation, but the time spent in the said process has to have its own limitation.

15. In ***Shamima Farooqui v. Shahid Khan***[24], after referring to the earlier decisions, especially the above quoted passages, the Court expressed:-

> "When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the court. As regards the second facet, it is the duty of the court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. It cannot allow it to sing the song of the brook. "Men may come and men may go, but I go on forever." This would be

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24

> the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a proactive approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more."
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> [Underlining is ours]

16. The object of stating this is that the legislative intent, the schematic purpose and the role attributed to the Family Court have to be perceived with a sense of sanctity. The Family Court Judge should neither be a slave to the concept of speedy settlement nor should he be a serf to the proclivity of hurried disposal abandoning the inherent purity of justice dispensation system. The balanced perception is the warrant and that is how the scheme of the 1984 Act has to be understood and appreciated.

17. Let us now proceed to analyse the fundamental intent of the scheme of the 1984 Act. Section 4 of the 1984 Act deals with the appointment of the judges. Section 5 provides for association of social welfare agencies, etc. It engrafts that the State Government may, in consultation with the High Court, provide, by rules, for the association in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of institutions or

organisations engaged in social welfare or the representatives thereof; persons professionally engaged in promoting the welfare of the family; persons working in the field of social welfare; and any other person whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of the 1984 Act. The aforesaid provision, as is evident, conceives involvement of institutions or organizations engaged in social welfare or their representatives and professionals engaged in promoting the welfare of the family for the purpose of effective functioning of the Family Court to sub-serve the purposes of the Act. Thus, the 1984 Act, to achieve its purpose, conceives of involvement of certain categories so that, if required, the Family Court can take their assistance to exercise its jurisdiction in an effective manner.

18. Section 6 provides for counselors, officers and other employees of Family Courts. Section 7 deals with the jurisdiction of the Family Court. The jurisdiction conferred on the Family Court, as we perceive, is quite extensive. It confers power in a Family Court to exercise jurisdiction exercisable by any district court or any subordinate civil court under any law relating to a suit or a proceeding between the parties to a marriage or a decree of a nullity of marriage declaring the marriage to be

null and void or annulling the marriage, as the case may be, or restitution of conjugal rights or judicial separation or dissolution of marriage. It has the authority to declare as to the validity of a marriage so as to annul the matrimonial status of any person and also the power to entertain a proceeding with respect to the property of the parties to a marriage or either of them. The Family Court has the jurisdiction to pass an order or injunction in circumstances arising out of a marital relationship, declare legitimacy of any person and deal with proceedings for grant of maintenance, guardianship of the person or the custody of or access to any minor. That apart, it has also been conferred the authority to deal with the applications for grant of maintenance for wife and children and parents as provided under the CrPC.

19. Section 9 prescribes the duty of the Family Court to make efforts for settlement by rendering assistance and persuading the parties for arriving at a settlement in respect of the subject matter of the suit or proceeding. For the said purpose, it may follow the procedure laid down by the High Court. If in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable opportunity of settlement between the parties, it may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

20. Section 11 provides for proceedings to be held in camera. The provision, being significant, is reproduced below:-

> "**Section 11**. **Proceedings to be held in *camera*.**—In every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires."

On a plain reading of the aforesaid provision, it is limpid that if the Family Court desires, the proceedings should be held in camera and it shall be so held if either of the parties so desires. A reading of the said provision, as it seems to us, indicates that, once one party makes a prayer for holding the proceedings in camera, it is obligatory on the part of the Family Court to do so.

21. Section 12 stipulates for assistance of medical and welfare experts for assisting the Family Court in discharging the functions imposed by the Act.

22. At this juncture, it is profitable to refer to certain provisions of the 1955 Act. Section 22 of the said Act provides for proceedings to be in camera and stipulates that the proceeding may not be printed or published. Section 23(2) of the 1955 Act enjoins that before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour

to bring about a reconciliation between the parties. The said provision is not applicable to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of Section 13. Sub-section (3) of Section 23 permits the Court to take aid of a person named by the parties or of any person nominated by the Court to bring out a resolution. It enables the Court, if it so thinks, to adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been effected and the court shall, in disposing of the proceeding, have due regard to the report.

23. It is worthy to note here that the reconciliatory measures are to be taken at the first instance and emphasis is on efforts for reconciliation failing which the court should proceed for adjudication and the command on the Family Court is to hold it in camera if either party so desires.

24. Section 26 of the 1955 Act deals with custody of children. It empowers the court, from time to time, to pass such interim orders and

make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children consistently with their wishes, wherever possible, and the Government may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree were still pending, and the court may also, from time to time, revoke, suspend or vary any such orders and provisions previously made. The proviso appended thereto postulates that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.

25. It is to be borne in mind that in a matter relating to the custody of the child, the welfare of the child is paramount and seminal. It is inconceivable to ignore its importance and treat it as secondary. The interest of the child in all circumstances remains vital and the Court has a very affirmative role in that regard. Having regard to the nature of

the interest of the child, the role of the Court is extremely sensitive and it is expected of the Court to be pro-active and sensibly objective.

26. In ***Mausami Moitra Ganguli v. Jayant Ganguli***[25], it has been held that the principles of law in relation to the custody of a minor child are well settled. While determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. The provisions contained in the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 hold out the welfare of the child as a predominant consideration because no statute on the subject can ignore, eschew or obliterate the vital factor of the welfare of the minor.

27. In the said case, a passage from Halsbury's Laws of England (4th Edn., Vol. 13) was reproduced which reads thus:-

> "809. *Principles as to custody and upbringing of minors.*— Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is

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> superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

28. In ***Rosy Jacob v. Jacob A. Chakramakkal***[26], the Court ruled that the children are not mere chattels, nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

29. In ***Vikram Vir Vohra v. Shalini Bhalla***[27], the Court took note of the fact that the learned Judge of the High Court had personally interviewed the child who was seven years old to ascertain his wishes. The two Judges of this Court also interacted with the child in the chambers in the absence of his parents to find out about his wish and

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took note of the fact that the child was aged about 10 years and was at an informative and impressionable stage and eventually opined that the order passed by the High Court affirming the order of the trial Court pertaining to visitation rights of the father had been so structured that it was compatible with the educational career of the child and the rights of the father and the mother had been well balanced. It is common knowledge that in most of the cases relating to guardianship and custody, the Courts interact with the child to know her/his desire keeping in view the concept that the welfare of the child is paramount.

30. It is essential to reflect on the reasoning ascribed in ***Krishna Veni Nagam*** (supra). As we understand, the two-Judge Bench has taken into consideration the number of cases filed before this Court and the different approaches adopted by this Court, the facet of territorial jurisdiction, doctrine of forum non-conveniens which can be applicable to matrimonial proceedings for advancing the interest of justice, the problems faced by the husband, the recourse taken by this Court to videoconferencing in certain cases and on certain occasions, the advancement of technology, the role of the High Courts to issue appropriate administrative instructions to regulate the use of videoconferencing for certain categories of cases and ruled that the

matrimonial cases where one of the parties resides outside the court's jurisdiction do fall in one of such categories.

31. Before we proceed to analyse further, we would like to cogitate on the principles applied in the decisions rendered in the context of videoconferencing. In ***State of Maharashtra v. Dr. Praful B. Desai***[28], the proceedings related to recording of evidence where the witness was in a foreign country. In ***Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav & Anr***.[29], the controversy pertained to a criminal trial under Section 302 IPC wherein the Court, in exercise of power under Article 142 of the Constitution, directed shifting of the accused from a jail in Patna to Tihar Jail at Delhi. In that context, the Court permitted conducting of the trial with the aid of videoconferencing. In ***Budhadev Karmaskar (4) v. State of West Bengal***[30], the issue of videoconferencing had arisen as the *lis* related to rehabilitation of sex workers keeping in view the interpretation of this Court of 'life' to mean life of dignity.

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32. In ***Malthesh Gudda Pooja v. State of Karnataka & Ors.***[31], the question that fell for consideration was whether a Division Bench of the High Court, while considering a memo for listing an appeal restored for fresh hearing, on grant of application for review by a co-ordinate Bench, could refuse to act upon the order of review on the ground that the said order made by a Bench different from the Bench which passed the original order granting review is a nullity. We need not dilate upon what ultimately the Court said. What is necessary to observe is what arrangement should be made in case of a High Court where there are Principal Seat and Circuit Benches and Judges move from one Bench to another for some time and decide the matters and review is filed. In that context, the Court opined:-

> "… when two Judges heard the matter at a Circuit Bench, the chances of both Judges sitting again at that place at the same time, may not arise. But the question is in considering the applications for review, whether the wholesome principle behind Order 47 Rule 5 of the Code and Chapter 3 Rule 5 of the High Court Rules providing that the same Judges should hear it, should be dispensed with merely because of the fact that the Judges in question, though continue to be attached to the Court are sitting at the main Bench, or temporarily at another Bench. In the interests of justice, in the interests of consistency in judicial pronouncements and maintaining the good judicial traditions, an effort should always be made for the review application to be heard by the same Judges, if they are in the same Court. Any attempt to too readily provide for

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> review applications to be heard by any available Judge or Judges should be discouraged."

And further:-

> "With the technological innovations available now, we do not see why the review petitions should not be heard by using the medium of video conferencing."

33. The aforesaid pronouncements, as we find, are absolutely different from a controversy which is involved in matrimonial proceedings which relate to various aspects, namely, declaration of marriage as a nullity, dissolution of marriage, restitution of marriage, custody of children, guardianship, maintenance, adjudication of claim of *stridhan*, etc. The decisions that have been rendered cannot be regarded as precedents for the proposition that videoconferencing can be one of the modes to regulate matrimonial proceedings.

34. The two-Judge Bench has also noted the constitutional scheme that provides for guaranteeing equal access to justice and the power of the State to make special provisions for women and children as enshrined under Article 15(3) of the Constitution and the duty to uphold the dignity of women and the various steps taken in the said direction. The Court has also referred to Articles 243-D and 243-T of the Constitution under which provisions have been made for reservation for women in Panchayats and Municipalities by the 1973 and 1974

amendments. It has also taken note of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that underlines the awareness of the international commitments on the subject. There is also reference to various authorities of the Court that have referred to the international conventions and affirmative facet enshrined under Article 15(3) of the Constitution. We must immediately clarify that these provisions of the Articles of the Constitution and the decisions find place in the footnote of the judgment to highlight the factum that various steps have been taken to uphold the dignity of women.

35. The two-Judge Bench has referred to certain judgments to highlight the affirmative rights conferred on women under the Constitution. We shall refer to them and explain how they are rendered in a different context and how conducting of matrimonial disputes through videoconferencing would scuttle the rights of women and not expand the rights. In ***Mackinnon Mackenzie & Co. Ltd v. Audrey D'costa and another*** [32] , the Court dealt with the principle of applicability of equal pay for equal work to lady stenographers in the same manner as male stenographers. A contention was advanced by

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the employer that this discrimination between the two categories had been brought out not merely on the ground of sex but the Court found it difficult to agree with the contention and referred to various aspects and, eventually, did not interfere with the judgment of the High Court that had granted equal remuneration to both male and female stenographers. In ***Vishaka and others v. State of Rajasthan and others***[33], the three-Judge Bench, taking note of Articles 14, 15, 19(1)(g), 21 and 51-A and further highlighting the concept of gender equality and the recommendations of CEDAW and the absence of domestic law, laid down guidelines and norms for observation at work places and other institutions for the purpose of effective enforcement of the basic human right of gender equality and sexual harassment and abuse, more particularly, sexual harassment at work places.

36. In ***Arun Kumar Agrawal and another v. National Insurance Company Limited and others***[34], the *lis* arose pertaining to the criteria for determination of compensation payable to the dependants of a woman who died in a road accident and who did not have regular source of income. Singhvi, J. opined that it is highly unfair, unjust and

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inappropriate to compute the compensation payable to the dependants of a deceased wife/mother who does not have a regular income by comparing her services with that of a housekeeper or a servant or an employee who works for a fixed period. The gratuitous services rendered by the wife/mother to the husband and children cannot be equated with the services of an employee and no evidence or data can possibly be produced for estimating the value of such services. Ganguly, J., in his concurring opinion, said that women make a significant contribution at various levels. He referred to numerous authorities and ruled:-

> "63. Household work performed by women throughout India is more than US $612.8 billion per year (Evangelical Social Action Forum and Health Bridge, p. 17). We often forget that the time spent by women in doing household work as homemakers is the time which they can devote to paid work or to their education. This lack of sensitiveness and recognition of their work mainly contributes to women's high rate of poverty and their consequential oppression in society, as well as various physical, social and psychological problems. The courts and tribunals should do well to factor these considerations in assessing compensation for housewives who are victims of road accidents and quantifying the amount in the name of fixing "just compensation".
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> 64. In this context the Australian Family Property Law has adopted a very gender sensitive approach. It provides that while distributing properties in matrimonial matters, for instance, one has to factor in "the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children

> of the marriage, including any contribution made in the capacity of a homemaker or parent."

37. In ***Voluntary Health Association of Punjab v. Union of India and others***[35], the two-Judge Bench which was dealing with the sharp decline in female sex ratio and mushrooming of various sonography centers, issued certain directions keeping in view the provisions of the Medical Termination of Pregnancy Act, 1971 and the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996. The concurring opinion adverted to the direction contained in point 9.8 of the main judgment which related to the steps taken by the State Government and the Union Territory to educate the people of the necessity of implementing the provisions of the said Act by conducting workshops as well as awareness camps at the State and district levels. In the concurring opinion, reference was made to the authority in ***State of H.P. v. Nikku Ram***[36] ***and M.C. Mehta v. State of T.N.***[37] and it was stated:-

> "A woman has to be regarded as an equal partner in the life of a man. It has to be borne in mind that she has also the equal role in the society i.e. thinking, participating and

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> leadership. The legislature has brought the present piece of legislation with an intention to provide for prohibition of sex selection before or after conception and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide. The purpose of the enactment can only be actualised and its object fruitfully realised when the authorities under the Act carry out their functions with devotion, dedication and commitment and further there is awakened awareness with regard to the role of women in a society."

38. In ***Charu Khurana and others v. Union of India and others***[38], the controversy arose about the prevalence of discrimination of gender equality in the film industry where women were not allowed to become make-up artists and only allowed to work as hair-dressers. Referring to various earlier judgments and Article 51-A(e), the Court observed:-

> "On a condign understanding of clause (e), it is clear as a cloudless sky that all practices derogatory to the dignity of women are to be renounced. Be it stated, dignity is the quintessential quality of a personality and a human frame always desires to live in the mansion of dignity, for it is a highly cherished value."

And again:

> "…The sustenance of gender justice is the cultivated achievement of intrinsic human rights. Equality cannot be achieved unless there are equal opportunities and if a woman is debarred at the threshold to enter into the

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> sphere of profession for which she is eligible and qualified, it is well-nigh impossible to conceive of equality. It also clips her capacity to earn her livelihood which affects her individual dignity."

39. Eventually, directions were issued that women were eligible to become make-up artists. The aforesaid decisions unequivocally lay stress and emphasis on gender equality and dignity of women.

40. In ***Voluntary Health Association of Punjab v. Union of India and Ors***[39]**,** while dealing with female foeticide, it has been observed:-

> "It needs no special emphasis that a female child is entitled to enjoy equal right that a male child is allowed to have. The constitutional identity of a female child cannot be mortgaged to any kind of social or other concept that has developed or is thought of. It does not allow any room for any kind of compromise. It only permits affirmative steps that are constitutionally postulated. Be it clearly stated that when rights are conferred by the Constitution, it has to be understood that such rights are recognised regard being had to their naturalness and universalism. No one, let it be repeated, no one, endows any right to a female child or, for that matter, to a woman. The question of any kind of condescension or patronisation does not arise."

41. Emphasizing on the equality and dignity of women, it has been stated:-

> "... let it be stated with certitude and without allowing any room for any kind of equivocation or ambiguity, the

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perception of any individual or group or organisation or system treating a woman with inequity, indignity, inequality or any kind of discrimination is constitutionally impermissible. The historical perception has to be given a prompt burial. Female foeticide is conceived by the society that definitely includes the parents because of unethical perception of life and nonchalant attitude towards law. The society that treats man and woman with equal dignity shows the reflections of a progressive and civilised society. To think that a woman should think what a man or a society wants her to think tantamounts to slaughtering her choice, and definitely a humiliating act. When freedom of free choice is allowed within constitutional and statutory parameters, others cannot determine the norms as that would amount to acting in derogation of law."

42. In ***Vikas Yadav v. State of Uttar Pradesh and others***[40], condemning honour killing, the Court after referring to ***Lata Singh v. State of U.P.***[41] and ***Maya Kaur Baldevsingh Sardar v. State of Maharashtra***[42], has opined:-

"One may feel "My honour is my life" but that does not mean sustaining one's honour at the cost of another. Freedom, independence, constitutional identity, individual choice and thought of a woman, be a wife or sister or daughter or mother, cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by

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> the girl. Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so-called brotherly or fatherly honour or class honour by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise. It is a vice, condemnable and deplorable perception of "honour", comparable to medieval obsessive assertions."

43. The aforesaid enunciation of law makes it graphically clear that the "constitutional identity", "freedom of choice", "dignity of a woman" and "affirmative rights conferred on her by the Constitution" cannot be allowed to be abrogated even for a moment. In this context, we have to scan and appreciate the provision contained in Section 11 of the 1984 Act. The provision, as has been stated earlier, mandates the proceedings to be held in camera if one of the parties so desires. Equality of choice has been conferred by the statute. That apart, Section 22 of the 1955 Act lays down the proceedings to be held in camera and any matter in relation to any such proceeding may not be printed or published except a judgment of the High Court or of the Supreme Court with the previous permission of the Court.

44. We, as advised at present, constrict our analysis to the provisions of the 1984 Act. First, as we notice, the expression of desire by the wife or the husband is whittled down and smothered if the Court directs that the proceedings shall be conducted through the use of

videoconferencing. As is demonstrable from the analysis of paragraph 14 of the decision, the Court observed that wherever one or both the parties make a request for the use of videoconferencing, the proceedings may be conducted by way of videoconferencing obviating the need of the parties to appear in person. The cases where videoconferencing has been directed by this Court are distinguishable. They are either in criminal cases or where the Court found it necessary that the witness should be examined through videoconferencing. In a case where the wife does not give consent for videoconferencing, it would be contrary to Section 11 of the 1984 Act. To say that if one party makes the request, the proceedings may be conducted by videoconferencing mode or system would be contrary to the language employed under Section 11 of the 1984 Act. The said provision, as is evincible to us, is in consonance with the constitutional provision which confer affirmative rights on women that cannot be negatived by the Court. The Family Court also has the jurisdiction to direct that the proceedings shall be held in camera if it so desires and, needless to say, the desire has to be expressed keeping in view the provisions of the 1984 Act.

45. The language employed in Section 11 of the 1984 Act is absolutely clear. It provides that if one of the parties desires that the proceedings

should be held in camera, the Family Court has no option but to so direct. This Court, in exercise of its jurisdiction, cannot take away such a sanctified right that law recognizes either for the wife or the husband. That apart, the Family Court has the duty to make efforts for settlement. Section 23(2) of the 1955 Act mandates for reconciliation. The language used under Section 23(2) makes it an obligatory duty on the part of the court at the first instance in every case where it is possible, to make every endeavour to bring about reconciliation between the parties where it is possible to do so consistent with the nature and circumstances of the case. There are certain exceptions as has been enumerated in the proviso which pertain to incurably of unsound mind or suffering from a virulent and incurable form of leprosy or suffering from venereal disease in a communicable form or has renounced the world by entering any religious order or has not been heard of as being alive for a period of seven years, etc. These are the exceptions carved out by the legislature. The Court has to play a diligent and effective role in this regard.

46. The reconciliation requires presence of both the parties at the same place and the same time so as to be effectively conducted. The spatial distance will distant the possibility of reconciliation because the Family

Court Judge would not be in a position to interact with the parties in the manner as the law commands. By virtue of the nature of the controversy, it has its inherent sensitivity. The Judge is expected to deal with care, caution and with immense sense of worldly experience absolutely being conscious of social sensibility. Needless to emphasise, this commands a sense of trust and maintaining an atmosphere of confidence and also requirement of assurance that the confidentiality is in no way averted or done away with. There can be no denial of this fact. It is sanguinely private. Recently, in ***Justice K.S. Puttaswamy (Retd) v. Union of India & others***[43]**,** this Court, speaking through one of us (Chandrachud, J.), has ruled thus:-

> "The intersection between one's mental integrity and privacy entitles the individual freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual."

And again:

> "Privacy represents the core of the human personality and recognizes the ability of each individual to make choices and to take decisions governing matters intimate and personal."

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47. Frankfurter Felix in ***Schulte Co. v. Gangi***[44], has stated that the policy of a statute should be drawn out of its terms as nourished by their proper environment and not like nitrogen out of the air. Benjamin N. Cardozo, in ***Hopkins Savings Assn. v. Cleary***[45], has opined that when a statute is reasonably susceptible of two interpretations, the Court has to prefer the meaning that preserves to the meaning that destroys.

48. The command under Section 11 of the 1984 Act confers a right on both the parties. It is statutory in nature. The Family Court Judge who is expected to be absolutely sensitive has to take stock of the situation and can *suo motu* hold the proceedings in camera. The Family Court Judge is only meant to deal with the controversies and disputes as provided under the 1984 Act. He is not to be given any other assignment by the High Court. The in camera proceedings stand in contradistinction to a proceeding which is tried in court. When a case is tried or heard in court, there is absolute transparency. Having regard to the nature of the controversy and the sensitivity of the matter, it is desirable to hear in court various types of issues that crop up in these

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types of litigations. The Act commands that there has to be an effort for settlement. The legislative intendment is for speedy settlement. The counsellors can be assigned the responsibility by the court to counsel the parties. That is the schematic purpose of the law. The confidentiality of the proceedings is imperative for these proceedings.

49. The procedure of videoconferencing which is to be adopted when one party gives consent is contrary to Section 11 of the 1984 Act. There is no provision that the matter can be dealt with by the Family Court Judge by taking recourse to videoconferencing. When a matter is not transferred and settlement proceedings take place which is in the nature of reconciliation, it will be well nigh impossible to bridge the gap. What one party can communicate with other, if they are left alone for sometime, is not possible in videoconferencing and if possible, it is very doubtful whether the emotional bond can be established in a virtual meeting during videoconferencing. Videoconferencing may create a dent in the process of settlement.

50. The two-Judge Bench had referred to the decisions where the affirmative rights meant for women have been highlighted in various judgments. We have adverted to some of them to show the dignity of woman and her rights and the sanctity of her choice. When most of the

time, a case is filed for transfer relating to matrimonial disputes governed by the 1984 Act, the statutory right of a woman cannot be nullified by taking route to technological advancement and destroying her right under a law, more so, when it relates to family matters. In our considered opinion, dignity of women is sustained and put on a higher pedestal if her choice is respected. That will be in consonance with Article 15(3) of the Constitution.

51. In this context, we may refer to the fundamental principle of necessity of doing justice and trial in camera. The nine-Judge Bench in ***Naresh Shridhar Mirajkar and Ors v. State of Maharashtra and Anr.***[46], after enunciating the universally accepted proposition in favour of open trials, expressed:-

> "While emphasising the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it. If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze, is it or is it not open to him in exercise of his inherent power to hold the trial in camera either partly or fully? If the primary function of the court is to do justice in causes brought before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in

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> open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal and it is held that it admits of no exceptions whatever, cases may arise where by following the principle, justice itself may be defeated. That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course. It is hardly necessary to emphasise that this inherent power must be exercised with great caution and it is only if the court is satisfied beyond a doubt that the ends of justice themselves would be defeated if a case is tried in open court that it can pass an order to hold the trial in camera; but to deny the existence of such inherent power to the court would be to ignore the primary object of adjudication itself. The principle underlying the insistence on hearing causes in open court is to protect and assist fair, impartial and objective administration of justice; but if the requirement of justice itself sometimes dictates the necessity of trying the case in camera, it cannot be said that the said requirement should be sacrificed because of the principle that every trial must be held in open court."

52. The principle of exception that the larger Bench enunciated is founded on the centripodal necessity of doing justice to the cause and not to defeat it. In matrimonial disputes that are covered under Section 7 of the 1984 Act where the Family Court exercises its jurisdiction, there is a statutory protection to both the parties and conferment of power on the court with a duty to persuade the parties to reconcile. If the proceedings are directed to be conducted through videoconferencing, the command of the Section as well as the spirit of the 1984 Act will be in peril and further the cause of justice would be defeated.

53. A cogent reflection is also needed as regards the perception when both the parties concur to have the proceedings to be held through videoconferencing. In this context, the thought and the perception are to be viewed through the lens of the textual context, legislative intent and schematic canvas. The principle may had to be tested on the bedrock that courts must have progressive outlook and broader interpretation with the existing employed language in the statute so as to expand the horizon and the connotative expanse and not adopt a pedantic approach.

54. We have already discussed at length with regard to the complexity and the sensitive nature of the controversies. The statement of law made in ***Krishna Veni Nagam*** *(supra)* that if either of the parties gives consent, the case can be transferred, is absolutely unacceptable. However, an exception can be carved out to the same. We may repeat at the cost of repetition that though the principle does not flow from statutory silence, yet as we find from the scheme of the Act, the Family Court has been given ample power to modulate its procedure. The Evidence Act is not strictly applicable. Affidavits of formal witnesses are acceptable. It will be permissible for the other party to cross-examine the deponent. We are absolutely conscious that the enactment gives

emphasis on speedy settlement. As has been held in ***Bhuwan Mohan Singh*** *(supra),* the concept of speedy settlement does not allow room for lingering the proceedings. A genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to bring in a settlement or to arrive at a solution of the *lis*, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. Therefore, we are disposed to think that once a settlement fails and if both the parties give consent that a witness can be examined in video conferencing, 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 video conferencing. 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.

55. Be it noted, sometimes, transfer petitions are filed seeking transfer of cases instituted under the Protection of Women from Domestic Violence Act, 2005 and cases registered under the IPC. As the cases under the said Act and the IPC have not been adverted to in ***Krishna Veni Nagam*** (supra) or in the order of reference in these cases, we do intend to advert to the same.

56. In view of the aforesaid analysis, we sum up our conclusion as follows :-

(i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.

(ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.

(iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that videoconferencing will sub-serve the cause of justice, it may so direct.

(iv) In a transfer petition, video conferencing cannot be directed.

(v) Our directions shall apply prospectively.

(vi) The decision in ***Krishna Veni Nagam*** (supra) is overruled to the aforesaid extent

57. We place on record our appreciation for the assistance rendered by Mr. Ajit Kumar Sinha, learned senior counsel.

58. The matters be placed before the appropriate Bench for consideration of the transfer petitions on their own merits.

.....CJI.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

New Delhi.
October 9, 2017.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

TRANSFER PETITION (CIVIL) No. 1278 OF 2016

SANTHINI ..... PETITIONER

Versus

VIJAYA VENKETESH ..... RESPONDENT

WITH T.P. (C) NO.422 OF 2017

J U D G M E N T

Dr D Y CHANDRACHUD, J

I The judgment proposed by the learned Chief Justice has been circulated and deliberated upon. The reasons why I am unable to adopt the view propounded in the judgment of the

learned Chief Justice will be delivered separately. I record below my conclusions:

1. The Family Courts Act, 1984 has been enacted at a point in time when modern technology (at least as we know it today) which enables persons separated by spatial distances to communicate with each other face to face was not the order of the day or, in any case, was not as fully developed. That is no reason for any court - especially for this court which sets precedent for the nation - to exclude the application of technology to facilitate the judicial process.
2. Appropriate deployment of technology facilitates access to justice. Litigation under the Family Courts Act 1984 is not an exception to this principle. This court must be averse to judicially laying down a restraint on such use of technology which facilitates access to justice to persons in conflict, including those involved in conflicts within the family. Modern technology is above all a facilitator, enabler and leveler.

3. Video conferencing is a technology which allows users in different locations to hold face to face meetings. Video conferencing is being used extensively the world over (India being no exception) in on line teaching, administration, meetings, negotiation, mediation and telemedicine among a myriad other uses. Video conferencing reduces cost, time, carbon footprint and the like.

4. An in-camera trial is contemplated under Section 11 in two situations: the first where the Family Court so desires; and the second if either of the parties so desires. There is a fallacy in the hypothesis that an in-camera trial is inconsistent with the usage of video conferencing techniques. A trial in-camera postulates the exclusion of the public from the courtroom and allows for restraints on public reporting. Video conferencing does not have to be recorded nor is it accessible to the press or the public. The proper adoption of video conferencing does not negate the postulates of an in-camera trial even if such a

trial is required by the court or by one of the parties under Section 11.

5. The Family Courts Act 1984 envisages an active role for the Family Court to foster settlements. Under the provisions of Section 11, the Family Court has to endeavour to "assist and persuade" parties to arrive at a settlement. Section 9 clearly recognises a discretion in the Family Court to determine how to structure the process. It does so by adopting the words "where it is possible to do so consistent with the nature and circumstances of the case". Moreover, the High Courts can frame rules under Section 9(1) and the Family Court may, subject to those rules, "follow such procedure as it deems fit". In the process of settlement, Section 10(3) enables the Family Court to lay down its own procedure. The Family Court is entitled to take the benefit of counsellors, medical experts and persons professionally engaged in promoting the welfare of the family.

6. The above provisions - far from excluding the use of video conferencing - are sufficiently enabling to allow the Family Court to utilise technological advances to facilitate the purpose of achieving justice in resolving family conflicts. There may arise a variety of situations where in today's age and time parties are unable to come face to face for counselling or can do so only at such expense, delay or hardship which will defeat justice. One or both spouses may face genuine difficulties arising from the compulsions of employment, family circumstances (including the needs of young children), disability and social or economic handicaps in accessing a court situated in a location distant from where either or both parties reside or work. It would be inappropriate to deprive the Family Court which is vested with such wide powers and procedural flexibility to adopt video conferencing as a facilitative tool, where it is convenient and readily available. Whether video conferencing should be allowed must be determined on a case to case analysis

to best effectuate the concern of providing just solutions. Far from such a procedure being excluded by the law, it will sub serve the purpose of the law.

7. Conceivably there may be situations where parties (or one of the spouses) do not want to be in the same room as the other. This is especially true when there are serious allegations of marital abuse. Video conferencing allows things to be resolved from the safety of a place which is not accessible to the other spouse against whom there is a serious allegation of misbehaviour of a psychiatric nature or in a case of substance abuse.

8. Video conferencing is gender neutral. In fact it ensures that one of the spouses cannot procrastinate and delay the conclusion of the trial. Delay, it must be remembered, generally defeats the cause of a party which is not the dominant partner in a relationship. Asymmetries of power have a profound consequence in marital ties. Imposing an unwavering requirement of personal and physical presence (and exclusion of facilitative

technological tools such as video conferencing) will result in a denial of justice.

9. The High Courts have allowed for video conferencing in resolving family conflicts. A body of precedent has grown around the subject in the Indian context. The judges of the High Court should have a keen sense of awareness of prevailing social reality in their states and of the federal structure. Video conferencing has been adopted internationally in resolving conflicts within the family. There is a robust body of authoritative opinion on the subject which supports video conferencing, of course with adequate safeguards. Whether video conferencing should be allowed in a particular family dispute before the Family Court, the stage at which it should be allowed and the safeguards which should be followed should best be left to the High Courts while framing rules on the subject. Subject to such rules, the use of video conferencing must be left to the careful exercise of discretion of the Family Court in each case.

10. The proposition that video conferencing can be permitted only after the conclusion of settlement proceedings (resultantly excluding it in the settlement process), and thereafter only when both parties agree to it does not accord either with the purpose or the provisions of the Family Courts Act 1984. Exclusion of video conferencing in the settlement process is not mandated either expressly or by necessary implication by the legislation. On the contrary the legislation has enabling provisions which are sufficiently broad to allow video conferencing. Confining it to the stage after the settlement process and in a situation where both parties have agreed will seriously impede access to justice. It will render the Family Court helpless to deal with human situations which merit flexible solutions. Worse still, it will enable one spouse to cause interminable delays thereby defeating the purpose for which a specialised court has been set up.

II The reference should in my opinion be answered in the above terms.

.....J.
[Dr. D Y CHANDRACHUD]

New Delhi
October 09, 2017

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

TRANSFER PETITION (CIVIL) No. 1278 OF 2016

SANTHINI ..... PETITIONER

Versus

VIJAYA VENKETESH ..... RESPONDENT

WITH

T.P. (C) NO. 422 OF 2017

J U D G M E N T

Dr D Y CHANDRACHUD, J

1 While setting down my inability to adopt the view propounded in the judgment of the learned Chief Justice, my conclusions have been formulated thus:

1. The Family Courts Act, 1984 was enacted at a point in time when modern technology (at least as we know it today) which enables persons separated by spatial distances to communicate with each other face to face was not the order of the day or, in any case, was not as fully developed. That is no reason for any court - especially for this court which sets precedent for the nation - to exclude the application of technology to facilitate the judicial process.

2. Appropriate deployment of technology facilitates access to justice. Litigation under the Family Courts Act 1984 is not an exception to this principle. This court must be averse to judicially laying down a restraint on such use of technology which facilitates access to justice to persons in conflict, including those involved in conflicts within the family. Modern technology is above all a facilitator, enabler and leveler.

3. Video conferencing is a technology which allows users in different locations to hold face to face meetings. Video conferencing is being used extensively the world over (India being no exception) in online teaching, administration, meetings, negotiation, mediation and telemedicine among a myriad other uses. Video conferencing reduces cost, time, carbon footprint and the like.

4. An in-camera trial is contemplated under Section 11 in two situations: the first where the Family Court so desires; and the second if either of the parties so desires. There is a fallacy in the hypothesis that an in-camera trial is inconsistent with the usage of video conferencing techniques. A trial in-camera postulates the exclusion of the public from the courtroom and allows for restraints on public reporting. Video conferencing does not have to be recorded nor is it accessible to the press or the public. The proper adoption of video conferencing does not negate the postulates of an in-camera trial even if such a trial is required by the court or by one of the parties under Section 11.

5. The Family Courts Act 1984 envisages an active role for the Family Court to foster settlements. Under the provisions of Section 11, the Family Court has to endeavour to "assist and persuade" parties to arrive at a settlement. Section 9 clearly recognises a discretion in the Family Court to determine how to structure the process. It does so by adopting the words "where it is possible to do so consistent with the nature and circumstances of the case". Moreover, the High Courts can frame rules under Section 9(1) and the Family Court may, subject to those rules, "follow such procedure as it deems fit". In the process of settlement, Section 10(3) enables the Family Court to lay down its own procedure. The Family Court is entitled to take

the benefit of counsellors, medical experts and persons professionally engaged in promoting the welfare of the family.

6. The above provisions - far from excluding the use of video conferencing - are sufficiently enabling to allow the Family Court to utilise technological advances to facilitate the purpose of achieving justice in resolving family conflicts. There may arise a variety of situations where in today's age and time parties are unable to come face to face for counselling or can do so only at such expense, delay or hardship which will defeat justice. One or both spouses may face genuine difficulties arising from the compulsions of employment, family circumstances (including the needs of young children), disability and social or economic handicaps in accessing a court situated in a location distant from where either or both parties reside or work. It would be inappropriate to deprive the Family Court which is vested with such wide powers and procedural flexibility to adopt video conferencing as a facilitative tool, where it is convenient and readily available. Whether video conferencing should be allowed must be determined on a case to case analysis to best effectuate the concern of providing just solutions. Far from such a procedure being excluded by the law, it will sub serve the purpose of the law.

7. Conceivably there may be situations where parties (or one of the spouses) do not want to be in the same room as the other. This is especially true when there are serious allegations of marital abuse. Video conferencing allows things to be resolved from the safety of a place which is not accessible to the other spouse against whom there is a serious allegation of misbehaviour of a psychiatric nature or in a case of substance abuse.

8. Video conferencing is gender neutral. In fact it ensures that one of the spouses cannot procrastinate and delay the conclusion of the trial. Delay, it must be remembered, generally defeats the cause of a party which is not the dominant partner in a relationship. Asymmetries of power have a profound consequence in marital ties. Imposing an unwavering requirement of personal and physical presence (and exclusion of facilitative technological tools such as video conferencing) will result in a denial of justice.

9. The High Courts have allowed for video conferencing in resolving family conflicts. A body of precedent has grown around the subject in the Indian context. The judges of the High Courts should have a keen sense of awareness of prevailing social reality in their states and of the federal structure. Video conferencing has been adopted internationally in resolving conflicts within the family. There is a robust body of authoritative

> opinion on the subject which supports video conferencing, of course with adequate safeguards. Whether video conferencing should be allowed in a particular family dispute before the Family Court, the stage at which it should be allowed and the safeguards which should be followed should best be left to the High Courts while framing rules on the subject. Subject to such rules, the use of video conferencing must be left to the careful exercise of discretion of the Family Court in each case.
>
> 10. The proposition that video conferencing can be permitted only after the conclusion of settlement proceedings (resultantly excluding it in the settlement process), and thereafter only when both parties agree to it does not accord either with the purpose or the provisions of the Family Courts Act 1984. Exclusion of video conferencing in the settlement process is not mandated either expressly or by necessary implication by the legislation. On the contrary the legislation has enabling provisions which are sufficiently broad to allow video conferencing. Confining it to the stage after the settlement process and in a situation where both parties have agreed will seriously impede access to justice. It will render the Family Court helpless to deal with human situations which merit flexible solutions. Worse still, it will enable one spouse to cause interminable delays thereby defeating the purpose for which a specialised court has been set up."

2 I now proceed to indicate my reasons.

3 The three Judge Bench was constituted to decide the correctness of a judgment rendered by two Judges of this Court in **Krishna Veni Nagam** v **Harish Nagam**[1] **("Krishna Veni")**. This reference to a larger bench was occasioned by an order of a Bench of two Judges in **Santhini** v **Vijaya Venketesh**[2] **("Santhini")**. The analysis of the issues which arise in the present reference must be prefaced by determining, first and foremost, the subject of the controversy in **Krishna Veni**

[1] (2017) 4 SCC 150
[2] Transfer Petition (Civil) No. 1278 of 2016, dated 9 August 2017

and what the decision laid down. In **Krishna Veni**, this Court dealt with a petition filed under Article 139A of the Constitution for the transfer of a proceeding for divorce instituted by one spouse against the other under Section 13 of the Hindu Marriage Act, 1955. The spouse who sought transfer of the proceedings instituted in the Family Court at Jabalpur to its counterpart at Hyderabad pleaded for a transfer of proceedings on the ground that she would face serious hardship in defending a proceeding in a distantly located court. In the course of its decision, the Bench of two Judges noted that a large number of transfer petitions are being filed and are "mechanically allowed". This position was noted over a decade ago in **Anindita Das** v **Srijit Das**[3]. Under Section 19 of the Hindu Marriage Act, 1955, a petition for divorce could be instituted at the place where the marriage is solemnized or where the respondent resides at the time when the petition is presented or where the parties last resided together. Evidently, though one of the spouses is entitled to institute divorce proceedings at a place contemplated by Section 19, a woman required to defend the proceeding at a place away from her residence is subjected to hardship. In many cases, the court alleviates the hardship involved by directing the payment of expenses incidental to attending hearings in the location where the divorce proceeding is instituted.

[3] (2006) 9 SCC 197

4 Now, it is in this background that the two Judge Bench in **Krishna Veni** considered whether video conferencing could suitably be deployed. The court was conscious of the fact that both the spouses may face genuine difficulties : the spouse against whom the proceeding is instituted would face hardship and inconvenience by being required to commute to a distant court, while the spouse who has instituted the proceeding (in a forum which the law permits) may genuinely suffer grave inconvenience if the proceeding is transferred to a distant court within whose jurisdiction the other spouse resides. The exercise of the jurisdiction of this Court to transfer matrimonial proceedings may not always provide a satisfactory solution since one or the other spouse would in any case suffer inconvenience as a result of the relief of transfer being refused or, as the case may be, being allowed. This provided the backdrop to the following observations of the two Judge Bench:

> "14. One cannot ignore the problem faced by a husband if proceedings are transferred on account of genuine difficulties faced by the wife. The husband may find it difficult to contest proceedings at a place which is convenient to the wife. Thus, transfer is not always a solution acceptable to both the parties. It may be appropriate that available technology of videoconferencing is used where both the parties have equal difficulty and there is no place which is convenient to both the parties. We understand that in every district in the country videoconferencing is now available. In any case, wherever such facility is available, it ought to be fully utilised and all the High Courts ought to issue appropriate administrative instructions to regulate the use of videoconferencing for certain category of cases. Matrimonial cases where one of the parties resides outside court's jurisdiction is one of such categories. Wherever one or both the parties make a request for use of videoconferencing, proceedings may be conducted on videoconferencing, obviating the needs of the party to

> appear in person. In several cases, this Court has directed recording of evidence by video conferencing."

Eventually, the Court directed that while issuing summons in a matrimonial proceeding, the court where proceedings have been initiated, may examine whether appropriate safeguards could be introduced to protect the interest of the spouse who resides outside the jurisdiction and to whom the summons are being issued. Among those safeguards, is the availability of a video conferencing facility. The above directions are contained in the following extract from the decision:

> "18. We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of defendant/respondent does not result in denial of justice. Order incorporating such safeguards may be sent along with the summons. The safeguards can be:
>
> (i) Availability of videoconferencing facility.
>
> (ii) Availability of legal aid service.
>
> (iii) Deposit of cost for travel, lodging and boarding in terms of Order 25 CPC.
>
> (iv) E-mail address/phone number, if any, at which litigant from outstation may communicate."

5 Since the decision in **Krishna Veni** forms the focus of the present reference, it is necessary to emphasise what the two Judge Bench held and what it did not. **Krishna Veni** notes that a transfer of proceedings (from one state to another) is not always a solution acceptable to the contesting spouses since one of them would suffer hardship as a result of the transfer of proceedings. It was in this

context that the court observed that "it may be appropriate" to use video conferencing facilities "where both the parties have equal difficulty and there is no place which is convenient to both the parties". The decision does not stipulate a mechanical direction that in every transfer petition parties should be directed to take recourse to video conferencing facilities. Evidently, the Court was concerned with the fact that an order of transfer would work to the prejudice of the spouse against whom the transfer is ordered. Similarly, it is necessary to emphasise that the two Judge Bench requires the court issuing summons to a spouse who resides outside its jurisdiction to examine the feasibility of safeguards that would obviate a denial of justice. One of those safeguards which the court "may examine" is the availability of a video conferencing facility.

6 Plainly, **Krishna Veni** does not embody an absolute or invariable mandate that all transfer petitions should be disposed of by the court, by the application of a mechanical formula requiring the contesting spouses to take recourse to the facility of video conferencing. The language of the judgment is permissive and is sufficiently flexible to accommodate an application of mind to the interests of justice, the position and circumstances of parties as well as to the feasibility (both in technical and practical terms) of adopting video conferencing as a solution to spatial distances. Hence, it is fallacious to read **Krishna Veni** as a mandate to take recourse to video conferencing in all transfer petitions filed before this Court. That

was not plainly the intent underlying the judgment nor indeed does such a consequence flow from the decision.

7 While referring the correctness of the view in **Krishna Veni** to a larger Bench, a coordinate Bench in **Santhini** has differed on the use of video conferencing in matrimonial disputes. The referring order records that while placing reliance on the two Judge Bench decision in **Krishna Veni,** orders are being passed by this Court, the High Courts and by District Courts relegating parties to video conferencing even where such facilities are not available. The Bench opined that this has made the "situation" not only of inter-state or intra-state appeal but also of intra-district appeal. As regards this aspect, it needs really no detailed reasoning to hold that a misconstruction of a judgment of a court either by coordinate courts or by courts from whose decision an appeal lies is no justification to overrule the former. It is the misconstruction which has to be set at rest.

8 Relying upon Section 9 of the Family Courts Act 1984, the court in **Santhini** was of the view that it is the mandatory duty of the Family Court to make efforts for settlement between parties. Invoking the provisions of Sections 22, 23 and 26 of the Hindu Marriage Act 1955, the court focused on the duty of the court to "make every endeavor" to make the parties arrive at a reconciliation "in every case where it is possible so to do consistently with the nature and circumstances of the case".

The Bench also referred to Order XXXIIA of the Code of Civil Procedure introduced in 1976 to emphasize the duty cast on the Court to make every effort for settlement in family matters. It concluded that **Krishna Veni** had not considered the above-mentioned provisions. In doing so, the Bench highlighted the importance of reconciliation in family matters and observed as follows:

> "The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework… [I]n reconciliation, the duty-holders have to take a proactive role to assist the parties to reach an amicable solution... In reconciliation, as already noted above, the duty-holders remind the parties of the essential family values, the need to maintain a cordial relationship, both in the interest of the husband and wife or the children, as the case may be, and also make a persuasive effort to make the parties reconcile to the reality and restore the relationship, if possible. The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation... The role of a counsellor in Family Court is basically to find out what is the area of incompatibility between the spouses, whether the parties are under the influence of anybody or for that matter addicted to anything which affects the normal family life, whether they are taking free and independent decisions, whether the incompatibility can be rectified by any psychological or psychiatric assistance etc. The counsellor also assists the parties to resume free communication. In custody matters also the counsellor assists the child, if he/she is of such age, to accept the reality of incompatibility between the parents and yet make the child understand that the child is of both parents and the child has a right to get the love and affection of both the parents and also has a duty to love and respect both the parents etc. Essentially, the counsellor assists the parents to shed their ego and take a decision in the best interest of the child."

Expressing its reservations on the use of video conferencing in family matters, the Bench held that:

> "To what extent the confidence and confidentiality will be safeguarded and protected in video-conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered. "It is certainly difficult in video conferencing, if not impossible, to maintain confidentiality. It has also to be noted that the footage in video-conferencing becomes part of the record whereas the reconciliatory efforts taken by the duty-holders... are not meant to be part of the record. All that apart, in reconciliatory efforts, physical presence of the parties would make a significant difference. Having regard to the very object behind the establishment of the Family Courts Act, 1984, the Code of Civil Procedure and to the special provisions introduced in the Hindu Marriage Act under Sections 22, 23 and 26, we are of the view that the directions issued by this Court in Krishna Veni Nagam need reconsideration on the aspect of video-conferencing in matrimonial disputes".

These observations make it necessary to consider the scheme of the Family Courts Act, 1984 and to determine whether the use of video conferencing stands excluded by its provisions.

Statutory Scheme of the Family Courts Act

9 The Family Courts Act, 1984 was enacted 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".

The Statement of Objects and Reasons of the Family Courts Act, 1984 provides that:

> "...emphasis should be laid down on conciliation and achieving socially desirable results and **adherence to rigid rules of procedure and evidence should be eliminated.**"

In **K A Abdul Jaleel** v **T A Shahida**[4], this Court held that "the reason for enactment of the said Act was to set up a court which would deal with disputes concerning the family **by adopting an approach radically different from that adopted in ordinary civil proceedings**".

Section 9 (1) of the Act casts a duty on the Family Court to make efforts for a settlement between parties to the matrimonial dispute :

> "In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, **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."

[4] 2003 (4) SCC 166

A similar duty is cast upon the Family Court under Section 23 (2) of the Hindu Marriage Act, 1955, which states that:

> "... it shall be the duty of the Court in the first instance, in every case **where it is possible so** to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties"

The phrase in these provisions "**where it is possible to do so** consistent with the nature and circumstances of the case", acknowledges that it may not be possible to do so in every case.

In **Komal S Padukone** v **Principal Judge, Family Court, Bangalore City**[5], the Karnataka High Court held that:

> "Section 9 makes it clear that the duty of Family Court to make efforts for settlement in the first instance is "where it is possible to do, consistent with the nature and circumstances of the case". Where one of the parties is abroad or is disabled, it may not be possible to attempt settlement in the first instance. But, that does not mean that the party who is unable to appear, should be denied the right to prosecute or defend the proceedings. All that it means is that the effort to make settlement, gets postponed to a later date when parties are able to appear. **In some cases, it may not be possible to attempt settlement at all due to the peculiar facts and circumstances**."

[5] AIR 1999 Kant 427

10 A clear discretion is provided to the Family Court to evolve the procedure which it will follow during the hearing of a case. The Family Court, however, under Section 9(1) would be subject to the “rules made by the High Court” in this regard. Similarly, the obligation under Section 23(2) of the Hindu Marriage Act is to make every endeavour to bring about a reconciliation between the parties, “where it is possible to do so consistently with the nature and circumstances of the case” .

11 While dealing with the above provisions, one aspect needs to be discussed. It is a general belief that the process of reconciliation requires the physical presence of both the parties at the same place and at the same time. The physical presence of both the parties together is emphasized since it is perceived that when parties are alone together they are able to strike an emotional bond, which will not be possible in video conferencing. Intimate details are to be discussed in an intimate environment.

12 The point, however, is whether a hypothesis of desirability should be elevated to a position of a legal principle which allows no interface of technology in the course of settlement. To appreciate the issue, it is necessary to understand and demystify technology.

Video conferencing and the statute

13 Video conferencing transmits video, audio and data across a communications network enabling geographically dispersed participants to meet synchronously. 'The general keyword associated with video conferencing is interactivity. This allows real time visual and audio contact between two or more persons at different geographical locations.'[6] The emotional attachment which people can develop (or rekindle) when are in the same physical space cannot be undermined. However, it must be noted that the effect of video-conferencing is that people who are not present at the same place and at the same time are able to interact with each other as if they are present together. The premise, in the referring judgment that "the footage in video conferencing becomes part of the record" is incorrect. It does not necessarily become a part of the record. Discussions relayed through video conferencing in the course of settlement will of course not be recorded. Technology answers our commands.

14 Section 10 (3) of the Family Courts Act enables a Family Court to lay down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings. Far from embodying a specific bar or prohibition

[6] "The Technology and Pedagogy of Two-way communication over Geographical distance", *University of Malta* (2013), available at https://www.um.edu.mt/itservices/documents/guides/videoconferencingguides/VC_full_guide.pdf

to the use of video conferencing, this provision gives the Family Court ample powers to use video conferencing in matrimonial disputes, where appropriate.

15 Section 11 of the Family Courts Act provides for "in camera" proceedings in specified circumstances. It states:

> "In every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires."

Section 11 uses both the expression "may" and "shall". The Family Court has the discretion to order an in-camera trial. However, when a party desires an in-camera trial, it is obligatory to do so. Hence, in-camera trials are not mandated in every case in the Family Court.

Section 22 of the Hindu Marriage Act, 1955 provides for proceedings to be in camera and stipulates that the proceeding may not be printed or published.

While analyzing whether video conferencing would be contrary to Section 11 of the Family Courts Act and Section 22 of the Hindu Marriage Act, it would be necessary to understand the meaning of the phrase "in-camera".

Black's Law Dictionary defines "in-camera" as follows[7]:

> "In chambers; in private. A cause is said to be heard in camera either when the hearing is had before the judge in

[7] Black's Law Dictionary, *West Publishing Co.* (1979), at page 681.

> his private chambers or when all spectators are excluded from the courtroom."

16 Video conferencing and in-camera proceedings are not irreconciliable. Video conferencing, in itself, is a private interaction. It does not involve third persons or spectators apart from the two participants between whom the video conferencing is taking place (judge or counsellor and one of the parties to the dispute). As long as it is not accessible to the public, privacy is maintained. Therefore, it does not run contrary to the intent of Section 11, which is to maintain privacy. The same level of privacy that is afforded to parties during in-camera proceedings which take place in the same physical space, can be maintained over the virtual space of video conferencing. Technology also allows us to ensure that there is no record of the conversation which took place through video conferencing, once the conversation is over. This is similar to a telephone call (unless the call was being recorded). Technology provides flexibility. Discussions across an audio-visual link in the course of counselling or conciliation will not be recorded so as to maintain privacy and intimate confidences. On the other hand, where in the course of a trial, a judge requires that a record of the deposition be maintained, technology will facilitate it.

In fact, one of the advantages of adopting video conferencing technology in trials of disputes, which has been acknowledged in various jurisdictions where this is being practised, is the increased accuracy that results from the judge having access to the recorded video. Even if a video conference is recorded for this

purpose, the records can be destroyed after the judgment is delivered or once the purpose of recording by the judge has been served.

17 This Court must also take a robust view of today's conditions. We are living in an age of technology. Men and women have access to and are in possession of instruments which use advanced technologies. The reality is that the world is not a closed space. It has never been, and is becoming increasingly interconnected. People are constantly moving from one place to another in the course of their personal and professional pursuits. In spite of the distances that this movement entails, people are able to interact with each other because of digital facilities. Most desktops and mobile devices have cameras, thereby facilitating the ease of online communications in the audio-visual mode.

18 Video conferencing has made face-to-face interactions possible even in the absence of physical proximity. Technological developments have brought a turning point in the history of human civilization and have resulted in enhanced efficiency, productivity and quality of output in every walk of life. Technology has paved the way for an open and accessible world where physical barriers to communication and connectivity have broken down.

19 Technology must also be seen as a way of bringing services into remote areas to deal with problems associated with the justice delivery system. With the increasing cost of travelling and other expenses, video conferencing can provide a cost-effective and efficient alternative. Solutions based on modern technology allow the court to enhance the quality and effectiveness of the administration of justice. The use of technology can maximize efficiency and develop innovative methods for delivering legal services. Technology based solutions must be adopted to facilitate access to justice. Family courts are overburdened with all too familiar problems : too few courts, vacancies in judge strength and a creaking infrastructure. Men and women in matrimonial distress have their woes compounded in the justice delivery system. Repeated adjournments break the back of the litigant. We must embrace technology and not retard its application to make the administration of justice efficient.

20 The pervasive problem of pendency, the barriers to access to justice in India, and the inability of the judicial process to ensure timely and effective justice calls for a wide range of reforms. There is a widespread concern that the manner in which disputes are resolved in the judicial process is expensive and causes hardships to litigants. Due to advances in technology and tools for video conferencing, even when parties are not in proximity to each other, conflicts can be resolved effectively.

All the statutory provisions noted above apply to 'parties'. Since these provisions are applicable to parties equally, regardless of gender, they are gender-neutral.

High Court decisions

21 Even prior to **Krishna Veni** there has been a line of judgments of various High Courts which have allowed video conferencing in matrimonial disputes. These decisions are important because they indicate a robust attempt to foster flexible, technology-based solutions, in the context of matrimonial disputes. High Courts in each state are aware of the social and economic circumstances prevailing there and the feasibility of adopting technology. These decisions must be given credence because unless there is a manifest failure of justice under law or a cause of public injury, the assessment by the High Courts of local conditions ought to be respected. This to my mind is the mandate of a vibrant federal structure.

In **Mukesh Narayan Shinde** v **Palak Mukesh Shinde Nee Palak D Patel**[8] (2012), the petitioner husband and respondent wife had decided to convert a Petition filed under Section 13(1)(ia) to a Petition for divorce by mutual consent under Section 13B of the Hindu Marriage Act, 1955. The husband was residing in Mumbai, while

[8] 2012 (3) ALLMR 521

the wife was residing in the US. The request was rejected by the Family Court holding that the respondent wife was absent throughout and counselling had not taken place in that matter. The Bombay High Court set aside the order of the Family Court and held that:

> "The physical presence of both the parties is generally asked and necessary to verify the authenticity of the identity of the parties and consent of the parties. However, **there are peculiar circumstances like the case in hand where either of the parties cannot remain present before the Court due to certain practical difficulties i.e. Job, leave, visa etc. Due to globalization noticeable educated young persons are crossing the borders of India and they are taking up jobs outside the country. So some of them can not remain present before the Family Court to give consent in matrimonial matters. There is no illegality to solve such difficulty by adopting novel and available ways. This hurdle can be crossed with the help of advanced technology of communication and new scientific methods**. Though the physical presence is not possible, the Court can accept and rely on the virtual presence of the parties for verification and confirmation of the mutual consent. **Even though, the counselling with the Marriage Counsellor can be facilitated by virtual presence**." (emphasis supplied)

The High Court directed the Family Court to arrange a video conference of the Marriage Counsellor with a respondent wife in the Court with the help of a computer/laptop or by using a webcam and also to verify and record online consent. Parties were directed to appear before the Family Court so as to enable it to give directions to make arrangements for counselling and verification by video conference.

In **Blessy Varghese Edattukaran** v **Sonu**[9] (2015), a Division Bench of the Kerala High Court, while dealing with the issue of divorce by mutual consent held that:

> "[T]his Court is of the considered opinion that, the intention of the legislature contained in S. 9(1) of the Family Courts Act does not insist upon the Family Court to direct the parties to undergo the process of counselling invariably in all the cases as a mandatory requirement… **the endeavour by the Court to assist and to persuade the parties in arriving at a settlement is required only if it is possible to do so and is consistent with the nature and circumstances of the case... But in cases where any one of the parties or both the parties makes an application to the court to dispense with the procedure of counselling due to their non-availability in the country or due to any other valid reasons incapacitating their personal appearance, then it will be left open to the Family Courts to consider such applications and to allow the exemption from undergoing counselling with respect to either one of the parties or to both the parties, as the case may be. In such situation it is also not necessary in all the cases to insist upon both the parties to have counselling 'together'**... **Possibility for conducting the counselling through "video conferencing" using computer/laptop or mobile phones having requisite facility also can be explored and permitted.**" (emphasis supplied)

In **Finy Susan Francis** v **Binu Philip Paul**[10] (2015), parties jointly requested the Family Court to direct the Counsellor to conduct counselling through a video conference. The Family Court declined the request, while holding that counselling is mandatory and finding that no facilities were available in the court for conducting counselling through video conference. The Division Bench of the Kerala High Court

[9] 2015 (4) KLT 572
[10] O.P. (FC). No. 401 of 2015 (R)

held that the Family Court ought to have considered the feasibility of counselling being done through video conferencing with the help of a computer/laptop or through a cell phone having facilities for the said purpose. The court therefore quashed the order of the Family Court and granted liberty to the parties to approach the Family Court seeking to dispense with the process of counselling or else to seek permission for arranging counselling through video conferencing by offering to provide necessary facilities.

In **Suvarna Rahul Musale** v **Rahul Prabhakar Musale**[11] (2014), the Bombay High Court allowed the Petitioner-wife who was staying in the US to record evidence by way of video recording. It was held that:

> "The petitioner/wife has moved an Application for recording of evidence through video conferencing because she is working in U.S. She has a minor daughter aged about 6 years and stays with her. It is a different and distant country. Travelling to and fro from U.S. to India is undoubtedly financially expensive so also it is difficult for a mother of 6 years old girl to arrange the logistics. Though in the Application only financial difficulty and inconvenience is mentioned, it is necessary to understand what kind of inconvenience a mother of 6 years old child can face if she has to travel from U.S. to India to give evidence. Moreover she is a working lady and may face difficulty in getting leave and may be some hurdles in VISA. Hence, the Application for video conferencing is justified on all counts…
>
> It is to be noted that our legislature has wisely taken note of this fact and accordingly has made the changes in the Evidence Act by amending Section 65 and thereby section

[11] (2015) 7 Bom CR 608

> 65A, 65B are inserted on the point of recording of evidence relating to electronic record and admissibility of electronic record. When the legislature has expanded the scope of term 'Evidence' acknowledging advance technology and scientific methods used by people in their day-to-day activities, it is the duty of the Judicial officers to put life to those letters of law by interpreting them effectively...
>
> An attitudinal change in Judges is required. We need to train ourselves to understand the pulse of the new generation who is avidly techno savvy. Though it is difficult for the Judges, especially who are in their middle age, to accept and digest the entry of new language and methods of evidence in the established judicial system, it is high time for us to change our mindset and see whether this new technology can help us to increase the speed and also we have to take into account the convenience of the parties as our judicial system is necessarily litigant centric...
>
> The presence of the person can be obtained physically so also virtually. What is important is that a person should be seen and be heard and vice versa. These are the methods of distant communication, which is possible by virtual measures and microspeakers. Therefore, it is not necessary for the Judge to insist for the physical presence of the witness when it is not possible especially in the circumstances of this case, a virtual presence can be secured which is very much legal and for this purpose, it is not necessary for the Judge himself to give time but such evidence can be recorded by appointing Commissioner."

Sirangai Shoba v **Sirangi Muralidhar Rao**[12] (2017) concerned the legality and correctness of an order allowing examination on Skype technology for recording evidence in a divorce petition. Allowing the use of Skype technology for witness testimony, the High Court of Andhra Pradesh held:

[12] AIR 2017 AP 88

> "[T]here is no foundation to say the request to record evidence through Skype technology is a device to avoid facing the criminal case allegedly filed against him and so far as the apprehensions as to demeanor and possibility of prompting or tutoring can be taken care of with necessary precautions, the reconciliation also can be done if need be by use of Skype technology, there are no grounds to interfere with the impugned order of the lower Court permitting the recording of evidence of the party- witness abroad through Advocate Commissioner and by use of Skype technology, but for to give necessary directions of the precautions required to be taken to ease out the apprehensions of the other side in giving disposal of the revision petition."

The Andhra Pradesh High Court relied upon a decision of a Division Bench of the Delhi High Court in **International Planned Parenthood Federation (IPPF)** v **Madhu Bala Nath**[13], where it was observed that Courts must be liberal to record evidence through video conferencing in order to save time or avoid inconvenience:

> "Procedures have been laid down to facilitate dispensation of justice. Dispensation of justice entails speedy justice and justice rendered with least inconvenience to the parties as well as to the witnesses. If a facility is available for recording evidence through video conferencing, which avoids any delay or inconvenience to the parties as well as to the witnesses, such facilities should be resorted to. Merely because a witness is travelling and is in a position to travel does not necessary imply that the witness must be required to come to Court and depose in the physical presence of the court."

[13] AIR 2016 Delhi 71

In **International Planned Parenthood Federation (IPPF)** v **Madhu Bala Nath**[14] (2016), the Division Bench of the Delhi High Court noted that :

> "...Video-conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with same facility and ease as if he is present. In fact he/she is present before one on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video-conferencing both parties are in the presence of each other…"

In **V Srivatsan** v **SR Gayathri**[15] (2017), the husband had initiated a matrimonial proceeding for restitution of conjugal rights, whereas the wife had filed for divorce. The petitioner-husband made an application before the Court for examination through video conferencing. It was pleaded by him that since he was residing in the US and was employed in Los Angeles, he had to remain at the place of posting and it would be extremely difficult and prejudicial for him to come to India to depose in the case. According to him, it also involved an unnecessary amount of delay, expenditure and inconvenience, which, on the facts and circumstances of the case would be patently unreasonable and extremely harsh on him. The application was allowed. It was held that:

> "**Section 11 of the Family Courts Act, 1984 suggests and provides for in camera proceedings, so that there will not be any ambiguity in understanding the parties. But many of the Family Courts are not adopting the unique path-breaking initiatives**...

[14] FAO (OS) 416/2015 & CM no 13475/2015, decided on 07.01.2016
[15] C.R.P.(PD) No. 1012 of 2016 and C.M.P. No. 5676 of 2016, judgment dated 23.01.2017

So far as the matrimonial matter is concerned, excepting the fact of the touch of the person concerned, video conferencing is an advancement of Science and Technology, which permits one to see, hear and talk with someone, who is far away with the same facility and ease as if he is present herein. The application of any technique through advancement of technology, is only to make things easier and flexible...Video conferencing is one such facility even under Section 65-A and B of the Evidence Act and a special provision as to evidence relating to electronic record and admissibility of the same, has been introduced in the amended Act. There should not be any bar of examination of witness by way of video conferencing...

In fact the Hon'ble Supreme Court regarding Process Re-engineering is suggesting rule for ICT enablement of the Court processes. As a first step for process re-engineering, electronic filing, recording of evidence through video conferencing, electronic evidence, service of summons etc are suggested. On the utilization of video conferencing facilities, there are more than lakh of cases across the country have been conducted which resulted in expediting trials apart from tremendous financial savings...

Admittedly, electronic video conferencing is cheaper and facilitate to avoid delay of justice. Wherever there is a linkage facility available, then the attendance of the witness may be dispensed with and examination may be done through video conferencing. Order 18 Rule 4 (3) of the Code of Civil Procedure provides for recording evidence either by writing or mechanically in the presence of the Judge...The mechanical process also includes electronic process for both the Court and the Commissioner. If the law Courts do not permit the technology development in the Court proceedings, it would be lagging behind compared to the other sectors. The technology is only a tool and necessary safeguards have to be taken for the purpose of recording evidence through audio-video link...

Therefore, without going into other questions, the trial Court is only directed to follow the necessary safeguards for taking evidence through video conferencing by giving a day-today hearing, preferably, within three months from the date of communication of the order. The petitioner is directed to

> bear any incidental expenses in this regard. It is made clear that such expenses is directed to be paid by the petitioner-husband without prejudice to the rights and contention of the parties. The court may accordingly fix time for video conferencing considering different time zone of the land, in which, the husband is living and intimation be given to him through electronic mail with respect to the time and date to be fixed for Video conferencing well in advance." (emphasis supplied)

These are words of wisdom and perspicacity across the spectrum. Voices from within the judiciary in a federal structure should merit close listening by the Supreme Court.

Foreign jurisprudence

22 Video conferencing has been applied in matrimonial proceedings in various other jurisdictions. With the advancement of technology, many countries have laid down detailed guidelines regulating the use of video conferencing technology in Family Courts. In the absence of detailed statutory guidelines, courts have been held to have wide powers to regulate the procedure to be followed, including allowing video conferencing. Guidelines have developed through case-law.

Nearly seventeen years ago, in **De Carvalho v Watson**[16], the Alberta Court of Queen's Bench in Canada had this perspective on video conferencing technology:

[16] De Carvalho v Watson (2000), 83 Alta LR (3d) 354

> "It is not the suggestion of this Court that because video conferencing is an available form of technology suitable for examination and cross-examination of witnesses or potential witnesses that such use of technology should be used generally as a substitute for personal appearances... But it seems to me that where there are circumstances such as the present where an individual is a long way away from the jurisdiction where the examination would normally take place, where the costs for the personal attendance of that individual would be extremely substantial, where the examination can be carried out with a minimum of difficulty by the use of such video conferencing technology, and where there has already been a (sic) opportunity for counsel to engage in personal cross-examination of an extensive nature of the particular witness or potential witness, that this is an appropriate type of case for a Court to look positively upon a request made on behalf of such witness that the witness be allowed in a civil action such as this to provide continued evidence on examination for discovery by way of video conference. This would be inappropriate only where there is some other circumstance which would cause a meaningful risk of causing prejudice to the party seeking to require the witness to appear in person."

It also rejected the arguments of the defendant opposing an examination by video conference:

> "The only submission of substance alleged on behalf of the Defendants is that it would be easier to assess credibility of the witness if the witness appeared in person... [T]he state of technology is now such that when video conferencing is properly carried out, in my opinion, a good view can be had of the witness for the purposes of assisting in assessing credibility through that medium."

An article titled "Technology and Family Law Hearings"[17] (2012) speaks about the usage of 'Skype' (a video-conferencing software) in the context of family law arbitrations:

> "The witnesses were located in different countries and in different time zones. Despite this, the use of Skype facilitated a mutually convenient schedule for the witnesses and counsel. The witnesses had access to the agreed exhibits, took the oath over video, and were cross-examined. The corollary is that there is less opportunity to observe if witnesses are testifying under any form of impairment, if they are being coached off-screen, or if they are reading from notes that are not part of the record. There was some concern about the delay of a witness's facial expression when a damaging document or picture was unveiled mid-testimony. However, the advantages to video conferencing technologies and the costs saved outweighed the disadvantages of a face-to-face cross-examination."[18]

In **P** v **C**[19], the Ontario Court of Justice in Canada allowed testimony by the internet-based video conferencing program Skype, despite the lack of clarity in the Ontario Family Law Rules on this issue, in situations where a judge sees it fit. It was held:

> "36. It is clear to me that the balance of convenience on this motion favours the Applicant. With the conditions which I set out... the Respondent should suffer little or no prejudice in his counsel's ability to cross-examine. The cross-examination will be conducted in real time, and the "lag" which counsel fears in the transmission of questions and answers should not exist. Requiring the Applicant and her spouse to travel to T.O. would have a negative impact on

[17] Ron S. Foster and Lianne M. Cihlar, "Technology and Family Law Hearings", *Western Journal of Legal Studies* (2012), Vol. 5, Issue 1
[18] Ibid, at page 16
[19] P. v. C. Between L.V.P, Applicant, and M.E.C, Respondent [2004] O.J. No. 200 ONCJ N

> their already financially -stretched household, and would be damaging to the children's best interests.
>
> 37. Cross-examination of the Applicant and Mr. B.M. by Skype will be permitted. The Applicant shall bear any of the costs incidental to facilitating this video conference. Applicant's counsel shall contact court administration well in advance of the trial to ensure that the connection between the facilities to be used in D. and Courtroom 1E in T.O. is effective."

In **Edmonton (City)** v **Lovat Tunnel Equipment Inc**[20], the Alberta Court of Queen's Bench set out guidelines for information to be stated in applications for allowing hearings through video conferencing:

> "1. the relevance of the evidence which it is anticipated that the witness will give and why that evidence is necessary to their case;
> 2. the reasons why they suggest that video conferencing should be employed, bearing in mind that rule 216.1 requires that there be a "good reason" for the court to allow the admission of such evidence. If the applicant intends to argue that cost and inconvenience are factors which should be taken into consideration, ...some evidence would be presented as to the anticipated time and costs associated with video conferencing as opposed to alternate means of procuring the evidence;
> 3. the logistical and technical arrangements that they have made both here and in the place from which they propose that the witness give their evidence... Counsel must ensure that the witness will have access at the appropriate time to a clear copy of any exhibit to which their attention may be directed during the course of their testimony which presumably can be done via a fax machine at both ends of the video conference…. [S]ome efforts would be made by the person administering the oath to ensure that there is no

[20] Edmonton(City) v Lovat Tunnel Equipment Inc (2000), 260 AR 259 (QB)

> scripting of the evidence. Also, a tape of the video conference should be made."

In a study titled "Legal assistance by video conferencing: what is known?"[21] (2011), it was observed:

> "While further research is required to identify the relative impact of any or all of the following factors, the uptake and use of video conferencing for legal assistance appears to be affected by:
>
> – the convenience, privacy and confidentiality of video conferencing compared to other available modes of assistance
>
> – whether video conferencing offers services or benefits that are not already available through existing legal services, including services available by telephone, such as access to specialist services or more timely assistance
>
> – the quality and reliability of the video conferencing (e.g. drop outs, picture quality)
>
> – the willingness of clients, lawyers and the host service at the client end to use this form of technology for legal assistance."

'Specific situations where video conferencing may assist the parties in reaching agreement outside of court regarding their families include: families in different geographic locations, and families that have a history of or current concern with regards to family violence.'[22] This view has been supported in a paper titled "The

[21] Suzie Forell, Meg Laufer and Erol Digiusto, "Legal assistance by video conferencing: what is known?", *Justice Issues* (Nov. 2011), at page 2, available at http://www.lawfoundation.net.au/ljf/site/articleIDs/B0A936D88AF64726CA25796600008A3A/$file/JI15_Videoconferencing_web.pdf

[22] Anthony Syder, "Technology in Mediation", *Fair Way*, available at http://www.fairwayresolution.com/resources/whats-new/technology-in-mediation

Australian Online Family Dispute Resolution Service"[23] written by Wilson Evered, Zeleznikow and Thomson, according to which:

> "While the focus of ADR has largely been on face-to-face processes, incorporating technology into ADR processes has quietly been commonplace for a long time. Primarily, this has taken the form of using the telephone as a simple measure to convene people who cannot or should not be together in the same room, whether owing to geographical situations or to extremely vitriolic situations, or those where violence has occurred."

An article on the use of Skype in family courts[24] has stated that:

> "The use of Skype and similar services in visitation is just one example of the ways in which technology is changing law. Technology has also changed the way attorneys work; some lawyers carry the iPad tablet in lieu of a briefcase, and there are now several niche blogs dedicated solely to advising legal professionals on how to get the most out of their iPads. And, beyond affecting day-to-day responsibilities, technology has raised a number of issues in the courts…
>
> Xxx xxx xxx
>
> As many commentators note, technological change in general will correspond to change in divorce and family law cases. Technology can be used to better meet the needs of families…"

International precedent – both of a judicial and academic nature – is testimony to the use and acceptance of video conferencing.

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[23] Elisabeth Wilson Evered, John Zeleznikow and Mark Thomson, "The Australian Online Family Dispute Resolution Service", available at https://www2.iceaustralia.com/ei/images/nmc2014/abstracts/nmc14abstract00068.pdf

[24] "The Use of Skype Ordered in Family Court", available at https://fernandezlauby.com/Articles/The-Use-of-Skype-Ordered-in-Family-Court.html

Video Conferencing must be in the interest of justice

23 Video-conferencing facilities allow parties to communicate with each other in situations where it would be expensive, inconvenient or otherwise not desirable for a person to attend the court procedure.

24 The overriding factor, as contemplated by the Delhi High Court in its video conferencing guidelines[25], is that the use of video conferencing in any particular case must be consistent with furthering the interests of justice and should cause minimal disadvantage to the parties.

25 Given the delays in judicial proceedings, which are often due to the wilful procrastination of one of the parties, video conferencing will serve the purpose of safeguarding the interests of justice by preventing undue delay. The massive pendency of cases in India and issues related to access to justice will require a careful deployment of appropriate technologies.

26 The High Courts, under Section 9(1) of the Family Courts Act, should lay down guidelines in regard to video conferencing in matrimonial matters. The Delhi

[25] "Video Conferencing Guidelines issued by the High Court of Delhi", available at http://www.nja.nic.in/CJ-CM_Resolution/Delhi_HC/Video%20Conferencing%20Guidelines%20issued%20by%20DHC.PDF

High Court has provided for certain minimum requisites for the application of video conferencing in all cases. They are follows:

(a) A desktop or laptop with internet connectivity and printer
(b) Device ensuring uninterrupted power supply
(c) Video camera
(d) Microphones and speakers
(e) Display unit
(f) Document visualizer
(g) Comfortable sitting arrangements ensuring privacy
(h) Adequate lighting
(i) Proper acoustics
(j) Digital signatures from licensed certifying authorities for the co-ordinators at the court point and at the remote point

27 The guidelines prepared by Delhi High Court also provide that the expenses of the video conferencing facility ought to be borne by such party as the Court may direct. It has also been provided that the Court may, at the request of the person to be examined, or on its own motion direct appropriate measures to protect his/her privacy keeping in mind age, gender and physical condition. It has further been provided that where a party or a lawyer requests that in the course of video conferencing some privileged communication may have to take place, the Court will pass appropriate directions. An encrypted master copy shall be retained in the Court as part of the record. These guidelines are being adverted to since they indicate that the High Courts are sufficiently enabled to formulate and evolve a procedure to facilitate video conferencing.

The ideal and the real

28 There is, in my view, no basis either in the Family Courts Act 1984 or in law to exclude recourse to video conferencing at any stage of the proceedings. Whether video conferencing should be permitted must be determined as part of the rational exercise of judgment by the Family Court.

29 As in many other areas of law and life, there is a gorge between the ideal and the real. In an ideal world, spouses and partners live in everlasting harmony. Fairy tales are built along the lore of couples "who lived happily ever after…", but we know that life is not perfect. Indeed, some would believe that the perfection of life lies in its imperfections. In marital relationships, the spirit of dialogue and a faith in a plurality of views leads to a synthesis between often conflicting ideas, opinions, aspirations and needs. Yet marital relationships do on occasion run aground, increasingly so in recent times. Institutions such as the Family Courts are intended to provide service to families in distress. In doing so, there must be a synthesis between the ideals of the law and the need to implement them in dealing with practical problems of society today. The challenge is to build a robust pathway that bridges the ideal and the real. In an ideal sense, the physical presence of couples sharing the same physical space before a judge or counsellor may foster a settlement. Yet there are genuine reasons why parties are unable to remain together in one physical space or do not desire to do so. A spouse may have been

subject to grave marital abuse. Another may have been repeatedly violated by a history of domestic abuse and gender violence. One of the spouses may be involved in substance abuse or may suffer from psychiatric disorder. Technology enables the judicial forum to protect the legitimate concerns of privacy of one or both spouses. Spouses, even without the above problems, may live apart in distant cities because of reasons of employment. Compulsions of employment, the needs of children, care of the elderly and disability within the family may make it practically impossible for parties to commute to another city to pursue or defend a proceeding. Besides, insistence on physical presence is questionable in a situation where our family courts are overburdened and are unable to provide timely justice. To deprive parties of the benefit of video conferencing will result in a denial of access to justice. Nor can recourse to technology be conditioned on the consent of both spouses for, this will only enable one spouse to procrastinate or delay the proceeding. Withholding consent to video conferencing will then become a tool in the hands of one of the litigants to delay the proceedings.

30 As a matter of principle, video conferencing cannot be excluded from any stage of the proceeding before the Family Court. Whether it should be adopted in a particular case must be left to the judicious view of the Family Court. The High Courts will be well advised to formulate rules to guide the process. Family Courts must encourage the use of technology to facilitate speedy and effective solutions.

Above all, it must be acknowledged that a whole-hearted acceptance of technology is necessary for courts to meet societal demands for efficient and timely justice.

Should this court even attempt to put a lid on the inexorable movement towards incorporating technology? If we do so, we risk ourselves being left behind as an anachronism in a digital age.

.....J.
[Dr. D Y CHANDRACHUD]

New Delhi;
October 09, 2017