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

%   Dated : 30th June, 2020

+   CM(M) 40/2019 and CM APPL.No.1226/2019

DEEPTI KAPUR ..... Petitioner
Through : Mr. Rakesh Vats, Advocate

versus

KUNAL JULKA ..... Respondent
Through: Ms. Kaadambari Singh Puri, Advocate with Ms. Lovina Ropia, Advocate

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI, J.

This petition under Article 227 of the Constitution of India impugns order dated 24.12.2018 made by the learned Principal Judge (South), Family Court, Saket, Delhi in HMA No.609/2012 titled *Kunal Julka vs. Deepti Kapur*.

2. The issue at hand arises from a matrimonial dispute which is pending before the Family Court by way of a divorce petition bearing HMA No. 609/2012, the relevant details of which are referred to hereinafter.

3. The petitioner/wife is the respondent in the aforesaid divorce petition which was filed on 26.09.2012 by the respondent/husband seeking

dissolution of their marriage on the ground of cruelty available under section 13(1)(ia) of the Hindu Marriage Act, 1955. In the divorce proceedings, the husband filed a Compact Disc (CD) purporting to contain an audio-video recording of the wife supposedly speaking with her lady friend, by name Sugandha, on phone and talking about the husband and his family in a manner, which the husband claims was derogatory, defamatory and constituted cruelty to him. In the written statement filed by the wife in the divorce proceedings, she opposed the taking on record of the CD and the purported transcript of conversation contained therein. The wife opposed the CD being brought on record on the ground, *firstly*, that the contents of the CD were tampered with and were therefore not authentic ; and *secondly*, that the contents of the CD were not admissible in evidence since they were a recording of a 'private' conversation that the wife had had with a friend, which had been secretly recorded by the husband, without the knowledge or consent of the wife, in breach of her fundamental right to privacy.

4. In response to the wife's objections, the husband moved an application before the Family Court, in which he in effect sought appointment of an expert to prove the genuineness of the CD with the purpose of bringing the CD on record. Agreeing with the husband's contentions, by way of impugned order dated 24.12.2018, the Family Court allowed the husband to bring on record the evidence comprised in the CD, while directing that the contents of the CD be examined by the Forensic Science Laboratory (FSL) to assess the genuineness of the recording. By way of the impugned order, the Family Court has directed the FSL to render its opinion on the following aspects :

> *"The FSL shall report :(l) (sic) Whether the contents of CD and the original recording in the recording device are at variance? (2) Whether the original recording has been tempered (sic) with? (3)Whether the transcript relied upon by the petitioner is correct, as per the original recording?"*

5. While the prayer made in the application on which the Family Court has made the impugned order is somewhat ambiguous, the essential question raised in the present proceeding is as regards the admissibility of the contents of the CD, since according to the wife, the conversation comprised in the CD has been recorded in breach of her fundamental right to privacy; and is therefore inadmissible in evidence.

Petitioner's submissions :

6. The wife's objection arises from the conceded position that the audio-video recording on the CD was made by means of a CCTV camera installed by the husband in the bedroom of the parties ; and that is how the conversation between the wife and her friend came to be recorded. The wife accordingly contends that since the evidence comprised in the CD was collected in breach of the wife's fundamental right to privacy, the same is not admissible in a court of law. Relying on a Constitution Bench judgment of the Supreme Court in ***Justice K. S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.***[1], the wife has urged that privacy has (now) been recognised by the Supreme Court as a fundamental right, available to a person not only against the State but also against private individuals. It is argued that a person is entitled to criticise someone and not share the criticism with the world ; and that a person has a right to all thoughts and behavioural patterns

[1] (2017) 10 SCC 1

within one’s zone of privacy. In this context, it is urged that the conversation between the wife and her friend, conducted in the bedroom and therefore in the belief that the same was being conducted in private, cannot be brought on record and be cited in evidence. It is further submitted that since the husband's action of secretly recording the conversation using a CCTV camera installed in the bedroom is a violation of the wife's fundamental right to privacy, the recording is *per se* illegal and therefore not admissible in evidence.

7. In the context of section 14 of the Family Courts Act 1984 (‘Family Courts Act', for short), it is argued, that though this provision otherwise empowers a Family Court to receive evidence, if in the opinion of the Family Court, such evidence assists it to deal effectually with a dispute, whether or not the same is otherwise relevant or admissible under the Indian Evidence Act 1872 (‘Evidence Act’, for short), yet this section does not permit evidence which is inadmissible “*as per the Constitution”* to be taken on record. Relying upon certain judicial precedents, it is argued on behalf of the wife that since the conversation comprised in the CD was recorded in breach of the wife’s fundamental right to privacy as recognised in the Constitution, it cannot be admitted in evidence *even under* section 14 of the Family Courts Act.

8. Additionally it has been urged that the husband’s action of surreptitiously and clandestinely recording the wife's telephone conversation with her friend also amounts to an offence under section 354-D of the Indian Penal Code 1860, whereby the very act of recording such conversation is a criminal offence, punishable in law ; and accordingly evidence collected by

committing a penal offence must *per se* be inadmissible in a court of law for any purpose and under any statute.

Respondent's submissions :

9. On the other hand, it is the husband's contention that although privacy has been recognised by the Supreme Court as a fundamental right, this right is not absolute but is subject to exceptions. Relying upon other judicial precedents, it is urged that the husband was entitled to establish cruelty on the wife's part and to prove his case seeking dissolution of marriage on that ground ; and in these circumstances, the wife's right to privacy must give way to the husband's right to bring evidence to prove his case, else the husband would be denied the right to fair trial guaranteed under Article 21 of the Constitution. It is of course also argued on behalf of the husband, that section 14 of the Family Courts Act specifically empowers a Family Court to receive evidence, if in its opinion such evidence will assist the court to deal effectively with the dispute, regardless of whether the same is otherwise relevant or admissible under the Evidence Act.

10. In support of their respective submissions, the parties have cited the following judicial precedents:

Precedents cited by the petitioner/wife :

(i) ***Justice K. S. Puttaswamy (Retd.) & Anr. vs. UOI & Ors.*** (supra) : in which a 9-Judge Constitution Bench of the Supreme Court has held that the right to privacy is a constitutionally protected right of an individual.

(ii) ***Rayala M. Bhuvaneswari vs. Nagaphanender Rayala***[2] **:** in which a single Judge of the Andhra Pradesh High Court has held that the act of phone tapping by the husband is illegal and infringed the wife's right to privacy.

(iii) ***State of Punjab vs. Baldev Singh***[3] : in which, while dealing with section 50 of The Narcotic Drugs and Psychotropic Substances Act 1985 ('NDPS Act', for short), a 5-Judge Constitution Bench of the Supreme Court has held that while considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused where the court is satisfied that the evidence had been obtained by conduct of which the prosecution ought not to take advantage, particularly when that conduct causes prejudice to the accused.

Precedents cited by the respondent/husband :

(i) ***Yusufalli Esmail Nagree vs. The State of Maharashtra***[4] : in which a 3-Judge Bench of the Supreme Court has held that a tape recording can be considered as a statement, provided it is not tampered with; and that the tape recording was done without knowledge is not in itself an objection to its admissibility.

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[2] MANU/AP/0907/2007

[3] (1999) 6 SCC 172

[4] (1967) 3 SCR 720

(ii) ***N. Sri Rama Reddi & Ors. vs. V. V. Giri***[5] : in which a 5-Judge Constitution Bench of the Supreme Court has upheld the decision in *S. Pratap Singh vs. State of Punjab : (1964) 4 SCR 733*, that a tape recorded conversation is admissible. It was further held that a tape recording can be used to corroborate as well as contradict evidence.

(iii) ***R. M. Malkani vs. State of Maharashtra***[6] : in which a 2-Judge Bench of the Supreme Court has held that conversation that is tape recorded by an external device, without tampering or interrupting telephone lines, is admissible in evidence. In this case the Supreme Court has spelt-out three conditions for admissibility of a tape recording, namely (a) relevance, (b) voice identification and (c) proof of accuracy. Further it has been held that evidence, even if procured illegally, is admissible.

(iv) ***Ziyauddin Burhanuddin Bukhari vs. Brijmohan Ramdass Mehra & Ors.***[7] : in which a 3-Judge Bench of the Supreme Court has held that tape recordings of speeches were documents under section 3 of the Evidence Act, which stood on no different footing than photographs, and were admissible after satisfying the three conditions as laid down *inter alia* in *RM Malkani* (supra).

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[5] (1970) 2 SCC 340

[6] (1973) 1 SCC 471

[7] (1976) 2 SCC 17

(v) ***X vs. Hospital Z***[8] : in which a 2-Judge bench of the Supreme Court has held that the disclosure by a doctor of a serious disease suffered by a prospective groom that saved the prospective wife from contracting that disease, did not invade the man's right to privacy, despite the fact that one of the most important aspects of a doctor-patient relationship is the doctor's duty to maintain secrecy about a patient's medical condition ; and that though the right to privacy is one of the basic human rights, it is not treated as absolute and is subject to such action as may lawfully be taken for prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others. For completeness it must be noted that upon an application made subsequently, a 3-Judge bench of the Supreme Court in ***X vs. Y Hospital***[9] clarified that the decision of the 2-Judge bench decided *only* that revealing the man's medical condition to the fiancé's relatives did not violate his right to privacy since the fiancé had a right to know about the medical status of the man she was to marry, while holding that certain other observations made by the 2-Judge bench were uncalled for.

(vi) ***Sharda vs. Dharmpal***[10] : in which a 3-Judge Bench of the Supreme Court has held that a matrimonial court has the power to order a person to undergo medical tests ; and

[8] (1998) 8 SCC 296
[9] (2003) 1 SCC 500
[10] (2003) 4 SCC 493

passing of such an order by the court would not be in violation of the right to personal liberty under Article 21; and that if a party refuses to submit himself to medical examination despite a court order, the court will be entitled to draw an adverse inference against that party.

(vii) ***Tukaram S. Dighole v. Manikrao Shivaji Kokate***[11] : in which a 2-Judge Bench of the Supreme Court, citing *Ziyauddin Burhanuddin Bukhari* (supra), has held that tape recordings are documents under section 3 of the Evidence Act, which stood on no different footing than photographs; and were admissible after satisfying the three conditions as laid down *inter alia* in *R.M. Malkani* (supra), though with more stringent standards of proof.

(viii) ***Anurag Kumar Singh & Ors. vs. State of Uttarakhand & Ors.***[12] : in which a 2-Judge Bench of the Supreme Court has held that courts cannot give any direction contrary to the statutes or rules made thereunder in purported exercise of judicial discretion.

(ix) ***Anvar P. V. vs. P.K. Basheer & Ors.***[13] : in which a 3-Judge Bench of the Supreme Court has held that electronic record produced for inspection of the court is documentary evidence under section 3 of the Evidence Act, to be proved in

[11] (2010) 4 SCC 329
[12] (2016) 9 SCC 426
[13] (2014) 10 SCC 473

accordance with the procedure prescribed under section 65-B of the Evidence Act.

(x) ***Justice K. S. Puttaswamy (Retd.) & Anr. vs. UoI & Ors.*** (supra) : in which a 9-Judge Constitution Bench of the Supreme Court has held that the right to privacy is a fundamental right; however it is not an absolute right and has to be placed in the context of other rights and values.

(xi) ***Havovi Kersi Sethna vs. Kersi Gustad Sethna***[14] : in which a single Judge of the Bombay High Court has followed the tests laid down *inter alia* in *RM Malkani* (supra) as to the admissibility of tape recorded conversations.

(xii) ***Manohar Lal Agrawal vs. Santosh & Ors.***[15] : in which a Division Bench of the Rajasthan High Court has held that the Family Court has been left free to receive any evidence or material which assists it to deal effectually with a dispute and the provisions of the Evidence Act would not be applicable.

(xiii) ***Preeti Jain vs. Kunal Jain & Anr.***[16] : in which a single Judge of the Rajasthan High Court has held that the 'privilege' in respect of husband-and-wife communication under section 122 of the Evidence Act is eclipsed by section 14 of the Family Courts Act 1984.

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[14] SCC OnLine Bom 120
[15] MANU/RH/0162/1993
[16] SCC OnLine Raj 2838

(xiv) ***Sagrika Debata vs. Satyanarayan Debata & Anr.***[17] : in which a Division Bench of the Orissa High Court has held that consideration of evidence by a Family Court is not restricted by the rules of relevancy or admissibility provided under the Evidence Act.

(xv) ***Akham Ibodi Singh vs. Akham Biradhwaja Singh & Anr***[18]**.**: in which case a single Judge of the Gauhati High Court has held that the Family Court deals with disputes concerning the family by adopting an approach radically different from that adopted in ordinary civil proceedings ; and that section 14 of the Family Courts Act does not suffer from any vice of either arbitrariness or being fanciful.

(xvi) ***Pootholi Damodaran Nair vs. Babu***[19] : in which a single Judge of the Kerala High Court has held that a tape recording can be considered as a statement provided it is not tampered with; and the tests laid down *inter alia* in *R.M. Malkani* (supra) are followed.

Decision of the Family Court :

11. In allowing the husband's application, the Family Court has dealt with the rival contentions of the parties in the following way :

> *"7.1 There can be no dispute to the law laid down in* ***K.S.Puttaswamy & Anr.****'s case* ***(supra).*** *The law, as*

[17] 2009 SCC OnLine Ori 82
[18] 2006 SCC OnLine Gau 276
[19] 2005 SCC OnLine Ker 189

enunciated by a Full Bench (sic) of the Hon'ble Supreme Court of India is binding and sacrosanct. However, this court is of the opinion that the scope of ***K.S.Puttaswamy & Anr.****'s case* ***(supra)*** *is restricted to a stage prior to violation of the right to privacy. The Hon'ble Supreme Court of India has held that a person has a right to maintain his privacy. This right has been conferred the status of a Fundamental right. The protection has been enunciated to be available against state, as well, as non-state entities. However, the consequences of such violation, on the admissibility/ inadmissibility of the evidence collected by such violation, are not the subject matter or have not been discussed in the judgment."*

"7.2 Thus, in the present case, the act of petitioner/ husband of planting an audio-video recorder without the knowledge and permission of respondent, certainly amounts to invasion of respondent's right to privacy. Petitioner had no right to plant such a device. Having planted the said recorded (sic) and made a recording therein, the legally permissible consequences would follow. In appropriate proceedings, petitioner can be held liable for violating the respondent's Fundamental right to privacy. The question that needs to be answered by this court in the present application is, from the next stage onwards i.e. ***'whether the evidence so collected in violation of respondent's Fundamental right to privacy is admissible or not ?.*** *This court is of the opinion that* ***K.S.Puttaswamy & Anr****'s case* ***(supra)*** *is silent on this question. Reliance upon law laid down in* ***X Vs. Hospital Z'****s,* *case* ***(supra)*** *and* ***Sharda Vs. Dharampal's*** *case* ***(supra)*** *also does not answer this question. In* ***X Vs. Hospital Z'****s case* ***(supra),*** *it was held by the Hon'ble Supreme Court that dissemination of information about a person being infected with HIV +ve is not hit by right of*

privacy, as the prospective spouse has a right to protect herself from being infected. In ***Sharda Vs. Dharampal's*** *case* ***(supra)****, Family courts' power to direct a person to undergo medical test was held not violative of Article 21 of the Constitution of India. The judgments relied upon by ld. counsels based on Article 19 & 21 of the Constitution of India, therefore, do not answer the question, which this court is required to answer."*

(Emphasis supplied)

12. The Family Court has further given the following reason for receiving the evidence filed by way of the CD in light of section 14 of the Act :

> *"8.1 It is sec.-14 of the Family Court of Act, which squarely & clearly answers the question posed.* ***Sagarika Devatta's*** *case* ***(supra)*** *elucidates the object of sec.-14 of the Family Courts Act. The legislature's wisdom to keep the procedure in legal aspect of a Family Court, to be simple and non-complicated have been held to be the object of the Sec.-14 of the Family Court Act. For ready reference, Sec.-14 of the Family Court Act is reproduced hereinbelow :*
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> *It is, therefore, evident that the Family Court is within its right to receive any report, statement, document or information, which in the opinion of the court will assist it in effectually dealing with a dispute between the parties; whether such evidence is relevant or admissible or not. Therefore, the question of admissibility of the evidence collected by violating the respondent's right to privacy, would not be gone into, by a Family Court and the evidence shall be taken on record; if the court is of the opinion, that such evidence will assist it in dealing with the dispute effectively."*

"8.2 This court is of the opinion that the conversation between the respondent and her friend, wherein, she has allegedly spoken about the petitioner/ his family and the status of the matrimonial life ***would, certainly assist the court in effectively deciding the dispute*** *between the parties.* ***Such a piece of evidence is certainly relevant****. Therefore, in view of sec.-14 of the Family Court Act, the evidence can not be thrown out on the ground that the same is inadmissible. Dr. Hingorani's argument that the admissibility mentioned in Sec.-14 of The Family Courts Act pertains to admissibility under Indian Evidence Act and not under the Constitution of India, does not impress this court. The question of admissibility has been defined only under the Indian Evidence Act and there is no way that appreciation of admissibility of evidence can be carried out under Constitution of India. Therefore, court is of the opinion that the audio-video recording, as contained in the CD is certainly permissible to be taken on record and considered for effectively adjudicating the dispute between the parties."*

(Emphasis supplied)

13. The Family Court has differed with the view taken by a single Judge of the Rajasthan High Court in ***Vishal Kaushik vs. Family Court & Anr.***[20], holding that judgement to be *per incuriam* for the reason that, according to the Family Court, the law laid down by the Supreme Court in *R.M. Malkani (supra)* as followed in ***State vs. Navjot Sandhu***[21] was not brought to the notice of the Rajasthan High Court and has therefore not been considered.

14. The Family Court has relied essentially upon the law as expatiated by the Supreme Court in *Navjot Sandhu* (supra), as is discussed later in this judgment.

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[20] 2015 SCC OnLine Raj 7851

[21] (2005) 11 SCC 600

<u>Discussion and conclusions</u> :

15. The impugned order requires to be tested on the anvil of well-worn principles of admissibility of evidence ; as moulded in light of section 14 of the Family Courts Act, which creates a special dispensation for a Family Court receiving evidence to effectively decide disputes before it ; and above all in view of the overarching effect of the recent, authoritative recognition given by the Constitution Bench judgment of our Supreme Court to the right to privacy as a fundamental, though not absolute, right. In assessing the scope and operation of section 14 of the Family Courts Act, attention must also be given to the interpretative principles of a 'special law' prevailing over the 'general law' ; and of a 'later statute' prevailing over an 'earlier statute'. The question also needs to be addressed as to whether admissibility is to be decided based only on principles of evidence or also based on constitutional rights and principles. Finally, it also needs to be seen if ethical and moral considerations should also be factored-in for deciding admissibility of evidence.

16. At this point, it would be useful to extract the relevant Constitutional/ statutory provisions which need to be considered. These are:

<u>The Family Courts Act 1984</u>

> *"**14. Application of Indian Evidence Act, 1872.-**A Family Court <u>may receive as evidence</u> any report, statement, documents, information or matter <u>that may, in its opinion, assist</u> <u>it to deal effectually with a dispute</u>, <u>whether or not the same</u> <u>would be otherwise relevant or admissible under the Indian</u> <u>Evidence Act</u>, 1872 (1 of 1872)."*

> *"**20. Act to have overriding effect.-** The provisions of this Act shall have effect notwithstanding anything inconsistent*

therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

(Emphasis supplied)

Indian Evidence Act 1872

*"**5. Evidence may be given of facts in issue and relevant facts-** Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.*

***Explanation—**This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure."*

*"7. **Facts which are the occasion, cause or effect of facts in issue-***

Facts which are the occasion, cause, or effect, immediately or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant."

*"**8. Motive, preparation and previous or subsequent conduct***

Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue

or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1*- The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other section of this Act.*

Explanation 2*—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct is relevant."*

*"**Section 65B : Admissibility of electronic records.***

(1) *Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible."*

(Emphasis supplied)

Constitution of India

*"**21. Protection of life and personal liberty** - No person shall be deprived of his life or personal liberty except according to procedure established by law."*

17. The Statement of Objects and Reasons (SOR) of the Family Courts Act enunciates the main purpose of its enactment in the following words :

"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."

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"2. The Bill inter alia, seeks to—

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

(Emphasis supplied)

meaning thereby, that apart from the emphasis on settlement of disputes by conciliation, the other main objective was to ensure expeditious proceedings inter alia by simplifying the rules of evidence required to be followed by Family Courts.

18. One of the earliest, leading decisions on the question of admissibility of tape-recorded conversations is ***Regina vs. Maqsud Ali***[22], where a secretly tape-recorded conversation was the only incriminating piece of evidence implicating the accused persons for murder. In the face of strong objection raised by the defence however, in exercise of his discretion, the trial judge admitted the tape recording in evidence. In this backdrop, the court of

[22] (1966) 1 QB 688

criminal appeal held that there was no difference in principle between a tape recording and a photograph; accordingly, a tape recording was admissible in evidence provided that its *accuracy could be proved* and the *voices properly identified* and provided the *evidence was relevant* and *otherwise admissible.* The court did not lay down any exhaustive set of rules by which the admissibility of evidence could be judged but observed that such evidence had *always* to be regarded with caution and assessed in the light of all the circumstances of a particular case. The court further observed that but for the fact that the tape recorder was a mechanical device, it was no different from an eavesdropper, and since the accused were not in custody and no caution was required, the use of the tape recorder could not be said to operate unfairly against them. The court said that the *method* of taking the tape recording could not affect its admissibility, which still remained a matter for the discretion of the judge. The court however added that *it should not be taken to be saying* that such recordings are admissible *whatever the circumstances*, but it does appear wrong to deny to the law of evidence advantages to be gained by new techniques and new devices.

19. The law in India in relation to 'admissibility' of evidence is crisp, clear and consistent. A 5-Judge Constitution Bench of the Supreme Court in ***Pooran Mal vs. The Director of Inspection (Investigation), New Delhi & Ors.***[23] (and connected matters) was considering a challenge to the seizure of articles consisting of account books, documents and valuables by Income Tax Authorities, purporting to exercise their authority for search and seizure under section 132 of the Income Tax Act 1961 and Rule 112-A of Income

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[23] (1974) 1 SCC 345

Tax Rules. The legal challenge was that the said provisions were violative of the fundamental rights guaranteed under Articles 14, 19(1)(f), 19(1)(g) and 31 of the Constitution. Enunciating the law on the point, the Supreme Court observed as under:

> *"**23.** * * * * * **
> *Now, if the Evidence Act, 1872 which is a law consolidating, defining and amending the law of evidence, no provision of which is challenged as violating the Constitution — permits relevancy as the only test of admissibility of evidence (See Section 5 of the Act) and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, **it will be wrong to invoke the supposed spirit of our Constitution** for excluding such evidence. Nor is it open to us to strain the language of the Constitution, because some American Judges of the American Supreme Court have spelt out certain constitutional protections from the provisions of the American Constitution. In M.P. Sharma v. Satish Chander already referred to, a search and seizure made under the Criminal Procedure Code was challenged as illegal on the ground of violation of the fundamental right under Article 20(3), the argument being that the evidence was no better than illegally compelled evidence. In support of that contention reference was made to the Fourth and Fifth Amendments of the American Constitution and also to some American cases which seemed to hold that the obtaining of incriminating evidence by illegal seizure and search tantamounts to the violation of the Fifth Amendment. The Fourth Amendment does not place any embargo on reasonable searches and seizures. It provides that the right of the people to be secure in their persons, papers and effects against unreasonable searches and seizures shall not be violated. Thus the privacy of a citizen's home was specifically safeguarded under the Constitution, although reasonable*

searches and seizures were not taboo. Repelling the submission, this Court observed at p. 1096:

> *"A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the **Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy**, analogous to the American Fourth Amendment, **we have no justification to import it**, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches."*

*It, therefore, follows that neither by invoking the spirit of our Constitution **nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search**."*

*"**24.** So far as India is concerned its law of evidence is modelled on the rules of evidence which prevailed in English Law, and **Courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure**. In Barindra Kumar Ghose v. Emperor the learned Chief Justice Sir Lawrence Jenkins says at page 500:*

*"Mr Das has attacked the searches and has urged that, even if there was jurisdiction to direct the issue of search warrants, as I hold there was, still the provisions of the Criminal Procedure Code have been completely disregarded. On this assumption he has contended that the evidence discovered by the searches is not admissible, but to this view I cannot accede. For, without in any way countenancing disregard of the provisions prescribed by the Code, I hold that **what would otherwise be relevant does not become irrelevant because it was discovered in the course***

***<u>of a search in which those provisions were disregarded</u>**. As Jimutavahana with his shrewd common sense observes — "a fact cannot be altered by 100 texts," and as his commentator quaintly remarks: "If a Brahmana be slain, the precept 'slay not a Brahmana' does not annul the murder". <u>But the absence of the precautions designed by the Legislature lends support to the argument that the **alleged discovery should be carefully scrutinized**</u>."*

* * * * * *

In Kuruma v. Queen [1955 AC 197] where the Privy Council had to consider the English Law of Evidence in its application to Eastern Africa, Their Lordships propounded the rule thus:

*"<u>The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the **Court is not concerned with how it was obtained**</u>."*

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In Kuruma case, Kuruma was searched by two police officers who were not authorised under the law to carry out a search and, in the search, some ammunition was found in the unlawful possession of Kuruma. The question was whether the evidence with regard to the finding of the ammunition on the person of Kuruma could be shut out on the ground that the evidence had been obtained by an unlawful search. It was held it could not be so shut out because the finding of ammunition was a relevant piece of evidence on a charge for unlawful possession. In a later case before the Privy Council in Herman
*King v. Queen [(1969) 1 AC 304] which came on appeal from a Court of Appeal of Jamaica, the <u>law as laid down in Kuruma case was applied **although the Jamaican Constitution guaranteed the constitutional right against search and seizure**</u>*
** * * * * * In other words search and seizure for the purposes of preventing or detecting crime reasonably enforced was not inconsistent with the constitutional guarantee against search*

and seizure. It was held in that case that the search of the appellant by a Police Officer was not justified by the warrant nor was it open to the Officer to search the person of the appellant without taking him before a Justice of the Peace. Nevertheless it was held that the Court had a discretion to admit the evidence obtained as a result of the illegal search and the constitutional protection against search of person or property without consent did not take away the discretion of the Court. Following Kuruma v. Queen the Court held that ***it was open to the Court not to admit the evidence against the accused if the Court was of the view that the evidence had been obtained by conduct of which the prosecution ought not to take advantage****.* ***But that was not a rule of evidence but a rule of prudence and fair play****. It would thus be seen that* ***in India****, as in England, where the test of admissibility of evidence lies in relevancy,* ***unless there is an express or necessarily implied prohibition in the Constitution*** *or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out."*

(Emphasis supplied)

20. Following earlier decisions, the position regarding admissibility of evidence is very pithily captured by a 2-Judge Bench of the Supreme Court in *Navjot Sandhu* (supra) as follows :

"154. * * * * * *

The legal position regarding the question of admissibility of the tape-recorded conversation illegally collected or obtained is no longer res integra in view of the decision of this Court in R.M. Malkani v. State of Maharashtra. In that case, the Court clarified that a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible as res gestae under Section 7 of the Evidence Act. Adverting to the argument

that Section 25 of the Telegraph Act, 1885 was contravened the learned Judges held that there was no violation. At the same time, the question of admissibility of evidence illegally obtained was discussed. The law was laid down as follows: (SCC p. 477, para 24)

> *"**There is warrant for the proposition that even if evidence is illegally obtained it is admissible**. Over a century ago it was said in an English case where a constable searched the appellant illegally and found a quantity of offending article in his pocket that **it would be a dangerous obstacle to the administration of justice if it were held, because evidence was obtained by illegal means, it could not be used against a party charged with an offence**. See Jones v. Owens. The Judicial Committee in Kuruma v. R. dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence."*

*"**155.** We may also refer to the decision of a Constitution Bench of this Court in Pooran Mal v. Director of Inspection (Investigation) in which the principle stated by the Privy Council in Kuruma case was approvingly referred to while testing the evidentiary status of illegally obtained evidence.*

*Another decision in which the same approach was adopted is a recent judgment in State v. N.M.T. Joy Immaculate. ****** ”*

(Emphasis supplied)

21. Although in *Puttaswamy* (supra) the 9-Judge Constitution Bench of the Supreme Court has *not dealt with* the law and principles of evidence in the context of the right to privacy, the observations of the Supreme Court in that case that are relevant for purposes of the present discussion are the following :

On the right to privacy being a fundamental right :

> *“644. The right to privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State and non-State actors and allows the individuals to make autonomous life choices.”*

On right to privacy *not* being an absolute right:

> *“325. Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the threefold requirement of (i)* ***legality****, which postulates the existence of law; (ii)* ***need****, defined in terms of a legitimate State aim; and (iii)* ***proportionality*** *which ensures a rational nexus between the objects and the means adopted to achieve them.”*

On the need to place right to privacy in the context of other rights and values:

> *"509. Based upon the prevalent thinking of the US Supreme Court, a seminal judgment was delivered by Mathew, J. in Gobind [Gobind v. State of M.P., (1975) 2 SCC 148 : 1975 SCC (Cri) 468]. This judgment dealt with the M.P. Police Regulations, similar to the Police Regulations contained in Kharak Singh [Kharak Singh v. State of U.P., AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332]. After setting out the majority and minority opinions in the said judgment, Mathew, J. went on to discuss the US Supreme Court judgments in Griswold [Griswold v. Connecticut, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)] and Roe [Roe v. Wade, 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)] . In a very instructive passage the learned Judge held: (Gobind case [Gobind v. State of M.P., (1975) 2 SCC 148 : 1975 SCC (Cri) 468] , SCC pp. 155-57, paras 22-24 & 27-28)*
>
> > " * * * * * *
> >
> > *23. Individual autonomy, perhaps the central concern of any system of limited Government, is protected in part under our Constitution by explicit constitutional guarantees. In the application of the Constitution our contemplation cannot only be of what has been but what may be. Time works changes and brings into existence new conditions.* ***Subtler and far-reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet****. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individuals. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining*

the essence and scope of the right. ***Privacy interest in autonomy must also be placed in the context of other rights and values.***

24. Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-bearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of distinctive characteristics of the right to privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

* * * * * *

27. There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such "harm" is not constitutionally protectable by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures.

28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right to privacy as an emanation from them which one can

> *characterise as a fundamental right, we do not think that the right is absolute."*
> *The Police Regulations were, however, not struck down, but were termed as being perilously close to being unconstitutional."*
>
> (Emphasis supplied)

22. It is crucial to note however, that at the time that the decisions in ***M.P. Sharma & Ors. vs. Satish Chandra & Ors.***[24] and subsequently in *Pooran Mal* (supra) were rendered, privacy was *not* recognised as a fundamental right under the Constitution, as indeed no such right had been expressly enunciated by our Founding Fathers. Today however, in *Puttaswamy* (supra), our Supreme Court has recognised privacy as a fundamental right, while qualifying it to say that the right to privacy is not absolute but is subject to exceptions, limitations and contours ; and must be placed in the context of other rights and values. However, even at the time of *M.P. Sharma* (supra) and *Pooran Mal* (supra), Articles 14, 19(1)(f), 19(1)(g), 20(3) and 31, under which these cases arose, were very much in Part-III of the Constitution dealing with fundamental rights; *and yet the Supreme Court opined that merely because a search or seizure was illegally conducted and may amount to breach of a fundamental right, that would not make the search or seizure invalid in law*. Applying the same principle, this court is of the view that although today, privacy is recognised as a fundamental right, that alone would not make evidence collected in breach of that right, inadmissible. Muchless would it negate the specific statutory dispensation contained in section 14 of the Family Courts Act, which says that evidence

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[24] AIR 1954 SC 300

would be admissible, whether or not the same is otherwise relevant or admissible under the Evidence Act.

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

24. Since no fundamental right under our Constitution is absolute, in the event of conflict between two fundamental rights, as in this case, a contest between the *right to privacy* and the *right to fair trial*, both of which arise under the expansive Article 21, the right to privacy may have to yield to the right to fair trial. Reference in this regard may be made to the observations of a 5-Judge Constitution Bench decision of our Supreme Court in ***Sahara India Real Estate Corporation Limited & Ors. vs. Securities and Exchange Board of India & Anr.***[25] , where the court observes thus :

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

[25] (2012) 10 SCC 603

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

(Emphasis supplied)

25. In fact, the rule of evidence that the test of admissibility of evidence is *only* its relevancy, laid down *inter-alia* in *Pooran Mal* (supra) has been followed by our courts even after *Puttaswamy* (supra). In one of the most recent judgments in ***Yashwant Sinha & Ors. vs. Central Bureau of Investigation through its Director & Anr.***[26], where the issue before the Supreme Court was whether it should permit certain documents, which the State Authorities alleged had been unauthorisedly removed from the records of the Ministry of Defence, to be placed on record in a review petition; and whether the review petitioners should be permitted to rely upon such unauthorisedly procured documents. The Attorney General had submitted that the Supreme Court could not consider these documents. Dealing with this objection the Supreme Court opined as under:

*"**9.** An issue has been raised by the learned Attorney with regard to the manner in which the three documents in question had been procured and placed before the Court. In this regard, as already noticed, the documents have been published in The Hindu newspaper on different dates. That apart, even assuming*

[26] (2019) 6 SCC 1

that the documents have not been procured in a proper manner should the same be shut out of consideration by the Court ? In ***Pooran Mal v. Director of Inspection*** *this Court has taken the view that the "test of admissibility of evidence lies in its relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out".*

* * * * * *

*"**45.** I may also notice another aspect. Under the common law, both in England and in India, the context for material being considered by the court is relevancy. There can be no dispute that the manner in which evidence is got, namely, that it was procured in an illegal manner would not ordinarily be very significant in itself in regard to the court's decision to act upon the same [see in this context judgment of this Court in Pooran Mal v. Director of Inspection]."*

(Emphasis supplied)

26. Coming now to the scope and purport of section 14 of the Family Courts Act, that has been discussed in a judgment of a Co-ordinate Bench of the Bombay High Court in ***Deepali Santosh Lokhande vs. Santosh Vasantrao Lokhande***[27], in which case, while deciding an application to bring on record electronic evidence under section 65B of the Evidence Act, the Bombay High Court has taken the following view :

*"**5.** Having considered the submissions as urged on behalf of the parties, it is quite clear that the proceeding before the Family Court would stand on a different footing from the proceeding before the regular Civil Courts where the rigour of the provisions of the Evidence Act are fully applicable for the*

[27] 2018 (1) Mh. L.J. 944

Civil Court to evaluate the evidence on preponderance of probabilities and for that matter even the proof of electronic record. It is apposite to examine the provisions of section 14 of the Family
Courts Act which reads as under:…..”

* * * * * *

*“6. …….. The object, effect and consequence of this provision is to **remove any embargo** on the Family Court to first examine the relevancy or admissibility of the documents under Indian Evidence Act in considering such documents in adjudication of the matrimonial dispute. The Statement of Object and Reasons leading to the enactment of the Family Court's Act would also become a guiding factor so as to ascertain the intention of the legislature in framing section 14 when it uses the above words. One of the objects of the legislation as Clause 2 (h) of the Statement of Object and Reasons would provide is “simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute”. This clearly manifests the intention of the legislature to remove complexities in the application of rules of evidence to make the procedure more comprehensible so as to enable a Family Court to deal effectively with a matrimonial dispute under the Family Courts Act, which is a special Act.”*

*“**7.** When section 14 stipulates and says that the Family Court can receive a document in evidence irrespective of the same being relevant or admissible in evidence under the Evidence Act, it signifies two important facets namely that the Family Court at the threshold cannot reject a document on the ground that the document is not legally admissible in evidence and secondly the test and rigor of relevancy and admissibility of the document can be dispensed with by the Family Court if the Family Court is of the opinion that any evidence would assist it*

to deal effectively with the dispute. It cannot be disputed that admissibility presupposes relevancy as admissibility is founded on law whereas relevancy is determined by Court using judicial skills, logic and experience. Admissibility does not signify that a particular fact stands proved but merely that such a fact is received by the Court for the purpose of being weighed. The learned Judge overlooked that merely because the documents are marked as Exhibits and the same also becoming available for cross-examination, is neither an admission as to documents nor can be treated as an admission of its contents."

(Emphasis supplied)

Furthermore, discussing the effect of section 20 of the Family Courts Act, which gives overriding effect to that statute, the Bombay High Court has held as under :

*"**9.** A cumulative reading of section 14 and section 20 of the Family Courts Act, takes within its ambit the restricted applications of the provisions of the Evidence Act qua the documentary evidence which includes electronic evidence, whether or not the same is relevant or admissible, if in the opinion of the Family Court such evidence would assist the Family Court to deal effectively with the matrimonial dispute. Considering the above object and the intention of the legislature, in providing for a departure, from the normal rules of evidence under the Evidence Act, in my opinion, there was no embargo for the learned Judge of the Family Court to accept and exhibit the documents as sought by the petitioner-wife. Ultimately, it is the absolute power and authority of the Family Court either to accept or disregard a particular evidence in finally adjudicating the matrimonial dispute. However, to say that a party would be precluded from placing such documents on record and or such documents can be refused to be exhibited unless they are proved, in my opinion,*

goes contrary to the object of section 14 of the Family Courts Act"

*"**10.** In matrimonial cases, the Family Court is expected to adopt standards as to how a prudent person would gauge the realities of life and a situation of commotion and turmoil between the parties and applying the principle of preponderance of probabilities, consider whether a particular fact is proved. Thus, the approach of the Family Court is required to be realistic and rational to the facts in hand rather than technical and narrow. It cannot be overlooked that matrimonial disputes involve human problems which are required to be dealt with utmost human sensitivity by using all intelligible skills to judge such issues. The Family Court has a special feature where in a given case there may not be legal representation of the parties. Section 13 of the Act makes such a provision. In such a situation, the parties who are not experts in law cannot be expected to know the technical rules of the evidence qua the relevancy, admissibility and proof of documents. Thus, the strict principles as referred in the impugned order on the decisions which are not under the Family Courts Act, would not be of any relevance in the proceedings before the Family Court."*

*"**11.** Thus, in my opinion, even if there is any electronic record for which certificate under section 65-B of the Evidence Act is necessary, it would not preclude the learned Judge of the Family Court to exhibit such documents and receive such documents in evidence, on forming an opinion as to whether the documents would assist the Court, to deal effectively with the dispute in hand. Such exercise has not been undertaken in passing the impugned order."*

(Emphasis supplied)

27. In this court's opinion, the Legislature being fully cognisant of the foregoing principle of admissibility of evidence, has enacted section 14 infact to *expand that principle* insofar as disputes relating to marriage and family affairs are concerned ; and the Family Court is thereby *freed of all rigours and restrictions* of the law of evidence. The Legislature could not have enunciated it more clearly than to say that the Family Court *"may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872"*. Therefore the only criterion or test under section 14 for a Family Court to receive, *that is to say admit*, evidence is its subjective satisfaction that the evidence would assist it to deal effectually with the dispute. It may also be relevant to note that under section 13 of the Family Courts Act, parties are to represent themselves without the assistance of lawyers ; and therefore even more so, all technical aspects of admissibility of evidence are to be ignored before a Family Court, since parties appearing in-person cannot be expected to be well versed with the technicalities of the law of evidence. Reference in this regard may be made to the observations made by a Division Bench of the Bombay High Court in ***Shiv Anand Damodar Shanbhag vs Sujata Shiv Anand Shanbhagh***[28].

28. For the record, the *vires* of section 14 of the Family Courts Act has *not* been challenged by the petitioner in these proceedings.

29. To be sure, in view of the expressed intention of the Legislature in section 14 of the Family Courts Act, all that is being said here is that

[28] 2013 SCC OnLine Bom 421

evidence, whether collected legitimately or otherwise, may be *received* by the Family Court if it is of opinion that the evidence would assist it to effectively decide the dispute. It is not being suggested that the Family Court is *bound to believe, accept or act upon* such evidence for purposes of adjudication.

30. As observed by the Bombay High Court in the aforementioned case, it is noteworthy that, what is permitted under section 14 is *only* for the Family Court to *receive* evidence without the rigours and shackles of the conventional rules of evidence, with the *only* threshold test being that in the opinion of the Family Court that piece of evidence will assist it to deal effectively with the dispute at hand. Thereafter however, the Family Court is free to either accept or discard or give weightage or disregard a particular piece of evidence when finally adjudicating the dispute. As under the ordinary law of evidence, so also under section 14, *there is absolutely no compulsion on the Family Court to accept a given piece of evidence as proof of a fact-in-issue or of a relevant fact*, merely because such evidence has been taken on record by disregarding all rigours of the rules of evidence. Correspondingly, it is open to the contesting party to dispute, cross-examine and disprove the evidence so cited; and to thereby contest any claim being made on the basis of such evidence. The limited relaxation as it were, in section 14 is that even if under the Evidence Act or under conventional rules of evidence, a certain piece of evidence (whether a report, statement, document, information or other matter) is *ex-facie* found to be *not* relevant and therefore *not* admissible, the Family Court *may yet receive* such evidence on record if in its opinion, the evidence would assist it to deal

effectively with the dispute. What credence, value or weightage is to be given to the evidence so received is discretionary upon the judge, when finally adjudicating the dispute.

31. Another settled principle of interpretation of statutes that guides us in understanding the scope and operation of section 14 is the maxim *'generalia specialibus non derogant'*. In ***Barker vs. Edger & Others***[29], the Privy Council of the House of Lords has pithily summarised the purport of the maxim in the following words :

> *"The general maxim is, "Generalia specialibus non derogant." When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."*

While in the above case, the Privy Council was dealing with a *subsequent* general enactment, the principle applies *a fortiori* to a *subsequent* special enactment. That is to say, a special enactment would prevail, whether made earlier or subsequently, over a general enactment *if that is the discernible intention of the Legislature* in relation to the subject matter of the special enactment. Our Supreme Court has also dealt with the issue in ***Sharat Babu Digumarti vs. Government (NCT of Delhi)***[30] in which the issue was of construing section 81 of the Information Technology Act 2000, which provision is in *pari materia* with section 20 of the Act and

[29] 1898 AC 748

[30] (2017) 2 SCC 18

gives an overriding effect to the Information Technology Act over anything inconsistent therewith contained in any other law for the time being in force. The other provision of law in question was section 292 of the Indian Penal Code 1860 which makes the sale of obscene books etc. a penal offence. In *Sharat Babu Digumarti* (supra), the Supreme Court has opined as under :

> *"**32.** Section 81 of the IT Act also specifically provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. All provisions will have their play and significance, if the alleged offence pertains to offence of electronic record. It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are inclined to think so as it is a **special provision for a specific purpose** and the Act has to be given effect to so as to make the protection effective and true to the legislative intent. This is the mandate behind Section 81 of the IT Act. The additional protection granted by the IT Act would apply."*
>
> * * * * * *
>
> *"**37.** The aforesaid passage clearly shows that if legislative intendment is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. We have already referred to the scheme of the IT Act and how obscenity pertaining to electronic record falls under the scheme of the Act. We have also referred to Sections 79 and 81 of the IT Act. Once the special provisions having the overriding effect do cover a criminal act and the offender, he gets out of the net of IPC and in this case, Section 292. It is apt to note here that electronic forms of transmission are covered by the IT Act,*

> *which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence under Section 292 IPC."*
>
> (Emphasis supplied)

32. To address the aspect whether ethical and moral considerations should be factored-in to decide admissibility of evidence, attention may be drawn to the observation of the Supreme Court in *Pooran Mal* (supra), where the court said that when there is no express or specifically implied prohibition in the Constitution, it is uncalled for and unwarranted to invoke the *spirit* of the Constitution to exclude evidence. Equally so, in the face of the settled rule of evidence as augmented by section 14 of the Family Courts Act, it would be unwarranted to bring into the picture *subjective and undefined ethical and moral values or considerations*, to decide if evidence should even be *receivable* by a Family Court. Without at all denigrating the importance of ethical and moral considerations, in the opinion of this court, to say that a Family Court should shut-out evidence at the very threshold on the basis of how it is collected, would be *(i)* in breach of section 14 which unequivocally expresses the intention of the Legislature ; *(ii)* in breach of settled principles of evidence ; and *(iii)* in breach of the enunciation by the Supreme Court that though the right to privacy is a fundamental right, *it is not absolute and must be placed in the context of other rights and values*. Such construction would have more potential for mischief than possible salutary effect.

33. If it were to be held that evidence sought to be adduced before a Family Court should be excluded based on an objection of breach of privacy

or some other cognate right, then in many a case the provisions of section 14 would be rendered nugatory and dead-letter. It must be borne in mind that Family Courts have been established to deal with what are essentially sensitive, personal disputes relating to dissolution of marriage, restitution of conjugal rights, legitimacy of children, guardianship, custody, and access to minors; which matters, by the very nature of the relationship from which they arise, involve issues that are private, personal and involve intimacies. It is easily foreseeable therefore, that in most cases that come before the Family Court, the evidence sought to be marshalled would relate to the private affairs of the litigating parties. If section 14 is held not to apply in its full expanse to evidence that impinges on a person's right to privacy, then section 14 may as well be effaced from the statute. And yet, falling back upon the general rule of evidence, the test of admissibility would *only* be relevance ; and accordingly, even ignoring section 14, fundamental considerations of fair trial and public justice would warrant that evidence be received if it is relevant, regardless of how it is collected. No purpose would therefore be served by emasculating the salutary provisions of section 14 of the Family Courts Act by citing breach of privacy. Looking at it dispassionately, *even assuming* evidence is collected in breach of privacy, at best and at worst, it is the *process of collection* of evidence that would be tainted *not the evidence itself*.

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

(a) The settled rule, purely from the standpoint of the law of evidence, is that *evidence is admissible so long as it is relevant,*

regardless of how it is collected. Digressing from this settled position would have wide ramifications and consequences; and would be a serious hindrance to judicial proceedings across the board, in several foreseeable and unforeseeable ways. On the other hand, the possible misuse of this rule of evidence, particularly in the context of the right to privacy, can be addressed by prudent exercise of judicial discretion by a court *not* at the time of *receiving* evidence *but* at the time of *using* evidence at the stage of adjudication ;

(b) Merely admitting evidence on the record is *not* proof of a fact-in-issue or a relevant fact ; admitting evidence is *not even* reliance by the court on such evidence ; admitting evidence is *mere inclusion* of evidence in the record, to be assessed on a comprehensive set of factors, parameters and aspects, in the discretion of the court ;

(c) The limited threshold test of 'relevance' ensures that the right of a party to *bring* evidence to court, and thereby to a fair trial, is not defeated. What weight is to be given to evidence so brought-in, and whether or not the court ultimately relies upon such evidence for proof of a fact-in-issue or a relevant fact, is always in the discretion of the court. This, a court may do on other considerations, including considerations of justice and fair play. We must be clear that the test of admissibility is only a 'threshold test', which opens the doors of the court, as it were, so that relevant evidence brought by a litigating party is

permitted entry into the court records. It does not bind the court to treat such evidence as proof of a fact-in-issue or relevant fact. Section 14 of the Family Courts Act makes this threshold test even less stringent, in that the Family Court may receive evidence, whether or not it would otherwise be relevant or admissible under the Evidence Act, provided in its opinion such evidence would assist it in effectively dealing with the dispute;

(d) It appears that a crucial facet of the above rule of evidence has so far been ignored, namely the consequences that may follow if evidence is collected illegally by violation of someone's rights. Merely because a court allows evidence to be admitted, does not mean that the person who has illegally collected such evidence is absolved of liability that may arise, whether in civil or criminal law or both ;

(e) Although *MP Sharma* (supra) and *Pooran Mal* (supra) were decided before the right to privacy was authoritatively recognised as a fundamental right in *Puttaswamy* (supra), the challenge in those two cases also arose from allegations of violation of fundamental rights *inter alia* under Articles 20(3) and 14 of the Constitution. Also, the decision in *Puttaswamy* does *not* allude to any change in the principles of admissibility of evidence by reason of recognition of privacy as a fundamental right ; and in fact the principle of *Pooran Mal* has been followed by the Supreme Court even as recently as 2019 in *Yashwant Sinha* (supra), which is a post-*Puttaswamy*

judgment, though in the context of documents procured illegally from a ministry and not in breach of any fundamental right ;

(f) Drawing from the observations of the Supreme Court in *Tukaram S. Digole* (supra), a word of caution would be in place here. The Family Court must bear in mind that tape recordings are more susceptible to tampering and alteration by transposition, excision etc., which may be difficult to detect; and therefore such evidence must be received and treated with caution and circumspection ; and, to rule-out the possibility of any kind of tampering, the standard of proof applied by a court for the authenticity and accuracy of a tape recording should be more stringent as compared to other documentary evidence;

(g) In the context of section 50 of the NDPS Act, in *Baldev Singh* (supra) the Supreme Court has said that while considering the aspect of fair trial, the nature of evidence obtained and the nature of the safeguard violated are both relevant factors. If therefore, evidence has been collected in a search conducted in violation of the statutory mandate of section 50 of the NDPS Act, the admission of such evidence would make the trial unfair ; and in that circumstance, the evidence must be excluded. Under the Family Courts Act, on the other hand, the statutory mandate of section 14 is to relax the rules of admissibility of evidence, which relaxation must therefore guide the Family Court.

35. That being said however, considering the breadth of the power conferred upon it under section 14 of the Family Courts Act, some safeguards are required to be considered by the Family Court while exercising its power to receive evidence under that provision. *Firstly*, even though a given piece of evidence may have been admitted on the record, the Family Court must be extremely circumspect in what evidence it chooses to *rely upon* in deciding the dispute, particularly the authenticity and genuineness of the evidence, for which stringent standards must be applied. *Secondly*, if in its opinion the nature of the evidence sought to be adduced is inappropriate, embarrassing or otherwise sensitive in nature for any of the litigating parties, or for that matter for some other person not directly connected with the litigation, the court may restrict the parties who are present in court at the time of considering such evidence ; or may anonymise or redact the evidence ; or may conduct *in-camera* proceedings so as not to cause distress to any person or party, while at the same time not hesitating to receive evidence that the Family Court considers necessary for effectively deciding the dispute. All proceedings must be conducted strictly within the bounds of decency and propriety; and no opportunity should be given to any party to create a spectacle in the guise of producing evidence. *Thirdly*, in egregious cases, the Family Court may initiate or direct initiation of legal action against a litigating party or other person, who may appear guilty of procuring evidence by illegal means. Any party aggrieved by the production of such evidence would also be at liberty to initiate appropriate proceedings, whether in civil or criminal law, against concerned parties for procuring evidence illegally, although the initiation or pendency of such proceeding

shall not make the evidence so produced inadmissible before the Family Court.

36. It may be noted that in the impugned order the Family Court has expressed its subjective opinion that the recording comprised in the CD will certainly assist it in deciding the dispute between the parties ; and that therefore the evidence on the CD is relevant. Even otherwise, the conversation between the wife and her friend, which is the subject matter of recording on the CD, in which she is alleged to have spoken about the husband and his parents, would be a 'relevant fact' as understood in law, upon a combined reading of sections 5, 7 and 8 of the Evidence Act. To that extent therefore, the contents on the CD are relevant for purposes of the divorce proceedings.

37. While consistency in law is of utmost importance and law must get its full play regardless of the fact situation, this court must record the unease it feels with regard to a certain aspect that has arisen in this matter. Marriage is a relationship to which sanctity is still attached in our society. Merely because rules of evidence favour a liberal approach for admitting evidence in court in aid of dispensation of justice, this should not be taken as approval for everyone to adopt any illegal means to collect evidence, especially in relationships of confidence such as marriage. If the right to adduce evidence collected by surreptitious means in a marital or family relationship is available without any qualification or consequences, it could potentially create havoc in people's personal and family lives and thereby in the society at large. For instance, if a spouse has the *carte blanche* to install a recording device in a bedroom or other private space or to adopt any means

whatsoever to collect evidence against the partner, even if in circumstances of matrimonial discord, it would be difficult to foresee the length to which a spouse may go in doing so ; and such possibility would itself spell the end of the marital relationship. It is not uncommon for spouses to continue living together, even in matrimonial strife, for years on-end. So, *while law must trump sentiment, a salutary rule of evidence or a beneficent statutory provision, must not be taken as a license for illegal collection of evidence*.

38. In the above view of the matter, and subject to the above observations, this court finds no infirmity in the impugned order and the same is upheld.

39. The petition is disposed of in the above terms, leaving the parties to bear their respective costs.

40. Pending applications, if any, shall also stand disposed of.

ANUP JAIRAM BHAMBHANI, J.

June 30, 2020
vk/Ne