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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FAMILY COURT APPEAL NO.132 OF 2008

WITH

CIVIL APPLICATION NO.189 OF 2009

WITH

CIVIL APPLICATION NO.215 OF 2009

WITH

CIVIL APPLICATION NO.193 OF 2013

WITH

CIVIL APPLICATION NO.348 OF 2015

Husband

... Appellant

Versus

Wife

... Respondent

WITH

FAMILY COURT APPEAL NO.109 OF 2008

WITH

CIVIL APPLICATION NO.293 OF 2008

WITH

CIVIL APPLICATION NO.258 OF 2013

Wife

... Appellant

Versus

Husband

... Respondent

Smt. Manjula Rao a/w Ms. Neena Shah, Ms. Sushmitha Sherigar and Ms. Lavanya Mudaliar for the Appellant (husband) in FCA/132/2008, for Applicant in CAM/189/2009, for Respondent in FCA/109/2008, CAM/215/2009, CAM/193/2013, CAM/348/2015, CAM/293/2008, CAM/258/2013.

Mr. Mihir Desai, Senior Advocate and Mr. Javed Patel and Ms. Devyani Kulkarni i/by Judicare Law Associates for the Appellant (wife) in FCA/109/2008, for Applicant in CAM/215/2009, CAM/193/2013, CAM/348/2015, CAM/293/2008, CAM/258/2013 and for Respondent in FCA/132/2008, CAM/189/ 2009.

**CORAM : A.S. OKA &
SMT. ANUJA PRABHUDESSAI, JJ.**

DATE ON WHICH SUBMISSIONS WERE HEARD : 11.08.2017

DATE ON WHICH JUDGMENT IS PRONOUNCED : 13.10.2017

JUDGMENT (PER A.S. OKA, J.):

1 These two appeals can be conveniently disposed of by a common judgment and order as both the appeals arise out of the same matrimonial Petition before the Family Court at Bandra, Mumbai. We are directing that the names of the parties and their children should be masked.

2 Marriage Petition No.A-531 of 2004 was filed by the wife in the Family Court in Bandra, Mumbai. The marriage between the parties was solemnized on 25th June, 1989. There are two issues born from the said marriage. The daughter is born on 19th September, 1993 and the son is born on 9th February, 2001. Both the children are admittedly citizens of Sweden. Today, the husband along with the children is residing in Sweden and the wife is residing in Mumbai. Initially in the Petition filed by the wife, she sought a decree of judicial separation under Section 10 of the Hindu Marriage Act, 1955 (for short “the said Act”). By carrying out an amendment, by way of a prayer made in the alternative, she sought a decree of divorce under clause (i-a) of Sub-

Section (1) of Section 13 of the said Act. The wife also prayed for custody of both the minor children. The wife prayed for a money decree against husband in the sum of Rs.44,89,000/- with interest thereon at the rate of 18% or at market rate, whichever is more. In addition, she prayed for maintenance for herself at the rate of Rs.35,000/- p.m and for minor children at the rate of Rs.11,000/- p.m. By the judgment and decree dated 5th March, 2008 the learned Judge of the Family Court at Mumbai dismissed the prayer for divorce. The learned Judge held that the wife was entitled to retain custody of both the children. A direction was issued to grant weekend access to enable the husband to meet the children. The husband was directed to pay maintenance at the rate of Rs.11,000/- p.m from the date of the order. An order was also passed to provide vacation access to the wife. Family Court Appeal No.132 of 2008 has been preferred by the husband being aggrieved by the decree passed by the Family Court retaining the custody of the minor children with the wife and directing payment of maintenance to the children. Family Court Appeal No.109 of 2008 has been preferred by the wife being aggrieved by the rejection of the prayer for divorce, the rejection of the prayer for passing a money decree in the sum of Rs.44,89,000/- with interest thereon and the rejection of the prayer for grant of maintenance to herself.

3 At the outset, we may note here that now the controversy between the parties which is the subject matter of these Appeals has been narrowed down. The order dated 24th March, 2017 passed by this Court is relevant. The order was passed when hearing was conducted through video conferencing on the fourth floor of the High Court Annex Building at 5.30 pm on that day. As the husband along with the children, is in Sweden, hearing was conducted by using the medium of video conferencing. Paragraphs 1 to 4 of the said order read thus :-

- “1. The Appeal was fixed for final hearing today at 3.00 p.m. in the Court. It was heard for some time on the last date. After hearing the parties for some time, the parties agreed to settle certain contentious issues such as dissolution of marriage and withdrawal of rival allegations and accusations based on which, a decree of divorce was sought. The Appellant and the Respondent both agreed to relinquish their right, title or interest and/or claims against each other's properties and inheritance acquired before or after the divorce anywhere in the world. The parties have agreed to complete the formalities as regards their divorce. It was agreed that in the present Appeals, a decree will be applied in terms of Section 13B of the Hindu Marriage Act, 1955. The Appellant-wife agreed to sign Swedish Divorce Application. As regards the custody of the son Smyan, the wife agreed that the custody will be retained with the husband. The issue which remains to be sorted out is of grant of reasonable visitation rights and access to the mother. As regards the daughter Natasha, the wife is insisting on her custody. The other contentious issues which remain are as regards refund of the sum of Rs.44,89,000/and maintenance as prayed in Prayer Clauses (c) and (c)(i) of the Petition No.A-531 of 2004.
2. The learned senior counsel appearing for the Appellant-wife and the learned counsel appearing for the Respondent-husband have tendered the consent terms

which are signed in our presence by the Appellant wife and the Advocate on record for the Appellant-wife and the Advocate on record for the Respondent-husband. Today, we had a meeting/hearing through video conferencing. The husband who is in Sweden stated that he has agreed to the consent terms. The signature of the husband will be obtained by sending a copy of the consent terms to him. During the course of meeting/hearing through video conferencing, there was some dialogue between the son and the mother. The mother could see the daughter. It was agreed to have a meeting/hearing through video conferencing on 21st April 2017 around 5.00 p.m.

3. The consent terms are taken on record and marked "C1" for identification. We accept the statements and undertakings of the Appellant and the Respondent incorporated in the consent terms respectively.
4. Another document is tendered which is signed by the Advocates for both the parties and the Appellant wife wherein the issues which will need adjudication by this Court in the pending Appeals have been set out. The same is taken on record and marked "C2" for identification."

4 The consent terms marked as 'C-1' have been signed by the appellant, the Advocate for the appellant and the Advocate for the respondent. Though the respondent has not signed the said consent terms, in the second paragraph of the aforesaid order, the consent of the husband has been recorded. Even at the conclusion of the hearing of this Appeal, the learned counsel appearing for the husband has stated that a decree be passed in terms of the consent terms. The consent terms marked as 'C-1' read thus :

“CONSENT TERMS

1. The Appellant wife and the Respondent husband have agreed to convert the above Appeal to a Petition under section 13(b) of the Hindu Marriage Act, 1955 and resolve the dispute by agreeing to divorce by mutual consent.
2. The parties hereto agree and undertake to withdrew all the allegations and accusations relating to the relief of decree of divorce made against each.
3. The Appellant and respondent agree undertake that they relinquish their right and/or interest and/or claims against each other's properties, inheritance acquired before or after the divorce anywhere in the world.
4. That the Appellant agrees and undertakes (i) to sign the Swedish divorce Application in India to dissolve the marriage dated 2506.1989 in Sweden on a no fault basis, without prejudice to her right to claim the return of Rs.44,89,000/- with interests as prayed in clause (c) of a the Petition, (ii) her maintenance and alimony of Rs.35,000/- as prayed in clause (c) (i) of the Petition (iii) custody of Natasha and reasonable access of Smyan in India agrees to confine her claim in the above Appeal as stated herein. The Appellant undertakes not to make any further claim of maintenance and/ or any monetary claim in future against the Respondent.
5. The Appellant and the Respondent have signed the present Consent Terms out of their own free will without coercion and/ or force and have signed after reading and understanding the contents of the same.

However, it is clarified that the Appellant has agreed to sign divorce form to be presented in Swedish Court on the representation made by the Respondent that her presence in Sweden will not be required.”

5 The document signed by the Advocates for the parties and the wife are marked as 'C-2' reads thus :-

**“BY CONSENT FOLLOWING ISSUES WILL BE ADJUDICATED
IN the ABOVE APPEAL**

1. The issue of monetary claim made by the Appellant wife i.e. (i) return of the sum of Rs.44,89,000/- and (ii) the maintenance as prayed in prayer clause (c) and (c) (i) of the Petition No.A-531 of 2004.
2. The issue of the custody of the girl child Natasha to Appellant wife.
3. The issue of access to Smyan in India.”

6 Thus, now these Appeals remain confined to the three issues which are noted in the document marked as 'C-2'.

7 We must note here that the arrangement in terms of clause 4 of the consent terms at Exhibit 'C-1' could not be worked out for various reasons. Nevertheless, the learned counsel appearing for both the husband and wife have stated that a decree under Section 13-B of the said Act be passed.

8 After having perused the allegations and counter allegations and the manner in which parties have contested the matter, we find that there is an irretrievable breakdown of the marriage. The Petition before the Family Court was presented on 5th April, 2004. Before the Family Court and even before this Court, there have been attempts to save the marriage which have completely failed. Therefore, this is a fit case where parties should be allowed to convert the Petition by amending prayer clauses (a) and (a-1) into a Petition seeking a decree of divorce under Section 13-B of the said Act. Apart from the fact that once conversion is permitted, the amendment will relate back to the date of the institution of the Petition, now the law is well settled. The Apex Court in the case of *Amardeep Singh Vs. Harveen Kaur*¹ held that the cooling period of six months can be waived. Considering peculiar facts of the case, perhaps there cannot be a better case to condone the cooling period. Therefore, we are of the view that this is a fit case where the marriage between the parties should be dissolved by a decree of divorce by mutual consent under Section 13-B of the said Act.

9 Before we refer to the orders passed by this Court on the issue of custody from time to time and other factual aspects as well as legal submissions, we may note here that now the appeals are being

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confined to the three issues which are set out in the document marked as 'C-2' which is reproduced above.

10 Now, we may make a reference to the various orders passed by this Court and the Apex Court dealing with the issue of custody of the children. Civil Application No.189 of 2009 in the Appeal preferred by the husband came up before a Division Bench of this Court on 29th September, 2015. We may note here that a Petition filed by the wife for the guardianship of the daughter is pending. We are not dealing with the merits of the said proceedings. Paragraphs 21, 22 and 23 of the order dated 29th September, 2015 read thus :-

“21. Taking into consideration these peculiar circumstances, we have come to the conclusion that it would not be advisable to keep Smyank any longer in Mumbai against his wishes. During the course of interview, we found that, at times, he was locked in a room, though this allegations is vehemently denied by the Respondent/wife. It did appear to us that the child was being kept in Mumbai against his wishes.

22. We are aware that Smyank, at the moment, is taking education in one of the best schools in Mumbai and that his academic record is very good and that in the past he had not behaved in the manner in which he had behaved recently in the last two/three weeks. However, the fact remains that if this is a state of mind of the child which is adolescent and is neither a child nor an adult, it is possible that it may affect him in one way or other which may result in child taking some drastic steps. Under these circumstances, keeping in mind the present condition of the child, we are of the view that he may be permitted to go to Sweden alongwith his father, subject to the following conditions being

imposed:-

- (i) The Applicant/husband shall take his wife to the School where the admission is to be given to Smyank and he will ensure that if admission is granted he will continue to take education in that School and provide all facilities and pay school fees and incur all expenditure for that purpose.
- (ii) Secondly, within four weeks, if the admission is not obtained, the Applicant/husband would send the child back alongwith his mother so that he can continue to take education in Mumbai. In such an eventuality, we request the School Authorities at Mumbai to condone his absence.
- (iii) We are informed that Diwali Vacations are going to commence from 08/11/2015 to 18/11/2015. In case admission is not given to the child in School in Sweden, the Applicant/husband shall ensure that by 18/11/2015 the child should be returned along with his mother to Mumbai.
- (iv) In the event, the admission is given to the child in any School in Sweden and after sometime if he feels that he is not comfortable in Sweden, he may be sent back to Mumbai and husband shall accompany him and ensure that his custody is handed over to Respondent/wife.”

(emphasis added)

11 The same order notes that the daughter is suffering from an ailment known as 'down syndrom'. The order notes that she is able to communicate in low voice. Paragraph 24 notes the views expressed by the daughter when the Division Bench had a dialogue with her. Paragraph 24 reads thus :-

“24. So far as daughter Natasha is concerned, she is an adult. Though she is suffering from down syndrome, she is in

a position to communicate in a low voice. **We found that the child is comfortable with the father. When she was interviewed in our Chamber. It is not in dispute that Natasha was in the custody of the applicant/husband for two years though, according to the Respondent/wife this was contrary to the orders passed by the Court. Secondly, it has been stated in the affidavit of the Applicant/husband that during her adolescence, the Applicant/husband had looked after her and had made her self reliant during her menstruation period. We have noticed that she is very comfortable with her father and not comfortable with her mother and when we asked her the question whether she would like to be with her mother, she had replied “never ever”.**

(emphasis added)

12 Paragraph 29 of the said order reads thus :-

“29. We are informed at this stage that though the custody of Natasha was continued with the Applicant/husband, sister of the Respondent/wife has taken away Natasha from the School and the Counsel for Respondent/wife was unable to tell us her whereabouts. This is unfortunate to say the least. When specific orders were passed that temporary access which was given to the Applicant/husband was continued by this Court, the orders passed by this Court could not have been disobeyed. **Be that as it may, custody of Natasha may be handed over to the Applicant/husband so that he can take appropriate steps for getting exit visa from the appropriate authority.**”

(emphasis added)

13 As noted in the order dated 8th October, 2015, the order dated 29th September, 2015 was challenged by the wife before the Apex Court. Though, the Apex Court did not interfere with the order, a liberty was granted to the wife to apply for modification. Further order dated

8th October, 2015 passed by this Court issues the following two directions :-

- “9. We hope that wiser counsel would prevail on the Respondent/wife and she would comply with the order passed by this Court. Since the son Smyan has been admitted in a school in Sweden, necessary formalities, such as, temporary passport be issued to him by the Swedish Authority. **We direct the Respondent/wife to handover custody of daughter Natasha to the Petitioner within twenty four hours.**
10. The F.R.R.O. to issue Exist VISA to both son Smyan and daughter Natasha. The undertaking, which was directed to be given by the Petitioner, is tendered on record. The same is taken on record.”

(emphasis added)

14 The order dated 9th October, 2015 notes that as per the order dated 8th October, 2015, the wife has handed over the custody of the daughter to the husband.

15 Thereafter, an application for modification being Civil Application (St) No.28053 of 2015 was filed by the wife on 12th October, 2015. By order dated 12th October, 2015, the said application was rejected. Paragraphs 8 and 9 of the said order read thus :-

- “8. In our view, therefore, no case is made out by the Applicant/wife for modification of the order at this stage. Appellant/husband has already given an undertaking to this Court that he has roots in India and his brother and other family members are residing at Bangalore. In view of this, it is not necessary to obtain any other security. However, the undertaking given by the Appellant/husband that he will bring back the

children on a day fixed by this Court is accepted. We, therefore, reject the application for modification of the order. However, we make it clear that this is a temporary arrangement and the Appellant/husband shall bring both the children to India on 23/12/2015 at 3.00 P.M. in this Court and file an affidavit, stating therein the facilities which are provided to Natasha alongwith medical certificate of the Hospital from Sweden where she was examined and produce other relevant material. Necessary formalities therefore be completed by FRRO, so that both the children can be taken to Sweden. Applicant/wife if she is still willing to travel to Sweden alongwith children, necessary arrangement would be made by the Appellant/husband as per undertaking given by him.

- 9 We are informed that, today, the Applicant/wife is not in a state of mind to travel to Sweden alongwith the children. However, in future, if she wants to travel to Sweden, undertaking given by the Appellant/husband may be made applicable to her subsequent date on which she intends to travel to Sweden. Mrs. Manjula Rao, the learned Counsel for the Appellant/husband has submitted that undertaking to provide for her residence and for her air-tickets to travel to Sweden also would be made applicable to her traveling to Sweden on subsequent date. She submitted that whenever the Applicant/wife wishes to travel to Sweden, applicant may give an intimation to her in advance so that proper arrangement can be made. Applicant/wife is directed go with the Counsel for Appellant/husband for signing the necessary relevant documents by tomorrow before the Swedish Council.”

16 The order dated 12th October, 2015 was challenged by the wife by filing Special Leave Petition (C) No.2967 of 2015. In the said SLP by order dated 15th October, 2015 parties were permitted to approach a specialist to make a complete assessment of medical condition of the daughter, her present treatment and prospects

consequent upon her travel to Sweden and the resultant change of living environment. Under the same order, no objection of the wife was recorded to enable the son to travel with his father to Sweden. Under the order dated 15th October, 2015 it was directed that if the husband travels to Sweden along with the son, the custody of daughter will remain with her parental grand-parents with liberty to wife to meet her every alternate day.

17 The order dated 28th October, 2015 passed by the Apex Court notes that the direction issued on 15th October, 2015 to get assessment of medical condition of the daughter done through a specialist has not been complied with. Under the said order, the husband along with son and daughter were permitted to travel to Sweden on 29th October, 2015 subject to undertaking of the father to come back to India on 16th November, 2015 along with the daughter. The Apex Court directed the examination of the daughter by All India Institute of Medical Sciences (AIIMS). On that day, the Hon'ble Judges of the Apex Court interacted with the daughter. After interacting with the daughter, the Apex Court made the following observation :-

“..... Accordingly, in the presence of her parents, we have interacted with Ms. Natasha. We are satisfied that M. Natasha can be in the custody of the father and she can accompany her father for Sweden, for the present, to continue her studies.”

18 Ultimately on 18th April, 2016 the wife withdrew the Special Leave Petition.

19 By order dated 20th April, 2017 this Appeal was specially assigned to this Bench. Before that on 24th March, 2017 hearing was conducted through video conferencing on the 4th Floor of the High Court Annex Building. The Bench interacted with the wife and husband (via video conferencing) who was in Sweden. The order passed on that day records that during the course of hearing through video conferencing, there was some dialogue between the son and the mother. The mother could see the daughter. Further video conferencing hearing was held on 21st April, 2017 when the mother had a dialogue with the son.

20 The learned Senior Counsel appearing for the wife submitted that though the husband has no objection for the wife travelling to Sweden to meet the son, due to various concerns, the wife is unable to visit Sweden though she is a Swedish National. He submitted that the husband be directed to send the son to India during the school vacations so that the mother will be able to enjoy his company. We must note here that at one stage, during video conferencing meeting, we had suggested that wife should travel to

England or to some other country in Europe so that the son can be taken by the husband at that place to enable the wife to meet him. However, we find that the son was not willing to travel out of Sweden for meeting the mother.

21 The learned Senior Counsel appearing for the wife also made certain submissions on the issue of custody, issue of guardianship of the daughter by placing reliance on several decisions and other material. We must note here that when we pointed out to him that Guardianship Petition filed by the wife is pending and therefore, we do not wish to touch the issues involved in the said Petition, the learned Senior Counsel has confined his submissions only to the custody. He would urge that considering the ailment suffered by the daughter, it is in the interests of the daughter that she is in the company of mother rather than father. He submitted that the father may not be able to look after the interests of the daughter especially considering her health condition and therefore, it is necessary that the custody is retained with the mother. He relied upon several decisions laying down the law as regards approach of the Court in custody matters. He submitted that the welfare of the daughter lies in allowing her mother to take her care and therefore, her custody be handed over to mother. He urged that the wife is entitled to access to meet the son. Therefore, a direction be

issued to the husband to bring the son to India during his school vacations.

22 The learned Senior Counsel appearing for the wife invited our attention to various documents placed on record as regards the claim of the wife for recovery of the sum of Rs.44,89,000/-. He invited our attention to various documents on record. He submitted that as per the Swedish laws it is true that certain amount was paid to the wife for taking care of the disabled child. He pointed out that certain amounts were transferred from the bank account of the wife to the account of the husband. He submitted that the wife has an explanation for each and every entry in her bank account. He also pointed out the material on record as regards the salary and income of the husband. He invited our attention to the cross-examination of the husband made by the Advocate for the wife. He pointed out that the husband admitted that he was having account in Skandia Banken bearing No.915006740-5 in Sweden. He pointed out paragraph 259 of the cross-examination of the husband wherein he admitted transfer of an amount of 5,00,000 skr from account of the wife to the Account No.1160354830562. He urged that there is an entry of transfer of amount of Rs.2,50,000 skr from the account of the wife to the aforesaid account of the husband. He pointed out that the respondent erroneously claimed that the account to which

amount was transferred was not his account which is contrary to the documentary evidence on record. He also has taken us through the relevant pleadings and documents on record. He submitted that there is a documentary evidence to show that amounts of Rs.5,00,000/- and 2,50,000/- skr were transferred from the account of the wife to the husband's account. He pointed out that the entries of maintenance charges in respect of societies/buildings reflected from the account of the wife are in respect of flat owned by her father and merely because she may have paid maintenance charges, it cannot be said that she is the owner of the flats. He submitted that admittedly at all relevant time, the wife had no income and even today, she does not have income. He pointed out that even assuming that certain amount was paid to the wife by Swedish Government for taking care of handicapped child, that is no ground to deny maintenance to the wife. He pointed out various parts of the oral evidence of both the husband and wife and urged that considering very high income of the husband, the wife is entitled to maintenance so that she can maintain a life style which is similar to the life style of the husband. He pointed out the reasons given by the Family Court for denying maintenance to the wife.

23 The learned counsel appearing for the husband has also taken us through various parts of the pleadings and evidence. She

submitted that as regards the custody of the daughter, the issue is virtually concluded by the orders of this Court which were not interfered with by the Apex Court. She pointed out that even during the video conferencing hearing held by this Court, the daughter showed great deal of reluctance to even appear before the video camera. She would urge that not only that proper care of the daughter is being taken in Sweden, the daughter is earning in Sweden. She submitted that apart from the fact that the desire of the daughter is not to live with the mother in India, there is no possibility of daughter getting any such employment in India considering her handicap. She stated that in India, she may not get proper facilities on par with the facilities extended by the Government of Sweden. She pointed out that the wife continues to be a citizen of Sweden and therefore, her unwillingness to travel to Sweden to meet the son cannot be understood at all. She submitted that the son had made it very clear to her that he is willing to meet her provided the mother travels to Sweden. She submitted that the husband does not wish to come in the way of mother meeting the son and in fact the mother is in touch with the son on telephone.

24 The learned counsel appearing for the husband invited our attention to cross-examination of the wife which shows that there are large number of withdrawals made by the wife by using Credit/Debit

Cards of the husband. Apart from the fact that the statement of her bank account for the entire period was not produced by the wife, the statement of account of her account in Karnataka Bank produced by her shows that there are large number of transactions involving high amount for which the wife has offered no explanation. She pointed out that wife received a large amount from the Government of Sweden for taking care of her own daughter. He submitted that the said amounts are received by the wife apart from large withdrawals made by her. She submitted that the entries in the extract of her bank account available on record will show that wife has a source of income. She submitted that an adverse inference needs to be drawn against wife for not producing the relevant documents and for not explaining utilisation of the amounts which she received from the Swedish Government. She submitted that wife has not accounted for the said amounts. She relied upon several statements made by the wife in her cross-examination. Her submission is that considering her conduct reflected from the evidence on record, her case cannot be believed at all and deserves to be discarded. She submitted that only because her husband was employed abroad, the wife cannot seek maintenance. She would, therefore, submit that the wife is not entitled to any monetary relief.

The first question before the Court is as regards the prayer for divorce. We have already reproduced the consent terms taken on record and marked 'C-1' for identification. From the evidence on record and from the submissions made across the bar as well as from the interaction which we had with both the parties at the time of video conferencing hearing, we are convinced that the marriage between the husband and wife has completely broken down. They have been separately residing for a considerably long time. We are satisfied that there is no collusion between the parties while seeking relief of divorce under Section 13-B of the said Act.

26 We may note here that though attempts were made to apply for divorce before the Swedish Court by consent of the parties, consensus could not have arrived at about the contents of the application to be made to the Swedish Court.

27 Hence, by accepting undertakings in clauses (2) and (3) of consent terms marked as 'C-1', the marriage between the parties deserves to be dissolved by a decree of divorce. We accordingly accept the undertakings.

28 Now, we are proceeding to deal with the issues which survive for consideration of the Court which are set out in document

marked as 'C-2' which we have reproduced above. The first question we considered is about the custody of the daughter.

29 As noted earlier, the date of birth of the daughter is 19th September, 1993. We have already noted that she is suffering from “down syndrome”. We have already made a reference to the orders passed by a Division Bench of this Court as well as the Apex Court. As far as the daughter is concerned in paragraph 24 of the order of the Division Bench dated 29th September, 2015, the observations made after interviewing the daughter have been noted. In paragraph 24, the Division Bench has observed thus :-

24. So far as daughter Natasha is concerned, she is an adult. Though she is suffering from down syndrome, she is in a position to communicate in a low voice. We found that the child is comfortable with the father. When she was interviewed in our Chamber. It is not in dispute that Natasha was in the custody of the applicant/husband for two years though, according to the Respondent/wife this was contrary to the orders passed by the Court. Secondly, it has been stated in the affidavit of the Applicant/husband that during her adolescence, the Applicant/husband had looked after her and had made her self reliant during her menstruation period. We have noticed that she is very comfortable with her father and not comfortable with her mother and when we asked her the question whether she would like to be with her mother, she had replied “never ever”.

30 In the same order, the Division Bench has taken a note of the fact that both son and daughter are attached to each other. In fact

the Division Bench has noted that it was noticed during the interview that daughter used to interact and look at her brother for approval. In fact, the observation of the Division Bench is that if the son is allowed to go to Sweden along with father and the daughter is kept in Mumbai, it will have consequential adverse effects on her psychology. It is as per this order that the custody of the minor daughter was ordered to be handed over to the father. We have already made a reference to the orders of the Apex Court. Under the order dated 28th October, 2015 the Apex Court permitted the father to take daughter subject to the condition of bringing her back. Further order dated 18th November, 2015 is already quoted earlier wherein the Apex Court recorded satisfaction after interacting with the daughter that she can be in the custody of the father and she can accompany her father to Sweden to continue her studies. Thus, from October or November, 2015 the daughter is continuously living with father in Sweden. As noted earlier, the daughter studied in Sweden and now some kind of work is provided to her and she continues to earn. We could notice during video conferencing meeting that the daughter was not comfortable when the mother was talking to her.

31 Therefore, it is impossible now at this stage to disturb the custody of the father. It appears to us that the daughter is not interested

in interacting with the mother. Considering the entire background, we are of the view that it may not be in the interest and welfare of the daughter that her custody is disturbed or that she is forced to meet her mother.

32 As regards visitation rights to meet the son, during video conferencing meetings, the son was very categorical that he had no objection for meeting his mother provided she comes to Sweden. Though the mother is a Swedish National, there is no plausible explanation forthcoming as to why she is not willing to go to Sweden. Even the husband has no objection if the wife meets the son in Sweden. Considering the fact that the daughter is very much attached to the son and considering the observation of the Division Bench that if the daughter is deprived of company of her brother it will affect her psychology, it will not be appropriate if we pass an order directing the father to bring the son to Mumbai to enable the mother to meet.

33 There is one more aspect which must be noted. The aspect is that the date of birth of the son is 9th February, 2001. In February, 2018 he will complete 17 years of age. He is taking education in Sweden. We must note here that in one of the video conferencing meetings even the learned counsel for the husband spoke to the son and

tried to persuade him to meet his mother outside Sweden but the son was very firm. Therefore, we do not deem it appropriate to issue a direction to the father to bring the son to Mumbai to enable the mother to meet him. However if the son comes to Mumbai, the husband will have to give prior intimation of the visit of the son to the wife. During such visits, the wife will be entitled to meet the son. She will be entitled to continue her conversation with the son on telephone and via video conferencing. It will be open for her to visit Sweden with prior intimation to the husband for the purposes of meeting the son.

34 Now we come to the issue of grant of monetary relief. The evidence on the issues of entitlement of the wife to maintenance and to the amount of Rs.44,89,500/- will have to be considered. The evidence is interlinked and therefore, we are considering both the issues together. Firstly, it will be necessary to make a reference to the pleadings. The marriage was solemnized on 25th June, 1989 and in the same year, the husband left for Sweden. In November, 1989 the wife went to Sweden and started cohabiting with the husband. Thereafter, the parties were for some time in Australia. The parties lastly cohabited together in Sweden. In the plaint, the wife has averred that in the beginning, her husband's take home pay was 10,333 skr equivalent to Rs.58,928/-. In paragraph 15 of the Petition, the wife has stated that the take home

salary increased to 15000 skr equivalent to Rs.85,500/-. This was in the year 1992.

35 In paragraph 19 of her Petition, she has stated that as the daughter was handicapped, for looking after her, the Swedish Government was paying basic salary of 6000 skr per month equivalent to Rs.34,200/- to the wife as she was staying home and taking care of the daughter. It is stated that this amount was directly transferred to her account in Sweden. It is her case that after spending the necessary amount, a part which was not spent became her savings. As stated earlier, the husband moved to Australia. Thereafter, he came back to Sweden. In the meanwhile, for some time, the parties were in India as the husband had an employment in India. In paragraph 40 of the Petition there is an allegation that the husband while in Australia was earning 3,00,000 AUD equivalent to Rs.99,00,000 per annum.

36 As regards her claim of Rs.42,75,000/-, paragraph 42 contains material averments which reads thus :

“42. As mentioned earlier when the parties had moved to Australia in 1999 the Petitioner used to put aside 50 AUD in a box in her kitchen. She did this for two and half years till the parties moved to Sweden in 2002. The saving for two and half year had amounted to around

6500 AUD i.e. Rs.2,14,500/- (Rupees Two Lacs fourteen thousand five hundred only). When the parties were to shift back to Australia in 2002 they closed all their accounts in Sweden. All the money that was in the Petitioner's Swedish account, about 750,000 skr i.e. Rs.42,75,000/- (Rupees forty two lacs seventy five thousand only). This was the Petitioner's saving from the money she got from the Swedish government as she was taking care of Natasha who was handicapped. This money was transferred into Respondent's account for easy and convenient transfer to Australia where the parties intended to buy a house and settle down. On account of delay in getting the visa to Australia the Petitioner got to Australia much after the cargo had arrived. Consequently this time round settling down into a new house was left to Respondent. The Respondent while arranging the house found the Petitioner money in the kitchen box and 'confiscated' on the alleged ground that it was 'his' money. He refused to return the money to her later. He also refused to transfer the money the 750,000 skr Rs.42,75,000/- (Rupees forty two lacs seventy five thousand only) that was originally in the Petitioner's account back into an account in the Petitioner's name. This was inspite of his tax consultant telling him that if he didn't he would lose as much as about 17-18000 A \$ a year as extra tax. He told the Petitioner that he did not trust her and also said that she would run away with his money. The Petitioner is entitled to the amount 750,000 skr i.e. Rs.42,75,000

(Rupees Forty two lacs seventy five thousand only) and 6500 AUD i.e. Rs.2,14,500/- (Rupees two lacs forty thousand five hundred only) That is a total of Rs.44,89,500/- (Rupees forty four lacs eighty nine thousand five hundred only) which belongs to her exclusively.”

37 Finally in paragraph 63, it is alleged on the date of filing of the Petition, the income of the husband was 3,00,000 AUD per year.

38 In the written statement filed by the husband, in response to paragraph 10 of the Petition, he has accepted that his take home salary was initially 10,333 skr. The material averments in paragraph 41 quoted above are dealt with by the husband in paragraph 52 of the written statement. The husband has dealt with paragraph 42 of the Petition in paragraph 53 of his written statement. He has reproduced the scheme of payment of child care allowance. He has stated that child care allowance is paid to the parents till the child attains the age of 19 years and thereafter, the amount is credited directly to the account of the child. He has stated that there are no monies, savings or otherwise of the wife which are lying with him.

39 In paragraph 71 of his written statement, the husband has stated that the wife has fraudulently taken an amount of Rs.25,000 AUD

from his bank account. He prayed that the same may be returned to him.

40 Now we turn to the evidence on record. The wife examined herself by filing her affidavit-in-lieu of examination-in-chief. In paragraph 55, she stated that she had saved the money which she has got from Swedish Government for looking after her daughter and the said amount of Rs.750,000 skr was in her bank account. She stated that while they were proceeding to Australia, the said amount was transferred to the account of the husband for facilitating easy transfer of the amount. She stated that while in Australia, she used to save 50 AUD a week and used to keep the said amount in a box kept in kitchen. She stated that she had collected about 6500 AUD by February, 2003. She stated that the said amount was taken away by her husband. She has stated that when her husband joined Infosys, he was getting monthly salary of 13972 AUD and that he had a bank balance of 3,78,000 AUD in February, 2004. In paragraph 67, the wife stated that she had undertaken to produce bank statements of her Karnataka Bank Account from the year 2000 till the date. We must note here that the criticism offered by the counsel for the husband was that the account statement for the entire period (before 21st September, 2001) was not produced by the wife.

41 In her cross-examination, she accepted that she had ATM Card through which she had an access to the husband's account. She denied the correctness of the suggestion that she withdrew a sum of Rs.2,14,500/- from bank account of her husband. She admitted that she has not annexed any document to the Petition showing that her amount equivalent to Rs.42,70,000/- was transferred to the husband's account. She denied the correctness of the suggestion that she withdrew various amounts between 21st January, 2004 to 27th January, 2004 from her husband's account. However, she admitted that she was withdrawing money from the said bank account of her husband by using ATM Card. She accepted that the ATM Card was cancelled on 27th or 29th January, 2004. In paragraph 78 of her deposition it is recorded that as undertaken by her, she has produced statements of her Account in Karnataka Bank from 21st September, 2001 to 28th March, 2006.

42 She was questioned on the entries in her bank account in Karnataka Bank and especially entries made of transfer of various amounts to Dignity Flat Owners and to Sukhmani Flat Housing Society. She stated that the flat in Dignity Apartment belongs to her father. She claimed that she does not have any interest in Sukhmani Co-operative Housing Society situated near Airoli in Navi Mumbai. Her attention was invited to various cash deposits shown in her Karnataka Bank Account.

In paragraph 84, she has stated thus :-

“84. True to say that there is a cash deposit of Rs.20,000/- on 13.8.2003. On 29.4.2004 there is a cash deposit of Rs.30,000/-. On 23.12.2004 there are two cheques of Rs.4 lacs. On 11.1.2005 there are four deposits by cheque of Rs.4,75,000/-, Rs.3,25,000/-, Rs.1,50,000/- and Rs.1,50,000/-. On 28.2.2005 there is a deposit in cash Rs.1,30,000/-. It is correct to say that as on 28.2.2005 there were 23,90,025/- in my bank account. On 28.2.2005 three Demand Drafts were taken from the account. Two demand Drafts of Rs.11,27,500/- and one D.D. is of Rs.1,24,430/- were drawn on Karnataka Bank Ltd. and not on my name. Not True to say that these D.D.s were given to Karnataka bank for repayment of loan. I am not the only person who can operate this account. It is held jointly with my father. On 3.5.2005, 28.5.2005 two cheques are issued to Dignity flat owners amount in to Rs.4,090/- and Rs.21,260/- from this account. True to say that on 13.7.2005 amount of Rs.1,50,000/- is deposited in the account. True to say that on 19.7.2005 I have issued a cheque Rs.1,08,000/- to Dignity flat owners. On 14.10.2005 cheque of Rs.4090/- on 6.12.2005 cheque of Rs.3468/-. On 3.3.2006 cheque of Rs.4090/- they are issued to Dignity flat owners. True to say that on 28.2.2005 two cheques of 2 lacs each was deposited in this account. True to say that on 10.1.2006, 10.2.2006 and 10.3.2006 there is a deposit of Rs.25,000/- each. True to say that in my affidavit of evidence filed on 19.1.2006 I had not stated

that I had aforesaid amounts deposited in my bank account.”

43 We must note here that nothing is placed on record to show that the said bank account in Karnataka Bank was jointly held by her with her father. The extract of account does not mention the name of her father. She stated that after 21st July, 2005 there was no cash deposit in her account. She accepted that she has not produced a copy of statement of her Bank account in Sweden. In paragraph 86, there is a cross-examination about the amounts withdrawn by her through ATM in Australia between 26th February, 2003 to 17th December, 2003. She again claimed in the cross-examination that in 2000-2001, amount of 7,50,000 skr were transferred from her bank account to her husband's account. In paragraph 101 of the cross-examination, she stated that the amounts withdrawn by her in Mumbai were not sufficient to start her life in Mumbai.

44 Now turning to the evidence of the husband, he accepted that he has sold his house in Stockholm and earned profits after paying 30% taxes. In paragraph 155 of his affidavit-in-lieu of examination-in-chief he reiterated that wife has withdrawn 25,000 AUD from his account fraudulently. In paragraph 168, the husband stated that the wife is an qualified Architect who has a working experience of four

years before the marriage and she will be able to secure a suitable job. He stated that in his affidavit-in-lieu of examination-in-chief that no amount has been transferred to his account from the wife's account. He stated that in August, 2004 he joined Infosys on the base salary of Rs.54,000/- p.m. He stated that on an average, his take home salary would be around Rs.70,000 - 80,000 since August, 2004. He admitted that he has not produced any document relating to his salary. Later on he stated that he was employed with Infosys since October, 2002. He accepted that in the year 2002, when he joined Infosys, he was at Stockholm. He pointed out that for work, he travelled to different countries such as Malaysia, Thailand, Philippines, Singapore, etc. He stated in the cross-examination that from June, 2003 to November, 2003 a sum of 11,000 AUD was withdrawn by the wife. He relied upon documents produced by the wife in Australian Court for stating this factual aspect. He, however, admitted that he has not produced the said documents before the Court. In paragraph 239, he accepted that till 25th December, 2003 his wife did not take up any employment.

45 Now, turning to the case made out by the wife as regards transfer of amount from her bank account to the bank account of the husband, it will be necessary to make a reference to the compilation of documents on record. English translation of the letter dated 4th May,

2006 addressed to the wife by Skandia Banken at Exhibit – 214 records that from her bank account amounts of 5,00,000 skr and 2,50,000 skr were transferred to Bank Account No.1160354830562 (the “said Account”). In paragraph 259 of the cross-examination, the husband stated that the said account was not his account. Exhibit – 216 is a certificate recording that the husband was not the owner of the said account.

46 We find that there is absolutely no evidence on record to show that the amounts of 5,00,000 skr and 2,50,000 skr were transferred to the bank account of the husband. In fact, the said account is not the account of the husband. Therefore, the wife has failed to substantiate the claim for refund of a sum of Rs.44,89,000/-.

47 Now turning to the issue of maintenance, as stated earlier, the husband has admitted that the wife was not employed after their marriage.

48 As far as the maintenance is concerned, it is necessary to make a reference to the decision of the Apex Court in the case of *Manish Jain Vs. Akanksha Jain*². In paragraph 15, the Apex Court had held thus :-

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“15. An order for maintenance pendente lite or for costs of the proceedings is conditional on the circumstance that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceedings. It is no answer to a claim of maintenance that the wife is educated and could support herself. Likewise, the financial position of the wife's parents is also immaterial. The Court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance and whether the applicant has any independent income sufficient for her or his support. Maintenance is always dependent upon factual situation; the Court should, therefore, mould the claim for maintenance determining the quantum based on various factors brought before the Court.”

(underline supplied)

49 The law laid down by the Apex Court for fixing maintenance *pendente lite* will also apply for considering the prayer for permanent alimony under Section 25 of the said Act.

50 Merely because the wife is an Architect, per se, this fact will not make her dis-entitled to seek maintenance. In fact, the husband has accepted that the wife was not employed. It is true that the wife received about 6000 skr per month from the Swedish Government as remuneration for looking after the daughter. The husband was working.

Therefore, the wife was at home and was looking after the children including the daughter. Therefore, receipt of the amount from Swedish Government is strictly no ground to deny maintenance. The evidence on record shows that in the year 2002, monthly salary of the husband was about Rs.54,000/- per month. When the Petition was filed his salary was allegedly 300,000 AUD.

51 Admittedly, after 2004 the wife has not withdrawn any amount from the bank account of her husband as ATM Card was cancelled. We have perused the extract of accounts of the wife with Karnataka Bank. It is true that the statement of account produced is for the period 21st September, 2001 to 28th March, 2006. The earlier account was not produced by the wife. Perusal of the account shows that there are large number of credit/deposit entries in the Bank Account of Karnataka Bank.

Date	Amount
13 th July, 2005	1,50,000
11 th January, 2005	4,75,000
11 th January, 2005	3,25,000
11 th January, 2005	1,50,000
11 th January, 2005	1,50,000
28 th February, 2005	2,00,000
28 th February, 2005	2,00,000
28 th February, 2005	1,30,000

52 On 23rd December, 2004 there are two credit entries in the sum of Rs.4 Lakhs in the said account. There is no satisfactory explanation by the wife as to how she kept on receiving large amounts till 28th February, 2005. Some of the said amounts were transferred by her by Demand Drafts.

53 The last credit entries of large amounts are of 28th February, 2005. There is no explanation for these credit entries. Therefore, wife cannot be granted maintenance till 28th February, 2005 as there are unexplained credit entries of large amounts in her Bank account. Thereafter, there are no entries of the large amounts. There is no material on record to show that the wife received any income from 1st March, 2005. There is no evidence brought on record to show that the petitioner is the owner of the flats in Dignity Apartment or Sukhmani Co-operative Housing Society. Therefore, we propose to grant maintenance to the wife from 1st March, 2005. Moreover, it is not the case of the husband that his income has been reduced.

54 Now the other question is what should be the quantum. From the cross-examination of the husband, it can be easily inferred that in the year 2005 he was receiving salary of Rs.70,000/- to 80,000/- per month. Thereafter, his income must have gradually increased.

55 The husband had responsibility of maintaining family of four including the female child suffering from down syndrome. Considering these aspects, we propose to fix the monthly maintenance payable to the wife at Rs.25,000/- per month from 1st March, 2005. After expiry of the period of 5 years, the maintenance will have to be increased by Rs.5,000/-. Therefore, from 1st March, 2010 to 28th February, 2015 she will be entitled to maintenance at the rate of Rs.30,000/- and from 1st March, 2015, she will be entitled to maintenance at the rate of Rs.35,000/-.

56 As regards the allegation of the husband about the wife withdrawing money from his bank account, there is absolutely no evidence adduced by the husband.

57 Perusal of the judgment of the Family Court shows that the only reason given by the Family Court for denying the maintenance to the wife is that the bank statements produced by her show that she has sufficient balance. This reason cannot be sustained when the wife admittedly does not have regular source of income at least from 1st March, 2005.

58 Accordingly, we dispose of the Appeals by passing the following order :-

ORDER

- (i) The wife shall carry out formal amendment to the Petition for converting the same into a Petition under Section 13B of the Hindu Marriage Act, 1955 within four weeks from today. The Registry shall permit her to do so;
- (ii) The marriage solemnized between the parties on 25th June, 1989 is hereby dissolved by a decree of divorce under Section 13-B of the Hindu Marriage Act, 1955;
- (iii) Undertakings of the parties in paragraphs 2 and 3 of the consent terms marked as 'C-1' are accepted;
- (iv) The prayer of the wife for grant of custody of the daughter is rejected;
- (v) It will be open for the wife to communicate with her son by telephone or via video conferencing after fixing the time as per mutual convenience. It will be open for the wife to visit Sweden for the purposes of meeting the son. Necessary arrangement shall be worked out by the husband and wife with consensus. If consensus cannot be arrived at, it will be open for the parties to approach

the Family Court for seeking necessary directions on this aspect;

- (vi) Whenever the son comes to India, it will be open for the wife to meet him. Arrangements for meeting the son in India shall be worked out by mutual consent. In case of dispute, the parties are free to approach the Family Court for seeking necessary directions;
- (vii) The husband is ordered and decreed to pay wife alimony of Rs.25,000/- per month from 1st March, 2005 till the end of February, 2010. From 1st March, 2010 he is ordered and decreed to pay alimony at the rate of Rs.30,000/- per month till the end of February, 2015. From 1st March, 2015 the husband is ordered and decreed to pay alimony at the rate of Rs.35,000/- per month;
- (viii) We grant time of one year from today to the husband to pay arrears of maintenance upto 31st October, 2017. If any interim maintenance is paid by him, he will be entitled to adjustment;
- (ix) From November, 2017 onwards, the husband shall transfer the monthly maintenance at the rate of Rs.35,000/- per month directly to the bank account of

the wife on or before 15th day of every month. The wife shall furnish her account details under her signature to the Advocate for the husband within a period of four weeks from today;

- (x) Even the amount of arrears shall be paid by the husband to the wife by direct transfer to her account;
- (xi) The prayer for passing a money decree in the sum of Rs.44,89,000/- with interest made by the wife is rejected;
- (xii) Considering the order of payment of maintenance which we have passed, we hold that it is not necessary to pass a separate order as to cost of litigation;
- (xiii) The impugned judgment and decree of the Family Court is modified on above terms. Both the Appeals are disposed of on above terms;
- (xiv) All pending Civil Applications do not survive and the same are disposed of.

(SMT. ANUJA PRABHUDESSAI, J)

(A.S. OKA, J)