THE HON'BLE DR JUSTICE B.SIVA SANKARA RAO

Crl.M.P.No.4351 of 2017 in/and Crl.P.No.4297 of 2017
and Crl.P.Nos.7716 and 8251 of 2017

COMMON ORDER:

All the three main criminal petitions and the miscellaneous petition supra are the outcome of the matrimonial dispute between husband *viz.*, T.S.Aswin Kumar and wife *viz.*, Smt.T.Srivallli – *de facto* complainant in C.C.No.440 of 2017 pending on the file of II Additional Junior Civil Judge-cum-XIX Metropolitan Magistrate at Miyapur, which case was taken cognizance for the offences punishable under Sections 498-A, 420, 365 read with 120-B I.P.C., which is the outcome of crime No.477 of 2015 of Chandanagar Police Station (P.S.), dated 20.12.2015, against husband *viz.*, Mr.T.S.Aswin Kumar– accused No.1, parents-in-law – Smt.T.Jayalakshmi and T.S.Rama Rao and husband's brother T.Ravi Krishna - accused Nos.2, 3 and 7 respectively and other relatives *viz.*, K.Subba Rao, K.Srieenivasa Rao and K.Sreeram Kumar i.e., accused Nos. 4 to 6 respectively in whose (accused Nos.4 to 6) favour there is a stay of proceeding with the C.C. as per the order of the Apex Court in Special Leave to Appeal (Criminal) No.3286 of 2016, dated 29.04.2016.

2. So far as Crl.P.No.8251 of 2017 concerned, it is impugning the docket order of the learned Magistrate, dated 10.08.2017, in Crl.M.P.No.3553 of 2017 in C.C.No.440 of 2017 obtained by husband – accused No.1, wife – *de facto* complainant maintained the quash petition. The said docket order reads as follows:

> "Heard both sides. Affidavit is filed by the petitioner/A1 undertaking that he will appear before this Court on or before 15th October, 2017. Considering the affidavit of the petitioner, this Court feels that it is appropriate to recall the NBW pending against the petitioner subject to certain conditions. Accordingly, the petition is allowed. The NBW pending against the petitioner/A1 is recalled and he is directed to appear before this Court on 04.10.2017."

3. For the sake of convenience, the parties are hereinafter referred to as husband – accused No.1 and wife - *de facto* complainant and accused Nos.2 to 7.

4. The contentions impugning the aforesaid docket order urged in the petition to quash the same are that:

Admitted facts:

(a) The marriage of the couple took place at Hyderabad under Hindu rites and caste customs on 07.12.2008 and out of their wedlock, they were blessed with a male child *viz*., Sriram while they were at U.S.A. on 03.04.2010. Coming to the matrimonial dispute with reference to the disputed facts, according to the *de facto* complainant, after the marriage, the couple left for U.S.A. While her husband was holding H1 work visa, she was briefly employed till she attained motherhood, whereafter she was subjected to cruelty and ill-treatment by him to get rid of her and for unjustified reasons. Many a time, he sought for divorce from her by mutual consent and having failed to materialize his wish to convince her to give consent for divorce, he hatched an evil plan to get rid of her one way or the other and as a part of the plan, by saying that he intended to visit his ailing mother, who was under post-operative care and for his medical check up regarding his heart problem, he proposed a visit of the couple to India during November, 2015, knowing fully well that her visa renewal process was under consideration and if she leaves U.S.A, renewal of her visa would not be extended and that even her employer warned her not to leave U.S.A. as H1 B visa was under consideration. Even when she stated to him that she wanted to stay back to pursue H1 B visa, which was under consideration, he assured that there would be no problem and he would arrange for her return to U.S.A. on his sponsored or H4 dependant visa and believing his version, she agreed to arrive India with him along with their child *viz.*, Sriram. As per the tour schedule, they purchased tickets for their visiting India on 22.11.2015 and that he would return to U.S.A. by 01.01.2016 and she and her son were to stay in India till 03.02.2016. As per their schedule, they reached her in-laws' house at Saroornagar, Ranga Reddy District. On 16.12.2015, her husband took an appointment for his medical check up by the Cardiologist and as the minor son could not be taken to the hospital, he was left at her in-laws' house and after the medical check up was concluded, her husband has taken her to her parents' house at Chandanagar to see them and dropped her there, as on next day i.e., 17.12.2015 her sister-in-law's baby shower function was to be held and he also assured to bring the child to that function. However, to her shock and surprise, on 17.12.2015, he did not come, much less with the child, to the function and she received a whatsapp call from him demanding her to agree for mutual consent divorce and when she was asking about his whereabouts, he disconnected the call and in those strange circumstances sensing some foul play, she immediately tried to contact her in-laws and close relatives to enquire about the whereabouts of her husband and minor son. Neither there was any information nor any message from her husband. Thereafter, she along with her parents visited her in-laws' house on the very morning on 18.12.2015 and to their shock, the house was under lock and key. She tried to find out from the close relatives and neighbours of her husband and in-laws, however, the same was of no avail. She stated that as a desperate measure, she approached the Police authorities and filed complaint bearing crime No.477 of 2015 on 20.12.2015 before Chandanagar Police Station for the fraud played in taking away the minor child without her consent by her husband and the Police, after investigation, filed charge sheet, which was taken cognizance by the Magistrate as C.C.No.440 of 2015 for the offences supra.

(b) It is further averred by the *de facto* complainant that the brother of her husband - Mr.T.Ravi Krishna – accused No.7 was also actively involved besides his parents and the other relatives – accused Nos.4 to 6, in the acts. Her husband - accused No.1 filed along with accused Nos.2 to 6, earlier, Criminal Petition No.437 of 2016 before this Court, which ended in dismissal in respect of her husband - accused No.1 and granting stay of arrest in respect of accused Nos.2 to 6 and aggrieved thereby, her husband - accused No.1 filed an appeal before the Apex Court, which by its order, dated 08.03.2017, directed that the investigation shall go on. It is, therefrom, the Police filed the charge sheet on 12.03.2017 that was taken cognizance by the learned Magistrate as C.C.No.440 of 2017 having *prima facie* found case against the accused for the offences supra. Non-Bailable Warrants (NBWs) were issued by the learned Magistrate against her husband - accused No.1 on 03.04.2017, and look out notices and blue corner notices were also issued to secure his appearance before the Court and despite such warrants, he disobeyed the orders of the learned Magistrate, without appearance. In the peculiar circumstances, the learned Magistrate issued letter, dated 13.04.2017, informing the situation and the stage of the crime to the Regional Passport Authority at Hyderabad and also informing that NBWs issued to the accused in the aforesaid C.C. are pending. The learned Magistrate, accordingly, directed the Regional Passport Authority, Hyderabad, to impound the passports of accused Nos.1 to 3 and 7 and report compliance by 07.06.2017 and the said letter of the learned Magistrate was impugned by her husband - accused No.1 by filing W.P.No.20351 of 2017, which is still pending. The Passport Authorities, therefrom, issued show cause notices to accused Nos.2, 3 and 7 calling for their explanation, otherwise to impound their passports and on considering the explanations submitted by the said accused, their passports were impounded, by order, dated 17.05.2017. A similar show cause notice was also issued to her husband - accused No.1 calling for his explanation, otherwise to impound his passport and he addressed an e-mail on 02.06.2017 to the Passport Authorities seeking time to submit detailed explanation and accordingly, he submitted explanation and the Passport Authorities, having considered the same, passed order, dated 02.06.2017, impounding his passport and aggrieved by the same, he filed W.P.Nos.20351, 20915 and 17767 of 2017 along with the other accused. There was a conditional stay obtained by accused Nos.2, 3 and 7, however, there was no stay so far as the action of the Passport Authorities against her husband - accused No.1 impounding his passport concerned until he appears before the Court and these writ petitions are, thereby, pending. It is as such the Consulate General of India addressed an e-mail on 27.07.2017 to her husband - accused No.1 stating about the pendency of the criminal case against him for cheating and for having forcibly taken away the minor child to U.S.A. from India without the consent of his wife – *de facto* complainant and the need for his repatriation as he is an illegal immigrant upon the instructions from the office of the General Administration (NRI) Department, Telangana State Secretariat, Hyderabad. It was also informed to her husband - accused No.1 that an emergency certificate would be issued for sending him to India to settle the cases foisted against him.

The contentions of the *de facto* complainant:

In this background, it is contended by the *de facto* complainant that her husband - accused No.1, instead of taking steps to come down to India in obedience with appearance against NBWs and blue corner notices issued against him, filed an affidavit on 05.08.2017 in C.C.No.440 of 2017 stating false and untrue facts and by suppression of the material facts, claiming that the child cannot be moved from the U.S.A. under the pretext of the orders passed by the U.S.A. Court, though there is no such bar imposed by the U.S.A. Court for his bringing the child to India, apart from that U.S.A. Court order is not binding on the Indian Court. It is further contended that the Court appointed guardian in U.S.A. has clearly stated in an e-mail communication to the *de facto* complainant that if the child needs to be repatriated, a simple application can be filed before the appropriate Court for release of his passport for easy passage. Her husband – accused No.1 maliciously filed affidavit, dated 05.08.2017, suppressing these facts by pleading that a safe passage be given to him as he plans to visit India on 15.10.2017 by seeking to set aside the look out notice and NBW and for a direction to the Passport Authorities to revoke the order for impounding his passport.

5. It is in this factual background, the impugned docket order was in attack in saying that the said order was passed mechanically by non-application of mind, though there were no grounds to recall or cancel NBW for his contemptuous behaviour and disobedience in not submitting to the orders of the Court despite long pending NBW and thereby, the impugned docket order is unsustainable and liable to be quashed.

6. The learned counsel for husband - accused No.1 has contended, *inter alia,* by disputing the above facts that the impugned docket order of the learned Magistrate out of his judicial discretion permitting him

(accused No.1) to come down to India and to submit to the jurisdiction of the Court by cancelling/recalling NBW, nowhere requires interference by this Court including under Section 482 Cr.P.C. of the inherent powers of this Court, neither there is any abuse of process nor otherwise to sub-serve any ends of justice and thereby, sought for dismissal of the quash petition *viz.*, Crl.P.No.8251 of 2017.

7. The contentions of accused Nos.1 to 3 and 7:

(i) Coming to the facts in dispute concerned, the contention of the husband - accused No.1 so also his parents and brother - accused Nos.1 to 3 and 7 respectively, in the quash petitions *viz.*, Crl.P.Nos.4297 and 7716 of 2017 filed against the cognizance order of the learned Magistrate for the offences punishable under Section 498-A, 120-B, 365 and 420 I.P.C. issued against them, is that originally, the Police registered the crime for the offence punishable under Section 498-A I.P.C. and in the course of their investigation, Sections 420 and 120-B I.P.C. were added by memo, and in the final report, after completion of the investigation, besides the above offences, Section 365 I.P.C. also was added, by showing accused Nos.1 to 3 and 7 in abscondence in view of the stay order of the Apex Court, dated 29.04.2016, so far as accused Nos. 4 to 6 are concerned and therefrom, look out notice was issued against husband - accused No.1 so also against accused Nos.1 to 3 and 7 to impound their passports besides issuing NBWs to secure their presence before the learned Magistrate and thereafter, husband - accused No.1 received show cause notice, dated 24.05.2017, from the Consulate General India stating as to why his passport shall not be impounded as per the request from the Regional Passport Officer, Hyderabad due to NBW pending against him, to which he submitted his explanation.

Accused No.1 questioned the said show cause notice in W.P.No.17774 of 2017 and there was a limited stay, by order, dated 09.06.2017, while directing to file counter by 14.06.2017, on which date the writ petition was withdrawn. Accused No.1 works for livelihood at U.S.A. for the past sixteen years; that after marriage with the *de facto* complainant in 2008, the couple blessed with a male child *viz.*, Sriram in U.S.A. and the child is a citizen of U.S.A. and is governed by U.S.A. laws.

(ii) Accused Nos.1 to 3 and 7 further averred, particularly by accused No.1, that his wife – *de facto* complainant committed adultery with one Naga Satya Chilukuri and therefore, he filed O.P.No.2149 of 2015 on the file of the Family Court in India, which is pending and also constrained to file divorce and custody petition on the file of Circuit Court of Cook County, Illinois County Department, Domestic Relations Division, U.S.A. *vide* case No.2015 D 331167 as the minor son is a U.S.A. citizen. As a counter blast to the above case, she gave a false report before Chandanagar P.S. on 20.12.2015 registered as crime No.477 of 2015 against accused Nos.1 to 6 for the offence punishable under Section 498-A I.P.C. and later, she included his brother - accused No.7, who was not originally figured and Chandanagar Police, in a mechanical manner shown accused Nos.1 to 3 and 7 in abscondence and filed charge sheet before the learned Magistrate. It is, therefrom, the learned Magistrate issued letter to the Regional Passport Officer on 13.04.2017, based on which, passport of his brother - accused No.7 was impounded and questioning the same W.P.No.17767 of 2017 was filed by his brother – accused No.7 and there was an interim order, dated 09.06.2017, in his favour. The *de facto* complainant contested the case before the U.S.A. Court supra by filing counter-affidavit and different petitions for various reliefs. She was given interim maintenance and custody of the child for alternate weekends, initially. Later, the husband – accused No.1 received a whatsapp chat between the *de facto* complainant and her paramour Chilukuri in U.S.A. through one Srikanth - her own sister's husband revealing threat to him (accused No.1) and also the minor child through a hired jail person *viz.*, Hari in India due to the conspiracy conspiring with him (Hari) by the *de facto* complainant and her paramour. By looking into the same, the U.S.A. Court passed 'no contact' order, dated 06.01.2017, against the *de facto* complainant, while so at her instance, urgent motion was moved in the U.S.A. Court, which by its order, dated 29.03.2016, directed accused No.1 to deposit passport of his son to his attorney in order to handover the same to the guardian *ad litum* attorney appointed by the U.S.A. Court on 14.10.2016. However, she all of a sudden, returned to India, without informing to U.S.A. Court, her attorney withdrew vakalat for her, after putting her on notice and the U.S.A. Court passed decree of divorce on 02.06.2017. It is also contended that there is no independent investigation conducted by the Police of Chandanagar before filing the charge sheet. The *de facto* complainant suppressed several facts including her contesting the divorce case in U.S.A. Court and sending of e-mail communications to her by accused No.1. It is only to harass the accused persons supra and also accused Nos.4 to 6, the false case is foisted and also added the offence under Section 365 I.P.C. as if accused No.1 kidnapped his own son though he is the father and the boy is U.S.A. citizen and aged above five years and the question of kidnap does not arise that too when the U.S.A. Court granted interim custody to him in the divorce case, which was also made absolute by granting divorce as referred supra.

(iii) It is also averred that the *de facto* complainant moved learned XIX Metropolitan Magistrate's Court at Miyapur for two reliefs one, to enter into the matrimonial home and the other for her appointment as the guardian of the minor child, which ended in dismissal on 31.03.2017 in Crl.P.Nos.1437 and 1438 of 2017. She also filed O.P.No.159 of 2016 for restitution of conjugal rights and O.P.No.621 of 2016 for custody of the child, which are pending. It is their contention that all these cases filed by her including the Police report leading to filing of the charge sheet are abuse of process of law and to serve as a counter blast to the divorce petitions filed by him in India and in U.S.A. mainly on the ground of her adultery with Chilukuri with the evidence in support thereof, including whatsapp messages, photographs and report and videos provided by a private investigators in U.S.A. It is contended by them therefrom that neither accused No.1 much less the other accused committed any offence and they hail from respectable families and are law abiding citizens and these proceedings are a futile exercise and to harass them and thereby, sought for quashing C.C.No.440 of 2017.

(iv) The additional averments in the quash petition of accused Nos.2, 3 and 7 i.e., Crl.P.No.7716 of 2017 are that besides they committed no offence and hail from respectable families and law abiding citizens, implication of them in the criminal case is only to harass them as a futile exercise by the *de facto* complainant influencing the Police, there are no allegations made out either against accused Nos.2 and 3 – parents of accused No.1 or accused No.7 – brother of accused No.1 and there were defects after filing of the F.I.R. from stage to stage in the Police investigation implicating them with additional offences. Even accused Nos.2 and 3 cooperated with the Investigation Officer, whenever contacted, over phone, by sending their version to the Police and also accused No.1 sent e-mails appraising the Police the true facts and her adulterous conduct with Chilukuri. The accused also arranged and spoke through skype calls with the Investigation Officer, but these facts were not mentioned in the final report. Accused Nos.2 and 3 left to Abudabi, where their younger son is living and also on health grounds of accused No.2 and thereby, the proceedings in C.C.No.440 of 2017 are liable to be quashed.

(v) It is further averred commonly that after the marriage of the couple - accused No.1 and the *de facto* complainant was performed on 08.12.2008 at Hyderabad, they flied to U.S.A. within three weeks and therefore, there is no jurisdiction to the learned Magistrate at Miyapur to take cognizance of the Police report. It is also contended commonly that it is after accused No.1 filed divorce case – O.P.No.2149 of 2015 in India on the ground of adultery against the *de facto* complainant, as a counter blast to it, she filed the false Police report implicating the accused. The Police investigation is mechanical by non-application of mind and no offences were made out and taking of cognizance of the same by the learned Magistrate is unsustainable including issuance of NBWs, look out notices and thereby, sought for quashing C.C.No.440 of 2017, cognizance proceedings and all the consequential orders.

8. So far as Crl.M.P.No.4351 of 2017 in Crl.P.No.4297 of 2017 filed by accused No.1 is concerned, it is for suspension of operation of letter in Dis No.654 of 2017, dated 13.04.2017 (referred to supra) addressed to the Regional Passport Officer by the learned Magistrate to impound the passport of accused No.1 pursuant to NBW issued against him, pending disposal of Crl.P.No.4297 of 2017.

9. Heard the learned counsel for accused Nos.1 to 3 and 7 and also the *de facto* complainant in the respective petitions and perused the facts covered by the material on record mostly referred supra, including the provisions and propositions to discuss to the extent required hereinafter instead of making the order bulky.

10. As referred to supra, the undisputed facts of these petitions are that the marriage of the couple took place on 08.12.2008; the couple left for U.S.A. on 21.12.2008; they were blessed with a male child *viz.*, Sriram in U.S.A. on 03.04.2010; the couple returned to India on 04.06.2010 with the child; the husband – accused No.1 left to U.S.A. on 25.10.2012 and the *de facto* complainant left to U.S.A. with the child on 02.03.2013. The dispute is but for the facts and events mainly from May, 2015 in U.S.A. between the couple as alleged and so far the criminal case investigation concerned and taking cognizance thereof are not of much germane, more particularly, on the jurisdictional aspects also. Therefore, reference to the connected facts is necessary for proper appreciation and understanding of the facts in dispute. The allegation of the husband – accused No.1 in his divorce petition - O.P.No.2149 of 2015 supra filed on 16.12.2015 was that the wife – *de facto* complainant was having extramarital relationship with Chilukuri in U.S.A. and the same is covered by the private investigation reports and video clippings apart from messages and whatsapp calls including by the so called intercepting of her phone contacts by the accused in U.S.A. Before coming to that, undisputably, the couple with the minor child came down to India from U.S.A. on 22/23.11.2015. The so called private detectives/investigator's report regarding her extramarital relationship with Chilukuri according to the quash petition averments of the accused, is just a day before the date

of filing the divorce petition - O.P.No.2149 of 2015 for the alleged acts, particularly of July, 2015.

11. Accused No.1 took away the child with him to U.S.A. on 17.12.2015 i.e., on the very next day of his filing O.P.No.2149 of 2015 in India on 16.12.2015. The Police report given by the *de facto* complainant to Chandanagar P.S. was with no lapse of time on 20.12.2015. His divorce case in U.S.A. Court including for custody was subsequent to that on 22/23.11.2015. So far as attracting of the offences concerned and whether there are any criminal acts taken place within the jurisdiction of the learned Magistrate taking cognizance against the accused, the very report of the *de facto* complainant and the Police investigation after examination of the *de facto* complainant as L.W.1, her parents and brother as L.Ws.2 to 4 and three circumstantial witnesses – L.Ws.5 to 7, disclosed that accused No.1 was saying to the *de facto* complainant that but for the compulsion of his parents and relatives, he married her and also that his mother – accused No.2 instigated him always to harass and torture the *de facto* complainant physically and mentally and he used to utter vulgar words and put her in depression. Unable to bear his harassment and his baseless suspects, she visited a Psychiatrist in September, 2015 and even thereafter, he harassed her continuously and his mother was also abusing her by comparing her with other women and saying that she is not fit to her son - accused No.1 and there was no expected dowry brought by her from her parents and used to insist her to give consent for divorce to her son. Further, after the couple visited India on 22/23.11.2015 and in their stay at the family house of accused Nos. 1 to 3 and 7 at Saroornagar, all the accused tortured her to meet their demand for additional dowry or otherwise to part with the child and give

divorce to accused No.1 and that all the accused hatched a plan, according to which, accused No.1 dropped the *de facto* complainant at her parents' house, after his medical check up, on the promise that he along with the child will pick up her from there on the next day, but accused No.1 took away the child to U.S.A.

12. Even though the Police originally registered the case against accused Nos. 1 to 6 for the offence punishable under Section 498-A I.P.C. and in the course of their investigation, they filed memos for including Sections 420, 120-B and also 365 I.P.C. and also adding accused No.7 though he has nothing to do with the case originally filed. It is the obligation on the part of the Investigating Officer to add Sections once there is material.

13. (i) So far as the offence under Section 498-A I.P.C. concerned, the main allegations are against accused Nos.1 and 2 and not against accused Nos.3 to 7 as there are no specific allegations against them.

(ii) So far as the offence of kidnap under Section 365 I.P.C. and the offence of cheating under Section 420 I.P.C. as a part of the privy of the accused are concerned, the matter is under stay so far as accused Nos.4 to 6 are concerned.

(iii) Coming to the allegations of cheating against accused Nos. 1 to 3 and 7 that it is their part of the scheme that the couple left the child at her in-law's house and went for medical check up of her husband – accused No.1 by the Cardiologist and he dropped her at her parents' house with a promise to bring the child on the next day to her parents' house to attend the function there, however, has taken away the child without her consent out of the country i.e., to U.S.A. Even though the child born in U.S.A. and got the U.S.A. citizenship, the child is till then with the parents together and cannot be said to have not attached to the mother at all by then and that the couple is governed by the Hindu Law and the Laws of India. Even the child born in U.S.A. and is a citizen of U.S.A., the minimum responsibility of informing the *de facto* complainant lies on accused No.1 before taking away the child to U.S.A. even though he is the father, which itself indicates his malicious act and that when accused Nos.1 to 3 and 7 are residing together in a house, wherefrom accused No.1 has taken away the child to U.S.A., it cannot be said that without their privy, from the very circumstances and the facts which according to her having been established, the couple went to the hospital by leaving the child at her in-laws' house and accused No.1 dropped the *de facto* complainant at her parents' house with a promise to bring the child to attend the function at her parents' house on the next day and it is nothing but deceiving the *de facto* complainant.

(iv) So far as the offence of kidnap is concerned, it is of two kinds, one is kidnapping from the lawful guardianship and the other is kidnapping out of India. The child born on 03.04.2010 and taking away the child took place on 17.12.2015. No doubt, by then the child was only hardly 5 ½ years of age and under Section 6 of the Hindu Minority and Guardianship Act, 1956 (for short 'the Act'), the father is the natural guardian and 'after' him, the mother, which was also interpreted by the Apex Court in Ms.Githa Hariharan vs. Reserve Bank of India[1], wherein it was observed that the word 'after' shall have to be given a meaning which would sub-serve the need of the situation *viz*., welfare of the minor and having due regard to the factum that law Courts endeavour

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1 (1999)2 SCC 228

to retain the legislation rather than declaring it to be a void and it depicts not the death of the father but 'in the absence of' be it temporary or otherwise or total apathy of the father towards the child, enables the mother to act. Here, the very Section 6 of the Act shows that the custody of the child who has not completed the age of five years shall ordinarily be with the mother. It does not mean that after five years the custody of the child shall be given to the father, which in general paralance, depend upon several circumstances and facts. From the undisputed facts referred to supra, till the couple landed in India in the last week of November, 2015, they were residing with the child in U.S.A. and even after they reached India, the couple are with the minor child at the house of accused Nos.1 to 3 and 7 i.e., the *de facto* complainant's in-laws' house and it is, therefrom, once the custody of the mother has been taken away from joint custody by accused No.1 leave about guardianship, which is nothing but out of the privy of the aforesaid accused in making her to part with the child at the house of her in-laws' on the pretext to go to hospital for accused No.1's medical check up by the Cardiologist and therefrom by dropping her at her parents' house within the twin cities by saying on the next day he will attend to the function at her parents' house along with the child, however, given a shock to her and has taken away the child by leaving the country. Accused No.1 much less other accused supra cannot take shelter under Section 6 of the Act because the child has been taken to their custody from the joint custody and guardianship of the mother and even otherwise, once there was any taking away of the child from the joint custody of the mother, even if by the guardian(s), it attracts *prima facie* case for the learned Magistrate to take cognizance. As defined under Section 359 I.P.C. kidnap means taking away beyond the limits of

India. The child was taken away by accused No.1 without the consent of the *de facto* complainant – the joint custodian, technically out of India and it is not pretended by any of the accused that it is with consent of her. When such is the case, there is *prima facie* case in taking the cognizance at that stage including for framing of a charge, if any. The element of proof or chance of success of the case ending in conviction is not required to be gone into. It is enough in saying there is *prima facie* accusation in taking cognizance and framing of the charge. Therefore, there is nothing to say that Section 365 I.P.C. no way attracts as practically it is not taking away from the custody within the twin cities from one place to another, much less within India but taking away out of the country *viz.*, India, to cause that person (child) to be confined or get out of reach of the mother from her joint custodianship of the child.

14. Coming to the decision placed reliance on by the learned counsel for the quash petitioners on the territorial jurisdiction, of the expression of the Apex Court in Manoj Kumar Sharma vs. State of Chhattisgarh[2], it was observed that to take cognizance by the Court concerned so far under Sections 177 to 179 Cr.P.C., some part of the offence or consequence ensuing therefrom, must be situate in, or arise within the jurisdiction of Court concerned. Here, as discussed supra, after the couple landed in India at Hyderabad in the house of the accused supra, the child was left there by accused No.1 with the other accused and thereafter, the child was taken away by accused No.1 to U.S.A. without the consent of the *de facto* complainant, which is the outcome of the privy of the accused and it falls within the jurisdiction of the Courts in India. From part of the acts of the accused also in compelling the *de facto*

[2] (2016)9 SCC 1

complainant to give consent for divorce and ill-treated, it cannot be said that the learned Magistrate has no jurisdiction to take cognizance for the offences supra to the extent discussed supra.

15. Even coming to the three Judge Bench expression of the Apex Court in Ajay Mitra vs. State of M.P.[3] for the offence of cheating, what was held is *mens rea* at the time of inducing the person deceived to deliver any property to any person essential to constitute offence under Section 420 I.P.C. where there was a contractual transaction between accused No.1 and the complainant. Now coming to the case on hand from facts with reference to the above principle of law, as per the *de facto* complainant's averments in her report and statement and also the Police final report covered by the investigation, she was made to leave the child with the accused persons supra according to their part of the so called scheme when the couple visited the hospital for accused No.1's cardiac check up and after completion of the medical check up, accused No.1 has taken her to her parents' house and dropped her there on the pretext that he would come there on the next day along with the child for attending the function at her parents' house. Thus, the above acts out of the privy of the accused fulfill the ingredients of the offence of cheating by deception of the *de facto* complainant to leave the child at the house of her in–laws' on the pretext of accused No.1 bringing the child to her parents' house. Thus, there is nothing to say that the offence under Section 420 I.P.C. is not made out. So far as the other expression placed reliance in this behalf in International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) vs. Nirma Cerglass

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[3] (2003) 3 SCC 11

Technics (P) Ltd.[4] of the Apex Court, it was discussed as to what are the ingredients for the offences, where the dispute is purely of civil in nature and that civil liability cannot be converted into criminal liability, referring to the expression in the earlier case S.W.Palanitkar vs. State of Bihar[5], wherein it was observed that there is distinction between cheating and breach of contract; that it would depend upon the intention of the accused at the time of alleged inducement and that mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown at the beginning of the transaction.

16. Even at the cost of repetition, on this principle, the beginning of the transaction in question is the criterion. It could not be established that accused No.1 much less the other accused got the intention to take away the child out of the joint custody of the *de facto* complainant at the time of the marriage and before birth of the child or even subsequently after the birth of the child. But, after the couple landed in India at the house of the accused at Hyderabad from U.S.A., accused No.1 taking the *de facto* complainant along with him to the hospital by leaving the child there (at her in-laws' house) and after completion of the check up, dropping her at her parents' house with a promise to bring back the child on the next day to the function and their retaining the child with them shows the deception in the process of their dishonest intention from out of the privy of the accused and thereby, the offences under Sections 420 read with 120-B I.P.C. are made out and it cannot be said that there is no offence of cheating.

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[4] (2016)1 SCC 348
[5] 2002 SCC (cri) 129

17. So far as the quashing of the proceedings concerned, even the three Judge Bench in Inder Mohan Goswami vs. State of Uttaranchal[6] observed that the High Court had inherent power under Section 482 Cr.P.C., which is very wide and the plenitude of the power requires great caution in its exercise though there is no hard and fast rule that can be laid down to exercise extraordinary jurisdiction. Having regard to the above, the availability of inherent power is different from exercise of the same in relation to the fact situation of case on hand, which depends upon the merits of each case in tilting the result for no precedent of facts with exact similarity.

18. Even coming to the other expression placed reliance in Criminal Appeal No.1265 of 2017 of the Apex Court, dated 27.07.2017, on the scope of Section 498-A I.P.C., at paragraph 8 thereof, referring to the earlier expressions, it was observed that misuse of the provision is judicially acknowledged and there is need to adopt measures to prevent such misuse and that the object behind the said provision is to check and curb the menace of dowry and to save the matrimonial homes from destruction. Their experience shows that apart from the husband, all family members are implicated and dragged to the Police Stations, though arrest of those persons is not at all necessary, in a number of cases, such harassment is made simply to satisfy the ego and anger of the complainant. By suitably dealing with such matters, the injury to innocents could be avoided to a considerable extent by the Magistrates, but if the Magistrates themselves accede to the bare requests of the Police without examining the actual state of affairs, it would create negative effects, thereby, the very purpose of the legislation would be

6 (2007) 12 SCC 1

defeated and the doors of conciliation would be closed forever and the husband and his family members may have difference of opinion in the dispute, for which, arrest and judicial remand are not the answers as the ultimate object of every legal system is to punish the guilty and protect the innocents. Even if these principles are applied to the facts of the case on hand discussed at length supra, the offence of Section 498-A I.P.C. is made out against accused Nos.1 and 2 and the learned Magistrate has rightly taken cognizance on the report and Police investigation and so also for the other offences under Sections 420, 120-B and 365 I.P.C. as discussed supra, and thereby, there is nothing to quash the entire cognizance of order of the learned Magistrate against accused Nos. 1 and 2. So far as accused Nos.3 and 7 are concerned, the cognizance order sustained against them as discussed supra for the offences under Sections 420, 120-B and 365 and not for the offence under Section 498-A.

19. In the result, Crl.P.No.4297 of 2017 filed by accused No.1 is dismissed. Crl.P.No.7716 of 2017 filed by accused Nos.2, 3 and 7 is allowed in part in so far as accused Nos.3 and 7 by setting aside the cognizance order against them in respect of the offence under Section 498-A I.P.C., however, by holding that there is *prima facie* case to take cognizance against them for the other offences under Sections 420, 120-B and 365 I.P.C. and it is dismissed in so far as accused No.2 is concerned as he goes on par with accused No.1.

20. In the backdrop of the above, coming to Crl.P.No.8251 of 2017, undisputably, there are no strained relations between accused No.1 on the one hand and accused Nos.2, 3 and 7 on the other. They are all husband, parents in-law and husband's brother of the *de facto* complainant and residing under one roof and whenever accused No.1 visits India he joins

them and stays along with them, so also from the last week of November, 2015 till he left India along with the child, it is at that time, the alleged offence of taking away the child took place and in no lapse of time the *de facto* complainant has given the Police report on 20.12.2015, which resulted in registering the crime. Even the quash petitions' averments of the accused persons, in particular of accused Nos.2, 3 and 7 in common petition supra, show in the course of investigation by the Police, accused Nos.2 and 3 were cooperating and even accused No.1 was sending messages by responding to the Police, thereby, they cannot say that they had no knowledge of the crime pending and also the investigation.

21. Once they did not submit to the jurisdiction of the Court by surrendering themselves and taking bail, much less at the time of investigation, there is nothing wrong in showing them in abscondence for out of reach to the Police even to arrest including filing of the final report and as such, issuing NBWs by the learned Magistrate from the expressions of the Apex Court in India in Inder Mohan Goswami (6 supra). From that expression of the three Judge Bench also it shows though the Courts can exercise power to issue NBWs, as far as possible if the Court is of the opinion that a summon will suffice in getting the appearance of the accused in the Court, the summon or the bailable warrant should be preferred by avoiding issue of NBW and that once NBW is issued, the accused should submit to the jurisdiction of the Court, at least but for obtaining anticipatory bail or by surrendering and obtaining regular bail and at least when the learned Magistrate issued NBWs and look out notices to secure their presence as part of the duty to post the cognizance case by supplying the copies of case papers for hearing all the parties, if

not discharged by framing of charges, examination and conducting of crime as expeditiously as possible.

Thus, when the accused persons could not obtain stay orders while seeking to quash the proceedings and not even submitting to the jurisdiction of the learned Magistrate, there is nothing to cancel the NBWs already issued by the Magistrate, but for if at all for the sole purpose to secure the presence of the accused before the Magistrate Court by supplying copies of the case papers, hearing all the parties, framing charges, examination, put to trial from assurance of their availability in relation to bail as the case may be and treat such assurance if at all citizen only to suspend the NBWs rather than recall/cancel warrant itself and the power to issue fresh warrant is altogether different. Thereby, for the factual background supra, recalling of warrant is unsustainable and accused No.1 shall submit to the jurisdiction of the learned Magistrate for the subsequent consideration of any concession on bail, if at all applied on merits.

22. Having regard to the above, Crl.P.No.8251 of 2017 is allowed in part by setting aside the order of recall of the NBWs till 04.10.2017 and directing that accused No.1 shall submit himself to the jurisdiction of the learned Magistrate within the time as undertaken by him in the affidavit filed before the learned Magistrate i.e., on or before 15.10.2017 for taking him to judicial custody and meantime to facilitate his arrival and to submit to jurisdiction of the Court's judicial custody, the look out notice is suspended and the passport impounding order is lifted for his facilitating the journey. Needless to say his right to move for bail is left open, so also for any application to file under Section 205 Cr.P.C. for permission to

represent through a special vakalat holder for facing enquiry or trial by so representing to hear and consider with necessary conditions.

23. Having regard to the above and coming to Crl.P.M.P.No.4351 of 2017 in Crl.P.No.4297 of 2017 filed by accused No.1 concerned for suspending letter, dated 13.04.2017, addressed by the learned Magistrate to the Regional Passport Officer, Hyderabad with the direction to impound passport of accused No.1 due to pending NBW, there is nothing to suspend the said letter, but for to say if at all he is landing in India pursuant to the undertaking given to the Court to submit to the jurisdiction of the learned Magistrate by appearing in person before 04.10.2017 and pursuant to the aforesaid order of recall of NBW as referred to supra, the Regional Passport Officer or the Authorities concerned including the Police shall not arrest him enabling him to appear/submit himself to the jurisdiction of the learned Magistrate to appear in person as per his undertaking i.e., on or before 15.10.2017. This petition is, accordingly, disposed of with observations in the previous para also.

24. This Court is under a hope that the good sense will prevail on the couple to amicably settle their marital differences and the child custody outside the Court on his landing in India.

25. As a sequel, pending miscellaneous petitions, if any, in these criminal petitions shall stand disposed of as infructuous.

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DR. B.SIVA SANKARA RAO, J

10th October, 2017
Note: Issue C.C. today.
(B/o)
GHN