IN THE HIGH COURT OF MADHYA PRADESH AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE ASHISH SHROTI

MISC. PETITION No. 3395 of 2023

SMT ANJALI SHARMA

Versus

RAMAN UPADHYAY

Appearance:

Shri Shubhendu Singh Chauhan - Advocate for the petitioner /wife.

Shri Sankalp Sharma, learned counsel for the respondent /husband

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ORDER

(Passed on this 16th Day of June, 2025)

The petitioner/defendant/wife has filed this misc. petition challenging the order dated 13/4/2023 passed by Additional Principal Judge, Family Court, Gwalior in Case No. 122-A/2018 (HMA), whereby learned Family Court has permitted the respondent/plaintiff/husband to mark the exhibits on the WhatsApp chats produced by him in his evidence.

2. For the sake of convenience, petitioner and respondent hereinafter shall be referred to as wife and husband respectively.

3. The facts necessary for decision of this case are that the marriage between the parties took place on 1/12/2016 at Gwalior as per Hindu Rites & Rituals. Out of this wedlock, a baby girl was born on 11/10/2017. The husband has filed a suit for dissolution of marriage under Section 13 of Hindu Marriage Act, 1955, on the ground of cruelty. He has also pleaded adultery on the part of wife. In order to prove adultery, in paragraphs 8 & 9 of the plaint, specific pleadings have been made with regard to WhatsApp chat of the wife with a third person. The husband has pleaded that by way of

a special application installed in the wife's phone, the WhatsApp chatting of her phone are automatically forwarded to his phone, which shows that the wife is having extramarital affair with a third person.

4. The wife has filed her written statement and denied the allegations made in the plaint. It is also borne out from the records that she has also filed an application under Section 9 of the Hindu Marriage Act seeking restitution of conjugal rights.

5. When the suit was at the stage of husband's evidence, he sought to exhibit the WhatsApp chats, to which the wife raised an objection. The learned Family Court has rejected the wife's objection and has allowed the husband to exhibit the WhatsApp chats. Being aggrieved by this order of the Family Court, the instant misc. petition has been filed by wife.

6. The learned counsel for the wife submitted that the act of husband in installing an application in wife's mobile, without her consent, was illegal and infringed her rights to privacy. It is his submission that since the evidence has been collected by illegal means, the husband cannot be allowed to rely upon such evidence and such evidence is inadmissible in evidence. He has further submitted that the evidence collected by husband is in violation of Section 43, 66 & 72 of the Information Technology Act. Learned counsel for the wife has placed reliance upon the judgment of Delhi High Court in the case of ***National Lawyers Campaign For Judicial Transparency and Reforms & Ors. vs. Union of India & Ors.*** reported in ***2017 SCC Online Del. 8564***, the judgment of the Punjab & Haryana High Court in the case of ***Neha Garg vs. Vibhor Garg*** reported in ***2021 SCC Online P&H 4571***, judgment of Andhra Pradesh High Court in the case of ***Rayala M. Bhuvaneshwari vs. Nagaphanender Rayala*** reported in ***AIR 2008 AP 98*** and also the judgment of this Court in the case of ***Ram Talreja vs. Smt. Sapna Talreja*** passed in ***M.P. No.949/2022***.

7. On the other hand, learned counsel for the husband submitted that the WhatsApp chats produced by the husband are relevant for establishing the

allegation of adultery on the part of wife. Placing reliance upon Section 14 of the Family Courts Act, learned counsel submitted that Family Court is competent to take in evidence the material which is relevant for decision of the case even if such evidence is otherwise inadmissible under Indian Evidence Act. He placed reliance upon the decision of Rajasthan High Court in the case of ***Preeti Jain vs. Kunal Jain*** reported in ***AIR 2016 Raj. 153***, decision of Delhi High Court in the case of ***Deepti Kapur vs. Kunal Julka*** reported in ***AIR 2020 Del. 156*** and Punjab & Haryana High Court in ***X vs. Y*** reported in ***2023:PHHC:165262-DB***.

8. Heard the arguments of both the sides and perused the record.

9. The validity of impugned order is required to be tested on the anvil of principles of admissibility of evidence keeping in view the statement of objects & reasons and the provisions of Section 14 & 20 of Family Courts Act, 1984. The Statement of objects & reasons of the Family Courts Act enunciates the main purpose of its enactment in the following words:

> *"**Statement of Objects and Reasons.**—Several associations of women, other organisations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family*

disputes.

***2**. The Bill inter alia, seeks to:—*

*** *** ***

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

*** *** ***"*

10. Further, Section 14 & 20 of Family Courts Act, 1984, are reproduced hereunder for ready reference:

> *"**14. Application of Indian Evidence Act, 1872.-** Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872).*
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> ***20. Act to have overriding effect.-** The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."*

11. In order to achieve its object to simplify the rules of evidence and procedure, Section 14 of the Family Courts Act provides for an exception to the general rule of evidence regarding admissibility of any report, statements, documents, information or matter, which it considers necessary to assist it and to deal with it effectively. Apparently, such a provision is made keeping in view the nature of cases which are dealt with by the Family Courts. Needless to mention here that Section 14 of Family Courts Act is a special legislation and by virtue of this provision, the strict principles of admissibility of evidence as provided under the Evidence Act have been relaxed.

12. A cumulative reading of Section 14 & 20 of the Family Courts Act, takes within its ambit the restricted applications of the provisions of the Evidence Act *qua* the documentary evidence which includes electronic evidence, whether or not the same is otherwise admissible. The only guiding

factor is that the Family Court should be of the opinion that such evidence would assist the Court to deal with the matrimonial dispute effectively. It is the absolute power and authority of the Family Court either to accept or discard particular evidence in finally adjudicating the matrimonial dispute. However, to say that a party would be precluded from placing such documents on record and/or such documents can be refused to be exhibited unless they are proved as per Evidence Act, runs contrary to the object of Section 14 of the Family Courts Act.

13. At this juncture, it would be useful to extract certain provisions of Indian Evidence Act, 1872, which are relevant for adjudication of issue involved in this case. Section 5 of Act of 1872 provides that:

> *"**5. Evidence may be given of facts in issue and relevant facts-** Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.*
>
> *Explanation— This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure."*
>
> "***122. Communication during marriage.-** No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.*"

Thus, on one hand, the explanation to Section 5 restrains a person from giving evidence of a fact which he is disentitled to prove under any law, on the other hand Section 122 of Evidence Act permits disclosure of any communication made to a person during marriage by any person to whom he is married in a suit between married persons.

14. Before referring to various judicial pronouncements dealing with the scope of Section 14 of Family Courts Act and Section 122 of Evidence Act, it is profitable to deal with the argument of learned counsel for petitioner/ wife that the evidence produced by respondent is not obtained by legal means and the method adopted by him for obtaining such evidence has violated wife's right of privacy as enshrined under Article 21 of Constitution of India. To deal with this argument, it is profitable to refer to certain authorities of Apex Court dealing with right to privacy, considered to be a fundamental right under Article 21 of Constitution of India.

15. More than five decades ago, the Apex Court in the case of ***R.M. Malkani vs. State of Maharashtra reported in (1973)1 SCC 471*** was dealing with admissibility of a tape recorded conversation, which was obtained by illegal means, in a criminal matter involving offences punishable under Section of 161 & 385 of Indian Penal Code. The Apex Court held thus:

> *"24. It was said by counsel for the appellant that the tape recorded conversation was obtained by illegal means. The illegality was said to be contravention of Section 25 of the Indian Telegraph Act. There is no violation of Section 25 of the Telagraph Act in the facts and circumstances of the present case.* ***There is warrant for proposition that even if evidence is illegally obtained it is admissible****. Over a century ago it was said in an English case where a constable searched the appellant illegally and found a quantity of offending article in his pocket that it would be a dangerous obstacle to the administration of justice if it were held, because evidence was obtained by illegal means, it could not be used against a party charged with an offence. See Jones v. Owen [(1870) 34 JP 759]. The Judicial Committee in uruma, Son of Kanju v.R.[1955 AC 197] dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution.*

> *It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence.*
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> *25.This Court in Magraj Patodia v. R.K. Birla [AIR 1971 SC 1295] dealt with the admissibility in evidence of two files containing numerous documents produced on behalf of the election petitioner. Those files contained correspondence relating to the election of Respondent 1. The correspondence was between Respondent 1 the elected candidate and various other persons. The witness who produced the file said that Respondent 1 handed over the file to him for safe custody. The candidate had apprehended raid at his residence in connection with the evasion of taxes or duties. The version of the witness as to how he came to know about the file was not believed by this Court.* ***This Court said that a document which was procured by improper or even by illegal means could not bar its admissibility provided its relevance and genuineness were proved****."*

The Apex Court thus allowed material obtained by impermissible means to be admitted in evidence. Pertinently, it was a case where strict rules of evidence were applicable and there was no provision available like Section 14 of Family Courts Act. This judgment was later on followed by Apex Court in the case of ***State (NCT of Delhi) vs. Navjot Sandhu reported in (2005)11 SCC 600***.

16. The next judgment of Apex Court in line is ***Sharda vs. Dharmpal reported in (2003)4 SCC 493***, wherein the Apex Court was dealing with a case involving an issue as to whether a party to a divorce proceeding can be compelled to undergo medical examination in order to ascertain his/her mental condition. The Apex Court after taking into account the provisions of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Mental Health Act, 1987, Hindu Marriage Act, 1955, Evidence Act, 1872, Article 21 of Constitution of India, held as under:

> *"76. The matter may be considered from another angle. In all such matrimonial cases where divorce is sought, say on the ground of impotency, schizophrenia etc. normally without there being medical examination, it would be*

> *difficult to arrive at a conclusion as to whether the allegation made by a spouse against the other spouse seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If the respondent avoids such medical examination on the ground that it violates his/her right to privacy or for that matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory.* ***Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as an absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash. In matters of the aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent****. Thus the court has to reconcile these competing interests by balancing the interests involved.*
>
> *77. If for arriving at the satisfaction of the court and to protect the right of a party to the lis who may otherwise be found to be incapable of protecting his own interest, the court passes an appropriate order, the question of such action being violative of Article 21 of the Constitution of India would not arise.* ***The court having regard to Article 21 of the Constitution of India must also see to it that the right of a person to defend himself must be adequately protected****."*

17. The right to privacy has been recognized as a fundamental right by virtue of celebrated judgment of 9-Judge Constitution Bench of the Apex Court in ***K.S. Puttaswamy vs. Union of India reported in (2017)10 SCC 1***. Though, the Apex Court has not dealt with the law and principles of evidence in the context of the right to privacy, the observations of the Apex Court in that case that are relevant for purposes of the present discussion are the following:

> *"325. Like other rights which form part of the fundamental*

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

18. By reading the dictum of Apex Court in the case of ***Sharda & Puttaswami (supra)***, it is evident that right to privacy is recognized as a fundamental right under Article 21 of Constitution, but the same is not an absolute right. In case of necessity, a law can be framed permitting invasion to life and personal liberty. Section 14 of Family Courts Act and Section 122 of Indian Evidence Act are some such statutory provisions which permits invasion to right to privacy. It is worth mentioning here that *vires* of either of the aforesaid provisions are not under challenge and, therefore, the same have to be deemed as valid, fair and reasonable.

19. Since no fundamental right under our Constitution is absolute, in the event of conflict between two fundamental rights, as in this case, a contest between the right to privacy and the right to fair trial, both of which arise under Article 21 of our Constitution, the right to privacy may have to yield to the right to fair trial. Reference in this regard can be made to the observations of a 5-Judge Constitution Bench decision of Apex Court in ***Sahara India Real Estate Corporation Limited Vs. Securities and Exchange Board of India*** reported in ***(2012)10 SCC 603*** where the court observed in para 25 thus:

> *"..... It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system*

> *are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under of Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of freedom of expression as it is for other values. Consequently, free speech, in appropriate cases, has got to correlate with fair trial.* ***It also follows that in an appropriate case one right (say freedom of expression) may have to yield to the other right like right to a fair trial****. Further, even Articles 14 and 21 are subject to the test of reasonableness after the judgment of this Court in Maneka Gandhi vs.Union of India."*

20. Reading the law laid down by Apex Court in the case of ***Sharda, Puttaswamy & Sahara India (supra)***, it comes out loud and clear that even though right to privacy has been recognized as a fundamental right, the same is not absolute and is subject to exceptions and limitations. While a litigating party certainly has a right to privacy, that right must yield to the right of an opposing party to bring evidence it considers relevant to court, to prove its case. It is a settled concept of fair trial that a litigating party gets a fair chance to bring relevant evidence before court. It is important to appreciate that while the right to privacy is essentially a personal right, the right to fair trial has wider ramifications and impacts public justice, which is a larger cause. The cause of public justice would suffer if the opportunity of fair trial is denied by shutting-out evidence that a litigating party may wish to lead, at the very threshold. Saying otherwise, would negate the specific statutory provision contained in Section 14 of Family Courts Act, which says that evidence would be admissible, whether or not the same is otherwise admissible under Evidence Act.

21. If it were to be held that evidence sought to be adduced before a Family Court should be excluded based on an objection of breach of privacy right then the provisions of Section 14 would be rendered nugatory and dead-letter. It is to be borne in mind that Family Courts have been

established to deal with matters that are essentially sensitive, personal disputes relating to dissolution of marriage, restitution of conjugal rights, legitimacy of children, guardianship, custody, and access to minors; which matters, by the very nature of the relationship from which they arise, involve issues that are private, personal and involve intimacies. It is easily foreseeable therefore, that in most cases that come before the Family Court, the evidence sought to be marshaled would relate to the private affairs of the litigating parties. If Section 14 is held not to apply in its full expanse to evidence that impinges on a person's right to privacy, then not only of Section 14 but the very object of constitution of Family Courts shall be frustrated. Therefore, the test of admissibility would only be the relevance. Accordingly, fundamental considerations of fair trial and public justice would warrant that evidence be received if it is relevant, regardless of how it is collected. The purpose of legislating Section 14 would be frustrated if it is to give way to right of privacy.

22. Now, it is profitable to refer to certain judgments from various High Courts dealing with scope of Section 14 of Family Courts Act. The Delhi High Court in the case of ***Deepti Kapur (supra)***, after exhaustively dealing with Section 14 & 20 of Family Courts Act, provisions of IT Act, right to privacy etc., held as under:

> *"28. In this court's opinion, the Legislature being fully cognisant of the foregoing principle of admissibility of evidence, has enacted Section 14 infact to expand that principle insofar as disputes relating to marriage and family affairs are concerned; and the Family Court is thereby freed of all rigours and restrictions of the law of evidence. The Legislature could not have enunciated it more clearly than to say that the Family Court "may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872". Therefore the only criterion or test under section 14 for a Family Court to receive, that is to say admit, evidence is its subjective satisfaction that the evidence would assist it*

> *to deal effectually with the dispute. It may also be relevant to note that under section 13 of the Family Courts Act, parties are to represent themselves without the assistance of lawyers; and therefore even more so, all technical aspects of admissibility of evidence are to be ignored before a Family Court, since parties appearing in-person cannot be expected to be well versed with the technicalities of the law of evidence. Reference in this regard may be made to the observations made by a Division Bench of the Bombay High Court in Shiv Anand Damodar Shanbhag vs. Sujata Shiv Anand Shanbhagh."*

23. In another case of ***S@S vs. CP reported in 2018 SCC Online Del. 9237***, the Division Bench of Delhi High Court has taken a similar view wherein a couple of print-outs from the 'Facebook' page of the petitioner therein and certain recorded telephone conversations in two CDs with transcripts, were allowed to be read in evidence.

24. The Bombay High Court also dealt with the similar aspect in the case of ***Deepali Santosh Lokhande vs. Santosh Vasantrao reported in 2017 SCC Online Bom. 9877*** and held as under:

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

25. In yet another case of Shiv ***Anand Damodar Shanbhag vs. Sujata Shiv Anand Shanbhag reported in 2013 SCC Online Bom 421***, similar view has been taken by Bombay High Court.

26. The Rajasthan High Court has also dealt with Section 14 of Family Courts Act in the case of ***Preeti Jain*** (supra) whereunder the husband was permitted to adduce video clippings recorded through pinhole camera for establishing extra marital affair of his wife.

27. The judgments cited by learned counsel for the petitioner now needs to be discussed. The judgment of Delhi High Court in the case of ***National Lawyers Campaign (supra)***, was a case where a writ of *mandamus* was sought directing Police and CBI to register an FIR based on a suicide note which was circulated on WhatsApp platform of which the source was not disclosed. The petitioners also could not justify their *locus* to file such a petition. Thus, this judgment is of no help to the petitioner for the reason firstly that it does not deal with Section 14 of Family Courts Act and secondly, the judgment is passed on facts of particular case.

28. Another judgment cited by petitioner's counsel is the case of ***Vibhor Garg (supra),*** wherein the husband sought to bring on record a CD and transcriptions of conversations with his wife, recorded in memory cards/ chips of mobile phones. The Court observed firstly that there is no mention of such conversation in petition and in affidavit evidence. The same was not allowed by the Court in view of breach of fundamental right of privacy of wife. In view of discussion made in earlier part of this order, this Court respectfully disagree with this view of P&H High Court as the same would entirely frustrate the purpose of Section 14 of Family Courts Act as also that of Section 122 of Evidence Act. Pertinently, Section 122 of Evidence Act was not even cited before P&H High Court.

29. Yet another judgment relied upon by wife's counsel is in the case of ***Rayala M. Bhuvaneswari (supra)***. This judgment would also not help the petitioner for the simple reason that it does not take into account provisions

of Section 14 of Family Courts Act as also that of Section 122 of Evidence Act. Further, in this case, the Trial Court directed for comparing admitted voice of respondent with the disputed portion of conversation. The court held that the act of tapping of conversation without the consent of spouse was illegal and infringement of the right of privacy of wife. For the reasons already stated hereinbefore, this Court respectfully disagrees with this view of Andhra Pradesh High Court also.

30. There are certain judgments of this Court also on the issue which needs to be referred. The first judgment in the line is in the case of ***Anurima @ Abha Mehta vs. Sunil Mehta*** reported in ***2016(1) MPLJ 333***. This was a case where the husband sought to bring on record a CD containing conversation of wife with a third person. This court held that the conversation is recorded without the knowledge and permission of wife and is thus infringes her right of privacy. The act of the husband was found to be in violation of Article 19 & 21 of Constitution of India. Relying upon ***Anurima (supra)***, Indore Bench of this Court passed similar order in the case of ***Ram Talreja (supra)*** which is relied upon by petitioner's counsel. Likewise, in ***Smt. Saroj vs. Aashish Yadav (M.P. No.1422 of 2024)*** also, this court passed similar order relying upon ***Anurima (supra)*** and also in **Abhishek Ranjan** (discussed below). Unfortunately, provisions of Section 14 of Family Courts Act as also that of Section 122 of Evidence Act were not cited before this Court in all these cases.

31. There is one more order passed by coordinate bench of this court in the case of ***Abhishek Ranjan vs. Hemlata Choubey (M.P. No.1300 of 2023)***. In this case, the Family Court refused to accept secondary evidence in form of conversation between husband and wife to prove cruelty. This Court, after placing reliance upon ***Neha Garg (supra)*** by P&H High Court and also upon ***Anurima (supra)***, held the act to be in violation of right to privacy. The order passed by Family Court, declining to take such evidence on record, was upheld. Section 14 of Family Courts Act was not expressly

considered and discussed by this Court in this case and has only referred para 18 of ***Neha Garg (supra)*** which deal with right of privacy only. Thus, this judgment also cannot be said to have been passed by this Court after taking into account ambit and scope of Section 14 of Family Courts Act. Further, Section 122 of Evidence Act was also not cited before this Court which directly deals with the issue involved.

32. The term *sub silentio* is a legal Latin term which means "under silence" or "in silence". Further, the term *per incuriam* means “through inadvertence”. The Apex Court in the case of ***Municipal Corporation of Delhi vs. Gurnam Kaur*** **reported in** ***(1989)1 SCC 101*** dealt with these doctrine and held as under:

> *“11. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das' case and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavement or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the Court on the question or not whether any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a PG NO 939 pavement squatter. Professor P.J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th edn. explains the concept of sub silentio at p. 153 in these words:*
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> > *"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the*

> *court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."*

Further, in the case of ***Hyder Consulting (UK) Ltd. Vs. State of Orissa*** **reported in** ***(2015)2 SCC 189***, the Apex Court dealt with doctrine of *sub silentio* and *per incuriam* and held as under:

> *"47. Therefore, I am of the considered view that a prior decision of this Court on identical facts and law binds the Court on the same points of law in a later case. In exceptional circumstances, where owing to obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or obligatory authority running counter to the rasoning and result reached, the principle of per incuriam may apply. The said principle was also noticed in Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., (2001) 6 SCC 356."*

33. The Division Bench of this Court has also considered the doctrine of sub silentio and per incuriam in the case of ***Ram Bharose Sharma vs. State of M.P. & ors.*** reported in *2021(4) MPLJ 90*, wherein the Division Bench held as under:

> **"28.** Therefore, cumulatively, the decision of Division Bench in the case of *A was Samasya Niwaran Sansthan* (supra) as well as in *Ward Sudhar Samiti*(supra), did not consider the interplay of different provisions of the Act of 1956 and their resultant effect in the light of principle of Public Policy, especially when provisions of issuance of public notice and authority to impose improvement charges lie with the Commissioner as per section 371 and 378 respectively of the Act of 1956 and both judgments did not consider these provisions and point of law involved in given factual set up, then both these judgments pass *sub silentio* and cannot be relied upon being *per incuriam* on discussion made and reasons stated above.

34. Thus, keeping in view of the aforesaid legal provision with regard to doctrine of *sub silentio* and *per incurium*, it is gathered that this Court did not take note of and discussed the ambit and scope of Section 14 of Family Courts Act and Section 122 of Indian Evidence Act while deciding the case

of ***Abhishek Ranjan (supra)***. The Court has considered the judgment of P&H High Court in the case of ***Neha Garg and Dr. Tripad Deep Singh (supra)*** and judgment of this Court in the case of ***Anurima (supra)***. Relied upon right to privacy only, the case of ***Abhishek Ranjan (supra)*** has been decided. Thus, this Court in the case of ***Abhishek Ranjan*** also, has not considered the ambit and scope of Section 14 of Family Court Act. Further, Section 122 of Evidence Act was also not cited before this Court. Therefore, the judgment in the case of ***Abhishek Ranjan (supra)*** also cannot be said to be an authority on interpretation of Section 14 of Family Courts Act and Section 122 of Evidence Act.

Therefore, since in judgments passed by this Court in the case of ***Anurima @ Abha Mehta***, ***Ram Talreja***, ***Smt. Saroj*** **and** ***Abhishek Ranjan (supra)***, this court failed to discuss the provisions of Section 14 of Family Courts Act and Section 122 of Evidence Act, which are germane to the issue involved, these judgments have been passed *sub-silentio* and cannot be relied upon being *per incuriam.*

35. In view of the discussion made above, this court is of the opinion that the Legislature, being fully aware of the principals of admissibility of evidence, has enacted Section 14 in order to expand that principle in so far as disputes relating to marriage and family affairs are concerned. The Family Court is thereby freed of restrictions of the strict law of evidence. The only test under Section 14 for a Family Court to receive the evidence, whether collected legitimately or otherwise, is based upon its subjective satisfaction that the evidence would assist it to deal effectually with the dispute.

36. Further, after having received such evidence on record, the Family Court is free to either accept or discard or give weightage or discard a particular piece of evidence while finally adjudicating the dispute. In other words, merely because evidence has been taken on record by virtue of Section 14, there is no compulsion on Family Court to rely upon such piece

of evidence and it can discard such evidence if it is not found trustworthy while appreciating the evidence at the adjudication stage. It is also open to the opposite party to dispute, cross-examine and disprove the evidence so cited and to contest any claim being made on the basis of such evidence. The limited relaxation given by Section 14 is that even if under conventional rules of evidence, a report, statement, document, information or other matter is not admissible, the Family Court may yet receive such evidence on record if in its opinion, the evidence would assist it to deal effectively with the dispute. What value or weightage is to be given to such evidence is the discretion of the judge, when finally adjudicating the dispute.

37. Wide powers inherit more responsibility. In view of the unusual and wide power conferred on Family Court under Section 14, certain safeguards are required to be adopted by the Family Court while exercising its power under that provision. Some of such safeguards may be:

i. even though a given piece of evidence has been admitted on record, the Court must be extremely careful in relying upon such evidence while deciding *lis*. The authenticity & genuineness of such evidence must be strictly and meticulously examined.

ii. if in its opinion, the nature of the evidence sought to be adduced is inappropriate, embarrassing or otherwise sensitive in nature for any of the parties, may be litigating or not, the Family Court may restrict the parties who are present in court at the time of considering such evidence. It may conduct in-camera proceedings so as not to cause embarrassment to any person or party.

iii. all proceedings must be conducted strictly within the bounds of decency & propriety, and no opportunity should be given to any party to create a spectacle in the guise of producing

evidence.

iv. any party aggrieved by the production of such evidence would be at liberty to initiate appropriate proceedings, whether in civil or criminal law, against party for procuring evidence illegally, although the initiation or pendency of such proceeding shall not make the evidence so produced inadmissible before the Family Court.

38. In view of the discussion made above, it is held that:

(a) the evidence is admissible so long as it is relevant, irrespective of the fact how it is collected. The possible misuse of this rule of evidence, particularly in the context of the right to privacy, can be addressed by prudent exercise of judicial discretion by the Family Court, not at the time of receiving evidence but at the time of using evidence at the stage of adjudication;

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

(c) the test of ‘relevance’ ensures that the right of a party to bring evidence to court, and thereby to a fair trial, is not defeated. What weight is to be given to evidence so brought-in, and whether or not the court ultimately relies upon such evidence for proof of a fact-in-issue or a relevant fact, is always in the discretion of the court.

(d) merely because a court allows evidence to be admitted, does not mean that the person who has illegally collected such

evidence is absolved of liability that may arise, whether in civil or criminal law or both;

(e) such evidence must be received and treated with caution and circumspection and to rule-out the possibility of any kind of tampering, the standard of proof applied by a court for the authenticity and accuracy of a such evidence should be more stringent as compared to other evidence;

39. In view of the aforesaid, the impugned order, dated 13/4/2023, passed by learned Family Court in Case no.122-A/2018(HMA), is upheld. The petition is dismissed.

(ASHISH SHROTI)
JUDGE

JPS/-