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

\+ CM(M) 684/2010 & CM.13618/2010

% Judgment dated 17.01.2013

MON MOHAN KOHLI ..... Petitioner
Through: Ms.Geeta Luthra, Sr. Advocate with
Mr.Ankur Mahindroo, Advocate

versus

NATASHA KOHLI ..... Respondent
Through: Mr.Rajshekhar Rao, Ms.Anu Bagai,
Mr.Bhuvan Mishra and Ms.Manini Brar,
Advocates

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Present petition is directed against the order dated 10.03.2010 passed by the Additional District Judge, Delhi, whereby an application filed by the petitioner (husband) under Order 12 Rule 6 of the Code of Civil Procedure for passing a decree of annulment of marriage in view of admission made by the respondent (wife) in the written statement, was rejected.

2. Petitioner was married to the respondent on 14.11.1994 and a male child was born out of their wedlock. The petitioner has filed a petition for grant of divorce under Section 13 (1) (ia) of the Hindu Marriage Act on the ground of cruelty which petition is also pending. Meanwhile, petitioner has filed another petition for grant of decree of nullity under Section 11 of the Hindu Marriage Act in the alternate under section 12(c) of the Hindu Marriage Act for annulment of marriage on the ground of fraud.

3. According to the petitioner, marriage between the petitioner and the respondent is a nullity since the respondent had a subsisting marriage with one Mr.Kia Louis Boccagna, which was performed in the United States of America. It is submitted that this fact was duly admitted by the respondent in her written statement which was filed to the petition filed by the petitioner herein under Section 13 (i) (ia) of the Hindu Marriage Act, seeking divorce on the ground of cruelty. According to this petition, the petitioner had no knowledge that the marriage of Mr.Kia Louis Boccagna son of Mr.David Boccagna and the respondent was subsisting even at the time of filing of the divorce petition in the trial court. According to the petitioner, the fact regarding the actual marriage of the respondent with Mr.Kia Louis Boccagna came to the knowledge of the petitioner after he obtained the certified copy of the decree which was obtained by the respondent from the United States of America, which was received by the petitioner through a courier on 12.05.2007. According to the petitioner, the marriage between the respondent and Mr.Kia Louis Boccagna is a subsisting marriage which is borne out of the order of the Matrimonial Court at Florida, United States of America i.e. Circuit Court of the Fifteenth Judicial Circuit of Florida. In and For Palm Beach County, Juvenile and Family Division, Case No.CD 90-8251 FZ establishing that the respondent continued to be married to Mr.Kia Louis Boccagna.

4. Ms.Luthra, learned senior counsel for the petitioner contends that the said order dated 28.03.1991 shows that the marriage is subsisting and the petition filed by the Mr.Kia Louis Boccagna for divorce/ annulment was dismissed due to non service on the respondent. The petitioner thereafter filed a petition for nullity/ annulment under Section 11 and in the alternate Sections 12(1) (c) of the Hindu Marriage Act, which was filed on 17.07.2007. According to Ms.Luthra, the learned trial court arrived at a

finding that the admission i.e. the respondent's marriage with Mr.Kia Louis Boccagna on the date of marriage to the petitioner (husband) and on the date of filing to the petition for nullity has been adequately made out. The observations made by the trial court in 16 and 17 of the Order have been relied upon and are reproduced below:

> "16. Keeping the above principles in mind and after thoughtful consideration of the above contentions, in light of the pleadings of the parties and the record placed, I am of the view that as far as the admission as to the Respondent's marriage is concerned, there is enough and adequate admission of marriage between the Respondent and Mr.Boccagna. I also find force in the contentions of the Ld. Counsel for the petitioner that the respondent cannot claim that she did not have the details as to the fate of her relationship with Mr.Boccagna or that once she realized about the subsistence of marriage, she had discreetly made efforts for its nullity. As far as the admission as to the marriage with Mr.Boccagna is concerned, there is little doubt that the written statement, itself is redolent of subsistence of marriage with Mr.Boccagna, and the subsequent attempts of the respondent for its annulment under Rule 140 (e) of the Domestic Relations Law, State of New York, goes on show that the respondent had accepted the subsistence of marriage with Mr.Boccagna.
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> 17. Coming now to the contention that whether the admission is specific and unambiguous. I am of the opinion that the requirement of law to the effect that an admission has to be specific, clear, unambiguous and unequivocal, does not depend upon the choice of the words in the pleadings or as to how are the admissions couched in the phrases, but would largely depend upon the subsistence of the pleadings. Admissions may be presented in a circuitous manner, where a party, though admitting the fact, does not wish it to be taken against him, outrightly. The Court, nevertheless, can look into the substance, in order to find out as to whether any other interpretation is possible or whether the explanation, provided by the party against whom such admission is being

> used, takes the case of the party to such a position, where the Court is rendered of the view that it is not safe to conclude upon the admission, and regardless the fact that admission itself amount to evidence, that the very question demands further corroboration and a higher quotient of evidence. A reading of the written statement leaves this court in no doubt as to the fact that as far as the marriage of the respondent with Mr.Boccagna is concerned, the same is clearly admitted by Respondent."

5. Ms.Luthra, also contends that the admission made by the respondent in her written statement is specific and unambiguous and thus satisfies the ingredients of Order 12 Rule 6 CPC, according to which the admission has to be specific clear, unambiguous and unequivocal. It is submitted that even indirect admissions and admissions made in documents and not specifically in pleadings are to be considered as admissions while disposing of an application under Order 12 Rule 6 of the CPC. It is contended that in view of the admissions made by the respondent there is no room for doubt that the respondent was married to one Mr.Kia Louis Boccagna, at the time of marriage with the petitioner. It is thus contended that since the admission is binding on the respondent, the petitioner is entitled to a decree of nullity. The relevant portions of the written statement filed by the respondent (wife) reads as under:

> "As regards her marriage with Mr.Kia Louis Boccagna, it is correct that she had been married for a while to the said Mr.Kai Boccagna. The said marriage was nevertheless dissolved. As the marriage with Mr.Kai Boccagna is an episode in the respondent's life that is almost 25 years in the past, the exact dates are no longer in the memory of the respondent."

6. Ms.Luthra, learned senior counsel for the petitioner also submits that the respondent has admitted that she was never a party to any dissolution of

marriage, although she had been given to understand by Mr.Kia Louis Boccagna and Mr.David Boccagna that her marriage with Mr.Kia Louis Boccagna has been dissolved. It is submitted that such a plea is preposterous as no unilateral dissolution of marriage is known in civil law. She further contends that under the principles of natural justice and in any system of civil jurisprudence, no final order can be obtained by any party against another without giving notice to the said party. It is submitted that there is no explanation as to how the respondent came to such an understanding that her marriage with Mr.Kia Louis Boccagna stood dissolved. It is also contended that simply because respondent's husband Mr.Kia Louis Boccagna had entered into a bigamous and adulterous relationship with Ms.Caryn D Fillipo, as alleged by the respondent, can be of no benefit to the respondent to categorically establish dissolution of her earlier marriage and further the assurances made by her are patently false and she has committed perjury with impunity, knowing fully well that the marriage with Mr.Kia Louis Boccagna was subsisting.

7. It is next contended that after filing of the written statement the respondent indulged in forum hunting and approached the Supreme Court of the State of New York, Westchester County (County Court) in the State of New York, where according to the petitioner, the parties had never resided, by filing a petition for annulment of her marriage with Mr.Kia Louis Boccagna under Section 140 (e) of the Domestic Relation Law (DRL) on the ground of non-consummation of marriage. It is also submitted by Ms.Luthra that the said petition was fraudulent and collusive in nature. She further contends that the petition for annulment of her marriage with Mr.Kia Louis Boccagna was filed on 21.11.2007 on the ground of alleged non-consummation of marriage after a gap of 25 years

is meaningless particularly when no reply was filed by Mr.Kia Louis Boccagna in the County Court. After the decree of annulment of marriage was obtained by the respondent, respondent sought to amend her written statement on 30.04.2009. It is submitted that although the stand taken by the respondent in her written statement filed at the first instance was that most likely her marriage has been dissolved with Mr.Kia Louis Boccagna as per the assurances given to her by David Boccagna, father of her husband (Mr.Kia Louis Boccagna), the respondent sought to rely upon a decree of annulment passed under Section 140 (e) of the Domestic Relations Law, which resulted in an annulment ab initio of marriage with Mr.Kia Louis Boccagna and the said annulment operated as nullifying her marriage and had made the effect of making her bigamous marriage with the petitioner as a valid marriage.

8. According to the petitioner a void marriage in terms of Section 5(1) (a) of the Hindu Marriage Act, cannot be validated by any subsequent act or event. It is contended that the learned trial court had erred in holding that evidence would be required to decide the said issue, although this was a pure question of law. It is contended that the trial court has grossly erred in not coming into a finding that the said foreign judgment has no effect and no conclusiveness in view of section 13 of the Code of Civil Procedure. Reliance is placed on Section 13 of the CPC, which is also reproduced below:

> "**13.When foreign judgment not conclusive.-**
>
> A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-
>
> (a) where it has not been pronounced by a Court of

competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [India] in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in [India].

9. Ms.Luthra, counsel for the petitioner submits that the requirement and mandate of Section 13 would show that there has to be direct adjudication between the same parties and thus there is no conclusiveness of a foreign judgment neither it is existing in the present case. It is submitted that the foreign judgment is not binding on the petitioner as there is no conclusiveness between the petitioner and the respondent.

10. It is contended that the only issue which was to be decided / adjudicated by the trial Court was the effect of the declaration that the marriage between the respondent and Mr.Kia Louis Boccagna had been annulled *ab initio* and whether the annulment could have any effect on the third party/ stranger. It is also the contention of counsel for the petitioner that no decree of foreign court is binding on the Indian Courts if it was not inter se the parties. By an application for amendment, the subsequent events and facts were brought on record when the amendment was allowed and the amended written statement was taken on record.

11. Another submission made by Ms.Luthra, counsel for the petitioner is that the decree of annulment dated 28.04.2008 which was passed by the Supreme Court of the State of New York, Westchester County (County Court) in the State of New York, was a collusive decree between the respondent and Mr.Kia Louis Boccagna and thus would have no bearing

to the marriage of the respondent with the petitioner and the decree is void in view of section 5(i) (a) of the Hindu Marriage Act. Section 5 (i) of the Hindu Marriage Act, reads as under:

> "5. **Conditions for a Hindu marriage.** - A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-
>
> (i) neither party has a **spouse living at the time of the marriage**"

12. Relying on Section 5, Ms.Luthra, submits that the marriage between the petitioner and the respondent is nullified as the respondent had a living spouse at the time of marriage with the petitioner and the respondent has played a fraud upon the court and is guilty of bigamy, perjury and contempt of court. It is contended that the respondent in reply to the application under Order 12 Rule 6 CPC, in the written statement and in the application seeking amendment of the written statement clearly establishes that there is clear and categorical admission made by the respondent with regard to the subsistence of her marriage with Mr.Kia Louis Boccagna, at the time of her marriage with the petitioner. In addition to the grounds raised by her that the decree dated 28.04.2008 is not binding or unenforceable in India under Section 13 of the Code of Civil Procedure.
13. Ms.Luthra, contends that the said decree was collusive in nature, barred by law of limitation and even otherwise a decree which has been declared as void ab initio could not have any binding effect on the third party, who would be affected. Ms.Luthra has placed reliance on Begins Vs. Begins 1958 555 for the said proposition.
14. Reliance is also placed on ***Smt. Padi & Ors. Vs. Union of India*** AIR

1963 Himachal Pradesh 16 (V 50 C6) and more particularly paragraph 3, which reads as under:

> "3. It has not been disputed that the petitioner was married to Smt. Mathi about 20 years back or that she was alive at the time when he married Smt. Padi or that the last mentioned marriage took place after the coming into force of the Hindu Marriage Act 1955. Section 5 of the aforesaid Act inter alia provides that a marriage may be solemnized between two Hindus if neither party has a spouse living at the time of the marriage. Section 11 thereof lays down that any marriage solemnized after the coming into force of the Act shall be null and void and Section 17 emphasizes that any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party has a husband or wife living and applies the provisions of Sections 494 and 495 of the Indian Penal Code. The conjoint effect of the aforesaid sections is that if a marriage is solemnized after the commencement of the Hindu Marriage Act between persons either of whom has a spouse living at the time of the marriage the marriage is void and the provisions of Sections 494 and 495 are attracted to marriages between Hindus also. In the instant case it has already been noticed that at the time when the petitioner married Smt. Padi his wife Smt. Mathi was alive and there is thus no escape from the conclusion that the marriage between the petitioner and Smt. Padi was void. A thing which is void has no existence in the eye of law. Since in the eye of law the relationship of husband and wife did not exist between the petitioner and Smt. Padi her subsequent marriage with another person will not attract Section 494, I.P.C."

15. Ms.Luthra, has also strongly urged before this court that the decree of nullity which has been obtained by respondent from a foreign court is not binding on the petitioner. In support of her contention, learned senior counsel for the petitioner has relied on various judgments, which have been discussed in detail by the trial Court in the order dated 10.03.2010.

16. This petition is opposed by the respondent on the ground that the application filed by the petitioner under Order 12 Rule 6 CPC has been

dismissed by way of a reasoned order, which requires no interference in proceedings under Article 227 of the Constitution of India. It is further submitted that the petitioner is in effect seeking review/ re-appreciation of evidence/ material before the trial court, which is not contemplated under Articles 226/ 227 of the Constitution of India, which only confers supervisory jurisdiction on the High Courts to examine whether an inferior court has proceeded within its parameters or not.

17. Mr.Rao, counsel for the respondent further submits that while exercising supervisory jurisdiction under Article 227 of the Constitution of India, the High Court does not act as an Appellate Court and cannot re-weigh or review the evidence on the basis of which the Court below has based its decision. Elaborating his argument further, Mr.Rao, counsel for the respondent submits that it has been repeatedly held that the jurisdiction under Article 227 of the Constitution of India cannot be used even to correct errors of law in the decision under challenge.

18. Counsel for respondent next contends that the impugned judgment has been passed by the trial court in an application filed by the petitioner under Order 12 Rule 6 of the CPC, and such a relief cannot be claimed as a matter of right, but only as a matter of discretion and this discretion cannot be interfered with unless there is gross abuse of the process and the trial court has reached a conclusion which no reasonable man could in the circumstances of the case. It is also the contention of counsel for the respondent that to entitle a party for a decree on admission, the admission has to be unequivocal, unambiguous, specific and positive. The pleadings cannot be looked into piecemeal or dissected, but are to be considered as a whole. The written statement in the present case raises triable issues, which go to the root of the matter.

19. Mr.Rao, submits that on 17th July, 2007 the petitioner had filed a petition

under Section 11 of the Hindu Marriage Act, 1955 for a Decree of Nullity and in the alternative under Section 12(1)(C) for the Annulment of marriage between the petitioner and the Respondent on the ground that the respondent marriage with a person named Mr.Kai Boccagna was subsisting at the time of the marriage between the petitioner and the respondent in the year 1994. The respondent, on 24th October 2007, filed her Written Statement to the petition stating that although the respondent did get married to Mr.Kai Boccagna but the same was dissolved and in fact, Mr.Kai Boccagna had subsequently married a lady named Ms.Caryn de Philipo. However, in order to present the complete state of facts before the Hon'ble Court, the Respondent also categorically stated in the Written Statement that the Respondent was in the process of ascertaining detailed facts regarding the marriage between the Respondent with Mr.Kai Boccagna as well as the date of its dissolution and as soon as the same were available with her, she would bring the same before the Hon'ble Court by way of an amendment to the Written Statement. Thereafter, having come to know about the date of her marriage with Mr.Kai Boccagna and the fact that, contrary to what the respondent had been given to understand, the marriage between the Respondent and Mr.Kai Boccagna had still not been dissolved, the Respondent immediately moved the U.S. Court which after due consideration of the material on record before it, annulled the marriage of the Respondent with Mr.Kai Boccagna ab initio vide its Order dated 28th April 2008.

20. It is also submitted by Mr.Rao, counsel for the respondent that in order to bring this subsequent event of the U.S. Decree dated 28th April 2008 on the record of the learned trial court, the respondent moved an application under Order 6 Rule 17, Code of Civil Procedure, 1908 on 5th July 2008. It is pertinent to mention that this Application has been allowed by the

learned trial court and remains unchallenged by the Petitioner.

21. After the amendment was allowed, the petitioner made an application under Order 12 Rule 6 CPC. It is strenuously urged before this court that when the first written statement was filed, the respondent had reserved her right to file an amendment to the written statement as and when she would come in possession of better particulars. The factum of annulment of marriage of respondent with Mr.Kia Louis Boccagna *ab initio* raises a triable issue for which evidence is required to be led and thus would not tantamount to admission within the meaning of Order 12 Rule 6 of the CPC.

22. I have heard counsel for the parties and carefully considered their rival submissions. Since both the parties have relied upon paragraph 6 of the written statement, it would be useful to reproduce the same:

> "6. Para 6 of the Petition is vague, wrong and hence denied. It is denied that before filing of the Petition on 31/1/07, under Section 13(1) (i-a) of the Hindu Marriage Act, the Petitioner started making inquiries about the antecedents of the respondent, as alleged. The allegation made in the Para under reply are vague and baseless. The petitioner is an extremely mischievous person who is also a habitual liar. It is stated that at the time when the parties entered into the marriage, the Respondent had completely, fully and truthfully made a complete disclosure of all her past relationships to the petitioner. The petitioner was always aware that the respondent had a relationship with Mr.Prakash Mehta, whom she never married. The petitioner was also aware that after the relationship ended, the respondent had made absolutely no financial gains from that relationship. As regards the allegation of the petitioner of her friendship with Mr.David Boccagana, the same has been mischievously stated herein as the petitioner was always aware, as disclosed to him by the Respondent that Mr.David Boccagana was a business partner of the Respondent when the Respondent as a young lady had traveled to USA to start a business. Mr.David

Boccagana and the Respondent had entered into a partnership in terms of which the Respondent had opened a boutique in florida in the name and style of "Natasha". As regards her marriage with Mr.Kai Boccagana, it is correct that she had been married for a while to the said Mr.Kai Boccagana. The said marriage was nevertheless dissolved. As the marriage with Mr.Kai Boccagana is an episode in the respondent's life that is almost 25 years in the past, the exact dates are no longer in the memory of the Respondent. Nevertheless, it is stated that the petitioner herein has pleaded these facts also before the Hon'ble High Court of Delhi where there is litigation pending between the parties. Even before the High Court of Delhi, the Respondent herein in her reply has prima facie demonstrated that despite much passage of time and despite the fact that the Respondent is in the process of ascertaining all the detailed facts, it is prima facie evident that the marriage of the Respondent with the petitioner is a valid and subsisting marriage. It is stated that the Respondent is in the process of ascertaining the detailed dates and facts regarding the date of marriage with Mr.Kai Boccagana and the date of dissolution of the marriage. For this process, it is ascertained by the Respondent that in the United State of America, after the September 11 attack in the Twin Trade Towers in New York, the confidential information takes time to be unearthed, as such time is required for the same. As and when, the Respondent is in possession of better particulars, the Respondent's reserves her right to amend the present Written Statement to bring such subsequently discovered facts on record. In this respect, it is stated that the Respondent traveled to USA on an H-2 Visa, which was issued on or about 02.11.1982 and which was valid up to 15.08.1983. At the time of her marriage with Mr.Kai Boccagana, the Respondent was unaware that Mr.Kai Boccagana had been married earlier to one Mrs.Michle Boccagana. The Respondent continued her business in the USA till 1985 after which she left USA, leaving behind all that she had created. Once more she did not gain anything monetarily out of the business or relationship in Flordia. The Respondent had always been given to understand by Mr.David Boccagana and Mr.Kai Boccagana that her marriage with Mr.Kai Boccagana had been dissolved – "Nevertheless when the Respondent in 1993 considered

marriage with the petitioner, the Respondent took the precaution of contacting Mr.David Boccagana, as the whereabouts of Mr.Kai Boccagana were no longer available at that time. Upon seeking to ascertain from Mr.David Boccagana that the Divorce had actually taken place and as to when, the Respondent met with a very hostile response which itself came as a shock. Nevertheless, Mr.David Boccagana confirmed that the dissolution of the marriage had actually taken place and that on the strength of that dissolution, Mr.Kai Boccagana had re-married Caryn De Fillipo. This is in addition to the fact that even prior to any attempt which had been made by the Respondent with Mr.Davi Boccagana regarding her divorce with Mr.Kai Boccagana after the respondent left USA in 1985. In the old passport of the Respondent, there is an endorsement of an application given which is stamped for procession of permanent residence in the USA. In the best understanding and belief of the Respondent, the USA immigration rules that existed then had a few salient features including that a person could apply for being issued a Green Card Resident Alien status inter alia upon marriage to a US Citizen. Further rules in this regard stated that the Green card could be issued to such an applicant, not before the lapse of one year before the marriage. To the best understanding and memory of the Respondent, the sequence of events would thus be that a person, such as the Respondent would first have to entered into the marriage with a US citizen apply for being issued a Green Card, in the meantime obtain the Endorsement on her Passport which endorsement was marked on her Passport on 20.09.1983, leave the US and re-enter the USA and then subsequently be granted the Green Card. An examination of her Green Card shows that it was issued to the Respondent on or about 11.07.1984. Thus, it becomes evident that the marriage of the Respondent with Mr.Kai Boccagana possibly took place at least in any year prior to the issuance of the Green Card. In this context, it becomes extremely pertinent that Mr.Kai Boccagana was earlier married with Michele and that the Divorce between Michele and Mr.Kai Boccagana took place as late as on 07.09.1983. There is an order from a Court in Flordia in USA which seems to suggest that the Application filed by Mr.Kai Boccagana for divorce from the Respondent was dismissed by The Florida court on

> 28.03.1991. The Respondent sought to make preliminary inquiries from the pleadings of that case it only stands to reason that the said pleadings may make a categoric statement regarding the date of marriage of Mr.Kai Boccagana and the Respondent. To the shock of the Respondent, the Respondent has been informed that the pleadings of that case appear to be untraceable. This is coupled with the fact that the petitioner had soon prior in time visited the US recently and there is an apprehension in the mind of the Respondent that the disappearance of the pleadings in the case may not be entirely for innocent reasons. It is also a matter of record that Mr.Kai Boccagana again got married on Caryn and the said marriage took place on 22.09.1991 which further seems to suggest that Mr.Kai Boccagana had obtained divorce from the Respondent between 28.03.1991 and 22.09.1992. As the marriage between the petitioner and the Respondent herein took place on 14.11.1994, it therefore appears that the said marriage was not a bigamous marriage as the marriage with Mr.Kai Boccagana of the Respondent stood dissolved prior to her marriage with the petitioner herein."

23. It is also borne out from the record that the respondent had also in the meanwhile applied before the State Supreme Court of New York, County of Westchester, for a decree of annulment of her marriage with Mr.Kai Louis Boccagna, while alleging that consent of the respondent had been obtained by Mr.Kai Louis Boccagna, fraud and misrepresentation, and vide judgment dated 28th April, 2008, the Supreme Court of the State of the New York, County of Westchester, New York, granted the decree in the following terms:

> "**ORDERED, ADJUDGED AND DECREED** that the marriage contract heretofore existing between **Natasha Kohli** Plaintiff, and **KAI L. BOCCAGNA** Defendant is hereby annulled based on (DRL # 140 (e)) by the Defendant **ab initio**; and it is further

ORDERED AND ADJUDGED that there is no award of maintenance and there is no marital property and therefore no findings with respect to equitable distribution; and it is further

ORDERED AND ADJUDGED that the Plaintiff is authorized to resume use of her prior surname, to wit: Chatta and it is further

ORDERED AND ADJUDGED that the Defendant shall be served with a copy of this judgment with notice of entry, by the Plaintiff, within 30 days of such filing."

24. Ms.Luthra, learned senior counsel for the petitioner has very strongly urged before this court that reading of the written statement can only lead to one single conclusion that the marriage between the respondent and Mr.Kai Louis Boccagna was subsisting when she married to the petitioner and thus the application under Order 12 Rule 6 CPC should have been allowed and a judgment should have been passed on admission. The learned trial court has passed a detailed judgment and has considered the rival contentions of the parties, the judgments relied upon by the parties and has correctly applied the law to the facts of the present case.

25. While it is the case of the petitioner that the admissions of the respondents are clear and categorical and the respondent has admitted her marriage with Mr.Kia Louis Boccagna, and non-consummation of marriage would not render her marriage with Mr.Kia Louis Boccagna, as a nullity, it also the case of the petitioner that the divorce based on the judgment of the New York Court is not on merits and it is an ex parte decree, which cannot be recognized in India. This argument of counsel for the petitioner is unacceptable on the ground that it is only open to Mr.Kia Louis Boccagna, to raise a defence that the decree obtained from New York Court is an *ex parte* decree and not for the petitioner. The decree is very

much binding on the respondent and Mr.Kia Louis Boccagna, till it is set aside.

26. Without making any observations on the merits of the matter, since the matter is pending before the trial Court for adjudication on merits, the petitioner cannot gain any advantage by reading a few lines of the written statement, as the written statement or any document sought to be relied upon for the purpose of judgment on admission is to be read as a whole, moreover the marriage between the respondent and Mr.Kia Louis Boccagna, has been declared as null and void, ab initio and *prima facie* being a decree in rem would also bind the petitioner herein.

27. Whether the marriage of respondent with Mr.Kia Louis Boccagna, was a marriage at all in the eyes of law and the legal effect of the declaration and whether the declaration relates back to the date of the marriage is a complex triable issue which cannot be decided in an application under Order 12 Rule 6 CPC. Even the question raised by the petitioner with regard to the validity and effect of the foreign judgment is an issue which is closely related to the first question and in the facts of this case inseparable for the reason that the order is under challenge has been passed on an application under Order 12 Rule 6 CPC. There is no quarrel with the argument of counsel for the petitioner that the court can pass a decree even on constructive admission, as has been held in the case of **Surjit Sachdev Vs. Kazakhstan Investment Services Pvt. Ltd.** -66 (1997) DLT 54, 59. There is also no quarrel with the proposition that the object of Order 12 Rule 6 CPC is to enable a party to obtain speedy judgment as held in the case of ***Uttam Singh Vs. Union Bank of India*** AIR 2000 SC 2740. But the court cannot lose track of the fact that an order under Order 12 Rule 6 CPC is a discretionary order and not to be passed as a matter of right in every matter and admission has to be

categorical, specific, unequivocal, unambiguous and a document sought to be relied upon has to be read as a whole and not in part [See ***R.K. Markan Vs. Rajiv Kumar Markan*** 97 (2002) DLT 754 and ***Arun Kumar Jain & Anr. Vs. Raghubir Saran Charitable Trust & Ors.*** – 144 (2007) DLT 43]. In the case of ***Jasbir Sobti & Ors. Vs. Surender Singh*** 135 (2006) DLT 658, it was held that the judgment on admissions is not a matter of right and is a matter of discretion of the court and further that where the objection will go to the root of the matter, it would not be appropriate to exercise discretion.

28. Counsel for the respondent has also relied upon the case of ***Daljit Singh Anand Vs Harjinder Singh Anand***- 149 (2008) DLT 303, while submitting that the written statement and the other averments have to be read as whole and the split vision is not permissible, while entertaining an application under Order 12 Rule 6 of the Code of Civil Procedure. Reliance is also placed on ***Parivar Seva Sansthan Vs Veena Kalra*****, 86 (2000) DLT 817**, wherein it has been held that where triable issues, going to the root of the case, are raised, the Court should proceed to try the issues raised and return the findings on merits. In the case of ***Baljit Kaur Vs United Insurance Company Ltd.*** 70 (1997) DLT 742, it has been held that a judgment under Order 12 Rule 6 is a matter of discretion and not a matter of right and when a case involves question which cannot be conveniently disposed of on a motion, under the rule, the court may, in the exercise of discretion, refuse the motion. In the case of ***Shri Mohan Prasad Jha Vs Shri Shambhu Prasad Jha*** -82 (1999) DLT 281, it has been held that the provision cannot be resorted to cut short a litigation when factual disputes are raised between the parties and when there is no clear and unequivocal admission in respect of a particular fact in the written statement. Counsel for respondent has also relied upon the case of

Express Towers P Ltd. and Anr Vs Mohan Singh -2007 (97) DRJ 687, wherein the Court has observed that under Order 12 Rule 6, a decree can be passed when admissions are clear and unambiguous and no other interpretation is possible and that the Court is vested with a right to ask for independent corroboration of facts, even when denial in the pleadings is not specific. The Hon'ble High Court has further held that when a case involves disputed questions of fact and law, which require adjudication and decision, resort to judgment under Order 12 Rule 6, may not be safe and correct.

29. The trial court has considered the rival contentions between the parties in great detail and the application under Order 12 Rule 6 CPC has been rejected while noticing that though there is admission of the previous marriage there are other circumstances calling for trial of the case. The same has been enumerated in para 35 of the judgment, which is reproduced below:

> "a) Foreign Law is a question of fact, as can be deciphered from Section 45 of Evidence Act, and without meaning any offence to the propositions of Law cited before this Court, the same are too contentious to be dealt with in an application U/o 12 Rule 6 CPC. Various inferences emerge from the circumstances pleaded by the parties. Considering the law cited by both the parties, their (sic. there) appear a diversity of opinion in relation with the date from which such decree is to take effect. There are other variables, in as much as, it is yet to be seen that whether the decree, in principle, is a decree of annulment of "voidable marriage" or a declaration as to a "void marriage" regard being given to the case propounded by the Respondent before the U.S. Court. Besides, the effect of decree by the U.S. Court, would also vary, dependent upon whether it is a decree on 'merits' of the case and whether it takes into its sweep, the marriage of the parties to the petition, contracted before the grant of such decree. It is not the case that no opinion can be made

at this stage, but what transpires is the fact that once the parties are put to trial and test of examination, the Court would be able to come at a definite, or at least better conclusion.

b) The marriage as per the Hindu philosophy is a sacrament and considering the scheme of the Act, the Court has to remain alive to the sanctity of the institution. The Court, at the same time, cannot be oblivious of the fact that the same cannot be viewed as merely a contract, which may be the case under the European Law.

c) The admission of the respondent as regards her marriage with Mr.Boccagna, cannot be viewed or considered as dissected from her stand that the decree dated 28.04.2008 nullifies the marriage, as void ab initio. Veracity of her stand cannot be gone into at this stage, nor the same can be brushed aside in view of the law relied upon by the petitioner side.

d) The decree by the U S Court, rules that the marriage between the respondent and Mr.Boccagna was declared null and void ab initio, and the same cannot be inferred lightly. Whether or not the same is in collusion or obtained upon fraud is a pure question of fact which can only be dealt with in trial.

30. This court in the case of ***Classic Equipments (P) Ltd. Vs. Johnson Enterprises & Ors.*** 2010 (2) R.A.J. 406 (Del) had an occasion to deal with the scope and power of the High Court under Article 226 of the Constitution. There is no doubt that the powers of the High Court are very wide, but the High Court must ensure that the same are to be exercised not as a court of appeal. It was further held that the High Court should be slow to interfere unless there is grave miscarriage of justice. Relevant portion of the judgment reads as under:

> "19. It is no longer *res integra* that the powers of the High Court under Articles 226 and 227 of the Constitution of India, are very wide, however, the same are to be exercised

not as a Court of Appeal, and the High Court should be slow to interfere unless there is grave miscarriage of justice.

20. In the case of ***Shamshad Ahmad Vs. Tilak Raj Bajaj*** (2008) 9 SCC 1, the Apex Court has re-visited the law with regard to the power of the High Court under Articles 226 and 227 of the Constitution of India and while taking into consideration various judgments has held that no doubt the power of the High Court under Articles 226 and 227 are very wide and extensive over all Courts and Tribunals, the same are to be exercised not as a Court of Appeal and can neither review or re-apprise the evidence, but ordinarily should interfere where there is grave miscarriage of justice or flagrant violation of law:

> **"38.** Though powers of a High Court under Articles 226 and 227 are very wide and extensive over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction, such powers must be exercised within the limits of law. The power is supervisory in nature. The High Court does not act as a court of appeal or a court of error. It can neither review nor reappreciate, nor reweigh the evidence upon which determination of a subordinate court or inferior tribunal purports to be based or to correct errors of fact or even of law and to substitute its own decision for that of the inferior court or tribunal. The powers are required to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts and inferior tribunals within the limits of law.
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> **39.** In *Chandavarkar Sita Ratna Rao* v. *Ashalata S. Guram*[1] this Court stated: (SCC p. 458, para 16)

[1] (1986) 4 SCC 447.

> "*16*. … unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention it was not for the High Court under Articles 226 and 227 of the Constitution to interfere. If there is evidence on record on which a finding can be arrived at and if the court has not misdirected itself either on law or on fact, then in exercise of the power under Article 226 or Article 227 of the Constitution, the High Court should refrain from interfering with such findings made by the appropriate authorities."

40. Even prior to *Chandavarkar*[1] in *Bathutmal Raichand Oswal* v. *Laxmibai R. Tarta*[2] dealing with the supervisory power of a High Court under Article 227 of the Constitution, Bhagwati, J. (as His Lordship then was) stated: (*Bathutmal Raichand Oswal case*[2], SCC pp. 864-65, para 7)

> "*7*. … If an error of fact, even though apparent on the face of the record, cannot be corrected by means of a writ of certiorari it should follow a fortiori that it is not subject to correction by the High Court in the exercise of its jurisdiction under Article 227. The power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal. *The High Court cannot in guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the legislature has not conferred a right of appeal and made the decision of the subordinate court or tribunal final on facts*."

(emphasis supplied)

[2] (1975) 1 SCC 858.

41. In *State of Maharashtra* v. *Milind*[3] this Court observed: SCC p. 29, para 33)

> "*33*. … The power of the High Court under Article 227 of the Constitution of India, while exercising the power of judicial review against an order of inferior tribunal being supervisory and not appellate, the High Court would be justified in interfering with the conclusion of the tribunal only when it records a finding that the inferior tribunal's conclusion is based upon exclusion of some admissible evidence or consideration of some inadmissible evidence or the inferior tribunal has no jurisdiction at all or that the finding is such, which no reasonable man could arrive at, on the materials on record."

42. In *State* v. *Navjot Sandhu*[4] this Court reiterated: (SCC pp. 656-57, para 28)

> "*28*. Thus the law is that Article 227 of the Constitution of India gives the High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or fettered by any Act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and to seeing that they obey the law. The powers under Article 227 are wide and can be used to meet the ends of justice. They can be used to interfere even with an interlocutory order. However, the power under Article 227 is a discretionary power and it is difficult to attribute to an order

[3] (2001) 1 SCC 4 : 2001 SCC (L&S) 117.

[4] (2003) 6 SCC 641 : 2003 SCC (Cri) 1545.

of the High Court, such a source of power, when the High Court itself does not in terms purport to exercise any such discretionary power. It is settled law that this power of judicial superintendence, under Article 227, must be exercised sparingly and only to keep subordinate courts and tribunals within the bounds of their authority and not to correct mere errors. Further, where the statute bans the exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article 227 of the Constitution of India since the power of superintendence was not meant to circumvent statutory law. *It is settled law that the jurisdiction under Article 227 could not be exercised 'as the cloak of an appeal in disguise'*.

(emphasis supplied)"

31. Applying the settled law to the facts of this case, I am of the view that the trial Court has passed a reasoned order, keeping in view the law and facts of the present case. The trial Court has further stated detailed reasons in paragraphs 35 of the judgment, which have been reproduced in the paras aforegoing why trial in the case would be necessary.

32. I see no reason to take a different view in the matter. Moreso, as this is a family matter and cannot be equated with the commercial matter. In family matters, the Court must tread carefully and leave no room for doubt as in the present case, and if it is held that a valid marriage subsisted when the respondent married the petitioner, it would have far reaching consequences, hence, it would be appropriate that the matter is decided by a competent Court after recording evidence rather than in an

application under Order 12 Rule 6 CPC. Similar view has been expressed by the Apex Court in a recent decision rendered in ***Deoki Panjhiyara Vs. Shashi Bhushan Narayan Azad & Anr*** decided on 12.12.2012 in somewhat different facts, the wife had filed an SLP challenging the order of the High Court. In the said case, the appellant was married to the respondent in the year 2006. She filed a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2006, seeking certain reliefs including the maintenance, wherein interim maintenance was granted which was affirmed by the Sessions Judge, against which the husband filed a writ petition before the High Court, seeking recall of the order on the ground that he came to know subsequently that his marriage with the appellant was void on the ground that at the time of said marriage the appellant was married to one Rohit Kumar Mishra. The certificate of marriage between the appellant the Rohit Kumar Mishra was placed on record. The writ petition filed by the husband, was allowed, however, the Supreme Court set aside the order of the High Court. Relevant paragraphs of the judgment read as under:

> "14. Admittedly, both the appellant and the respondent are governed by the provisions of the Hindu Marriage Act, 1955. Section 11 of the Hindu Marriage Act makes it clear that a marriage solemnized after the commencement of the Act "shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions so specified in clauses (i), (iv) and (v) of Section 5.
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> 15. While considering the provisions of Section 11 of the Hindu Marriage Act, 1955 this Court in Yamunabai v. Anantrao air 1988 SC 645 has taken the view that a marriage covered by Section 11 is void-ipso-jure, that is, void from the very inception. Such a marriage has to be ignored as not existing in law at all. It was further held by this Court that a

formal declaration of the nullity of such a marriage is not a mandatory requirement though such an option is available to either of the parties to a marriage.

It must, however, be noticed that in Yamunabai (supra) there was no dispute between the parties either as regards the existence or the validity of the first marriage on the basis of which the second marriage was held to be ipso jure void.

16. A similar view has been expressed by this Court in a later decision in M.M. Malhotra v. Union of India 2005 (8) SCC 351 wherein the view expressed in Yamunabai (supra) was also noticed and reiterated.

17. However, the facts in which the decision in M.M. Malhotra (supra) was rendered would require to be noticed in some detail:

The appellant M.M. Malhotra was, inter alia, charged in a departmental proceeding for contracting a plural marriage. In reply to the charge sheet issued it was pointed out that the allegation of plural marriage was not at all tenable inasmuch as in a suit filed by the appellant (M.M. Malhotra) for a declaration that the respondent (wife) was not his wife on account of her previous marriage to one D.J. Basu the said fact i.e. previous marriage was admitted by the wife leading to a declaration of the invalidity of the marriage between the parties. The opinion of this court in M.M. Malhotra (supra) was, therefore, once again rendered in the situation where there was no dispute with regard to the factum of the earlier marriage of one of the spouses.

18. In the present case, however, the appellant in her pleadings had clearly, categorically and consistently denied that she was married to any person known as Rohit Kumar Mishra. The legitimacy, authenticity and genuineness of the marriage certificate dated 18.4.2003 has also been questioned by the appellant. Though Section 11 of the aforesaid Act gives an option to either of the parties to a void marriage to seek a declaration of invalidity/nullity of such marriage, the exercise of such option cannot be understood to be in all situations voluntarily. Situations may arise when recourse to

a court for a declaration regarding the nullity of a marriage claimed by one of the spouses to be a void marriage, will have to be insisted upon in departure to the normal rule. This, in our view, is the correct ratio of the decision of this Court in Yamunabai (supra) and M.M. Malhotra (supra). In this regard, we may take note of a recent decision rendered by this Court in A. Subash Babu v. State of Andhra Pradesh & Anr., 2011 (7) SCC 616, while dealing with the question whether the wife of a second marriage contracted during the validity of the first marriage of the husband would be a "person aggrieved" under Section 198 (1)(c) of the Code of Criminal Procedure to maintain a complaint alleging commission of offences under section 494 and 495 IPC by the husband. The passage extracted below effectively illuminates the issue:

> "Though the law specifically does not cast obligation on either party to seek declaration of nullity of marriage and it may be open to the parties even without recourse to the Court to treat the marriage as a nullity, such a course is neither prudent nor intended and a declaration in terms of Section 11 of the Hindu Marriage Act will have to be asked for, for the purpose of precaution and/or record. Therefore, until the declaration contemplated by Section 11 of the Hindu Marriage Act is made by a competent Court, the woman with whom second marriage is solemnized continues to be the wife within the meaning of Section 494 IPC and would be entitled to maintain a complaint against her husband."

19. In the present case, if according to the respondent, the marriage between him and the appellant was void on account of the previous marriage between the appellant and Rohit Kumar Mishra the respondent ought to have obtained the necessary declaration from the competent court in view of the highly contentious questions raised by the appellant on the aforesaid score. It is only upon a declaration of

> nullity or annulment of the marriage between the parties by a competent court that any consideration of the question whether the parties had lived in a "relationship in the nature of marriage" would be justified. In the absence of any valid decree of nullity or the necessary declaration the court will have to proceed on the footing that the relationship between the parties is one of marriage and not in the nature of marriage. We would also like to emphasise that any determination of the validity of the marriage between the parties could have been made only by a competent court in an appropriate proceeding by and between the parties and in compliance with all other requirements of law. Mere production of a marriage certificate issued under Section 13 of the Special Marriage Act, 1954 in support of the claimed first marriage of the appellant with Rohit Kumar Mishra was not sufficient for any of the courts, including the High Court, to render a complete and effective decision with regard to the marital status of the parties and that too in a collateral proceeding for maintenance. Consequently, we hold that in the present case until the invalidation of the marriage between the appellant and the respondent is made by a competent court it would only be correct to proceed on the basis that the appellant continues to be the wife of the respondent so as to entitle her to claim all benefits and protection available under the DV Act, 2005.
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> 20. Our above conclusion would render consideration of any of the other issues raised wholly unnecessary and academic. Such an exercise must surely be avoided."

33. In this matter highly contentious issues have been raised by the parties which can best be decided on evidence.

34. In view of above, no grounds are made out to interfere in the judgment passed by learned trial court on 10.03.2010. The present petition and the application are accordingly, dismissed.

35. At this stage, counsel for the petitioner submits that a direction should be issued to the trial court for day-to-day hearing in the matter. The order-sheets have been perused, which have been produced in court, which shows that the trial court has already been giving short dates in the matter and both the counsel are pursuing the matter without any unnecessary adjournment. However, having regard to the age of the petitioner, the trial court is directed to dispose of the matter, expeditiously.

G.S.SISTANI, J

JANUARY 17, 2013
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