2025 INSC 829

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2025
(Arising out of Special Leave Petition (Civil) No.21195 of 2021)

VIBHOR GARG ... APPELLANT

VERSUS

NEHA ... RESPONDENT

J U D G M E N T

NAGARATHNA, J.

Leave granted.

2. The present civil appeal has been filed assailing the judgment dated 12.11.2021 passed by the High Court of Punjab and Haryana in CR No. 1616 of 2020 (O&M), wherein the High Court has allowed the civil revision petition filed by the respondent herein.

Factual Background:

3. Briefly stated, the facts of the present case are that the marriage between the appellant-husband and the respondent-wife was solemnized on 20.02.2009. A daughter was born out of the said wedlock on 11.05.2011. Due to marital discord between the parties, the appellant filed a divorce petition being CIS No. DMC/405/2017 under Section 13 of the Hindu Marriage Act, 1955 before the Family Court, Bathinda, on 07.07.2017. The divorce petition was subsequently amended and filed again on 03.04.2018.

3.1 When the aforesaid case was listed for evidence, the appellant herein submitted his affidavit of examination-in-chief on 07.12.2018. Later, an application was moved by the appellant-husband on 09.07.2019 seeking permission to submit his supplementary affidavit by way of examination-in-chief along with memory cards/chips of the mobile phones, compact disc (CD) and transcript of conversations recorded in memory cards/chips of the mobile phones. In the said application, the appellant stated that various telephonic conversations happened between the parties during the period from November 2010 to

December 2010, as well as between August 2016 and December 2016 and the same had been recorded by the appellant and stored in the memory cards/chips of the mobile phones. The appellant had also prepared the transcripts of those recorded conversations. Thus, the appellant prayed that he may be allowed to file his supplementary affidavit by way of his examination-in-chief along with memory cards/chips of the respective mobile phones, CD and transcripts of the conversations so recorded in memory cards/chips of the respective mobile phones.

3.2 The respondent herein opposed the application on the ground that the examination-in-chief was already completed and moreover, the admissibility of memory card/chips along with CD and transcripts is in dispute and these electronic instruments cannot be exhibited. The respondent therefore sought the dismissal of the application filed by the appellant.

3.3 The learned Principal Judge, Family Court, Bathinda allowed the application filed by the appellant on 29.01.2020, on the ground that the conversation between the parties is relevant for the adjudication of the controversy between the parties and there is no bar on the admissibility of such a tape recording. The

Family Court observed that the appellant is only wanting to prove the conversation between him and the respondent and not with respect to a third party. Reliance was placed by the Family Court on Section 14 of the Family Courts Act, 1984 ("F.C. Act" for short) which allows a Family Court to receive any evidence, statement, report, documents, etc., which is helpful in adjudicating the dispute between the parties and also on Section 20 of the F.C. Act, which has an overriding effect on the general rules of evidence. Thus, the appellant was allowed to prove the CD pertaining to the conversation between him and the respondent subject to its correctness. Consequently, on 18.02.2020 the appellant tendered by way of evidence the transcript of the audio recording, the original memory card of the phone and the CD prepared from the said memory card.

3.4 Being aggrieved by the order dated 29.01.2020 passed by the learned Principal Judge, Family Court, Bathinda, the respondent-wife filed a civil revision petition before the High Court of Punjab and Haryana being CR No. 1616 of 2020 (O&M). On 05.03.2020, the High Court issued notice in the matter and granted an interim order of stay on the order dated 29.01.2020.

3.5 By the impugned judgment dated 12.11.2021, the High Court allowed the civil revision petition filed by the respondent and thereby set aside the order dated 29.01.2020 passed by the Principal Judge, Family Court, Bathinda. It was held that the CD tendered in evidence by the appellant-husband contained conversations between the husband and the wife recorded surreptitiously without the consent or knowledge of the wife and acceptance of the same in evidence would constitute a clear infringement of the right to privacy of the wife. While the High Court did not dispute that the Family Court is not bound by the strict rules of evidence, it held that the CD cannot be accepted in view of the right to privacy of the wife, which is a facet of the right to life accorded by the Constitution of India.

3.6 In the impugned order, the High Court supported its reasoning by placing reliance on the following judgments of various High Courts:

i. *Deepinder Singh Mann vs. Ranjit Kaur, 2014 SCC OnLine P&H 4826*

ii. *Tripat Deep Singh vs. Paviter Kaur, 2018 (3) RCR (Civil) 71*

iii. *Rayala M. Bhuvaneswari vs. Nagaphanender Rayala, AIR 2008 AP 98*

iv. *Anurima @ Abha Mehta vs. Sunil Mehta s/o Chandmal, (2016) 2 RCR (Civil) 773*

v. *Vishal Kaushik vs. Family Court, 2016(1) RLW 693 (Raj.)*

3.7 The crux of the observations made by the High Courts in all these judgments was that the recorded conversations between a husband and a wife cannot be made the basis for deciding a petition under Section 13 of the Hindu Marriage Act, 1955 since courts cannot judge under what circumstances the recorded statements were made by the parties. That recording any such conversation without the knowledge of the other partner would amount to violation of the right to privacy. On the basis of this reasoning, the High Court passed the impugned judgment in favour of the respondent herein.

3.8 Being aggrieved by the judgment dated 12.11.2021 passed in CR No. 1616 of 2020 (O&M), the appellant-husband has preferred the present civil appeal. This Court issued notice in the matter on 12.01.2022 and granted an interim stay of the proceedings in CIS No. DMC/405/2017 pending before the Court of Principal Judge, Family Court, Bathinda, Punjab.

3.9 However, on 03.12.2024, this Court directed that pending disposal of the present civil appeal, the Family Court shall continue the evidence of PW-1 pursuant to what had been recorded on 18.02.2020, though as a matter of safeguard, the recording of evidence and subsequent cross-examination was to happen *in-camera.* The transcription of the said recording of the evidence of PW-1 and cross-examination was directed to be placed in a sealed cover.

3.10 Subsequently, on 19.12.2024, this Court appointed Ms. Vrinda Grover, learned Advocate, as an amicus curiae to assist this Court in the case. The learned amicus has placed her written note of submissions before this Court and has advanced detailed submissions on the different facets of the issue facing this Court in this present case.

Submissions:

4. We have heard the learned counsel for the appellant Sri Ankit Swarup; learned senior counsel for the respondent Sri Gagan Gupta; and the learned amicus curiae Ms. Vrinda Grover. We have perused the material on record.

Submissions of Amicus Curiae:

4.1 The learned amicus has submitted that with the increase in accessibility to technology, covert recording of audio and video conversations has become an easier option for parties which would have direct implications for the nature and kind of evidence that will be presented before the law courts. The issue before this Court regarding admissibility of covertly recorded communications between spouses in matrimonial proceedings lies at the intersection of rights emanating from Article 21 of the Constitution of India, the erstwhile Indian Evidence Act, 1872 ("Evidence Act", for short) and the F.C. Act which requires all three Acts to be harmoniously construed in the interest of justice.

4.2 The learned amicus submitted with reference to the provisions of the F.C. Act that an interpretation which incentivises surveillance and covert recording of interactions and communications without the consent and knowledge of the other married partner militates against the letter and spirit of conciliation, which is the central objective of the statute as stated in the preamble to the F.C. Act. That a conjoint reading of Section 122 of the Evidence Act and Section 14 of the F.C. Act shows that

there is no explicit legal bar on covertly recorded audio/video recordings being produced as evidence in proceedings between parties to the marriage. However, certain considerations, including the avowed objective of the law to promote conciliation between parties to a marriage, the deleterious impact of covert recording and surveillance on matrimonial relations and the breach of the right to privacy of the spouse subjected to covert recording warrant that these elements of law, procedure, rights and public interest be harmonised in the interest of justice.

4.3 Learned amicus has brought to our attention the divergent views taken by various High Courts on the issue of admissibility of evidence with respect to the recording of conversations in proceedings between a husband and wife.

4.4 As per the compilation of case law submitted by the learned amicus for the perusal of this Court, the High Courts in the following cases have allowed the communication between the parties and other private information to be placed on record or summoned as evidence:

i. *Deepti Kapur vs. Kunal Julka, 2020 SCC OnLine Del 672*

ii. *Preeti Jain vs. Kunal Jain, AIR 2016 Raj 153*

iii. *Kethana Lokesh vs. Rahul R. Bettakote, 2024 SCC OnLine Kar 6368*

iv. *Jil vs. State of Gujarat, 2024 SCC OnLine Guj 4363*

v. *Essaki Ammal @ Chitra vs. Veerabhadra @ Kumar, 2012 (4) CTC 743*

vi. *Havovi Kersi Sethna vs. Kersi Gustad Sethna, 2011 SCC OnLine Bom 120*

4.5 However, the High Courts in the following cases have disallowed production of phone call recordings, text messages and other private materials as evidence:

i. *Anurima @ Abha Mehta vs. Sunil Mehta s/o Chandmal, (2016) 2 RCR (Civil) 773*

ii. *Abhishek Ranjan vs. Hemlata Chaubey, Misc. Petition No. 1300/2023 decided on 29.08.2023*

iii. *Saroj vs. Aashish Yadav, Misc. Petition No. 1422/2024 decided on 02.08.2024*

iv. *Ram Talraja vs. Sapna Talreja, Misc. Petition No. 949/2022 decided on 26.04.2022*

v. *Aasha Lata Soni vs. Durgesh Soni, 2023 SCC OnLine Chh 3959*

vi. *Rayala M. Bhuvaneswari vs. Nagaphanender Rayala, AIR 2008 AP 98*

vii. *Deepinder Singh Mann vs. Ranjit Kaur, 2014 SCC OnLine P&H 4826*

viii. *Tripat Deep Singh vs. Paviter Kaur, 2018 (3) RCR (Civil) 71*

ix. *Neha vs. State of Haryana, 2020 SCC OnLine P&H 4469*

x. *Vishal Kaushik vs. Family Court and Anr., 2016(1) RLW 693 (Raj.)*

xi. *Dharmesh Sharma vs. Tanisha Sharma, 2024 SCC OnLine HP 5208*

4.6 Therefore, in light of the above propositions, the learned amicus advocated for a set of guidelines to be formulated that may aid the Family Courts in exercising their discretion under Section 14 of the F.C. Act while dealing with admissibility of audio/video recordings as evidence between a husband and a wife. Some factors suggested by the learned amicus for providing guidance in the exercise of judicial discretion are enumerated as follows:

a) A proximate and temporal nexus of the audio/video recording to the facts in issue or relevant facts.

b) The intention of defaming, harassing or prejudicing the spouse, or prolonging the litigation by placing on record the audio/video recording.

c) Burden of proof on the party producing the covert recording to demonstrate that it is the least restrictive and intrusive

method of proving the claim, in line with the doctrine of proportionality.

d) Exercise of care and caution while giving weightage to such evidence by considering the context in which the conversation happened and was recorded covertly by one of the parties.

e) Control, ownership and access that each party to the marriage has to electronic recording devices since the socio-economic differential between parties to the marriage based on gender may have a direct bearing on their ability, capacity and opportunity to make covert audio/video recordings.

f) Authenticity and accuracy of the recordings is also an important factor, since the electronic audio/video recordings are highly vulnerable to manipulation.

However, while dealing with the issue of determining the authenticity of the audio/video recordings, the learned amicus sounded a note of caution that this might increase the burden on the already scarce Forensic Science Laboratory (FSL) resources and lead to delay in the proceedings.

4.7 Lastly, it was submitted that specific directions are required to ensure that the audio/video recordings are filed, maintained and stored in a manner which safeguards the privacy of parties before the Family Court. Reliance was placed on the recently notified Delhi Family Courts (Amendment) Rules, 2024, which inserted Chapter VI, Rule 17 in the existing Rules, with regard to "protecting the privacy of parties or persons". The said amendment prohibits parties from extracting in the pleadings the contents of a document which is of a sensitive nature and which is likely to affect the right to privacy or cause embarrassment, without the leave of the court and "a document" is said to include the electronic recordings as well. Further, the Family Court has been directed to keep in view the requirements of protecting the right to privacy and dignity of parties while applying the Rules to a given situation.

4.8 Therefore, it was suggested by the learned amicus that this Court may pass appropriate directions for exercise of judicial discretion under Section 14 of the F.C. Act and in the interim, consider directing all the States and Union Territories to adopt

and follow the mandate under Chapter VI Rule 17 of the Delhi Family Courts Rules, 1996.

Submissions on behalf of the Appellant:

5. Learned counsel Sri Ankit Swarup appeared for the appellant-husband and urged that the impugned order ought to be set aside. It was submitted by the learned counsel that in matrimonial proceedings involving allegations of cruelty, the parties are bound to recreate issues and events which were otherwise confined to the matrimonial home and the bedroom and away from the public eye. These proceedings involve a discussion on the aspects of the private married life of parties. Often in such cases, there is neither any third-party witness to prove the allegations nor is there proof by documentary evidence. This is where modern technology and electronic devices can help in bringing such evidence to the court room. If an argument of privacy is permitted to be raised, it will impinge upon the right to fair trial accorded to the other spouse and the appellant herein would be unsuccessful in proving cruelty of the respondent and thereby be deprived from seeking divorce before the Family Court.

5.1 It was submitted that as per the exception contained in Section 122 of the Evidence Act, the communication between married persons can be disclosed in matrimonial proceedings like divorce. Further reliance was placed on Sections 14 and 20 of the F.C. Act to contend that the objective of these overriding provisions is to secure the right to fair trial of married persons and to effectively deal with the private dispute between the parties and that is why these provisions allow the Family Courts to deviate from the strict rules of evidence and admit into evidence materials that are necessary for the adjudication of the dispute. While the respondent has taken the defence of right to privacy, it is not an absolute right and has to be balanced with the right to fair trial of the appellant.

5.2 Learned counsel for the appellant drew our attention to the judgments rendered by different High Courts to contend that right to privacy cannot be a defence to shun relevant evidence in the form of audio/video recordings or some other technologically collected private data. Apart from the High Court judgments which have allowed the evidence of recorded conversations and private information between the spouses and which have been

cited by the learned amicus before us, learned counsel for the appellant placed reliance on a judgment of the Karnataka High Court, Dharwad Bench in ***Deepali vs. Praveen, 2023:KHC-D:11968***, wherein also the High Court allowed a CD containing video recording and WhatsApp messages sent by the wife to be placed on record by the husband in a divorce proceeding, in light of the exception carved out under Section 122 of the Evidence Act. In addition, learned counsel also placed reliance on a judgment of the Calcutta High Court in ***Norendra Nath Mozumdar vs. State, AIR 1951 Cal 140***, to contend that the protection under Section 122 of the Evidence Act cannot exist in suits between married persons when one of the spouses is in litigation against the other, for, to prevent disclosure in that event will be to defeat justice.

5.3 Learned counsel for the appellant also placed before us the recommendation made by the Law Commission in its 69th report with respect to Section 122 of the Evidence Act, wherein it had recommended creating an explicit exception to the bar of Section 122 in the proceedings between married persons. Reliance was also placed on a judgment of the Bombay High Court in ***Vilas***

Raghunath Kurhade vs. State of Maharashtra, 2010 SCC OnLine Bom 1967, wherein the court suggested an appropriate amendment to Section 122 of the Evidence Act to check the blanket ban on any type of communication which may not withstand the requirements of the modern times so as to do complete justice in a case.

5.4 Therefore, learned counsel for the appellant submitted that the appellant may be allowed to place the recorded conversations before the Family Court through his supplementary affidavit of examination-in-chief and the same may be considered by the Family court in light of the relevance of the evidence led and the cross-examination of the appellant with respect to the same.

Submissions on behalf of the Respondent:

6. Learned senior counsel Sri Gagan Gupta who appeared for the respondent-wife, with reference to her counter affidavit, questioned the authenticity and admissibility of the purported conversations sought to be produced. It was submitted that the appellant had not mentioned anything about these recorded conversations in his pleadings and therefore, he cannot be

allowed to bring in evidence something that does not have any foundational basis in any of the pleadings hereinbefore.

6.1 It was further submitted that permission to bring on record such evidence is fraught with inherent and imminent danger as the court would never be able to ascertain the circumstances in which the alleged conversation was held or the manner in which the conversation was initiated or continued. The same is a unilateral act of one of the spouses without knowledge or consent of the other spouse and in the present case, the same relates to the years 2010 and 2016 and has been deliberately delayed to be filed in Court as late as in July 2019 and thus causes serious prejudice to the respondent herein inasmuch as while the appellant was as per his own admission indulging in call recording/phone tapping ever since 2010, the respondent cannot be expected to have complete memory of such old conversations between the husband and wife which were not documented. That the respondent would have no means to verify the genuineness and completeness of the said purported phone conversations. Thus, even if the respondent can be said to have the right of cross-examination or of forensic examination of the

purported material, the said right would be an illusory right in the facts of this case.

6.2 Learned senior counsel for the respondent has stressed upon the right to privacy of the respondent and has highlighted that the conversations sought to be produced were recorded without the knowledge or consent of the respondent. Marriage is said to be a sacrosanct relationship and it is not expected of spouses either to illegally record the conversations between them or to produce them as evidence. Permission to lead such evidence would amount to licensing a married couple to betray the trust at any given moment and judicial recognition of the same would result in every married couple doubting their partner and becoming careful and apprehensive and running a risk of every conversation being recorded which could not be the objective behind either Section 122 of the Evidence Act, or Sections 14 and 22 of the F.C. Act.

6.3 In light of the same, learned senior counsel submitted that the unilateral and illegal recording of a private conversation by one spouse without informing the other spouse cannot be said to be a “communication” at all and thus any such purported

evidence of any such alleged conversation is not admissible in law. Therefore, as per the learned senior counsel, there is no infirmity in the impugned judgment and the same ought to be upheld in entirety.

Points for consideration:

7. Having heard learned counsel for the appellant and learned senior counsel for the respondent as well as learned amicus, the following points would arise for our consideration.

a) Whether the High Court was justified in setting aside the order of the Family Court and thereby declining permission to the appellant herein to corroborate his evidence in the form of what has been recorded on his mobile phone and by means of a compact disc (CD) and transcription of the same containing the communication made by the respondent-wife to the appellant husband in order to prove his case for seeking divorce?

b) What order?

Section 122 of the Evidence Act:

8. Section 122 of the Evidence Act reads as follows:

> **"122. Communications 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."
>
> (underlining by us)

8.1 In the case of ***M.C. Verghese vs. T.J. Ponnan, AIR 1970 SC 1876***, the three-Judge Bench of the Supreme Court, while dissecting the provision, held as follows:

> "13. …The section consists of two branches – (1) that a married person shall not be compelled to disclose any communication made to him during marriage by his spouse; and (2) that the married person shall not except in two special classes of proceedings be permitted to disclose by giving evidence in Court the communication, unless the person who made it, or his representative in interest, consents thereto."
>
> (underlining by us)

8.2 In the above case, this Court was dealing with a complaint of defamation by the appellant therein (Verghese). The appellant therein claimed that the respondent therein (Ponnan) had written

some letters to his wife (Rathi), which contained defamatory material against the appellant. The appellant claimed to be in possession of those letters and sought to make a case of defamation based on those letters. The same was being objected to on the ground that the communication in the letters was barred under Section 122 of the Evidence Act. This Court, while ruling in favour of the appellant therein, observed as follows:

> "14. A prima facie case was set up in the complaint by Verghese. That complaint has not been tried and we do not see how, without recording any evidence, the learned District Magistrate could pass any order discharging Ponnan. Section 122 of the Evidence Act only prevents disclosure in giving evidence in court of the communication made by the husband to the wife. If Rathi appears in the witness box to give evidence about the communications made to her husband, prima facie the communications may not be permitted to be deposed to or disclosed unless Ponnan consents. That does not, however, mean that no other evidence which is not barred under s. 122 of the Evidence Act or other provisions of the Act can be given.
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> 15. In a recent judgment of the House of Lords Rumping v. Director of Public Prosecutions, (1962) All E.R. 256 Rumping the mate of a Dutch ship was tried for murder committed on board the ship. Part of the evidence for the prosecution admitted at the trial consisted of a letter that Rumping had written to his wife in Holland which amounted to a confession. Rumping had written the letter on the day of the killing, and had handed the letter in a closed envelope to a member of the crew requesting him to post it as soon as the ship arrived at the port outside England. After the appellant was arrested, the member of the

crew handed the envelope to the captain of the ship who handed it over to the police. The member of the crew, the captain and the translator of the letter gave evidence at the trial, but the wife was not called as witness. It was held that the letter was admissible in evidence. Lord Reid, Lord Morris of Borth-Y-Gest, Lord Hodson and Lord Pearce were of the view that at common law there had never been a separate principle or rule that communications between a husband and wife during marriage were inadmissible in evidence on the ground of public policy. Accordingly except where the spouse to whom the communication is made is a witness and claims privilege from disclosure under the Criminal Evidence Act. 1898, (of which the terms are similar to S. 122 of the Indian Evidence Act though not identical), evidence as to communications between husband and wife during marriage is admissible in criminal proceedings.

16. The question whether the complainant in this case is an agent of the wife because he has received the letters from the wife and may be permitted to give evidence is a matter on which no opinion at this stage can be expressed. The complainant claims that he has been defamed by the writing of the letters. The letters are in his possession and are available for being tendered in evidence. We see no reason why inquiry into that complaint should, on the preliminary contentions raised, be prohibited. If the complainant seeks to support his case only upon the evidence of the wife of the accused, he may be met with the bar of S. 122 of the Indian Evidence Act. Whether he will be able to prove the letters in any other manner is a matter which must be left to be determined at the trial and cannot be made the subject-matter of an enquiry at this stage."

(underlining by us)

8.3 Another complexity posed before this Court in the aforesaid case was that by the time the matter reached this

Court, the wife of the respondent therein had already taken a decree of divorce from the respondent therein and therefore it was prayed that the bar under Section 122 would no longer apply. This Court negated the said argument as under:

> "18. …When the letters were written by Ponnan to Rathi, they were husband and wife. The bar to the admissibility in evidence of communications made during marriage attaches at the time when the communication is made, and its admissibility will be adjudged in the light of the status at the date and not the status at the date when evidence is sought to be given in court."
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> (underlining by us)

8.4 In the aforesaid case, this Court held that Section 122 only prevents disclosure in giving evidence by the other spouse in court of the communication made. It does not mean that other evidence, which is not barred under this Section or other provisions of the Act, is barred. The latter part of the Section states the exceptions to the rule of privilege, namely, (a) in suits between married persons (i.e., husband and wife), i.e., divorce proceedings or other cases, or (b) proceedings in which one of them is prosecuted for any crime against the other. In these cases, there is no privilege.

8.5 In the case of ***Ram Bharosey vs. State of U.P., (1954) 1 SCC 284***, a three-Judge Bench of this Court had to deal with the deposition of PW-2, who was the wife of the appellant-accused therein. In her deposition, she had stated about seeing the appellant come down the roof of the house in the morning, taking bath and then having a conversation with her. The part of the wife's statement where the appellant told her that he would give her jewels and that he had gone to the middle house to get them were held to be inadmissible under Section 122 of the Evidence Act but the part of the deposition that talked about the wife seeing the appellant in the morning was held to be admissible. The Court observed as follows with reference to the deposition of the wife in light of Section 122 of the Evidence Act:

> "3. ...The middle house referred to in this deposition is the house in which Manna was living. The argument of the appellant is that his statements to P. W. 2 that he would give her jewels, and that he had gone to the middle house to get them were inadmissible under Section 122 of the Evidence Act, being communications made to his wife. <u>This is plainly so, and the Courts below ought not to have taken this evidence into consideration</u>.
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> xxx
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> 6. Firstly, there is the evidence of P. W. 2 that the accused was seen in the early hours of the 27th May 1952 while it was still dark, coming down the roof of

> his house, that he went to the bhusha kothri and came out again and had a bath and put on the dhoti again. This is not inadmissible under Section 122, as it has reference to acts and conduct of the appellant and not to any communication made by him to his wife."
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> (underlining by us)

8.6 In the case of ***Appu Alias Ayyanar Padayachi vs. State, AIR 1971 Mad 194,*** the Madras High Court was dealing with a confession made by the appellant-accused therein to his wife which was in the presence of other witnesses. While the wife was not allowed to disclose that communication due to the bar under Section 122, it was allowed to be disclosed by the other witnesses present at the scene. The Madras High Court observed as follows:

> **"6.** But, as observed in *Queen* v. *Donaghue*, (1899) ILR 22 Mad 1 at page 3, the communication between a husband and his wife is not protected if it can be proved without their assistance, for, in these communications there is no question of any compulsion or permission to the wife or the husband to disclose it. The section protects the individuals and not the communication of it. Viscount Radcliffe in *Rumping* v. *Director of Public Prosecutions*, 1962-3 All ER 256 at 265 observed that such communications could be proved by some other form of testimony as that of a witness who had overheard their confidence or by the production of a letter which contained the confidence, but had passed into other hands. In other words, the law does not protect the communications as such, but only excludes the spouse from being a witness to prove it. Thus marital communications could be proved by the evidence of the over-hearers, even though the wife herself could not have been called to

> testify to them. The decision in *R.* v. *Smithies*, 1832-5 C and P 332, *R.* v. *Simons*, 1834-6 C and P 540 and *R.* v. *Bartlett*, 1837-7 C and P 832 are to this effect. In 1834-6 C and P 540, two over-hearers were allowed to prove at the trial what the husband, who was tried, had told his wife in confidence."
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> (underlining by us)

8.7 Section 122 of the Evidence Act deals with rule of privilege protecting disclosure of all communications between persons married to one another made during marriage, except in certain cases, i.e., in litigation between themselves. According to Sarkar's Law of Evidence, 20th Edition, Volume 2, the provisions of the Section may be summarised as under:

(i) The privilege extends to all communications made to a person during marriage, by any person to whom he or she has been married, but not to communications before marriage.

(ii) The communication need not be confidential. The rule applies to communications of every nature.

(iii) The rule of privilege applies equally whether or not the witness or his or her spouse is a party to the proceeding. It extends to all cases, i.e., to cases between strangers as

well as to suits or proceedings in which the husband or wife is a party.

(iv) The privilege extends to communications made to a spouse and not to those made by a spouse. But the privilege is conferred not on the witness (unless the witness happens to be the spouse who made the communication), but on the spouse who made the communication; the witness cannot therefore waive it at his or her will, nor can the court permit disclosure even if he or she is willing to do it ***(Nawab Howladar vs. Emperor, 1913 SCC OnLine Cal 447.*** It is only the spouse who made the communication or his or her representative in interest who can consent to give up the privilege.

8.8 From a reading of the above section and the judgments, the following principles and interpretations can be culled out:

(i) Unlike Section 120 of the Evidence Act, which deals with competency of a husband or a wife to be a witness in a civil or criminal proceeding involving the other, Section 122 of the said Act deals with the admissibility of privileged

communications made by a married person to a partner during the subsistence of the marriage.

(ii) Section 122 of the Evidence Act is worded in two parts – one, dealing with '**compellability**' and the other, dealing with '**permissibility**'. These two parts are separated by a semi-colon, which shows that the two parts are separate and have to be read disjunctively.

(iii) The first part deals with '**compellability**'. Here, if one of the spouses is not willing to disclose the communication made to the other, the latter cannot be compelled by any court, authority or person, which by law is otherwise competent to compel the person to give evidence, to disclose what their married partner communicated to the said spouse during the time when the marriage was subsisting. This is a blanket bar which cannot be relaxed in any situation. This protects the right to privacy between a married couple.

(iv) The second part deals with '**permissibility**'. This is an even greater restriction than the first part. Here, even if one of the spouses is willing to disclose the communication made

to him/her, the Court still cannot permit it to be taken as evidence, unless the other spouse who made that communication, or their representative-in-interest, consents to the disclosure of such communication. In other words, without the consent of the spouse who made the communication, the court cannot permit the other spouse to disclose that communication. Another way of looking at it is that if one of the spouses is willing to disclose the communication, then it is not the court that can give consent to the disclosure but it is actually the other spouse who made that communication who can consent to disclosing it.

(v) The second part, relating to 'permissibility', is then followed by two exceptions which are –

a. proceedings in suits between married persons,

b. proceedings in which one married person is prosecuted for any crime committed against each other.

Therefore, it means that in these two given scenarios, the requirement of taking consent from the other spouse

before being permitted to disclose the communication is done away with.

[***Ref.: M.C. Verghese vs. T.J. Poonan, (1969) 1 SCC 37***]

(vi) The provision is neither an absolute bar on any person nor on the communication. It puts a specific and limited bar on a married person from disclosing the communication made to him/her by his/her spouse during the subsistence of a marriage between them.

(vii) If the marriage was subsisting at the time when the communications were made, the bar prescribed by Section 122 of the Evidence Act will operate. The bar to the admissibility in evidence of communications made during marriage attaches at the time when the communication is made and its admissibility will be adjudged in light of the status on the date and not the status at the date when evidence is sought to be given in court.

(viii) The provision applies vis-à-vis a legally wedded wife and not to any other kind of relationship. [***Ref.: Shankar vs. State of T.N, (1994) 4 SCC 478***]

(ix) The prohibition of disclosure under the Section applies even after the marriage is no longer subsisting, if the "communication", whose disclosure is sought to be prohibited, is only the one that was made during the subsistence of the marriage.

(x) The bar from disclosure under the provision applies to the spouse to whom the communication was made and not to the spouse who made the communication. *For example*, if X and Y are married, then X cannot disclose what Y told to her and Y cannot disclose what X told to him. But X can disclose what she told to Y and Y can disclose what he told to X.

(xi) Hence, under this Section, it is only the spouses who are barred from disclosing what was said to them by the other spouse. The bar is not on other persons like the family members, kith and kin or third-parties who may have heard or overheard that communication. [***Ref.: Appu vs. The State, AIR 1971 Mad 194***]

(xii) The bar does not also apply to the communication made to a third party even if the same communication was made to

that third party which was made to the spouse. For example, X tells something to spouse Y. X tells the same thing to friend Z. Then Y is barred under this section to disclose that communication, but not Z.

(xiii) The use of the blanket word "*any communication*" means that the bar in the Section applies to disclosing all kinds of communication and not just private/confidential communication. The communication may also be oral or written or sign language.

(xiv) However, the use of the word "*communication*", followed by the phrase "*made to him*", denotes that the communication here should not be read as 'conversation' or a 'dialogue'. When communication is made to a person, it would mean that a message or information has been conveyed by one person to the other.

This can be understood by an illustration. Suppose in a trial for the murder of a person 'Z', the husband 'Y' is being tried as an accused. The wife 'X' comes to the witness box to depose about the conversation that happened

between X and Y on the day of the crime. X deposes as under:

> *"On that night, when my husband Y came back home, his clothes were drenched in blood. I was scared to see that. I asked Y, "**What happened? Whose blood is this? Did you kill someone?**" Y replied back in anger and said, "Z had been troubling me for a long time, so today I killed him." Shocked to hear this, I further asked "**Where is the body? What did you kill him with?**" Y replied in a whispering tone and said, "I killed him using a knife and buried the body in the park."*
>
> *(underlining by us)*

Now, in the above deposition, the part in plain *italics* was what the wife herself thought or experienced. That part is not barred by Section 122 of the Evidence Act. Further, the part in **bold** was what the wife told to the husband. That part is also not barred by Section 122. But the underlined part was the communication that was made by the husband to the wife. Therefore, under Section 122, the wife is barred from disclosing the said communication without the consent of the husband, and the Court cannot permit the wife to disclose that communication and that part of the deposition would not form part of the record. The Court will have to delete that part from the deposition.

(xv) The bar in the Section is with respect to ***"disclosure"*** of 'communication' by the 'spouse', and not to that "communication" *per se*. The spouse cannot be compelled or permitted to get into the witness box and disclose the communication, but that communication may be brought before the court through any other means. The bar under Section 122 of the Evidence Act does not mean that no other evidence can be given for that communication which is not barred under Section 122 or other provisions of the Evidence Act. For example, husband 'Y' wrote a letter to wife 'X', telling her that he has committed a murder. Now as per Section 122 of the said act, the wife 'X' is barred from disclosing this communication. But if during investigation of the crime, the police find these letters and bring them before the Court in evidence then the bar of Section 122 of the said Act will not be attracted.

[***Ref.: Appu vs. The State, AIR 1971 Mad 194, and M.C. Verghese vs. T.J. Poonan, (1969) 1 SCC 37***]

(xvi) The bar under Section 122 of the Evidence Act is limited to disclosing of communications made to that spouse but is not attracted for the acts that were seen by the spouse or

experienced by the spouse. For example, when husband 'Y' comes to wife 'X' and tells her that "*I killed Z*", then X is barred from disclosing this communication. But X is not barred from disclosing if she secretly saw Y killing Z.

[***Ref.: Ram Bharosey vs. State of U.P., (1954) 1 SCC 284***]

9. The issue that arises for our consideration in this case is, *whether the conversation between spouses secretly recorded by one of them could be permitted to be made admissible in evidence.* However, this one issue has three elements which this Court will have to address:

a) Whether a secretly recorded conversation can be permitted to be given in evidence?

b) Whether in light of the Evidence Act and the F.C. Act, a conversation between spouses can be permitted to be given in evidence in a proceeding for divorce?

c) Whether such a recorded evidence should be disallowed solely on the ground that it is violative of the privacy of one of the spouses?

9.1 The first issue deals with the aspect of the validity of discreetly recorded digital evidence. The second issue deals with

spousal privilege under the Evidence Act and the relaxation of the rules of evidence by the F.C. Act. The last issue deals with spouse's right to privacy and the ambit of such privacy.

Validity of secretly obtained evidence:

9.2 This Court has often had the occasion to deal with the issue of using illegal and immoral ways to procure evidence against a person without the knowledge of the person. It is often alleged by accused persons that the investigation authorities did not follow legal methods and procedures to obtain the evidence against them. Sometimes recording devices and phone-tapping mechanisms are resorted to for the purpose of collecting relevant evidentiary material. In such cases, the view taken by this Court has been that merely the fact that an evidence was not obtained strictly in accordance with law does not absolutely bar the admissibility of such an evidence. The Court, while appreciating such evidence, may have to tread with caution and be assured about the accuracy and reliability of such evidence but the said evidence cannot be said to be irrelevant and/or inadmissible merely on the argument that it was illegally obtained.

9.3 In the case of ***Yusufalli Esmail Nagree vs. The State Of Maharashtra, AIR 1968 SC 147 ("Yusufalli Nagree")***, a three-judge bench of this Court was dealing with a case of corruption wherein a conversation was secretly recorded by the police by laying a trap and concealing a microphone in the room of the accused. The conversation was recorded on a tape recorder. The admissibility of this recorded conversation was objected to on the ground that this was recorded without the knowledge of the accused and the accuracy of the conversation recorded on the tape recorded was challenged. This Court, speaking through Bachawat, J., rejected these arguments made by the accused. While this Court refused to lend its approval to the police practice of tapping telephone wires and setting up hidden microphones for the purpose of tape recording, it held that the fact that the tape recording was done without the knowledge of the accused is not in itself an objection to its admissibility in evidence because the accused in this case was free to talk or not to talk; his conversation was voluntary and there was no element of duress, coercion or compulsion. It was further observed that the imprint on the magnetic tape is the direct effect of the relevant sounds. Like a photograph of a relevant incident, a contemporaneous tape

record of a relevant conversation is a relevant fact and is admissible under Section 7 of the Evidence Act. This Court further observed with respect to the balance to be struck between the relevance and caution while dealing with a tape-recorded conversation as follows:

> "6. … If a statement is relevant, an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with."
>
> (underlining by us)

9.4 In furtherance to the above view came the judgment of this Court in the case of ***R. M. Malkani vs. State of Maharashtra, (1973) 2 SCR 417 ("R.M. Malkani")***, wherein the validity of a tape-recorded conversation was in question. This Court, while allowing the tape-recorded conversation to be admitted in evidence, observed the following:

> "Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a

> relevant conversation is a relevant fact and is admissible under section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under section 7 of the Evidence Act."

9.5 The aforesaid test laid down by this Court has become a *locus classicus* on the issue of determining the admissibility of a tape-recorded conversation. The three-fold test of relevance, identification and accuracy has to be satisfied before a Court admits a recorded conversation in evidence. However, the fact that the conversation was recorded without the consent and knowledge of the person speaking is not a prohibition on the admissibility of the evidence, as laid down by the Evidence Act and read into the statutory provisions by this Court.

Applicability of Section 122 of the Evidence Act to a proceeding for divorce:

10. As explained above, Section 122 of the Evidence Act deals with two parts – compellability and permissibility. The facts of the present case concern only the applicability of the second part of Section 122, i.e., the one dealing with permissibility. The husband in this case would have ordinarily been barred from disclosing any form of communication that was disclosed by the

wife to him by virtue of being a privileged communication under Section 122. But due to the exception provided in that Section, the bar on the disclosure of such communication is lifted since the communication sought to be disclosed in the present case is in a proceeding between the husband and the wife, i.e., the petition filed by the husband for divorce under Section 13 of the Hindu Marriage Act. Therefore, such a privileged communication is not barred from being disclosed and brought before the Court and the objection taken by the wife with respect to Section 122 of the Evidence Act is not acceptable.

10.1 Looking at it from another angle, under Section 122 of the Evidence Act, what is barred in the present case is the disclosure of the communication made by the wife to the husband by the latter standing in the witness box. But the communication that was made to the husband is itself not barred. The phone on which the conversation was recorded is no different from an eavesdropper. The restriction under Section 122 does not apply to the communication that was made by the wife to the husband and the same can also be proved by means other than the husband himself coming to the witness box to disclose

that communication. However, the overriding exception in the second part of the section with regard to disclosure in a proceeding between the spouses would apply; and under the exception, the doctrine of privileged communication would not apply.

10.2 Section 14 of the F.C. Act gives a wide discretion to the Family Courts in deciding matrimonial disputes since they can go beyond the strict rules of evidence in terms of relevance and admissibility while admitting any evidence which they think is relevant for the adjudication of the dispute at hand. However, we do not think that adverting to Section 14 of the F.C. Act is required in the present facts when the Evidence Act itself permits such a communication to be admitted in evidence by way of an exception. The powers under Section 14 of the F.C. Act would normally be resorted to in a scenario where the Evidence Act creates some prohibition with respect to relevance or admissibility of any evidence. But if the Family Court is of the opinion that it is expedient to go beyond the procedural technicalities of the Evidence Act for adjudicating the dispute, in such a case, the Family Court is allowed to take that evidence on

record, notwithstanding what is stated in the Evidence Act. But the exercise of this extraordinary power under Section 14 of the F.C. Act is not warranted in this case.

10.3 Some arguments have been made by the learned amicus about the fact that permitting such an evidence would jeopardise domestic harmony and matrimonial relationship inasmuch as it would encourage snooping on the spouse, thereby fracturing the very objective of Section 122 of the Evidence Act. We do not think such an argument is tenable. If the marriage has reached a stage where spouses are actively snooping on each other, that is in itself a symptom of a broken relationship and denotes a lack of trust between them. The said snooping cannot be said to be a consequence of the Court admitting the evidence obtained by snooping. In fact, snooping between partners is an effect and not a cause of marital disharmony. The privacy of communication exists between spouses, as has been recognised by Section 122, but the said right of privacy cannot be absolute and has to be read also in light of the exception provided in Section 122 of the Evidence Act. When Section 122 itself recognises and protects spousal privacy in the first part of the Section then, the said right

has to be construed in terms of Section 122 only and has to be subject to the exception contained therein. In other words, when the right to privacy of communication between spouses is the very basis of Section 122 then the exceptions to these should also flow only from Section 122 of the Evidence Act.

10.4 During the years when this Court decided cases such as ***Yusufalli Nagree*** and ***R.M. Malkani***, bugging, snooping, tapping were considered acts that had a clear element of invading the privacy of an individual for the purpose of gathering concrete evidence. Devices like tape-recorders and microphones were carefully placed in a space wherein the conversations could be secretly recorded and the entire process was not as easy as clicking a button on a mobile phone. Even in those times, the Courts have encouraged the need for having better evidence for adjudication than to close the doors of technology and refuse to accept the material in front of them on the mere ground that privacy would be breached.

10.5 On the other hand, before a Court of law, a relevant piece of conversation available on an electronic device should not be allowed to be shut out when it is the best evidence available for

deciding the dispute. The erstwhile Evidence Act is a legislation that was more than a century old and therefore obviously could not encapsulate all the technologically varied challenges which the modern technology poses before us. Yet, what the said legislation remarkably conveys is that the purpose of the law of evidence is not to create barriers but to break them to ensure that a clearer picture is created in the mind of the judge so as to decide a dispute before it. This is why when the evidence is not direct, the legislation allows a judge to rely on circumstantial evidence; it allows presumptions of fact and law and adverse inferences to be drawn from the conduct of parties and witnesses so that a fair and reasonable conclusion can be reached from the material on record. Now, in today's day and age, when the technological advancement has made it easier to record and recreate moments of past and present for reference in future, then to say that such better forms of evidence and material would not be admissible on the ground of they being in violation of the right to privacy would amount to defeating the very object of the Evidence Act. That was the reason for the Parliament to amend the Evidence Act by incorporating Section 65B which specifically deals with electronic evidence.

10.6 Section 65A deals with special provisions as to evidence relating to electronic records. The contents of electronic records may be proved in accordance with the provisions of Section 65B. Section 65B of the Evidence Act speaks of the admissibility of the electronic records. Sections 65A and 65B read as under:

> **"65-A. Special provisions as to evidence relating to electronic record.**—The contents of electronic records may be proved in accordance with the provisions of Section 65-B.
>
> **65-B. Admissibility of electronic records.**—(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.
>
> (2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely—
>
> (a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and

references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer

operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

Section 122 of the Evidence Act and Right to Privacy:

11. Learned amicus as well as learned counsel and learned senior counsel for the respective parties have relied upon a number of judgements of the High Courts in support of their rival contentions. Having regard to the view which we have taken in the matter, we find that the conclusions arrived at in the case of *Preeti Jain vs. Kunal Jain, AIR 2016 Raj 153; Jil vs. State of Gujarat, 2024 SCC OnLine Guj 4363; Essaki Ammal @ Chitra vs. Veerabhadra @ Kumar, 2012 SCC OnLine Mad 2093; Havovi Kersi Sethna vs. Kersi Gustad Sethna, 2011 SCC OnLine Bom 120; Deepti Kapur vs. Kunal Julka, 2020 SCC OnLine Del 672* are just and proper inasmuch as tape recorded/digitally recorded

conversation between the spouses was permitted to be let in as evidence in support of the contentions raised by the parties, having regard to the parameters laid out under Section 122 of the Evidence Act.

11.1 However, in the cases of *Anurima @ Abha Mehta vs. Sunil Mehta s/o Chandmal, (2016) 2 RCR (Civil) 773; Abhishek Ranjan vs. Hemlata Chaubey, Misc. Petition No. 1300/2023 decided on 29.08.2023 by High Court of Madhya Pradesh at Jabalpur Bench; Saroj vs. Aashish Yadav, Misc. Petition No. 1422/2024 decided on 02.08.2024 by High Court of Madhya Pradesh at Indore Bench; Ram Talraja vs. Sapna Talreja, Misc. Petition No. 949/2022 decided on 26.04.2022 by High Court of Madhya Pradesh at Indore Bench; Aasha Lata Soni vs. Durgesh Soni, 2023 SCC OnLine Chh 3959; Rayala M. Bhuvaneswari vs. Nagaphanender Rayala, AIR 2008 AP 98; Deepinder Singh Mann vs. Ranjit Kaur, 2014 SCC OnLine P&H 4826; Tripat Deep Singh vs. Paviter Kaur, 2018 (3) RCR (Civil) 71; Neha vs. State of Haryana, 2020 SCC OnLine P&H 4469; Vishal Kaushik vs. Family Court, 2016(1) RLW 693 (Raj.); Dharmesh Sharma vs. Tanisha Sharma, 2024 SCC OnLine HP 5208; and Kethana Lokesh vs. Rahul R. Bettakote,*

2024 SCC OnLine Kar 6368 decided on 19.06.2024 passed by the High Court of Karnataka at Bengaluru, the High Courts declined to permit the conversation recorded by one of the spouses to corroborate the contention as being in violation of the right to privacy under Article 21 of the Constitution of India. Hence, it is necessary to dilate upon the contours of the right to privacy in the context of Article 21 of the Constitution with reference to the recent dicta of this Court rendered by Constitution benches.

11.2 In ***K.S. Puttaswamy (Privacy-9J.) vs. Union of India*** reported in ***(2017) 10 SCC 1***, **("*Puttaswamy")**, Chelameswar and Bobde JJ. enunciated that the constitutional right to privacy under Article 21 is limited to the relationship between the citizen and the State. Bobde J. (as he then was) drew a distinction between 'common law rights' and 'fundamental rights' by observing thus:

> "**397.**...we can dismantle a core assumption of the Union's argument: that a right must either be a common law right or a fundamental right. The only material distinctions between the two....lie in the incidence of the duty to respect the right and in the forum in which a failure to do so can be redressed. Common law rights are horizontal in their operation when they are violated by one's fellow man, he can be named and proceeded against in an ordinary court of law. Constitutional and fundamental rights, on the

> other hand, provide remedy against the violation of a valued interest by the "State"...It is perfectly possible for an interest to simultaneously be recognised as a common law right and a fundamental right".

11.2.1 However, Nariman J. observed that Article 21 was couched in a negative form in order to interdict State action that fell afoul of its contours. But right to privacy being a fundamental right could be both against the government as well as private individuals. The discussion in ***Puttaswamy*** was restricted to the right to privacy under Article 21 primarily against State action.

11.2.2 Kaul J. suggested horizontal application of the right to privacy by holding that:

> "**593.**..(in) today's world, privacy is a limit on the Government's power as well as the power of private sector entities".

Later in the judgement, he concluded that the right to privacy is a fundamental right, and that it:

> "**644.**..is a right which protects the inner sphere of the individual from interference from both State and non-State actors".

Further, once again emphasising that technology has made it possible for non-State actors to 'enter citizens' houses', he held that:

> "**646.**..privacy is one of the most important rights to be protected both against State and non-State actors and be recognised as a fundamental right".

However, Kaul J began his judgement by observing that:

> "**584.**..(the) right to privacy is claimed qua the State and non-State actors. Recognition and enforcement of claims qua non-State actors may require legislative intervention by the State".

He thus recognised that in the status-quo, while enforcing the right to privacy against private bodies might be desirable, it was perhaps not yet possible.

11.2.3 The opinion by Chandrachud, J. (as he then was) was authored on behalf of himself, Khehar J., Agrawal J. and Nazeer J. Chandrachud J did not dilate as such on the public-private aspect of the right to privacy as was done by the other Judges on the Bench. He held that the protection of privacy as a constitutional right embodies both 'negative' and 'positive' freedoms. From a negative perspective, it protects the individual from unwanted intrusions (note that here, Chandrachud J did not limit it to intrusions by the State). From a positive perspective, it 'obliges' the State to adopt measures for protecting individuals' privacy. He then quoted the entry on the right to

privacy in the Max Planck Encyclopaedia of Comparative Constitutional Law as an 'apt' description of this facet. The entry opined that the 'negative' right to privacy entails protection against unwanted intrusion by both State and private actors. Chandrachud J, unlike Bobde J, did not separate common law and fundamental rights in terms of their enforceability against separate bodies. Instead, he merely emphasised that simply because privacy was a common law/statutory right, it was not proscribed from also being recognised as a constitutional right.

11.3 Subsequently, in ***Kaushal Kishor vs. State of U.P. (2023) 4 SCC 1 ("Kaushal Kishore")***, one of the questions that a five-judge Constitution bench decided was whether a fundamental right under Articles 19 or 21 could be claimed other than against the State/State instrumentalities. Ramasubramanian, J., writing for the majority, referred to 'Horizontal Effect' as a constitutional concept, and proceeded to list a number of cases where the Supreme Court had applied fundamental rights obligations horizontally. He then opined that in ***Puttaswamy***, the Supreme Court had framed a 'tool' that establishes guidelines for horizontal application. According to

him, this 'tool' was expressed in Bobde J's opinion, the relevant extract of which has been reproduced above.

11.3.1 Ramasubramanian, J. relied on this separation of common law rights and fundamental rights to support his conclusion that Article 19/21 rights can indeed be enforced against non-State entities. While considering the question whether a fundamental right under Articles 19 and 21 can be claimed against anyone other than the State or its instrumentalities, it was clarified that the question is not about "*claim*" but about "*enforceability*". The further question whether Part III of the Constitution has a "*vertical*" or "*horizontal*" effect was also considered and it was observed that wherever constitutional rights impact the relations between private individuals, they are said to have "a horizontal effect". When a constitutional right regulates the Government and State actors in their dealings with private individuals, they are said to have "a vertical effect". After discussing the approach of constitutional courts in overseas jurisdiction on "*verticality vs. horizontality*", reference was made to Article 12 of the Constitution of India which defines the expression "*the State*". It was observed that

there are some Articles in Part III of the Constitution where the mandate is directly to the State and there are other Articles where without injuncting the State, certain rights are recognised to be inherited, either in the citizens of the country or in persons. Referring to Part III of the Constitution, it was observed that the Articles therein relate to citizens and persons. It was further observed that the rights conferred by Articles 15(2)(a) and (b), 17, 20(2), 21, 23, 24, 29(2), etc. are enforceable against non-State actors also. As already noted, Article 21 deals, *inter alia,* with the right to privacy.

11.3.2 While referring to ***Puttaswamy***, it was observed that the original thinking of this Court that the fundamental rights can be enforced only against the State has changed over a period of time and that such rights can be enforced even against authorities, instrumentalities of the State, agencies of the State, those entities which enjoy monopoly status conferred by the State or where there is "deep and pervasive control" by the State with regard to the "nature of duties/functions performed". Therefore, Question No.2 was answered by the majority as follows:

> "A fundamental right under Articles 19/21 can be enforced even against persons other than the State or its instrumentalities."

11.3.4 In the aforesaid judgment, Question No.3 was formulated thus:

> "Whether the State is under a duty to affirmatively protect the rights of a citizen under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?"

It was clarified by Ramasubramanian, J. that the word "*citizen*" ought to be read as "*person*" as Article 21 states that "no person shall be deprived of his life or personal liberty". In the context of personal liberty, it was observed that technological eavesdropping except in accordance with the procedure established by law was frowned upon by this Court in ***People's Union for Civil Liberties (PUCL) vs. Union of India, (1997) 1 SCC 301***. Earlier mobile phones were not in vogue and the State monopoly in communication was yet to be replaced by private players such as intermediaries/service providers. The infringement of the right to privacy by private players is now rampant and therefore, fundamental right to privacy can be enforced against non-State actors. In this regard, reliance was

placed on the judgment of this Court in ***Maneka Gandhi vs. Union of India, (1978) 1 SCC 248*** wherein it was observed that any law interfering with personal liberty of a person must satisfy a triple test : (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorising interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14, it would be no procedure at all within the meaning of Article 21.

12. In view of the aforesaid discussion, we firstly observe that Section 122 of the Evidence Act is not assailed in these proceedings. Secondly, under Section 122 of the said Act, privileged communication between the spouses is protected in the context of fostering intimate relationship. However, the exception under Section 122 of the Evidence Act has to be

construed in light of right to a fair trial which is also an aspect of Article 21 of the Constitution of India. When we weigh the respective rights of the parties in a trial within the parameters of Section 122 of the Evidence Act, we do not think that there is any breach of right to privacy in the instant case. In fact, Section 122 of the aforesaid Act does not recognise such a right at all. On the other hand, the said Section carves out an exception to right to privacy between spouses and therefore cannot be applied horizontally at all. In this regard, we reiterate that as per procedure established by law, Section 122 of the Evidence Act does not touch upon the aspect of right to privacy as envisaged under Article 21 of the Constitution, let alone invade upon such right. The reason is because Section 122 of the Evidence Act recognises the right to a fair trial, right to produce relevant evidence and a right to prove one's case against a spouse so as to avail the relief sought for by a party.

12.1 As already discussed, Section 122 of the Evidence Act deals with both compellability as well as permissibility. The first part deals with compellability while the second part deals with permissibility. The second part dealing with permissibility is

followed by two exceptions which are – a) proceedings in suits between married persons; and b) proceedings in which one married person is prosecuted for any crime committed against each other. Under the exception, the requirement of taking consent from other spouse before disclosing the communication is done away with. Therefore, the exception has been carved out in Section 122 of the Evidence Act itself to state that such privilege between spousal communication does not extend to a case of litigation between the spouses themselves. In such a situation, the spouses would have the right to prove their respective cases and therefore can let in such evidence which is permitted under Section 122 of the Evidence Act, if one could use the expression "spill the beans".

12.2 However, in ***Kaushal Kishore***, one of us (Nagarathna, J.) authored a partly dissenting opinion by observing thus –

> "**260.3.** While the content of a certain common law right, may be identical to a fundamental right, the two rights would be distinct in two respects : first, incidence of the duty to respect such right; and second, the forum which would be called upon to adjudicate on the failure to respect such right. While the content of the right violated may be identical, the status of the violator, is what is relevant".
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"**263.** Therefore, the primary object of Part III of the Constitution was to forge a new relationship between the citizens and the State, which was the new site of Governmental power. The realm of interaction between citizens inter se, was governed by common law prior to the enactment of the Constitution and continued to be so governed even after the commencement of the Constitution because as recognised hereinabove, the common rights and remedies were not obliterated even after the Constitution was enacted. These inalienable rights, although subsequently placed in Part III of the Constitution, retained their identity in the arena of common law and continued to regulate relationships between citizens and entities, other than the State or its instrumentalities. It is therefore observed that the incidence of the duty to respect Constitutional and fundamental rights of citizens is on the State and the Constitution provides remedies against violation of fundamental rights by the State. These observations are in consonance with the recognition by this Court in People's Union for Civil Liberties v. Union of India [People's Union for Civil Liberties v. Union of India, (2005) 2 SCC 436] ("People's Union for Civil Liberties") that the objective of Part III is to place citizens at centre stage and make the State accountable to them".

"**264.** On the other hand, common law rights regulate the relationship between citizens inter se. Although the content of a common law right may be similar to a fundamental right, the two rights are distinct insofar as, the incidence of duty to respect a common law right is on citizens or entities other than State or its instrumentalities; while the incidence of duty to respect a fundamental right, except where expressly otherwise provided, is on the State. Remedies against violation of fundamental rights by the State are constitutionally prescribed under Articles 32 and 226; while common law remedies, some of which are statutorily recognised, are available against violation of common law rights.

Such remedies are available even as against fellow citizens or entities other than State or its instrumentalities. To this extent, horizontality is recognised in common law. Further to some extent certain fundamental rights are recognised statutorily and some others are expressly recognised in the Constitution as being applicable as horizontal rights between citizens inter se such as Articles 15(2), 17, 23 and 24".

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"**268.7.** Thus, recognising a horizontal approach of fundamental rights between citizens inter se would set at naught and render redundant, all the tests and doctrines forged by this Court to identify "State" for the purpose of entertaining claims of fundamental rights violations. Had the intention of this Court been to allow fundamental rights, including the rights under Articles 19 and 21, to operate horizontally, this Court would not have engaged in evolving and refining tests to determine the true meaning and scope of "State" as defined under Article 12. This Court would have simply entertained claims of fundamental rights violations against all persons and entities, without deliberating on fundamental questions as to maintainability of the writ petitions. Although this Court has significantly expanded the scope of "State" as defined under Article 12, such expansion is based on considerations such as the nature of functions performed by the entity in question and the degree of control exercised over it by the State as such. This is significantly different from recognising horizontality of the fundamental rights under Articles 19 and 21, except while seeking a writ in the nature of habeas corpus. Such a recognition would amount to disregarding the jurisprudence evolved by this Court as to the scope of Article 12 of the Constitution".

12.3 It must be reiterated that the content of a common law right may be similar to that of a fundamental right, but they are distinguished by the incidence of their duties on private entities and the State respectively. Therefore, one can foist similar obligations on private bodies and the State, while separating the avenues by which these obligations are enforced.

12.4 In our view, Section 122 of the Evidence Act does not concern itself with right to privacy *vis-à-vis* spouses which is evident on a reading of the Section and on discerning its plain meaning. The 69th report of the Law Commission of India in 1977 observed that the section is "*based on the abiding communication between the husband and wife, which is of such a nature that their mutual communications are not always to be regarded on the same footing as communications between person who have no such intimate tie*". It prefaced this by noting that the law of evidence has generally demonstrated a "degree of solicitude towards the sanctity of marriage", and also referred to Best CJ's opinion in ***Doker vs. Hasler, (1824) 171 E.M. 992,*** that "the happiness of the marriage…requires that the confidence between man and his wife should be kept for ever inviolable". Similarly,

the 1853 report of the English Commission on Common Law Procedure had observed that the 'happiness' of human life depends on a large part upon the "inviolability" of domestic confidence, and that the "alarm and unhappiness" caused to society by the disclosure of confidential communications outweighs the disadvantage in terms of a loss of evidence during trials.[1]

12.5 Therefore, the Delhi High Court observed in ***RIT Foundation vs. Union of India, 2022 SCC OnLine Del 1404***, that the Law Commission Report makes it clear that the "raison d'etre for the spousal privilege (is) the "higher degree of confidence that goes with a marriage". This was also the view taken by the Delhi High Court in an earlier case – ***S.J. Choudhary vs. State 1984 SCC OnLine Del 185*** – where it held that the "prohibition under Section 122 of the Evidence Act is based on the ground that the admission of such testimony is likely to disturb the peace of the family and weaken the feeling of mutual confidence".

[1] Report of the 69th Law Commission of India on the Indian Evidence Act, 1872, page 636.

12.6 Clearly therefore, the founding rationale for Section 122 of the said Act, as has been recognised by the Law Commission and subsequently by certain High Courts, was to protect the sanctity of marriage and not the right to privacy of the individuals involved. Therefore, in adjudicating situations where the privilege under Section 122 of the Act is not granted, as in suits between a couple (an exception provided for in Section 122 itself), the right to privacy is not a relevant consideration, since it is not the rationale under which spousal communications were deemed privileged under Section 122 of the Act.

Conclusion:

13. In view of the aforesaid discussion, we set aside the impugned order dated 12.11.2021 passed by the High Court in CR No.1616 of 2020 (O & M) and restore the order passed by the Family Court dated 29.01.2020 passed by the learned Principal Judge, Family Court, Bhatinda. The Family Court is directed to take on record the supplementary affidavit filed by way of examination-in-chief along with memory card/chip of the mobile phones, compact disc (CD) and transcript of the conversation recorded in memory card/chips of the mobile phones for the

relevant period and consider the same as evidence, in accordance with law.

The appeal is allowed and disposed of in the aforesaid terms.

We place on record our sincere appreciation to the valuable assistance rendered by the learned amicus Ms. Vrinda Grover. We direct the Registry of this Court to pay a sum of Rs.1,00,000/- as honorarium for the valuable services rendered by the learned amicus.

Parties to bear their respective costs.

.....J.
(B.V. NAGARATHNA)

.....J.
(SATISH CHANDRA SHARMA)

NEW DELHI;
JULY 14, 2025.