supra, I consider it a duty to observe that the said judgment of the Full Bench was given in the light of the judgments of their Lordships of the Supreme Court in the following cases:—

(i) *Vora Abhasbhai Alimahomed* v. *Haji Gulamnadi Haji Safibhai,* (11) supra.

(ii) *Mangilal* v. *Sugan Chand Rathi,* (12) supra.

(iii) *Manujendra Dutt* v. *Purnedu Prosad Roy Chowdhury and others,* (13) (supra).

(21) In view, however, of the subsequent pronouncement of their Lordships in *Messrs. Raval and Company* v. *K. G. Ramachandran and others*; (19) Supra and in *Puwada Venkateswara Rao* v. *Chidamana Venkata Ramana;* (20) Supra; there appears to be now no escape from reversing the Full Bench judgment of this Court in *Bhaiya Ram's case*. It is precisely in this situation that even when sitting in Single Bench while deciding—*Mool Raj Jain* v. *Messr. Jayua Engineering Works* (22); I did not follow the Full Bench of this Court which has been impliedly overruled by the Supreme Court partly in *Puwada Venkateswara Rao* v. *Chidamana Venkata Ramana* (*supra*) and partly in *Rattan Lal* v. *Vardesh Chander and others;* (21) (*supra*). It is with these observations that I agree that this revision petition should be accepted and the order of the Rent Controller, directing the eviction of the tenant-respondent be restored allowing him two months' time to vacate, but leaving the parties to bear their own costs.

N.K.S.

FULL BENCH

Letters Patent Appeal.

Before S. S. Sandhawalia, S. S. Sidhu and S. P. Goyal, JJ.

KAILASH VATI WIFE OF AYODHIA PARKASH,—*Appellant.*

versus

AYODHIA PARKASH, SON OF SHRI LACHHMAN DASS,—*Respondent.*

Letters Patent Appeal No. 418 *of* 1975

November 19, 1976.

Hindu Marriage Act (*XXV of* 1955)—*Section* 9—*Restitution of conjugal rights—Wife gainfully employed at a place away from her*

(22) C.D. 355/76 decided on November 3, 1976.

Kailash Wati, wife of Ayodhia Parkash *v.* Ayodhia Parkash, son of Shri Lachhman Dass (S. S. Sandhawalia, J.)

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matrimonial home—Refusal to leave her job to live with her husband—Such withdrawal from society of the husband—Whether for a reasonable excuse—Concept of matrimonial home—Whether can be whittled down to a weekend meeting at the unilateral desire of the wife to live separately—"Consortium"—Meaning of—Stated—Husband of a working wife—Whether abandons his rights to require the wife to live in the matrimonial home—Right to determine the locus of such home—In whom inheres.

Held, that under Hindu law, the obligation of the wife to live with her husband in his home and under his roof and protection is clear and unequivocal. It is only in the case of some distinct and specified marital misconduct on the part of the husband, and not otherwise, that Hindu law entitles the wife to live separately and claim maintenance therefor. This marital obligation has been further buttressed by clear statutory recognition by section 9 of the Hindu Marriage Act, 1955. This provides for an immediate remedy where either of the spouses falters in his or her obligation to provide the society and sustenance to the other. Indeed, the obligation to live together under a common roof is inherent in the concept of a Hindu Marriage and it cannot be torn asunder unilaterally by the desire of the wife to live separately and away from the matrimonial home merely for the reason of either securing or holding a job elsewhere. Such an act would be clearly in violation of a legal duty and it is plain, therefore, that this cannot be deemed either reasonable or a sufficient excuse for the withdrawal of the wife from the society of her husband, as visualised under section 9 of the Act.

(Para 44)

Held, that the hallowed concept of the matrimonial home cannot be whittled down to a weekend or an occasional nocturnal meeting at the unilateral desire of the wife to live separately for purpose of employment. Such an arrangement poses not the least difficulty where the two spouses willingly agree to the same. So long as it is consensual the arrangement may indeed be to the mutual benefit of both the spouses. The idea of the matrimonial home lies at the very centre of the concept of marriage in all civilised societies. It is indeed around it that generally the marriage tie revolves. The home epitomizes the finer nuances of marital status. The bundle of indefinable rights and duties which bind the husband and the wife can perhaps be best understood only in the context of their living together in the marital home. One of the essential features of marriage is the matrimonial home and therefrom arises the legal concept of consortium. The right to consortium by the husband was a dominant incident of marriage from the earliest times. Originally consortium was used to determine a right which the law recognised in the

husband growing out of the marital union to have access to the companionship and society of his wife. But with the passage of time, the concept of consortium has definitely assumed a distinct and firm footing of mutuality. It is no longer merely a husband's right to the companionship or the society of the wife but equally the wife's right to the companionship and society of the husband. The concept of what is consortium in Anglo-American jurisprudence seems to be equally recognisable under Hindu Law. The withdrawal from the matrimonial home by either spouse would, thus, inevitably involve a total or partial loss of consortium to either spouse.

(Paras 6, 7, 9 and 10).

Held, that where the husband marries a woman already in public or private service he does not by doing so impliedly give up his right to claim a common matrimonial home with his wife. Any working woman entering into matrimony by necessary implication consents to the obvious and known marital duty of living with a husband as a necessary incident of marriage. If by a common consent the parties agree to live apart, there can obviously be not the least objection. However, the mere fact of a marriage of two working spouses does not, without more, entitle either one of them to claim that because of that fact each one of them is entitled to live apart. Such a claim would be robbing the marriage of one of its essential ingredients. Therefore, far from there being any implicit waiver of the husband's right to claim the society of his wife in the home set up by him, there is on the other hand a clear acceptance of the marital obligation to live with the husband by a working wife when she knowingly enters the bonds of matrimony. Where a husband either encourages or at least allows the wife to take up employment after marriage he does not by doing so again abandon his legal right of having his wife live within the matrimonial home. No necessary inference arises from the mere fact of a husband at one or the other stage having consented to his wife's taking employment that thereafter he would not be entitled to claim her society and companionship within the matrimonial home. Again, where a wife against the wishes of her husband accepts employment away from the matrimonial home and unilaterally withdraws therefrom it would be an obvious case of unilateral and unreasonable withdrawal from the society of the husband and thus a patent violation of the mutual obligation of husband and wife to live together. The aforesaid rules are, however, subject to two qualifications, namely, that the husband

must actually establish a matrimonial home where he can maintain his wife in dignified comfort in accordance with the means and standards of living of the parties. Secondly, it must be crystal clear that the husband whilst claiming the society of his wife in the marital home should be acting in good faith and not merely to spite his wife. (Paras 11, 13, 14 and 15).

Held, that even on general principles, apart from the special rules of Hindu law, the husband is entitled to determine the locus of the matrimonial home provided that he acts *bona fide*. The Hindu law in particular imposes onerous obligation upon a Hindu husband to maintain the wife and the children from the wedlock and as against the right of maintenance always inhering in a Hindu wife, there is a corresponding obligation on her to live together with the husband in the matrimonial home determined by him.

(Paras 26 and 31).

Tirath Kaur *v.* Kirpal Singh.

1975 Revenue Law Reporter 512 overruled.

Pravinaben *v.* Sureshbhai Tribhovan Arya,

A.I.R. 1975 Gujrat 69 dissented from.

N. R. Radhakrishnan *vs.* N. Dhanalakhshmi.

A.I.R. 1975 Madras 331 dissented from.

Case referred by Hon'ble Mr. Justice S. S. Sandhawalia and Hon'ble Mr. Justice S. P. Goyal, to a larger Bench on 23rd March, 1976, for decision of an important question of law involved in the case. The Full Bench consisting of Hon'ble Mr. Justice S. S. Sandhawalia, Hon'ble Mr. Justice S. S. Sidhu, and Hon'ble Mr. Justice S. P. Goyal, finally decided the case on 19th November, 1976.

Letters Patent Appeal under Clause 10 *of the Letters Patent against the judgment dated 2nd May,* 1975, *passed by Hon'ble Mr. Justice Gurnam Singh in F.A.O. No.* 32-*M of* 1973 *(Smt. Kailash Wati Vs. Ayodhia Parkash) affirming that of Shri Surjit Singh Khurana,*

Subordinate Judge 1st Class, Phillaur, dated 5th February, 1973, passing a decree in favour of the petitioner for the restitution of conjugal rights against the respondent and leaving the parties to bear their own costs.

Claim : Petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955.

H. L. Sarin, Advocate with M. L. Sarin, Advocate, for the appellant.

A. N. Mittal, Advocate with Viney Mittal, Advocate and S. K. Aggarwal, Advocate, *for the respondent.*

JUDGMENT

Judgment of the Court was delivered by—

S. S. Sandhawalia, J.

(1) Does the Hindu Marriage Law countenance or sanctify the concept of (what may be conveniently so called) a week end marriage as of right at the unilateral desire of the wife, is the rather interesting and significant question which falls for determination by this Full Bench.

(2) Originally before the Letters Patent Bench, two questions had arisen upon which there was apparent conflict of authority, and had thus necessitated this reference. Firstly, whether the relief of conjugal rights could be declined to a husband on any other ground except those envisaged in the then unamended Section 9 of the Hindu Marriage Act ? Allied thereto was the ancillary issue of the burden of proof thereof. Secondly, whether a wife, who was gainfully employed at a place away from her matrimonial home, would be justified in law to refuse to leave her job and join her husband to live in the matrimonial home despite the insistent demand of the husband to do so? The first question upon which the various High Courts had differed, as noticed in the referring order, now stands amply resolved by the recent amendment of Section 9 of the Marriage Laws (Amendment Act of 1976). Section 3 of this Act now provides that

sub-section (2) of section 9 shall be omitted and further that the following explanation shall be added to the original sub-section (1)—

> "Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the Society."

It is evident from the above that the legislature has forthrightly cut the Gordian knot of conflict on this point and, therefore, no reference to this aspect of the case is necessary. The only issue that consequently survives for decision is the one noticed at the very outset.

(3) The appellant Smt. Kailash Wati was married to the respondent Ajodhia Parkash on the 29th of June, 1964, and at that time both of them were employed as village level teachers—the appellant at her perental village of Bilga in tahsil Phillaur and the respondent at village Kot Ise Khan. After the marriage, the appellant was transferred to the station of her husband's posting and in all they stayed together in the matrimonial home for a period of 8 to 9 months. The allegation of the respondent-husband which is well borne out from the record is that the appellant manoeuvred to get herself transferred again to village Bilga and virtually ever since has been residing there with her parents against his wishes. It is the common case that but for a paltry spell of 3 or 4 days in September, 1971, when the appellant accompanied the respondent to Moga, the couple has not lived together. Ajodhia Parkash respondent, therefore, filed an application for the restitution of conjugal rights under section 9 of the Hindu Marriage Act (hereinafter called as the Act) on the 4th of November, 1971, and in her written statement the appellant took up the plea that she had never refused to honour her matrimonial obligations but was firm in her stand that in the existing situation she would not revert to the matrimonial home. It was categorically stated that she was not prepared to resign her job and to return to the conjugal home despite the insistence of the respondent. The trial Court decreed the suit of the husband respondent on the 5th of February, 1973. On an appeal preferred by the wife the learned Single Judge, whilst placing reliance on a Single Bench judgment of this Court reported in *Smt. Tirath Kaur* v. *Kirpal Singh,* (1), upheld the findings and the decree of the trial Court. It, however, deserves mention forthwith that the view in

(1) A.I.R. 1964 Pun. 28.

Smt. Tirath Kaur's case above mentioned was substantially modified (apparently by way of compromise) by the Letters Patent Bench on the 2nd of December, 1963, but the judgment appears to have been reported rather belatedly in *Smt. Tirath Kaur* v. *Kirpal Singh* (2).

(4) Ere I come to the legal issues involved, it is apt to notice with some precision the firm stands taken on behalf of each of the contending spouses which has been accepted by the Courts below. The husband's stand is that even at the time of the original presentation of the petition in 1971, his wife had unilaterally withdrawn from the matrimonial home for a continuous period of six years. He claims to be in a position to maintain his wife in dignified comfort at his place of posting with his salary, income from agricultural land and also from other sources. Therefore, he insists that she should return to live with him in the conjugal home. It is highlighted on his behalf that for the twelve long and best years of his life the wife has denied him the society and sustenance of conjugal life and if she persists in her adamance there is little possibility of her returning home till perhaps her superannuation from Government service.

(5) On the other hand the wife's consistent position is that the husband at the time of marriage with his eyes open had accepted her as a working wife and she was, therefore, under no obligation to live with her husband because considerations of employment prevented her to do so. She claims a right to live separately because of the fact of her posting elsewhere. Her stand is that she has never positively denied access to her husband as and when possible in the peculiar circumstances and in her own words (in the written statement) she avers—

> "* * * The respondent never refused to go with the petitioner on holidays. Hence she is justified in not leaving service and thus accompanying him.....".

In her statement on oath in Court she was even more forthright at the stage of the examination-in-chief in the following terms:—

> "* * * The petitioner also insists that I should leave the job. I am not prepared to leave the service and thus reside with the petitioner on that condition.....".

(2) 1975 Rev. Law Reporter 512.

It deserves notice that even at the stage of argument before us the stand of the learned counsel for the appellant still was that the appellant wife was willing to allow access to her husband as and when it may be possible at her place of posting at Bilga where she was residing with her parents. In the present case where both the spouses are employed at a place more than eighty miles apart, the practical position is that the husband might on an alternative week end or on any holiday make a visit to his wife and perhaps at her option the wife if so inclined may return a visit in similar circumstances.

(6) From the aforesaid stand of the quarrelling spouses, the direct issue that arises herein is whether the hallowed concept of the matrimonial home can be withheld down to a weekend or an occasional nocturnal meeting, at the unilateral desire of the wife to live separately ?

(7) In examining this question it may first be forthrightly stated that such an arrangement poses not the least difficulty where the two spouses willingly agree to the same. Indeed in the peculiar circumstances of the work-a-day life of modern times such a situation arises quite often and perhaps is likely to arise with greater frequency in the future. So long as it is consensual such an arrangement may indeed be to the mutual benefit of both the spouses. In this country with its paucity of employment, instances are not lacking where as the wage-earner, husband is compelled to live far apart from the matrimonial home and returns to live with his wife and family for perhaps a fragmentary portion in a whole year. Similarly the wife may be so gainfully employed and the husband so willing in such an arrangement that she may conveniently live elsewhere and either return to conjugal home occasionally or meet the husband elsewhere as and when possible. To emphasise the point as long as the matter is consensual the spouses may not only live separately but may even live in separate countries without in any way either jeopardising their marriage or infringing their legal duties to each other. The difficulty or the legal conundrum arises only when the wife unilaterally breaks away from the matrimonial home and claims a legal right to live apart on the ground of having been already employed prior to the marriage or having procured employment thereafter.

(8) I do not propose in the first instance to examine this issue from the stand point of the dicta of Hindu Sages which might look

somewhat archaic in modern times. The Hindu Marriage Act has made significant and radical changes in the earlier concept of Hindu marriage, as a sacrament. However on matters which are not directly covered by the provisions of this Act, the Hindu Law is not only attracted but is binding and consequently reference thereto would be inevitable. However at this stage it is both instructive and refreshing to examine the matter on general principles.

(9) To my mind, the idea of the matrimonial home appears to lie at the very centre of the concept of marriage in all civilised societies. It is indeed around it that generally the marriage tie revolves. The home epitomizes the finer nuances of the marital status. The bundle of indefinable rights and duties which bind the husband and the wife can perhaps be best understood only in the context of their living together in the marital home. The significance of the conjugal home in the marriage tie is indeed so patent that it would perhaps be wasteful to elaborate the same at any great length. Indeed, the marital status and the conjugal home have been almost used as interchangeable terms. Lord Merriman pithily highlighted this aspect in *Lane* v. *Lane* (3), in the following words:—

> "Remembering always, as Lord Merrivale, p—, said in *Pulford* v. *Pulford* (4), that desertion is not a withdrawal from a place but from a state of things, I will call that state of things, for short, 'the home !' "

It is plain from the above that the "state of things" to which reference is made above, is the marital status itself which Lord Merriman has rightly termed as nothing but an abbreviation for the matrimonial home.

(10) That one of if not the essential feature of marriage is the matrimonial home, is further evident from the fact that therefrom arises the legal concept of *consortium*. This was so perhaps in Roman Law, but certainly in the Common Law of England, the right to consortium by the husband was a dominant incident of marriage from the earliest times. No precise definition of this term is perhaps possible and one can do no better than quote the

(3) 1951 P. 284.

4 (1) 1923 P. 18, 21.

descriptive words of Lord Reid in the decision of the House of Lords in *Best* v. *Samuel Fox and Co., Ltd.* (5):—

> "The origin of the husband's right of action seems to have been that he was regarded as having a quasi proprietary right, and I think that it included a right to his wife's society as well as to her services. I can see no sign of any difference in quality between his right to her assistance and his right to her society, and indeed it would be difficult to say where in fact assistance ends and society begins, either today or in the middle Ages. No doubt her, services and assistance had an additional value because her comfort and society went with them. I do not think that consortium was an abstraction. It seems to me rather to be a name for what the husband enjoys by virtue of a bundle of rights some hardly capable of precise definition."

However, it is worth highlighting that originally consortium was used to determine a right which the law recognised in the husband growing out of the marital union to have access to the companionship and society of his wife. But with the passage of time, the concept of consortium has definitely assumed a distinct and firm footing of mutuality. It is no longer merely a husband's right to the companionship or the society of the wife but equally the wife's right to the companionship and society of the husband. So far as western jurisprudence is concerned, the following statement of the law in 41 C.J.S. at page 402, supported as it is by abundant authority, would suffice:—

> "The term, however, has developed to include the right of the wife to the society and comfort of the husband, and is now used interchangeably to denote the affection, aid, assistance, companionship, comfort, and society of either spouse; and as thus employed the term has been defined as, those duties and obligations which by marriage both husband and wife take on themselves toward each other in sickness and health; conjugal affection; conjugal fellowship; conjugal society and assistance; the conjugal society arising by virtue of the marriage contract; the consort's

(5) (1952) 2 All. E.R. 394.

affection, society, or aid; the person's affection, society, or aid; the person, affection, assistance and aid of the spouse. The loss of consortium is the loss of any or all of these rights.

While the meaning of the term 'conjugal rights' is vague and indefinite it has been defined as matrimonial rights; the right which husband and wife have to each others' society, comfort, and affection. Marital or conjugal rights include the enjoyment of association, sympathy, confidence, domestic happiness, the comforts of dwelling together in the same "habitation, eating meals at the same table, and profiting by the joint property rights as well as the intimacies of domestic relations."

It is evident from the above that withdrawal from the matrimonial home by either spouse would inevitably involve a total or partial loss of consortium to either spouse and, as noticed earlier, consortium lies at the very root of the marital relationship. The issue, therefore, is whether a wife (on one ground or another) and in particular for reasons of employment can unilaterally withdraw from the marital home and substitute therefor a mere right of access to the husband as and when it may be possible for him to do so.

(11) To particularise, three situations obviously come to the mind in such a withdrawal by the wife from the matrimonial home. The first one is, as in the present case, where the husband marries a woman already in public or private service. Does he by doing so impliedly give up his right to claim a common matrimonial home with his wife? I feel, the answer to this must necessarily be returned in the negative for reasons which appear in detail hereinafter. Indeed, to my mind, the true position in law appears to be that any working woman entering into matrimony by necessary implication consents to the obvious and known marital duty of living with a husband as a necessary incident of marriage. As already noticed earlier, if by common consent the parties agree to live apart, there can obviously be not the least objection. However, the mere fact of a marriage of two working spouses does not, in my view, without more, entitle either one of them to claim that (because of that fact) each one of them is entitled to live apart. Such a claim would be robbing the marriage of one of its essential ingredients. Therefore, far from there being any implicit waiver of the

husband's right to claim the society of his wife in the home set up by him, there is on the other hand a clear acceptance of the marital obligation to live with the husband by a wroking wife when she knowingly enters the bonds of matrimony.

(12) To obviate any hardship, I may perhaps mention that though by implication no such right to live separately arises to the wife in the situation envisaged above, it may perhaps be possible for the parties to expressly bind themselves to this effect by a clear agreement. It has been held in English Law that a mutual agreement by husband and wife not to insist on the right and obligation of each to live together is not against public policy. However, the matter has not been at all debated before us in this light and I would, therefore, refrain from expressing any final opinion one way or the other. This is particularly so because here we are concerned with the concept of marriage according to Hindu Law which certainly has very distinctive features of its own.

(13) The second possibility that arises is where a husband either encourages or at least allows his wife to take up employment after marriage. Does he by doing so again abandon his legal right of having his wife live within the matrimonial home? Herein again, to my mind, the answer would be in the negative. A particular situation or financial circumstances at one or the other stage of marriage, require that both the spouses may have to seek work. In such a situation, either by mutuality or even at the instance of the husband, a wife might obtain gainful employment away from the matrimonial home. Merely from this to infer that thereafter the said condition must necessarily continue or a permanent right accrues to the wife to live away from the matrimonial home on the ground of employment elsewhere, does not appear to me as supportable either on principle or authority. As noticed earlier, in such a position also the rights of the parties may perhaps be capable of change by express agreement. I would, however, firmly opine that no necessary inference arises from the mere fact of a husband at one or the other stage having consented to his wife's taking employment that thereafter he would not be entitled to claim her society and companionship within the matrimonial home.

(14) The third and the last situation does not present any serious difficulty. This is where a wife against the wishes of her husband accepts employment away from the matrimonial home and

unilaterally withdraws therefrom. This, to my mind, would be an obvious case of a unilateral and unreasonable withdrawal from the society of the husband and thus a patent violation of the mutual obligation of husband and wife to live together.

(15) The view expressed in the context of the aforesaid three situations however, is subject to two plain qualifications. Firstly, the husband must actually establish a matrimonial home wherein he can maintain his wife in dignified comfort in accordance with the means and standards of living of the parties. Secondly, it must be crystal clear that the husband whilst claiming the society of his wife in the marital home should be acting in good faith and not merely to spite his wife. Where the demand to return to the matrimonial home is made *mala fide* and with an intention to spite the wife or with an intent to thrust her into committing a matrimonial offence then obviously the wife in those special circumstances may have a reasonable cause in refusing to return to the husband.

(16) With the aforesaid two qualifications, it appears to me that on general principles alone a wife is not entitled to unilaterally withdraw from the matrimonial home and live elsewhere merely by taking shelter behind the plea that she would not deny access to the husband as and when possible. Considerations only of employment elsewhere also would not furnish her a reasonable ground for withdrawal from the society and companionship of the husband which in practical terms is synonymous with withdrawal from the matrimonial home.

(17) The aforesaid conclusion, however, does not adequately resolve the legal tangle. It was forcefully pressed before us on behalf of the appellant that even though the wife may not be entitled to withdraw from the conjugal home at her own wish, yet the crucial issue still is as to the locus of the matrimonial home. It was in terms contended that in the present times the husband had no superior right to determine the location of the matrimonial home and the wife was equally entitled to do so. In the particular context of this case, it was suggested that the husband was welcome to set up house with the wife at her place of posting and thus live with her. Indeed in all seriousness, it was urged that in case of the working spouses the wife is equally in a position to claim and perhaps command, if she is in a superior financial status, that the husband should come and live with her at a place of her choice.

(18) The issue squarely arises and it would be shirking one's duty if it is not frontally faced. If a unilateral withdrawal from the matrimonial home is deemed to be unwarranted by law, then it must necessarily be determined as to where the locus of the matrimonial home is to be.

(19) As would be apparent from the discussion hereafter, the issue is not free from difficulty but nevertheless commands a clear and categorical answer unless the law is to be left in a vacillating state. As in the context of the earlier question, it is first useful to examine this matter also *dehors* the strict rules of Hindu Law and upon larger principles. However, two broad factors must always be kept in the background. Firstly, that almost as a matter of unanimity all civilised marriage laws impose upon the husband a burden to maintain not only the wife but also the children from the wedlock, whilst there is no such corresponding obligation on the wife to maintain either the husband or the family despite the fact that she may independently be in comfortable financial circumstances. Closely connected to this legal liability is the factor that the husband usually, if not invariably, is the wage earner of the family and is thus compelled to live near his place of work. It stands to reason, therefore, that the right of choosing a home wherefrom he can effectively discharge his legal duty of being the bread winner of the family should fall upon him.

(20) In the above context I would first advert to the American law where it appears amply well settled that the husband has the right to choose and establish the matrimonial home and it is the marital obligation of the wife to accept such a determination and even to follow the husband in the case of a change of domicile made by him. Obviously here also the husband must necessarily act in good faith and not in a manner to either spite the wife or to force her into a marital breach in order to procure a divorce or a judicial separation. Given the condition of *bona fides*, the legal position appears to be that the choice of the family home is both the burden and the privilege of the husband. It is undesirable to burden this judgment with any copious quotations from American cases, but as an instance of the forthright statement of the law may be noticed in *Pace* v. *Pace*, (6)—

> "In this state the husband is the head of the family, and as such has the right to fix the matrimonial residence without the consent of the wife; and the wife is bound to follow

(6) 154 Georgia, 712.

her husband, when he changes his residence, provided the change is made by him in good faith, and not from whim or caprice, or as mere punishment of the wife, or to a place where he does not intend to reside, or to a place where her health or comfort will be endangered."

In 41 C.J.S. at page 399, the legal position is summed up in the following terms supported as it is by a plethora of authorities mentioned in the foot notes thereat—

"It is the husband's right to choose and establish the matrimonial domicile, and in general it is the duty of the wife to submit to the determination of the husband and to follow him to the domicile of his choice. On a change of domicile by the husband, it is the duty of the wife to follow him to the new domicile."

Coming now to the English Law on the point, the authorities do not seem to be very consistent. One may first notice the weighty observations of Henn Collins J., in *Mansey* v. *Mansey*, (7)—

"She seems to have taken up the position that she was entitled to dictate to her husband where he should live. The rights of a husband as they used to be have been considerably circumscribed in favour of the wife, without very much, if any, curtailment of his obligations, but we have not yet got to the point where the wife can decide where the matrimonial home is to be, and, if the husband says he wants to live in such-and-such a place, then, assuming always that he is not doing that to spite his wife, and that the accommodation is of a kind which one would expect a man in his position to occupy, the wife is under the painful necessity of sharing that home with him. If she will not, she is committing a matrimonial offence. She is deserting him."

(21) It is apparent from the perusal of the judgment that Henn Collins J. was attempting to state the law as it stood then and his above quoted enunciation held the field for a considerable time. However, on a point so ticklish as this, it would be vain to expect

(7) 1940 (2) All. E.L.R. 424.

judicial unanimity and perhaps dissenting voices were raised and the contrary view cannot be better noticed than in the words of the illustrious Denning L.J. in *Dunn* v. *Dunn,* (8):

> "I want to say a word also on the proposition that a husband has the right to say where the home should be, for indeed, it is the same fallacy in another form. If the proposition were a proposition of law it would put a legal burden on the wife to justify her refusal; but it is not a proposition of law and I am sure Henn Collins J.in *Mansey* v. *Mansey* did not intend it as such. It is simply a proposition of ordinary good sense arising from the fact that the husband is usually the wage earner and has to live near his work. It is not a proposition which applies to all cases. The decision where the home should be is a decision which affects both the parties and their children. It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over that of the other. Each is entitled to an equal voice in the ordering of the affairs which are their common concern. Neither has a casting vote, though to be sure that they should try so to arrange their affairs that they spend their time together as a family and not apart."

With great deference and diffidence, I find it necessary to take a view contrary to the one quoted above. I have shown earlier that there is no paucity of authority and indeed the American Reports are replete with decisions on the point that the ultimate choice of the matrimonial home lies with the husband who normally is the bread winner of the family and in law is burdened with the right to maintain his wife and children. With the limitations of research into American case law in India, appears to me that there is virtual unanimity in American Law about the right of the husband to determine the locus of the matrimonial home, provided he acts in good faith. The view expressed by Denning L.J. seems to give a clean go by to a legal proposition which appeared to be well-settled.

(22) A close analysis of the judgment of Henn Collins J. in *Mansey's case* (supra) would show that the learned Judge after a full consideration of the matter had come to the conclusion which stands quoted earlier. However, Denning L.J. merely by-passed it

(8) 1949 P. 98.

with an observation that this was not a proposition or a statement of law and hence Henn Collins, J. did not intend it as such. I do not think that the conclusion arrived at by Henn Collins J. was a mere gloss or that he did not intend what he laid down rather succinctly

(23) It then deserves notice that the view expressed by Denning L.J. in *Dunn's case* (supra) was not a unanimous view of the Court of appeal. Lord Bucknill L.J. indeed did not opine on this point at all. The other learned Judge Pilcher J. dissented and though curiously his full judgment is not reported, it is mentioned in the report that he opined that in case of difference of opinion between the spouses as to the place of the matrimonial home, someone must have the casting vote. In my view that casting vote in the ultimate analysis must be given to the party which under the law is obliged to maintain both the wife and the children of the wedlock. It would be placing the husband under an impossible burden if he is compelled to support a wife and the family at a place which is not even his choice of the matrimonial home. The burden and the benefit of choosing the matrimonial home and sustaining the family therein, therefore, must go together. The corresponding rights and obligations should merge in the husband.

(24) Coming now to the rationale of the view expressed by Denning L.J. in *Dunn's case* (supra), it is, of course, a common place that the decision of the locus of the matrimonial home affects all the three parties, namely the husband, the wife and the children. Equally plain it is that where possible they should decide the location of the home with reasonableness and mutuality and in a spirit of give and take. This is indeed a counsel of perfection and if it were always so possible, there need necessarily be no reason for a rule of law on the point. However, cases are galore where it is not possible. The difficulty and the necessity for a rule of law obviously arises where the parties are not in agreement and neither side is either considerate enough or willing to attribute reasonableness to the other. In such a situation, it appears to me that it is the duty of the law to decide betwixt them and lay down a clear rule of conduct. Not doing so would perhaps be evading the issue and would leave the law in a state of flux where neither of the parties would know as to where they stand. To leave each individual case to the trial Judge for deciding as to the reasonableness or unreasonableness of the view of the either spouse regarding the choice of a home would make the parties mere grist to the mill of litigation. As noticed above, it appears to be

well settled that the husband in the choice of the home must be acting *bona fide* and not merely to spite the wife. However, once this pre-requisite is there, then the issue of the reasonableness or unreasonableness of the choice of a matrimonial home becomes ethereal and so thin a line would their bounds divide that it would perhaps be placing an equally unreasonable burden in every case on the trial Judge to adjudicate between the contending choices of the two spouses. It deserves highlighting that the choice of a place to live can sometimes be so entirely subjective and conditioned by so many variables that to-call either views reasonable or otherwise..... would become extremely difficult. In that very case Denning L.J. was compelled to notice this awkward situation in the following terms :—

> "The wife was deaf and had difficulty in making herself understood by strangers. A considerate husband would have recognised her difficulty and not have insisted on her coming. A considerate wife would have put up with the difficulties and gone. Neither was considerate. Neither was reasonable. From his point of view he was not acting unreasonably. Each insisted on their own point of view and hence the marriage came to an end."

What indeed is the trial Judge to decide in such a situation where neither of the spouses is unreasonable or put it the other way which appears to be reasonable in his or her point of view? To my mind, there appears to be no choice in such a situation but to tilt the balance one way or the other either in favour of the husband or in favour of the wife. As Pilcher J., said that someone must have a casting vote and it is perhaps best to give that casting vote to the husband who has to bear the burden of maintaining both the wife and the children in the matrimonial home. To leave a matter so tenderly balanced for decision on a tenuous test of reasonableness through a tortuous process of trial and appeals appears to me as resulting in plain hardship to the parties and more so in India where a matrimonial litigation sometimes hangs in balance for years in a hierarchy of Courts. With great respect, if I may say so, the view expressed by Denning L. J. introduced an element of uncertainty

and unpredictability in a field of law where a clear and forthright rule should be accepted. It has been well-said that in most fields it is of paramount importance that the law should be both uniform and settled.

(25) It is unnecessary to delve with great detail into the controversy which seems to have been sparked by the observations of Denning L.J. in England. Willmer J. in *Walter* v. *Walter* (9), construed his observations in *Dunn's case* (supra) in a manner which later led Denning L.J. to hold in *Hosegood* v. *Hosegood*, (10), that he had been misled in interpreting the said judgment. The learned Judge further felt compelled to lay down another qualification to his observations to the effect that there were cases where each party is reasonable from his own point of view but unreasonable in not giving proper weight to the other's point of view and if each unreasonably persists then both the parties may be presumed to intend to bring the marriage to an end. With all the qualifications, the observations of Denning L.J. in *Hosegood's case* (supra) were the subject of trenchant criticism by Lord Merriman in *Simpson* v. *Simpson*, (11). However, it would perhaps be vain for us to follow the trial of this conflict of judicial opinion in England.

(26) I would, therefore, conclude that even on general principles, subject to the qualification of the husband acting *bona fide*, he is entitled in law to determine the locus of the matrimonial home.

(27) I have so far considered the matter in the larger perspective and on general principles and it remains to examine the same in the special context of our own statutes and the dictates of Hindu Law. Herein, what deserves particular notice is the legal obligation which both the general and the Hindu Law attach to the status of the husband. What may first be borne in mind is the fact that even under the general law a husband is bound to support his wife and

(9) (1949) 65 T.L.R. 680.

(10) (1950) 66 T.L.R. 735.

(11) 1951 (1) A.E.L.R. 955.

children, both legitimate and illegitimate. Reference in this connection may be made to the relevant portions of section 125(1) of the Criminal Procedure Code, 1973:—

> "125(1). If any person having sufficient means neglects or refuses to maintain—
>
> (a) his wife, unable to maintain herself, or
>
> (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
>
> (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
>
> (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct."

Further by virtue of sub-section (3) of section 125 of the Criminal Procedure Code, 1973, the allowance in favour of the wife or the children is recoverable by issuing of a warrant for levying the amount due in the manner provided for levying fines and the husband or the father is further liable to imprisonment for a term which may extend to one month for each month's allowance or part thereof which remains unpaid until he complies with the order. It is plain from the provisions of section 125 of the said Code that apart from the rules of Hindu Law, a husband is obliged to maintain his wife and family on pain of stringent processes on par with those applicable in the field of criminal law itself. Reference to the earlier section 488 of the Criminal Procedure Code, 1898, would show that this obligation has indeed been heightened by the new Code.

(28) Coming now to the rules of Hindu Law itself, it is instructive to first refer to section 18 of the Hindu Adoption and Maintenance Act, 1956. The relevant part thereof is in the following terms:—

"18(1). Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,—

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her;

(b) * * * *.

(c) * * * *.

(d) * * * *.

(e) * * * *.

(f) * * * *.

(g) * * * *.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion."

It is obvious from the above quoted provisions that a general right inheres in a Hindu wife to be maintained by her husband during her lifetime and in the special circumstances of prescribed matrimonial misconduct by the husband, she is even entitled to live separately and nevertheless claim maintenance from him. This ancillary right, however, is forfeited if she is unchaste or converts herself to another religion.

(29) In the context of the obligations of maintenance, reference to section 20 of the said Act is again inevitable:—

"(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate

or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or property."

Section 22 of the said Act further lays down an obligation on the heir of a deceased Hindu (subject to the qualification laid down) to maintain the dependents of the deceased out of the estate inherited by him. Section 19 of the said Act further provides for the obligation of a Hindu to maintain his widowed daughter in law in the circumstances spelled out in that section. In this context, it has to be kept in mind that by virtue of section 3(b) of this Act, maintenance herein includes the provision for food, clothing, residence, education and medical assistance and treatment in all cases and in the particular case of an unmarried daughter also the reasonable expenses of and incident to her marriage. Reference in passing must also be made to section 6 of the Hindu Minority and Guardianship Act, 1956. From the provisions thereof, it is evident that though a Hindu father is the natural guardian of his minor children, yet the custody of infants up to the age of 5 years is ordinarily to be with the mother. Therefore, in a particular situation, a Hindu father is obliged to maintain a child below the age of 5 years even though such a child may be in the custody of his wife who may be living separately due to estrangement.

(30) It is thus plain from even a bird's eye view of the aforementioned statutory provisions that Hindu law imposes clear and sometimes burdensome obligations on a Hindu male. He is bound to maintain his wife during her lifetime. Equally, he must maintain his minor children and this obligation is irrespective of the fact whether he possesses any property or not. The obligation to maintain these relations is personal and legal and it arises from mere fact of the existence of the relationship between the parties. Further, the sacred

concept of the Hindu family, which has apparently received statutory recognition, obliges the Hindu male to maintain his unmarried daughter and his aged or infirm parents in the eventuality of their being unable to maintain themselves. With certain qualifications, the obligation to maintain a widowed daughter-in-law and the dependants of a deceased from whom any property may be inherited would also fall upon the Hindu male. As against this, the thing is that the Hindu wife even though in independently prosperous financial circumstances is under no similar obligation to maintain her husband and perhaps in his presence is not obliged to support even the children of the family.

(31) The issue thus arises whether the Hindu male is entitled to discharge the aforementioned onerous obligation in a home of his own choice or is he even further obliged to sustain his wife and children at a place other than that where he may choose to reside. Other things apart, particular attention deserves to be focussed in this context on the children born out of the wedlock. If the wife were to be unilaterally entitled to live apart from a husband, then where indeed is the place of the children in a house so divided? Should a husband be obliged to discharge his legal duty of the cusody and maintenance of his infant and minor children whilst the wife chooses to live away from him? Then, should the wife be entitled to claim the custody and control of the infant children at a place away from the matrimonial home and yet claim maintenance from the father in view of his legal obligation to maintain them? To my mind, the answer to these questions is a plain and categorical one. The onerous obligation, which the law imposes on the Hindu husband, is at least co-related to the right to determine the location of the matrimonial home. To put it in other words, as against the right of maintenance always inhering in a Hindu wife, there is a corresponding obligation to live together with the husband in his home. That rights and duties should be co-related and that the benefit and the burden must concur, is a principle which is too elementary to deserve elaboration. In my view, therefore, the logical concomitant to the obligation to maintain the wife and the family by the Hindu husband is that he at least has the right to claim that the wife shall live with him in a matrimonial home determined by his choice.

(32) Coming now to the specific rules of Hindu Law, these appear to be unmistakably unequivocal. It therefore, suffices to refer to

the statement of the law in the authoritative treatise Mulla's Principles of Hindu Law contained in paras 442 and 555 thereof:—

"442 Marital duties.—(1) *The wife is bound to live with her husband and to submit herself to his authority.* An agreement enabling the wife to avoid a marriage or to live separate from her husband if he leaves the village in which his wife, and her parents reside, or if he marries another wife, is void. Such an agreement is against public policy and contrary to the spirit of the Hindu law. An agreement of this kind is no answer to a suit for restitution of conjugal rights by a husband against his wife.

(2) The husband is bound to live with his wife and to maintain her."

"555. *Separate residence and maintenance.*—(1) A wife's first duty to her husband is to submit herself obediently to his authority, *and to remain under his roof and protection.* She is not, therefore, entitled to separate residence or maintenance, unless she proves that, by reason of his misconduct or by his refusal to maintain her in his own place of residence or for other justifying cause, she is compelled to live apart from him."

(33) The above quoted statement of the law is so plain as to require no further elaboration. Indeed the learned counsel for the appellant did not attempt to place any contrary construction on the same but merely argued rather tamely that these rules were no longer applicable in view of section 4 of the Hindu Marriage Act. This contention is without substance. That section merely provides for exclusion of those rules of Hindu Law with respect to specific matters for which provision has been made in the Hindu Marriage Act. Plainly enough this Act does not even remotely attempt to define the general marital duties and obligations of the husband and the wife to each other. Therefore, the applicable rules of Hindu Law cannot possibly be excluded from their valid field of operation.

Similarly sub-clause (b) of section 4 only provides that any other law which is inconsistent with any of the provisions of the Hindu

Marriage Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in the said Act. Learned counsel for the appellant has been wholly unable to point out any provision in the Hindu Marriage Act, which is inconsistent or in conflict with the rules of Hindu law quoted above. In any case within this jurisdiction the matter is concluded by the Full Bench judgment in (12), wherein Chief Justice Bhandari speaking for the Bench has observed as follows:—

> "According to the Hindu Law, Marriage is a holy union for the performance of religious duties. The relationship between husband and wife imposes upon each of them certain legal marital duties and gives each of them certain legal marital rights. The marital rights and duties are absolutely fixed by law and include the husband's right to protect his wife, to give her a home, to provide her with comforts and necessities of life within his means, to treat her kindly and not cruelly or inhumanly and to discharge the duties growing out of the relationship which has been created by the marriage.
>
> *On the other hand, it is the duty of the wife to live with her husband wherever he may choose to reside and to fulfil her duties in her husband's home.* She has no right to separate residence or maintenance unless she satisfies the Court that the husband had refused or neglected to maintain her in his own place of residence or that the wife by reason of the husband's misconduct was justified in living separate and apart from him."

(34) Now, the case that covers the present one on all fours and has been rightly relied upon by the learned Single Judge and the Court below, is the judgment of Grover J. *Tirath Kaur* v. *Kirpal Singh* (1) (supra). That case was also under section 9 of the Hindu Marriage Act and the facts therein were not only similar but appear to be identical. Repelling the arguments raised on behalf of the appellant wife it was observed that:—

> "It is not possible to accede to the contention of Mr. Gandhi, that the husband in the present case should content himself by visiting his wife whenever he wishes to live with

(12) A.I.R. 1958 Pb. 87.

her or cohabit with her or by her coming to live with him occasionally. There can be no bar to such an arrangement being made by mutual consent and concurrence of the parties but I have not been shown any rule or principle in law which would justify the Court holding that the wife can be allowed to virtually withdraw herself from the society of the husband in this manner."

It must, however, be candidly noticed that the decree in the aforementioned judgment was substantially modified by the Letters Patent Bench in the appeal directed against the same and belatedly reported in 1975 R.L.R. 512. However, the way I look at this judgment, it appears to have been so done apparently by way of a compromise. The Bench after admonishing the parties for their lack of accommodation directed that they should alter their places of work in order to have a common matrimonial home. However, I must confess that here are a few isolated observations which are capable of a construction that the basic rationable of Grover J., in deciding the case was up set. For the sake of candour I deem it necessary to say that if the Division Bench judgment is to be construed as laying down a proposition of law that the wife is entitled to live separately merely for reasons of employment then the same is unsupportable for reasons which appear in the earlier part of this judgment. It is plain from a reading of the judgment that the matter was not at all seriously canvassed before the Letters Patent Bench. No reference was made to the applicable rules of Hindu Law or to the plethora of precedent available both in Indian and foreign law which has been discussed in detail by me earlier. The judgment is conspicuous by the absence of any elaborate reasoning. A passing reference to the law has been made as an old fashioned view, but one fails to see how settled law in a field can be by passed by a judgment by labelling it as old fashioned and substituting a new fangled proposition for the same. As I said earlier it is perfectly possible for a spouse to live and work apart by consent but to lay it down as a proposition of law that the wife is entitled to live separately for reasons of employment perhaps would be cutting at the root of the concept of the marriage and the matrimonial home. With the greatest respect and deference to the distinguished Judges of the Letters Patent Bench I would hold that the casual view expressed by them is erroneous and would over rule the same.

(35) Now going back to the view of the learned Single Judge in *Tirath Kaur's case* (supra), it may be noticed that the same has

received repeated affirmance both in this Court and in other High Courts. It must, however, be mentioned that it appears that the Letters Patent Bench judgment in Tirath Kaur's case apparently was not noticed by them as it seems to have been reported as late as in the year 1975 by a local Law Journal in *Tirath Kaur* v. *Kirpal Singh* (2) (sugra). Verma, J., in *Surinder Kaur* v. *Gurdeep Singh,* (13), approved and followed the Single Bench view in *Tirath Kaur's case* in the context again of virtually identical facts and further proceeded to hold that a working woman entering matrimony by implication accepts the obligation to reside with her husband in the following words:—

> "It enjoins on the wife the duty of attendance, obedience to and veneration for the husband and to live with him wherever he may choose to reside. In the case in hand, the respondent was and is employed at Chandigarh. Therefore, by entering into marriage with him, the appellant had placed herself under obligation to reside with him at Chandigarh."

(36) It is unnecessary to multiply other judgments of this Court which have taken a view consistent with Justice Grover's observations in *Tirath Kaur*'s case.

(37) A Division Bench in *Gaya Prasad* v. *Mst. Bhagwati,* (14), unreservedly approved and followed the ratio of *Smt. Tirath Kaur's* case and Bhargava J., speaking for the Bench went further to observe:—

> "Merely on the ground that the husband has small income and the wife, if she is allowed to serve at a place away from the marital home can substantially augment the family income, cannot be held to be sufficient reason to deny the wife's society to the husband. Nothing in Hindu Law warrants the adoption of such a course."

(38) Chief Justice Reddy speaking for the Bench in *Vuyyuru Pothuraju* v. *Vuyyuru Radha,* (15), in a case under section 9 of the Hindu Marriage Act enunciated the relevant rules of Hindu Law in the following terms:—

> "These rights have to be determined with reference to Hindu Law. In our opinion, it is the bounden duty of the wife

(13) A.I.R. 1973 Pb. & Hry. 134.

(14) AI.R 1966 Madhya Pradesh 212.

(15) A.I.R. 1965 Andhra Pradesh 407.

to live with her husband wherever he may choose to reside. Her home is in her husband's house. The rules of Hindu Law impose an obligation and duty upon the wife to live with her husband wherever he may choose to reside."

and concluded—

"Be that as it may, it is now well established that it is the right of the husband to require his wife to live with him wherever he may choose to reside and that Courts cannot deprive him of his right, except under special circumstances which absolve the wife from that duty. It may be premised that though marriage under the Hindu Law is a contract, it is also a sacrament, it is more religious than secular in character."

(39) As I said earlier in so controversial a field unanimity of opinion can hardly be hoped for. It is thus necessary to notice the dissentient voices in two Single Bench judgments of the Gujarat and the Madras High Courts. In *Pravinaben* v. *Sureshbhai Tribhovan Arya* (16) Shah, J., took a contrary view to hold that a school teachress was entitled to live separately from her husband by reasons of her employment and declined the relief of restitution of conjugal rights to the husband. On facts the learned Judge found that the husband's real intention appeared to be to secure a divorce rather than any anxiety for the company and society of his wife, and also that his attitude towards the wife was unreasonable. Perhaps the harsh facts of the case compelled some of the observations against the husband made by the learned Judge, but there is no evading the issue that the judgment does aid the case of the appellant. With great respect, if I may say so, the basic fallacy herein was the treatment by the learned Judge of the case as if it was one of desertion and the great significance he seems to have attached to the fact that there was no *animus deserendi* on the part of the wife. There is a clear distinction between the two matrimonial remedies under section 9 and under section 10 of the Hindu Marriage Act. Whilst desertion is one of the necessary ingredients under section 10, no such requirement is necessary or called for to secure the relief of

(16) A.I.R. 1975 Gujrat 69.

the restitution of conjugal rights under section 9. There is thus a clear dividing line between desertion on the one hand and the mere withdrawal from the society of the other spouse without reasonable excuse which is the only requirement to claim the relief of restitution of conjugal rights under section 9. Whilst *animus deserendi* would have to be established in a claim under sub-clause (a) of section 10 of the Act, no such matter requires proof in a relief under section 9(i) of the Act. Now, it appears to be plain that a spouse may withdraw from the society of the other on a mere whim without there being any *animus descrendi* but nevertheless the other spouse would be able to claim a decree for restitution of conjugal rights. It appears to me that the line dividing the two marital remedies seems to have been obscured in this case and thus the reasoning and the result thereof has been materially affected. Consequently the learned judge proceeded to opine that living far away from a matrimonial home by the wife for reasons of mere employment was an enforced or compelled separation which was justifiable in law.

(40) With the greatest respect I am unable to see the nature of the compulsion or suggested involuntariness in the case of a wife who willingly accepts employment away from the matrimonial home. This could perhaps be understandable in those very rare cases where she may be employed in a service governed by statutory provisions analogous to the Essential Services Maintenance or the Army Act but one fails to see how the mere holding of an ordinary job elsewhere can be raised to the level of an enforced or compelled separation. Perhaps the inevitable and the anamolous consequences of laying down a rule of law that a wife is entitled to abandon the matrimonial home for mere reasons of employment were completely missed. There is no manner of doubt that the very idea of marriage involves a mutual obligation to live together and this is even on a higher footing according to the dictates of Hindu Law. How this legal obligation of living together can be overridden by the mere acceptance by the wife of a job elsewhere is supportable neither on principle nor on authority. Indeed any such rule as laid down in this case, would therefore cut completely at the basic matrimonial obligation of the spouse to live together the moment the wife chooses to accept any employment elsewhere. In a country of India's dimension and size its practical effect is manifest. It implies that whilst a husband may be living and working at Srinagar, the wife would be entitled to seek employment and take up residence at

Trivandrum and such living apart may be treated as a reasonable cause for withdrawing from the society of the other spouse. Would such a pen friendship marriage survive the stress of this kind of life, or be countenanced or sanctified by law as justifiable ?

(41) Again in *N. R. Radhakrishnan* v. *N. Dhanalakshmi* (17), Maharajan, J., dismissed the husband's appeal against the denial of a decree of restitution of conjugal rights by a short judgment. On facts it was found that the husband had deliberately and ingeniously got himself transferred from Madras where the matrimonial home was and where his wife was employed as a School Mistress. It was observed that this transfer to Krishnagiri was apparently to tease the wife and further that the husband was intentionally avoiding his posting back to Madras which was perfectly possible. It was also noticed that the husband was in indigent circumstances whilst living in an urban area with an income of mere Rs. 200 which was patently insufficient to support his wife and daughter in a town. It was picturesquely observed that without the salary of the job in which the wife was working, she and her child would probably be thrown out to the wolves. On these facts the learned Judge held that the husband was not entitled to claim that the wife should resign her job and abandon herself to the husband's mercies. It is apparent that the case is distinguishable on facts which evidenced a twin condition that the husband had changed the matrimonial home to deliberately spite the wife and further was not in a position to singly set up a home in which he could maintain his wife and daughter in reasonable comfort. This case, therefore, appears to have been decided on its peculiar facts. A reference to the judgment would show that the matter was not adequately canvassed before the learned Single Judge. A large number of precedents on the points were either not cited or not taken notice of. There is no elaborate discussion either on principle or on the relevant precedents and judgment is mainly confined to the recitation of the peculiar facts of the case. The Division Bench judgment in *Vuyyuru Pothuraju* v. *Vuyyuru Radha* (14) (supra) was merely referred to in passing and distinguished on the short ground that in that case the wife was not gainfully employed and thereafter the learned Judge proceeded to quote and follow his own view in an earlier case.

(17) A.I.R. 1975 Madras 331.

Nevertheless if some isolated observations in this case are deemed as an authority for the proposition that a wife is entitled to live apart only on the ground of her employment elsewhere then I would record my dissent for reasons already recorded in detail in the earlier part of the judgment and which it would be wasteful to repeat.

(42) To summarise, I have attempted to show by reference to Anglo-American jurisprudence that the concept of the marital home lies at the very centre of the idea of marriage in all civilised societies. Perhaps, from primeval times when human beings lived sheltered in subterranean caves to the modern day when many live perched in flats in high rise apartments within the megapolis, the husband and the wife have always hankered for a place which may be their very own and which they may call a home. The innumerable mutual obligations and rights which stem from the living together of man and wife are undoubtedly beyond any precise definition and stand epitomized by the concept of the matrimonial home. Any unilateral withdrawal therefrom is hence a plain violation of the mutual obligation to live together and is not to be ordinarily countenanced unless it is for a patently reasonable cause. Closely allied to this concept is the determination of the locus of the matrimonial home. By and large, even western jurisprudence plainly recognises the right of the husband to ordinarily determine its locale subject to two basic qualifications. Firstly, the husband must be acting *bona fide* and not merely to spite his wife or to push her into a matrimonial wrong. Secondly, where the husband is so deficient in meeting his legal obligations as not to be able to provide a home in which the wife can be sustained in reasonable comfort.

(43) The aforesaid legal result is well settled even on larger principles. However, whatever may be the position in western jurisprudence, it appears to be clear and categorical under the rules of Hindu Marriage law. With considerable respect, I say that even where some western jurists have taken a contrary view, the same is not to be necessarily emulated in the field of Hindu law, but indeed to be avoided. Of late, both sociologists and jurists in the western world have looked with considerable concern at the progressive break down of the family as an institution and the consequent rootlessness of individuals in urbanised western life which has tended to throw up very disturbing features. If I recall rightly, Professor Toynbee has called this as the red light signal of the western civilisation.

(44) Under Hindu law, the obligation of the wife to live with her husband in his home and under his roof and protection is clear and unequivocal. It is only in the case of some distinct and specified marital misconduct on the part of the husband, and not otherwise, that Hindu law entitles the wife to live separately and claim maintenance therefor. This marital obligation has been further buttressed by clear statutory recognition by section 9 of the Hindu Marriage Act. This provides for an immediate remedy where either of the spouses falters in his or her obligation to provide the society and sustenance to the other. Indeed, the obligation to live together under a common roof is inherent in the concept of a Hindu marriage and to my mind, it cannot be torn asunder unilaterally by the desire of the wife to live separately and away from the matrimonial home merely for the reason of either securing or holding a job elsewhere. Such an act would be clearly in violation of a legal duty and it is plain, therefore, that this cannot be deemed either reasonable or a sufficient excuse for the withdrawal of the wife from the society of her husband, as visualised under section 9 of the Act.

(45) Again, under Hindu law, it is more than amply clear that the husband is entitled to determine the locus of the matrimonial home. Indeed, the obligation here is on the part of the wife to remain with him and under his roof. It deserves repetition that this legal obligation on the part of the wife is not without its co-related right. The husband in Hindu law is obliged to maintain his wife during her lifetime and equally is under heavy obligations to sustain the minor children from the wedlock, the unmarried daughters till their marriage, his aged and infirm parents unable to maintain themselves, and a host of other duties to which detailed reference has been made in the earlier part of the judgment.

(46) It was said that the view I am inclined to take is tilted a little in favour of the husband. A closer and incisive analysis would, however, show that this is not necessarily so. Indeed, a contrary view or even a vacillating statement of the law would be more burdensome not only to one but to both of the spouses. The concept of the Hindu marriage of earlier time has slid down from its high altar of being sacramental to the more mundane concept where the rights and the duties of the wife are governed by status, though as yet it has not reached the stage of being a mere civil contract as in some western countries. The Hindu Marriage Act now provides for

the restitution of conjugal rights, judicial separation, divorce, annulment of marriage, and a number of other conjugal reliefs. As is evident from the recent and substantial changes brought about in the Hindu Marriage Act (which have substantially relaxed the conditions and the grounds of divorce etc.), Hindu marriage law now no longer conceives marriage either as a sacrament or viewed from a rather cynical angle as a chain which shackles unwilling spouses together irrevocably. It is best perhaps that in present times it should be a silken bond between affectionate spouses or at least co-operative partners. Where both of them cannot even mutually agree upon something so basic as either living apart (may be for reasons of the wife's employment) or even upon a common place to live together, then it is plain that the marriage has reached dangerously near that precipice which, in legal terminology, has been summarised as—that it has irretrievably and irrevocably broken down. In such a situation (as modern trends and the recent change in law shows) it is obviously in the interest of both that they should clearly and determinedly make their choice and decide to part and go their individual ways rather than be condemned by the law to live together unhappily ever afterwards.

(47) Testing the present case on the touch stope of the above-mentioned legal conclusions, it is plain that this appeal canot succeed. Even on facts it is evident, and therefore the Courts below are right in holding, that the appellant wife here deliberately and ingeniously secured her transfer away from the matrimonial home and the place of posting of the respondent husband at Kot Ise Khan in order to go back to her parental village at Bilga. For the last nearly one decade the wife has virtually refused to live with her husband except for a paltry spell of two or three days and that also under some pressure. She is categorical in her stand that she would not conform to her legal obligation to live with her husband for the stake of a job even though he is willing and is in a position to support her in reasonable comfort in accordance with the style of life to which the parties are used to. The time perhaps has come when the appellant must make her choice betwixt the job and the husband. A unilateral withdrawal from the society of her husband in the present situation cannot possibly be deemed a reasonable excuse so as to come within the ambit of the definition provided under section 9 of the Hindu Marriage Act. As was said earlier an act contrary to a legal obligation obviously cannot be deemed reasonable for the purpose of this provision. The respondent husband here has waited

patiently in the wings for the best part of his life and it would perhaps be bordering on the cruel to require him to keep on waiting endlessly in suspense. The appeal is without merit and is hereby dismissed. The parties are, however, left to bear their own costs.

N.K.S.

FULL BENCH.

MISCELLANEOUS CIVIL

Before R. S. Narula, C. J., O. Chinnappa Reddy and Bhopinder Singh Dhillon, JJ.

DALIP SINGH, SON OF VIR SINGH ETC.,—*Petitioners*

versus

THE STATE OF PUNJAB and another,—*Respondents.*

Civil Writ No. 5849 *of* 1975

December 2, 1976.

Punjab Municipal Act (3 *of* 1911)—*Section* 188 (e) (*ii*)—*Word "regulation" therein—Whether includes the power to make rules to confine certain trades within specified municipal areas.*

Held, that the word "regulation" in section 188 (e) (ii) of the Punjab Municipal Act, 1911 is of vast amplitude and includes the power to frame bye-laws authorising the Municipality to confine certain trades within specified municipal areas. (Para 5).

Petition under Articles 226 *and* 227 *of the Constitution of India praying that an appropriate writ, order or direction be issued quashing the impugned Bye-law No. XVI made by the Administrator, Municipal Committee, Hoshiarpur, having bearing on the subject of sale of meat within the Municipal Limits as contained in Notification No.* 8344-2CII-75 31538. *dated the* 12*th September,* 1975 *and prohibiting the petitioners completely to carry on their business in the present premises, in view of the decision of this Hon'ble Court in*