

Supreme Court of India

Perry Kansagra vs Smriti Madan Kansagra on 15 February, 2019

Author: U U Lalit

SLP(C)No. 9267 of 2018

Perry Kansagra vs. Smriti Madan Kansagra

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Reportable

IN THE SUPREME COURT OF INDIA CIVIL

APPELLATE JURISDICTION

CIVIL APPEAL NO. 1694 OF 2019
(@ SPECIAL LEAVE PETITION (CIVIL) NO. 9267 OF 2018)

PERRY KANSAGRA

Appellant

VERSUS

SMRITI MADAN KANSAGRA

... Respondent

JUDGMENT

Uday Umesh Lalit, J.

1. Leave granted.

2. This appeal challenges the final Judgment and Order dated 11.12.2017 passed by the High Court of Delhi allowing Review Petition No.221 of 2017 preferred by the respondent against the judgment and order dated 17.02.2017 passed by the High Court of Delhi in MAT App. (F.C.) No.67 of 2016. SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra

3. The appellant (Kenyan and British Citizen) and Respondent (Indian Citizen) got married on 29.07.2007 at New Delhi. After marriage, the Respondent shifted to Nairobi, Kenya and settled into her matrimonial home with the appellant. A son, named Aditya Vikram Kansagra was born to the couple on 02.12.2019 at New Delhi. After delivery, the respondent returned back to Nairobi along with Aditya. Thereafter, the Respondent and Aditya travelled from Kenya to India on few occasions. Aditya holds Kenyan as well as British passport.

4. The appellant, Respondent and Aditya came from Nairobi to New Delhi on 10.03.2012. According to the appellant, the return tickets for travel back to Nairobi were booked for 06.06.2012. While in India, in May 2012, the Respondent filed a civil suit registered as CS (OS) No.1604 of 2012 before the High Court of Delhi praying inter alia for an injunction to restrain the appellant from removing

Aditya from the custody of the Respondent. Upon notice being issued, the appellant contested the suit in which visitation orders were passed by the High Court from time to time. The appellant thereafter filed Guardianship Petition praying inter alia that he be declared the legal Guardian of Aditya and be given his permanent custody. The Guardianship SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra Petition dated 06.11.2012 was registered as No.G-53 of 2012 before the Family Court, Saket, New Delhi.

5. In terms of visitation orders passed by the High Court, the appellant along with paternal grandparents were permitted to meet Aditya for 2 hours on Friday, Saturday and Sunday in the 2ND week of every month. According to the appellant he flew from Nairobi to New Delhi every month to meet Aditya along with the paternal grandparents. In view of the pendency of the guardianship petition, CS (OS) No.1604 of 2012 was disposed of by the High Court on 31.08.2015, leaving the parties to place their grievances before the Family Court. The arrangement of visitation was thereafter modified by the Family Court by its orders dated 09.02.2016 and 09.03.2016.

6. On 18.04.2016, an application was filed by the appellant praying that the Family Court may direct the Court Counsellor to bring Aditya to the Court for an in-chamber meeting, which prayer was objected to by the Respondent.

After hearing both sides, the Family Court allowed said application vide Order dated 04.05.2016, and directed that Aditya be produced before the Court 07.05.2016. The relevant part of the Order was as under:- SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra ..The court is parens patriae in such proceedings. Petitioners visitation with the child is anyway scheduled for 07.05.2016. Let the child be produced before the court at 10 am on 07.05.2016 before he goes for meeting with his father and grand parents.

7. The Respondent being aggrieved, filed MAT App. (FC) No.67 of 2016 before the High Court. On 06.05.2016, after hearing both sides, Division Bench of the High Court referred the parties to mediation and also directed that Aditya be produced before the Court on 11.05.2016. Paragraphs 7 and 9 of said Order were :-

7. During our interaction with the parties, a desire is expressed by the parties to make one more attempt for a negotiated settlement of all disputes between the parties by recourse to mediation. The parents of the respondent are also present and have joined the proceedings before us. They have also submitted that they would like to make an attempt for a negotiated settlement for all disputes between the parties.

9. With the consent of parties, it is directed as follows:

(i) The parties shall appear before Ms. Sadhana Ramchandran, learned Mediator in SAMADHAN-

Delhi High Court Mediation and Conciliation Centre on 9th May, 2016 at 2:30 pm. SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra

(ii) It shall be open for the learned Mediator to join any other person or relative of the parties, as may be deemed necessary, for a holistic and effective mediation.

(iii) In case, the respondent or any of his relative are not available in India, it shall be open for the learned Mediator to join them by any electronic mode of communication including Skype, Video Conferencing, etc. at the cost of the respondent.

(iv) It shall also be open for the learned Mediator to meet the child at any place, as may be deemed convenient to her, and to arrange any visitation or meetings with the respondent of the child with the consent of the parties.

8. Thereafter, the matter came up on 11.05.2016. The High Court interacted with Aditya and following observations were made in paras 2 to 6 of its Order :-

2. We are also informed that the child has today met with Ms. Sadhana Ramachandran, learned Mediator as well as Ms. Swati Shah, Counsellor in SAMADHAN Delhi High court Mediation and Conciliation Centre and that the mediation efforts are still underway.

3. The son of the parties Master Aditya Vikram Kansagra has been produced before us today. We have also had a long conversation with him and are deeply impressed with the maturity of this intelligent 6½ year old child who displays self confidence and a remarkable capacity of expressing himself with clarity. He exhibits no sign of confusion or nervousness at all.

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4. We also note that the child was comfortable in his interaction with his father and grandparents in court. The child has expressed happiness at his visitations with his father and grandparents. He unreservedly stated that he looks forward to the same. Master Aditya Vikram Kansagra is also able to identify other relatives in Kenya and enthusiastically refers to his experiences in that country. It is apparent that the child has bonded well with them.

5. We must note that the child is at the same time deeply attached to his mother and Nani. His bearing and personality clearly bear the stamp of the fine upbringing being given to him by the appellant and her mother.

6. As of now, since 9th February, 2016, the child is meeting his father and grandparents between 10:30 am and 05:00 pm on Saturday and Sunday in the second week of every month and for two hours on Friday in the second week of every month. The visitation is supervised as the court has appointed a Counsellor who has been directed to remain present throughout the visitation.

9. During the ensuing mediation sessions, the Mediator and the Counsellor interacted with Aditya. The Counsellor interacted with Aditya on 08.07.2016 and 11.07.2016. Based upon her interactions

with him, the Counsellor submitted a report dated 21.07.2016 in a sealed cover. Though, mediation was attempted on many occasions, the parties were unable to resolve their SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra disputes and differences and an interim report was submitted by the Mediator on 22.07.2016. On 11.08.2016, the sealed cover containing the report of the Counsellor was opened and the report was taken on record. Copies of the report of the Counsellor were given to the parties. In an application moved the next day, i.e. on 12.08.2016, the appellant relied upon the report of the Counsellor dated 21.07.2016 and prayed for permission to speak to Aditya on telephone. While opposing the prayer, the respondent objected to such reliance on the ground of confidentiality. The Mediator thereafter filed final report in November, 2016 reporting failure.

10. Thereafter the matter came up for final arguments before another Division Bench of the High Court. The Respondent raised the issue of admissibility of the reports submitted by the Mediator and Counsellor contending that the reports could not be relied upon in view of principle of confidentiality. The High Court dealt with said submissions and while disposing of the appeal, by its judgment dated 17.02.2017 observed as under:-

10. The mediation has failed.

11. But we are called upon to decide an important question concerning confidentiality of the mediation process for the reason on October 11, 2016 a report SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra was received from the Mediator which was taken on record and copy given to both parties. The report of the Mediator refers to a child counsellor being involved who had also given an independent report which was also taken on record.

13. The report of the child counsellor is to the effect that the child was normal and in spite of being happy with his mother he seems to idolize his father and affectionately remembers his house in Kenya; about which house he loved talking with the counsellor. The affection and the bond of the child with the father was commended as the positive attitude of the appellant who, obviously was not torturing the child. The child showed his love, affection and comfort for the appellant, evidenced by he fondly and happily talking about a recent vacation in Kashmir with his mother. The child was not uncomfortable with the idea of making a trip to Kenya.

17. There can be no quarrel with the proposition that mediation proceedings are confidential proceedings and anything disclosed, discussed or proposed by the parties before the mediator cannot be recorded, much less divulged. The reason being that very often during mediations, offers, counter offers and proposals are made. The ethos of mediation would bar disclosure of specified communications and writings associated with mediation. Parties are encouraged during mediation to engage in honest discussions as regards their problems and in matrimonial disputes these honest discussions many a time give rise to a better understanding between the couple. Such an approach encourages a SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra forget and forgive attitude to be formed by the parties. If either spouse is under an apprehension that the well- meant deliberations might subsequently be used against them it would hamper an unreserved consideration of their problems. The atmosphere of mutual trust during mediation warrants

complete confidentiality.

18. But where the scope of mediation is the solution of a child parenting issue, report by a mediator or a child counsellor concerning the behavior and attitude of the child would not fall within the bar of confidentiality for the reason no information shared by the couple is being brought on record. The mandate of Section 12 of the Family Courts Act, 1984 cannot be lost sight of.

19. In the instant case, what has been taken on record during mediation proceedings is the report of the Child Counsellor and the mediator, which we find are reports commending the good attitude of both parents who, unlike many other couples, are not using the child as a tool to take revenge against the other. As noted above, the interaction by the previous Division Bench with the child has been recorded in the order dated May 11, 2016 i.e. the child being equally comfortable with both parents and having a desire to spend quality time with not only his mother and relatives from the maternal side but even with the father and relatives from the paternal side. Such reports are a neutral evaluation of expert opinion to a Court to guide the Court as to what orders need to be passed in the best interest of the child. These reports are not confidential communications of the parties.

20. Having answered the issue which incidentally arose, and noting that otherwise the appeal has been rendered infructuous, we terminate further proceedings SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra in the appeal inasmuch as no orders are now warranted to be passed in the appeal.

21. The learned Judge Family Court would consider granting over night interim custody to the respondent when he is in India by imposing such terms and conditions which would ensure that the child is not removed from the territory of India. The issue concerning the appellant claiming that she has lost the Kenyan passport of the child and a fresh passport being issued in the name of the child would also be looked into by the learned Judge, Family Court.

11. On 18.03.2017, the respondent filed Review Petition No.221 of 2017 questioning the judgment dated 17.02.2017. The Review Petition was allowed by yet another Division Bench of High Court by judgment and order dated 11.12.2017. After posing the question, ..whether the Counsellors report furnished in the course of mediation proceedings or the Mediators report in case of mediation, when the process fails, can be used by either of the parties during trial, the High Court concluded that the reports of the Mediator and the Counsellor ..shall be disregarded by the family court, when it proceeds to decide the merits of the case. During the course of its discussion, the High Court noted Delhi High Court Mediation and Conciliation Rules, 2004; Format of application of SAMADHAN (the Delhi High Court Mediation and Conciliation Centre); Conciliation rules of SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra UNCITRAL; Sections 75 and 81 of the Arbitration and Conciliation Act, 1996; Mediation Training Manual issued by the Mediation and Conciliation Project Committee, Supreme Court of India and Chartered Institute of Arbitrators Rules mandating confidentiality in matters pertaining to mediation and observed as under:-

21. There can, be no quarrel with the proposition that the mediation proceedings are confidential and anything disclosed, discussed or proposed before the mediator need not be recorded, much less divulged and that if it is done there would always be an apprehension that the discussion may be used against the parties and it would hamper the entire process. The atmosphere of mutual trust warrants complete confidentiality and the same is in fact noted in the main judgment. The petitioner is aggrieved by its later part which notes but where the scope of the mediation is resolution of child parenting issue, the report concerning the behavior and attitude of the child would not fall within the bar of confidentiality. To our mind, this is against the principle of mediation and charts the course of a slippery slope, as this judgment would hereafter discuss.

22. No exceptions are made in the mediation rules either in our laws or in various jurisdictions mentioned above to the absolute rule of confidentiality. This Court held the mandate of Section 12 of the Family Courts Act, 1984 cannot be lost sight of; yet the issue is whether the order dated May 6, 2016 was passed purely under Section 12 of the Family Courts Act, 1984 or it was simply to facilitate mediation of disputes between the parents of the child.

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25. Section 12 of the 1984 Act, empowers the Family Court with the discretion to refer the parties to a counsellor, Undoubtedly, that power also extends to the appellate court. However, this case has three rather unusual features: one that the Court never authorized the mediator to exercise power that is vested statutorily with it. The discretion to involve or not to involve a counsellor is the Courts and is non delegable. The respondent husbands argument that the referral order permitted the mediator to involve others cannot be meant to authorize the exercise of discretion that is solely vested with the Court. Second, the issue of confidentiality is to be examined because the mediator furnished two reports-to the Court, in this case. A mediators position is unique; undoubtedly she (or he) has professional training and competence to handle issues that involve intense and bitter struggle over matrimonial issues, properties, shared household, custody, (temporary or permanent) and in commercial matters, issues that have monetary and financial impacts. In all cases, parties express their fears, their expectations and their dearly held positions on the strength of the confidence that they repose in the mediator and the mediation process- both of which are reinforced by the absolute cloak of confidentiality. Given these imperatives, mediators reports, where the process has led to failure, should not record anything at all. Having regard to this position the fact that a mediator in a given case, proposes-for all the best and bona fide reasons, the involvement of a counsellor, does not in any manner undermine or take away the Courts sole power to exercise it. In the eventuality of the parties agreeing, to such a course, they have to be asked to approach the Court, for appropriate orders: the SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra Court would then refer them to the counsellor. The question of the kind of report to be submitted to the Court and whether it would be a part of the record would be known during the course of the proceeding. In the present case, the parties merely consented. There is nothing to show that the parties were aware that the mediators report, with regard to not merely what transpired, but with

respect to her reflections, would be given to the court; nor was there anything to show that they were aware - when they consented to the involvement of a counsellor that her report would be given to the court. The third unusual feature is that in at least two sittings with the counsellor, the mediator was present. This joint proceeding is, in the opinion of the Court, unacceptable. It can lead to undesirable consequences, especially if the mediator and counsellor proceed to furnish their reports (as they did in this case). A reading of both reports in the present case, paints a definite picture to the reader strongly suggestive of a plausible course of action or conclusion. It is this, the power of suggestion, which parties are guaranteed protection from, when they agree to mediation. Imagine if there were to be a possibility of divergence of opinion. Where would that lead? Aside from adding to contentiousness, the Court too would be left confounded.

29. The observations made in the main judgment dated February 17, 2017 in effect would permit the mediators to exercise de facto, or in default, the exclusive powers of the Court under Section 12 of the 1984 Act, which are non delegable. There is no question of validation of such action, by a later order of the Court. The danger of this would be that Courts can well draw upon such irregularly produced material, to SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra arrive at conclusions. The requirement of Section 12 also has to be understood as the mandate of law that only the Court and no other body can refer the parties to counseling. The proposition that something which the law mandates to be performed in one manner and no other manner where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at ALL applies with full force. The order dated May 06, 2016 in this case merely referred the parties to the mediator and carved out the course and ambit of mediation. The report of the counsellor was never sought by the Court, and yet was treated to be one under Section 12 of the Act of 1984. Had the Court invoked Section 12 of the Family Courts Act, 1984 it would have clearly spelt out and recorded that while doing so; and in that sense there ought to have been a clear invocation of Section 12. The absence of such reference necessarily meant that the reference to others meant only those connected with the dispute, such as family members of either the husband or the wife, whose participation was to facilitate amicable dispute resolution, not independent evaluation by a counsellor in an unguided manner to be incorporated or annexed to a mediation report.

30. If such a position is allowed as in this case, mediation may then well be used as a forum for gathering expert opinion which would then enter the main file of the case. The mandate of Section 89 of the Civil Procedure Code, 1908, read with Rule 20 and Rule 21 of the Delhi High Court Mediation and Conciliation Rules, 2004 provides for confidentiality and non-disclosure of information shared with the mediator and during the proceedings of mediation. In the present case, the help of the counsellor sought by Nazir Ahmed v King Emperor AIR 1936 PC 243 followed by State of UP v. Singhara Singh AIR 1964 SC 358 SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra the mediator to get holistic settlement between the parties was not ordered in the manner visualized by Section 12 of the Family Courts Act, 1984.

Consequently, neither the report of the mediator nor of the counsellor could have been allowed to be exhibited. They are contrary to the mandate of principles governing the mediation they undermine party autonomy and choice; besides, they clearly violate Section 75 of the Arbitration and Conciliation Act. The observations in the judgment dated February 17, 2017 to the extent it notes

that the reports of the mediator as also of the counsellor concerning the behavior and attitude of the child, especially when the mediation process has failed would not fall within the bar of confidentiality and hence cannot be used in any proceeding. Such reports are a neutral evaluation of expert opinion to a Court to guide the Court as to what orders need to be passed in the best interest of the child. These reports are not confidential communications of the parties and carving a general exception to mediation confidentiality in child custody matters and disputes for which the Family Court can seek the assistance of the counsellor, under Section 12 of the 1984 Act, are hereby recalled. We hasten to add that this judgment is not a reflection on the mediator whose unstinted track record is known to all, or the endeavor of the counsellor, who too is very experienced in her field. Their commitment and sincerity to secure a settlement satisfactory to all, and the mediation process in general, is not doubted; this judgment should in no way dampen that zeal and determination that they have displayed.

12. The view taken by the High Court in allowing the review is presently under challenge. Mr. Anunya Mehta, learned Advocate for the appellant SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra submitted - (a) the High Court exceeded the scope of review jurisdiction as if it was sitting in appeal over the earlier judgment; that in terms of law laid down by this court an error which is not self-evident and which is required to be detected by a process of reasoning cannot be termed as error apparent on the face of the record; b) the report of the Counsellor was not hit by confidentiality as it merely recorded the interaction of the Counsellor with the child and did not record any information or submission by parties to the lis;

that there is a recognized exception to the rule of confidentiality in child custody matters as the court, in such matters exercises *parens patriae* jurisdiction.

Mr. Saurabh Kirpal, learned Advocate for the respondent responded -

(i) mediation reports are part of confidential proceedings and cannot be permitted to be used in court proceedings for which reliance was placed on various statutory provisions; (ii) the Counsellor was not appointed under Section 6 of the Family Courts Act; (iii) exception under Rule 8 (viii) to (xiv) of the Family Court Rules cannot be read as exception to Rules 20 and 23 of the Mediation Rules; (iv) the mediation reports given by the Counsellor-in-

mediation did not fall within the exceptions provided in rule 8; (v) there was no waiver of confidentiality and the respondent had objected to the use of the SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra reports at the first instance; (vi) the earlier order being based on a misconception of law, the High Court was right in exercising review jurisdiction.

13. The issues that arise for our consideration can broadly be put under two heads:

a) Whether the High Court was justified in exercising review jurisdiction and setting aside the earlier judgment and

b) Whether the High Court was correct in holding that the reports of the Mediator and the Counsellor in this case were part of confidential proceedings and no party could be permitted to use the same in any court proceedings or could place any reliance on such reports.

14. As regards the first issue, relying on the decisions of this Court in *Inderchand Jain (dead) through Lrs. vs. Motilal (dead) through Lrs.* 2, *Ajit Kumar Rath vs. State of Orissa and others* 3 and *Parsion Devi and others vs. Sumitri Devi and others* 4, it was submitted by the appellant that the exercise of review jurisdiction was not warranted at all. In *Inderchand JAIN* 2 it was observed in paras 10, 11 and 33 as under:-

(2009) 14 SCC 663 (1999) 9 SCC 596 (1997) 8 SCC 715 SLP(C)No.9267 of 2018 *Perry Kansagra vs. Smriti Madan Kansagra* 10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order.

11. Review is not appeal in disguise. In *Lily Thomas v. Union of India* 5 this Court held: (SCC p. 251, para

56) 56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise.

33. The High Court had rightly noticed the review jurisdiction of the court, which is as under: The law on the subject exercise of power of review, as propounded by the Apex Court and various other High Courts may be summarised as hereunder:

(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

(ii) Power of review may be exercised when some mistake or error apparent on the face of record is found. But error on the face of record must be such an error which must strike one on mere looking at the (2000) 6 SCC 224 SLP(C)No.9267 of 2018 *Perry Kansagra vs. Smriti Madan Kansagra* record and would not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

(iii) Power of review may not be exercised on the ground that the decision was erroneous on merits.

(iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate.

(v) An application for review may be necessitated by way of invoking the doctrine *actus curiae neminem gravabit*. In our opinion, the principles of law enumerated by it, in the facts of this case,

have wrongly been applied. In *Ajit Kumar Rath*³, it was observed: -

29. In review proceedings, the Tribunal deviated from the principles laid down above which, we must say, is wholly unjustified and exhibits a tendency to rewrite a judgment by which the controversy had been finally decided. This, we are constrained to say, is not the scope of review under Section 22(3)(F) of the Administrative Tribunals Act, 1985. Similarly, in *Parsion Devi*⁴ the principles were summarized as under:

9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on SLP(C) No. 9267 of 2018 *Perry Kansagra vs. Smriti Madan Kansagra* the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise.

15. On the other hand, reliance was placed by the respondent on the decision in *Board of Control for Cricket in India and another vs. Netaji Cricket Club and others*⁶ to submit that exercise in review would be justified if there be misconception of fact or law. Para 90 of said decision was to the following effect:

90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words sufficient reason in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine *actus curiae neminem gravabit*. (2005) 4 SCC 741 SLP(C) No. 9267 of 2018 *Perry Kansagra vs. Smriti Madan Kansagra*

16. We have gone through both the judgments of the High Court in the instant case and considered rival submissions on the point. It is well settled that an error which is required to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record. To justify exercise of review jurisdiction, the error must be self-evident. Tested on this parameter, the exercise of jurisdiction in the present case was not correct.

The exercise undertaken in the present case, in our considered view, was as if the High Court was sitting in appeal over the earlier decision dated 17.02.2017. Even assuming that there was no correct appreciation of facts and law in the earlier judgment, the parties could be left to challenge the

decision in an appeal. But the review was not a proper remedy at all. In our view, the High Court erred in entertaining the review petition and setting aside the earlier view dated 17.02.2017. Having so concluded, the logical course in the circumstances would be to set aside the judgment under appeal and permit the respondent to challenge the judgment dated 17.02.2017. But such a course would entail further litigation and therefore, we have considered the matter from the stand point of second issue as well. SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra

17. At the outset, we must, therefore, consider various provisions on which reliance was placed by either side.

18. The Family Courts Act, 1984 (hereinafter referred to as the Act) was enacted to provide for the establishment of Family Courts with a view to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. Section 4 deals with appointment of Judges and sub-section (4) states that while selecting persons for appointment as Judges every endeavor shall be made to ensure that persons committed to the need inter alia to promote the welfare of children and to promote settlement of disputes by conciliation and counselling, are selected. Under Section 6 Counsellors can be appointed by the State Government in consultation with the High Court. Section 7 deals with jurisdiction and under sub clause (g) of sub-section (1) the jurisdiction extends in relation to guardianship issues, or the custody of, or access to, any minor. Section 9 deals with duty of Family Court to make efforts for settlement and empowers the Court, subject to any rules made by the High Court, to follow such procedure as may be deemed fit. Section 10 deals with procedure generally and states inter alia that Family Court can lay down its SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra own procedure with a view to arrive at a settlement. Section 12 deals with assistance of medical and welfare experts and Section 20 gives overriding effect to the Act. Section 21 enables the High Court to frame rules which may inter alia provide for efforts which may be made by, and the procedure which may be followed by, a Family Court for assisting and persuading parties to arrive at a settlement.

The relevant Sections being Sections 6, 9 and 12 of the Act are as under:-

6. Counsellors, officers and other employees of Family Courts. (1) The State Government shall in consultation with the High Court, determine the number and categories of counsellors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counsellors, officers and other employees as it may think fit.

(2) The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees, referred to in sub- section (1), shall be such as may be specified by rules made by the State Government.

9. Duty of Family Court to make efforts for settlement (1) In every suit or proceeding, endeavor shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra the parties in arriving at a settlement in respect of the subject-matter of

the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2). If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it think fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of any other power of the Family Court to adjourn the proceedings.

12. Assistance of medical and welfare experts.- In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act.

19. Pursuant to the rule making power, the High Court of Delhi notified the Family Courts (Procedure) Rules, 1992 (hereinafter referred to as the Rules). Rule 5 deals with Institution of Proceedings while Rule 8 deals with procedure to be followed to arrive at a settlement. Rule 8 is to the following effect.

SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra 8. Procedure to be followed to arrive at a settlement

(i) In every suit or proceeding the Judge may, at any stage, direct the parties to attend a counsellor with a view to promote conciliation and to secure speedy settlement of disputes.

(ii) The parties shall be bound to attend the counsellor on the date and time fixed by the Judge.

(iii) The counsellor may require the parties or any one of them to appear on a date and time fixed for further counselling. In case any of the parties fails to appear, the counsellor may report the matter to the Judge and the Judge shall pass such orders including awarding of costs, as the circumstances of the case may require. The Judge may nevertheless require the counsellor to submit a report.

(iv) The counsellor, in the discharge of his duties may:-

(a) Pay visits to the homes of both or any of the parties.

(b) Interview, relatives, friends and acquaintances of the parties or any of them.

(c) Seek such information from the employer of any of the parties, as may be deemed necessary.

v) With the prior permission of the Judge the counsellor may:-

a) refer the parties to an expert in other areas, such as medicine or psychiatry.

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b) seek assistance of any of the institutions, organizations or persons mentioned in Section 5 of the Act.

vi) The counsellor shall maintain a diary in respect of every case giving in brief the steps taken.

vii) Information gathered by the counsellor, any statement made before the counsellor or any notes or report prepared by the counsellor will be treated as confidential. The counsellor shall not be called upon to disclose such information, statements, notes or report to any court except with the consent of both the parties.

viii) The counsellor shall not be asked to give evidence in any court in respect of such information statements or notes.

Provided, however, that the counsellor will submit to the Judge a report relating to the home environment of the parties concerned, their personalities and their relationship with their child and/or children in order to assist the Judge in deciding the question of the custody or guardianship of any child or children of the marriage.

Provided further that the counsellor will also submit to the Judge a report relating to the home environment, income or standard of living of the party or parties concerned in order to assist the Judge in determining the amount of maintenance and/or alimony to be granted to one of the parties.

ix) The Judge may also request the counsellor to submit a report on any other matter, the Judge consider necessary.

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x) A copy of any report may be supplied to the parties, on such request being made by the parties.

xi) The parties will be entitled to make their submissions on the report.

xii) The counsellor shall not be asked to give evidence in any court in respect of any report made by him.

xiii) Save as aforesaid, the counsellor will submit a brief memorandum to the Judge informing the Judge of the outcome of the proceedings within the time specified by the Judge.

xiv) When the parties arrive at a settlement before the counsellor relating to the dispute or any part thereof, such settlement shall be reduced to writing and shall be signed by the parties and

countersigned by the counsellor. The Judge shall pronounce a decree or order in terms thereof unless the Judge considers the terms of the settlement unconscionable or unlawful.

xv) Cohabitation between the parties in the course of conciliation proceedings will not be deemed to be condonation of the matrimonial offence.

xvi) Even after passing of the decree or order the Judge may require the counsellor to supervise the placement of children in custody of a party and to pay surprise visits to the home where the child resides. In case any alternation is required in the arrangements the counsellor will make a report to the Judge. The Judge may after notice to the parties pass such orders as Judge may deem fit.

xvii) The Judge may require the counsellor to supervise, guide and/or assist reconciled couples, even SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra after the disposal of the case for such further period as the court may order.

xviii) On a request received from the counsellor the Judge may issue process to any person to appear before the counsellor at such place, date and time as may be desired by the counsellor.

20. Since reliance has been placed on various other statutory provisions to bring home the issue regarding confidentiality in mediation process, some of those provisions are also extracted herein:-

A] Sections 75 and 81 of the Arbitration and Conciliation Act, 1996 are to the following effect:-

75. Confidentiality Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

81. Admissibility of evidence in other proceedings. The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings, -

(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

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(b) admissions made by the other party in the course of the conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator. B] Rule 20 of the Delhi High Court Mediation and Conciliation Centre (SAMADHAN) is to the following effect:-

Rule 20: Confidentiality, disclosure and inadmissibility of information.

(a) When a Mediator /Conciliator receives factual information concerning the dispute(s) from any party, he shall disclose the substance of that information to the other party, so that the other party may have an opportunity to present such explanation as it may consider appropriate.

Provided that, when a party gives information to the Mediator/Conciliator subject to a specific condition that it be kept confidential, the Mediator/Conciliator shall not disclose that information to the other party.

(b) Receipt or perusal, or preparation of records, reports or other documents by the Mediator/Conciliator, while serving in that capacity shall be confidential and the Mediator/Conciliator shall not be compelled to divulge information regarding those documents nor as to what transpired during the Mediator/Conciliator before any Court or tribunal SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra or any other authority or any person or group of persons.

(c) Parties shall maintain confidentiality in respect of events that transpired during the Mediation/ Conciliation and shall not rely on or introduce the said information in other proceedings as to:

(i) views expressed by a party in the course of the mediation/conciliation proceedings;

(ii) documents obtained during the mediation/conciliation which were expressly required to be treated as confidential or other notes, drafts or information given by the parties or the Mediator/Conciliator;

(iii) proposals made or views expressed by the Mediator/Conciliator.

(iv) admission made by a party in the course of mediation/conciliation proceedings;

(v) The fact that a party had or had not indicated willingness to accept a proposal.

d) There shall be no audio or video recording of the mediation/conciliation proceedings.

e) No statement of parties or the witnesses shall be recorded by the Mediator/Conciliator. SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra C] The format of the application

which the Centre for Mediation and Conciliation (SAMADHAN) requires every party to fill in is to the following effect :-

I agree to attend all the Mediation Sessions at the time and place fixed by the Mediator. Any party can withdraw from mediation if they so choose on finding that it is not helping them or their case. Each party will bear its own lawyers fees. Each party will also share the cost of the Mediators fees equally, unless the Court directs otherwise.

The entire process of mediation will be confidential and whatever is submitted to the Mediator will not be divulged or produced or be admissible in any Court proceedings. The Mediator will not be compelled to appear as a witness in any Court of law.

The mediation process is voluntary and not binding on the parties till they, on their own volition, reach a settlement agreement and sign the same. D] Certain other provisions relied upon by the respondent are:-

- i) The UNICITRAL Conciliation Rules contain Article 14, which provides for confidentiality of all matters relating to conciliation.
- ii) That Section of the Uniform Mediation Act, USA, 2003, provides for privilege against disclosure, admissibility and discovery of communication and information exchanged during mediation process.

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- iii) That Rule of the Honk Kong International Arbitration Centre Rules mandates mediation to be a private and a confidential process.
- iv) The Code of Practice of Family Mediators followed by the Family Mediation Council, England and Wales in paragraph 5.5 provides that the Mediator must not disclose any information about, or obtained in the course of the mediation to anyone, including a court appointed officer or court, without express consent of each participant, an order of the court or where the law imposes an overriding obligation of disclosure on Mediator to do so.
- v) The Family Justice Courts, Singapore also mandates that all information and matters discussed during the Family Dispute Resolution Conferences, counselling, mediation or co-mediation are to be confidential.
- vi) The Members Code of Professional Conduct of Family Mediation Canada in Article 7 extends the principle of confidentiality to the documents prepared specifically for or resulting from mediation.
- vii) The California Rules of Court, 2017 also provides for confidentiality to be maintained in mediation relating to child custody matters.

21. In Afcons Infrastructure Limited and another vs. Cherian Varkey Construction Company Private Limited and others⁷ while dealing with issues concerning scope and width of Section 89 Civil Procedure Code and (2010) 8 SCC 24 SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra the modalities of Alternative Dispute Resolution mentioned therein, this Court noted various kinds of disputes in respect of which process of Alternative Dispute Resolution has normally been found to be suitable. Para 28 of the decision was as under:-

28. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:

(i) All cases relating to trade, commerce and contracts, including disputes arising out of contracts (including all money claims);

disputes relating to specific performance; disputes between suppliers and customers; disputes between bankers and customers; disputes between developers/builders and customers; disputes between landlords and tenants/licensor and licensees;

disputes between insurer and insured;

(ii) All cases arising from strained or soured relationships, including disputes relating to matrimonial causes, maintenance, custody of children;

disputes relating to partition / division among family members/coparceners/co-owners; and disputes relating to partnership among partners.

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(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.); disputes between employers and employees;

disputes among members of societies/associations/apartment owners associations;

(iv) All cases relating to tortious liability, including claims for compensation in motor accidents/other accidents; and

(v) All consumer disputes, including disputes where a trader/supplier/manufacture/service provider is keen to maintain his business/professional reputation and credibility or product popularity.

The above enumeration of suitable and unsuitable categorisation of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by

the court/tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

22. In *Moti Ram (dead) through Lrs. and another vs. Ashok Kumar and another*⁸ it was held that mediation proceedings are totally confidential and in case the mediation is unsuccessful, the Mediator should not write anything (2011) 1 SCC 466 SLP(C)No.9267 of 2018 *Perry Kansagra vs. Smriti Madan Kansagra* that was discussed, proposed or done during the mediation proceedings. The observations in that behalf were:-

2. In this connection, we would like to state that mediation proceedings are totally confidential proceedings. This is unlike proceedings in court which are conducted openly in the public gaze. If the mediation succeeds, then the mediator should send the agreement signed by both the parties to the court without mentioning what transpired during the mediation proceedings. If the mediation is unsuccessful, then the mediator should only write one sentence in his report and send it to the court stating that the mediation has been unsuccessful. Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings. This is because in mediation, very often, offers, counter offers and proposals are made by the parties but until and unless the parties reach to an agreement signed by them, it will not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process. Similarly, while dealing with a matter arising under the Arbitration and Conciliation Act, 1996, it was held by this Court in *Govind Prasad Sharma and others vs. Doon Valley Officers Co-operative Housing Society Ltd.* ⁹ that both the Conciliator and the parties must keep as confidential all matters relating to conciliation proceedings.

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23. Reliance was placed by the respondent on the decisions mentioned above and some statutory provisions including procedural norms in different jurisdictions to submit that there must be absolute confidentiality in respect of any statements made during the course of mediation. The appellant, however, relies upon Sub-Rule(viii) of Rule 8 of the Rules in support of the submission that in relation to matters, inter alia, of custody or guardianship of any child or children, the Counsellor could be asked to submit to the Judge a report relating to home environment of the parties concerned, their personalities and their relationship with the child and or children in order to assist the Judge in deciding the questions involved in the matter.

24. We, thus, have line of cases dealing with mediation/conciliation and other proceedings in general and Rule 8 of the Rules dealing inter alia, with custody issues which is in the nature of an exception to the norms of confidentiality. It is true that the process of mediation is founded on the element of confidentiality. Qualitatively, Mediation or Conciliation stands on a completely different footing as against regular adjudicatory processes.

Instead of an adversarial stand in adjudicatory proceedings, the idea of mediation is to resolve the dispute at a level which is amicable rather than SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra adversarial. In the process, the parties may make statements which they otherwise they would not have made while the matter was pending adjudication before a court of law. Such statements which are essentially made in order to see if there could be a settlement, ought not to be used against the maker of such statements in case at a later point the attempts at mediation completely fail. If the statements are allowed to be used at subsequent stages, the element of confidence which is essential for healthy mediation/conciliation would be completely lost. The element of confidentiality and the assurance that the statements would not be relied upon helps the parties bury the hatchet and move towards resolution of the disputes.

The confidentiality is, thus, an important element of mediation/conciliation.

25. Complete adherence to confidentiality would absolutely be correct in normal matters where the role of the court is purely of an adjudicator. But such an approach may not essentially be conducive when the court is called upon and expected to discharge its role in the capacity as *parens patriae* and is concerned with the welfare of a child. All custody and guardianship issues are resolved on the touchstone or parameter of best interest of the child. In custody and guardianship disputes between two parties, a minor child is in a SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra peculiar situation. At times, both sides are busy fighting legal battles and the court is called upon in *parens patriae* to decide what is in the best interest of the child. In order to reach correct conclusion, the court may interview the child or may depend upon the analysis of an expert who may spend some more time with the child and gauge the upbringing, personality, desires or mental frame of the child and render assistance to the court. It is precisely for this reason that the element of confidentiality which is otherwise the basic foundation of mediation/conciliation, to a certain extent, is departed from in Sub-Rule (viii) of Rule 8 of the Rules.

26. If the reports of the Counsellor touching upon the home environment of the parties concerned, their personalities and their relationship with their child or children would assist the court in determining the custody or guardianship issues, any technicality ought not to stand in the way. Sub-Rule (viii) of Rule 8 seeks to achieve that purpose and makes such material available for the assessment of the court. The observations of this Court in *Ashish Ranjan vs. Anupma Tandon* and *ANOTHER10* have crystalized the approach to be adopted in matters concerning custody or guardianship issues. Paras 18 & 19 of the decision are as under:

(2010) 14 SCC 274 SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra 18. It is settled legal proposition that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. Such an issue is required to be determined in the background of the relevant facts and circumstances and each case has to be decided on its own facts as the application of doctrine of *stare decisis* remains irrelevant insofar as the factual aspects of the case are concerned. While considering the welfare of the child, the moral and ethical welfare of the child must also weigh with the court as well as his physical well- being. The child cannot be treated as a property or a commodity and, therefore, such issues have to be handled by the court with care

and caution, with love, affection and sentiments applying human touch to the problem. Though, the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its *parens patriae* jurisdiction arising in such cases. (Vide *Gaurav Nagpal v. Sumedha NAGPAL*¹¹.)

19. The statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. (Vide *Elizabeth Dinshaw v. Arvand M. DINSHAW*¹², *Chandrakala Menon v. Vipin MENON*¹³, *Nil Ratan* (2009) 1 SCC 42 : (2009) 1 SCC (Civ) 1 : AIR 2009 SC 557 (1987) 1 SCC 42 : 1987 SCC (Cri) 13 : AIR 1987 SC 3 (1993) 2 SCC 6 : 1993 SCC (Cri) 485 SLP(C)No.9267 of 2018 *Perry Kansagra vs. Smriti Madan Kansagra Kundu v. Abhijit KUNDU*¹⁴, *Shilpa Aggarwal v. Aviral MITTAL*¹⁵ and *Athar Hussain v. Syed Siraj AHMED*¹⁶.)

27. Statements made by the parents during the course of mediation may not be relied upon on the ground of confidentiality but natural responses and statements made by the minor to the Counsellor would certainly afford a chance to decide what is in the best interest of the child. A child may respond naturally and spontaneously in its interactions with the Counsellor, who is professionally trained to make the child feel comfortable. Record of such interaction may afford valuable inputs to the Court in discharge of its duties in *parens patriae* jurisdiction. If during such interaction issues or aspects concerning welfare of a child are noticed, there is no reason why the Court be deprived of access to such aspects. As held by this Court in various judgments, the paramount consideration ought to be to see what is in the best interest of the child.

28. In terms of Sub Rule (viii) of Rule 8, the Counsellor is obliged to give report, inter alia, relating to home environment of the parties concerned, their personalities and their relationship with the child and/or children in order to (2008) 9 SCC 413 (2010) 1 SCC 591 : (2010) 1 SCC (Civ) 192 (2010) 2 SCC 654 : (2010) 1 SCC (Civ) 528 SLP(C)No.9267 of 2018 *Perry Kansagra vs. Smriti Madan Kansagra* assist the Judge in deciding the question of guardianship of any child or children. The intention is clear that the normal principle of confidentiality will not apply in matters concerning custody or guardianship issues and the Court, in the best interest of the child, must be equipped with all the material touching upon relevant issues in order to render complete justice. This departure from confidentiality is consistent with the underlined theme of the Act in general and Section 12 in particular. Once there is a clear exception in favour of categories stated therein, principles in any other forms of mediation/conciliation or other modes of Alternative Dispute Resolution regarding confidentiality cannot be imported. The effect of such exception cannot be diluted or nullified. In our view, the High Court considered the matter in correct perspective in paragraphs 17 to 20 of its judgment dated 07.02.2017.

29. There is, however, one aspect which must also be considered and that is who is the Counsellor within the meaning of Rule 8 and whether the Counsellor who assisted the court in the present matter comes within the four corners of said provision. It is true that under Section 6 the Counsellors are appointed by the State Government in consultation with the High Court. It is SLP(C)No.9267 of 2018 *Perry Kansagra vs. Smriti Madan Kansagra* also true that the Counsellor in

the present case was not the one who was appointed in terms of Section 6 but was appointed by a committee of the High Court and her assistance had been requested for in connection with many matters. The order passed on 06.05.2016 had indicated that the Mediator could join any other person as may be deemed necessary for a holistic and effective mediation. The next order dated 11.05.2016 did mention the name of the Counsellor and the fact that the Counsellor had a fruitful meeting with Aditya. The Counsellor, thereafter, interacted with him on 08.07.2016 and 11.07.2016, based on which interaction, a report was submitted on 21.07.2016. The engagement of the Counsellor was thus in complete knowledge of the parties as well as with express acceptance of the High Court. It may be that said Counsellor was not appointed under Section 6 of the Act but if the paramount consideration is the welfare of the child, there cannot be undue reliance on a technicality. As a matter of fact, the width of Section 12 of the Act would admit no such restriction. The report given by the Counsellor in the present case cannot, therefore, be eschewed from consideration. It is noteworthy that there was absolutely nothing against the Counsellor and in the judgment under appeal, the High Court went on to observe in para No.30 that the Counsellor was well experienced and known SLP(C)No.9267 of 2018 Perry Kansagra vs. Smriti Madan Kansagra for her commitment and sincerity to secure a settlement which would be satisfactory to all.

30. We do not, therefore, see any reason why the reports in the present case, be kept out of consideration.

31. We, therefore, allow this appeal, set aside the judgment dated 11.12.2017 passed by the High Court and restore the earlier judgment dated 17.02.2017 passed by the High Court of Delhi. There shall be no order as to costs.

.....J.

(Abhay Manohar Sapre)..... J.

(Uday Umesh Lalit) New Delhi, February 15, 2019