DISPOSAL/DISTRIBUTION OF SPOUSAL PROPERTY IN THE WAKE OF DISSOLUTION OF MARRIAGE

By

B.K. Sharma*

Vijay Nagpal**

That divorce is a necessity is now accepted on all hands. It is not antithesis of marriage. It is rather there to strengthen the institution of marriage. The present trend, therefore, is to consider divorce more favourably, calling it the mark of emancipation, specially, of the fair sex, a type of escape value for the release of undesirable tensions of marriage. It is indeed a part of the sifting out process, designed to produce a more rewarding and stable family life.[1]

Divorce legally dissolves the marriage tie, but it cannot erase the past. For those women who are not economically independent divorce removes the ground under their feet. The divorced women of middle class strata of society find their remarriage difficult and sometimes may have to lead the life of 'a disolate lone voyager'[2]. Sometimes a divorced wife looses those benefits that even a widow might receive. For instance, a widow becomes entitled to pension and other benefits of the husband and is also an heir to her husband. Thus, after divorce, the problem of her maintenance and support assumes importance. There are two types of statutory provision, which provide for the maintenance of a divorced wife.

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* Professor of Law, Deptt. Of laws, Panjab University, Chandigarh-160014

** Reader, Deptt Of Laws, Panjab University, Chandigarh-160014

1 Raj Kumari Agrawala, "Changing basis of Divorce and the Hindu Law", 14 JILI 431 at 432 (1972).

2 D.R. Khanna, 'Indissolubility of Marriage v. Easy Divorce', A.I.R. 1982 (Jour.) 134 at p.135

One is under the respective matrimonial statues[3] obtaining to various communities in India and other is section 125 of Code of Criminal Procedure which is of a general nature and obtains to all the communities in India accept Muslim divorced wives who are now governed by Muslim Women (protection of Rights on Divorce) Act, 1986[4].

The financial aspect of the problem, which is concomitant of divorce relates to another field also what we may call, the disposal/distribution of 'spousal property'. The problem may be convessed from two angles. First, there is increase in the number of married women in the labour force, thus, the wife contributes significantly to the common pool from gains of the employment or other work, which results in the augmentation of the family income which can be utilized in the purchase of 'family assets[5] including immovable property. This means that, increasingly, married women are acquiring property through their own work as distinguished form the property which comes to them, say by dowry, succession inheritance, etc. Secondly, a wife who devotes herself to the work of culinary and rearing of children indirectly helps her husband in the acquisition of 'family assets' or other property by her thrift and skills. Moreover, her contribution towards the family by her physical work is no less important than the husband's financial contribution[6].

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3 See for instance, Hindu Marriage Act, 1955; Special Marriage Act 1954; Parsi Marriage and Divorce Act, 1936 and Indian Divorce Act, 1869. There is no provision for maintenance of a Muslim wife under the Dissolution of Muslim Marriage Act, 1939.

4 No. 25 of 1986.

5 The expression 'family assets ' may be defined as "something acquired by the spouses for their joint use, with no thought of what is to happen should the marriage breaks down", per Lord Denning , L.J. (as the then was), in Hine V. Hine , (1962) 1 W.L.R. 1124 (C.A.).

6 English law now recognizes, "The contributions made by each of the by looking after the home or caring for the family" as one of the consideration which the court has to take into account (contd.)

So far as the marriage is a going concern, while purchasing the property, the spouses little bother, in whose name the property is put irrespective of the fact from whom the consideration flows. They plan their future as a life long affairs; the very idea of divorce is repugnant to the conjugal harmony. Other factor which compounds the problem is that earlier majority of married couples expended their income on the current needs of food, clothing, shelter, etc. But now with the distribution of durable consumer goods by way of instalment purchases and installment mortgages, the spouses are acquiring more and more assets of durable nature[7]. For instance, a matrimonial home and other family assets like car, scooter, T.V., fridge, A.C., furniture, etc. can now be easily purchased by a middle class family by raising loan or an instalment purchase. Both the spouses contribute either in cash or by his/her skill, thrift and hard work. On divorce, the question of distribution of these assets assumes importance.

Husband and wife normally enjoy and use much of their property together and very frequently. Their money and goods are mingled so inextricably that on divorce, an appropriation of assets to one spouse or the other becomes a game in which the element of hazard exceeds the arithmetical skill. In view of the peculiar nature of the conjugal relationship and the incidents of matrimonial home, it is not strange when a married couple purchases a house or when the contents of the home are being acquired that they do not contemplate that a time might come when decision would have to

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while making any financial provision on divorce. See section 25(1) (f) of the Matrimonial Causes Act, 1973. The provision first originated in section 5(1) (f) , Matrimonial Proceedings and Property Act, 1970.

7 See Kahn-Freund, "Recent Legislation on Matrimonial Property", (1670) 33 M.L.R. 601, at pp. 605-607.

be made as to who owned what. Nay, the very idea of having a precise statement or understanding as to where the ownership would rest; there is no discussion, no agreement and no understanding as to sharing of the ownership in the eventuality of breakdown of marriage culminating in divorce.

It is in this backdrop that the problem of distribution of 'family assets' arises. The broad question which arises is: How to find a compromise between the principle of separation and of community, while at the same time preserving the equality of the spouses in matters of property?

The problem that is being highlighted in this paper is:

> **How to recognize the contribution of a working as well as non working wife specially in a non-contractual situation. The raising of this is particularly relevant because we, as a part of the made-up Indian tradition, hardly visualize the resolution of even anticipated problem through contractual contrivances.**

Under common law of England a married woman lost her legal existence by the fact of marriage. In the words of Blackstone, "(b)y marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated in that of the husband..... Upon this principle, of an union of person in husband and wife", he further adds", "depend almost all the legal rights, duties and disabilities that either of them acquire by marriage".[8] By virtue of this principle much of her personal property whether possessed by her at the time of marriage or coming to her after marriage, either became absolutely his own, or during coverture might, if he chose, be made absolutely his own, so

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8 Blackstone, "Commentaries on the Laws of England," Vol. I, at p. 430.

that even if the wife survived him, it went to his representatives[9]. Under this scheme of law that lasted up to 1870, "it is surely substantially true to say that marriage transferred the property of wife to her husband"[10]. In sum, the husband could say, "what is yours in mine; is mine is my own[11]. After making provision in certain enactment's[12], it was only in 1935 by Law Reform (Married Women and Tort Feasors) Act,- which gave effect to three basic principles: equality of status and capacity; of separation of property; and of separation of liabilities[13] .

The aim before the English Parliament was to confer on the married women a full power to hold or dispose of their property, which it achieved by the year 1935. This principle of separation of property worked well till the husband remained the breadwinner and the wife's role was confined to the household. Still it could be argued that the husband retained the ownership of property that was purchased out of his earnings. But, during the Second World War and thereafter, most married women were wage earners, thus, were contributing towards the purchase of 'family assets'[14] directly when they made a down payment towards the purchase price or paying the instalments. In case, they contributed in the household expenses, thus, relieving the husband to save more for the purchase of such 'family assets', they made the contribution

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9 For a succinct summary of law on this point, see Dicey, "Lectures on the Relation between La w and Public Opinion in England During the Nineteenth Century," 2nd ed., (1952) at p. 372,n 2.

10 Ibid at pp. 375.

11 Virendra Kumar, "Alimony and Maintenance," 1st ed., 1978 at p. 37.

12 Married Woman's Property Act, 1870; Married Women's Property Act, 1872; for a summary of Law see B.K. Sharma, Divorce Law in India, pp. 362 et. seq.

13 Section I (a) of the Law Reform (Married Women and Tort Feasors) Act, 1935, provided: "..... a married woman shall be capable of acquiring , holding and disposing of , any property... as if she were a feme sole,"

14 For the meaning of the concept of 'family assets' see f.n. 5 *supra.*

indirectly. The courts in an overall effort to protect the interests of such married women, tried to do justice between the spouses by extending the meaning of Section 17 of the Married Women's Property Act, 1882.[15]

The courts, at any rate, succeeded in doing justice to a wife, who directly or indirectly contributed towards the acquisition of family assets, however, they never succeeded in getting a wife a share in the property by reason of her other contributions, i.e., other than financial contributions. For instance, a wife who looked after the home and family could not get anything from what they acquired during marriage except that she could claim maintenance from the husband.[16] So much so, that a wife could not claim any interest in the balance or any property bought with what she saved through her skill, economy, thrift and hard work from housekeeping money.[17] Sir Jocelyn Simon, P. stated the common situation, in an extra judicial address in 1965 by a telling metaphor: "The Cock can feather the nest because he does not have to spend most of his time sitting on it."[18].

Injustice caused to the wife was taken notice of by the Royal Commission which said that "if on marriage, she gives up her paid work in order to devote here self to caring for her husband and children, it is an unwarrantable hardship when in consequence she finds herself in end with nothing she can call her own."[19] Therefore,

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15 See B K Sharma, Divorce Law In India, Ch. VIII.

16 See Pettitt v. Pettitt, (1969) 2 All. E.R. 385 (H.L.), at pp. 403-4, per Lord Hodson; per Cross, L.J., in Nixon v. Nixon, (1969) 3 All. E.R. 1133, at p. 1139 (C.A.). For a Canadian Case, see Murdoch v. Murdoch, 13 R.F.L. 185.

17 See Blackwell v. Blackwell, (1943) 2 All. E.R. 579 (C.A.); Hoddinott v. Hddinott, (1949) 2 K.B., 406; Rimmer v. Rimmer, (1952) 2 All..E.R. 863.

18 Quoted by Lord Hodson, in Pettitt V. Pettitt, (1969) 2 All. E.R. 385, at p. 404.

19 "Royal Commission on Marriage and Divorce", (1956) Comd. 9678, at p. 178.

another Law Commission[20] recommended to recognize the contribution by the wife in looking after the home and family.[21]

Following the recommendations of the Law Commission, Matrimonial Proceedings and Property Act, 1970 was passed. Section 4 of the Act empowered the court to pass three types of property adjustment orders; namely, transfer of property for the benefit of the other spouse or for the benefit of any child of the family; settlement of property for the benefit of the other spouse or any child of the family; and, variation of anti-nuptial or post-nuptial settlements. Section 5 provided the matters that the court was to take into account while making any such order under section 4. Sub-section (1) (f) of section 5 recognized the wife's "contribution made by looking after the home or caring for the family" as a matter relevant in deciding property adjustment order. The court was given a general power to exercise the powers, having regard to their conduct, in such a manner so as to place the parties in the same financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the

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20 "Report on Financial Provision in Matrimonial Proceedings," Law Comm. No. 25.

21 The Commission recommended, id. para 69, p. 34:
"We recommend that in the exercise of the court's armoury of powers to order financial provision it should be directed to have regard to various criteria. Among these there is one of outstanding importance in regard to the adjustment of property rights as between the spouses. This is the extent to which each has contributed to the welfare of the family, including not only contributions, in money or money's worth (as in the determination of rights of particular items or property) but also the contribution made (normally by the wife) in looking after the home and family. This should meet the strongest compliant made my married women, and recognized as legitimate by the Morotn Commission in 1955, namely, that the contribution which wives make towards the acquisition of the family assets by performing their domestic chores, thereby releasing their husband for gainful employment, is at present wholly ignored in determining their rights. Under our proposal this contribution would be a factor which the court would be specifically directed to take into account".

other[22] Now these provisions are replaced and re-enacted in the Matrimonial Causes Act, 1973.[23]

Thus, a radically new approach to family property was introduced by readjusting spousal property cutting across existing interests. Before the Act of 1970, the courts could exercise these powers to limited extent. For instance, it could order settlement of the wife's property, only where divorce was granted on ground of wife's adultery, for the benefit of the innocent party and children of the parties.[24] Similarly, it could vary anti-nuptial or post-nuptial settlements.[25] The power to award a lump sum was only introduced in 1963.[26] But such a power it was said, was likely to be used in relatively rare cases where the party had sufficient assets to justify it.[27] Therefore, new power of adjustment of property is important as the court, may, as an alternative to the payment of a lump sum, order one spouse to transfer investments than to compel him to sell them to raise the necessary capital.

In contrast to English law, the Hindu married women, from antiquity enjoyed those rights in property that English married women were granted after a struggles of about a century. Sir, Guroodas Banerjee has remarked.[28] "Nowhere were proprietary rights of women recognised so early as India; and in very few

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22 Section 5 (1), Matrimonial Proceedings and Property Act, 1970.

23 Section 24(1) and 25 (1) respectively.

24 The provision first originated in Section 45 of the Matrimonial Causes Act, 1857, and was carried in subsequent enactments till it was repealed by Section 42 (2) of the Matrimonial Proceedings and Property Act, 1970.

25 The provision first originated in Section 192 of the Judicature (Consolidation) Act, 1925, and carried in subsequent statutes, now Section 24 (1) (c) Matrimonial Causes Act, 1973.

26 Section 5, Matrimonial Causes Act, 1963.

27 See Davis v. Davis, (1967) P. 185, at p. 192 per Willmer, L.J.

28 "Hindu Law of Marriage and Streedhana," 5th ed., (1915) at p. 370

ancient system of law have these rights been to largely conceded as in our own."

In India while passing the Indian Divorce Act, 1869[29] provisions regarding married women were made for Indian Christians on the lines of Matrimonial causes Act, 1857. Section 39 of the Act of 1869 provides for settlement of a wife's property on husband or children or both where a decree for divorce or judicial separation is passed on ground of adultery of the wife. Similarly, section 40 of the Act of 1869 gives the court power of diverting any property, which may have been settled on the guilty spouses for the benefit of children of the marriage and the innocent party and can be exercised in respect of ante-nuptial and post-nuptial settlements. A similar provision is found in Section 50 of Parsi Marriage and Divorce Act, 1936, under which a guilty wife's property can be settled for the benefit of children or any of them. For Muslim divorced wives no provision for disposal/distribution of property is made on granting divorce under Dissolution of Muslim Marriage Act, 1939. Now S.3 (d) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 makes provision for the return of property of a divorced woman that was given to her before at or after the marriage.

It has been observed earlier that a Hindu married woman is entitled to own property independently. Marriage does not effect her interest in the property. Parliament passed the Hindu Marriage Act, 1955, recognizing divorce, but the aspect of marital property did not seem to pose the problem to the legislature. Therefore, a simple provision in the form of Section 27 was enacted which provided for

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29 S.S. 39 and 40 Indian Divorce Act 1869.

the adjustment of parents made "at or about the time of marriage" and which may "belong jointly to both the husband and the wife."[32] Perhaps, the reason for confining the concept of spousal property to the property given "at or about the time of marriage," might be that the Indian women in 1950s were hardly engaged in any gainful employment. Even, the giving of higher education to the daughters at that time was considered to be luxury, or was "like another item in dowry."[31] The role of women was confined to the four walls of house-hold. Thus wife could not contribute directly to the family pool. Hence, on divorce, the question of division of 'family assets', acquired during marriage simply did not arise. At any rate, her contribution towards the welfare of the family and rearing of children was compensated through the award of matrimonial maintenance. Moreover, since matrimonial remedies under the Hindu Marriage Act were modeled on the basis of contemporary English Matrimonial Causes Act, 1950, which itself was wanting in terms of the concept of spousal property, therefore, there did not seem to be much occasion for anticipating the problems of 21st Century in terms of settlement of property acquired during the subsistence of marriage.

Here it may be noted that an identical provision also exists in section 42 of Parsi Marriage and Divorce Act, 1936. Family Courts Act, 1984[32] is another statute which makes a general provision for settlement of disputes relating to family matters between husband and wife including disputes with respect to the property of the

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30 Section 27, Hindu Marriage Act, 1955.

31 Rama Mehta, "Divorced Hindu Women", (1975), at p. 9.

32 No. 66 of 1984.

parties or of either of them'.[33] It may be interesting to note that the Special Marriage Act, 1954, which is a uniform civil code applicable to all the communities in India and provides a civil marriage do not contain any provision in this respect the probable reason seems to the that a civil marriage was thought to be a love marriage as opposed to arranged marriage and no dowry was expected.

Most of the cases that find reference in the Reports are on section 27 of the Hindu Marriage Act, 1955 (hereinafter cited as Act of 1955). Of late some cases have come under section of the Family Courts Act, 1984 also (hereinafter cited as Act of 1984). So our discussion would mainly be confined to these provisions.

Section 27 of the Act of 1955 empowers the matrimonial court to make suitable provision in the decree which it may pass in the proceedings under the Act "with respect to any properly presented at or about the time of marriage," and "which may belong jointly to both the husband and the wife". Since the relief is ancillary to the main proceedings, no order with respect to any such properly can be passed under section 27 if the decree for the main relief is refused.[34]

The section required that the provision contemplated under it should be made in the decree. It cannot, therefore, he made before or after the decree[35]. But where the wife made an application under

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33 Section 7 (I) Exp. (c) of Family Courts Act 1984 reads:
Jurisdiction- (1) Subject to the provisions of this Act, a family court shall-----
.....
Explanation- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:---
(c)a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them.

34. For a detailed analysis of the concept of ancillary relief, see B.K. Sharma and R.D. Anand, Matrimonial Causes: Dynamics of Ancillary Relief, 31 JILI. (1989), pp. 210-25.

35 Sumer Chand Vs. Bimla Rani, 1996 AIHC 2693 (P&H); Dharambir, Vs. Bimlesh Kuamr, (1985) I HLR 187 (Del); Mihir Narayan Vs Satyalakshmi, AIR 1991 (NOC) 92 (Orr.)

section 27 before the passing of decree of divorce, it was held that order u/s 27 after the passing of decree of divorce was not bad. It was further held that the words "may make such provision in the decree" confer a discretion on the court and the word "may" does not mean "must".[36] It is not necessary that a separate prayer in respect of an order under the section is made in the petition or the written statement.[37] But there should be no bar for the wife to file an application for the return of dowry where decree of divorce is made *ex-parte.*

An order under section 27 can be made regarding a property presented 'at or about the time of marriage". Herein the word 'at' seems to mean actual time of marriage and the words 'about the time of marriage' mean around the time of marriage "so long as it is relatable to the marriage ..... implying thereby that the properly can be traced to have connection with the marriage".[38] Therefore, property given at the time of betrothal ceremony would be covered under the section.

The expression "belong jointly to both husband and the wife "has been subject to controversy among the High Courts. While interpreting the word "jointly" most of the high courts have expressed the view that property that is presented to the parties

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36 Bijoy Krishna V Namita , AIR 1991 Cal. 34 (DB); Srinder Kuar v. Madan Gopal , Air 1980. P & H 334; Gurcharan Singh V. Ajmer Kur, II (1983) DMC 128 (P &H) ; Suraj Prakash V. Mohinder lal Sharma , I (1988) DMC 104 (P&H), taking a contrary decision because the earlier two judgements were not brought to the notice of the Court; Aruna V. Subhash, I (1994) DMC 59. (Del.)

37 The rules framed by some of the High Courts provide that a prayer for such relief under the section should be made in the petition itself.

38 Balkrishna V Sangeeta , AIR , 1997 SC 3662 at 3564; See also M.D. Krishna V M.C. Padma, AIR 1968 Mys 226 at pp. 228-29.

individually does not come within the purview of the section[39]. While interpreting the word 'jointly' Karnataka High Court had held that rupees two thousand paid to the husband along by way of 'Vara Dakshina' are not covered under the section. Similarly, the jewellery given to the wife become her *stridhana*, hence, could not be dealt by the court v/s 27. Faced with a similar situation, some of the High Court have invoked the power under section 151 of Code of Civil Procedure and have held that section 27 of the Act of 1955 does not exclude the power of the court to pass an appropriate order in regard to property that may belong solely to the husband or the wife.[40] A Division Bench of the Bombay High Court in *Sangeeta Balkrishan v. Ramkrishna*[41], has taken a pragmatic view. Reversing the decision of a single Judge in *Shakuntala v Mahesh*[42] the Division Bench had held (at p.9):

> "We are faced with a situation, however, where the Legislature made specific provision for disposal of one small restrictive class of property....., by virtue of the vacuum that is created, the courts have been hither to directing the parties to institute normal civil suits in relation to the remaining property. ..... this is hardly fair to the parties and having regard to the volume of litigation that is pending, neither it is fair to the courts when such a litigation would be unnecessary and to our mind, superfluous, ..., it is in

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39 Sumer Chand V. Bimla Rani 1996 AIHC 2693 (P&H) ; Nimrla Gupta V. Ravender Kuamr , AIR 1996 M P 227 (DB); Padmja Sharma V. Ratan Lal, I (1994) DMC 49 (Raj); Suraj Parkash V. Mohinder Pal, (1987) 2 H LR 632 (P& H) ; Anil Kumar V. Jyoti, (1987)2 HLR 162 (Raj).

40 Kamta Prasad V Om wati, AIR 1972 All. 153; Sangeeta Balkrishna Kadam V. Balkrishna , AIR 1994 BOM 1 at 9 (DB) ; Nirmala Gupta V Ravendra Kumar , AIR 1996 MP 227 (DB).

41 AIR 1994 Bom 1.

42 I (1990) DMC 270 (Bom.).

these circumstances that the court must exercise the powers vested in it under section 151 of the Code of Civil Procedure and pas orders in relation to the remaining items that are the subject mater of the dispute".

The eloquent exposition of the words 'belonging jointly' by M.M. Punchhi, J.(as he then was), of the Punjab and Haryana high court in *Surinder Kumar v. Madan Gopal Singh*[43] serves the objective of the provision. He did not follow the narrow interpretation that excludes the property presented for the exclusive use to either the husband or the wife[44]. He stressed that the word 'belong' does not, necessarily reflect title to the property in the sense of ownership[45]. According to him the word ' belong' denotes the joint use in their day to day living", whether the property was received "individually or collectively"[46] Therefore, the entire emphasis is on the nature of property and not on the fact that it was 'jointly' presented. It was further expounded:

"Properties and articles presented from any source and to any one of them which by very nature of the present, or by intention of the donor, or by agreement of spouses, has come to be jointly in use by both the husband and the wife, can well be said to belong jointly to both the them."[47]

From the perusal of views of the various High courts it is clear that the majority of courts have construct " jointly" in section 27 in

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43 1980 H.L.R. 507 followed in Yudhister Raj v. sarla Kumari, 1981 H.L.R 37 (P &H).

44 ID., at \p. 511. The decision of Allahabad High court in Kamta Pd. V. Om Wati, AI.r. 1972 All. 153, was cited.

45 Id., at p. 510.

46 Ibid.

47 Ibid.

terms of " owning". The word ' belong' in the context of the object of section 27 seems to be a term of art. It does not necessarily mean 'title' to the property in the sense of ownership. It bears the connotation of a person's connection with property which he or she happens to be in possession. Understood in this way, a present, say, some jewellery presented to the wife either by the husband's parent's or her own parents, albeit, seemingly for the exclusive use of the wife, belongs to both of them within the ambit of section 27. Likewise, a suit or gold ring presented to the husband by the wife's parents may be meant for his exclusive use, nevertheless, it could similarly be said, it belongs to both. If this idea is pursued logically, we intend to say that properties that are meant for the separate use of the husband or the wife are not 'his' or 'her' belongings, but 'their' belongings.[48]

Let us consider a similar predicament under the law prohibiting dowry. Under the Dowry Prohibition Act. 1961,as amended by the Dowry Prohibition (Amendment) Act, 1984, any property or other valuable security given or agreed to be given in connection with marriage comes under the definition of dowry.[49] This property or valuable security might be given by one party to the marriage or by the parents or any other person to either party or to other person.[50] Thus, any property presented by any person to any person in connection with marriage would fall within the ambit of this definition. Under the Act, this property or other valuable security although eventually would go to the wife and

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48 See Anju Bhargava V. Rajesh Bhargave, 1986 (2) H.L.R. 391 (Del).
49 Section 2, Dowry Prohibition Act, 1961.
50 Ibid.

after her death passes to her heirs,[51] yet for all other purposes, it belongs to both and may be used for augmenting the common interest. Since all such property ultimately vests in the wife- the vesting becomes evident in case there arises a conflict between the spouses- the husband has been held to hold the property only as a trustee for her.[52]

Thus, the cumulative effect of section 27 of the Hindu marriage Act read with the connotation of the term 'dowry' under the Dowry Prohibition Act is that the entire property irrespective of the fact of being vested in the wife[53] could be said to belonging to both the spouses for purposes of section 27. Similarly, the property given by the wife's parents to the husband exclusively in the sense of vesting that property in him, could be retrieved from him under section 6 of the Dowry Prohibition Act the moment its common or joint use was threatened or frustrated. This simply implies that the concept of "belonging jointly to both the husband and the wife" under section 27 is implicit even when such property is owned by any one of the spouses provided only that the same was given " at or about the time of marriage" in connection with marriage.

Thus, the whole position boils down as follows. The very nature of conjugal relationship gives the right to one spouse to deal with the property of the other. Accordingly, the whole of the property though owned individually yet 'belong' to both the spouses for purposes of section 27. The relationship of the parties is not an

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51 Id., Section 6.

52 See Moiliakiriath Abbas v K. Kundinathu, 1976 H.L.R. 105 (Ker.).

53 By virtue of Section 14 of the Hindu Succession Act, 1956, all the property which is presented to the wife on marriage becomes her separate property, nevertheless, by virtues of the joint use, during the subsistence of marriage , such property belongs to both.

ordinary commercial partnership of " I and you limited" but that of "We limited"[54], therefore, the proper construction of section 27, in our submission, is that it empowers the court to deal with all the property which is presented to both individually as well as jointly at and about the time of marriage.[55]

The underlying purpose of the legislature in enacting section 27 is that when the marriage breaks down and the parties fall apart the interest of the wife is protected. Such a view of section 27 would save the spouses, especially the wife, to run to different courts for settling property disputes which are essentially integral part of the matrimonial conflict problems.

Now coming to the Act of 1984, section 7 (1) Exp. (c) confers jurisdiction on a family court to decide a dispute with respect to the property of the parties or either of them. So it is clear that the controversy that has arisen under section 27 of the act of 1955 cannot arise under this Act. But one controversy which has arisen under this provision is: whether a family court while deciding a divorce petition under the Hindu Marriage Act on decide on application under section 27 of the act of 1955 read with section 7 of the Act of 1984 with respect to property which does not fall within the ambit of section 27. A Division Bench of Rajsthan High Court in Padmja Sharma v Ratan Lal[56] has held that section 7 of the Act of 1984 does not confer a right for getting all disputes decided in proceedings under section 13 of the Act of 1955. It was

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54 Per Sandhawalia, C.J. in Vinod Kumr , Sethi V Stae of Punjab, 1982 H.L.R. 327 , at p. 359, (P&H).

55 At least in two cases the courts have dealt with all items of dowry presented to the either party at the time of marriage, see Ishwar Pal Singh, v. Shakuntla Devi, 1979, H.L.R. 753 (Del.); Yudhister v. Sarla Kumari, 1981, H.L.R. 37 (P&H) .

56 (1994) 1 HLR 576 at 581

further held that for getting a relief for property other than covered under section 27 of the Act of 1955, a regular suit under the Act of 1984 has to be filed.

But in similar situation a Division Bench of Karnataka High Court[57] has held that the jurisdiction of the Family Courts is extended in respect of the suits and proceedings that are referred to in section 7 of the Act of 1984. The occasion to exercise such jurisdiction may arise under any law for the time being in force and the jurisdiction under section 7 is not merely with reference to the properties of the parties to the marriage but with respect to properties of either of them.

It is submitted that view expressed by the Rajsthan High Court is too technical and does not conform to the spirit of the Act of 1984[58]. Under section 9 (1) of the Act the Family Court is free to lay down its own procedure, subject to the rules made by the High Court in this behalf. Even though by virtue section 10 (1) of the Act of 1984 provisions of Code of Civil Procedure are made applicable but that does not "prevent a family court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceeding or at the truth of the facts alleged by one party and denied by the other"[59]. Moreover, a party is not entitled as a matter of right to be represented by a legal practitioner.[60] In these circumstances, the family court, rather than

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57 A.S. Gouri V. B.R. Satish, II (1991) DMC 350 ; See also Shyni V. George , AIR 1997 Ker. 231.

58 In the objects and reasons for exacting the Act of 1984 it ha been mentioned that several association of women and other organization had urged the government to set up family courts... " where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated", Quoted in K.A. Abdul Jaleel v T.A. Sahida, AIR 1997 Ker. 269 at 272.

59 S. 10 (3) , Family Court Act, 1984.

60 S. 13 ibid.

refusing to entertain a petition u/s 27 of the Act of 1955, should guide the parties to file a suit by filing a complaint or treat the petition as a plaint under section 7 of the Act of 1984.

Scanning the provision of section 27 of the Act of 1955, it becomes amply clear that its preview is narrower since it covers only that properly which is presented "at or about the time of marriage" and which may "belong jointly to both the husband and wife." On the other hand, it can be invoked only when a petition for a substantive relief is pending before the court. At best, it can help the wife if the span of marriage is comparatively short.

If we look towards the development of English Law, it seems to have developed in two phases. In the first phase, the law recognized the separation of property norm and awarded maintenance to the wife to compensate her contributions towards the family. Since the husband was the breadwinner, all the property that was purchased during marriage belonged to him. It was only after the Second World War that wife's contributions in the purchase of ' family assets' were recognized. Starting form Re Roger's Questions[61] in 1948, and ending with Hazel v Hazel[62] the Court of Appeal in numerous decisions recognised her active participation in the acquisition of 'family assets', when ultimately the Parliament intervened by passing the matrimonial Proceeding and Property Act, 1970.

In the second phase, the emphasis had shifted form periodical payments to once for –all settlement between the spouses. The purpose of lump sum and property settlement is that

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61 (1948) I All E.R. 328.
62 (1972) I W.L.R. 301.

this issue should be made to settle in such a way that there is a minimum possible dependence of one spouse upon the other. For instance, in O'D v. O'D.,[63] it was argued on behalf of the husband that it was appropriate to raise the periodical payments and reducing the lump sum. Holding that periodical payments alone would not do justice, Ormrod, L.J., quipped:[64]

> " Moreover, the court cannot over lock that as periodical payments case on remarriage an order of this size must be very strong disincentive, if not a prohibitive, to remarriage to this comparatively young women. She requires an adequate capital sum over and above the house."

One reason why it should be done so is the realization that a continuing financial relationship after the dissolution of marriage is not helpful in the emotional rehabilitation of the divorced couple. It creates rather a feeling of antagonism.[65] On the other hand, a long-term burden on the husband might militate against the stability of his second marriage. It also helps to remove bitterness that is often attendant on periodical payments.[66] Once made, the parties can regard " the book as closed"[67]. In periodical payments emotional element also comes to the fore. [68] Animosities that otherwise would

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63 (1975) 3 W.L.R. 308.

64 Id., at p. 315.

65 See Margaret Puxon, "the Family and the Law: the Laws of Marriage, Separation and Divore", (1967), at p. 17.

66 It is not that only in a country with meager resources , the enforcement of a maintenance award is difficult. Even in affluent societies , it is very diffucult to exact payment from the ex-husband. In a written answer the Secretary of State for social Services in England has stated that in 1979 £ 72 million were spent to recover 20 million from ex-husbands, see Carol Smart, "Regulating Families or Legitimating Patriarchy? Family Law in Britain," (1982) 10 Int. Jour. Of the Soc. Of Law; at p. 146, n. 9.

67 Per Lord Dinning , M.R. in Wachtel v. Wachtel, (1973) Fam. 72, at p. 96.

68 Edward Pokorny who was the 'Friend of the court' for Circuit Court for the country of Wayne, in the State of Michigan, states that generally the lawyers and the alimony-payers think that (contd.)

have burnt out with the passing of time are rekindled each time a check is mailed. The wife, on the other hand by, by reason of being dependent upon the divorced husband is encouraged to remain idle, when she would have been much happier and lead a fuller life had she become independent and taken employment instated of sitting at home and brooding over the past.[69] It is for this reason that an alimony recipient wife is sometimes termed as a "parasite", or an "alimony drone" sitting "upon her powdered bum" expecting " a bread ticked for life."[70]

Now, in the changed social and economic set-up, when opportunities for self support are becoming wider and wider, the traditional theory under which support was to be granted until death or remarriage is giving place to a new theory called "rehabilitative theory."[71]

It has been seen that the provisions regarding disposal of property under section 27 of the Hindu Marriage Act, section 42 of Parsi Marriage and Divorce Act and section 3 (1) of Muslim Women (Protection of Rights on Divorce) Act, 1986 are inadequate to deal with the property adjustment of spouses on divorce. The ambit of these provisions is limited to the dowry that a wife received at the time of marriage. When the marriage is dissolved, mainly, the court

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the word "alimony" contains " a sinister idea that it relates solely to the supported worthy and unworthy ex-wives" , in "Practical Problems in the Enforcement of Alimony Decrees", (1939), 6 Law and Contemp. Probs, 274, see also C.G. Peele , "Social and Psychological Effects of the Availability and the Granting of Alimony of the spouses", (1939) 6 Law and contemp. Probs. 283.

69 See Margaret Puxon , supra note , at p. 177. Sec also C.G. Peele, supra note, at p. 202.

70 Katherine O'donovan " Should all Maintenance of Spouses be abolished" ? (1982) 45 M.L.R. 424 at p. 427.

71 See generally J. Thomas Oldham, " the Effect of Unmarried Cohabitation by a Former Spouse upon his or her Right to continue to receive Alimony," (1978-79) 17 J.F.L. 249.

may be faced with various types of situation:

1. Firstly where two people have a modest start with little or nothing except their earning capacities and founding a family and building by their own efforts. In such cases the court may divide the family property on ground of equal partnership.[72]
2. Secondly, the parties did not have a modest start, but one or other or perhaps both spouses may bring into the marriage substantial capital assets (the dowry given to the wife at the time of marriage may be said to be a capital asset brought by the wife) or attain during marriage by inheritance or gift. The wife may contribute in terms of money in acquiring family assets or contribute by her sweat and toil. Or, the property of one may be sold in order to acquire another property[73] or is invested in a business venture. On divorce total net assets may be divided by **pro-rata contribution.**
3. Thirdly, the parties set up a matrimonial home with the dowry brought by the wife and both of them acquire assets like matrimonial home and other durable consumer goods and the wife contributes by paying the instalments from her own income or freeing the husband for paying the instalments by running the household from her own income. In such cases, apart from her dowry, the wife may be entitled in equal share with the husband in the

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72 For English cases see for instance, Watchel V. Watchel, (1973) fam. 72; Potter V Potter, (1982) I WLRI.

73 See for instance K.A. Abdul Jeleel V. T.A. Sahida, AIR 1997 Ker 269 (DB), where the husband purchased property by raising funds form the sale of ornaments of the wife.

acquisitions. Even in the cases, where a non working wife contributes in the family by her thrift and skill and helps the husband indirectly in the acquisition of family assets or building a business, she would be entitled to an equal share in the net assets. The English Courts seem to have accepted **"contribution theory."** The wife is regarded as earning a share in family assets by her contribution to the family welfare over a period rather than a mere fact of marriage.

4. Fourthly, if the divorce takes place after a short period, the parties should be placed in a position where they would have been had the marriage not taken place. For instance, the wife may be given the property that was given to her by her parents. The Court may also inquire into existence of any anti-nuptial or post-nuptial settlements on the parties whose marriage is before the court. The power of the court may not extend to out-and-out gifts, it will cover the case of creation of a trust.

Thus, there may be numerous situations that the court may face while making a property distribution order. In above situations we have only considered the interest of the parties to marriage, but the court should not make any order that will act towards the detriment of children and put them in a worse position than they would be in if the marriage had not been dissolved. Therefore, the interest of the children will have to be considered in conjunction with the interest of the spouses.

Now, for making a just and equitable distribution of property of the spouses, till an amendment is effected in the matrimonial

statutes, we can make use of already existing provision under section 7 of the **Family Courts Act** conferring jurisdiction on the Family Court deciding disputes relating to property of the spouses. The Act was passed in 1984 with the avowed objective to adopt an approach radically different form that adopted in ordinary civil proceedings. But unfortunately, it has yet to be enforced throughout the country. The Family Courts are established only in some metropolitan areas in the country. Under section 3 the State Government after consultation with the High Court to establish a Family Court----

(a) for every area in the state comprising a city or town whose population exceeds on million;

(b) for such other areas in the states it may deem necessary.

It may be noted that in case (a) above it is obligatory on the State Government to establish a family court whereas in case (b) it is optional. So, it is hoped that to ameliorate the sufferings of warring spouses the family courts are established as soon as possible.