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FAMILY LAW AND SUCCESSION

*Virendra Kumar**

I INTRODUCTION

THE SURVEY of "Family Law and Succession" for the year 2006 has been reasonably productive, inasmuch as it leads to the exploration of some relatively new areas of concern through judicial intervention. Issues of inter-caste marriages, mandatory registration of marriages, tribal women marrying non-tribal men, irretrievable breakdown of marriage, concept of notional partition, and the respective ambits of sub-sections (1) and (2) of section 14 of the Hindu Succession Act of 1956, being some of the important areas.

On the issue of inter-caste marriages, it has been possible to show how, in the face of traditional inertia that vehemently resisted the proliferation of inter-caste marriages in India, the Supreme Court in *Lata Singh* v. *State of UP*[1] (*per* Ashok Bhan and Markandey Katju JJ) has dealt with the problem. The apex court has eventually issued a judicial directive to all concerned in the administration of justice, which promotes national integration by effectively being an antidote to the caste system in India. For the full realization of this objective, however, it has been suggested that the enactment of the Hindu Codes should be treated merely as a precursor to the Uniform Civil Code as envisaged under the Constitution of India, and not as an end in itself.

The issue of desirability of going in for mandatory registration of marriages has been fully explored by the Supreme Court in *Seema* v. *Ashwani Kumar*[2] (*per* Arijit Pasayat and S.H. Kapadia, JJ) by invoking the concept of 'vital statistics' as reflected in entry 30 read with entry 5 of list III (concurrent list) of the Seventh Schedule of the Constitution. The court sees the provision of 'registration of marriages' as a part of 'vital statistics', as important as the registration of births and deaths, and, therefore, it has prompted the legislature to go in for the enactment of requisite laws on this count, and that too in a time-bound manner, in the light of the guidelines evolved by it.

* LL.M., S.J.D. (Toronto, Canada), UGC Emeritus Fellow (2002-2004). Former Professor & Chairman, Department of Laws; Dean, Faculty of Law; and Fellow, Panjab University, Chandigarh 160014 INDIA.

1 AIR 2006 SC 2522; see, section II: INTER-CASTE MARRIAGES IN INDIA: AN ANTIDOTE TO CASTE SYSTEM, *infra*.

2 AIR 2006 SC 1158; see section III: MANDATORY REGISTRATION OF MARRIAGES: A FUNCTIONAL NECESSITY, *infra*.

In *Anjan Kumar* v. *Union of Indian and Others*[3] (*per* H.K. Sema and Dr. A.R. Lakshmanan, JJ), the Supreme Court has addressed the issue of status of the child born out of the marriage between a tribal woman and non-tribal man, by raising a poser: Whether such a child could claim the status of scheduled tribe for the purposes of availing benefits guaranteed to the members of the scheduled tribe under the relevant provisions of the Constitution of India. The court resolved the issue on the rational basis by emphasizing that in order to claim such a status legitimately "one must show that he/she suffered disabilities – socially, economically and educationally cumulatively."

On the touchstone of this principle, in the case where a tribal man marries a non-tribal woman (forward class), their offshoots would obviously attain the tribal status, but the converse would not be true.

A three-judge bench of the Supreme Court in *Naveen Kohli* v. *Neelu Kohli*[4] (*per* B.N. Agrawal, A.K. Mathur, and Dalveer Bhandari, JJ), while reversing the decision of the Allahabad High Court on consideration of the totality of facts, has taken the opportunity to recommend the Union of India to seriously consider amending the Hindu Marriage Act of 1955 for incorporating irretrievable breakdown of marriage as "a ground for the granting of divorce." Such a recommendation is born out of the exploration of the concept of matrimonial cruelty, connoting a situation wherein matrimonial relationship has ceased to exist *de facto*, and, therefore, there is no sense in maintaining the same *de jure*. In this context it has been suggested that, following the English law, the theory of irretrievable breakdown of marriage should be made the *sole* ground for granting of divorce, and not just *a* ground. Moreover, the reversal of the high court judgment has been done not merely by reason of authority of the Supreme Court but by the authority of reason: by analyzing the facts of the case in the light of the "settled position of law."

The concept of notional partition is implicit under section 6, read with explanation 1 appended to it, of the Hindu Succession Act, 1956 (as it stood prior to the amendment by the Hindu Succession (Amendment) Act, 2005): it helps in crystallizing 'the interest of the deceased in *Mitakshara* coparcenary. In *Anar Devi and Others* v. *Parmeshwari Devi and Others*[5] (*per* B.N. Agrawal and P.P. Naolekar, JJ), the Supreme Court, while reversing the judgment of the high court, has put the whole concept of notional partition in proper perspective by observing: "The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs through all its stages." "All the consequences which flow from a real partition have to be logically worked out, which means the share of the heirs must be ascertained on the basis that

3 AIR 2006 SC 1177; see section IV: TRIBAL WOMAN MARRIED TO NON-TRIBAL MAN: STATUS OF THEIR CHILDREN, *infra*.

4 AIR 2006 SC 1675; see, section V: DISSOLUTION OF MARRIAGE: A SHIFT FROM FAULT TO IRRETRIEVABLE BREAKDOWN OF MARRIAGE, *infra*.

5 AIR 2006 SC 3332; see section VI: THE CONCEPT OF NOTIONAL PARTITION: ITS FUNCTIONAL OBJECTIVE, *infra*.

they had separated from one another and had received a share in the partition which had taken place during the lifetime." This judgment clearly demonstrates, how, on the one hand, the concept of notional partition defeats the principle of survivorship under certain stipulated conditions by crystallizing the undivided interest of the deceased as his share, and then making that share devolve by succession on the preferential heirs mentioned in class I of the schedule; on the other hand, it leaves the other incidents of coparcenary completely "undisturbed."

Section 14 of the Hindu Succession Act, 1956, which is indeed a measure of social reform, is somewhat problematic both in terms of construction and application of its two sub-sections (1) and (2) to analogous cases. The Supreme Court in *Sadhu Singh* v. *Gurudwara Sahib Narike*[6] has dealt with this problem, showing, how the 'property', emanating from any specified source or "in any manner whatsoever," in which a female Hindu is given absolute or full right by disregarding the recital of the instrument [effect of sub-section (1)], should be treated restrictively in terms of the restrictive recital of the same instrument [effect of sub-section (2)]? The court has crystallized the following "essential ingredients" that would determine whether sub-section (1) of section 14 of the Act would come into play: The antecedent of the property, the possession of the property as on the date of the Act, and the existence of a right in the female over it, however limited it may be. In the light of this analysis, the Supreme Court concludes:[7]

> What emerges according to us is that any acquisition of possession of property (not right) by a female Hindu after the coming into force of the Act, cannot normally attract Section 14(1) of the Act. It would depend on the nature of the right acquired by her. If she takes it as an heir under the Act, she takes it absolutely. If while getting possession of the property after the Act, under a devise, gift or other transaction, any restriction is placed on her right, the restriction will have play in view of Section 14(2) of the Act.

In view of this clear holding, the Supreme Court has supplied the requisite correction to the honest mistake made by the high court in reversing the decision of the lower appellate court, and herein lies the distinctive contribution of the apex court in this judgment.

II INTER-CASTE MARRIAGES IN INDIA: AN ANTIDOTE TO CASTE SYSTEM

With the increasing rigidity of the caste system in India, there has been a corresponding increase in the restrictions on inter-caste marriages. However,

6 AIR 2006 SC 3282; see section VII: SECTION 14 OF THE HINDU SUCCESSION ACT, 1956: AMBIT OF ITS SUB-SECTIONS (1) AND (2), *infra*.

7 *Id.* at 3287.

in the course of evolutionary process, some differentiations developed that divided inter-caste marriages into different categories. Under the traditional *Shastric* law, as modified by customs or usages, the two broad categories emerged, namely, *anuloma* and *pratiloma* marriages.

Anuloma marriages imply those that take place between a male of a superior caste (say, a *Kshatriya*) and a woman of an inferior caste (like a *Vaishya*). Such marriages were allowed, but limited by discriminatory rules in the realm of succession to property.

Pratiloma marriages, on the other hand, are those marriages that are established between a woman of superior caste and a man of inferior caste. Such marriages were altogether forbidden, inasmuch as even no rites were prescribed for the solemnization of such marriages. The issue of such a marriage was considered a child of an unlawful union!

Realizing that caste system in India was a curse on the nation as it proved divisive instead of integrating society, it needed to be destroyed sooner than later. In this respect, mention may be made of at least two legislative attempts that were made earlier to promote inter-caste marriages. One was the Special Marriage Act as amended by the Act of 1923, which enabled persons belonging to different castes validly to marry. Another is the Hindu Marriage Validity Act, 1949, which conferred validity on inter-caste marriages with retrospective effect.

Notwithstanding these relieving and reformative measures through statutory enactments, followed by the constitutional commandment for creating casteless society, the sway of traditional inertia seems to continue to be in full swing even in the 21st century India! The newspaper reports are replete with the stories of 'honour killing' of such persons who dare to undergo inter-caste or inter-religious marriage by defying the custom of the community. Although there is nothing 'honourable' in such killings, and yet such instances are acquiesced in or subtly approved of by the people in the name of avenging the injured feeling of the so-called 'superior' or 'higher' caste.

However, inter-caste marriages become the matter of utmost serious concern when the state, who is constitutionally committed to create a new social order irrespective of religion, race, caste, etc., becomes a participant in directly discouraging the inter-caste marriage. This is instanced by *Lata Singh* v. *State of U.P.*,[8] in which the Supreme Court has reminded the state of its obligation under the law that tends to encourage the national integration through inter-caste marriages.

The story of Lata Singh, pithily told, is that she, being major, married a man of her own will, whose caste (Gupta – a *Vaishya*) is lower to that of her own caste (seemingly Rajput – a *Kshatriya*), in the traditional hierarchy of castes. This infuriated her three brothers; their parents had already died. Apprehending danger to her life and the life of her husband, she went into hiding. One of her brothers lodged a missing person report with the police in

8 AIR 2006 SC 2522.

Lucknow. This led to the immediate arrest of her husband's two sisters, husband of one of the sisters, and one cousin brother.

Lata Singh (now Lata Gupta) eventually approached the National Human Rights Commission through Rajasthan Women Commission, Jaipur, for help. The National Commission, in turn, requested the Chief Secretary, Government of Uttar Pradesh, to investigate the whole case. His report revealed that "no offence was committed by any of the accused persons, and consequently the Sessions Judge, Lucknow enlarged the accused on bail," by observing that "neither was there any offence nor were the accused involved in any offence."[9]

Thereafter armed security was provided to her, and her statement was recorded by the chief judicial magistrate under section 164 of Cr PC, in which she clearly stated that she had married the person of her own free will. Despite this clear and categorical statement, the chief judicial magistrate passed the committal order "ignoring the fact that the Police had already filed a final report in the matter."[10] This followed the filing of the protest petition against the final report of the police "alleging that the petitioner was not mentally fit." However, on examination of the petitioner by the board of doctors of Psychiatric Centre, Jaipur, it was found that she "was not suffering from any type of mental illness."

Despite this development, the fast track court, Lucknow, before whom the case was pending, "issued non-bailable warrants against all the four accused." This led Lata Singh finally to approach the Supreme Court under article 32 of the Constitution for the proctection of her fundamental right.

On perusal of the case history, the Supreme Court instantly found that "no offence was committed by any of the accused and the whole criminal case in question is an abuse of the process of the Court as well as of the administrative machinery at the instance of the petitioner's brothers who were only furious because the petitioner married outside her caste."[11] The Supreme Court felt "distressed to note that instead of taking action against the petitioner's brothers for their unlawful and high handed act, the police has instead proceeded against the petitioner's husband and his relatives."[12] This led the apex court to pass a judicial order:[13]

> We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is major, the couple are not harassed by any one nor subjected to threats or acts of violence either himself or at his

9 *Id*. at 2524 (para 8).
10 *Id*. at 2524 (para 9).
11 *Id*. at 2524 (para 15).
12 *Ibid*.
13 *Id*. at 2525 (para 17).

instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.

In the light of this background, the following comments may be offered. Since such marriages are usually solemnized under the Hindu Marriage Act, 1955, a clarification is required about the use of the term 'Hindu', which is found to be somewhat problematic. Under the provisions of this Act, any two Hindus, subject to fulfilling certain conditions, may solemnize their marriage.[14] Here the term 'Hindu', for the purpose of application of this Act, has been used in a wider context. It means not just Hindus in the traditional sense of the term, including Virashavas, Lingyats, or followers of the Brahmo, Prarthana or Arya Samaj,[15] but also persons who are Buddhists, Jains or Sikhs by religion.[16] The connotation of this term is further amplified by stating statutorily that this Act also applies to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion.[17] By virtue of this exclusion-definition, it means that the term 'Hindu' will include even those who are not just 'dissenters' or 'non-conformists' but also the ones who vehemently repudiate 'Hinduism' (to be read 'Brahmanism'). *Looked from this perspective, the term 'Hindu', seems to be a misnomer, because it does not denote any particular religion. It simply refers to a system of personal laws governing the matrimonial relations of all excepting the ones which are specifically excluded from the purview of this Act on account of religion.*[18]

However, the full legality and legitimacy shall be provided to all the inter-caste or inter-religious marriages once the Uniform Civil Code as envisaged under the Constitution is brought about. The enactment of the Hindu Marriage Act in 1955 is merely a precursor to the Common Civil Code, and not an end in itself.[19]

III MANDATORY REGISTRATION OF MARRIAGES: A FUNCTIONAL NECESSITY

India is a signatory to the Convention on Elimination of All Forms of Discrimination against Women, which was adopted by the United Nations General Assembly in 1979, and ratified on 9.7.1993. Under this convention, India agreed in principle that compulsory registration of marriages was highly desirable, nevertheless, she expressed reservation by stating that to go in for compulsory registration did not seem 'practical in a vast country like India with its variety of customs, religions and level of literacy.'

14 See The Hindu Marriage Act, 1955 (25 of 1955), s. 5.
15 *Id*., s. 2(1)(a).
16 *Id*., s. 2(1)(b).
17 *Id*., s. 2(1)(c).
18 See author's comment on *Lata Singh* in *The Sunday Tribune*, October 1, 2006, under the caption, "Caste no bar: Court fiat on inter-caste marriages timely,".
19 *Ibid*.

Notwithstanding this expressed reservation, the Supreme Court in *Seema* v. *Ashwani Kumar*[20] has "noted *with concern* that in large number of cases some unscrupulous persons are denying the existence of marriage [by] taking advantage of the situation that in most of the States there is no official record of the marriage."[21] To meet this malady, the Supreme Court has invoked the concept of 'vital statistics' as reflected in entry 30 read with entry 5 of list III (Concurrent List) of the Seventh Schedule[22] of the Constitution. The court sees the provision of 'registration of marriages' as a part of 'vital statistics', as important as the registration of births and deaths, and on this count the legislature both at the levels of center and state is empowered to enact laws. For prompting the legislature to move in this direction, the court has wished to evolve certain broad guidelines.

However, for laying down the suitable guidelines in the matter of registration of marriages on the basis of ground realities, notices were issued by the Supreme Court to the various states and union territories and to the Solicitor General of India with two-fold objective. One, for eliciting their views on the desirability of compulsory registration of marriages; two, for getting the status-report about the hitherto adopted legislative and administrative measures in the direction of registration of marriages.

On the issue of desirability, the Supreme Court has noted the response to the effect that "[w]ithout exception, all the States and the Union Territories indicated their stand to the effect that registration of marriages is highly desirable."[23] On the point of compulsory registration of marriages, however, the Supreme Court has further noted that in the opinion of the states and the union territories such a measure "would be a step in the right direction for the prevention of child marriages still prevalent in many parts of the country."[24]

From the compilation of the information received in respect of relevant legislation hitherto enacted by the states and union territories, the picture presented before the Supreme Court is as under: Most of the states have framed rules regarding registration of marriages but with varying degree of emphasis. The States of Andhra Pradesh,[25] Himachal Pradesh,[26] Karnataka,[27]

20 AIR 2006 SC 1158.

21 *Id.* at 1159 (para 3). Emphasis added.

22 Entry 5: Marriage and divorce; infants and minors; adoption; wills; intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.
Entry 30: Vital statistics including registration of births and deaths.

23 *Supra* note 20 at 1159 (para 3).

24 *Id.* at 1159 (para 4).

25 See, The Andhra Pradesh Compulsory Registration of Marriages Act, 2002.

26 See, The Himachal Pradesh Registration of Marriages Act, 1996.

27 See, The Karnataka Marriages (Registration and Miscellaneous Provisions) Act, 1976. Section 3 of the Act, read with Registration of Hindu Marriage (Karnataka) Rules, 1966, provide for compulsory registrtion of all marriage contracted in the State.

Maharashtra and Gujarat[28] provide for compulsory registration of marriages for all within their respective state territories.

Pursuant to the provisions of section 8 of the Hindu Marriage Act of 1955, the State of UP has framed the UP Hindu Marriage Registration Rules, 1973, and since then marriages are being registered under those rules.[29] However, according to the affidavit filed before the Supreme Court, the state government has announced a policy of compulsory registration of marriages by the panchayats, and maintenance of such records along with the record of births and deaths.[30]

Some Acts regulating marriages of the members of certain communities like Christians and Parsis provide for compulsory registration. The Indian Christian Marriage Act, 1972 makes it compulsory for the registration of marriages that are performed under the provisions of this Act. For instance, under this Act the relevant entries are made in the marriage register of the concerned church soon after the marriage, and the signatures are appended by the bride and the bridegroom, the official priest and the witnesses as a token of correctness of those entries. Likewise, the Parsi Marriage and Divorce Act, 1936, makes registration of marriages compulsory for all Parsis. In the territories of Goa, Daman and Diu, registration of marriages continues to be compulsory under the old Law of Marriages (articles 45 to 47) that came into effect way back in the year 1911.[31]

On all India basis, the Special Marriage Act, 1954, which applies to Indian citizens irrespective of religion, makes the registration of all marriages compulsory that are performed under this Act.

The States of Assam, Bihar, West Bengal, Orissa and Meghalaya appear to provide for voluntary registration of Muslim marriages.[32] Registration of marriages of the Hindus that are solemnized under the Hindu Marriage Act of 1955 is optional or voluntary, because the provision contained in section 8 of the Act dealing with registration clearly provides that non-registration of marriage will not affect its validity in any way. However, sub-section (2) of section 8 empowers the state governments to make rules with regard to

28 See, The Bombay Registration of Marriages Act, 1953 (applicable to Maharashtra and Gujarat).

29 *Supra* note 20, at 1159 (para 9).

30 *Id*. at 1159 (para 6).

31 The procedural aspects about registration of marriages are contained in articles 1075 to 1081 of the Portuguese (Civil) Code, which is the common civil code in force in the state. The Hindu Marriage Act of 1955 is not in force there since it has not been extended to the state either by the Goa, Daman and Diu Laws No. 2 Regulations, 1963 by which central Acts have been extended to the state after the liberation of the state.

32 See, *supra* note 20, at 1159 (paras 1 and 6), citing Assam Moslem Marriages and Divorce Registration Act, 1935; Orissa Muhammadan Marriages and Divorce Registration Act, 1949 and Bengal Muhammadan Marriages and Divorce Registration Act, 1876.

registration of marriages.[33] If the state government is of the view that such registration should be compulsory, it can so provide. In that event, the person contravening any rule shall be punishable.

In the State of Jammu and Kashmir, for the Hindus, who are governed by Jammu and Kashmir Hindu Marriage Act, 1980, at present no rules have been framed for registration of their marriages. However, the Act does empower the state government to make rules enabling the parties to have their particulars relating to marriage entered in such a manner as may be prescribed for facilitating proof of such marriages. As regards the Muslims, Jammu and Kashmir Muslim Marriages Registration Act, 1981, provides that marriages contracted between Muslims after the commencement of the Act shall be registered in the manner provided therein within 30 days from the date of conclusion of *Nikah* ceremony. However, this Act has not been enforced so far. The Christians in the State of Jammu and Kashmir are governed by the Jammu and Kashmir Christian Marriage and Divorce Act, 1957. This Act provides for the registration of marriages solemnized by the minister of religion and marriages solemnized by or in the presence of marriage registrar, without stipulating whether or not such a registration is compulsory.[34]

In the light of this presented picture, the Supreme Court has inferred that though most of the states have framed rules regarding registration of marriages, yet such a registration is not compulsory in several states. Compulsory registration of marriages would be "in the interest of society." "If the record of marriage is kept, to a large extent, the dispute concerning solemnization of marriages between two persons is avoided."[35] In this respect, the Supreme Court endorsed the view of the National Commission for Women, which contended that in most cases non-registration of marriages affects the women to a great extent compulsory registration of marriages would be of critical importance to various women related issues such as:[36]

(a) Prevention of child marriages and ensuring minimum age of marriage.
(b) Prevention of marriages without the consent of the parties.
(c) Checking illegal bigamy/polygamy.
(d) Enabling married women to claim their right to live in the matrimonial house, maintenance, etc.

33 For instance, the States of West Bengal, Haryana, Tripura, Pondicherry and the Union Territory of Chandigarh have framed rules for the registration of marriages: West Bengal Hindu Marriage Registration Rules, 1958, Haryana Hindu Marriage Registration Rules, 2001, Tripura Hindu Marriage Registration Rules, 1957 and Tripura Special Marriage Rules, 1989 under the Special Marriage Act of 1954, Pondicherry Hindu Marriage (Registration) Rules, 1969, and UT Chandigarh Hindu Marriage Registration Rules 1966. In Pondicherry, however, all sub-Registrars have been appointed under section 6 of the Indian Registration Act, 1908, as Marriage Registrar for the purposes of registering marriages. See *Seema*, at 1160 (paras 10-12).

34 See ss. 26 and 27 of the Act of 1957.

35 *Supra* note 20 at 1161 (para 15).

36 *Id*. at 1160 (para 13).

(e) Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husbands.
(f) Deterring men from deserting women after marriage.
(g) Deterring parents/guardians from selling daughters/young girls to any person including a foreigner under the garb of marriage.

Although registration of marriage *per se* is not the determinative factor regarding the validity of marriage, yet it gives rise to a rebuttable presumption of marriage. Stated conversely, "the presumption which is available from registration of marriage would be denied to a person whose marriage is not registered." Registration is of "a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered." In view of such manifest advantages, the Supreme Court has concluded that "we are of the view that marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable in their respective States where marriage is solemnized."[37] Accordingly, the court has directed all the states and the central government to take certain steps, which may be abstracted as follows:[38]

(i) The procedure for registration in the shape of appropriate rules should be notified by respective states within three months from today, that is from the date of the judgment - February 14, 2006 – by giving due notice to the public.
(ii) The officer appointed under the said rules of the states shall be duly authorized to register the marriages by incorporating all the necessary details.
(iii) The consequences of non-registration of marriages or for filing false declaration shall also be provided for in the said rules.
(iv) As and when the central government enacts a comprehensive statute, the same shall be placed before the Supreme Court.
(v) The counsels for various states and union territories shall ensure that the directions given by the court in this case are carried out immediately.

IV TRIBAL WOMAN MARRIED TO NON-TRIBAL MAN: STATUS OF THEIR CHILDREN

What is the status of the child born out of the marriage between a tribal woman and a non-tribal man? Whether such a child could claim the status of scheduled tribe for the purposes of availing benefits guaranteed to the

37 *Id.* at 1161 (para 17).
38 *Id.* at 1161 (para 18).

members of the scheduled tribe under the relevant provisions of the Constitution of India. This is the "sole question" that has come up for consideration before the Supreme Court in *Anjan Kumar* v. *Union of Indian and Others.*[39]

In the instant case the appellant is the son of a non-tribal man belonging to *Kayastha* community in the State of Bihar and a woman of Oraon tribe, which is recognized as a scheduled tribe in the State of Madhya Pradesh. The appellant had procured a scheduled tribe certificate on the ground that his mother belongs to the Oraon tribe and that his sub-caste is 'Oraon'.

However, when on the strength of this certificate the appellant sought the benefit reserved for the members of the scheduled tribe in civil services, he was denied of the same, because he could not be treated as a person belonging to the scheduled tribe. He was neither brought up in tribal environment and nor his father is a tribal to claim such a status.

The situation in this respect became somewhat peculiar when a circular (dated 4th March, 1975) issued by the Government of India, Ministry of Home Affairs, on the subject, "Status of children belonging to the couple one of whom belonging to Scheduled Castes/Scheduled Tribes," is brought on record. In this circular there is a clear stipulation to the effect that when a scheduled tribe woman marries a non-scheduled tribe man, the children from such marriage may be treated as members of the scheduled tribe community, if the marriage is accepted by the community and the children are treated as members of their own community. In fact, this was the major plank of the argument advanced on behalf of the appellant before the Supreme Court.

To cover up the proviso appended to the rule, namely, due acceptance of the marriage and children by the tribal community, it was contended that "the appellant used to visit the village during recess/holidays and [that] there was cordial relationship between the appellant and the village community, which would amount to acceptance of the appellant by the village community."[40]

The Supreme Court negated this plea on fact-matrix by pointing out that the marriage of the appellant's mother (a tribal woman) with his non-tribal father, undisputedly, was a "court marriage performed outside the village," in order to save themselves from "the wrath of the community of the village," and "the risk of being ostracized or excommunicated from the village community." All this is, in court's view, indicative of the fact that "there is no question of such marriage being accepted by the village community." Such a conclusion was reinforced by adding that after the court marriage, the couple "settled down" far away from the tribal community where their son, "the appellant," was "born and brought up in the environment for *forward community*, and did not suffer any disability from the society to which he belonged."[41] This factor of suffering disability in such terms as economic, educational and other

39 AIR 2006 SC 1177 at 1178 (para 4).
40 *Id*. at 1179 (para 7).
41 *Id*. at 1179 (para 7). Emphasis added.

backwardness constitutes the very basis of providing 'preferential treatment for the Scheduled Castes and Scheduled Tribes under Articles 341, 342, 15(4), 16(4) and 16(4A) of the Constitution'. "Therefore, the condition precedent for a person to be brought within the purview of the Constitution (Scheduled Tribes) Order, 1950," the Supreme Court emphasized, "one must belong to a tribe and suffer such disabilities wherefrom they belong."

The appellant in this case did not belong to the scheduled tribe in any conceivable sense, "considering the typical characteristics of the tribal including a common name, a contiguous territory, a relatively uniform culture, simplistic way of life, and a tradition of common descent."[42] "By no stretch of imagination, a casual visit to the relative in other village would provide the status of permanent resident of the village or acceptance by the village community as a member of the tribal community," the court inferred.[43] The appellant neither shared any characteristics of the tribal community, nor had he suffered any of their disabilities.[44]

Since the appellant had procured the tribal certificate by "misrepresentation of the facts," the Supreme Court had no difficulty in quashing and setting aside the same. Once the tribal certificate was held to be 'non-genuine', the court, following the catena of cases decided by the apex court itself,[45] dismissed the appeal "with costs."

The singular merit of the decision of the Supreme Court in *Anjan Kumar* lies in clearly articulating the principal basis for availing the concession granted constitutionally to the members of the scheduled tribe. "To sustain the claim," says the Supreme Court, "one must show that he/she suffered disabilities – socially, economically and educationally cumulatively."[46] On this count, the case where a tribal man marries a non-tribal woman (forward class), whose offshoots would obviously attain the tribal status, is clearly distinguishable. The principal basis, according to the court, must be borne in mind both by the government while framing rules for the grant of the scheduled tribe certificate, and the concerned authorities while issuing the certificates under those rules. The court has cautioned the government not to

42 *Id*. at 1179-1180 (para 9). In order to bring out the typical characteristics of a tribe, the Supreme Court cites the works of Jai Prakash Gupta, *The Customary Laws of the Munda and the Oraon*, and K.L. Bhowmic, *Tribal India: a Profile in Indian Ethnology*. Both these works have been quoted by the apex court in *State of Kerala* v. *Chandramohanan*, (2004) 3 SCC 429 at 432.

43 *Id*. at 1179 (para 7).

44 The Supreme Court has gone to the extent of adding that the "transplantation of the outsiders as members of the tribe or community may dilute their way of life." *Id*. at 1180 (para 9).

45 *Kumari Madhuri Patil* v. *Addl. Commnr., Tribal Development*, (1994) 6 SCC 241; *Director of Tribal Welfare, Govt. of A.P.* v. *Laveti Giri*, (1995) 4 SCC 32, *Punit Rai* v. *Dinesh Chaudharty*, (2003) 8 SCC 204; *Valsamma Paul (Mrs.)* v. *Cochin University and Others*, (1996) 3 SCC 545; *Murlidhar Dayandeo Kesekar* v. *Vishwanath Pandu Barde*, Supp (2) SCC 549; and *R. Chandevarappa* v. *State of Karnataka*, (1995) 6 SCC 309l, *id.*, at 1180-81 (paras 10, 11 and 13).

46 *Supra* note 39 at 1181 (para 15).

issue circulars on this subject by overlooking the relevant provisions of the Constitution. If this happens, then such circulars issued by the government from time to time would not be treated as "law within the meaning of Article 13 of the Constitution of India." Likewise, the court has exhorted the certificate issuing authorities by observing that "the concerned authorities, before whom such claim is made, is duty-bound to satisfy itself that the applicant suffered disabilities socially, economically and educationally before such certificate is issued."[47] "Any concerned authority issuing such certificates in a routine manner would be committing dereliction of Constitutional duty."[48]

V DISSOLUTION OF MARRIAGE: A SHIFT FROM FAULT TO IRRETRIEVABLE BREAKDOWN OF MARRIAGE

A three-judge bench of the Supreme Court in *Naveen Kohli* v. *Neelu Kohli*,[49] has reversed the decision of the Allahabad High Court on consideration of the totality of facts. While doing so, it has taken the opportunity to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 for incorporating irretrievable breakdown of marriage as "a ground for the granting of divorce."[50]

In this case the couple were married in the year 1975. Three children were born out of this union. The appellant filed a petition for divorce in the family court on ground of cruelty under the relevant provisions of the Hindu Marriage Act, 1955 (as amended). The trial judge, *inter alia*, framed the issues whether the respondent wife treated the appellant husband with cruelty by registering various criminal cases and publishing derogatory news items, and whether on such counts he was entitled to get a decree of dissolution of marriage.

On totality of evidence, the trial court came to a definite conclusion that the respondent wife had filed a large number of cases, both civil and criminal, against the appellant to harass him and get him tortured by the police. The trial court also found that the allegation of keeping a concubine could not be proved against the appellant. Finding that there was no possibility of reconciliation between the parties, the family court judge dissolved their marriage. While passing this order, he also granted permanent maintenance (though it was not asked) to the wife to the tune of five lakh of rupees as lump sum. However, on first appeal by the respondent wife, the decision of the family court was reversed by the division bench of the Allahabad High Court.

47 *Id*. at 1181 (para 15).
48 *Ibid*.
49 AIR 2006 SC 1675.
50 *Id*. at 1690 (para 96). For fructifying this recommendation, the bench directed that a copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India.

By way of special leave to appeal, the appellant approached the Supreme Court. Dalveer Bhandari J, (for himself and on behalf of B.N. Agrawal and A.K. Mathur JJ) noticed that both the parties had levelled allegations against each other. It also noticed the factor of separation for more than 10 years and the filing of a number of criminal cases by the wife against the husband, whereby "every effort has been made to harass and torture him and even to put the appellant behind the bars by the respondent." [51] "The appellant has also filed cases against the respondent," seemingly as a reactionary measure. Such a situation led the Supreme Court to closely examine the reasoning that made the high court to reverse the decision of the trial court.

"In the background of the facts and circumstances of this case," the apex court observed "that the approach adopted by the High Court in deciding the matter is far from satisfactory." In his analysis, Bhandari J showed how the high court completely ignored to consider "the repercussions, consequences, impact and ramifications of all the criminal and other proceedings initiated by the parties against each other in proper perspective."[52]

Thus, "looking to the peculiar facts of the case," "considered view" of the Supreme Court was that "the High Court was not justified in setting aside the order of the Trial Court." Consequently, it set aside the impugned judgment of the high court and directed that the marriage between the parties be dissolved as per the provisions of the Hindu Marriage Act, 1955. Further, "to resolve the problem in the interest of all concerned," the Supreme Court directed the appellant to pay Rs. 25 lakhs to the wife towards her permanent maintenance.[53]

There are, at least three distinguishing features of this decision. Firstly, the presentation of facts has been made in such a manner as would make the facts to speak for themselves. Paragraph 14 of the judgment, for instance, says: "The respondent in her statement had admitted that she had opposed the bail of the appellant in the criminal case filed at the police station…."[54] The inference drawn from this statement is pointed and revealing: "This clearly demonstrates the respondent's deep intense feeling of revenge." This is further reinforced by another statement of fact: "… the respondent filed a complaint against the appellant's lawyer and friend alleging criminal intimidation which was found to be false."[55]

The second noteworthy feature of the judgment is that the reversal of the high court judgment has been done not merely by reason of authority of the Supreme Court but by the authority of reason and by analyzing the facts of the case in the light of the "settled position of law."

51 See, *id*. at 1680 (para 33).
52 *Id*. at 1688 (para 83).
53 In awarding such a sum of money, the court has taken into consideration the sound financial standing of the appellant. See, *id*. at 1690 (para 95).
54 *Id*. at 1677.
55 *Id*. at 1677-78.

The third distinctive contribution lies in its realization of the role of enunciating 'the law' under articles 141 and 142 of the Constitution. In this respect, the Supreme Court has expounded the concept of cruelty and its ever growing nuances in the light of juridical developments that have hitherto taken place in India and other common law jurisdictions, including England and Australia. Through their critical appraisal of all such developments, the Supreme Court has recommended for the formal adoption of the principle of irretrievable breakdown of marriage as 'a ground for the grant of divorce.'

The merit of the recommendation, however, is that it is borne out of the exploration of the concept of matrimonial cruelty. In this respect, the court begins by taking note of the fact that 'cruelty' was introduced as a ground of divorce under the Hindu Marriage Act, 1955, by the amendment of 1976.[56] As expounded by the Supreme Court, cruelty means such a conduct "as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent."[57] In its application, however, the question that often comes to the fore is, "whether the appellant's petition based on the ground of cruelty deserves to be allowed or not." On this count, the Supreme Court has examined the position both under English law and Indian law.

The English law seems to have dealt with the problem of balancing. On the one and there was a need to reduce the rigour of the concept of cruelty, which required "wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, or as to give rise to reasonable apprehension of such a danger,"[58] and/or the standard of proof that required the petitioner in a matrimonial petition to establish his case "beyond a reasonable doubt."[59] On the other hand, it was also considered desirable not to open the door of cruelty "too wide", "where the institution of marriage itself is imperiled."

On the substantive concept of cruelty, the English law has gone to the extent of laying down that it is "impossible to give a comprehensive definition of cruelty," which is "equally applicable in all cases except the requirement that the party seeking relief must show actual or probable injury to life, limb or health."[60] On the standard of proof, the change that has come about is that in the realm of matrimonial causes, "the case like any civil case may be proved by a preponderance of probability."[61]

56 Prior to 1976 amendment, it was only a ground for claiming judicial separation under S. 10 of the Act of 1955.

57 *Id*. at 1680 (para 37), citing *N.G. Dastane* v. *S. Dastane*, AIR 1975 SC 1534.

58 *Id*. at 1680 (para 39), citing D. Tolstoy, *The Law and Practice of Divorce and Matrimonial Causes*, 6th ed., at 61

59 *Id*. at 1680 (para 41), citing Lord Denning, L.J., in *Kaslefsky* v. *Kaslefsky*, (1950) 2 All ER 398, at 403. This was the view taken at one time under English law.

60 *Id*. at 1681 (para 44), citing Lord Reid in *Gollins* v. *Gollins*, (1964 AC 644: (1963) 2 All ER 966.

61 *Id*. at 1681 (para 41), citing the view of House of Lords by majority in *Blyth* v. *Blyth*, (1966) All E.R. 524, at 536. Similar view has been taken by the High Court of Australia in *Wright* v. *Wright*, (1948) 77 CLR 210, *id*. at 1681 (para 42).

In this backdrop, the Supreme Court has recapitulated the principles of matrimonial cruelty that have hitherto crystallized in the Indian law. The first thing to be noticed is that matrimonial cruelty does not necessarily mean 'physical violence'. "Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of husband, and assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty."[62] Thus, cruelty may be "mental or physical," "intentional or unintentional."[63] "The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions and their culture and human values to which they attach importance."[64] "Each case has be to decided on its own merits."[65] That is, "the court should not search for standard in life."[66] "It would also be better if we less depend upon precedents," because "the categories of cruelty are not closed."[67] "What is cruelty in one case may not amount to cruelty in another case."[68] This implies that the concept of cruelty is subjective in nature. Its effect "varies from individual to individual, also depending upon the social and economic status to which such person belongs."[69] In this respect, however, cruelty must be distinguished "from the ordinary wear and tear of family life."[70] "It cannot be decided [solely] on the basis of the sensitivity of the petitioner, and has to be adjudicated on the basis of the course of conduct which would, *in general*, be dangerous for a spouse to live with the other."[71] It should be "grave and weighty." In other words, before a conduct can be called 'cruelty', "it must touch a certain pitch of severity."[72]

On the whole, the approach should be "to take the cumulative effect of the facts and circumstances emerging from the evidence on record, and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other."[73] In this respect, however, care should be taken that in matrimonial life cruelty may be of "unfounded variety, which can be subtle or brutal." "It may be by words, gesture or by mere silence, violent or non-violent."

62 *Id*. at 1681 (para 45), citing *Sirajmohmedkhan Janmohamadkhan* v. *Hafizunnisa Yasin-khan*, (1981) 4 SCC 250.
63 *Id*. at 1681 (para 46), citing *Shoba Rani* v. *Madhukar Reddi*, (1988) 1 SCC 105.
64 *Id*. at 1682 (para 47).
65 *Ibid*.
66 *Id*. at 1682 (para 48, citing *Shoba Rani*, *supra* note 63).
67 *Ibid*, citing Lord Denning in *Sheldon* v. *Sheldon*, (1966) 2 All ER 257 (CA).
68 *Id*. at 1682 (para 49), citing *V. Bhagat* v. *D. Bhagat*, (1994) 1 SCC 337.
69 *Id*. at 1683 (para 54), citing *Gananth Pattnaik* v. *State of Orissa*, (2002) 2 SCC 619.
70 *Id*., at 1683 (para 51), citing *Savitri Pandey* v. *Prem Chandra Pandey*, (2002) 2 SCC 73.
71 *Ibid*. Emphasis added.
72 *Id*. at 1686 (para 67).
73 *Id*. at 1683-84 (para 55), citing *Parveen Mehta* v. *Inderjit Mehta*, (2002) 5 SCC 706. See also *Chetan Dass* v. *Kamla Devi*, (2001) 4 SCC 250, cited at 1694 (para 57) and *Shobha Rani* v. *Madhukar Reddi*, *supra* note 63 cited at 1685 (para 65).

In the matters of proof, a three-judge bench of the Supreme Court in *A. Jayachandra* v. *Aneel Kumar*,[74] seemingly following English law, has held that the concept, a proof beyond reasonable doubt, is to be applied to criminal trials, and not to civil matters, and certainly not to matters of such delicate personal relationship as those of husband and wife.

In the light of such principles of matrimonial cruelty as crystallized above, Bhandari J in *Naveen Kohli* has opined that in cases in which the parties are caught in long-drawn litigation,[75] filing criminal cases against each other,[76] or otherwise have crossed "the point of no return," with no "workable solution" in sight,[77] and the parties "cannot at this stage live together by forgetting their past as a bad dream,"[78] or their situation is that of "insoluble mess,"[79] evidenced by long separation,[80] it is better to dissolve such marriages. In fact, it was in view of these human factors that the marriage of the appellant was dissolved by the court in the instant case.

It might be sheer coincidence that on the same day of this decision another bench of two judges of the Supreme Court consisting of Mrs. Ruma Pal and Dr. A.R. Lakshmanan JJ in *Vinita Saxena* v. *Pankaj Saxena*,[81] by reversing the decision of the Delhi High Court, dissolved the marriage of the appellant wife by taking note of the following human aspects:[82]

- The appellant was 24 years of age when she got married.
- The marriage lasted for four to five months only when she was compelled to leave the matrimonial home.
- The marriage between the parties was not consummated as the respondent was not in a position to fulfil the matrimonial obligation.
- The parties have been living separately since 1993 – 13 years have passed they have never seen each other.
- Both the parties have crossed the point of no return.
- A workable solution is certainly not possible.
- Parties at this stage cannot reconcile themselves and live together forgetting their past as a bad dream.

74 (2005) 2 SCC 22.
75 *Id*. at 1684 (para 63), citing *V. Bhagat v. D. Bhagat, supra* note 68.
76 *Id*. at 1684 (para 61), citing *Swati Verma v. Rajan Verma*, (2004) 1 SCC 123.
77 *Id*. at 1686 (para 69), citing *Durga P. Tripathy v. Arundhati Tripathy*, (2005) 7 SCC 353.
78 *Ibid*.
79 *Id.* at 1686 (para 70), citing *Lalitha v. Manickswamy*, I (2001) DMC 679 SC.
80 See, *id*. at 1684 (paras 58, 59 and 60), citing *Sandhya Rani* v. *Kalyanram Narayanan*, (1994) Supp 2 SCC 588 (living separately for the last more than three years), *Chandrakala Menon* v. *Vipin Menon*, (1993) 2 SCC 6 (living separately for many years); and *Kanchan Devi* v. *Promod Kumar Mittal*, (1996) 8 SCC 90 (living separately for more than 10 years).
81 AIR 2006 SC 1662.
82 *Id*. at 1674 (para 50).

- The situation between the parties would lead to a irrefutable conclusion that the appellant and the respondent can never ever stay as husband and wife and the wife's stay with the respondent is injurious to her health.
- The appellant has done her Ph.D. The respondent, according to the appellant, is not gainfully employed anywhere.
- As a matter of fact, after leaving his deposition incomplete during trial, the respondent till date has neither appeared before the trial court nor before the high court.

These human aspects of life, in the opinion of the division bench, "give sufficient cogent reasons" "to allow the appeal and relieve the appellant (wife) from shackles and chain of the respondent (husband) and let her live her own life, if nothing else but like a human being."[83] In its view, "the orders of the Courts below have resulted in grave miscarriage of justice to the appellant who has been constrained into living with a dead relationship for over 13 years."[84]

A comparison of these two judgments would show that the end result and the reasons to reach that result were about the same in both the cases except that in *Vinita Saxena*, the court felt satisfied by reversing the decision of the courts below under article 136 of the Constitution; whereas in *Naveen Kohli*, the court proceeded further and made its concern to evolve or mature a principle in terms of articles 141 and 142 of the Constitution, which is approximating to, what is called, the theory of irretrievable breakdown of marriage.

Making a couple of small observations here would be in order. One is that, what is clearly intended by the apex court in *Naveen Kohli* is that the *express* introduction of irretrievable breakdown principle, as has been done under the English law, will certainly be much more conducive and functional than merely relying on the *implied* principle. For the efficacy and instant objectivity, the administration of justice on the basis of clearly codified law is certainly far superior to the adjudication from case to case on the basis of either analogous law or the residuary source of law; namely, justice, equity and good conscience.[85]

The second observation is that hitherto adopted basis for resolving matrimonial conflict problems under the Hindu Marriage Act is, what is termed as, fault theory, which is essentially based on adversarial model of justice. The courts under this theory provide justice to the so-called 'innocent' spouse against the 'guilty' spouse. However, on the other hand, the irretrievable breakdown theory is based on non-adversarial model, implying that the critical consideration for granting divorce is not, whether the petitioner himself or

83 *Id.* at 1674 (para 51).
84 *Id.* at 1674 (para 52).
85 See, author's comments in *The Sunday Tribune*, May 21, 2006, on *Naveen Kohli* under the title, "See the rift, not the fault: Irretrievable breakdown of marriage as ground for divorce."

herself is guilty of some matrimonial offence but, whether the marriage has broken down irretrievably, that is, beyond redemption. This shows that both the theories operate on entirely different planes. The piquant difference between the two has been brought out in the Report of the Moral and Social Welfare Board of the Church of Scotland presented to the General Assembly on 2.5.1969, which, *inter alia*, states:[86]

> Matrimonial offences are often the outcome rather than the cause of the deteriorating marriage. An accusatorial principle of divorce tends to encourage matrimonial offences, increase bitterness and widen the rift that is already there. Separation for a continuous period of at least two years consequent upon a decision of at least one of the parties not to live with the other should act as the sole evidence of marriage breakdown.

Following the English law, therefore, the theory of irretrievable breakdown of marriage should be made the *sole* ground for granting of divorce, and not just *a* ground.

VI THE CONCEPT OF NOTIONAL PARTITION: ITS FUNCTIONAL OBJECTIVE

The concept of notional partition is implicit under section 6 of the Hindu Succession Act, 1956, as it stood prior to the amendment by the Hindu Succession (Amendment) Act, 2005. The provisions of section 6, dealing with devolution of interest in coparcenary property, provides that when a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a *Mitakashara* coparcenay property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act. To this provision is engrafted an important proviso, which provides that, if the deceased had left surviving him a female relative specified in class I of the schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in *Mitakshara* coaparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

For crystallizing 'the interest of the deceased in Mitakshara coparcenary,' the mechanism is provided in explanation 1 appended to the proviso, which states: "For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not." It is this mechanism, which inheres the concept of notional partition.

86 Cited in *Naveen Kohli*, *supra* note 49 at 1687 (para 76).

The instance of applying the concept of notional partition has arisen in *Anar Devi and Others* v. *Parmeshwari Devi and Others*.[87] The abstracted fact situation in this case is as follows: A male Hindu coparcener died intestate in the year 1989, leaving behind his two daughters and an adopted son. The daughters, in order to have their share in the patrimony, filed a suit before the sub-divisional officer, claiming two-third share therein. The trial court passed *ex-parte* decree for partition of one-third share of each one of the three heirs. Against this decree, when the matter was taken in appeal, the appellate authority remitted the matter as the decree was passed *ex parte*. Against the order of remand, the matter was taken to the Board of Revenue, which reversed the order of remand and restored the decree passed by the trial court after recording a finding that each of the plaintiffs was entitled to one-third share in suit properties. This decision was confirmed by the single judge of the high court, and on further appeal by the division bench. Finally the matter went to the Supreme Court by special leave to appeal. The division bench of the Supreme Court reversed the judgments of the courts below by allotting one-sixth share of the suit properties to each of the two daughters and the remaining two-third to the adopted son.

The courts below, including the high court, seemingly committed an error in wrongly applying the concept of notional partition. They did assume that under the concept of notional partition, partition did take place between the deceased and the other coparcener immediately before his death. But, having made this assumption, it seems, they had gone back on that assumption while determining the shares of the heirs; that is, they ascertained the respective shares of the heirs without reference to the outcome of the initial assumption whereby the deceased having died partitioned. This indeed is erroneous. Here, the Supreme Court supplied the requisite correction by relying upon the statement: "The assumption which the statute requires to be made is that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs through all its stages."[88] "All the consequences which flow from a real partition have to be logically worked out, which means the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime."[89]

In this respect, the Supreme Court has applied the classic principle, which tells how the statutory fiction involving the concept of notional partition is to be construed: "When a statute enacts that something shall be deemed to have been done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full

87 AIR 2006 SC 3332.

88 *Id*. at 3334 (para 10), by citing *Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum*, AIR 1978 SC 1239 at 1243.

89 *Ibid*.

effect must be given to the statutory fiction and it should be carried to its logical conclusion.[90]

Acting on this principle, the Supreme Court has applied the concept of notional partition to the suit properties, as if partition actually took place between the deceased and the adopted son immediately before his death. Accordingly, the adopted son would be entitled to one-half of the suit properties as a coparcener, and then the remaining one-half, which is the share of the deceased, would be divided equally amongst the three heirs including the adopted son and two daughters of the deceased, the preferential heirs mentioned in class I of the schedule. Thus, each would get one-third of the remaining one-half, which comes out to be one-sixth share of each. Herein it may be noticed that the adopted son got an enlarged share – one-half as a coparcener and one-sixth as an heir, whereas each daughter got only one-sixth in the capacity of an heir.[91] Accordingly, the Supreme Court allowed the appeal and set aside the impugned judgments, and suit for partition was decreed to the extent of one-sixth share of each of the two daughters and the defendants.

The value of this judgment lies in bringing out clearly the true import and implications of the concept of notional partition. Its prime purpose is that it defeats the principle of survivorship under certain stipulated conditions by crystallizing the undivided interest of the deceased as his share, and then making that share devolve by succession on the preferential heirs mentioned in class I of the schedule.[92] However, it does not affect the other incidents of coparcenary; they are left "undisturbed and the coparcenary can continue without disruption."

VII SECTION 14 OF THE HINDU SUCCESSION ACT, 1956: AMBIT OF ITS SUB-SECTIONS (1) AND (2)

The provisions of section 14 of the Hindu Succession Act, 1956, are indeed a measure of social reform. This is evident from the very short title appended to this section: "Property of a female Hindu to be her absolute property." How, in what manner, in what circumstances, and to what extent, this objective is to be achieved or fulfilled is provided under sub-section (1) of section 14 read with the explanation appended to it.

90 *Id*. at 3334 (para 9), citing *State of Bomaby* v. *Pandurang Vinayak Chaphalkar and Others*, 1953 (4) SCR 773, at 778, which quoted with approval the dictum of Lord Asquith in *East End Dwelling Co. Ltd.* v. *Finsbury Borough Council*, (1952) Appeal Cases 109.

91 However, the position would be entirely different after the amendment of the Hindu Succession Act, 1956 by the amending Act of 2005 – each would get one-third share of the suit properties.

92 *Supra* note 87 at 3333 (para 6), citing the *Treatise of Mulla, Principles on Hindu Law*, 17th ed., at 250: The concept of notional partition enables "succession to and computation of an interest, which is otherwise liable to devolve by survivorship, and for the ascertainment of the shares in that interest of the relatives mentioned in Class I of the Schedule."

Sub-section (1) stipulates that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. Added explanation to this sub-section expounds the ambit of 'property' referred to therein by stating that it "includes movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act."

However, sub-section (2) of section 14 seems to limit the sway of sub-section (1) instantly by providing categorically that "Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

A bare perusal of the explanation appended to sub-section (1) and sub-section (2) brings to the fore the problem of construction. The problem is, how the 'property', emanating from any specified source or "in any manner whatsoever," in which a female Hindu is given absolute or full right by disregarding the recital of the instrument [effect of sub-section (1)], should be treated restrictively in terms of the restrictive recital of the same instrument [effect of sub-section (2)]? Although this problem has already been sorted out through a series of judicial decisions, and the text book writers have crystallized the respective operative areas of the two sub-sections, the problem surfaced again before the Supreme Court in *Sadhu Singh* v. *Gurudwara Sahib Narike*.[93]

The facts of this case involve the story of a childless couple, Ralla Singh and his wife Isher Kaur. Ralla Singh, at the ripe age of 73, made a will in the year 1968 in respect of his self-acquired properties. In his will, he stated that all his properties, both movable and immovable, would go to his wife in the first instance, and after her death to his two nephews (his sister's sons), Sadhu Singh and Pritam Singh. To effectuate this objective, he at the end of the will appended a note to the effect that his wife after his death will not be entitled to mortgage or sell the properties during her life-time. However, after the death of her husband in 1977, she purported to gift those properties in favour of a Gurudwara in the year 1980, and after her death in 1996, the respondent also got the mutation done in the revenue record. The appellant challenged the deed of gift during the life time of widow in terms of the recitals in the will, and also prayed for the recovery of possession of properties after her death. In this context, the question arose, whether the widow was entitled to make the deed of gift, and if not, then as a corollary, whether the appellant was entitled to get the suit properties.

93 AIR 2006 SC 3282.

The trial court held that will propounded by the appellant was not genuine. This meant that Isher Kaur, after the death of her husband, took the properties as an heir, and by virtue of section 14(1) read with appended explanation, her interest in those properties was that of a full owner, and not as a limited owner. As such, she was fully competent to deal with the properties in any manner she likes, including the making of deed of gift in favour of a Gurudwara. Consequently, the appellant had no claim against the respondent.

On appeal, the lower appellate court found that the will was genuine, and also it was the last will and testament of the executor Ralla Singh. Accordingly the same was upheld. In terms of the will, the widow was entitled only to a life estate, and, therefore, had no right to transfer the properties by way of gift. This case is clearly covered by section 14(2) of the Hindu Succession Act of 1956, and, as such section 14(1) has no application for converting her limited interest in properties to absolute interest. Consequently, the appellant as the legatee under the will was held entitled to recover the possession of properties from the Gurudwara after the termination of the life estate of the widow, that is after her death. Thus, the trial court decree was reversed.

However, on second appeal, the high court reversed the decision of the lower appellate court, seemingly by applying the principle laid down by the apex court. By implication, thus, section 14(2) of the Hindu Succession Act, 1956 had no application for limiting widow's interest in the properties only to 'life estate.' That is, her limited interest got converted into full right in the properties, whereby she was entitled to dispose them in any way she liked. This prompted the appellant eventually to come to the Supreme Court in appeal. The Supreme Court, in turn, reversed the decision of the first appellate court. While reversing the judgment of the high court, the apex court, *inter alia*, stated at the very threshold:[94]

> The High Court, by what can even charitably only be called a *thoroughly unsatisfactory judgment*, reversed the decision of the lower appellate court. It did not strain its thought process. Purporting to apply the ratio of the decision of this Court in *V. Tulasamma v. V. Shesha Reddi*,[95] and *Raghubar Singh v. Gulab Singh*,[96] that Court held that section 14(1) of the Act applied to the case. It did not refer to the decisions relied on, on behalf of the appellant herein. Though it accepted the finding of the appellate court on the genuineness and due execution of the Will by Ralla Singh, it did not specifically deal with the question whether section 14(2) was attracted to the case. Thus, reversing the decision of the lower appellate court, the High Court dismissed the suit.

94 *Id*. at 3284 (para 2). Emphasis added.
95 (1977) 3 SCR 261.
96 AIR 1998 SC 2401.

While making these 'disapproving' observations, the concern of the Supreme Court was to locate the genesis of the 'misconception', 'misreading' or 'flaw' in the judgment of the high court that led to the reversal of the decision of the appellate court. On this count, the analysis of the Supreme Court may be abstracted as follows.

(a) The high court "accepted the finding of the appellate court on the genuineness and due execution of the Will by Ralla Singh."[97] That is, the finding of the first appellate court "has not been upset by the Second Appellate Court."
(b) If it is so, why the High Court "did not specifically deal with the question whether Section 14(2) of the Act attracted to the case"?
(c) This seems to be somewhat intriguing when it is noticed that the High Court, in fact, had "considered the Second Appeal on the basis that the Will has been executed and the property came to Isher Kaur."
(d) It appears, "what it [the High Court] has presumably held is that Isher Kaur had pre-existing right in the property and consequently the limitation placed on her rights in the Will, could not prevail in view of Section 14(1) of the Hindu Succession Act."
(e) But, in the given fact situation, the widow "had no pre-existing right [in the properties under her possession] as such." This is because the property in her possession was the separate property of her husband, who had disposed of the same through his Will, and she received the property under the Will and not as an heir to her husband, as would have been the case if he would have died intestate. This fact was not borne by the High Court while reversing the decision of the lower appellate court.
(f) It is indeed true that the widow had, "at best, only a right to maintenance and at best could have secured a charge by the process of court for her maintenance under the Hindu Adoptions and Maintenance Act in the separate property of her Husband."[98] "May be, in terms of Section 39 of the Transfer of Property Act, she could have also enforced the charge even as against an alienee from her husband."[99] But nothing of this sort had happened in this case.
(g) Under the circumstances, the Supreme Court seems to feel, what the high court should have done was not done at all: "Unlike in a case where the widow was in possession of the property on the date of coming into force of the Act in which she had a pre-existing right at least to maintenance, a situation covered by Section 14(1) of the Hindu Succession Act, if his separate property is disposed of by a

97 *Supra* note 93 at 3284 (para 2).
98 *Id.* at 3284 (para 2).
99 *Ibid.*

Hindu male by way of testamentary disposition, placing a restriction on the right given to the widow, the question whether Section 14(2) would not be attracted, was not considered at all by the High Court."[100]

(h) Instead, the high court "proceeded as if the ration of *V. Tulasamma* (supra) would preclude any enquiry in that line." This is where the major flaw seems to lie in the judgment of the high court.

In the light of this abstracted analysis, in the context of the will executed by the husband Ralla Singh, according to the Supreme Court, the question to be posed is: "What has he bequeathed to his wife and whether he had placed any restriction on her estate so bequeathed."[101] "The corollary would be whether the appellant is entitled to the decree sought for by him in the context of section 14(2) of the Hindu Succession Act."[102] Simply stated, the issue to be examined is, whether the widow would take only a restricted right in terms of the will, by reason of its squarely falling within the ambit of section 14(2) of the Hindu Succession Act, or her limited right would get enlarged into full right under section 14(1) despite the imposed restriction under the will.

Since the high court for its decision seemingly relied upon the ratio drawn from *V. Tulasamma* and *Raghubar Singh*, the Supreme Court closely perused the principle emanating from those cases in the light of their respective fact situations. In *V. Tulasamma*, the husband had died in the year 1931 in a state of jointness with his step-brother, leaving behind his widow Tulasamma. In 1944, she approached the court claiming maintenance against the step-brother of her deceased husband. Her claim was decreed. At the stage of execution of the decree, in 1949 a compromise was entered into, under which she was allotted the property to enjoy only a limited interest, with no power of alienation. Later on, after the coming into force of the Act of 1956, Tulsamma, the widow, alienated the property, which was challenged by Shesha Reddi on the ground that under the terms of compromise, she had only limited interest that did not permit her alienation of the property. This plea, however, was counteracted by the Supreme Court by holding that it was a case where Tulasamma possessed the property on the date of coming into force of the Act as limited owner having acquired the same by virtue of a compromise, and in the light of the explanation appended to sub-section (1) of section 14, it was a case to which section 14(1) applied, and section 14(2) could not be relied on to override the effect of section 14(1). Thus, the ratio of *Tulasamma*, according to the Supreme Court in *Sadhu Singh*, "has application only when a female Hindu is possessed of the property on the date of the Act under semblance of a right, whether it be a limited or a pre-existing right to maintenance in lieu of which she was put in possession of the property either directly or

100 *Ibid*.
101 *Id*. at 3288 (para 16).
102 *Ibid*.

constructively as on the date of the Act, though she may acquire a right to it even after the Act."[103]

The same was the position in *Raghubar Singh*, wherein the testamentary succession was before the Act. The widow had obtained possession under a will. A suit was filed challenging the will. Later, the suit was compromised because she had the pre-existing right to maintenance. However, the compromise sought to restrict the right of the widow. In this context, the court held that since the widow was in possession of the property on the date of the Act under the will *as of right*, and the compromise decree created no new or independent right, section 14(2) of the Act had no application; and by virtue of section 14(1) her limited right got matured into full right.

In contrast to the fact situations presented by *V. Tulasamma* and *Raghubar Singh*, the Supreme Court also examined the propositions laid by the apex court in *Mst. Karmi* v. *Amru & Others*,[104] *Bhura and Others* v. *Kashi Ram*,[105] and *Sharad Subramanyan* v. *Soumi Mazumdar and Others*.[106] In all these cases, since the legatee under the will did not have a pre-existing right in the property, the apex court held that she was not entitled to rely on section 14(1) of the Act of 1956 to claim an absolute estate in the property bequeathed to her and her rights were controlled by the terms of the will under Section 14(2).

In view of the contrasting ratios as propounded in earlier cases, the Supreme Court in *Sadhu Singh* spelled out the following "essential ingredients" or conditions that would determine whether sub-section (1) of section 14 of the Act would come into play:

(a) The antecedent of the property;
(b) the possession of the property as on the date of the Act, and
(c) the existence of a right in the female over it, however limited it may be.[107]

With this analysis, the Supreme Court concludes:[108]

> What emerges according to us is that any acquisition of possession of property (not right) by a female Hindu after the coming into force of the Act, cannot normally attract Section 14(1) of the Act. It would depend on the nature of the right acquired by her. If she takes it as an heir under the Act, she takes it absolutely. If while getting possession of the property after the Act, under a devise, gift or other

103 *Id*. at 3286 (para 11).
104 AIR 1971 SC 745.
105 (1994) 2 SCC 111,
106 JT 2006 (11) SC 535.
107 *Supra* note 93 at 3287 (para 11).
108 *Ibid*.

> transaction, any restriction is placed on her right, the restriction will have play in view of Section 14(2) of the Act.

The Supreme Court has further amplified the scope of section 14(2) in the light of the basic or fundamental right of a person to devise or bequeath his property. Section 30 of the Act reinforces the right of a person to dispose of his property through testamentary succession. When a person does that, a succession under the Act stands excluded and the property passes to the testamentary heirs as per the stipulations in the will, unless of course any condition therein found invalid. From this it is inferred that there is nothing in the Act that prevents a person to dispose of his property by providing, say, a life estate or limited estate for his widow. In fact such a provision is squarely protected by section 14(2), excluding the invocation of section 14(1) of the Act. For such an interpretation, the Supreme Court finds support in *Mayne on Hindu Law* (15th ed., at 1172), which sums up the legal position in this respect by stating:[109]

> Sub-section (2) of Section 14 applies to instruments, decrees, awards, gifts, etc., which create independent and new title in favour of females for the first time and has no application where the instruments concerned merely seek to confirm, endorse, declare or recognize pre-existing rights. The creation of a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in such a case.

After locating the respective ambits of sub-section (1) and sub-section (2) of section 14, the Supreme Court has found as a fact that Isher Kaur, the widow of Ralla Singh, received his properties under the will, and not as an heir. The testate succession opened in 1977 after the death of her husband, that is much after the coming into force of the Act of 1956. As per the will, she received only a life estate, which the testator was absolutely free to make without being prevented by any of the provisions of the Act of 1956. This meant the she did not hold those properties in terms of any pre-existing right, say, of maintenance, either directly or under a compromise decree. This singular fact situation, as distinguished from that of *V. Tulasamma,* precluded the application of sub-section (1) of section 14 of the Act. By reason of her limited interest in the properties in terms of the will, she was not entitled to alienate the same, because that would jeopardize the interest of the nephews under that very Will. "Thus understood," observes the Supreme Court, "it has necessarily to be held, as was held by the first appellate court, that Isher Kaur was not competent to gift away the properties in favour of the Gurudwara as she had done."[110]

Isher Kaur purported to give the properties in gift to Gurudwara in 1980, when she was the holder of life estate. The life estate continued till her death

109 *Id*. at 3288 (para 15).
110 *Id*. at 3289 (para 21).

in 1996. During this period it is possible to hold the gift as valid. Keeping this eventuality in view, the Supreme Court has held:[111]

> Even if the gift were to be treated as valid, the donee there-under cannot resist the claim for eviction by the legatees under the Will, the nephews of Ralla Singh, on the cessation of the life estate of Isher Kaur. Admittedly, that life estate has ceased and once it is found that the plaintiff has acquired a title to the property as a legatee under the Will, he would be entitled for and on behalf of himself and his brother to recover possession o the property from the Gurudwara in view of the death of Isher Kaur.

In retrospect, where did the high court miss the 'legal' essence while reversing the decision of the lower appellate court, which drew the strong disapproval of the Supreme Court – calling the reversal as a 'thoroughly unsatisfactory judgment'? Once the property devolved on the widow, though only as a life estate in terms of the will of her husband, the high court, it seems, mixed it 'thoroughly' with the 'possession' of that property in the exercise of her right of maintenance. In this mixing, the high court appears to have ignored the legal requirement that for this purpose it was incumbent upon her to create a charge against that property by the process of court for her maintenance under the relevant provisions of the Hindu Adoptions and Maintenance Act, 1956. Partly, it is also possible, that the high court might have been overwhelmed by the 'engulfing' short title of section 14 as a whole, and not just to sub-section (1) only: "Property of a female Hindu to be her absolute property." The core element of, not just the 'pre-existing right' of maintenance in terms of the propounding of the Supreme Court in *V. Tulasamma* but, the 'crystallized' 'pre-existing right of maintenance' through the creation of a specific charge was, however, missed by the high court. This is wherein lies the distinctive contribution of the apex court in supplying the requisite correction to the honest mistake made by the high court. Otherwise also, the analysis of the Supreme Court in this case is highly instructive, for it teaches us how the ratio of the case is to be culled and to be applied in seemingly similar cases.

111 *Ibid*. See also, *id*. at 3290 (para 23): "On a true construction of the Will we have found that Isher Kaur had only a life estate in the properties. Hence, the gift executed by her cannot survive the cessation of the life estate or stand in the way of the ultimate beneficiary recovering possession on the strength of the bequest in his favour on the coming to an end of the intervening life estate."