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HINDU LAW

*Poonam Pradhan Saxena**

I INTRODUCTION

THE YEAR 2006 witnessed judicial deliberations on several noteworthy aspects of Hindu law. There have been important pronouncements in the area of adoption, custody and guardianship, marriage, divorce, maintenance, joint family and succession. These have been surveyed in the light of the legal provisions applicable to the core issue of litigation.

II HINDU ADOPTION AND MAINTENANCE ACT, 1956

Adoption by a married woman

Law relating to adoption among Hindus underwent certain fundamental changes in 1956, beyond mere codification, extending permissibility in favour of Hindu females to adopt in certain specific situations. However, the anomalies and the bias as between the rights of men and women still persist, more so amongst married couples, as present law confers the right of adoption on the husband, but with his wife's consent. This consent of the wife may be express or implied in cases where though she is present, she does not express her dissent. Thus, the decision making with respect to adoption and the lead role at the time of actual giving and taking the child has to be that of the husband with the consent of the wife. It thus appears to be a collaborative action. An important issue worth consideration is: can the child be brought in the family at the behest of the wife with the consent of the husband? Would such an adoption meet the requirements of section 7 of the Hindu Adoption and Maintenance Act, 1956? The question arose in connection with the succession rights of a Hindu female who claimed the total property of her alleged adopted father as his sole heiress on his death.[1] This claim was countered by the other natural heirs, who challenged the validity of adoption. According to the plaintiff, when she was barely two years old, her natural parents gave her in adoption to the alleged adoptive parents in presence of the priest and other persons. According to the testimony of the priest, the childless couple had approached him and had expressed a desire to adopt a

* Professor of Law, Faculty of Law, University of Delhi, Delhi; Senior Fulbright Fellow; Shastri Indo-Canadian Fellow.

1 *Malati Roy Chowdhury* v. *Sudhindranath Majumdar,* AIR 2007 Cal 4 (DB).

Brahmin girl. The priest arranged for the girl and performed the ceremony of adoption, in which the biological parents handed over the child to the adoptive mother by putting her on her lap. This whole exercise took place in presence of her husband and with his approval. Immediately after the ceremony was over, the child was brought into the home of the adoptive parents and was brought up by them as their own child. The school records corroborated that. Even where the alleged adopted mother died, it was the plaintiff who had lit her funeral pyre. Her primary contention was that though the term technically used indicates that adoption can be only by a Hindu male though with the consent of his wife, a natural agency between the husband and the wife is always presumed. When adoption takes place in presence of the husband and the child is taken by the wife, it shall be construed that adoption is deemed to have been done by the husband, viz, the male. The whole purpose of adoption under section 7 is for the benefit of the family consisting of the husband and the wife and not for the benefit of the husband alone. Thus, according to her, if the mother adopted the girl in presence of the husband it can be said that this adoption took place actually for and on behalf of her husband as he did not raise any objections and his consent was imputed.

The court rejected the contention and held that adoption was not valid as at the time of the alleged adoption the husband of the adopted mother was alive and the daughter was adopted by the mother and not by her husband. According to the court as the mother was married she had no right to take the child in adoption, as the language of section 7 clearly confers a right to adopt on a male and if he is married the consent of the wife is a must, but that does not mean that the wife is authorized to adopt with the consent of the husband. The court further said that adoption has to be taken factually or legally by the male in case of marriage and not by wife i.e., the wife has no capacity to adopt even with the consent of the husband and as the husband here had never taken any initiative for decision to adopt but was merely present as such the case of adoption sought to be made out by the daughter was held as not proved, and her claim to be the sole heiress and legal representative of the mother or for that matter her husband was negated by the court.

The court failed to note that unlike the old law where adoption had only a religious purpose and was meant for the benefit of only the father, under the present law, the purpose of adoption is purely secular. It is meant for providing a home to the orphan or abandoned children and at the same time provide the joy of parenthood to the childless couples. It is no longer for the spiritual benefit of the father alone but is meant to be for both spouses. The mother and the father were present at the time of adoption. It is immaterial whether the child was put on the lap of the mother or on the lap of the father. It was a collective act by both of them and must be viewed as such. For example, if the lead role was performed by the father and the mother though present had remained silent, but without raising any objection, her consent would have been presumed and the adoption would have been held as valid. Here though the lead role in arranging and conducting the ceremony was performed by the mother, but it was with the consent of the father and

therefore the involvement of both of them was equal. Such technicalities should be ignored and the court should have ruled in favour of adoption. By holding that the husband only consented but did not lead the ceremony, and therefore the adoption was not proved, the court has strengthened the stereotypes and has pushed the wife into a subservient position as incapable to take the decision of adoption even with the active concurrence of the husband.

Proof of adoption

A valid adoption is akin to rebirth of the adoptive child in the adoptive family. He is deemed to be dead for the natural family for all purposes save certain exceptions and is deemed to be reborn in the family of adoption from the date of the adoption. Thus the adoptive mother is deemed to be the mother for all purposes. In case of death of the adopted child after adoption, it is the adopted parents and not the natural parents who would be entitled to claim compensation. A claim petition in respect of the death of the child in an accident was filed by the father and the step mother of the child, without including its natural mother.[2] They maintained that the natural mother before leaving the country abandoned her six months old child and handed it over to the second wife of the father in adoption. The court disbelieved this story terming it highly unlikely that a recently divorced mother would hand over her only child to her husband's second wife and concluded that it appeared to be a decision borne out due to compulsions of financial constraints and difficulties, and absence of any other alternative. The court held in favour of a general presumption of validity of adoption, when it took place a long time back, but conditional upon the existence of some proof relating to adoption. Here besides the fact that the child was living in the same house as that of his father and the stepmother there was no other evidence that could form the basis to raise a presumption that the child was adopted by the step mother. The court also held that for proving adoption, natural mother was a necessary party and in the absence of proof of adoption, the claim petition by the step mother was not maintainable.

Though the court ruled against adoption, it did commit an error as it held that for proving the factum of adoption here, natural mother was a necessary party. It implies that if the natural mother had testified towards giving the child to the step mother, the court would have accepted the adoption as valid. The line of approach that the court took therefore is incorrect. As per the law of adoption applicable to the Hindus in India, father if alive alone has a right to give the child in adoption, but he cannot do it without the consent of the mother. Thus, even if the parents were divorced adoption would not be possible without the consent of the mother. Secondly, in this case adoption to the step mother could never have been possible. As per the law, the giver and taker of the child cannot be one and the same person. As at the time of the alleged adoption, the father had already married the step mother of the

2 *Oriental Insurance Co Ltd* v. *Lalita Sharma,* AIR 2006 NOC 326 (HP).

child, the step mother was a married woman and under Hindu Adoptions and Maintenance Act, 1956, a married woman does not have the capacity to take a child in adoption. It is only the husband who can take a child in adoption but with the consent of the wife. Thus, in the present situation, it was only the father who could have given the child in adoption and only he could have taken the child in adoption, in the first case with the consent of the biological mother and in the second with the consent of his second wife. Since under the Act, giver and taker of the child cannot be one and the same person, adoption could never have been possible. Thus, even in case the mother had substantiated the story of the couple that she had either abandoned or actually handed over the child to the step mother, adoption would never have been possible in such a case.

Mandatory age gap, minimum age and marital status of the adopted child

For validity of adoption under Hindu law, the Act lays down certain conditions that must be adhered to. Amongst these are that the minimum age difference between the adoptive mother and the son should be at least 21 years;[3] the child to be adopted must be below the age of 15 years[4] and should be unmarried.[5] A breach of the first condition is fatal to adoption as the expression must in section 11 (iv)[6] cannot be read as may and, therefore, a violation of this condition will make the adoption ineffective. With respect to the second and the third conditions, a violation of these may not affect the validity of the adoption if there is a custom of adoption of a married boy or one above the age of 15 years in the community to which the parties belong. Such custom or usage is prevailing in Maratha community governed by *Mayukha* or the Bombay School of Hindu Law. Thus, adoption of a married child or the one above the age of 15 years would be valid if there is a custom permitting such adoption, provided other conditions are satisfied.[7] However, in such cases the existence of a custom permitting adoption of child above the prescribed age in the Act must be proved to the satisfaction of the court. This issue arose in connection with a dispute relating to claim of succession rights

3 Hindu Adoptions and Maintenance Act, 1956, s. 11.

4 *Id.* s. 10 reads as under:
Persons who may be adopted
No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely, - ...
(iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;
(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

5 *Id.*, s. 11.

6 S. 11(IV) reads as under:
Other conditions for a valid adoption
In every adoption, the following conditions must be complied with: (iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted.

7 *Hanmant Laxman Salunke* v. *Shrirang Narayan Kanse,* AIR 2006 Bom 123.

to the property of a male Hindu. On his death his daughter filed a claim seeking partition of the property left by him that was resisted by the alleged adopted son.[8] He claimed that he was adopted by the deceased in 1960, as per the custom prevalent in the community but he could neither specifically state nor prove it to the satisfaction of the court. Further, at the time of the alleged adoption, his age was more than 15 years. The court rightly rejected his claim and held that no adoption could be proved.

Maintenance under the Act

Under section 18 of the Act a Hindu wife can claim maintenance from her husband provided the conditions laid down in the said section are satisfied. It is necessary here that the matrimonial relationship must exist, as the remedy is not available to the partners who live together either without getting married or under a defective marriage ceremony. A Hindu woman filed a petition under section 18 of the Act claiming maintenance from the alleged husband. She stated that they were married in Ayyapan temple and had lived thereafter as husband and wife and two issues were born out of this wedlock. The husband denied the relationship and claimed that she was blackmailing him as she had also filed criminal cases against him. The trial court granted interim maintenance to her on the ground that continuous and prolonged cohabitation of a man and a woman, and treatment of each other as husband and wife can raise a presumption of marriage. The court held that the power to grant interim maintenance was within the width and amplitude of section 18 of the Act and while exercising the power the court should not ignore the reality and long delay in final disposal of the case. On appeal, this finding of the lower court was reversed and it was held that interim maintenance could be granted if the status of the parties was not in dispute but if the status itself was seriously disputed then interim maintenance should not be granted.

III HINDU MINORITY AND GUARDIANSHIP ACT, 1956

Custody of the child: welfare of the child of paramount importance

In matters relating to the custody of a minor child, paramount consideration remains the welfare of the child and not the right of either of the parents. Though for the all-round development of the 13 year old daughter the company of the mother is most vital and important and cannot be equated with any other member of the family of the father,[9] yet if the interests of the child so require or if the girl who is intelligent enough to express her wishes conveys her desire to be with the father instead of the mother, the custody could be granted to the father.

Father is the natural guardian of the child and the mere fact that he has remarried would not make him unfit for his appointment as the natural guardian

8 *Bhimshya* v. *Janabi*, JT 2007 (1) SC 332.
9 *Kiran K Lokhani* v. *Ajit H Lokhani*, AIR 2006 NOC 276 (Bom).

or custodian of his child if there is nothing to show that he acted against the interest of the minor warranting his removal as a guardian.[10]

Where the welfare of the child so demands, the custody can be granted even to a grandparent despite the fact that one of the natural parents may be alive and willing to have the child. The mother of the child died an unnatural death and the father was tried under section 304 B of the Indian Penal Code, 1860.[11] The trial court convicted him while the high court acquitted him of the charges framed in connection with the unnatural death of his wife. The child was four years old when the father was sent to prison and since then the grandfather had looked after him. Brilliant in studies he fared very well in the board examination. In a claim to his custody by the father the 16 and a half years old son preferred clearly to live with the maternal grandfather. The court did not disturb the custody keeping in view his welfare.

Similarly, in *Mahendra Modi* v. *Gobardhan Lal*[12] the child was taken in by the maternal grand father after the death of his mother in unnatural circumstances. The father was convicted in connection with the death of the mother, had remarried, had a son and a daughter from his second marriage, and was totally engrossed in his new family. He never bothered to take care of the child nor visited him even once in 14 years. In this situation the maternal grandfather filed an application for appointing him as the guardian of the minor, a claim that the father resisted. The court rejecting the claim of the father held that, placing the child in the custody of the father whom he had never seen or heard may cause him emotional and psychological breakdown. It was thus in the interest of the child and in his welfare that maternal grandfather be appointed as his guardian.

Financial considerations alone not important

Affluence of one of the parents alone is not the determining criterion for granting custody of minor children. If the welfare of child so demands, custody would be granted to the mother despite the fact that the father and the paternal family may be financially very strong. In *Amit Bai* v. *Sheetal Bai*,[13] the parents separated and for the initial five years the child was with the mother, under the order of the district court. The father preferred an appeal to the high court, which reversed the decision of the district court and granted the custody to the father and the paternal grandfather subject to the condition of them depositing Rs five lakhs in the Punjab National Bank. The Supreme Court allowed the appeal of the mother and remanded the case to the high court on the ground that mother should have been given a chance to controvert allegations made in the petition. The mother was gainfully employed in Dubai and during her working hours the child was kept in the crèche/ care home. The court noted that it was not unusual for working mothers to utilize

10 *T Kochappi* v. *R Sadasivam Pillai*, AIR 2006 Mad 330.
11 *Ram Nath* v. *Ravi Raj Dudeja*, AIR 2006 P&H 216.
12 AIR 2006 Jhar 124.
13 AIR 2006 All 267.

services of the day care centers. Moreover, the child was with the mother for around 10 years and if at this stage the custody was transferred to the father, he would find him in a new surroundings which may not be very congenial even if the father and the grandfather were very affluent financially, and thus this fact alone would not entitle them to the custody because money cannot be a substitute for affection. The minor here was not asked about his wishes, as he was in Dubai and the court felt that bringing him here to ascertain his wishes would only result in wasting more time. The court observed that a poor man who has greater care and concern for his offsprings is in a better position to look after his minor children than a wealthy father who remains busy in earning money and ignores them. Thus, the question of custody of minor, the court held, is a question of fact and has to be determined on the basis of circumstances of each case.

Visitation rights

Where one parent gets the custody of the child, the other is usually granted visitation rights to meet the child. However, visitation rights are not rights of the parents and if the welfare of the child so demands, the parent's enforcement of their visitation rights can be put on hold. In an application made by the natural father[14] of a 10 year old girl, who was living with her mother and the step father, the court held that the child need not be forced to meet the real father, but, if on her own she wanted to meet her biological father she could do so unhindered by any of the parties.

IV HINDU MARRIAGE ACT, 1955

Parties to the marriage must be Hindus

Amongst the multiplicity of family laws in India, availability and applicability of matrimonial legislations is largely dependant upon the religion of the parties to the marriage. Under the Hindu Marriage Act, 1955, a valid marriage can be solemnized only between two Hindus. If either the husband or the wife is a non-Hindu a marriage cannot be solemnized validly under this Act. Where a Hindu man intends to marry a Christian woman, he should opt for either the Special Marriage Act, 1954 or the Indian Christian Marriage Act, 1872 or the validity of the marriage would be questionable. The issue came to light in connection with a divorce petition filed by the wife against her husband, who pleaded that the marriage between them solemnized under the Hindu Marriage Act, 1955 was a nullity as the wife was a Christian[15] . The wife pleaded that she converted to Hindu faith before her marriage and therefore her marriage solemnized under Hindu law was perfectly valid. Without proving conversion she stated that she was a Christian by birth but got married in Markandeshwar temple in accordance with Vedic rites to the husband who was a Hindu, and the same evening they underwent a wedding

14 *Ravi Dadu* v. *Seema Gupta,* 132 (2006) DLT 524.
15 *Madhavi Ramesh Dudani* v. *Ramesh K Dudani,* AIR 2006 Bom 94.

in the church as well. Pursuant to her marriage, she was given a Hindu name and dropped her Christian name of birth. She adopted the Hindu way of life, observed all Hindu religious ceremonies, performed pooja at residence, at factory premises and even went on tour to Badrinath, gave Hindu names to both of her daughters, and though her children went to an English medium school run by a church, they attended classes meant for non catholic students. Marital discord forced the parties to live separately and then she filed for judicial separation on grounds of husband's cruelty and claimed residential rights in the matrimonial home and maintenance for herself and the children. She also sought an injunction against the husband restraining him from selling the matrimonial home.

The trial court held that the wife was not a Hindu at the time of solemnization of the marriage under Hindu law and therefore the marriage was a nullity. That being so, she was not entitled to any of the reliefs asked for. The court observed that after this Vedic ceremony they went to the church for a Christian wedding. Moreover, there were no particulars, like date or time of the performance of any *shuddi* ceremony. The matter went in appeal to the High Court of Bombay which reversing the decision of the trial court held that even if there was no proof of *shuddi* ceremony the fact that she adopted the Hindu ways of life was enough to show that she was a Hindu. The court further observed that the priest should have known and he would not have solemnized the marriage if he had known that the wife was not a Hindu. The court thus granted divorce to the wife and maintenance to the children as the wife was sufficiently provided.

The decision of the high court appears to be incorrect in the light of the facts and circumstances of the case. If the wife had converted to Hindu faith before their getting married in accordance with Vedic rites, the subsequent wedding in the church was meaningless as none of the parties at that time could have been a Christian. And if they went to the church wedding because the wife was a Christian, then the former wedding in accordance with Vedic rites was a nullity. The line of argument that the court took that a priest would not have solemnized the wedding if the wife was not a Hindu again suffers from infirmity. It is not the solemnization of marriage by a priest that determines the conclusive validity of a marriage as for the validity of a Hindu marriage, both the parties must be Hindus. False information given by the parties to the priests or the priest ignoring the facts deliberately or erroneously would not make an otherwise invalid marriage valid in the eyes of law. Further, adoption of a Hindu name and Hindu way of life by the wife came after the solemnization of marriage but it is the religion of the parties at the time of marriage and not subsequent to it that determines the eligibility to marry under a particular enactment.

The trial court's pronouncement was correct as conversion to Hindu faith involves two facets, one that there must be renunciation of the former religion and second embracement of the new religion. Adopting Hindu way of life following these twin acts is mandatory. However, unless there exists a proof that a person renounced his religion, a mere fact of getting married according

to Hindu rites or Vedic rites would not be a conclusive pointer towards conversion in law. The wife was a Christian at the time of marriage to a Hindu husband and their marriage under the Hindu Marriage Act was therefore, a nullity. Her petition was rightly dismissed by the trial court. However, the wedding in the church was valid as under the Indian Christian Marriage Act,1872, a valid marriage may be solemnized under this Act if one of the parties is a Christian. Since the wife was a Christian at the time of the marriage, the church wedding established a relationship between her and her husband in the eyes of law and the appropriate matrimonial legislation under which she should have enforced the remedy was the Indian Divorce Act, 1869, and not the Hindu Marriage Act, 1955.

Right to marry

In the socioeconomic scenario prevailing in India more specifically in rural and semi urban areas it is a matter of deep concern that for a girl to defy the wishes of her parents /guardians to get married to a boy of her own choice is not only unthinkable but leads to gruesome consequences for the girl herself, her husband and sometimes his entire family members. Societal approval to honour killings is looming large in the face of such parties to the marriage. The plight of the parties and the husband's relatives came to light in a case[16] that involved a 21 year old girl, who after completing her graduation married on her own without the consent of her brothers with whom she was living after the death of her parents. Her brothers, assaulted, humiliated and irreparably harmed the entire family of the husband without sparing even the remote relatives; took over their property including their shops and agricultural lands and then lodged a missing report with the police. The police arrested the husband and almost all of his family members, distant cousins, and sisters living elsewhere, along with infants on the allegation that all of them had instigated the girl to marry this man. All the relatives were denied bail for a long time and one of the sisters of the husband was put in jail along with her month old baby. The girl apprehended danger to her life as also to that of the husband and her little child that she had meanwhile given birth to. She recorded her statement protected by armed security and testified that she was terrified at the prospects of visiting her birth place. The apex court took a very serious note of the entire situation and the conduct of the authorities and noted[17] that the petitioner was not a major and was free to marry anyone she liked or live with anyone she liked. Since there is no bar to an inter-caste marriage under the Hindu Marriage Act or any other law, no offence was committed by her husband or any of his relatives. The court pointed out with distress that instead of taking action against the petitioner's brothers for their unlawful and highhanded activities, the police had instead proceeded against the petitioner's husband and his relatives.

16 *Lata Singh* v. *State of Uttar Pradesh,* AIR 2006 SC 2522.
17 *Id.* at 2524.

Terming the caste system as divisive and a curse on the nation, the court hoped for its earliest destruction in the interests of the society. Inter-caste marriages according to the court are in fact in the national interest as they may eventually destroy the caste system. At the same time the court expressed deep concern over the threats and violence actually committed on young men and women who undergo inter caste marriages and called for serious punishment to be given to the perpetrators of such violence and observed:[18]

> Since several such incidents are coming to our knowledge of harassment, threats and violence against young men and women who marry outside their caste, we feel it necessary to make some general comments on this matter. The nation is passing through a crucial transitant period in our history and this court cannot remain silent in matters of great public concern such as the present one. This is a free and democratic society and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage, the maximum they can do is that they can cut off social relations with the son or the daughter but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage.[19] 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 marries the couple are not harassed nor subjected to threats or acts of violence and anyone who gives such threats or harasses or commits acts of violence either himself or at his 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. We sometimes hear of honour killings of such persons that undergo inter-caste or inter-religious marriages of their own free will. There is nothing honourable in such killings and in fact they are nothing but Barbaric and shameful acts of murder committed by brutal feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.

Court not only quashed proceedings against the husband and his relatives but directed action to be instituted by authorities against the wife's brothers and others involved.

Child marriage

Despite the evils of child marriage glaring in the face of the community at large, the menace continues unabated. Under the garb of customary practices, or for the sheer convenience of shrugging of the parental responsibility of

18 *Id*. at 2524-25.
19 *Id*. at 2525.

minor girl, young girls continue to be married off by their parents at an early age. It is a harsh reality that the 78 year old Child Marriage Restraints Act, 1929, has miserably failed to check child marriages. Once solemnized, the marriages remain perfectly valid. Thus, it is not uncommon for the parents to marry off their wards when they are minors. Yet, at the same time if a minor girl on her own gets married to a boy of her choice without parents consent, they file kidnapping charge against the husband. The Delhi High Court recently held[20] that the marriage solemnized in contravention of age requirement prescribed under section 5 of the Hindu Marriage Act, is neither void nor voidable under sections 11 and 12 and were only punishable under section 18, of the same enactment as also under the provisions of the Child Marriage Restraints Act, 1929. They also cautioned that this judgment does not mean nor indicate that the age of marriage has been reduced from the one prescribed under the Hindu Marriage Act. Two petitions were disposed of by this judgment, both involving elopement of girls in the age group of 16-17 years with their boyfriends with one backtracking after living with him for several months at various places but choosing to go back to her parents, while the second firmly standing in favour of her marriage and living with the husband.

In the light of absence of any provision for invalidating such marriages the courts have no option but to hold in favour of validity of such marriages. However, even the court cautioned that despite the fact that once solemnized a child marriage becomes valid does not mean and should not be understood as reducing the age of marriage. Though technically child marriages, these cases stand on a different footing than the marriage of infants brought about by their parents under the influence of traditional customs and societal practices. Invariably, cases like the one in hand involve decision making by the immature girls themselves. In cases where girl becomes either pregnant or is firm enough to withstand the family pressure, parents either grudgingly accept the marriage or continue to hound the couple for saving their hollow family prestige or honour posing grave danger to the very lives of these girls and their spouses.

The court said that it was for Parliament to consider whether the present provisions in the Hindu Marriage Act and the Child Marriage Restraints Act, 1929 have proved insufficient or failed to discourage child marriages and to take appropriate steps as are required in their wisdom. The menace of child marriages can be curbed only when Parliament, after giving wide and adequate publicity, notifies a date invalidating all child marriages solemnized after that notified date. The issue must be handled firmly and not casually.

Bigamy

The Hindu Marriage Act dictates absolute monogamy for both the spouses. A contravention of this condition not only makes the second marriage void but also the guilty party can be penalized under section 494 of the Indian

20 *Manish Singh* v. *State Government of NCT,* AIR 2006 Del 37 (DB).

Penal Code, 1860. At any point of time any of the parties can walk out of this relationship without being accountable in law to each other. Offence of bigamy is committed by a person when he gets married during the life time of the first spouse. But where a man gets married to a woman who at the time of this marriage already had a subsisting marriage with another man, is not guilty of committing the offence of bigamy, if without putting an end to this marriage he remarries. Thus, if the first marriage is void, the second marriage would not attract the penalty imposed under section 494 of the IPC. In a case before the Supreme Court,[21] the allegation of the first wife was that during the subsistence of her marriage, the husband remarried and was openly living with the second wife, not in the official accommodation allotted to him but in a rented accommodation. The husband was a pilot in the Indian Air Force. The husband, however, proved that when his marriage with his first wife was solemnized, she already had a subsisting marriage. This marriage therefore was a void marriage within the meaning of section 11 of the Hindu Marriage Act. If he got married a second time, without putting an end to this Marriage he was not guilty of committing bigamy under section 494. The husband was thus let off the charges of commission of bigamy and rightly so. However, during their stay together, the husband was very violent towards the first wife. She was subjected to beatings, slapping and kicking on several occasions by him and despite the fact that his marriage with her was not valid in the eyes of law, the acts of violence committed by him against the woman with whom he was living in a relationship akin to marriage, the court held him guilty of a conduct that was unbecoming of an officer.

Registration of marriages

In a diverse country like India ridden with illiteracy and poverty, it is neither possible nor feasible for the parties to bring or come up with a cogent proof of solemnization of their marriage. For women trying to enforce their marital rights, an important yet very tedious aspect is to prove their relationship with the husband, more so, if the unscrupulous husband denies it. Non registration of marriage affects women to a great measure as matrimonial rights cannot be enforced without proof and the wife is more in need of enforcing financial obligations in a marriage due to secured economic status of the husband and a general dependency of wife over him. If a marriage is registered it also provides evidence and a rebuttable presumption of the marriage having taken place. A law providing compulsory registration of marriage would be of critical importance to various women related issues such as: prevention of child marriages and ensuring minimum age of marriage; prevention of marriages without the consent of the parties; checking bigamy/ polygamy; enabling married women to claim their right to live in their matrimonial home, maintenance claim; inheritance rights and other benefits which they may be entitled to after the death of their husbands. It would also

21 *MM Malhotra* v. *Union of India,* AIR 2006 SC 80.

act as a deterrent for men to desert their wives after marriage; and most importantly, it would act as a deterrent for parents /guardians from selling their daughters /young girls to any person including a foreigner under the garb of marriage. It is, therefore, in the general interest of the society if marriages are made compulsorily registrable. The matter came up before the court during the hearing of a transfer petition.[22] The court noted that though most of the states have framed rules regarding registration of marriages, it is not compulsory in majority of states as till date, no mechanism or official record of marriages exists.

The court observed that though registration by itself cannot be a proof of a valid marriage *per se*, and would not be the determinative factor regarding the validity of marriage, yet it has a great evidentiary value in matters of custody of children, their rights and the age of parties to the marriage.

The court stated 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.

The court also issued directions to all state governments and the central government to take steps to ensure

i) that within three months from the date of the judgment the procedure for registration should be notified by the states and the central government either by amending the existing rules or by framing new rules. The amendment of existing rules or the promulgation of new rules be done after soliciting objections from public. For obtaining objections from public, due publicity be given and objections be invited within one month from the date of advertisement and the states should bring in the rules only after the expiry of one month from the expiry of the date for inviting objections from the public in this regard;

ii) the rule must provide for the appointment of registering officer; consequences for non registration of marriage or for filing of false information or declaration. The forms for registration must provide clearly for name, age, marital status (unmarried, divorcee etc) of the parties to the marriage;

iii) as and when the Central government enacts a comprehensive statute, the same shall be placed before the apex court for scrutiny.

The court also gave a direction to counsels of the state and the union territories to ensure that these directions should be carried out immediately and for the necessary follow up the registry was directed to hand over a copy of the judgment to the Solicitor General.

22 *Seema* v. *Ashwani,* (2006) 2 SCC 578.

Nullity of marriage

One of the grounds for declaring a Hindu marriage a nullity is that the consent of the party to the marriage was taken by force or fraud with respect to the nature of ceremony or a material fact relating to the respondent was concealed. Age and parental liabilities are material facts relating to a person and non disclosure of such liabilities or an active concealment of the same would amount to fraud. Thus, where before the marriage the husband told the wife that he was 40 years old and was a widower without any issue, the wife gave her consent to the marriage.[23] She discovered later that not only he was 55 years old but in fact had four major daughters and a son from his first wife. The husband was a homeopathic and ayurvedic doctor by profession and claimed knowledge of astrology. He had used his skills of medicine and astrology to lure the woman into believing that he was the best match for her. Holding that the suppression of age and issues from the first marriage amounted to fraud, the court observed, that marriage is a socially sensible and respectable institution and has a great human purpose. As the husband created a concavity in the institutional paradigm by employing his skills in astrology and medicine and in addition suppressed the most material fact of his having five major children, such a fraud may or may not invite criminal culpability but indubitably satisfies the requirement of section 12 (1) (c) of the Hindu Marriage Act.[24] The marriage was, thus, annulled by the court on the ground that the consent of the wife was obtained by fraud with respect to a material fact relating to the respondent husband.

Order of DNA test in case of dispute of paternity

In asking for a decree of nullity in case of pregnancy of the wife at the time of marriage by a person other than the husband and without the knowledge of the husband, the burden of proof is upon the husband to come up with cogent evidence of the allegation. In this situation can he pray for the conducting of the DNA test on the baby and the mother to prove that the child born is not his, and would this request amount to violation of the rights of privacy guaranteed to the wife and the child under the Constitution of India? In *Vandana Kumari* v. *P Praveen Kumar*[25] the husband filed a petition under section 12 (1) (d) of the Hindu Marriage Act, praying for a decree of nullity four months after the solemnization of his marriage on the ground that at the time of marriage his wife was pregnant by a person other than him and he was unaware of it. She thus was guilty of this extreme fraud and he should be granted a decree of nullity. He further contended that the marriage was not consummated, and as a proof of his allegation, he sought a DNA test to be performed on the wife and the foetus. The wife contested his allegation and also the plea for the DNA test on the ground, that these tests were unnecessary

23 *Sunder Lal Soni* v. *Namita Jain,* AIR 2006 MP 51.
24 *Id.* at 56.
25 AIR 2007 AP 17.

as legitimacy of the child was not in question and the same would also amount to a violation of her rights of privacy. The trial court held that it was a fit case for the order of DNA test, and directed the wife and the child to undergo this test. The wife preferred an appeal. The high court held that though the issue directly was not with respect to the legitimacy of the child, but indirectly the husband would be deemed to be the father of the child if no access at the time of the possible conception cannot be proved. Quoting section 112 of the Indian Evidence Act, the court observed that this section is based on the famous maxim "*pater est quim nuptiae demonstrant*" i.e., he is the father whom the marriage indicates and that the presumption of legitimacy is that a child born of a married woman is deemed to be legitimate and it throws on the person who is interested in making out the illegitimacy the whole burden of proving it. It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate and that access occurred between the parents. The presumption can only be displaced by strong preponderance of evidence and not by a mere balance of probabilities. The apex court earlier in *Kanti Devi* v. *Poshi Ram*[26] had observed:

> S. 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time of when the child could have been begotten the presumption could be rebutted. In other words the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally the rule of evidence in other instances is that the burden of proof is on the party who asserts the positive but in this instance the burden is cast on the party who pleads the negative. The raison d'etre is the legislative concern against illegitimizing a child. It is a sublime public policy that children should not suffer social disability on account of the latches or lapses of parents.

Section 112 was enacted at a time when the modern scientific advancements with DNA and RNA were not even in the contemplation of the legislature, but though the result of a genuine DNA test is said to be scientifically accurate even this the court said is not enough to escape from the conclusiveness of section 112. For example, if the husband and the wife were living together during the time of conception but DNA test reveals that the child was not that of the husband, the conclusiveness in law would remain unrebuttable. Hence the question regarding the degree of proof of non access for rebutting the conclusiveness must be answered in the light of what is meant by access or non access.

26 AIR 2001 SC 2226 at 2228.

Though DNA tests are not to be ordered as of routine, where the party has to prove a particular fact that can be conclusively and accurately proved by the tests, such tests can be ordered. If the party, against whom the tests have been ordered, refuses to undergo such tests, there is no reason why inferences cannot be drawn against them. The court concluded that it had ample powers while deciding matrimonial matters to order a person to undergo medical tests which cannot be held to be in violation of the right guaranteed under article 21 of the Constitution.

Restitution of conjugal rights

Restitution of conjugal rights and divorce are two prayers which are, according to the court,[27] diametrically opposite, mutually destructive and therefore cannot be made together. The observation was made in connection with a case that came up before the Himachal Pradesh High Court. Here a petition praying for a decree of restitution of conjugal rights on the ground that the wife had withdrawn without a reasonable excuse from his society was filed by the husband. He also prayed, in the alternative, for divorce on grounds of wife's desertion. The parties had married in 1988 and after 7 months of the marriage the wife left home. She joined the husband twice for brief periods, and they finally parted company in 1993. The court held that no such plea could be made in the alternative. If the husband prays for restitution of conjugal rights, it means that he genuinely wants the company of the wife, and it also means that even if she is guilty of cruelty, he is deemed to have condoned the acts of cruelty. Thus, the court rejected the petition of the husband on the ground that in one and the same petition, both the remedies in the alternative are not allowed.

The court's attitude is surprising. Here was a man who after 19 years of marriage was still without the company of his wife and without a remedy even though there was no evidence that it was he who was at fault. The policy of either live or leave free must be adopted by the court in dealing with matrimonial matters, more so when the prayer for separation or restitution comes from a person who approaches the court apparently with clean hands. The court is dealing with the personal lives of the parties and must adopt a humane approach. If the wife is not willing to live with the husband, despite nothing on record against him, an option must be given to the husband to lead a fresh life. The laws should not be given only a theoretical or mechanical application. The fact that he asked for restitution of conjugal rights shows the genuineness or a *bona fide* desire of a person to seek the company of his estranged wife. This was an opportunity for the court to decide the case on merits and see who was at fault and decide the matter accordingly. Strict and mechanical application of law is highly undesirable in matrimonial matters and should be avoided at all costs. Avenues should be opened and not closed for the parties to come to a solution of either living together or leaving each other if no amicable unity is possible. Since the parties cannot be forced to live

27 *Baldev Raj* v. *Bimla Sharma* AIR 2006 HP 33.

together through the coercive measure of law, in the event no harmonious habitation is possible, options must be explored for amicable separation. A contrary approach forces the parties to explore illegal or immoral options creating unhealthy atmosphere, having an adverse effect on the society as well.

Cruelty as a ground for divorce

In majority of contentious litigations, parties use the ground of cruelty to seek the matrimonial relief of divorce. What is cruel treatment is to a large extent a question of fact or a mixed question of law and fact and no dogmatic answer can be given to the variety of problems that arise before the court in these kind of cases. The law has no standard by which to measure the nature and degree of cruel treatment that may satisfy the test. It may consist of a display of temperament, emotion or perversion whereby one gives vent to his or her feelings, without intending to injure the other. It need not consist of direct action against the other but may be misconduct indirectly affecting the other spouse even though it is not aimed at that spouse. It is necessary to weigh all the incidents and quarrels between the parties keeping in view the impact of the personality and conduct of one spouse upon the mind of the other. Cruelty may be inferred from the facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence and inference on the said point can only be drawn after all the facts have been taken into consideration. Where there is proof of a deliberate course of conduct on the part of one, intended to hurt and humiliate the other spouse, and such a conduct is persisted, cruelty can easily be inferred. Thus, false allegations by the wife that the husband has extra marital affair amounts to cruelty on her part even if the charges are not pressed further.[28] This would amount to a matrimonial misconduct of such a nature that the husband cannot reasonably be expected to live with the wife and therefore, the marriage can be brought to an end. Similarly, filing of false cases against the husband and his family members, leading to the arrest of the husband and humiliation of his family members,[29] amounts to cruelty and divorce would be granted more so when all the reconciliation attempts fail.

In *Sujata Uday Patil* v. *Uday Madhukar Patil*[30] the husband filed for divorce after five years of marriage on grounds of wife's cruelty and desertion. The trial court granted instead judicial separation but on appeal the district court granted divorce. After the time for filing the appeal was over, the husband remarried. The wife filed an appeal after seeking condonation of the delay. The high court confirmed the decree of divorce holding that the act of cruelty was pertinent and grave on account of police complaints lodged against the appellant and his father and that too during the period when the marriage of respondent's brother was settled. It was in that background that the wife voluntarily left the matrimonial home and desertion on her part stood

28 *Sadhna Srivastava* v. *Arvind Srivastava*, AIR 2006 All 7.
29 *Manish Singh* v. *State Government of NCT*, AIR 2006 Del 37 DB.
30 SLP (C) Nos. 18502-18503 of 2004, decided on 13/12/2006.

confirmed by the fact that she lived separately for over two years and did not make any efforts to come back to matrimonial home for cohabitation. As the wife failed to establish any act of cruelty on part of the husband, her leaving the matrimonial home and cause separation was without sufficient cause. The court noted that the wife, after lodging a complaint against the husband in police station, left the matrimonial home without any remorse or repentance carrying all her belongings with her.

After a careful consideration of the findings recorded by the lower court, the court observed:[31]

> Matrimonial disputes have to be decided by courts in a pragmatic manner keeping in view the ground realities. For this purpose a host of factors have to be taken into consideration and the most important being whether the marriage can be saved and the husband and wife can live together happily and maintain a proper atmosphere at home for the upbringing of their off springs. This the court has to decide in the facts and circumstances of each case and it is not possible to lay down any fixed standards or even guidelines.

Taking into account the fact that the husband had remarried and was living with his second wife, with a child from her, the court held that even if the decree for divorce granted by the district judge which has been affirmed by the high court is set aside, as was prayed for by the appellant, no useful purpose would be served.

The court accordingly confirmed the decree of divorce passed by the high court and directed the husband to pay a lump sum amount of rupees eight lakhs to the wife as maintenance for herself and her son, within a period of six months.

Normal wear and tear of married life

Normal wear and tear of married life does not amount to cruelty. In a case from Calcutta,[32] the husband filed for divorce on grounds of wife's cruelty and desertion. His primary allegation was that the wife was not performing household duties and was insulting him and his mother. The court held it to be a normal wear and tear of married life and divorce was not granted.

Though very small differences or bickerings may not be a ground for divorce or even mere filing of a criminal case, but when it is accompanied by another ground of cruelty it is not normal wear and lear of married life. In Gajjala *Shankar* v. *Anuradha*[33] the wife had filed several criminal cases against the husband and the in-laws, which could not be proved. However, at her asking maintenance was granted. The case was filed against not merely the husband but also against his sister and parents as a result of which all of them

31 *Id.*, para 10.
32 *Sabita Chowdhary* v. *Dulali Mondal Chowdhary*, AIR 2006 Cal 318.
33 AIR 2006 AP 65 (DB).

were imprisioned though the court later acquitted them of the offence under section 498A. Husband's petition for divorce on grounds of cruelty was granted by the court.

Irretrievable breakdown of marriage

The interpretation given to the term irretrievable breakdown of marriage differs according to facts and circumstances of each case. However, the application of the theory of breakdown is very selective and the hesitancy to apply it in even deserving cases is very visible. In a case from Andhra Pradesh,[34] the parties were living separately from each other for a period of over nine years. The husband had entered into another relationship and was living with another woman and the wife had filed several criminal and civil cases against them. The husband filed a petition praying for a decree of divorce on the ground of wife's denial of conjugal rights and impotency. The trial court granted divorce as in its opinion there was nothing left in this marriage and in view of the circumstances of the case it was clear that the parties would never be able to live with each other. On appeal the high court held that mere filing of criminal cases for bigamy and dowry demand by the wife against the husband did not amount to cruelty, more so when the cases were filed when their relations had deteriorated. The court further held that even factors like, several years have passed and the husband is living with another woman or an allegation of impotency followed by an advice to the husband for medical checkup did not establish irretrievable breakdown of marriage and thus the decree of divorce granted by the lower court was set aside.

A charge of adultery and plea for a DNA test

It is a cardinal rule in matrimonial jurisprudence that a spouse guilty of matrimonial conduct himself cannot seek the relief of divorce from the court. The petition seeking matrimonial relief would be dismissed if the opposite party can prove that the plaintiff has not approached the court with clean hands and he is responsible for the state of affairs that led to the presentation of the petition. In *Sunil Knath Trambake* v. *Leelavati Sunil Trambake*,[35] the husband filed for divorce after ten years of marriage. The main contention of the wife was that he had solemnized a second marriage and had even fathered a son from this union, a charge that the husband denied. To support her allegation she sought a DNA test of the child as well as the father. She also relied on the birth certificate and the school records of the child which corroborated her stand. The trial court allowed her prayer and directed the child and the husband to make them available for it saying that in the interests of justice it was necessary. The husband strongly opposed the direction of the court on the ground that as the second woman and the child were not parties to the suit an order directing them to submit themselves for DNA test

34 *P Malleswaramma* v. *P Prathap Reddy*, AIR 2006 AP 4.
35 AIR 2006 Bom 140.

would be violative of the principles of natural justice. The wife contended that the test was necessary to show that the husband was leading an adulterous life and if he objects to the test, inferences should be drawn against him. The core question before the court was can the DNA test be ordered, in light of the facts and circumstances of the case? The High Court of Bombay held that though the DNA test is useful and also that the court has the power to order it, it should not be directed as a routine matter and should be ordered only in exceptional and deserving cases. The discretion, according to the court, should be exercised wisely and the court should do it only when it is in the interests of justice. The court also said that no person can be compelled to give a sample of blood for analysis against his /her will, but in the event of refusal it is open to the court to draw adverse inferences. But merely because one party refuses paternity in a divorce case does not mean that the court should order paternity test. The parties should be directed to lead evidence to support their contentions of paternity and only if the court finds it impossible to draw inferences or adverse inferences on the basis of such evidence on record or the controversy cannot be resolved without a DNA test, should it be ordered. The court should also record reasons as to how and why such tests are necessary to resolve the controversy and are indispensable. In the present case, documentary proof was available to show that it was the husband who had fathered the child in the shape of the birth certificate of the child as also the school records naming the husband and the second woman as father and mother. The court, therefore, rightly held that as neither the second woman nor the child was parties to the matrimonial proceedings ordering DNA test to be performed on them would be a violation of the principles of natural justice.

Divorce by mutual consent

In accordance with the provision of divorce by mutual consent,[36] after the presentation of the first petition, the parties have to wait for a compulsory period of six months before they can approach the court again with a second joint application. The issue whether the observance of this minimum waiting period of six months is mandatory or not has come up before the courts time and again, leading to a conflict of judicial opinion.[37] In a case from Delhi,[38] a mutual consent petition was filed by the husband and the wife seeking divorce. At the same time, they sought an exemption from waiting for a period of six months and wanted the court to pronounce divorce immediately. The marriage was solemnized four years back, and in the opinion of the court there

36 See, the Hindu Marriage Act, 1955, s. 13.

37 See *Dinesh Kumar Shukla* v. *Neeta,* AIR 2005 MP 106, where the six months waiting period was waived; see also, *Hitesh Narendra Joshi* v. *Jesal Hitesh Doshi,* AIR 2000 AP 362, wherein the period of six months was not waived; see also, *Arvind Sharma* v. *Dhara Sharma,* (1998) 1 SCC 22; *Paresh Shah* v. *Vijayanthimal,* AIR 1999 AP 186; *Krishna Khetrapal* v. *Satish Lal,* AIR 1987 P&H 191; *Haresh Kumar Prem Shanker* v. *Harshaben Chhotulal,* (1999) AIHC 4412.

38 *Abhay Chauhan* v. *Rachna Singh,* AIR 2006 Del 18.

was no possibility of reconciliation between the parties. Both of them were aged around 30 years, were well educated, independent, mature and fully comprehending parting of ways. Their decision to seek divorce, according to the court, was also found well considered and not influenced by any external factors including coercion etc or a hasty one, or one arrived at for collateral purposes. The claim for exemption was granted on the ground that ingredients required for waiver of six months in question were fully satisfied. The court held that the observance of six months waiting period under section 13 B[39] should be read as directory only and though it cautions the court of its duty to fight to the last ditch possible to save the marriages as it is in the interests of justice and also to the society that marriages should be saved but if the court is satisfied that the situation is such that the marriage should be put to an end immediately then it should do so. The words used in section 13 B, therefore, have to be read in the context in which the liberalized provision has been made by the legislature. When the intention of the legislature is to liberalize and to unlock the wedlock and help the two discordant spouses to get quick separation and to lead their remaining life without agony the section should be read as directory, otherwise the whole purpose would be frustrated.[40] The court further observed that where it is impossible to live like husband and wife, any compulsion to unite them would lead to social evils and disturbance of mental peace and disorder in the family life and thus it is not the social system but the personal safety of the parties to the wedlock which should be the guiding principle.

The facts of the case presented an interesting scenario. The parties were married on 27th April 2001 and separated in November 2001. They filed the mutual consent petition on 16th Dec 2004 and on the same day pleaded for the grant of waiver from waiting for six months that was refused by the additional district magistrate. In appeal, though the high court granted the waiver the order itself took around two years, i.e., much more time than what was pleaded to be waived!

In *Rupali* v. *Sunil Data*[41] the husband and wife filed a joint petition under section 13 B for divorce by mutual consent. The parties lived together only for a period of four months and then separated and all efforts for reconciliation had failed. Their statement was recorded and the case was adjourned for adhering to the waiting period of six months. After around three months from the filing of the first petition, the wife appeared before the court and stated

39 13B reads as under: ...
(2) the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

40 *Supra* note 39 at 20.

41 AIR 2006 P&H 93.

that her consent was obtained by force, fraud and undue influence and therefore the mutual consent petition should be dismissed. The trial court instead of dismissing the petition framed the following issue: whether the consent of the petitioner was obtained by fraud, at the time of filing of the petition? If so, to what effect?

The wife challenged this issue as framed by the trial court. The high court held that the very object for prescribing a waiting period of six months after presentation of the first petition to put an end to the marriage by mutual consent is to give the parties time and opportunity to rethink on his/her decision. If they have second thoughts or change in mind not to proceed, they can withdraw their consent. This withdrawal of consent can be unilateral and not necessarily joint and can be exercised at any time during the duration of six months. In fact the parties are not supposed to state in detail the reasons for the withdrawal of their consent. Six months is the "rethinking time" and is designed to prevent hasty and unilateral separations. The court should not, therefore, go into the questions of reasons for withdrawal of the consent by one party. If the wife had categorically alleged that she had withdrawn her consent, the proper course of action would have been to dismiss the mutual consent petition and not frame issues.

Matrimonial property

The Indian patriarchal system strengthens control over material assets in favour of males and perpetuates stereotyping of roles firming financial dependency of women on men. An Indian woman's assumption of household responsibilities takes her nowhere if after spending substantial part of her life in domestic drudgery a broken marital cord forces her to fight for her survival. In the absence of evaluation of home making as an economic contribution, this important though unremunerative work does not translate into a right to own material assets looked after by a wife as part of her house keeping. Control and ownership of material assets is miles apart from a long drawn battle for a meager quantum of maintenance to be squeezed out from the pocket of an unwilling husband under the compulsions of a court's direction. In a case[42] before the apex court, the parties who were married in 1959 lived together for 31 years when the husband filed a petition for divorce that was granted to him eight years later. The wife filed an application for a declaration of her half right in the property that stood in the name of the husband and husband and his other family members and a perpetual injunction restraining the husband and others from alienating the property. She pursued her proceeding for declaration and injunction relating to the properties even after grant of divorce. The family court dismissed the claim and held that the appellant had failed to prove that the properties standing in the name of her husband and others, were joint acquisitions or that she had a half share therein. Aggrieved by the

42 *Adhyaatamam Bhamini* v. *Jagadish Ambalal Shah*, civil appeal 5693 of 2006, decided on Dec. 11, 2006.

dismissal of her claim in respect of the immoveable properties, the appellant filed an appeal before the High Court of Bombay which found that there was no reason to differ from the conclusions of the family court regarding the title to the properties and the finding that the appellant had no joint ownership in the properties. The appellant thereupon filed a revision petition seeking a review of the order as also for condoning the delay in filing the appeal. The division bench of the high court found no ground to review the order earlier made. The matter went to the Supreme Court. The court held that the appellant ought to be given an opportunity to argue her appeal on merits. Since the case also involved the issue of condonation of the delay in filing the appeal, the matter was remitted to the high court to be tried afresh on the issue of half share in the property conditional upon the wife depositing a sum of Rs 10,000, within six weeks from the date of the judgment of the apex court. The court also noted that the issue relating to matrimonial property was important and did not deserve a casual dismissal as was done by the revision court.

Ironically, under the Hindu Marriage Act though there is a provision relating to division of matrimonial property,[44] the concept of matrimonial property includes only the joint acquisitions by the husband and the wife and if the wife fails to show monetary contribution towards property acquired by the husband, the husband alone remains the owner. A share in such property cannot be claimed by the wife even if by assumption of domestic responsibilities, she had enabled the husband to go out free of tension and earn a livelihood and her rights are reduced to a claim of maintenance only.

Interim maintenance

One of the primary duties of the husband is to provide maintenance to the wife and dependant children of the marriage. The whole purpose of providing interim maintenance to the indigent spouse is that no party should suffer due to lack of funds to pursue the litigation as well as sustain himself/ herself till the disposal of the case. On proof of change in circumstances, the maintenance order can always be modified and even cancelled if the circumstances of the case so warrant. However, the liability of an able bodied man cannot be diluted on the ground of termination from employment if he is otherwise fit enough to work for a living and is in fact making money by doing some work. A maintenance *pendente lite* petition was filed by the wife as against the husband under section 24 of the Hindu Marriage Act that was granted in her favour.[44] The husband later sought its cancellation on the grounds that as he was terminated from his employment as a police constable, he was not in a position to pay maintenance to his wife. He was meeting his own expenses from selling milk. The revision was dismissed by the court on the ground that being an able bodied man and skilled worker selling milk he can provide maintenance to his wife and children.

43 See the Hindu Marriage Act, 1955, s. 27.
44 *Yash Pal* v. *Neelam Kumari,* AIR 2006 (NOC) 1459 (J&K).

In *K Srinivasa Kumar* v. *K Sharvani*,[45] while passing a decree for divorce the court directed the husband to pay a sum of Rs 1,80,000 as permanent maintenance and alimony to the wife within a period of six months. He paid half of it and failed to pay the rest. The wife filed the execution proceedings against him in the court. During the pendency of the proceedings, the wife remarried and the husband sought exemption from paying the rest of the unpaid alimony on the grounds of material change in the circumstances. He contended that remarriage of the ex-wife would make her ineligible for a claim of maintenance from him as now the responsibility of maintaining her would be that of her second husband. The court noted that though quantum of maintenance once awarded can be altered, modified or even cancelled on proof of a material change in circumstances, such a change cannot have a retrospective application. If the direction awarding maintenance was on a prior date, and the husband himself defaulted in making payment the same cannot be taken to the advantage of the defaulter. The change in circumstances has been created to the disadvantage of the wife and to the advantage of the husband and same cannot be a ground of interference with the original order. The court's decision was influenced by the fact that the husband had committed a default in payment of half of the amount of the awarded maintenance. This also indicates that alteration in maintenance clause would not apply in case the order is to pay a lump sum amount within a specified period and circumstances warranting alteration take place subsequent to the specified period. Thus remarriage or even unchastity of the ex-wife subsequent to the period within which a lump sum maintenance amount is to be paid would be irrelevant.

V HINDU JOINT FAMILY

Presumption of joint property

There is no presumption that a Hindu family merely because it is joint possesses any joint property. The burden of proving that any particular property is joint family property is in the first instance upon the person who claims it as coparcenary property.[46] But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be the joint family property. This is, however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown that the onus shifts on the person who claims the property as self acquired to affirmatively make out that the property was acquired without any aid from the family estate.

In *Rama Nagappa Mahar* v. *Nagappa Mallapppa Mahar*[47] after the death of *karta* his wife and sons lived as members of undivided family. Since

45 AIR 2006 AP 365.
46 *Tilak Raj* v. *Vidhya Devi*, AIR 2006 J &K 29.
47 AIR 2006 Kant 31.

the family lived at a place X, one of the sons of the *karta* (defendant) sold the joint family land at the place Y and out of sale proceeds bought land near his residence and cultivated it as joint family property. Property stood in the name of *karta* and the defendant sought to have them mutated in his name, started treating the total property as his own separate property, without providing for the basic necessities to other members of the family. The other son (plaintiff) filed a suit for partition by metes and bounds claiming half of the share in the suit properties. The defendant contended that an oral partition had taken place way back in 1937 when he was not even born and under this partition, he had acquired an exclusive title to the property. The court held that the mere fact that parties are living separately or cultivating land separately would not prove oral partition. The defendant himself admitted that he sold the land at X as it was inconvenient for him to cultivate the same and a repurchase of land at Y was with the sole purpose of conveniently placed land so that the whole of cultivable land owned by the family should be at one place only. There was also no evidence that the defendant had independent income of his own sufficient to buy land at place Y. Moreover, defendant had no personal knowledge of the said partition that he pleaded. Thus, the total property, according to the court, was the joint family property and no partition was there. All the coparceners, therefore, had equal rights over the property and could claim partition of it in their own right. The defendant had no priority of claim and at the best he could contend that as he has made considerable improvements upon the land he cultivated at the time of partition he may be allotted that as part of his share.

In another case,[48] the *karta* of a Hindu joint family effected a partition of the property through registered partition deed and not only divided the property amongst his sons and grandsons but gave some share to the female members also. He later suffered from a paralytic stroke and was completely bedridden. During this time he executed a registered will of his share in the property in favour of his one son. His wife and one of the daughters filed a suit for claiming a share out of the bequeathed property. Their primary contention was that more property was purchased out of the one bequeathed to the son and, therefore, the entire property was the joint family property. Since the entire property was joint family property, a bequest of the same by an undivided coparcener was not permissible. The issue before the court was whether an undivided coparcener could make a will of his undivided interest in the joint family property? The court held that a member of joint family can bring about his separation in status by a definite and unequivocal declaration of his intention to separate himself from family and enjoy his share in severity. Once a partition is effected his share constitutes his separate property and he is empowered to make a testamentary disposition of the same. The court held that a bequest of this share in favour of any of his sons was therefore valid.

48 *Radhamma* v. *H M Muddukrishna,* AIR 2006 Kant 68.

VI THE HINDU SUCCESSION ACT, 1956

Succession rights of parties to a void marriage and children

A valid marriage is essential for creation of mutual rights of inheritance as between the husband and the wife. Thus, parties to a void marriage do not inherit from each other. However, the children of void marriage are accorded legitimacy under section 16 of the Hindu Marriage Act, and are entitled to inherit the property of either of their deceased parent. In *Gulaba @Sita Devi* v. *Sitabiya@Jagpatia*[49] the petitioner married the deceased during the subsistence of his first marriage. Her marriage therefore was void under section 11 of the Hindu Marriage Act. Her claim to inherit the property was rightly rejected by the court, which held that though she being a party to a void marriage is ineligible to inherit the property of her deceased husband, her son being legitimate is entitled to inherit his property. Similarly in another case,[50] a woman renounced the world and became a *sanyasin*. Without putting an end to this marriage, her husband married again and later died leaving behind property. The second wife it was held by the court was a party to a void marriage and, therefore, would not succeed to the property of the deceased.

Full ownership to Hindu women

It has been nearly 51 years that the impediment on the rights of a female to hold property as an absolute owner has been removed, yet the issue is very much alive even today. It should be noted that the right of a person to create a limited interest in his property in favour of any other person including a female was, however, expressly saved under section 14(2) of the Hindu Succession Act. Two cases on section 14, one each on each clause, were deliberated upon before the courts.

In *Komireddy Venkata Narasamma* v. *Kondareddy Narasimha Murthy*[51] a childless couple brought up the wife's niece as their own child, and also married her off. The husband executed a deed of settlement in 1961 creating a vested remainder in favour of the wife and a life interest in his own favour. In 1963, he executed a will creating a life interest in favour of his wife and after her death, the property was to devolve on the niece absolutely. After the death of the husband, the wife though had a life interest in her favour, executed a deed of settlement of the same property in favour of X. The question before the court was whether the right created in favour of the wife by the husband had enlarged into an absolute right. Was it a right primarily to secure her maintenance rights, i.e., in lieu of her pre existing rights of maintenance? Since this property was in the nature of a residence, the question before the court was whether a residence is akin to maintenance or it can be distinguished as conferring a mere right of residence. The court relied on its earlier decision[52]

49 AIR 2006 (NOC) 1379 (All).
50 *Daveerawwa* v. *Gangawa,* AIR 2006 (NOC) 535 (Kant).
51 AIR 2006 AP 40.
52 *Palchuri Henumayamma* v. *Tadikamalla Kotilingam,* AIR 2001 SC 3062.

and concluded that the right of residence is a facet of maintenance and what was created in favour of the wife was not a right of maintenance alone but the right to enjoy the property during her life time without the right to alienate it. This right by the operation of section 14 (1) of the Act, enlarged into an absolute right. Since the wife had an absolute right in her favour, the settlement made by her in favour of X was capable of taking effect in law and thus the vested remainder created in favour of the niece did not materialize.

In the second case,[53] the owner of certain property executed a will under which he gave all his movable properties to his wife, but gave her a life interest in the landed property. This landed property during his life time was let out to tenants. The will provided that on wife's death the executors would execute the will and collect rents /profits from the landed property. After the death of the owner, the wife entered possession and executed a lease deed in favour of appellant and died six years later. The appellant claimed the leasehold rights that were contested by the respondents who were the beneficiaries under the will of the owner of the property on the ground that as the wife had a pre-existing right of maintenance, her rights matured into an absolute estate on the coming into force of the Act, and thus the lease created by her was valid and the respondents' rights were defeated due to her acquiring the absolute estate in the property. The legatees maintained that all life interests need not be in lieu of the pre-existing rights of maintenance and therefore, the present case was covered under section 14 (2) and not by section 14 (1). According to the court section 14 (2) has carved out a completely different field and for its application three conditions must be satisfied which are as follows:

1. That the property must have been acquired by way of gift, will, instrument, decree, order of the court or by way of award;
2. that any of these documents executed in favour of a Hindu female must prescribe a restricted estate in such property; and
3. that the instrument must create or confer a new right, title or interest on the Hindu female and not merely recognize or give effect to a pre-existing right which the female Hindu already possessed.

Where any of these documents are executed but no restricted estate is prescribed sub-section (2) will have no application. Similarly, where these instruments do not confer any new title for the first time on the female Hindu, section 14(2) will have no application. The court held that section 14 (2) is a salutary provision which has been incorporated by Parliament for historical reasons in order to maintain the link between the *shastric* Hindu law and Hindu law which was sought to be changed by the legislation of 1956, so that where a female Hindu becomes possessed of property not by virtue of any pre-existing right but otherwise and the granter chose to impose certain conditions on the grantee the legislature did not want to interfere with such a transaction

53 *Sharad Subramanyan* v. *Soumi Mazumdar,* AIR 2006 SC 1993.

by obliterating or setting at naught the conditions imposed. The court concluded that no absolute ownership was created in favour of the wife and the legatees, therefore, had better rights over the property in comparison to the tenants.

Succession to the property of a female intestate

Hindu Succession Act provides two separate schemes for Hindu intestates depending upon their sex. In case of female intestate, there is further divergence linked with the source of the property which is the subject matter of inheritance. In a case from Karnataka,[54] the issue related to the property of a Hindu female who died issueless and left behind property that she had inherited from her husband. Two claimants to her property were her brother on one hand and her nephew (sister's son) on the other who also claimed the property on the ground that he was adopted by the deceased and as the adopted son he was the sole heir and entitled to the whole property. The story of adoption was disbelieved by the court.

According to section 16, where a woman dies and leaves behind property that she had inherited from her deceased husband, the property in the absence of her issues, would go only to the heirs of her husband. If section 16 is interpreted strictly, there is no third category of heirs and in the absence of heirs of husband, the property should go to the government under the doctrine of escheat or failure of heirs. However, according to the apex court[55] if no heir of the husband is present, then the property would be treated as her general property and would devolve in accordance with the scheme laid down in section 15 of the Act. Under this section the heirs to a Hindu female are classified in five categories or groups. The heirs in the first three categories include a deceased female's children, children of pre-deceased children, her husband, heirs of her husband, and her parents. If the heirs mentioned in the first three categories are not present the property would pass to the heir specified it the fourth category i.e. heirs of the father. The property in such cases would be treated as if it belonged to the father of the intestate and would go to his heirs to be determined on the date of the death of the deceased female. Under the Hindu Succession Act, except for children, grandchildren, husband and parents, the heirs of a female are never reckoned with respect to her but are grouped as heirs of her husband, heirs of her father and heirs of her mother. In the present case the court did not accept the adoption as valid but that would not negate the claim of the nephew to inherit the property in his own right as heir of the father of the deceased female. The court came to the conclusion that i) the doctrine of escheat would not apply in case there is a failure of heirs of the husband despite the fact that there are only two class of heirs in case a woman dies and leaves behind property that was inherited by her from her husband; and ii) that the brother was entitled to succeed to

54 *S. Krishnamurthy* v. *N. Aswathaiah,* AIR 2006 Kant 44.
55 *State of Punjab* v. *Balwant Singh,* AIR 1991 SC.

estate of his deceased sister in preference to her nephew as the former was nearer in relationship to the deceased than the latter.

However, here the court has committed an error of law as even adopting the logic of the court the claim was between the deceased's brother on one hand and her sister's son on the other. Both of them come in the fourth category, i.e., heirs of the father of the deceased and are equally placed. Here the relationship of both of them has to be reckoned with respect to the father of the deceased and while her brother would be the son of her father and therefore a class I heir, even her sister's son would be the son of a pre-deceased daughter and also a class I heir. Both of them are class I heirs and therefore inherit together and to exclude the nephew is a grave error of law that has been committed by the court. If the nephew was unable to prove the fact that he was adopted by the deceased, the very fact of him standing in a particular blood relationship would not be obliterated. It should be remembered that all class I heirs inherit together. In this case brother inherits as the son of the father of the deceased while the nephew would inherit as the son of a pre-deceased daughter of the father of the deceased. The court should have upheld the claim of both the claimants, as in law each of them would be entitled to a half share in the property.

Preference of heirs of the full blood

Under the general principles of inheritance, preference is given to the full blood relations of the deceased over his half blood relations standing in the same degree of propinquity. The rule of preference of heirs of the full blood and heirs of half blood apply only when there is a conflict between heirs of the same degree or proximity of relationship to the deceased.[56] This rule does not apply if the claimants of the full blood and half blood stand in different degrees in relation to the deceased. Thus, where the half blood relations are in a nearer degree in comparison to the full blood relations of a remoter degree the rule of preference does not apply. Plaintiffs who were half blood relations of the deceased were competing against the full blood nephews who were in the lower degree. Thus, section 18 would have no application to this case.

Partition of dwelling house at the instance of female heirs

Perhaps the most inequitable provision in the Hindu Succession Act that deprived the female class-I heirs to exercise their right to partition the property and claim their share in their parent's property was section 23. As it stood prior to the amendment of the Act it prevented a daughter from partitioning her share in the dwelling house wholly occupied by the male heirs of the deceased. Unmarried, widowed, divorced and permanently deserted daughters could claim a right of residence in the dwelling house but a married daughter was without any claim of residence /partition of her share. Since its deletion at least on paper, the provisions appear to be gender just. However, where the claim to the partition was filed at the time when it was unavailable to class-I female

56 *Ram Singari Devi* v. *Govind Thakur,* AIR 2006 Pat 169.

heirs but during the pendency of the petition due to the promulgation of the amendment the disability was removed, a question arises, can the female take the benefit of deletion *pendente lite*? A Hindu woman died in 1976[57] leaving behind four daughters and one son. Three of the sisters relinquished their shares in the property in favour of the fourth sister, who became the owner of 4/5th share in the property and the son was left with 1/5th share. The sister filed a suit for partition of the property and demarcation of her 4/5th share. The son stated that sisters were married even before the death of the mother, but said that the house was demolished and a new one was constructed by him at his own expense. The matter went in appeal to the high court. Meanwhile, the Hindu Succession Act was amended and section 23 was deleted from the statute book. The specific issues framed by the court were:

1. Can a suit for partition at the instance of a daughter be defeated by raising the defence of section 23?
2. Is section 23 applicable when only one male heir is present?
3. Is the impartibility of the house affected if the male heir inducts a third party in the dwelling house or any portion of it?
4. What is the situation after the amendment of the Hindu Succession Act, 1956 and the deletion of section 23 from it?

The trial court had held that on the death of the deceased female her five children inherited equally and thus each of them was entitled to one fifth of the property. However, in view of the prohibition incorporated in section 23, at the instance of females no partition of the property could be directed. On appeal, the appellate court, quoting an earlier apex court judgment[58] held that the prohibition contained in section 23 did not apply when though there was a male heir but strangers were inducted into the dwelling house. The matter went in appeal to the Kerala High Court which held that this right of male heirs to enjoy the share of the married sisters against their consent under section 23 is personal in character. It is neither transferable nor heritable therefore it is available to the male heir only till his death and is never and cannot be extended to his legal representatives.[59]

During the pendency of the litigation section 23 was deleted as per the Hindu Succession (Amendment) Act, 2005. The question whether the omission of section 23 during the pendency of a suit for partition or an appeal or second appeal therefore has relevance in deciding the question whether the male heir or male heirs could resist the suit for partition under section 23. The Supreme Court said,[60] that this right to claim such benefit is personal to the male heirs of the deceased Hindu intestate. Such a right is neither heritable nor

57 *S. Narayanan* v. *Meenakshi,* AIR 2006 Ker 143.
58 *Narasinha Moorthy* v. *Susheelabai,* AIR 1996 SC 1826.
59 *Supra* note 58 at 148.
60 *Supra* note 59.

transferable or alienable, therefore it cannot be said that cessation of such personal right during the pendency of a suit for partition would not entitle the female heir to claim partition taking note of the subsequent events. The son contended that the state of affairs as on the date of presentation of suit alone should be the relevant criteria and any subsequent change would be of no consequence. Rejecting this contention the court held that if the contention that the state of affairs as on the date of the suit alone would be relevant is to be accepted then it would have the effect of indirectly holding that the personal right of male heir to resist partition could be continued by his legal representatives in case such male heir dies during the pendency of the suit. However, it is a settled proposition of law that the personal right of the male heir cannot be claimed by his legal heirs. Therefore, whenever the personal right of a male heir under section 23 comes to an end, the right of the female heir to claim partition cannot be defeated, i.e. a defeasible right of a male heir would get defeated the moment his personal right ceases. Such personal right of a male heir is taken away by the omission of section 23 of the Hindu Succession Act, 1956, by the amendment of 2005, and the effect of such omission would be retroactive. The court followed an earlier apex court judgment wherein it was laid down that:[61]

> Normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the *lis*. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on this entitlement of the parties to relief or on aspects which bear on the moulding of the relief occurs, the court is not precluded from taking a cautious cognizance of the subsequent change of facts and law to mould the relief.

Thus, with the amendment, the right of a male heir to claim the benefit of section 23 would get defeated even in pending litigation and he cannot claim occupation of the entire dwelling house beyond his share without the consent of the other female class-I heirs.

VII CONCLUSION

The court took a very serious note of the atrocities committed by the relations of the couple, who defy the wishes of their family to get married. It urged that the authorities, instead of proceeding against the husband's family, should take action against the highhanded activities of the parental family of the bride. The judicial concern was also evident in the case of child marriages, when the court urged Parliament to enact befitting laws, and take appropriate

61 *Ramesh Kumar* v. *Kesho Ram,* 1992 Supp (2) SCC 623 at para 4.

action to ensure compliance with the provisions of Child Marriage Restraint Act, 1929, and to provide for compulsory registration of marriage. The court, however, adopted a very orthodox and conservative attitude in not upholding the validity of an adoption, when the mother had taken a lead role in the entire exercise, though with the consent of the husband. The court's reaction to the prayers coming from estranged couples to put an end to their failed marriages was mixed. While in one case taking a very liberal attitude the court even waived the period of six months in a mutual consent petition, in the other, the court held that despite the fact that the parties were not willing to live together, marriage cannot be dissolved even on irretrievable breakdown of marriage. The plea for DNA tests came in two cases, under different circumstances. While the first related to proving non access to the wife at the time of possible conception of the child with a prayer for a decree of nullity, the other was made by the wife to prove the adulterous life that the husband was leading. In the former the court gave the consent but in the latter, it held that an order for conducting DNA test should not be ordered as a matter of routine and it is only in exceptional and deserving cases where no other alternative mechanism of evidence is forthcoming and if it is in the interests of justice, that it should be ordered. In deciding the claim for succession, the court erred as despite the law placing both the brother of a female Hindu and her deceased sister's son on an equal platform and entitled to inherit together, the court rejected the claim of the nephew in preference to the brother in clear violation of the law.