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FAMILY LAW AND SUCCESSION

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I INTRODUCTION

THE YEAR 2007 for purposes of analysis in the realm of family law and succession has proved extremely rewarding. It has given an opportunity to bring to the fore certain perspectives that hitherto remained relatively unexplored.

A case decided by the Supreme Court, shows how the courts are trying to save the institution of marriage by discharging their bounden duty as envisaged under the provisions of section 23(2) of the Hindu Marriage Act, 1955.[1] This is perhaps the first case that has reached the summit court for adjudication under these provisions.[2] The approach of the court avoids the misgiving that the courts are not concerned to save the sanctity of the institution of marriage.[3]

The issue of true nature of property in the hands of inheriting sons if the same was acquired by the father from his own personal resources has hitherto remained problematic, giving rise to conceptual confusion.[4] Such conceptual confusion could be traced back to the apex court decision of 1986 in *Chander Sen* case.[5] For avoiding the perpetuation of such a confusion, and also its evident conflict with the principles enunciated in later decisions of the Supreme Court, the author has taken the opportunity of examining the rationale of *Chander Sen de novo* in the light of the first principles, and then has respectfully contended that the propositions laid down by the Supreme Court in *Chander Sen* need reconsideration by a larger bench of the apex court, else the whole concept of Hindu *Mitakashara* coparcenary will continue to be shrouded with uncertainty.[6]

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1 See, part II, "Matrimonial Reconciliation: the Bounden Duty of the Court," *infra*.

2 *Ibid*.

3 *Ibid*.

4 See part III, "Father's Self-acquired Property: Its Nature in the Hands of Inheriting Sons," *infra*.

5 *Ibid*.

6 *Ibid*

After the coming into force of the new enactments, collectively called the Hindu Codes, comprising four principal Acts, namely, the Hindu Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956; and the Hindu Adoptions and Maintenance Act, 1956 the law relating to marriage, succession, minority and guardianship, and adoptions and maintenance among Hindus has received a new public policy perspective. These enactments amend and codify the hitherto prevailing law, by overriding the text, rule or interpretation of traditional Hindu law and any custom or usage as a part of that law in respect of all those matters for which provisions are made in these Acts. However, the overriding effect is made subject to, "save as otherwise expressly provided." This means the era of custom is not over even in the areas that have been codified. The question, therefore, that often comes to the fore is how to test the validity of a custom: whether it is to be tested on the touchstone of justice, equity and good conscience. The Supreme Court, while dealing with this issue has held that if the customs that have been accepted, recognized by the courts and acted upon by the parties at a given point of time cannot be questioned on ground of justice, equity and good conscience, because they carry their own inherent value. Following this general prescription, although the rule of custom has been specifically excluded in terms of section 4 of the Hindu Succession Act, 1956 in respect of matters that are specifically covered under the provisions of the codified law, yet the operation of Hindu *Mitakashara* coparcenary as modified by the prevailing custom or usage is allowed to continue under the express provisions of the Act itself.[7]

Somehow or the other, the prevalent perception about the Muslim Women (Protection of Rights on Divorce) Act, 1986 is that it is a piece of legislation, which is retrogressive in nature. Such a perception is usually reinforced by asserting that the sole objective of Parliament for enacting this Act was to negate the effect of the judgment rendered by the Supreme Court in *Shah Bano* and thereby limiting the right of the Muslim wife to maintenance only during the period of *iddat* immediately after divorce. As a sequel to this, it is also construed and contended that a Muslim wife, divorced by her husband, is also instantly deprived of the valuable protection guaranteed to all women, irrespective of their religion, race, caste, etc., under the provisions of section 125, read with other relevant provisions of the Code of Criminal Procedure, 1973 (Cr PC). Such a perception, however, stands reversed by the Supreme Court in *Iqbql Bano* in the light of its reiteration of earlier established principles.[8] The outcome is that the position of Muslim women is now more entrenched on grounds of constitutional equality.[9]

7 See part IV, "Status of Custom in the Matters of Inheritance and Succession," *infra*.
8 See part V, "Muslim Women (Protection of Rights on Divorce) Act, 1986: Its Broad Ambit," *infra*.
9 *Ibid*.

Protection of Women from Domestic Violence Act, 2005 is of very wide import. It seeks to provide, *inter alia*, "for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household." Lest this protective right is lost in the realm of uncertainty, the Act provides fairly comprehensive definitions of the expressions 'shared household,' which seems to be a replica of the concept of 'matrimonial home,' and 'domestic violence,' which includes within its ambit any act of omission or commission or conduct that causes any 'physical abuse,' 'sexual abuse,' 'verbal and emotional abuse,' and 'economic abuse' of the aggrieved person either directly or indirectly by any person in a 'domestic relationship.' Nevertheless, this Act essentially provides a civil remedy. The avowed purpose of the Act is not to make its remedies as an instrument of oppression in the hands of women (to be read daughters-in-law) for punishing or terrorizing the parents-in-law, as has happened in *S.R. Batra* case. However, in the process of rendering the decision in the light of the peculiar circumstances presented before the Supreme Court, an opportunity for expansive interpretation of the protective provisions of the Act of 2005 was lost![10]

II MATRIMONIAL RECONCILIATION: BOUNDEN DUTY OF COURT

During the past couple of decades, there has been an incredible increase in divorce phenomenon in India. It seems to be pronounced in precipitated form in cosmopolitan cities, like Delhi, Chennai, Kolkata. Such a trend is now catching up even in small cities and towns. The State of Kerala, bearing the distinction of being the most literate state in India, "has registered 300 per cent upward spiral in divorce cases per year."[11] What does this incredible increase signify?

Does it mean that marriage as a social institution has lost or is losing fast its primordial position, and that the courts of law seem to be recognizing this fact by granting divorce decrees rather easily? Such a notion seems to be somewhat misplaced.

In the quagmire of conflict situations at least one thing is clear: people do not as yet seem to enter matrimony with a divorce-design. Such a position is reinforced on two counts. On the first count, leaving aside the exceptional cases of fraudulent marriages that fall within the realm of criminal law and not matrimonial law, the marriages are invariably 'solemnized' with full participation of the members of the community to which both the parties belong. Often, huge expenditure is incurred in the solemnization of marriage, as if, it is an investment to ensure that the couple may live happily 'ever afterwards'! The second count for ousting divorce notion in the

10 See part VI, "Protection of Women from Domestic Violence Act, 2005: Its Basic Objective," *infra*.

11 *The Sunday Tribune* (16.9.2007), "Spectrum."

contemplation of marriage is that as yet it has not been possible to evolve any viable arrangement that could be a legitimate substitute for the institution of marriage that provides a unique kind of sanctity and stability to human relations – a *sine qua non* for the healthy growth of children of the marriage.

It is in this backdrop, the legislative intent as clearly manifested in clause (2) of section 23 of the Hindu Marriage Act, 1955, needs to be appreciated. This clause mandates that, before proceeding to grant any matrimonial relief under the Act, such as judicial separation or divorce, "it shall be the duty of the court in the first instance, in every case, where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties." In the exploration of this legislative intent, a bold initiative taken by the Punjab and Haryana High Court has come up before the two-judge bench of the Supreme Court in *Jagraj Singh* v. *Birpal Kaur*.[12]

The fact matrix of the case reveals that the parties were married in the year1993. The following year a son was born to them, who did not survive. In the meanwhile, the husband left for Brunei, Darusslame, and the wife joined him there. However, not finding any gainful employment even in the capacity of a pharmacist (she being a holder of M.B., B.S. degree from Russia), she returned to India and started living with her parents. Relations between the two became strained in due course of time, and in the year 2002 she petitioned for divorce on grounds of desertion and cruelty under the relevant provisions of the Hindu Marriage Act, 1955 (HMA). The district judge, finding that the husband had neither treated the wife with cruelty nor deserted her, dismissed her petition. On appeal by the wife, the husband appeared before the high court not in person but through the special power of attorney (SPA).

Being acutely aware of its bounden duty under section 23(2) of the HMA, the high court directed the husband to appear before the court in person. On the stipulated date, the wife was present, but the husband was conspicuous by his absence. The SPA assured the court that "the husband would positively remain present in the Court on the next date of hearing."[13] However, when the husband did not show up at the twice subsequently adjourned hearings, the peeved judges of the high court passed the non-bailable warrants "to be executed through the Ministry of External Affairs, Government of India" on the address given by the husband's SPA in a foreign country.[14]

This unprecedented order of the high court was challenged before the Supreme Court by the husband through his SPA, contending that "the personal appearance of the party to the proceeding is not mandatory,"[15] and that the court had no jurisdiction to issue non-bailable warrant under the HMA.[16]

12 AIR 2007 SC 2083, *per* C.K. Thakker and Lokeshwar Singh Panta JJ.
13 *Id*. at 2085 (para 5).
14 *Ibid*.
15 *Id*. at 2085 (para 8).
16 *Ibid*.

This led the apex court to examine *for the first time* the ambit of the court's duty under section 23(2) of the HMA. Emphasizing the need for maintaining the institution of marriage, C.K. Thakker J (for himself and Lokeshwar Singh Panta J) discerned[17] that "conjugal rights are not merely creature of statute but inherent in the very institution of marriage;" the matrimonial disputes should not be allowed to be driven to a "bitter legal finish;" "every possible effort must be made so as to restore the conjugal home and bring back harmony between the husband and wife;" and the court must endeavour by directly involving the parties in such a manner so that "possible irritations and misapprehensions should not be allowed to vitiate the [conjugal] atmosphere." Hence, the approach of a court of law in matrimonial matters should be "much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire."[18] It is with this objective the court must make attempt to bring about reconciliation "irrespective of the stage" of the case under section 23(2).[19] The court "should not give up the effort of reconciliation merely on the ground that there is no chance for reconciliation,"[20] or one party or the other says that there is no possibility of living together.

The apex court does recognize the fact that living together is highly "personal to the parties." Nevertheless, in its attempt to rehabilitate the couple the court is obliged to determine the reasonability of their not reconciling, and this could not be done without having first hand interaction with the couple concerned.[21] This indeed is the basis for issuing the non-bailable warrant to the recalcitrant husband for ensuring his presence in the instant case.

However, the Supreme Court has added, in the author's view rightly, a new dimension to the reconciliation approach when it granted interim stay against the non-bailable warrant issued by the high court till the next date of hearing.[22] This was done for overcoming "the grievance and apprehension" of the husband that he might be arrested the moment he landed in India. When the husband's counsel still insisted on his original plea that no such order could be passed by the high court in matrimonial proceedings, the Supreme Court sternly stated that if in spite of protection granted by it, "the husband is bent upon to disobey and flout the order passed by the Court, which is in consonance with Section 23(2), he cannot claim as of right the equitable relief from this Court."[23] Accordingly, the appeal was dismissed "with costs." [24]

17 *Id*. at 2086 (para 14).
18 *Id*. at 2086 (para 15).
19 *Id*. 2087 (para 17).
20 *Id*. at 2087 (para 19).
21 *Id*. at 2087 (para 18).
22 *Id*. at 2088-89 (para 26).
23 *Id*. at 2089 (para 27).
24 *Id*. at 2089 (para 28).

Thus, it is merely a misgiving that the courts are not concerned to save the sanctity of the institution of marriage. The increasing incidence of divorce phenomenon seems to be a transitory phase. It would die down as soon as one learns to found marriage on mutual respect and understanding. For breaking the traditional inertia of inequality, the burden of course lies more on men than women!

III FATHER'S SELF-ACQUIRED PROPERTY: ITS NATURE IN THE HANDS OF INHERITING SONS

What is the true nature of property in the hands of inheriting sons if the same was acquired by the father from his own personal resources? This question specifically came up for consideration before the single judge bench of the Punjab and Haryana High Court in *Kulwant Singh* v. *Makhan Singh*.[25] In the regular second appeal, reversing the decision of the lower courts, Mittal J held that in the facts and circumstances of the case, "11 marlas of land which was purchased by the father of the parties to the suit and the building constructed thereon which was inherited by the four brothers after the death can be said to be the Joint Hindu Family property in the hands of four brothers in equal share qua their sons."[26] Accordingly, Kulwant Singh, the plaintiff-appellant, one of the four members (sons) of the Hindu undivided family (properly called, 'coparcenary') was held to have no power to deal with the joint family property (properly called 'coparcenary property') so long they remained joint. Hence his suit regarding the sale of ¼th share by the defendant in the land measuring 11 marlas and the building constructed thereon was dismissed.[27]

However, by special leave to appeal both the brothers Kulwant Singh and Makhan Singh (out of four brothers), aggrieved by the decision of the high court, approached the Supreme Court in the capacity of plaintiff-respondent and defendant-appellant (now through LRs). Taking up the appeal filed by Kulwant Singh (Civil Appeal No. 4455/2005) in *Makhan Singh (D) by LRs.* v. *Kulwant Singh*,[28] the apex court specifically directed its attention to the issue "as to why the decree for specific performance to the extent of 11 marlas regarding the sale of ¼th share in 11 marlas of land and the building constructed thereon has been denied by the High Court."[29] However, the apex court decided this issue summarily by making a reference to its earlier decision in *Commissioner of Wealth Tax, Kanpur and Others* v. *Chander Sen and Others*,[30] wherein it had been held that "a son who inherits his

25 AIR 2003 P&H 142, *per* Satish Kumar Mittal J.
26 *Id*. at 147 (para 13).
27 See, *id*. at 149 (para 21).
28 AIR 2007 SC 1808, *per* B.P. Singh and H.S. Bedi JJ. (Hereinafter simply, *Makhan Singh*)
29 *Id*. at 1812 (para 11).
30 AIR 1986 SC 1753, *per* R.S.Pathak and Sabyasachi Mukherji JJ. (Hereinafter simply, *Chander Sen*)

father's assets under section 8 of the Hindu Succession Act does so in his individual capacity and not as a Karta of the Hindu Undivided Family."[31]

Since on the basis of "admitted" facts in *Makhan Singh* "11 marlas had been purchased by Dula Singh [father of Kulwant Singh and Makhan Singh] from his income as an employee of the Railways," "it was therefore his self-acquired property."[32] "Such a property falling to his sons by succession could not be said to be the property of the Hindu Joint Family."[33] Acting on this conclusion, the Supreme Court allowed the appeal filed by Kulwant Singh and decreed the suit in his favour by reversing the decision of the Punjab and Haryana High Court on this count.[34]

The principal proposition propounded by the Supreme Court in *Chander Sen* is now more than two decades old – decided in 1986. Although this proposition clearly and categorically runs contrary to the well-established concept of *Mitakashara* coparcenary, at least till the oncoming of the Hindu Succession (Amendment) Act of 2005, its veracity hitherto has not been questioned in judicial decision-making. However, a very recent case of the apex court – *Ass Kaur (Smt.) (Deceased) by LRs* v. *Kartar Singh (Dead) by LRs*,[35] which abstracts legal statements showing the continued existence of *Mitakashara* coparcenary tend to negate the propounding of the apex court in *Chander Sen*.

For instance, the apex court in *Ass Kaur*, while considering the overriding effect under section 4 of the Hindu Succession Act, which specifically excludes the application of customary law with respect to any matter for which provision is made in this Act, has taken the opportunity to reiterate the existence of the principle of *Mitakashara* coparcenary. S.B.Sinha J. (for himself and Markendey Katju J.), *inter alia*, stated: "Property inherited from paternal ancestor is, of course, ancestral property as regards the male issue of the propositus, but it is his absolute property as regards other relations."[36] In support of this view, the court has abstracted the statements from the standard work, *Mulla's Principles of Hindu Law*:[37]

> [I]f A inherits property, whether movable or immovable, from his father, or father's fathers, or father's father's father, it is ancestral property as regards his male issue. If A has no son, son's son, or son's son's son in existence at the time when he inherits the

31 *Makhan Singh*, at 1812 (para 11).
32 *Ibid*.
33 *Ibid*.
34 *Ibid*.
35 AIR 2007 SC 2369, *per* S.B. Sinha and Markendey Katju, JJ. (Hereinafter simply, *Ass Kaur*)
36 *Id*. at 2375 (para 32).
37 The Supreme Court has abstracted the following statements that were earlier cited by the apex court with approval and reliance in *Smt. Dipo* v. *Wassan Singh and Others*, [(1983) 3 SCC 376], wherein the sister was held to be a preferential heir as it was found that the entire property was an ancestral property.

> property, he holds the property as absolute owner thereof, and he can deal with it as the pleases …..[38]
> A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenery with his sons, sons' sons, and sons' sons' sons, but as regards other relations he holds it, and is entitled to hold it, as his absolute property.[39]
>
> Again:
> The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession.[40]

After referring to these statements, the Supreme Court in *Ass Kaur* has further observed, rather assertively, that "there is no dispute in regard to the aforementioned propositions of law."[41] As if to reinforce this view, the apex court cited[42] its two other earlier decisions, namely, *Dharma Shamrao Agalawe* v. *Pandurang Miragu Agalawe and Others*[43] and *Sheela Devi and Others v. Lal Chand and Another*.[44]

Since the two-judge bench proposition of the Supreme Court in *Chander Sen* (1986), recently relied upon in *Makhan Singh* (2007), is in direct conflict with the abstracted principle duly approved by another two-judge bench of the Supreme Court in *Ass Kaur* (2007) – both the cases considering the impact of the provisions of the Hindu Succession Act on the Hindu joint family property, the present author is prompted to unfold the rationale of *Chander Sen* afresh, particularly because it propounded the proposition, which is contrary to the view hitherto accepted by the respected commentators on Hindu Law like J.D.M. Derret.

Chander Sen case is fairly a comprehensive judgment delivered by Sabyasachi Mukherji (for himself and R.S. Pathak J). The apex court in this case squarely raised the question whether the income and asset, which a son inherits from his father when separated by partition, should be assessed as income of the Hindu undivided family of the son, or his individual income.[45] For answering this question in the light of the provisions of the Hindu

38 *Mulla's Principles of Hindu Law* 289 (15th ed.).
39 *Ibid*.
40 *Id*. at 291.
41 *Ass Kaur* at 2375 (para 33).
42 *Id*. at 2376 (para 33).
43 AIR 1988 SC 845.
44 2006 (1) SCALE 75.
45 *Chander Sen* at 1756 (para 10).

Succession Act, the Supreme Court specifically directed its concern to examine the impact of the said Act on the hitherto prevailing provisions of the Hindu law.

In respect of the prevailing position prior to the Act of 1956, the Supreme Court summed up by stating that there was "no dispute among the commentators on Hindu Law, nor in the decisions of the Court that under the Hindu Law as it is, the son would inherit the same as Karta of his own family."[46] However the real problem is in relation to the post-Act of 1956 position; that is, in terms of the impact of the provisions of the Act of 1956, including particularly the provisions of its section 8, on the un-codified law of Hindu undivided family.[47]

For determining this impact, the Supreme Court took into account the views expressed by the various high courts specifically on this very issue in hand. On its analysis, the court noted the divergent views[48] expressed by the Allahabad High Court in *Commissioner of Income-tax, U.P.* v. *Ram Rakshpal, Ashok Kumar*,[49] full bench of the Madras High Court in *Addl. Commissioner of Income-tax, Madras* v. *P.L. Karuppan Chedttiar*,[50] the Madhya Pradesh High Court in *Shrivallabhadas Modani* v. *Commissioner of Income-tax, M.P.-I*,[51] and the Andhra Pradesh High Court in *Commissioner of Wealth-tax A.P. –II* v. *Mukundgirji,*[52] on one side and the Gujarat High Court in *Commissioner of Income-tax*, *Gujarat-I* v. *Dr Babubhai Mansukhbhai*[53] on the other. In view of its analysis, the Supreme Court set in to examine the impact-issue *de novo*. The results of its analysis may be abstracted as under:

(a) The singular objective of enacting the Hindu Succession Act 1956, as indicated by its very preamble, is "to amend and codify the law relating to intestate succession among the Hindus."[54] Here the use of the term "amend" means "to modify (the hitherto prevailing principles of Hindu law) where necessary."[55]

(b) Section 4 of the Act, "as noted by the Andhra Pradesh High Court," "makes it clear" "that one should look to the Act in case of doubt and not to the pre-existing Hindu law."[56]

46 *Ibid*.
47 *Ibid*.
48 See *Chander Sen* at 1759 (para 18).
49 (1968) 67 ITR 164, analyzed in *Chander Sen* at 1756 (para 8).
50 114 ITR 523 analyzed in *Chander Sen* at 1758 (para 16).
51 138 ITR 673 analyzed in *Chander Sen* at 1759 (para 16A).
52 144 ITR 18 analyzed in *Chander Sen* at 1759 (para 17).
53 (1977) 108 ITR 417, analyzed in *Chander Sen* at 1758 (para 15). (Hereinafter simply, *Dr Babubhai Mansukhbhai*)
54 *Chander Sen* at 1760 (para 19). However, it remains an enigma as to why the legislature omitted to include a reference to 'Testatmentary Succession', which is specifically dealt with in Chapter III of the Act under section 30.
55 *Id*. at 1760 (para 20).
56 *Ibid*.

(c) (i) Section 8 of the Act, which lays down the general rules of succession, provides in the very first rule that the property of male Hindu dying intestate shall devolve upon the heirs specified in Class I of the Schedule appended to the Act. These heirs (prior to the amending Act of 2005) include the following 12 in number: Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son.[57]

(ii) A perusal of the list of heirs mentioned in Class I of the Schedule shows that it "only includes son, and does not include son's son, but does include son of a pre-deceased son."[58] In other words, while including son, and son of a pre-deceased son, the Class I heirs "does not include specifically the grandson."[59]

(iii) The inclusion of grandson along with the son despite his exclusion specifically would mean that when son inherits the separate property of the father, "he takes it as karta of his individual family" – a view subscribed by the Gujarat High Court in *Dr Babubhai Mansukhbhai*. Such a view, in the opinion of the Supreme Court, "is not possible" in the light of the provisions of section 8 of the Act.[60]

(iv) The Supreme Court, notwithstanding the contrary opinion expressed in *Mulla's Commentary on Hindu Law* (15th ed. at pages 924-26), dealing with section 6 of the Hindu Succession Act, as well as in *Mayne's on Hindu Law* (12th ed. at pages 918-19),[61] justifies its view mainly on two counts. One, it would amount to applying the old Hindu law (that is, enabling the grandson to get a right by birth along with the son in the property inherited by the son), which is "contrary to the scheme outlined in section 8."[62] Two, the acceptance of the view of the Gujarat High Court "would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it (that is, the inherited property) will be joint Hindu property vis-à-vis son, and female heirs with respect to whom no such concept could be applied or contemplated."[63] Such female heirs include widow, mother, daughter of a pre-deceased son, etc.[64]

57 *Id*. 1756-57 (para 10).
58 *Id*. at 1760 (para 20).
59 *Id*. at 1757 (para 11).
60 *Id*. at 1760 (para 20).
61 *Id*. at 1760 (para 21).
62 *Id*. at 1760 (para 20).
63 *Ibid*.
64 *Ibid*.

In the light of the reasons as abstracted above, the Supreme Court in *Chander Sen* affirmed that "the express language [of section 8 of the Hindu Succession Act, 1956], which excludes son's son, but included son of a predeceased son, cannot be ignored," and "must prevail."[65] To this extent, the old Hindu law stands "amended." and, accordingly, the court accepted the view expressed earlier by the High Courts of Allahabad, Madras, Madhya Pradesh, and Andhra Pradesh, in preference to the contrary view taken by the Gujarat High Court.[66]

However, it is submitted that the stand adopted by the Gujarat High Court, which is in consonance with the view expressed by the commentators on Hindu law that is duly approved by the Supreme Court in *Ass Kaur* (2007) is more tenable for the following reasons:

(A) The overriding effect of the Act, as stipulated in the provisions of section 4, is not unqualified. This needs to be realized at least in two respects. Firstly, the opening expression of section 4, "Save as otherwise expressly provided," clearly envisages that there are certain exceptions where the law immediately in force before the commencement of the Act in the form of any text, rule or interpretation of Hindu law and any custom or usage as a part of that law shall continue to apply. Secondly, the text of section 4 itself limits the overriding effect of the Act by laying down that only those matters that are specifically dealt within the Act stand amended, and not those that are not covered and codified by it either directly or indirectly.

(B) Prior to the amendment introduced by the Hindu Succession (Amendment) Act of 2005, the provisions of section 6 read with section 8 of the principal Act of 1956 clearly provide when the Hindu Undivided Family including Mitakashara coparcenary is retained and the extent to which it has been amended under certain circumstances.

(C) The opening and the principal part of section 6 of the Act preserves the concept of Mitakashara coparcenary in its pristine form by providing unequivocally that when a male Hindu dies after the commencement of this Act, having an interest at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.

(D) The principle of survivorship is, however, defeated in a situation when a male Hindu dies leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative. In that situation, instead

65 *Id*. at 1760 (para 22).
66 *Id*. at 1760 (para 23).

of surviving members taking the whole property by virtue of surviving the deceased, the deceased's interest in the Mitakashara coparcenary property shall devolve in accordance with the provisions of section 8. This is the impact of the proviso to the principal statement made in section 6.

(E) For crystallizing the interest of the deceased in the Mitakashara coparcenary property, a legal fiction has been introduced by appending Explanation I to the Proviso, whereby "the interest of a Hindu Mitakashara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not."

(F) The superseding of the principle of survivorship, it needs emphasis, does not mean that the concept of Mitakashara coparcenary has been totally abandoned or erased from the applicable body of Hindu law. To wit, even in the event of crystallizing and separating the interest of the deceased coparcener, it is required to resort to the process of partition as envisaged under the Mitakashara law.

(G) Having crystallized the interest of the deceased coparcener into a share allotted to him on partition, it would devolve upon the heirs in the order of succession as stipulated under section 8. According to the rules of this section, the Class I heirs, twelve in number that include both males and females,[67] take precedence over all the rest.[68]

(H) Identifying the share of the deceased in the coparcenary property on the basis of notional partition – the partition resorted to only for a specific purpose of demarcating the share of the deceased – does not amount to partition among the surviving members of the coparcenary. They continue to live jointly as before. This is borne out from the appended Explanation II, which categorically provides that nothing contained in the proviso to section 6 (which makes room for the daughter to claim a share in the property of deceased father) shall enable a person who has separated himself from coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein. This implies that the purpose of proviso is only to carve out a share in the property of the deceased for the benefit of daughters, and let the Hindu Undivided Family and coparcenary go on as usual.

(I) The retention or continued existence of coparcenary is further reinforced by the provisions of section 10 (read with section 8),

67 See, *supra* note 57 and the accompanying text.

68 Under the general rules of succession, the property of a male Hindu dying intestate shall devolve: firstly upon the heirs, being relatives specified in class I of the schedule; secondly, if there is no heir of class I, then upon the relatives specified in class II of the schedule; thirdly, if there is no heir or any of the two classes, then upon the agnates of the deceased, and lastly, if there is no agnate, then upon the cognates of the deceased.

which deals with the distribution of deceased's share in the coparcenary property carved out through notional, and actual, partition amongst the heirs in Class I of the Schedule. A perusal of the rules provided in this section reveals that the distribution is to be done on the basis of per stripe or branch, and not per capita so far as the coparceners in Class I are concerned, which include son, son of a predeceased son, son of a predeceased son of a predeceased son. This is evident from the use of the term "branch," that is 'stripe', in Rules 3 and 4. In this respect, the position may be contrasted in relation to distribution of property amongst heirs in Class II of the Schedule under section 11, which no where uses the term 'branch' or per stripe in the mode of distribution. It simply says that the property of the intestate shall be divided between the heirs specified in any one entry in Class II of the Schedule so that they share equally.

(J) The provisions of section 19, which spell out the mode of succession of two or more heirs, do not discard the retention of the concept of Mitakashara coparcenary in certain specified situations. It provides that if two or more heirs succeed together to the property of an intestate, they shall take the property "*save as otherwise expressly provided in this Act*, per capita and not per stripes; and as tenants-in-common and not as joint tenants."[69] The Supreme Court did make a specific reference to the provisions of this section in *Chander Sen* by adding a special paragraph 12A.[70] But, somehow or the other, the italicized saving clause, which is of critical importance in the context of devolution of property has escaped the attention of the Supreme Court while considering the purport of this section. It appears that for its flawed incorporation, the Court relied upon the judgment of the Andhra Pradesh High Court in *Commissioner of Wealth-tax A.P.–II v. Mukundgirji*,[71] wherein there is an omission of the saving clause.[72] It is this omission, which led the court to conclude that whenever two or more heirs succeed together to the property of an intestate, they should always take the property as tenants–in-common and not as joint tenants. This means that the Act has chosen to provide that the property which devolved upon heirs mentioned in Class I of the Schedule under section 8 constituted the absolute properties and his sons have no right by birth in such properties.[73]

69 Emphasis added.
70 *Chander Sen* at 1757.
71 See *supra* note 52.
72 See *Chander Sen* at 1759 (para 17)
73 *Ibid*.

(K) A perusal of the provisions of section 19 reveals that two modes of devolution of property are clearly intended when it is specifically stated that devolution of property on two or more heirs would be per stripes if so expressly stated, and otherwise it would be per capita, that is if it is not stated specifically whether it would be per stripes or per capita. The dual mode had been necessitated by the operation of the provisions of section 6 of the principal Act (prior to their replacement by the Amending Act of 2005) read with the provisions of section 10.[74] In the process of devolution, the daughter is given a share in the property of her father without conferring the status of a coparcener on her, and as such she would get her share per capita, that is in her own individual capacity. On the other hand, the son acquires the property as Karta of the family, that is per stripe in which his son would take interest by virtue of his birth. In view of this exposition, it would, therefore, does not seem to be right to assert, as has been done by the Supreme Court in *Chander Sen*, that two modes of devolution of property are not intended under the Act of 1956.[75]

(L) However, after the Hindu Succession (Amendment) Act of 2005, which makes the daughter of a coparcener by birth a coparcener in her own right in the same manner as the son, and shall have rights in the coparcenary property as she would have had if she had been a son, and be subject to the same liabilities in respect of the said coparcenary property as that of a son,[76] it is difficult to contend that the Hindu Succession Act of 1956, even prior to its amendment in 2005, intended to abolish the institution of Hindu Mitakashara coparcenary and thereby introducing only one mode of devolution of property whereby the inheritor takes it as per capita, and not per stripe. Had that been the emphasis, the daughters would not have been made the coparceners!

In view of the reasons as expounded above in paragraphs (A) to (L) on the basis of first principles, it is respectfully contended that the propositions laid down by the Supreme Court in *Chander Sen* need reconsideration by a larger bench of the apex court, else the concept of Hindu *Mitakashara* coparcenary will continue to be shrouded with confusion.

IV STATUS OF CUSTOM IN MATTERS OF INHERITANCE AND SUCCESSION

Prior to independence, as a principle of public policy, in questions

74 See *supra* para 'I' of the reasoning.
75 *Chander Sen* at 1760 (para 22 read with 20).
76 See the substituted new section 6 by the amending Act of 2005 into the principal Act of 1956.

regarding marriage, divorce, dower, adoption, minority and guardianship, inheritance and succession, wills, legacies, gifts, partition, and other family relations, the applicable custom was allowed to have full sway. The state interfered the least in all such matters. This is what was proclaimed under the Punjab Laws Act, 1872. Section 5 of the said Act, for instance, provided that the rule of decision should be any custom applicable to the parties concerned, provided only the same was not contrary to justice, equity and good conscience, and had not been altered or abolished or declared void by any competent authority. It is indeed true that Hindu law and Muhammadan law were also invoked and applied depending upon if the parties were Hindus or Muslims in regulating family relations. But even in such cases, the rules of Hindu law and Muslim law were not applied in their pristine form. Those rules were held to be applicable as were modified by the prevailing custom or usage. Moreover, all local customs and mercantile usages were regarded as valid under the provisions of section 7 of the Act of 1872, unless they were held contrary to justice, equity and good conscience, or declared void by the appropriate authority.

The policy of non-interference by the state into the realm of customary law regulating family relations continued even after the enactment of Hindu Law of Inheritance (Amendment) Act of 1929. For, the provisions of that Act applied only in the absence of any proof of applicable custom. This only meant that the provisions of the Act of 1929 were applied subject only to the applicability of customary law. In other words, statutory law did not exclude the application of customary law; that is, customary law would prevail over statutory law.

However, after independence the public policy perspective has undergone a drastic change even in the matters of family relations. This changed perspective is evident in the new enactments, collectively called the Hindu Codes, comprising four principal Acts, namely, the Hindu Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956, and the Hindu Adoptions and Maintenance Act, 1956. These enactments amend and codify the law relating to marriage, succession, minority and guardianship, and adoptions and maintenance among Hindus by overriding the text, rule or interpretation of traditional Hindu law and any custom or usage as a part of that law in respect of all those matters for which provisions are made in these Acts. Thus, during the British period it was the customary law that overrode the statutory law, whereas after independence the order of super-session has changed.

The full sway of custom prior to the enactment of the four principal Acts has been brought out by the Supreme Court in *Ass Kaur*.[77] The singular issue to be decided in this case was whether on the death of a widow, her interest would devolve on the co-widow under the applicable customary law, or to her married daughter under the general law as contained in the provisions of

77 See *supra* note 35.

Hindu Law of Inheritance (Amendment) Act, 1929, read with the Hindu Women's Right to Property Act, 1937.[78]

Realising that the devolution of property took place prior to the coming into force of the Hindu Succession Act, 1956, the court held that the case was clearly covered and governed by the then prevailing public policy considerations that excluded the operation of statutory provisions in favour of applicable custom.

In this case, the widow Ass Kaur admittedly belonged to the Sidhu Jat family of Muktsar Tehsil, who are predominantly an agricultural tribe and governed by *zamindara* customs in the matters of marriage, succession, alienation, etc. The following attributes of these customs hve been spelt out by the Supreme Court in the instant case:

(a) In the presence of sons, the daughter received no share in the ancestral property.[79]
(b) The daughter succeeded to the self-acquired property of the father in preference to collaterals even though they are within the fourth degree.[80]
(c) If a brother died issueless, the other brother, if any, took by survivorship.[81]
(d) When the last surviving son died issueless, the mother succeeded to the property in her capacity as widow of her deceased husband and not as mother of the deceased son in preference to collaterals.[82]
(e) Collaterals, and not sister, were the preferential heirs to ancestral property in the hands of a propositus, while the sister and not collaterals was a preferential heir in regard to non-ancestral property.[83]
(f) A widow, who remarried the brother of her deceased husband, known as *Karewa* marriage, succeeded to her co-widow in preference to collaterals.[84]
(g) A widow in *Karewa* marriage did not forfeit her life estate, if any, in her deceased husband's property.[85] However, this principle did

78 *Ass Kaur* at 2372 (para 8).
79 *Id*. at 2372 (para 7).
80 *Id*. at 2375 (para 29), citing *Mahant Salig Ram* v. *Musammat Maya Devi*, AIR 1955 SC 266 (para 9), which relied specifically on *Rattigan's Digest of Customary Law* [para 23 (2)], the correctness of which was not disputed earlier in *Gopal Singh* v. *Ujagar Singh*, AIR 1954 SC 579.
81 *Id*. at 2372 (para 7).
82 *Id*. at 2372 and 2373 (paras 7 and 13), citing *Currie's Customay Law of Ferozpur District*. See also *Shiromani Gurudwara Prabandhak Committee and Others* v. *Harcharan Singh*, AIR 1934 Lahore 11 (DB).
83 *Id*. at 2375 (para 32), citing *Smt. Dipo* v. *Wassan Singh and Others*, AIR 1983 SC 846 (paras 2 and 3).
84 *Id*. at 2372 (para 12). See also, *Ratigan's Digest of Customs* to the same effect, cited at 2374 (para 23).
85 *Id*. at 2322 (para 11).

not apply where the re-marriage was not with the brother of the deceased husband, but with some other person, relative or stranger.[86]

(h) In default of male lineal descendants and of a widow, the mother of the deceased succeeded to a life–interest, provided she had not remarried.[87]

(i) In the absence of any proof of custom, the general principles of Hindu law applied. For instance, a sister became an heir in preference to the collaterals in regard to devolution of property under the provisions of Hindu Law of Inheritance (Amendment) Act of 1929.[88]

Having articulated the propositions of customary law, as those prevailed prior to the enactments of Hindu Codes of 1955-56, the Supreme Court in *Ass Kaur* has dealt with a "serious contention," namely, whether the validity of a custom must be judged on the touchstone of justice, equity and good conscience.[89] At first blush, the apex court refused to go into this question simply because no such contention had been raised earlier either before the trial court or before the high court. Nevertheless, the court has made a distinction between two aspects of the custom: "It is one thing to say that customary law had no application or the custom had not been proved; but it is another thing to say despite its acceptance and proof the same should not be applied on the ground of equity, justice and good conscience."[90] After raising this distinction, the court itself instantly observes that "We, therefore, cannot go into such a contention."[91]

What does this mean? In the first instance, it appears that the apex court has disposed of this contention merely on technical ground; that is, since the issue was not raised earlier, the same could not be allowed now in appeal. However, on a little reflection it becomes evident that, through the projected distinction between the two aspects of custom, the apex court has also considered the issue on substantive count. The purport of the distinction becomes more manifest in the statement wherein it is emphasized that "it is well-settled that where a custom is repeatedly brought to the notice of the courts of a country, the courts may hold that custom introduced into the law

86 *Id*. 2374 (para 21), citing *Chunnilal* v. *Mst Attar Kaur*, AIR 1933 Lahore 69: wherein it was observed, "Where a person dies leaving two widows and on of them remarries the whole estate of the deceased passes to the other widow and the mere retention of the re-married widow's name in the revenue records would not place her in adverse possession of her share qua the co-widows and owing to her intervening between the estate and the reversioner the latter's rights would not be affected."

87 *Id*. at 2374 (para 20), citing *Harcharan Singh* v. *Mohinder Kaur*, AIR 1987 P & H 138, at 140 (para 22).

88 See, *id*. at 2373 (para 16).

89 *Id*. at 2374 (para 26).

90 *Ibid*.

91 *Ibid*.

without the necessity of proof in each individual case."[92] Such a stance is further strengthened when it is directed that the court can also take judicial notice of such customs in terms of section 57 of the Evidence Act, 1872, which provides that as and when custom was repeatedly recognized by the courts, the same need not be proved afresh.[93]

All this clearly means that the customs that have been accepted, recognized by the courts and acted upon by the parties at a given point of time cannot be questioned on ground of justice, equity and good conscience, because they carry their own inherent value. In the instant case, the custom in which collaterals are preferred over the married daughter, has come to be evolved for keeping the ancestral property within the family. Acting on this premise, the Supreme Court has held:[94]

> Raj Kaur, who was the widow of Hira Singh, was married to another brother [Relu Singh] just to safeguard the family property. She succeeded under the customary laws to her husband after the death of her co-widow. In that view of the matter, if the daughters who were married were to be excluded by customary law, no exception thereto can be taken.

Although the rule of custom has been specifically excluded in terms of section 4 of the Hindu Succession Act, 1956 in respect of matters that are specifically covered under the provisions of the codified law, yet the operation of Hindu *Mitakashara* coparcenary as modified by the prevailing custom or usage is allowed to continue under the express provisions of the Act itself.[95]

V MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986: ITS BROAD AMBIT

The commonly shared perception about the Muslim Women (Protection of Rights on Divorce) Act, 1986[96] continues to be that it is a piece of legislation, which is retrogressive in nature. Such a perception is usually reinforced by asserting that the sole objective of Parliament for enacting this Act was to negate the effect of the judgment rendered by the Supreme Court in *Shah Bano*,[97] and thereby limiting the right of the Muslim wife to

92 *Id*. at 2373-74 (para 18), citing *R.B.S.S. Munnalal and Others* v. *S.S. Rajkumar and Others*, AIR 1962 SC 1493, at 1498 (para 11).

93 *Id*. at 2374 (para 19), citing *Ujagar Singh* v. *Mst. Jeo*, AIR 1959 SC 1041 and *Bawa* v. *Taro*, AIR 1951 Pun 239.

94 *Id*. 2374 (para 28).

95 See *supra*, Part III, " Father's Self-acquired Property: Its Nature in the Hands of Inheriting Sons."

96 Hereinafter simply cited as the Act of 1986.

97 AIR 1986 SC 945.

maintenance to only during the period of *iddat* immediately after divorce. As a sequel to this, it is also construed and contended that a Muslim wife, divorced by her husband, is also instantly deprived of the valuable protection guaranteed to all women, irrespective of their religion, race, caste, etc., under the provisions of section 125, read with other relevant provisions of the Code of Criminal Procedure (Cr PC).

Since a Muslim husband continues to enjoy the exclusive power of divorcing his wife unilaterally, he has the queer privilege to limit his liability to provide support and maintenance at will. He can do this by simply telling her that she stood divorced with a retrospective effect. This means that the wife could never dare to invoke the provisions of section 125 of Cr PC for reminding the reluctant husband of his obligation to provide her the requisite support and maintenance. This is precisely what a Muslim husband did to his wife after a lapse of a period of about three decades in *Iqbal Bano* v. *State of U.P.*[98]

In this case, Iqbal Bano was married to a Muslim in the year 1959. A son was born to them in 1966, who unfortunately died in 1991. The husband, who was living separately from Iqbal Bano, stopped visiting her and also did not pay anything for her sustenance. When her request for maintenance did not materialise, she filed an application against her husband in the year 1992 under section 125 of Cr PC for the grant of requisite maintenance. The husband denied his liability to pay any maintenance, because long back he had divorced her through triple *talaq*. Besides, it was also contended that *Mehr* had been paid and the period of *iddat* was over long ago; he was, therefore, no more obliged to maintain her.

The trial magistrate, finding no substance in his plea of divorce, ordered him to pay maintenance at the rate of Rs. 450.00 per month. However, in the revision petition, the court of additional sessions judge rescinded the order of maintenance mainly on three related counts. One, since there was a clear and categorical mention of triple *talaq* in the written statement made by the husband, the same had to be accepted as a valid plea of divorce. Two, once the exercise of right to divorce was proved, any resort to the provisions of section 125 of Cr PC for seeking maintenance was barred by the Act of 1986. Three, under the provisions of the Act of 1986, a Muslim husband's liability towards his divorced wife was limited only during the period of *iddat*, which was over about 30 years back in the instant case.

The writ petition against the decision was summarily dismissed by the Allahabad High Court by observing that the revision court "committed no illegality in modifying the order passed by the Magistrate in declining the maintenance after the date of divorce."[99] This led Iqbal Bano to come finally to the Supreme Court in appeal.

98 AIR 2007 SC 2215, *per* Arijit Pasayat and D.K. Jain JJ. (Hereinafter simply cited as, *Iqbal Bano*.)

99 See, *id*. at 2216 (para 3).

The Supreme Court reversed the decision of the high court, because the approach approved by it tended to nullify the beneficent objective of the statutorily enacted provisions. In this respect, first of all the court saw through the strategy of overcoming the very purpose of the provisions of section 125 of Cr PC read with the relevant provisions of the Act of 1986. Such an attempt was frustrated by the court by examining the validity of divorce in view of the "written statement" that divorce had been effected about 30 years ago "by utterance of the words 'Talaq', 'Talaq', 'Talaq' three times."[100] In court's considered opinion, mere "utterance" of the word 'talaq' three times is not sufficient to effectuate divorce. Such a plea is simply "not sustainable."[101] In the realm of Muslim law, according to the apex court, a 'talaq' to be effective has to be "pronounced", which means "to utter formally," or "to utter rhetorically."[102] "[A] mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of a copy of the written statement to the wife."[103] The pronouncement of *talaq* is required to be proved as such.[104] In this wise, the Supreme Court emphatically disapproved the view taken by some of the commentators on Muslim law, like Mulla and Tahir Mahmood, in their respective commentaries, wherein "a mere plea of previous talaq taken in written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end the marital relationship with effect from the date of filing the written statement."[105] Such a plea "cannot be treated as pronouncement of talaq by the husband on the wife."[106] This view of the apex court is in consonance with the Islamic tradition. Pronouncement of *talaq* is indeed a very serious matter under Muslim law. It is true that a Muslim husband continues to claim the privilege of unilateral divorce in India, but still in order to be effective, it is required to be 'pronounced', and not just casually uttered. Once the plea of divorce is disregarded, the benefit of the provisions of section 125 of Cr PC cannot be denied to the Muslim wife during the subsistence of marriage.

The Supreme Court in *Iqbql Bano* has gone a step further. In order to explore how, in what manner, and to which extent the provisions of the Act of 1986 are instrumental for extending benefits to divorced Muslim women, the court assumes as if dissolution of marriage took place because *talaq* had been pronounced validly.[107] Such an assumption has led the court to examine

100 See, *id*. at 2216 (para 6).
101 *Ibid*.
102 *Ibid*.
103 *Shamim Ara* v. *State of U.P. and Another*, 2002 (7) SCC 518, cited in *Iqbal Bano*, at 2216 (para 6).
104 *Ibid*.
105 *Ibid*.
106 *Ibid*. The court has even refused to consider the affidavit filed by the husband in some previous judicial proceedings, not inter parties, containing a self-serving statement. Such a statement cannot be read in evidence as relevant and of any value, *ibid*.
107 *Iqbal Bano*, at 2218 (para 9).

if the divorced wife in the instant case is entitled to draw any support and maintenance from her estranged husband.

Evidently, the purpose of the Act of 1986 is "to protect the rights of Muslim women who have been divorced in accordance with Muslim law." In this respect, the Act has a supervening effect. It clearly provides under section 3: "Notwithstanding anything contained in any other law for the time being in force," "a divorced woman shall be entitled" to "a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband." The analysis of the provisions of section 3 of the Act by the Supreme Court may be abstracted as follows.

(a) The connotation of the term 'provision'
The word 'provision' implies that "something is provided in advance for meeting some needs."[108] "In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs."[109] Such a 'provision' for meeting the present as well as future needs must be 'reasonable and fair'. That is, a reasonable and fair provision includes a "provision for her residence, her food, her clothes, and other articles."[110]

(b) The connotation of the term 'within'
The word 'within' implies "on or before," and "not beyond."[111] So understood, "the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay maintenance to the wife, and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3)."[112] It is nowhere provided by Parliament in the Act that "reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it."[113] Since the term 'within' means "the time by which an arrangement for payment of provision and maintenance should be concluded,"[114] it implies that the liability of the husband is not excluded for 'post-iddat period'. Thus, the provision "would extend to the whole life of the divorced wife unless she gets married for the second time."[115]

108 *Danial Latifi and Another* v. *Union of India*, 2001 (7) SCC 746, cited in *Iqbal Bano*, at 2217 (para 7).
109 *Ibid*.
110 *Ibid*.
111 *Ibid*.
112 *Ibid*.
113 *Ibid*.
114 *Ibid*.
115 *Ibid*.

(c) A Muslim husband's two-fold obligations
Under section 3(1)(a) of the Act, a Muslim husband has "two separate and distinct obligation," as is evident from the use of two different verbs – "to be made and paid to her within iddat period."[116] This implies that "a fair and reasonable provision is to be made while maintenance is to be paid."[117] Such a construction becomes evident when the provision of section 3(1)(a) is differentiated from that of section 4 of the Act. The provision of latter section empowers the Magistrate to issue an order for payment of maintenance to the divorced woman against her various relatives without making any reference to 'provision'. The clear implication is that the right to have 'a fair and reasonable provision' in her favour is a right enforceable only against the woman's former husband in addition to what he is obliged to pay as 'maintenance'.[118] The husband is relieved from his liability only if he has already discharged his obligation of both 'reasonable and fair provision' and 'maintenance' by paying these amounts in a lump sum to his wife, in addition to having paid his wife's *mahr* and restored her dowry as per section 3(1)(c).[119] Such a construction of section 3(1)(a) is further supported by the provisions of section 3(3) o f the Act, which makes a specific reference to the factors that are required to be considered in making a 'provision', such factors as 'the needs of the divorced wife', 'the means of the husband', and 'the standard of life the woman enjoyed during the marriage'.

(d) A Muslim husband's obligation to pay regular alimony
The construction of sub-section (1) read with sub-section (3) of section 3 of the Act has prompted the Supreme Court to say that "there is no reason why such 'provision' could not take the form of the regular payment of alimony to the divorced wife."[120]

In view of the above, the resultant effect of the analysis may be summed up as under:[121]

116 *Ibid*.
117 *Ibid*.
118 *Ibid*.
119 In *Danial Latifi*, the Supreme Court for the wider obligation of the Muslim husband towards his divorced wife drew support from the Islamic tradition by observing that section 3(1)(a) of the Act corresponds to the concept of 'mata' in Holy Quran. In this respect, however, a conflict arose whether the term 'mata' means merely 'maintenance', or it bears the wider connotation of 'provision'. On this count, the apex court held that the concept of 'mata' does indicate the right of the divorced woman to a provision in addition to 'mahr' and 'maintenance'. *Danial Latifi* was followed by the Supreme Court in *Sabra Shamim* v. *Maqsood Ansari*, 2004 (9) SCC 616. Cited with utmost approval in *Iqbal Bano*, at 2217-18 (para 7).
120 *Id*. at 2218 (para 7).
121 *Ibid*, *Danial Latifi* [para 36].

(i) It is erroneous to construe the provisions of section 3(1)(a) of the Act that the obligation of a Muslim husband to support his divorced wife is confined only to the *iddat* period and not thereafter. Under these provisions, the court is empowered to make a reasonable and fair provision for the divorced wife keeping her future needs even beyond the period of *iddat*.

(ii) Such an obligation needs to be discharged seemingly in one go and that too before the period of *iddat* expires.

(iii) If despite the making of a reasonable and fair provision and payment of *mahr* and all the properties that are due to her, she is sill unable to maintain herself and her children after the period of *iddat*, she can proceed under section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law.

(iv) Proceedings under section 125 of Cr PC are *now* civil in nature. Accordingly, the magistrate, while considering the claim of a Muslim woman under the provisions of Cr PC is not prohibited to consider her claim under the Act of 1986.[122]

(v) If the relatives of the divorced woman are unable to pay maintenance, the magistrate may eventually direct the State Waqf Board established under the Act to pay maintenance.

In view of these propositions, the Supreme Court in *Iqbql Bano* set aside the impugned order of the high court.[123] The apex court specifically directed the high court to decide the case afresh on the basis of principles enunciated by them in the judgment.[124]

Thus, if looked retrospectively, one would find the Muslim Women (Protection of Rights on Divorce) Act, 1986 progressive in nature, rather than retrogressive. It does not negate the beneficial effect of the decision of the Supreme Court in the *Shah Bano* case. In *Danial Latifi*, portraying the true picture of the Act of 1986, the apex court observed that "*though it may look*

122 *Id*. at 2218 (para 9). Proceedings under section 125 of Cr PC and claim under the Act of 1986 are tried by the same court, because "proceedings under section 125 Cr.P.C. are civil in nature," *Ibid*, citing *Vijay Kumar Prasad* v. *State of Bihar and Others,* 2004 (5) SCC 196 (para 14): "The basic distinction between section 488 of the old Code and section 126 of the [new] Code is that section 126 has essentially enlarged the venue of proceedings for maintenance so as to move the place where the wife may be residing on the date of application. The change was thought necessary because of certain observations by the Law Commission, taking note of the fact that often deserted wives are compelled to live with their relatives far away from the place where the husband and wife last resided together. As noted by this court in several cases, proceedings under section 125 of the Code are civil in nature. Unlike clauses (b) and (c) of section 126(1) an application by the father or the mother claiming maintenance has to be filed where the person from whom maintenance is claimed lives."

123 *Id*. at 2218 (para 10).

124 *Id*. at 2218 (para 11).

ironical that the enactment intended to reverse the decision in Shah Bano case, actually codifies the very rational contained therein."[125] This inference is justified by the predicament posed before the Supreme Court in that case and how the court rectified that situation.[126] It is this principle underlying the decision in *Shah Bano* that finds reflected and codified in the provisions of the Act of 1986.[127] Looked from this perspective, the provisions of the Act of 1986 do not violate in any conceivable sense the principle of equality contained in articles 14, 15 and 21 of the Constitution.[128]

VI PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005: ITS BASIC OBJECTIVE

This Act which came into force on 26.10.2006, has been enacted by Parliament essentially to provide for a remedy under civil law, which is intended to protect women from being victims of domestic violence and to prevent the occurrence of such violence in society.[129] As a part of this strategy, this Act seeks to provide, *inter alia*, "for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household."[130] Such a right is concretely secured through a 'residence order', which is passed by the magistrate.

Lest the protective right of the women from domestic violence is lost in the realm of uncertainty, the Act provides a fairly comprehensive definition of the expression 'shared household,' which seems to be a replica for the concept of 'matrimonial home.' The expression 'shared household' means[131] a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent. This includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the

125 See, *id*. at 2218 (para 7). Emphasis added.

126 "Precisely the point that arose for consideration in *Shah Bano* case was that the husband has not made a 'reasonable and fair provision' for his divorced wife even if he had paid the amount agreed as *mahr* half a century earlier and provided *iddat* maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 Cr PC.," *id*. at 2217 (para 7).

127 "This position was available to Parliament on the date it enacted the law. [B]ut even so, the provisions enacted under the Act are 'a reasonable and fair provision and maintenance to be made and paid' as provided under Section 3(1)(a) of the Act…." *Ibid*.

128 *Danial Latifi* [para 36(4)], *Ibid*.

129 See the Statement of Objects and Reasons.

130 *Ibid*.

131 See section 2(s) of the Act of 2005.

aggrieved person has any right, title or interest in the shared household.[132]

Likewise, the concept of 'domestic violence' has also been provided with the widest possible amplitude.[133] It includes within its ambit any act (omission or commission or conduct) that causes any 'physical abuse,'[134] 'sexual abuse,'[135] 'verbal and emotional abuse,'[136] and 'economic abuse'[137] of the aggrieved person either directly or indirectly by any person in 'domestic relationship.' The expression 'domestic relationship' statutorily envisages every conceivable relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.[138] However, for determining whether any act, omission or conduct of the respondent constitutes 'domestic violence', the overall facts and circumstances of the case shall be taken into consideration.[139]

The protective provisions of the Act of 2005 have been invoked before the Supreme Court in *S.R. Batra and Another* v. *Smt. Taruna Batra*[140] - a case by special leave to appeal against the judgment of the Delhi High Court.[141] Seemingly, this case represents 'dicey' character of law, inasmuch as the judgment of the trial court was reversed by the first lower appellate court, whose decision, in turn, was upset by the high court. The Supreme Court eventually set aside the decision of the high court.

On facts, the case of *S.R. Batra* is a story of matrimonial conflict between a Delhi couple: the respondent Taruna Batra was married to one

132 *Ibid*.

133 See s.3 of the Act of 2005.

134 It means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force. See Explanation I(i) appended to section 3 of the Act of 2005.

135 It includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman. See Explanation I (ii) appended to s. 3 of the Act of 2005.

136 This expression includes (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested. Explanation I (iii), *id*.

137 It includes, *inter alia*, (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom; (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or entitled to use by virtue of domestic relationship or which may be reasonably required by the aggrieved person or her children; (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household. Explanation I (iv), *id*.

138 See s. 2(f) of the Act of 2005.

139 See Explanation II appended to s. 3 of the Act of 2005.

140 AIR 2007 SC 1118, *per* S.B. Sinha and Markenday Katju JJ. Hereinafter simply, *S.R. Batra*.

141 AIR 2005 Del 270.

Amit Batra, the son of the appellants (parents-in-law) in the year 2000. After marriage, the couple started living at the second floor of the house of the appellants in Ashok Vihar, Delhi. It appears that, owing to some serious misgivings, serious differences arose between the couple. Consequently, the wife moved to her parents' home, and the husband shifted to his own flat at Mohan Nagar in Ghaziabad. Thereafter, the husband filed a divorce petition against his wife, and the wife, it appears, as a counterblast filed an F.I.R under the relevant provisions of the Indian Penal Code and got arrested by the police her husband, both her father-in-law and mother-in-law, and her married sister-in-law. All the arrested persons could secure bail 'only after three days.'[142]

In this back drop of bitter matrimonial conflict problem, compounded by the invocation of the provisions of criminal law, the respondent wife – laid claim to reside at the second floor of the appellant in-law's house. The trial court decreed her claim and granted a temporary injunction restraining the appellants from interfering with her possession.[143] On appeal, however, the order of the trial judge was reversed, because the senior civil judge found as a fact that Taruna Batra could not be said to be residing with her estranged husband in the suit property, inasmuch as he had already moved to his own flat in Ghaziabad before the litigation between the parents-in-law and daughter-in-law started,[144] and, therefore, the appellants' house ceased to be their matrimonial home: "matrimonial home could not be said to be a place where only wife was residing."[145] In view of this finding, the first lower court held that Taruna Batra had no right to reside in properties other than that of her husband.

The single judge of the Delhi High Court, on the other hand, on appeal held that mere shifting of residence by the husband from Delhi to Ghaziabad could not make Ghaziabad the matrimonial home of Taruna Batra, particularly when the husband had already filed a divorce petition against her.[146] This decision of the high court has been finally set aside by the Supreme Court. The reasons for reversal, however, require some critical consideration, especially in order to examine the very objective of the protective provisions of the Act of 2005. In this respect, the comments are at least on two distinct counts.

The first critical comment relates to the manner in which the Supreme Court in *S.R. Batra* has overcome the judicial precedent laid down by a bench of the Supreme Court of equal strength in *B.R. Mehta* v. *Atma Devi and Others*.[147] In this case, the court, while considering the proposition that whether allotment of temporary accommodation to the wife in government

142 See *S.R. Batra* at 1119 (para 5).
143 *Id*. at 1119 (para 8).
144 *Id*. at 1119 (para 7).
145 *Id*. at 1119 (para 9).
146 *Id*. at 1120 (para 11).
147 (1987) 4 SCC 183, *per* Sabyasach Mukharji and G.L. Oza JJ Hereinafter simply, *B.R. Mehta*.

service, who had strained relation with her husband, could be considered the matrimonial home of the spouses, and thereby constituting a ground for termination of tenancy of the husband at the instance of the landlord. In this context, Sabyasachi Mukharji, J. (for himself and G.L. Oza J) observed that although we did not have in India the law on the pattern of English Matrimonial Homes Act, 1967, for regulating the rights of the spouses in matrimonial homes, nevertheless they emphasized that "it may be that with change of situation and complex problems arising it is high time to give the wife or the husband a right of occupation in a truly matrimonial home, in case of strained relationship between the husband and the wife."[148]

Obviously, these observations made in *B.R. Mehta* were relevant in considering the claim of the wife to matrimonial home in *S.R. Batra*. However, Markendey Katju J (for himself and S.B. Sinha J) dispensed with these observations by stating:[149,150]

> In our opinion, the above observation is merely an expression of hope and it does not lay down any law. It is only the legislature which can create a law and not the Court. The courts do not legislate, and whatever may be the personal view of a Judge, he cannot create or amend the law, and must maintain judicial restraint.
> There is no such law in India, like the British Matrimonial Homes Act, 1967, and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in-law or mother-in-law.

In making these observations, the Supreme Court is justified in the light of the peculiar circumstances of the case but only in respect to the rights that are made available to wife against her husband and not against parents-in-law. However, in two other respects the opinion expressed by the apex court, it is submitted, is not fully justifiable. In one respect, now in the year 2007, unlike in the year 1987, there is a law in India in the shape of Protection of Women from Domestic Violence Act, 2005, which is analogous to the provisions contained in the British Matrimonial Homes Act, 1967 at least in respect of wives. In fact, the Supreme Court itself considered the application of the provisions of this Act in the instant case.[151] Moreover, the British Act of 1967 itself did not introduce any new principle regulating the rights of the spouses in matrimonial home: that Act merely gave "statutory expression" to the existing common law principles in pursuance of "much social awareness."[152]

148 *Id*. 196 (para 6), cited in *S.R. Batra* at 1120 (paras 13 and 14).
149 *S.R. Batra* at 1120 (para 15).
150 *Id*. at 1120 (para 16).
151 See *infra*.
152 See *B.R. Mehta* at 192 (para 6).

In other respect, to say and hold that the judges of the Supreme Court under no circumstances create or amend the law is not constitutionally sustainable. The interpretation of the Constitution under article 141, it is submitted with respect, is not a mechanical process; it is a highly creative one that imparts the requisite dynamism to the constitution.[153]

The second major comment relates to the applicability of the provisions contained in sections 17 and 19(1), read with the provisions of section 2(c) of the Act of 2005.

Section 17, dealing with the right of a woman to reside in a 'shared household'[154] provides:

> (1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.
> (2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

Section 19(1) enables the magistrate, while disposing of an application made by an aggrieved person seeking relief under the provisions of the Act of 2005, on being satisfied that domestic violence has taken place, to pass a 'residence order', *inter alia*, to the following effect:

> (a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;
> (b) directing the respondent to remove himself from the shared household;
> (c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;
> (d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;
> (e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

153 See also the comments of the author made in the debate, "Judges vs Judges," initiated by *The Tribune* (December 21, 2007): "[Judicial Activism] is not a new judicial phenomenon. Nor is it alien to the rule of law and constitutionalism. In fact, it is an integral part of the interpretative processes that are inherently creative, and not just merely mechanical. It is this quality or creative interpretation that provides dynamism to our Constitution – the basic document of our polity. Thus, *per* se, judicial activism is not problematic…."

154 For the statutory exposition of 'shared household', see *supra* note 131.

(f) directing the respondent to secure same level or alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman.

In view of these provisions, the specific issue before the Supreme Court in *S.R. Batra* was, whether the place of residence in in-laws' house where the respondent Taruna Batra resided with her husband in domestic relationship till the dispute arose between them could be regarded as 'shared household.'[155] The court has held that, since the house in question cannot be said to be a 'shared household' within the meaning of section 2(s) of the Act of 2005,[156] the protection envisaged under the provisions of sections 17 and 19(1) cannot be made available to the respondent.[157] The reasoning of the Supreme Court for reaching such a conclusion may be abstracted as under:

(a) The statutory definition of 'shared household' in Section 2(s) of the Act of 2005 is not "very happily worded and appears to be the result of clumsy drafting."[158]
(b) If the definition of 'shared household', implying "that wherever the husband and wife lived together in the past that property becomes a shared household" is accepted, that would lead to "chaos and would be absurd."[159]
(c) The court has demonstrated such absurdity by exemplifying:[160]
"It is quite possible that the husband and wife may have lived together in dozens of places e.g. with the husband's father, husband's paternal grand parents, his maternal parents, uncles, aunts, brothers, sisters, nephews, nieces etc. If the interpretation canvassed by the learned counsel for the respondent is accepted, all these houses of the husband's relatives will be shared households and the wife can well insist in living in all these houses of her husband's relatives merely because she had stayed with her husband for some time in those houses in the past…."
(d) "It is well settled that any interpretation which leads to absurdity should not be accepted."[161]

155 *S.R. Batra* at 1121 (para 23).
156 *Id*. at 1120 (para 21).
157 *Id*. at 1121 (para 24).
158 *Id*. at 1121 (para 29).
159 *Id*. at 1121 (para 25).
160 *Ibid*.
161 *Id*. at 1121 (para 26).

(e) The house in question belongs to the mother-in-law of the respondent and it does not belong to her husband, and, therefore, she has no claim to live in the said house.[162]

(f) The claim for alternative accommodation can only be made by the respondent against her husband and not against her in-laws or other relatives.[163]

On the issue of interpretation of statutory definition of 'shared household' in section 2(s), which in the opinion of the Supreme Court in *S.R. Batra* is 'not very happily worded' due to 'clumsy drafting' (resulting into the decision as the apex court arrived), it is submitted that the legislature has very carefully used the expression, "where the person aggrieved *lives* or at any stage *has lived* in *domestic relationship*." (Emphasis supplied)

The italicised words betray at least two things: One, the respondent daughter-in-law's residing at her in-laws' place refers to her living in the present (present indefinite tense) or in the vicinity of the present (present perfect tense). The use of present indefinite or present perfect tense cannot be construed as respondent daughter-in-law's living in her in-laws house with her husband deep into the past, as seems to be indicated by the use of the words, "that wherever the husband and wife lived together in the past."[164] Therefore, it is impermissible to construe the expression in the past or past perfect tense,[165] which is essentially couched in the present indefinite or present perfect tense. Such a construction would reverse the finding of the senior civil judge, who found that "Smt. Taruna Batra was not residing in the premises in question,"[166] because, as the trial judge had earlier found, seemingly on the strength of the use of present perfect tense in the construction of 'shared household', that Smt. Taruna Batra "was in possession of the second floor of the property and [therefore] he granted a temporary injunction restraining the appellants [in-laws] from interfering with the possession of Smt. Taruna Batra…."[167]

The second connotation flowing from the italicised words is the emphasis placed on the expression, "in domestic relationship." Section 2(s) of the Act of 2005 envisages 'shared household' "where the person aggrieved lives or at any stage has lived in domestic relationship either singly or along with the respondent." This clearly means that 'shared household' implies joint

162 *Id*. at 1120 (para 17). In support of this assertion, the mother-in-law also stated that she had taken a loan for acquiring the house and it was not joint family property, and the Supreme Court had accepted that statement, because it had "no reason to disbelieve." *Id*. at 1120 (para 18)

163 *Id*. at 1121 (para 27).

164 *Id*. at 1121 (para 25).

165 See, *id*. at 1121 (para 23): "where the person aggrieved lives or any stage had lived in domestic relationship"

166 *Id*. at 1120 (para 20). *Cf.* with the findings of the trial judge, *id*. at 1119 (para 8).

167 *Id*. at 1119 (para 8).

living of husband and wife in 'domestic relationship' with a certain degree of permanency, and not just living together *simpliciter* in transition. Such a reference to 'domestic relationship' would instantly preclude the possibility of including 'absurd' situations, as exemplified by the Supreme Court above,[168] in the construction of 'shared household.'

Thus, the construction placed by the Supreme Court in *S.R. Batra* on the provisions of the Act of 2005 drastically reduces the value of the wide ambit of protection that is intended to be given to women in domestic relationship by protecting their rights to residence in shared household. Nevertheless, the eventual decision of the Supreme Court seems to be right in not treating the residence of in-laws as a 'shared household' in the instant case. The reason, that might have prompted the perceptive judges of the Supreme Court to take the restrictive view of the provisions of the Act of 2005, which are otherwise expansive, is the undesirable, and therefore unacceptable, mixing of the civil law remedy with that of criminal law. The Act of 2005 is essentially a civil law remedy, with the avowed purpose of providing protection to women in domestic relationship. Certainly its purpose is not to make its remedies as an instrument of oppression in the hands of women for punishing or terrorizing the parents-in-law, as has happened in the instant case.

How could the court think of providing protection to a person by interpreting the provisions of protective law liberally, who had earlier sent her husband, her father-in-law, mother-in-law and sister-in-law to jail by initiating criminal proceedings against them? It appears that the court vehemently resisted the attempt to read the penal objectives of criminal law into protective purposes of civil law. The court, therefore, has rightly concluded by saying that whatever protective rights she has, she could proceed against her husband. The Supreme Court would not allow the respondent daughter-in-law to drag the parents-in-law into the matrimonial conflict problem with her husband. This was how, as if by sheer quirk of circumstances, an opportunity for expansive interpretation of the protective provisions of the Act of 2005 was lost!

168 See note 160 and the accompanying text, *supra*.