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HINDU LAW

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1 INTRODUCTION

IMPORTANT JUDICIAL pronouncements in the area of Hindu law of marriage and matrimonial remedies, maintenance, minority and guardianship, adoption, joint family and succession have been briefly analysed in this survey. The survey also includes two judicial pronouncements dealing with a woman's right of residence in the matrimonial home, in the event of a matrimonial breakup.

II HINDU MARRIAGE ACT, 1955

Bigamy

Marriage is a monogamous union under the Hindu Marriage Act, and a violation of this basic rule would strike at the root of this union rendering it not only void, but also subjecting the husband to penal liability. At the same time, as a party to a void marriage fails to get the legal status of a wife, her living with the bigamous husband can be purely a matter of her own choice unenforceable legally by this husband. Since the matrimonial relations are not recognized by the law, she is free to live wherever she wants without being accountable in law to the bigamous husband and his demand for her conjugal company would be without any legal force. A visible concern and strong disapproval displayed by the judiciary to the amazing audacity of a bigamous husband in seeking redressal in face of violation of legal provisions came to light in the case under survey.[1] Here an already married Hindu man deceived a girl by concealing his marital status into marrying him. On discovery of his earlier subsisting marriage, the girl on her own left him and resumed habitation with her father. The husband filed a writ of *habeas corpus* against the father of the girl, alleging that she was being detained by him against her wishes and he be directed to produce his wife before the court so that she could accompany him and live with him. The court not only rejected his plea and quashed the writ but also strongly disapproved of the act of the husband and held that the girl was free to live wherever she wanted,

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1 *Amit Agarwal* v. *State of UP,* AIR 2007 (NOC) 442 (All).

as she was a party to a void marriage. It further directed the husband to pay compensation to the tune of Rs 3 lakhs to the young girl for ruining her life and that of her father.

An extremely good judgment, it deserves wide publicity so that it can prove to be a deterrent to men who mockingly contravene the legal provisions, and thereafter take recourse to the legal machinery for achieving their nefarious objectives.

Plea for restitution of conjugal rights and its automatic conversion to divorce by mutual consent

Four distinct matrimonial remedies have been provided in the Hindu Marriage Act, 1955. It is pertinent to note that while the three main matrimonial remedies, viz, a decree of divorce and nullity bring an end to the marriage and a decree of judicial separation enables the parties to live apart from each other, a decree of restitution of conjugal rights is aimed at bringing the quarrelling parties back under one roof to give their marriage another try. It enables the parties to patch up their differences and its perception is in the nature of protecting the marriage, rather than breaking it. An issue arose: can a petition praying for a decree of restitution of conjugal rights be converted by the court on its own into one by divorce by mutual consent breaking the marriage? In the instant case,[2] after two years of the marriage the husband filed a petition praying for a decree of restitution of conjugal rights. His case was that the wife stayed briefly after marriage at his residence and then went back to Kolkatta to live with her father and his several attempts to bring her back failed. The wife appeared before the court, sought time to file the written statement that was granted to her, but she failed to do it by the specified date. However, the very same day the lower court passed a decree of divorce by mutual consent, without there being any plea for that by either of the parties. The wife went in appeal to the high court. The primary question before the court was: where the only relief asked for in the petition was restitution of conjugal rights, was the lower court within its powers to pass a decree of divorce instead, that too by mutual consent?

A division bench of the Jharkhand High Court strongly disapproved the lower court's verdict and observed:[3]

> Prima facie I have no hesitation in holding that the court below has committed serious illegality in passing the impugned erroneous order of dissolution of marriage by mutual consent. It is nothing but a whimsical and arbitrary order passed by an office of the rank of District and Sessions Judge. It appears that either the presiding officer has no elementary knowledge of law or he has failed to appreciate the requirement of law to be complied with before passing

2 *Hina Singh* v. *Satya Kumar Singh,* AIR 2007 Jhar 34.
3 *Id*. at 38.

a judgment or order for dissolution of marriage by mutual consent as contemplated under s. 13 B of the Hindu Marriage Act.

The court set aside the decree and remitted the case to the lower court for proceeding with the suit in accordance with the provisions of law.

It must be remembered that a petition for restitution of conjugal rights is diametrically opposite to divorce, and when one is asked for, the other cannot and should not be granted on its own. Secondly, even if the parties ask for divorce it is now a statutory obligation of the court to try and enforce a settlement or reconciliation. Thirdly, a petition praying for divorce by mutual consent is to be filed in a specific format after compliance with its specific requisites. Presentation of a joint petition is the first requisite, which was missing here. Secondly, after stating in the joint petition that they have mutually decided to put an end to their marriage, they have to file a second joint petition after a gap of at least six months, failing which the first petition becomes redundant. None of these elements were present here. It is amazing to conceive of a situation, that a man tries to protect his marriage and seeks the help of the court to bring his estranged wife back, but finds that he loses her forever and his marriage is brought to an end due to a peculiar stand of the court.

Continuity of annulment petition after death of one of the parties to the marriage

Matrimonial litigations are primarily between the spouses and a third party must come up with cogent proof of a cause of action for seeking permission to continue a matrimonial litigation after the death of one of the parties to the marriage. A practical reality remains that matrimonial breakups not only adversely affect the parties but also innocent children in multiple ways. Amongst others, declaration of marriage as a nullity would be catastrophic for the children of the marriage branding them illegitimate, putting severe impediments on their inheritance rights from the property of their parent's relations and making them ineligible to be coparceners in the father's joint family. Therefore, the question of nullity should not be taken lightly and should not be decided until and unless it is clearly established that a ground provided under section 11 exists. The present case[4] raised two vital issues, firstly, whether the permission should be accorded to the child of the marriage to continue the litigation filed by her father against the mother praying for a decree of nullity on the ground that it was her second marriage without the first being dissolved; and secondly, with respect to the validity of the first marriage of the mother itself. The petition was filed by the husband against the wife alleging that at the time of the marriage, the wife concealed the fact of her already existing marriage. The parties were married in 1992 and had a daughter from this marriage. According to the husband due to wife's bigamous status, this second marriage was void under the Hindu

4 *Balwinder Kaur* v. *Gurumukh Singh,* AIR 2007 P&H 74.

Marriage Act, that postulates absolute monogamy. The trial court pronounced the verdict in favour of the husband by holding that the marriage was void. The appeal was filed by the wife challenging the verdict of the trial court, but she died during its pendency and after her death, the daughter wanted to continue the appeal on her behalf. She contended that even though she was not a direct party, but the outcome of the matrimonial petition would affect her status vitally.

The question before the court was: with the death of the wife, should the case be continued or abated? The question had far reaching implications with respect to the status and rights of the daughter as even though the law provides that children of void and annulled voidable marriages are legitimate, they are, however, entitled to inherit the property of only their parents and not of any of the relatives of their parents. They can neither be coparceners in the family of their father nor a sharer in coparcenary property. If this marriage was allowed to be declared void and the litigation was allowed to abate then as per the trial court order, the marriage would have remained void and the daughter would have been branded statutorily legitimate but would be unable to share the coparcenary property of the father. Thus, for the sake of children, there should not be any ambiguity with respect to the status of the marriage. The court rightly concluded that the petition should be allowed to be continued at the daughter's instance as her status depended upon the outcome of this litigation. If the marriage was held to be valid she would be a legitimate child and her inheritance and coparcenary rights would be protected but if the marriage is declared void, she would neither be a coparcener nor entitled to inherit the property of any of the relatives of her parents. Thus the status of her parent's marriage would be vital for her rights.

The second issue related to proof of the first marriage of the wife. It is noteworthy that it is only when the first marriage was validly solemnized and during its subsistence the party got married a second time, that he/she would be guilty of committing bigamy and the second marriage would be void. It was imperative, therefore, for the husband to prove that the first marriage of the wife was validly solemnized by observance of all essential rites and ceremonies. For authenticating the claim of the wife's subsisting marriage, the husband produced a passport application form of the wife, wherein she had shown her to be the wife of another man by an endorsement in her own handwriting. He also produced a marriage registration certificate and some witnesses none of whom had attended the first marriage but nevertheless deposed that the marriage was solemnized in 1992 and they knew that the bride was the first wife of the husband. However, they were unable to prove whether in this marriage requisite ceremonies of marriage were performed or not? The court held that mere registration cannot cure the defect of an otherwise invalidly solemnized marriage and the performance of required ceremonies must be proved. As the husband failed to prove the observance of requisite ceremonies in the alleged first marriage, the court rightly concluded that the alleged second marriage was valid as there was no proof of the valid solemnization of the first marriage of the wife.

Annulment of marriage

A marriage can be declared void by a competent court on ground of mental incapacity of the party to the marriage under the Hindu Marriage Act. However, husband's claim for annulment of his marriage on the ground that the wife is suffering from mental disorder of such a kind, that makes her unfit for procreation of children[5] is a heavy one and must be discharged by him effectively. Merely by showing that the wife was undergoing treatment of some kind from the doctor for some mental disorder is not sufficient, more so in the absence of any judicial notice of indicating any serious mental disorder of the wife. Annulment in such cases would be denied to the party. Similarly, a declaration of nullity on grounds of impotency of the wife cannot be given to the husband if the wife was competent to perform the act of marital intercourse though her uterus has been removed.[6] Removal of uterus would not make her unfit for cohabitation.

Pregnancy at time of marriage

Pregnancy at the time of solemnization of marriage by a person other than the husband without his knowledge is a serious matrimonial misconduct entitling the husband to obtain a decree of nullity and bring this marriage to an end. However, one of the primary requirements of section 12 (iv) is that since the discovery of such pregnancy, the husband should not voluntarily cohabit with the wife. Thus, where the husband filed a suit[7] in the court alleging that the wife was pregnant by a person other than him at the time of marriage without his knowledge, he is required to prove not only such pregnancy but also that he refrained from cohabitation since its discovery. His failure to prove either would disentitle him to a remedy. In the instant case the husband failed to establish that he had not voluntarily lived with her after the discovery of this fraud. It was held that he was disentitled to get a remedy, though he succeeded in proving the wife's pre-marital pregnancy.

Similarly, where despite the allegation by the husband[8] that the wife was suffering from paranoid schizophrenia and Gilbert syndrome, he continued to cohabit with the wife, it was held that he was not entitled to get the decree.

Impotency of the spouse is yet another ground on which a Hindu marriage can be declared a nullity. In a case from Rajasthan,[9] the husband filed a case praying for a decree of nullity on the ground of wife's impotency. He pleaded that on the very first night of the wedding, the wife told him, that she was dedicated to her guru, Kumari Aruna Sharma and that the institution of marriage was fake for her. Her persistent repugnance to consummate marriage coupled with her unwillingness to get medically examined made the family court to draw an adverse inference against her and

5 *Nandkishore Agarwala* v. *Meena Agarwal,* AIR 2007 Chh 110.
6 *P Devraj* v. *V Geetha,* AIR 2007 (DOC) 145 (Mad).
7 *Devendra Sharma* v. *Sandhya,* AIR 2007 MP 103.
8 *Prakash Kumar Bachlaus* v. *Chanchal,* AIR 2007 NOC 1032 (Raj).
9 *Renuka* v. *Rajendra Hada,* AIR 2007 Raj 112.

declare the marriage as null and void. Subsequently, after about 14 years, when she wanted to lead evidence from a medical expert that she had no bodily defect, the court held that it would not affect the decree passed by the court since the husband had established that the wife was impotent at the time of marriage and continued to be so till the presentation of the petition.

Divorce

Adultery and plea for DNA test

Matrimonial offences of adultery are difficult to be proved in a court of law since by their very nature the acts are likely to be committed in privacy with hardly any possibility or feasibility of direct evidence. In such cases where adultery is committed not by way of an isolated act but over a period of time, resulting in the pregnancy of the wife, a paternity test with DNA examination can conclusively prove, the fault on part of the erring spouse. Since under the rules of Indian Evidence Act, a disclaimer by the father of the paternity of the child born during subsistence of the marriage is not easy, husbands harbouring genuine doubts over the paternity of the child born to their wives seek help of advance medical techniques to prove that they have not impregnated the wife, and the issue is a result of an illicit affair that the wife may have had even during the subsistence of the marriage. It can conclusively prove adultery on part of the wife as well as help the father in a disclaimer of paternity of such issue.

The case[10] under survey therefore raised important issues not only of the paternity of the child born to the wife, in face of the charges of adultery against her by the husband, but also as to whether the report of the DNA test can be admitted in evidence and whether the husband can be granted a remedy when he sought divorce on grounds of wife's adultery without impleading the alleged adulterer. The marriage of the parties was solemnized when they were four to five years old. The wife came to live with the husband only when she attained the age of 23 years, lived with him for two days and thereupon went back to her parent's place. When the husband got the news of her pregnancy and subsequent birth of the child he filed a petition for divorce on grounds of her adultery. To prove his case he sought the permission from the court to have a DNA test to be conducted on the wife, and the child, which was granted by the court and it was the court's letter that was sent to the centre for DNA finger printing and diagnostics. The DNA report along with the forwarding letter clearly stated that the husband was not the biological father of the child born to the wife. However, when he wanted to produce it as evidence, it was objected to by the wife. The trial court also refused to accept the report on the ground that the report was not prepared or signed by the husband and therefore could not be tendered in evidence. His petition praying for a decree of divorce on grounds of wife's adultery was also

10 *Radhey Shyam* v. *Pappi,* AIR 2007 Raj 42.

dismissed on the ground that the husband had not impleaded the alleged adulterer as a necessary party and had failed to prove adultery on part of the wife as well.

The husband preferred an appeal to the high court and stated that as he was unaware of the identity and whereabouts of the adulterer, he could not have impleaded him as a necessary party. On the issue of proof of adultery he stated that the DNA report was a conclusive proof, as it showed that the child was fathered by somebody else, which clearly established adultery on part of the wife. The high court accepted the contention of the husband and held that he could not have impleaded any person as the necessary party in the absence of any knowledge of his identity. It further held that the lower court committed an error of law in denying the husband from tendering in evidence the DNA report, as it failed to draw a distinction between tendering of a document in evidence and producing a document. The husband though was not the author of a document nor did he sign it, still he was the person who with the order of the court obtained the DNA report to prove his case, and therefore had a right to tender the document in evidence. The lower court should have permitted him to tender the document in evidence and thereafter should have considered whether the document had been duly proved or not and whether any further proof was required. The present court also accepted the husband's argument that the DNA report is a public document and mere tender in evidence of it would have been sufficient for making it a lawful evidence for consideration of the court. The matter was rightly remanded to the trial court for permitting the husband to tender the DNA report and prove his case.

Cruelty as a ground for divorce

Majority of the contentious litigations are based on cruel conduct of the spouse. However, what conduct would amount to cruelty in a given set of circumstances would depend on multifarious factors. It has to be considered in the light of the norms of marital ties of the particular society to which the parties belong; their social values, status and the environment in which they live. Every matrimonial conduct which may cause annoyance to the other may not amount to cruelty. Mere trivial irritations, quarrels between the spouses which happen in day to day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety which can be subtle or brutal. It may be by words, gestures or by mere silence, violent or non violent. But before such conduct can be called cruelty it must touch a certain pitch of severity. It has to be seen whether the conduct was such that no reasonable person would tolerate. To constitute cruelty the conduct complained of should be grave and weighty. It must be something more serious than ordinary wear and tear of married life. Cruelty may be physical or corporeal or mental. In physical cruelty, there may be tangible and direct evidence but in case of mental cruelty there may not be direct evidence. Thus, the mental process and mental effects of incidents that are brought out in evidence need to be probed as evidence in matrimonial disputes. At the

same time a too technical and hypersensitive approach may be counter productive to the institution of marriage as the issue is not of an ideal husband or an ideal wife but a particular man or a particular woman.

The apex court this year deliberated on the concept of cruelty in a case[11] where the facts proved indicated that since the beginning of the marriage the wife used to demand money from the husband for her father and would quarrel with him if it was not paid. She would often not provide food to the husband, threaten to kill the children and implicate him in false dowry case; mercilessly beat up the children and often tie them with ropes. While she was pregnant with the fourth child, she pushed her three children in the well and jumped after them. She was rescued, but the three children died. A case of murder was registered as against her and was still being tried in the city courts. The trial court held the wife guilty of cruelty and granted a decree of divorce to the husband, which was confirmed by the high court. The wife challenged this verdict before the Supreme Court.

The court held that her conduct amounted to cruelty and confirmed the decree of divorce granted by the lower courts. As the expression cruelty has not been defined in the Act, the court explained it and observed that cruelty may be defined as wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental or as to give rise to a reasonable apprehension of such a danger.

Ordinary wear and tear of married life

The concept of cruelty is also deeply influenced by the socio-cultural values[12] and the stereotyping of the roles of the parties in matrimony. Needless to say that as the perception of the parties, their standing in the eyes of the society and the compulsions of modernity emerge, the definition of cruelty also changes. Noteworthy is the fact that while in the past refusal to serve tea to the friends of the husband or visitors could break the marriage, as it amounted to cruelty,[13] the same is not the case now.[14] Similarly, reluctance on part of the wife to live with the sister and the mother of the husband;[15] non consummation of marriage not entirely due to the fault of the wife;[16] allegations that the wife never used to cook food in time, visited her parents without his permission, insulted his old parents and threatened to implicate him in false cases;[17] used to sing Hindi songs and spent a lot of time in the bathroom;[18] unwillingness of the wife to help in domestic household chores and the demand that the husband should live with

11 *Mayadevi* v. *Jagadish Prasad,* AIR 2007 SC 1426.
12 *A Vishwanathan* v. *G Lakshmi,* AIR 2007 NOC 462 (Mad) .
13 See *Kalpana Srivastava* v. *S N Srivastava,* AIR 1985 All 253.
14 *Narinder Singh* v. *Rekha,* AIR 2007 Del 118.
15 *Aurn Chettri* v. *Madhu Chettri,* AIR 2007 NOC 563 (MP).
16 *Lakshmi Priya* v. *K* V. *Krishnamurthy,* AIR 2007 NOC 800 (Mad).
17 *Bhavna Sharma* v. *Devendra Kumar Sharma,* AIR 2007 Raj 157.
18 *Bidyut Kumar Saha* v. *Tapa Saha,* AIR 2007 Gau 1.

her in a separate accommodation;[19] would be treated as petty quibbles, trifling differences and quarrels that happen in day to day married life and would not amount to cruelty. Similarly, where the husband expressed his deep anguish and hurt on discovering that the wife was one and a half years older to him, and communicated his desire to sever all ties with her, the court held it as an irrational response not warranting any remedy.[20]

However, where the wife refused to perform her marital obligations without any reasonable excuse,[21] and where the newly wedded wife refused to share the bed with the husband on the very first night as she was averse to cohabitation,[22] the court held that the wife was guilty of cruelty and the husband's prayer for dissolution of marriage was proper.

Fulfilling responsibilities of looking after aged parents

Indian society expects a son to look after his aged parents, and casts a duty upon him not only to provide for them financially but also to maintain a joint habitation with them so that he can accord them proper care. In such cases if the wife insists that he should maintain a separate habitation, would it amount to cruelty to the husband was the question that arose in a case from Rajasthan.[23] Here the husband was the sole earning member of the family and it was not possible for him to abandon his aged parents or his younger brother. The wife demanded that he abandon his family and live with her parents at their residence, which he refused. At this the wife became abusive and physically cruel and persistently denied physical relations with him. The court held that not only it was an unreasonable demand of the wife, but the wife's indulgence in public humiliation of the husband was an act of cruelty. The parties here had lived apart from each other for a period of more than 14 years. While granting the decree of divorce on grounds of cruelty of the wife the court held that even the society expects a son to look after his aged parents and other siblings.

What perhaps weighed with the court was the fact that the wife wanted the husband to not merely live with her and leave his parents, but live with her parents. It is surprising that in the days of gender equality the wife's desire to look after her own parents is still unacceptable and considered unnatural. While it cannot be denied that nobody can provide better care and comfort to the parents in old age than their own children, to enforce this duty only on the son and not on the daughter no longer appears to be reasonable.

19 *Mukesh Kumar* v. *Chanchal,* AIR 2007 (NOC) 1140 (Del).
20 *Sanjay Yadav* v. *Anita Yadav,* AIR 2007 P&H 136.
21 *Tara Devi* v. *Arun Kumar,* AIR 2007 (NOC)140 (Raj).
22 *Rita Das Biswas* v. *Trilokesh Das Biswas,* AIR 2007 Gau 122; *Kusum* v. *Om Prakash,* AIR 2007 Raj 5.
23 *Ramesh Jangid* v. *Sunita,* AIR 2007 Raj 160.

Filing of complaints with the police

Mere filing of criminal complaints of alleged commission of offences of cruelty and demand of dowry against the husband would not amount to cruelty unless they are proved to be false. However, where the wife not only filed criminal cases against the husband[24] and his family members as a result of which they were detained in the police station; aimlessly used to wander around bare headed in front of her in-laws; sit in the verandah only in her petticoats; defied the directions of the husband; refused to serve tea and snacks to his friends when they visited him; and lodged complaints against her husband to his superior; it was held that she was guilty of cruelty and the husband was granted divorce. Similarly, where the wife in her criminal complaint implicated not only the husband but also his parents, brothers, sister and on her verbal unsubstantiated complaint of alleged dowry demand all of them were imprisoned for a considerable time, it was held that she was guilty of cruelty.[25]

Renunciation of Hindu religion and conversion as a ground for divorce

Religion based laws place special emphasis on the religion of the parties to the marriage and if one of the spouses ceases to be a Hindu by converting to another faith, it though does not affect adversely the validity of the marriage, it nevertheless furnishes a ground for the non converting spouse to approach the court for divorce. In a case from Kerala,[26] the husband converted to Islam and the wife filed a petition seeking divorce. The husband contended that the wife had given her consent to the conversion and was therefore prevented from seeking divorce from him. The court rejected his argument and held that despite the fact that the wife may have given her consent conversion in itself is a matrimonial misconduct and a ground on which the non converting spouse can seek divorce. The statute does not state that conversion without the consent of the other spouse would only entitle the non converting spouse to have a cause of action in her favour. It must be remembered that the right of the non converting spouse is indefeasible and something that is not intended in the context cannot be read into the statute nor can a disqualification in the matter of conversion be as one with the consent of the other spouse so as to take it out of the preview of section 13 (1) (ii).

Condonation

Where one party alleges cruelty on part of the other, it is the duty of the court to ensure that the party has not condoned this act. Even if the party is guilty of cruelty, if the other spouse forgives her and restores the relations to normalcy, he cannot later base his divorce petition on the condoned act

24 *Alka Dadhich* v. *Ajay Dadhich,* AIR 2007 NOC 1558 (Raj).
25 *P Mohan Rao* v. *P Vijayalakshmi,* AIR 2007 NOC 2494 (AP).
26 *Suresh Babu* v. *V P Leela,* AIR 2007 (NOC) 285 (Ker).

unless the party is guilty of committing again the same matrimonial misconduct or another one. Thus, where the husband after alleging[27] that the wife was guilty of cruelty, continued cohabitation with her and as a result of which a child was born, the court held that it was proved that he had condoned the guilty acts of the wife and now is not entitled to get any remedy. Similarly, in another case[28] the wife had earlier filed criminal proceedings against the husband under section 498A, and these proceedings had ended in a compromise. She had come back to the matrimonial home, became pregnant and gave birth to their second child. Her resumption of cohabitation with the husband clearly showed that even if the husband was guilty of cruelty, these acts were condoned by her. The high court thus held that she was not entitled to a decree of divorce.

Taking advantage of one's own wrong

Despite the liberalization of divorce under the Hindu Marriage Act, the fundamental rules of matrimonial jurisprudence remain unaltered, i.e., no party can be allowed to take advantage of his or her own wrong or disability. However, section 13 IA of the Act that enables any party to go to the court and file a petition praying for a decree of divorce on the ground stated therein does create a perplexing situation. According to this provision, where a decree of restitution of conjugal rights is granted in favour of one party as against the other, and one year has passed and it has not been complied with, then any party can go to the court and file a petition praying for a decree of divorce.

Does this "any party" include a "guilty party" in the first petition or not, i.e. a party due to whose conduct the other was forced to approach the court with a prayer for the initial restitution of conjugal rights, and would it also include a party who is responsible for the non compliance with the restitution of conjugal rights decree? If the party in whose favour the decree has been granted fails to comply with this decree, can he also go to the court and seek divorce?

Section 13 IA, is based on the irretrievable breakdown of marriage theory. It inculcates a fact, that if the relations between the parties have broken down beyond repair, it is futile to keep them tied to each other and the matrimonial bond may be allowed to be broken. However, the problem arises due to the language used in section 23 of the Act, which clearly states, that it is the duty of the court to ensure that in a matrimonial litigation, no party should be allowed to take advantage of his or her own wrong or disability. The question whether non compliance of the decree of restitution of conjugal rights not amount to a wrong within the meaning of section 23 of the Act has time and again confronted the courts in the past. It is

27 *Kiran Devi* v. *Vinod Kumar Gupta,* AIR 2007 NOC 1561.

28 *Jyoti Devi Soni* v. *Gouri Shankar Soni,* AIR 2007 (NOC) 2009 (Raj).

interesting to note that though the apex court had earlier taken the view[29] that mere non compliance with the restitution of conjugal rights decree did not amount to a wrong within the meaning of section 23, a diametrically opposite view was taken in *T Srinivasan's* case.[30]

In the earlier cases the court had granted a decree of divorce even if the party who primarily failed to comply with the restitution of conjugal rights decree approached it praying for a decree of divorce. The reason being that if after going to the court and establishing a misconduct on the part of other spouse, the parties had not been able to come back together, it could lead to a conclusion that this marriage had broken down beyond patch up and no useful purpose would be served by protecting such a marriage which is nothing but an empty shell. In a recent case[31] on account of some bickering in the family over a broken engagement of the wife's younger sister to the mentally challenged younger brother of the husband, the wife was thrown out of the home. She filed an application seeking maintenance and also prayed for a decree of restitution of conjugal rights against the husband, pleading that he had withdrawn from her society without a reasonable excuse. She succeeded in obtaining the decree, and the court directed the husband to give conjugal company to her, which he failed to do. After one year he went to the court seeking divorce, on the ground that one year has passed and the decree of restitution of conjugal rights has not been complied with. He alleged that the wife had not resumed cohabitation by not coming to his residence. Since the matrimonial home was his home it was she who should have come there and having failed to do so, she became the guilty party responsible for non compliance of the decree. His second line of argument was that non compliance with the restitution of conjugal rights decree did not amount to a wrong within the meaning of section 23 and therefore he was entitled to the decree of divorce.

The family court granted divorce to the husband, and the wife preferred an appeal to the high court. The court held that once the decree for restitution of conjugal rights was granted in favour of the wife, it was the husband's legal duty to resume cohabitation with her. The court further noted that in the age of gender justice and women emancipation and empowerment, it cannot be argued that it is always the duty of the wife to go back to the matrimonial home and it is equally the duty of the husband to resume cohabitation and to take his wife back to the matrimonial home. The court observed.[32]

> Marriage is a sacred bond entered into by the husband and the wife. Both are duty bound to ensure the solidity of the institution. They

29 *Dharmendra* v. *Usha Kumar*, (1977) 4 SCC 12; *Saroj Rani* v. *Sudarshan Kaur Chadha*, (1984) 4 SCC 90.

30 *T N Sriniwasan* v. *T Varalakshmi*, (1998) 3 SCC 112.

31 *Gopi Bai* v. *Govind Ram*, AIR 2007 Raj 90.

32 *Id.* at 92.

> should make an endeavour to live in peace and harmony. In case either one of them breaks the bond, the erring party cannot be allowed to take advantage of his/her wrong. To allow the erring party to take advantage of his/her own wrong is to motivate people to dilute and destroy the institution of marriage. Since the family is the basic unit of any society, it is imperative that the family be protected and promoted by the two spouses. The courts of law are also bound to protect and promote the family as a social unit. Therefore the courts are duty bound to consider as to who is in fault while considering a petition for divorce. S. 23 of the Act merely imports the fault theory in divorce cases.

In the present case, the court followed the ruling given in *Srinivasan's* case and held that the husband cannot be permitted to take advantage of his wrong committed under section 23 of the Act and the remedy of divorce was therefore denied to him. This interpretation brings section 13 IA in conformity with the fundamental principles incorporated in section 23.

Constitutional validity of section 13(2)(iv)

Family laws have time and again being challenged on the ground of their constitutional validity on account of discrimination against women. However, the litigation this year saw a new twist when a man challenged section 13 (2)(iv) on the ground of its constitutional invalidity.[33] The question arose in connection with the maintenance claim filed by the wife who was married to the husband during her infancy. She was four years old and he was seven at the time of the marriage. The husband made two contentions, firstly, that under Hindu law a woman has been granted more grounds on which she can file a petition for divorce in comparison to a Hindu husband. He specifically cited section 13 (2)(iv), which provides that a girl who was married before the age of 15 can repudiate her marriage on attaining 15 years of age, but before she became 18 but this provision was not available to a minor boy married under similar circumstances. This provision was, therefore, gender discriminatory and should not be sustained in the light of constitutional guarantee of gender equality.

His second contention was that it was the state, which had totally failed to check child marriages, and as such the state should be made responsible to provide maintenance to the child bride. Had the state acted on time he would have been saved from being a party to a child marriage when he was incapable to give his consent to it. Further, the state was not performing the obligations in the appropriate manner from time to time.

33 *Roop Narayan Verma* v. *Union of India*, AIR 2007 Chh 64. This provision has become redundant in light of the remedies provided to minor children including minor boys under the newly enacted Prohibition of Child Marriages Act, 2006.

Rejecting his first contention and upholding the constitutional validity of section 13(2)(iv), the court held that article 15(3) of the Constitution permits the state to make special provision for women and children and therefore even if a woman has been granted more grounds on which she can proceed praying for a decree of divorce it is permissible within the Constitution. On the second issue as to whether the state's inability to check child marriages has led to the circumstance leading to presentation of the petition in the present case, the court rejected the argument of the husband and held that he had failed to demonstrate any instance where despite any person approaching the state authorities, they wilfully disobeying the law, denied redressal to him.

It may be noted that the newly enacted Prohibition of Child Marriages Act, 2006, is a step in the right direction, as presently a child marriage has become voidable giving a chance to both the parties to avoid it before they can attain majority. However, the maintenance obligations in such cases are heavy and it is time legislature and judiciary should start advocating self sufficiency or economic independence of the spouses, rather than making one a burden on the other.

Ex-parte divorce decree

The principles of natural justice demand that no party should be condemned without a hearing. The rule applies with equal force in matrimonial litigations as well and therefore where the petition is filed by the husband the notice of it must be given to the wife. If one of the parties to the marriage remains absent consistently, it becomes the duty of the court to investigate whether she has been informed duly about the proceedings or not. The issue arose in connection with a case[34] where the husband filed a petition seeking divorce from his wife. He, however, did not pay the process fees for serving notice on her. On her failure to appear before the court, the husband prayed for an *ex parte* divorce that was granted by the lower court. Totally unaware of the proceedings, on coming to know of it, the wife preferred an appeal. The high court noticed that the trial court had passed an *ex parte* order of divorce without noticing the fact that the husband had neither paid the process fees for issuing notice to the wife nor any summons in ordinary course had either been issued or received by her. The registered notice served through the court also had a suspicious endorsement. This *ex parte* divorce order was passed mechanically at mere *ipse dixit* of the husband i.e., he being the sole witness. It was also noticed by the high court that the mandatory procedure of section 23 of the Act to secure presence of the wife to ensure and make all efforts of reconciliation between the parties was not complied with and there was nothing to show that the wife had refused to establish conjugal relations with the husband when he used to visit her house where he had willingly gone to live. It all showed that the wife was

34 *Sarda Sharma* v. *Santosh Sharma,* AIR 2007 (NOC) 1407 (Chh).

not a deserter. It was held that the *ex parte* decree for divorce was improper and liable to be set aside.

III MAINTENANCE

Eligibility to claim maintenance

The basic principle of matrimonial litigation is that no party should suffer from lack of financial resources as this would adversely affect their chances of a fair trial if they are put in competition with the financially stronger spouse, but before a party can file a claim of maintenance he/she must show that he/ she is incapable to maintain himself/herself. Incapability in this regard invariably points to the lack of ownership of property or a regular income. This is a harsh reality in India that a wife's financial dependency on the husband is a rule rather than an exception. This may be due to multifarious factors but one of them is that in Indian patriarchal structure, the son centered economy ensured till recently that a daughter on birth does not get anything from the joint family property. However, with the legislative intervention, it has been corrected largely, as a daughter has been introduced as a coparcener and gets a right by birth in the ancestral property held by her parental joint family. Her marital status would not adversely affect her being a coparcener, and thus presently not only she would hold her share in her own right but is also capable to carry her share to the matrimonial family with her upon marriage. A question arises: can the quantum of her share be kept in mind, if later owing to matrimonial differences, she claims maintenance from her husband? Can she claim the status of a spouse incapable to maintain herself despite their being evidence that the ancestral family business of which she is now a member may be worth several crores of rupees?

This question arose[35] in connection with a maintenance petition filed by the wife against the husband claiming interim maintenance. In support of her claim with respect to the quantum of income of the husband the wife had applied for production of some documents as against the husband that was allowed by the court. In answer to that, the husband pleaded that the wife's parents and brothers were carrying out joint family business and as per the recently introduced amendment to Hindu Succession Act, 1956, a daughter has also been made a coparcener. He wanted the wife to be given a direction by the court to produce documents relating to the joint family business that her natal family was conducting to show whether and if in accordance with the recent amendment she has become a sharer in the joint family business; how much was her income from the same, and thus whether she was in fact entitled to a claim of maintenance or not? He claimed that as the daughter has been given equal rights in movable as well as immovable ancestral properties of parental family including rights in business as well as business of father, she can no longer claim that she is unable to maintain herself.

35 *Pushkar Navnitlal Shah* v. *Rakhi Pushkar Shah,* AIR 2007 Guj 5.

Section 24 of the Hindu Marriage Act is for the purposes of support and necessary expenses of the proceedings to a spouse in stringent financial circumstances and was equally applicable to either spouse and not only to the wife. The trial court which rejected the application of the husband, he claimed, should have looked into the source of income and then determined whether she was or was not entitled to any maintenance. The High Court of Gujarat, also dismissed his claim and held that he was not entitled to get a permission for production of such documents.

It is interesting to note the domination of patriarchal stereotypes and of the same by the judiciary when confronted with this interesting question. The court not only rejected the contention of the husband for production of documents as irrelevant but also added:[36]

> It is not possible to express any opinion in relation to the provisions of section 6 of the Hindu Succession Act, 1956, or section 29A of the Maharashtra Amendment to the Succession Act as admittedly those provisions are not applicable inter-vivos and come into play only at the stage of opening of succession. Even if a daughter is equated with a coparcener of a Hindu undivided family, it is well settled that no coparcener can predicate his share in the joint family property till actual partition takes place. Thus this contention of the present proceedings is to say the least misconceived.

The court's evasive attitude to directly tackle this question was strange as the contention that after the amendment to Hindu Succession Act, 1956, as a coparcener, she would be an equal owner of this property with her brothers had substance and this argument therefore should not have been brushed aside lightly. It was on evidence that her parents had a very lucrative business that was being carried on by them for over five decades. It was not their separate business but the ancestral business. With established firms having agencies of various reputed pharmaceutical companies and as the wife was now a coparcener, she would have had ownership that could deny her the status of being a spouse in "indigent circumstances". Further the opinion of the court that both section 6 of the Hindu Succession Act and section 29 of the Maharashtra amendment do not apply to *inter vivos* is incorrect. A daughter has been made a coparcener, and while it is true that she would get a share from her parents only on their demise, this rule applies only to separate property of her parents and does not apply to a share in coparcenary property. If she has become a coparcener in the same manner as a son, she can demand a partition during her lifetime irrespective of the wishes of the other coparceners. She need not wait for anybody's death or even consent. It is her share, and even though it cannot be ascertained before a partition

36 *Id*. at 9.

takes place she can always demarcate it by asking for a partition in her own right. The moment she says, "I want specification of my share", she becomes a separate member, and even if she does not ask for a partition, her ownership of a share in the coparcenary property can never be denied. She thus has a choice. Being a co-sharer in the coparcenary property, if the husband was allowed to lead evidence of the total worth of the property, her share and its quantum could easily have been ascertained. Thus, while being the owner of a large chunk of coparcenary property, which she willingly allows her natal family to manage, if she can be allowed to claim the status of an indigent spouse, it clearly appears to say the least unfair and unjust. The very purpose of maintenance provisions is to ensure that a spouse who is not in a position to maintain herself should not be left destitute and should be provided for by the financially comfortable spouse or ex-spouse. However, maintenance obligations should not in any case be imposed by way of penalty on the ex-husband, where the wife may own assets far more than that of the husband. The only legal hurdle may be that she would not like to demarcate them, though she is capable of doing that merely to spite the husband. It is the ownership criteria that should be kept in mind, otherwise it may be difficult for the court to prevent misuse of the beneficial provisions by unscrupulous women trying to get even with their husbands.

Non payment of maintenance

During the pendency of any litigation in which a party to the marriage has approached the court for a main matrimonial remedy, if it is brought to the notice of the court that one of the parties to the marriage is not in a position to maintain herself and /or even to meet the cost of litigation the court may direct, upon an application presented to the court with a request for the same, that one of the parties should pay to the other not only maintenance *pendente lite* but also the cost of proceedings. The liability to pay maintenance to the party as well as cost of proceedings are strict and cannot be ignored on ground such as that the wife was facing trial under the Immoral Traffic Prevention Act,[37] and that she was earlier married twice and this fact was concealed from the husband. Maintenance *pendente lite* can be granted even before first making an effort for reconciliation.[38] The court has ruled that non payment of interim maintenance would amount to a wrong within the meaning of section 23 of the Hindu Marriage Act, and even with the establishment of the fault on the other spouse, the husband would not be entitled to obtain a decree of divorce.[39] Similarly, a mere allegation that the wife was living in adultery with the finding yet to be established before law would not be sufficient to defeat her or the children's maintenance rights.[40]

37 *Pramod* v. *Krishna,* AIR 2007 (DOC) 147 (P&H)
38 *Sidharth* v. *Kanta Bai,* AIR 2007 MP 59.
39 *Naresh Kumar* v. *Sarabjit Kaur,* AIR 2007 P&H 47.
40 *Preetam Chand* v. *Kanta Devi*, AIR 2007 (NOC) 514 P&H.

Evasion of responsibility to maintain children

Matrimonial breakups bring adversity on children. They suffer emotionally and financially, more so, when the financially superior parent tries to shrug of his responsibility by adopting unethical means to the disadvantage of his own progeny. In such cases the courts have to be extremely vigilant as they are confronted with the issue of enforcing a settlement against the interests of the children, and deal with heartless parents trying to put their ego before the welfare of their own children.

Two questions arose in connection with maintenance rights of the children, after the matrimonial breakup. In the first case[41] the parties separated after divorce and kept a daughter each with them. The elder daughter remained with the father, while the younger went with the mother. The father remarried and had a son from the second wife. Though the mother was gainfully employed as a primary school teacher, the father's financial position was much better in comparison to her. The mother brought up her daughter who was studying for CA course. The father celebrated the marriage of the elder daughter by himself with gaiety and spend a substantial amount of money on her wedding. With respect to the younger daughter, he did not wish to contribute any monetary help from his side. The mother alleged that on her own she could not spend a matching amount on the wedding of the younger daughter and filed a case seeking marriage expenses of comparable amount from the father. The father denied his responsibility to maintain or contribute to marriage expenses for the younger daughter contending that since he had not asked for any help from the mother on the occasion of the wedding of the first daughter, the mother cannot demand any if she decides to celebrate the wedding of the younger daughter. By dividing the responsibilities they were on equal footing and none was in a position to seek assistance from the other. The court held that both the daughters were entitled to same treatment, and the fact that one of them was with a financially strong parent would not mean that the father can neglect the other or escape the obligation to maintain the younger daughter. The court directed the father to pay Rs 7,000 per month to the younger daughter for her maintenance and marriage expenses. The court observed that it is a well settled principle of law that both the parents are under an equal obligation to maintain all the children of the wedlock whether they live with one or the other. It is their legal, moral and social duty to provide for their child, to the best of their ability, good education and standard of living within their means. The mere fact that the spouse with whom the child is living has a source of income even if sufficient would in no way absolve the other spouse of his obligation to make his contribution towards the maintenance and welfare of the child, even if the salary of one spouse may be less than the income of the other spouse.

41 *Vijay Malti* v. *Rajiv Vij,* AIR 2007 Del 89.

In the second case[42] the parents separated after divorce and the mother took both the children with her. The father tried to avoid the maintenance responsibilities on three grounds: first he quoted section 20 of the Hindu Adoptions and Maintenance Act and tried to show that the right of the child to claim maintenance is from father or mother. The term or in between the parents, he claimed, shows that the children can proceed either against the father or against the mother. If, as in this case, they were with the mother and it was she who was maintaining them, they could not proceed against the father. Secondly, he contended that as the mother was already maintaining them they were being maintained, and they were not in need of further maintenance, and cannot take the label of children incapable to maintain themselves. Thirdly, he contended that at the time of divorce, the husband and the wife had entered into a mutual agreement that neither she nor the children would claim maintenance from the father and thus they are estopped under the terms of the agreement to claim maintenance from him. The court held that the father and the mother by mutual agreement cannot take away the statutory right of children. Under no circumstances any agreement adverse to the interest of minors can be enforced by law. These arguments were totally fallacious and could not be accepted as the father cannot be absolved from liability of maintaining the children. He was accordingly, directed to pay maintenance to each of his children.

Adoption and Maintenance Act, 1956

Adoption once validly effected is an irrevocable act and the biological parents cannot seek its custody later. The same principle applies in the interest of the children when children are given in foster care by their parents first voluntarily and later when they seek its return at their whims and pleasure. In a case from Bombay,[43] the biological parents gave their child to a childless couple, as they stayed away from each other and were not sure whether they would be able to or even wanted to take care of the child properly or not. The foster parents took good care of the child but six and a half years later, the biological parents filed an application with the scrutiny officer, that they wanted the child back with them. They were still living separately and were not sure as to who would keep the child. The matter went to the court and dismissing their claim, the court held that merely because of the report of the scrutiny officer the child cannot be handed over back to the biological parents. Biological parents cannot wait to receive back the child indefinitely and leave the fate of the child in suspended animation leaving to them the choice of exercising option of claiming child at a later point of time. In the interest of the child, its care and continuity should not be disturbed.

42 *Mohinder Singh* v. *Ravneet Kaur,* AIR 2007 P&H 49.

43 *Maroti Vithal Bhatwalkar* v. *Mahila Vikas Mandal , Chandrapur,* AIR 2007 (NOC) 965 (Bom).

Adoption under Hindu law

In Mithila, there was a valid custom relating to adoption by way of appointment of *karta putra*. For appointment of *karta putra* no formal ceremony or formality was required. What was necessary was taking consent of the adopted child and purpose of adoption for performance of exequial rights. The case related to an alleged adoption by a widow[44] in 1937 that was also confirmed by execution of a registered adoption deed subsequent to the enactment of the Hindu Adoptions and Maintenance Act, 1956. She later died and upon her death the question arose as to who would succeed to her property. The adoption was challenged as invalid by the other relations on the ground that she was residing outside the area where custom was prevalent. As the adoption was prior to 1956, it was governed purely by the customary law. The court held that since the custom was not controverted in the pleadings, proof of the same was not necessary. Further, the adoptive mother executed an adoption deed subsequently; the proof of the same existed and also both the essentials for the validity of appointment of *karta putra*, namely, consent of the adopted child and purpose of adoption for performance of exequial rights were proved by evidence. As the adoption was prior to 1956 a deed of adoption merely confirmed the fact of adoption. The court held the adoption to be valid and the adopted son entitled to inherit the property.

Maintenance claim after award of decree of restitution of conjugal rights

A claim of maintenance can always be renewed on a fresh cause of action. A question arises: where the wife's petition claiming maintenance is rejected once as the court concludes that she voluntarily deserted the husband and awarded the decree of restitution of conjugal rights to the husband, would her claim seeking maintenance once again on the ground of husband's failure to comply or enforce the decree be barred by *res judicata?* The case[45] started with the wife filing a petition against the husband for a claim of maintenance. She had left the matrimonial home alleging cruelty and ill-treatment by the husband. The husband filed a counter to that claiming restitution of conjugal rights and argued that she had withdrawn from his society under the pretext of illness of her mother and did not return thereafter. The court heard both the petitions together, found no substance in the wife's allegations and held her guilty of voluntarily deserting the husband for no fault of his and dismissed her maintenance petition. The court, however, allowed maintenance to the child who was with the mother. A year later the wife filed a second petition praying for maintenance on the ground of husband's failure to respect the decree of restitution of conjugal rights and her destitute condition. The husband pleaded that not only her application seeking maintenance was barred on account of the principle of

44 *Gauri Shankar Prasad Singh* v. *Baid Nath Prasad Singh*, AIR 2007 Pat 78.
45 *Dilip Kumar Barik* v. *Usha Rani Barik,* AIR 2007 Ori 83.

res judicata as there was no fresh cause of action, but also that since the decree of restitution of conjugal rights was passed in his favour, it was the wife who should have taken appropriate steps for its compliance and in not doing so she became guilty of failure to comply with the decree as well. The court dismissed the contention of the husband, rejected the plea of *res judicata* and held that in Indian society the husband should take steps to enforce the decree of restitution if he in fact wanted his wife back. Complete inaction on his part after securing the restitution decree would indicate a lack of genuine interest to secure the company of the wife. As the duty is on both parties to respect the decree of the court, the husband could not be excused if he displays a total apathy to seek his wife's return to matrimonial home. The court rightly concluded that the wife should be granted maintenance as it could not be denied that she was destitute.

Hindu law

Under Hindu law, there is a basic presumption that every Hindu family is a joint Hindu family. This presumption of jointness of a Hindu family is stronger amongst nearer relations and the remoter one goes, the presumption becomes weaker and weaker.[46] All coparceners till they are joint hold the property cumulatively with incidents of survivorship. The interests of each of them are not static but are fluctuating and vary depending upon the deaths and births in the family. Thus, a coparcener cannot make a gift of his undivided share till he remains joint with others. Once the partition takes place and the joint share is converted into separate property the power to make a gift is acquired by the members of the family who now hold the interest as tenants in common and not as joint tenants.[47]

V HINDU MINORITY AND GUARDIANSHIP ACT, 1956/ GUARDIANS AND WARDS ACT, 1890

Custody of minor married girl

A child marriage has always remained a subject of controversy with respect to its permissibility as well as its status. The recent Prohibition of Child Marriage Act, 2006, has made it voidable generally and void in certain cases, yet the rights and liabilities of the parties to a child marriage have never been in doubt. A question arises, if the wife is a party to a child marriage, who would be her guardian? In answer to this query the Andhra Pradesh High Court has held[48] that despite the fact that there is a prohibition on the solemnization of child marriages, and the fact that under Hindu Marriage Act, these marriages are not null and void, illegal or invalid, the

46 *Hankari Devi* v. *Rajbhawani Devi,* AIR 2007 (NOC) 2008 (Raj).
47 *Munni Lal Mahto* v. *Chandeshwar Mahto*, AIR 2007 Pat 66.
48 *Makemalla Sailoo* v. *Supdt of Police, Nalgonda,* AIR 2007 (NOC) 135 (AP).

husband of the wife would be her natural guardian under section 6 of the Act, and custody can be given to him.

In another case[49] an application was filed by the mother for obtaining the custody of her 10 year old daughter who was staying with the father. The court held that considering the fact that she was attaining adolescence, she might be in need of personal guidance including monitoring of her physiological changes. Moreover, mother's constant presence can instil in minor's mind qualities of fidelity in her life; hence the court ruled in favour of granting custody of the daughter to the mother. Similarly, in another case[50] the custody petition was filed by the mother for her one and a half year old daughter who was with the father, but as the father was serving in another city the child was being looked after by the paternal grandmother. The mother came from an educated, cultured and financially sound family, and was forced to leave the matrimonial home under compulsion. The court held that the child would get the best care, protection and nourishment from the mother and granted the custody to her.

Custody petition where child was born and was living abroad

Where the parties are Indian citizens and are married in India, then notwithstanding the fact that their child was born abroad or was even living there, the courts in India do have the jurisdiction to decide the custody battle between the parents. In the instant case,[51] the parties were married in Kerala and the child was born in Bahrain. The mother had the custody of the child, but the father took the child and came to India. The mother filed a petition in the family court at Kerala, seeking restoration of its custody and the father pleaded that as the child was born and was living in Bahrain, the family courts at Kerala did not have the jurisdiction to try this case involving its custody. The court held that the Indian courts did have the jurisdiction to try this case and granting the custody to the mother they observed that even though the father was the natural guardian of the minor child, he could not on this ground alone have any preferential right over the child.

Disposal of property of minor by its guardian

It is a well settled rule that the property of minor child cannot ordinarily be disposed of without the consent of the court. The court while granting the permission keeps the welfare of the child in mind. The mother as a guardian to the property of the minor sons applied for permission from the court to sell vacant plots belonging to them.[52] She wanted to sell these plots and with the sale proceeds to buy readymade flats in an established residential colony,

49 *Kanheeri Venugopalan* v. *K* V. *Beena,* AIR 2007 (NOC) 291 (Ker).

50 *Ruchirkumar Gajanandbhai Suthar* v. *Amitaben Hasmukhlal Nanchandas Mewada,* AIR 2007 (NOC) 682 (Guj).

51 *Hareendran Pillai* v. *Pushplatha*, AIR 2007 NOC 1064 (Ker).

52 *Ram Krishan Gupta* v. *Nootan Agarwal,* AIR 2007 (NOC) 649 (All).

where most of her relatives also had flats. The lower court's denial of permission made her file an appeal in the high court. The court granted her permission to sell the property belonging to the minors for purchase of flats in their names as it was in the interest of the minors. Further, where the mother not only acts as a guardian but also as an elder member of the Hindu joint family, sells the joint family property including her own share and also the share of her minor sons, the fact that she has not taken the permission of the court would not invalidate the sale.[53]

VI DOMESTIC VIOLENCE ACT, 2005

Right of residence in matrimonial home

The primary question accosting an Indian woman, in the event of a matrimonial dispute when she either leaves the matrimonial home on her own or is forced to leave it is where to go. As in majority of cases the house belongs either to the husband or to his parents. A question arises, if the matrimonial home stands in the name of not the husband but either of his parents, can an estranged wife, who claims to be a victim of domestic violence, claim a right of residence in such a house? The issue assumes importance, in the Indian scenario, as the eligibility of a boy to get married is determined not by his ability to acquire a house for himself, but by his acquisition of a regular job or an avocation. Since extended family system is a typical Indian feature, it is not uncommon that grown up sons continue to live with their parents, a fact that also has not only judicial sanction but in fact its approval as time and again the Indian courts have reminded the sons of their duty to look after his parents which includes maintaining a residence with them.

Two important decisions on the recent legislation, whereby Hindu women wanted to enforce their residential rights in their matrimonial home against the wishes of their husbands, in fact highlighted the utter futility of this provision in the Indian patriarchal setup that bares the patrilocality. In a case from Delhi,[54] owing to matrimonial dispute the wife left the matrimonial home and started living with her parents. The husband filed a petition claiming divorce and the wife as a counter to the divorce petition filed criminal cases against him under sections 406/498-A/ 506 and 34 of the IPC. Her father-in-law, mother-in-law, husband and a married sister-in-law were arrested, and were granted bail only after three days. She tried to re-enter the matrimonial home and upon her failure to do so as the premises were locked, filed a suit claiming a permanent injunction against the in-laws to enable her to enter the house. The trial court granted an injunction in favour of the wife as against the in-laws restraining them from interfering

53 *Sannamma* v. *Shivanna,* AIR 2007 (NOC) 2228 (Kar).
54 *S R Batra* v. *Taruna Batra* (2007) 3 SCC 169.

with the possession of the entire second floor of the house and permitting the wife to occupy the same. The husband had meanwhile shifted to Ghaziabad. On an appeal filed by the mother in-law in whose name the house stood the senior judge dismissed the claim of the wife and held that as the husband was not living in this house it is not the matrimonial home and the wife had no right to any property that does not belong to her husband. The wife preferred an appeal to the high court which reversed the judgment of the lower court and held that only because the husband changes his residence, it would not shift the matrimonial home and therefore the wife was entitled to retain the premises, owned by her mother-in-law. The matter went to the apex court. The court held that as the premises in question belonged to the mother-in-law of the wife and not to her husband, the wife had no right whatsoever to claim any possession rights in such house. Even if this was the house where she and her husband had lived together after getting married, it would not make this house as their matrimonial home in the sense that she could claim legitimately a right of residence in it against the wishes of its owners.

In another parallel case that came from Bombay,[55] the husband filed a suit against the wife claiming divorce and the wife filed a corresponding petition claiming her right to continue to live in the matrimonial home and sought an injunction against her dispossession. The premises in question did not belong to the husband but in fact were in the name of his mother. A little before the presentation of the suit claiming divorce, the husband and the wife had shifted to another premises near the house of the mother-in-law, but the wife staked her claim not on that premises but wanted to enforce her rights of residence on the premises owned by her mother-in-law. Here again the court rejected her claim on the ground that merely because the wife stayed in the house of her mother-in-law along with her husband, she would not get a legal right of residence in the mother-in-law's house. It is not the property in which the husband had any right. The right is available only as against the husband and not against any member of his family. "Shared household" would mean the house belonging to or taken on rent by the husband or the house which belongs to the joint family of which the husband is a member.

Both the cases point towards one curious feature. In Indian society, upon marriage it is the woman who leaves her parent's home and joins the husband's household. In several cases the wife goes and lives in a home owned by either of her parents-in-law and is expected to live with them. Her duties include not only looking after the husband but his entire family and their needs. If she wants the husband to maintain a separate residence and the husband refuses she has no remedy. If she is kicked out of such homes, she again has no remedy as the house does not stand in the name of the husband. However, if she insists that the husband maintain a separate residence with

55 *Hemaxi Atul Joshi* v. *Muktaben Karsandas Joshi,* SC suit no 3072 of 2007, decided on 5.12.2007 (Bom).

her, she can claim a right of residence in such a home which might be either a rented accommodation, or even owned by the husband. Her rights clearly are statutorily secured if she lives in her husband's house than when she lives in her in-laws house. In such a scenario, the court's verdicts that Indian society expects a son to live with the parents so that he can look after them in their old age may be a little too harsh on the wife. Even this year, a couple of matrimonial cases on this very issue had come up before the courts, where the son's duty towards his parents was judicially recognized, by upholding his argument that the wife would be guilty of cruelty if she insists that he leave the house of his parents and live with her. This is also a reality that ownership of a residence soon before or after marriage by the husband is not a very common feature. It is a paradoxical situation for an Indian woman, that neither her rights to insist on a separate residence can be recognized by the courts as against the wishes of her husband, nor can she claim any rights of residence in the house of her in-laws.

VII HINDU SUCCESSION ACT, 1956

Property subject to inheritance rules

Whatever property is owned by a person can go to his or her heirs in the case of his demise. Where more property is added after the death and distribution of the then available property, it again goes in accordance with the law of inheritance the deceased was subject to. The question that arises is: can the compensation that is awarded to "next of kin" in lieu of the death of a person be distributed in accordance with the rules of succession or not? Who are the "next of kin" of the deceased to whom compensation can be given? Is this category different from the category of heirs?

In the unfortunate riots of 1984 called anti Sikh riots, a family of four, the husband, wife and their two very young children were burnt alive by the mob.[56] The only two relatives who survived this family was the mother of the deceased wife and father of the deceased husband. Later the government announced an *ex gratia* payment to be made to the next of kin of the dead. It began with Rs 10,000 and was later enhanced to Rs. 20,000 and for all four deceased, was made to the father of the deceased husband. The wife's mother was not given anything. Much later, on 16.01.006, the government decided to make an *ex gratia* payment of Rs 3.5 lakhs to next of kin to each of the deceased which came to Rs 14 lakhs for the present family of four. The mother of the deceased wife now contended that half of this amount should be given to her, as she had also lost her daughter. Both the father of the husband and she herself, were on equal terms. Both of them had lost a child each and two grandchildren. If the father of the Hindu man was entitled to get *ex gratia* payment, as he had lost his son, the mother of the married daughter

56 *Ganny Kaur* v. *State of NCT of Delhi,* AIR 2007 Del 273.

should also get the payment as she had lost her daughter, the loss was not entirely that of the father of this man only, and he should not get the payment for the loss of his daughter-in-law as well, in the presence of her mother. The way the case was fought displays a very important issue: i.e., who would be the next of kin for a married woman, and her children? The husband's father or her own mother and for the children, the paternal grandfather or the maternal grandmother or both?

In the days of advocated equality of sexes, upon marriage, how is it that a married woman's property can legally be claimed by the heirs of her husband and not by her own blood relatives? The husband's father claimed here that upon the application of the principles of succession i.e, Hindu Succession Act, 1956, both for the property of a male and a female intestate, i.e., both for the property of his son and daughter-in-law and each of the grandchild, the scheme of succession preferred him over the maternal grandmother. For his son he was a class-II heir placed in entry- I, while the mother of the wife will figure nowhere. For the property of his daughter-in-law, he could claim inheritance under the category of " Heirs of her husband", which is the second category while her own mother would come in the third category, i.e., "father and mother".

The court chose to ignore the principles of succession and held instead that personal law rules cannot be applied to *ex gratia* payment and here in terms of equity, justice and good conscience, both the mother of the deceased woman and the father of the deceased husband would get Rs 7 lakh each.

Right of daughter to get a share in coparcenary property

Under the amendment of 2005, a daughter has been made a coparcener and is now envisaged as a sharer of the property in her own right in the same manner as son. At the same time it has been provided that the Act would not apply if a partition had taken place in the family prior to 20.12.2004. Thus, where partition had taken place before this date, a daughter cannot demand a reopening of the partition despite the fact that she is a coparcener.

In 1984, a partition suit was filed by two members of a Hindu joint family,[57] against their father for partition of the joint family property. The mother, other sons and daughter were also made parties. Under a joint application filed by both the parties, the matter was referred to arbitration in 1989 and under a decree passed in 1991 the daughter was granted 1/36 share in the joint family property. An appeal against this decree was dismissed and subsequently a petition was filed in 1993 for execution of this award. In 1998 the daughter died. Her husband filed a suit after the coming into force of the 2005 Amendment Act, claiming that as the execution petition is still pending, partition has not become final and his wife as a coparcener would

57 *Brij Narain Aggrwal* v. *Anup Kumar Goyal,* AIR 2007 Del 254.

have been entitled to 1/6th share in the property and the same should be handed over to him as her legal heir.

The court negatived his claim and held that the first requirement of a daughter becoming a coparcener would be the existence of a Hindu joint family. If the joint family has already been disintegrated by a previous partition, there would be no question of the daughter becoming a coparcener in it, but if the joint Hindu family is in existence on that day the daughter shall be a coparcener in the joint Hindu family like any other son and shall have the same rights and liabilities in the coparcenary as that of the son. If no Hindu undivided family is in existence on that day when the amendment came into force, the question of the daughter being coparcener does not arise. Here, the moment partition was demanded by one of the coparceners, a severance in status took place and since all coparceners had agreed for a partition, in fact the coparcenary in itself had come to an end. Not only coparceners but all other members of the family having right in the joint family property had agreed to refer the matter to arbitration. The amending act shall not be applicable where the partition has already been affected before 20.12.2004.[58] The cut off date of 20.12.2004 has been given by the legislature only to ensure that those partitions which have been affected before this date when the Bill was introduced Parliament are to be recognized. This ensures that no false claim of partition may be put forward and partition shall be considered only where a deed of partition has been duly registered prior to 20.12.2004 or a partition has been affected by a decree of the court. The explanation has been added to rule out the plea of an oral partition which is normally taken by the parties to evade the application of the Act. Here partition took place in 1991, much before 20.12.2004, and the daughter died in 1998. The court rightly held that mere pendency of the execution proceedings would not give right to the husband to revive a Hindu undivided family which ceased to exist in 1984 itself. The court dismissed the suit terming it as frivolous imposing costs on the plaintiffs.

Property inherited from father: separate property in the hands of the son

A son who inherits the property of his father under section 8 of the Hindu Succession Act, 1956, does so in his individual capacity and not as a *karta* of the joint Hindu family. The apex court reaffirmed this rule, that had upset the traditional law, that a son inheriting the property from his father does it as the *karta* of his family, and the character of the property would be coparcenary *qua* his sons. It did put severe impediments on the rights of the son, as he did not acquire full powers of disposal over this property, and his sons acquired a right by birth in it. The ruling of the apex court is also in conformity of the scheme of succession laid down in the Hindu Succession Act. The matter arose in connection with a case,[59] where a

58 See the Hindu Succession (Amendment) Act, 2005, s. 6 (5).

59 *Makhan Singh* v. *Kulwant Singh,* AIR 2007 SC 1808; See also *, Commissioner Wealth Tax, Kanpur* v. *Chander Sen*, (1986) 3 SCC 567.

railways employee acquired property in course of his employment and died. On his death, his son inherited the property, and the issue was: can it be categorized as the joint family property so that his sons have an equal right of ownership in it. The court held that property falling to the sons by succession could not be said to be the property of the joint family and therefore the son would hold it as his separate property having full powers of disposal over it.

Heirs to a male intestate

Heirs to a male Hindu under the Act are grouped in four classes, class I has sixteen heirs, five males and eleven females. Law also provides that so long as a single class I heir is present the property does not pass to the class II heirs. Thus, where the deceased died[60] unmarried and issueless, leaving no class I heir, the two claimants to the property — the brother of the deceased and his another brother's son — the court held that the property would go to the brother of the deceased since he was a class-II heir and was placed in the second entry of class-II whereas the nephew came in entry four.

Succession rights of illegitimate children in the property of their putative father

Marriages are classified in three categories under Hindu Marriage Act, 1955 for ascertaining their legal validity viz: valid, void and voidable. However, for such classification it must be a marriage and not a relationship short of marriage. A live in relationship is not covered under the expression void marriage as for becoming a marriage, its solemnization must be proved. The Act provides that a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either the bride's community or the bridegroom's community. Where such a marriage is solemnized, and it contravenes, section 5 (i), (iv) or (v) of the Act, then it is categorized as void. If it is covered under any of the clauses of section 12, it will be called a voidable marriage. However, if either the rites and ceremonies are not observed at all, or they are defective ceremonies, the parties will not get the status of husband and wife, as the valid solemnization is the primary prerequisite for conferment of this status on the parties. Their relationship in such cases cannot be classified in any of the three categories of marriages postulated by the Act. Thus, where the solemnization of the marriage has not been proved, the question of ascertaining its validity does not arise. If the relationship is short of marriage, it is branded illicit and the woman does not get the status of a wife and the children begotten from this relationship are illegitimate and are not entitled to inherit the property of their putative father.

This year two diametrically opposite judicial pronouncements were delivered on an identical issue, the Kerala High Court taking a correct

60 *Patiram* v. *Mula,* AIR 2007 MP 131.

approach, while the MP High Court totally distorting the legal provisions. In the case from Madhya Pradesh,[61] a woman W was married to H_1 who deserted her during the subsistence of her marriage and upon this desertion, she started living with H_2 and gave birth to seven children from this relationship. On death of H_2, the children claimed his property as his heirs, and their claim was resisted by the other relations of H_2 on the ground that these children are illegitimate as neither their parents were married nor they could have married as W was already the legally wedded wife of H_1.

The high court noted that W was the legally wedded wife of H_1, but in view of long cohabitation between W and H_2, a marriage could be presumed between them, and secondly on the basis of this presumed marriage the children born would get the benefit of section 16 (1) of the Hindu Marriage Act, 1955, and would be entitled to inherit the property of their putative father.

The judgment appears strange and incorrect. It appears strange as despite the Hindu Marriage Act, expressly abrogating customary practices contrary to its provisions, and incorporating strictly, the rule of monogamy, the judge tried to accord legitimacy to the second relationship by noting that among some castes a second marriage can be validated in certain specific circumstances. He quoted with approval a 1961 case,[62] wherein it was observed:[63]

> In Khatri society the prevalent custom is that second marriage by Natra can be gone into during the lifetime of the husband. There are a number of modes of dissolution of marriage one of which is that the first husband either takes some monetary benefits or he may even deny the same. After contracting marriage through Natra if the wife lives with the man as a wife for a number of years and if her former husband takes no action regarding his rights of the marriage then it is presumed that the Natra is legal and children out of this union would be considered legitimate.

The second argument that the court took was that since this woman, who was already married to another person lived with H_2 for a long time period, this long cohabitation would in itself lead to a presumption of validity of marriage. In support, it quoted an apex court ruling[64] to the effect that long cohabitation leads to a presumption of validity of the marriage. This ruling, however, involved a monogamous union and in absence of clear cut proof that there was no solemnization of marriage.

61 *Parmanand* v. *Jagrani,* AIR 2007 MP 242.
62 *Rewaram* v. *Ramratan* 1961 MPLJ SN 245.
63 *Id*. at 244.
64 *S P S Balasubramaniam* v. *Surutayan,* AIR 1994 SC 133.

The judgment unfortunately suffers from serious infirmities. It reads more like an advocate's brief for the bigamous wife and her illegitimate children rather than a judicial decision. Here, even if it is assumed that they were cohabiting for a long time, when there was a concrete proof that W was already married to H_1 and living with H_2, long cohabitation would not lead to a presumption, that they had a relationship that could be sustained in law. Rather, presumption in favour of marriage would stand rebutted. The court itself noted that in the instant case even though the parties had lived together for a long time there was no custom in their community that permitted second marriage during the lifetime of the first husband. Even otherwise, abandonment of the wife by the first husband does not bring the marriage to an end. As no ceremonies were observed for the second relationship, both the courts held that W was not legally wedded spouse of H_2 and the children were illegitimate.

However, on the question of succession rights of illegitimate children, the court held that even if the children were illegitimate, in view of section 16 of the Hindu Marriage Act they would be treated as legitimate for succession to the property of their parents but not of any other relative of their parents. Since the property here was the separate property of the father, they would be entitled to inherit it. The court observed:[65]

> The Hindu Marriage Act is a beneficial legislation and therefore it has to be interpreted in such a manner as advances the object of the legislation. The Act intends to bring about social reforms. Conferment of social status of legitimacy on a group of innocent children, who are otherwise treated as bastards, is the prime object of Section 16.

It thus concluded that even if W was already the legally wedded wife of H_1 , when upon desertion by him she started living with H_2, without getting married to him and bore his seven children, these children are entitled to inherit his property in light of section 16 of the Hindu Marriage Act. The decision of the court is totally erroneous. The title to section 16 of the Hindu Marriage Act reads as : "Legitimacy of children of void and voidable marriages", which clearly shows that statutory legitimacy is conferred only where the marriage is either void or voidable under this Act. The phrases "void marriage" and "illicit relationship" are fundamentally different. For classifying a marriage into void or voidable, it is a prerequisite that it must be a marriage. Under the Act, no relationship is equated with a marriage unless it is solemnized with proper rites and ceremonies. It is only a violation of the legal validity requirement that would make a validly solemnized marriage a void or voidable marriage. Thus, unless marriage is valid from solemnization point of view it cannot be categorized as either void, or

65 *Supra* note 63 at 246.

voidable or even a valid marriage. It is a relationship short of marriage equated with live in relationship or concubinage, if no ceremonies were observed, it can never be classified as a marriage and no provision of Hindu Marriage Act nor that of Indian Penal Code for prosecuting the party for committing bigamy can be applied to such a relationship.

Secondly, even if long cohabitation does give rise to a presumption that a valid marriage might have existed, it is a rebuttable presumption and can never stand in light of clear proof of two facts: first that the woman started living with the second man while her husband was alive and had deserted her and two, she started living with him without observing any rites or ceremonies, both of which were present in this case. Presumptions can be applied only in those cases where there appears to be confusion but not where complete facts were proved before the court. The court chose to not only ignore the implications of both the facts, but made the parties subject to an Act, which could not have applied to them. The provision of Hindu Marriage Act, 1955 can be applied to determine the rights and liabilities of the parties to the marriage and their issue born of the union only if the parties marry under this Act. When the parties do not marry under this Act, or do not marry at all, this Act and for that matter no matrimonial legislation can apply to their relationship nor govern the rights of their children. Section 16 of the Hindu Marriage Act can apply only where the marriage was solemnized under this Act. When the marriage was not solemnised at all, application of section 16 by the court appears to be totally erroneous.

Thirdly, even, section 2 (i) of the Hindu Succession Act, 1956, provides: "Related means related by legitimate kinship". Thus, if a person is not related with a legitimate kinship he would not be entitled to inheritance under the Act. The exception is in case of their relationship to their mother and to one another. Beyond this, they are not deemed to be related to any of their other blood relatives. Clear legislative provision, should not be twisted or distorted to come to a totally unwarranted conclusion.

In the case from Kerala,[66] on the death of a Hindu male, his first wife and children claimed property. A second woman who had a live in relationship with the deceased and her daughter born of this relationship also claimed the property. It was established before the court that the deceased and W_2, had never married but were living together in an intimate relationship. The court here rightly held that neither W_2 nor her daughter is entitled to inheritance rights under the law. The daughter cannot claim protection of section 16 of the Hindu Marriage Act as for that it must be established that a marriage was performed between her parents which was missing here. The court observed that under section 3 (1)(j), of the Hindu Succession Act, related means 'related' by legitimate kinship. In fact to safeguard the rights of illegitimate children proviso hereunder was added to the effect that illegitimate children shall be deemed to be related to their

66 *Chodan Puthiyoth Shyamalavalli Amma* v. *Kavalam Jisha,* AIR 2007 Ker 246.

mother and to one another and their legitimate descendants shall be deemed to be related to them and to one another. The deeming provision is not extended to the father of the illegitimate children. It is therefore absolutely clear that only a legitimate kinship is a relative, who is entitled to inherit the properties of a male relative. If so, an illegitimate child cannot be a relative under class-I like a legitimate son and daughter. An illegitimate child can inherit the property of the father only when it is covered under section 16. But in order to attract this section there should have been a marriage between the parents and that marriage should have been null and void under section 11. If on evidence it is established that there was no marriage between the parents the issue born of this relationship cannot take the benefit of section 16. If the marriage was solemnized between the parents, the benefit of section 16 would have been accorded to them. The court rightly rejected the claim of the daughter of the deceased to inherit his property.

Preference to full blood relations over half blood

Under the classical law, upon the death of a coparcener, his share went under doctrine of survivorship to the remaining coparceners. However, after the commencement of the Hindu Succession Act the question is, can the intestate succession principles of preference to full blood over half blood can be applied in case of calculation and distribution of property when a coparcener dies after seeking partition of his share from the joint family? In a case from Allahabad,[67] the property belonged to a Hindu man governed by *Mitakshara* law. On his death his three sons inherited the property in equal shares. The eldest son A had three sons from his first wife, X, Y and Z and three sons from his second wife, O, P and Q. On A's death, his sons claimed equal shares out of the total 1/3 rd belonging to their father. Each of them had 1/7th share in the property. During the pendency of the suit, X and Y died, and by amending the plaint, O, P and Q claimed a portion of their shares as well. Z, his surviving brother claimed that he was the full brother of X and Y while O, P and Q were half brothers of X and Y and their own claim would be in preference to that of the claim of O, P and Q. The court held that O, P, and Q would be treated on par with Z as the rule of full blood being preferred over half blood does not apply to coparcenary property. The court observed that upon inheritance from their father, the property in the hands of A became coparcenary property and all the litigants were descendants of A, but in relation to each other half brother. As A's death had occurred after the commencement of the Hindu Succession Act the court said, it is section 6 that was applicable and with its application, section 18 of the Act would be inapplicable. It observed:[68]

> Consequently, in view of the aforesaid, section 18 of the Act became inapplicable. The submission of the learned counsel that the

67 *Chunnilal* v. *Dullar,* AIR 2007 All 202.
68 *Id*. at 204.

plaintiffs in the alternative being half brothers were not entitled to succeed as the heirs of defendant no 4 is erroneous since in the opinion of the court section 18 of the Act would not be applicable to coparcenary property.

The court dismissed the appeal holding that the step brothers were entitled to get a share out of the deceased's property.

The decision seems to be erroneous. It is amazing and unfortunate how the court ignored the legal provision and failed to appreciate and understand the correct legal position. It is a fact that the moment partition is demanded whether verbally or through a suit, a *de jure* partition takes place. Here each of the brothers agreed for a partition, and thus the share of each of them was determined. It was only during the pendency of the partition suit, that the two brothers had died. It is a clear rule that the date of severance in case partition is demanded by filing a petition in a court of law is the date of institution of the suit. It is this date on which the brothers became separate from each other and their status as coparceners came to an end *vis a vis* each other. When two of the brothers died during the pendency of the partition suit, their status was that of "separate persons" in relation to both their full blood brother as well as half brothers and the character of the share that they were entitled to was of separate property in relation to these brothers and not that of coparcenary property. This share would go under the Hindu Succession Act in accordance with the rules contained in sections 8 to 13 and not under section 6. Both full brother and the three half brothers would be class-II heirs of the deceased, and since the full blood is given preference to half blood it was only the full blood brother who would get his property. By giving the property to all the remaining brothers in equal share, the Allahabad High Court has committed a grave error of law.

Remarriage of a Hindu widow

Section 24 of the Hindu Succession Act, though deleted now, was already a superfluous provision and therefore its deletion has made no change in the situation as it existed before and as it exists presently. It gave effect to the rule that succession rights are available only to the family members of the intestate and no non family member can claim succession rights in his property. It is noteworthy that as far as the heirs of a male Hindu are concerned, they can be grouped in two broad categories, viz., blood relations and relations by marriage. Marital status of blood relations is totally irrelevant while deciding their eligibility to inherit. However, the relations who enter the family by marriage to male members, but leave the family after the death of these male members by getting married to anyone outside the family become disentitled to get the property of the intestate. It is only the widow of the intestate who cannot be covered in any of the similar kind of situation. She can become a widow only on the death of the intestate, which is the precise time when the succession opens and vests the property in the widow. Once the property vests in the widow can she be divested of the

property subsequently if she remarries? This issue was discussed in connection with a case from Patna[69] wherein the land belonged to two brothers jointly. One of them died in 1955 and soon thereafter, his widow remarried. The contention of the surviving brother was that upon the remarriage of this widow, the land that she was entitled to would come to him by reversion under the Hindu Women's Right to Property Act, 1937. However, the petition that was filed much later after coming into force of the Hindu Succession Act, 1956, did not specify when the second marriage of the woman took place, whether before the coming into force of the 1956 Act or after it. If it took place before the Act came into force, the right of the brother could be looked into. However, if it took place after the 1956 Act, then in view of section 14 of the Act, she clearly became the absolute owner of the property, and full ownership does not have any reversion consequences. Once the property vests in her, remarriage would not have any adverse consequences on it. The court noted with disapproval:[70]

> [W]e….make it absolutely clear that we are anguished that a brother in order to usurp the properties of a sister in law had approached the settlement officer with a wrong proposition of law and obtained a settlement in a manner unwarranted.

Holding that as the claimant had failed to specify when the remarriage of the widow took place, and that the case was filed after the enactment of the Hindu Succession Act, it was held that the widow had an absolute interest in the estate and she could not be divested of the same upon her remarriage.

Full ownership in property to Hindu females

Under the law as it stood prior to 1956, a Hindu widow had only a limited interest in the property of her husband on his death, and on her death the property was to revert on the reversioners. However, under section 14 of the Act, the property possessed by a Hindu widow, whether acquired before or after the enactment of the Hindu Succession Act, would be held by her as an absolute owner thereof. The term acquired would include the property acquired by the widow through succession[71] and she would hold it as an absolute owner with full powers of alienation.[72]

According to section 14 (2), the owner of a property is competent to confer a limited estate in favour of any Hindu female voluntarily and such limited estate would not mature into an absolute one. The reason is that the owner has a liberty to make a disposition of the property in accordance with his wishes. However, where even under a will, the property was given to the

69 *Babulal Kewani* v. *State of Bihar,* AIR 2007 Pat 70.
70 *Id*. at 71.
71 *Daya Lal Bhaiyalal,* AIR 2007 MP 72.
72 *Mangal Singh* v. *Kehar Singh,* AIR 2007 (NOC) 212 (P&H).

Hindu female in lieu of her pre-existing maintenance rights, such property notwithstanding the fact that it was bequeathed to her as a limited estate, would mature into an absolute ownership. Thus, where the husband settled[73] the property in favour of his wife through the will , in lieu of her maintenance rights, such property would become her absolute estate on the commencement of the 1956 Act, and the provision of section 14 (2) would not be attracted.

Succession to property of a female intestate

On the death of a Hindu female, the heirs that are grouped in five categories take the property in order of their priority. In a case from Chhatisgarh,[74] a Hindu male died as a member of a Hindu joint family leaving behind two of his sons. One of the sons was S, who had a wife W and a son SS. S died in 1945, leaving behind W and SW who was the widow of his predeceased son SS. Upon the death of S, his wife W, succeeded to his share as a limited owner but became an absolute owner in 1956. She died in 1961, and was survived by the widow of her predeceased son SW. The issue was who would succeed to her properties? In accordance with the scheme of succession under the Hindu Succession Act, as she had died issueless, the property would revert to the heirs of her husband and the widow of a predeceased son would inherit the property as the class I heir of her deceased husband.

Preferential right to acquire joint family property

According to section 22 when an interest in immovable property of intestate devolves on two or more class-I heirs and any one of such heir proposes to transfer his/her interest in the property, the other heirs shall have preference over the interest so proposed to be transferred. In order to attract the provisions of section 22 it is one of the conditions precedent that there must be an existing interest over the immovable property which devolves upon two or more class-I heirs. The basic criteria for applicability of this provision is the element of jointness of the property and if that jointness is severed then such right will also fall through. It is due to the reason that in a joint property no one except on certain specified circumstances can claim exclusive ownership over any portion of the property unless it is specified by certain acts of the parties. A Hindu father died[75] and four of his sons inherited the land as the joint family property. The suit property had fallen on the share of A after the usual family partition division and he having such independent right over the suit property transferred the interest to B, an outsider ignoring the claim of the other brother, who then claimed preferential right to buy it under section 22 of the Hindu Succession Act, 1956.

73 *Pentapali Subba Rao* v. *Jupudy Pardhasarthy,* AIR 2007 (NOC) 220 (AP).
74 *Onkar Prashad* v. *Bhoodhar Prashad,* AIR 2007 (NOC) 524 (Chh).
75 *Haren Sarma* v. *Renu Borthakur,* AIR 2007 Gau 70.

The court noted that in this case though there was inheritance together by these brothers, the plaintiff himself had admitted that the property was enjoyed by each of them separately on amicable settlement /division among the co-heirs. Thus, the suit land was the joint property, but was later on separated . This clearly showed that the suit property did not remain the joint property and was amicably partitioned by the parties by way of a family settlement, enabling the parties to occupy their respective shares separately. The court held that the applicant could not take the benefit of section 22, as there was no element of jointness. If the parties had remained joint they could have claimed the benefit but the moment they demarcated their shares under the family settlement they could no longer claim the preferential right to purchase the share of the other. The plaintiff's claim was rightly rejected by the court.

Daughter's right to partition dwelling house of father after the amendment of 2005

Perhaps the most inequitable provision under the pre-amended Act was section 23 that put statutory impediments on the right of all the class-I female heirs to seek partition of their inherited share in the dwelling house in absence of the consent of the male members of the intestate's family. This year also three cases[76] came up before the various courts in which the question as to whether the deletion of section 23 would affect positively the rights of daughters who had filed claims seeking partition of the dwelling house as against their brothers and whose suits were pending in the courts when the amendment came in were decided by the courts. The courts held that the restriction imposed upon the female heirs to claim partition in respect of dwelling house ceased to be effective from 9.9.2005, in light of omission of section 23 by amendment Act of 39 of 2005. It further held that the effect of omission of section 23 would apply to all proceedings whether original or appellate involving adjudication of rights of parties and pending as on this date or initiated after it.

In *Santosh Kumar's* case, the prayer for a partition of the dwelling house was contested by the brother on two grounds, firstly, that the daughter does not have a right to have her share ascertained under the Act, and secondly, that since he had made substantial improvements in the house at his own cost the same should be reserved for him. Strangely enough the trial court granted the verdict in his favor and the matter was carried in appeal by his sister. The high court reversed the ruling of the lower court and held that if one co-sharer makes improvements or modifications in the common property without the consent of the other sharers he does it at his own peril and at best can claim only an equitable consideration for the allotment of the house to him after its valuation. With respect to the second issue, during the

76 *Santosh Kumar* v. *Baby*, AIR 2007 Ker 214; *Kaushalaya Bai Biharilal Pateriya* v. *Hiralal Bhagwandas Gupta,* AIR 2007 (NOC) 136 (Bom); *Ratnakar Rao Sindhe* v. *Leela Ashwath,* AIR 2007 (NOC) 941 (Kar).

pendency of this appeal the Hindu Succession Act was amended and section 23 was deleted and the brother contended that the petition should be considered in light of the facts and the legal position as it stood and existed on the day of the filing of the petition and not in light of the subsequently changed legal and factual scenario. The court held and rightly so, that this right of the brother or any male heir under section 23 was personal in character and was neither transferable nor heritable and if it was held that the situation and legal position existing on the date of presentation of the petition only should be considered and regard should not be had to subsequent events then it would mean that this right could become heritable, i.e., a defeasible right of a male heir would get defeated the moment his personal right ceases. Such personal right of the male heir is taken away by the omission of section 23. The effect of such omission would be retroactive. Holding that one co-sharer cannot build on the common property in such a way as to defeat the legitimate rights of other co-sharer when the extent of property is small, such construction would make it impossible to partition the property in specie among all co-sharers. The law does not recognize any such right in one co-sharer to make improvement in co-ownership property without express consent granted by other co-owners. The entitlement to get share in a co-ownership property is a very valuable right and it cannot be defeated by one co-owner by constructing a building in it without the consent of the other co-owners. He cannot thereafter claim to allot the entire property including the building without valuating the structure. Such unauthorized acts of a co-owner in a co-ownership property would defeat the rights of other co-sharers who have equal hare in the property. The situation would be grave if the extent of the property is small. The courts, thus, rejected the claim of the brother as he had only 1/6th share in the total property, and allowed the plea of the sister for ascertaining her share in the property.

Disqualifications

Since the amendment of the Act in 2005, heirs can be disqualified under only two situations. Section 25 of the Act provides that if a person commits murder of the intestate he cannot succeed to his property. This section incorporates the principle of "*Nemo ex suo delicto meliorem suam conditionem facere potest"* and is based on the principles of justice, equity and good conscience to make it impossible for a murderer who deserves to be hanged or to be shut behind the prison bars for life to derive advantage or beneficial interest from the very heinous act committed by him. In the instant case,[77] the husband was held guilty of committing the murder of the wife within few years of her marriage. She had left behind property including a flat that she had purchased before her marriage. In accordance with the

77 *Janak Rani Chadha* v. *State of NCT of Delhi*, AIR 2007 Del 107; see also *Nannepuneni Seetharamaiah* v. *Nannepuneni Ramakrishnaiah,* AIR 1970 AP 407.

provisions of the Hindu Succession Act the property would constitute her general property and would have gone to her husband. However, in accordance with the provision of section 27 of the Act, as he was the one who had committed her murder, he stood disqualified from inheriting her property. The second category of heirs under section 15 is "heirs of husband". The court held that if the heir is disqualified he is presumed to be dead, and the succession passes to the heirs in the next category. However, in this case, the next category in fact was a representative of the disqualified heir. Thus, neither the disqualified heir nor his representatives are entitled to succeed. Therefore, the parents of the husband were held not entitled to inherit the property of the deceased daughter-in-law that they otherwise would have inherited had it not been for the disqualification rule. The property would then pass to the next heirs i.e., the parents of the deceased woman.

However, where an heir is charged with the murder of the intestate, but is acquitted by the criminal court as her involvement in the murder is not proved at all , such an heir is not disqualified and can inherit the property of the deceased. In a Bombay case,[78] the wife was accused of murdering her husband/abetment to commit murder along with three persons and was denied succession certificates in view of section 25 of the Hindu Succession Act. In the light of clear acquittal by the criminal courts, the Bombay High Court rightly held that as there was nothing to suggest that she could have been involved in any way with the murder of her husband, she was entitled to succeed to his property.

VIII CONCLUSION

The year 2007, witnessed some important judicial pronouncements. The court strongly disapproved and came down heavily on the impertinent attempts of the bigamous husband to seek conjugal company of the girl who was deceived into marrying him, making him monetarily liable. They allowed the nullity petition to be carried forward by the issue of such marriage. On the grounds of cruelty, the court held that the wife's insistence that the husband should leave his parents and live with her parents and upon his refusal to do so, her resorting to his humiliation amounted to cruelty. Attempts of the estranged wife to capture possession of a portion of mother-in-law's property, were also thwarted by the courts as they held that though she can claim a right of residence in the house of her husband no such right is available to her in the house of any of the relations of the husband. Mother's success in obtaining the custody of her children was evident as she was preferred over the father in the interest of children, and the courts strongly disapproved and refused to allow the father to evade his

78 *Sarita Chauwhan* v. *Chetan Chauwhan,* AIR 2007 Bom 133.

responsibility to maintain his children by adopting various tactics. In the area of succession, unfortunately a couple of incorrect pronouncements were made. While the Madhya Pradesh High Court granted succession rights to the children of an illegitimate union from the property of the putative father, the Allahabad High Court erred in equating full and half brothers on par ignoring section 18 of the Hindu Succession Act. The Gujarat High Court chose to ignore the fact that after the amendment, since a daughter has been introduced as a coparcener, her acquiring a share in the huge coparcenary property, held by her parents, may deprive her of the status of a spouse in indigent circumstances.