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FAMILY LAW AND SUCCESSION

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I INTRODUCTION

SURVEY FOR the year 2008 in the realm of family law and succession represents a mixed bag of decisions rendered by the Supreme Court during the year. It covers cases both in areas of the un-codified Hindu law and the codified law as contained in the Hindu Marriage Act, 1955, Hindu Succession Act,1956, Hindu Minority and Guardianship Act, 1956, and Hindu Adoptions and Maintenance Act, 1956. In these areas, opportunity has been there to examine the nature of the preferential right to acquire property under Hindu Succession Act (HSA); nature of the inherited property from father in the hands of the sons, and how it is impacted by the codified law under the HSA; nature and amplitude of property rights of women under section 14 of the HSA; the differentiation between the *Mitakshara* coparcenary property and the Hindu joint family property; adoption by a Hindu wife and how she is discriminated *vis-à-vis* her husband in the matter of adoption under the Hindu Adoptions and Maintenance Act; incorporation of the principle of irretrievable breakdown of marriage in section 13 of the Hindu Marriage Act through the exercise of power by the Supreme Court under article 142 of the Constitution of India; and how to determine the welfare of children as a paramount consideration within the sweep of the law of guardianship as reflected under the provisions of Hindu Minority and Guardianship Act, 1956, supplemented by the Guardians and Wards Act, 1890. Efforts have been made to highlight the connotation of the expression 'unable to maintain herself' in section 125 of the Code of Criminal Procedure, and to also examine whether the provisions of this section are equally applicable in case of 'irregular marriage' under the Muslim law.

II PREFERENTIAL RIGHT TO ACQUIRE PROPERTY UNDER THE HINDU SUCCESSION ACT: ITS TRUE NATURE

Preferential right to acquire property in certain cases has been conferred under section 22 of the Hindu Succession Act, 1956. Sub-section (1) of this

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section provides that where, after the commencement of this Act, interest in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred. The nature of this 'preferential right' has been examined, though obliquely, by the Supreme Court in *Ashutosh Chaturvedi* v. *Prano Devi & Others*.[1]

A bare reading of section 22(1) reveals that the exercise of the preferential right is hedged with certain inherent limitations. In the first instance, this right is available only to the heirs specified in class I of the schedule, and to no others. Secondly, class I heirs bear a reference only to the heirs of a male Hindu dying intestate, and, therefore, the heirs of a female Hindu, which are stipulated not in class I but under the provisions of sections 15 and 16 of the Act, are not entitled to invoke this preferential right. To this extent, the reference made in sub-section (1) of section 22 to "interest in any business carried on by … her," is somewhat misleading. Thirdly, even in case of male Hindu, such a preferential right is available only in those cases, where he dies intestate, not only having at the time of his death an interest in *Mitakshara* coparcenary property, but also has left him surviving a female relative specified in class I of the schedule or a male relative specified in that class who claims through such female relative.[2] If no such female or male through a female relative is left behind, the question of exercising any preferential right will not arise, because in that case, under the general rule of survivorship he would leave behind nothing as the entire property would go to survivors in their own right.[3]

There is also some other implicit limitation in terms of the mode of exercising this preferential right. In this respect, sub-section (2) of section 22 of the HSA provides for determination of consideration when there is a difference between the parties, namely, the one intending to acquire and the other proposes to transfer. The party intending to acquire can enforce this right by making an application to that effect in a court which is located within the limits of whose jurisdiction the immovable property is situated or the business is carried on, and includes any other court which the state government may, by notification in the official Gazette, specify in that

1 AIR 2008 SC 2171, per SB Sinha, J (for himself and S Sirpurkar, J) (Hereinafter simply *Ashutosh Chaturvedi*).

2 Here the reference is made to the provisions of s. 6 of the Act prior to the Hindu Succession (Amendment) Act of 2005.

3 See *Bhola Nath Rastogi and Others* v. *Santosh Prakash Arya and Others*, AIR 1975 Pat 336. In this case the court did not permit defendants to invoke the preferential right under s. 22 of the HSA, because the entire property of a male Hindu, dying intestate, went to his sons by survivorship, and that there was separation between the two sons before the sale deed by the defendants was executed. The decision of the Patna High Court has been cited with approval by the Supreme Court, see *Ashutosh Chaturvedi* at 2174 para 12.

behalf.[4] If the party intending to take the benefit of the preferential right, in the absence of any agreement between the parties, files an application, the court has to determine the amount of consideration for the intended transfer and the party is again given an option to get such a transfer from the co-sharer on such consideration or to refuse the same.[5] If the party declines to purchase the property for the same amount, he has to bear all the costs of or incidental to the application proceeding.[6]

If there are two or more heirs specified in class I of the schedule proposing to acquire any interest under section 22(1), that heir who offers the highest consideration for the transfer shall be preferred.[7]

The provisions of section 22 of the Act do not lay down any other procedure. Accordingly, the scope of the application of these provisions is limited and so the jurisdiction of the court enforcing this right.[8] Since there is no other 'special procedure for seeking the said remedy' under this section, the ordinary procedure for enforcement of any civil right has to be resorted to by the co-heirs who wish to enforce their rights under sub-section (1) of section 22 of the HSA.[9]

In the light of this abstracted legal position about the preferential right under section 22(1) of the HSA, the question that has arisen for consideration of the Supreme Court in *Ashutosh Chaturvedi*, though indirectly, is about the true nature of the preferential right. In this case a suit for declaration of title and confirmation of possession was filed by the appellant in the year 1990. Thereafter, during the pendency of the suit, sale deeds were executed by the respondents in favour of third parties in that very year. The application for amendment of the suit was filed 13 years after the filing of the said suit in respect of preferential right. The issue before the apex court in this case was, whether a suit claiming preferential right under section 22(1) could be filed after the lapse of a period of 13 years. To this the Supreme Court responded by observing that a right claiming preference over a property in terms of a statute "ordinarily is a weak right," and that for the fructification of such a right, article 97 of the Limitation Act, 1963, provides the period of one year's limitation.[10] Since, in this case the appellant came to the court to seek the relief after a long time the same was barred by limitation. Accordingly, the court refused to exercise its discretionary jurisdiction to allow the amendment of the plaint.[11] Otherwise

4 See the explanation appended to s. 22 of the HSA.
5 S. 22 (2) of the HSA.
6 *IbId.*
7 S. 22(3) of the HSA.
8 *Ashutosh Chaturvedi* at 2174 para 13, citing with approval *Murlidhar Das* v. *Bansidhar Das and Others*, AIR 1986 Ori 119.
9 *Id.* at 2175 para 14, referring to *Valliyl Sreedevi Amma* v. *Subhadra Devi and Others*, AIR 1976 Ker 19.
10 *Id.* at 2173 para 8.
11 *Id.* at 2175 para 16.

also, devolution of interest of the deceased on his heirs under section 6 (unamended) read with the appended schedule-I takes place soon after the demise of the intestate; unusual delay in the exercise of the preferential right is indeed a limitation on the very basis of the first principle.

III INHERITED PROPERTY FROM FATHER: ITS TRUE NATURE UNDER THE HINDU SUCCESSION ACT[12]

What is the true nature of the property in the hands of a son which has been inherited by him from his own father? This issue has come for final determination before the Supreme Court in *Bhanwar Singh* v. *Puran and Ohers*[13] in an appeal against the judgment of the Punjab and Haryana High Court. In this case, one Bhima, a male Hindu, died in 1972 leaving behind a son, Sant Ram, and three daughters. Since the property left by Bhima was seemingly his own separate self-acquired property, the same was equally divided amongst his son, and three daughters, under the relevant provisions of the Hindu Succession Act, 1956 (HSA), as it then existed. 1/4th share of each is shown to be recorded in the revenue records of 1973-74. In 1977, a son, the appellant Bhanwar Singh, was born to Sant Ram. During his minority Sant Ram alienated the property to the respondents. On attaining majority, the appellant challenged the alienation, claiming that his father after his birth in 1977 had no right to dispose of the property except for legal necessity. In this context the issue arose about the true character of property in the hands of Sant Ram under the provisions of HSA. In other words, whether the appellant Bhanwar Singh had acquired any interest therein by birth in the year 1977.[14]

The Supreme Court, affirming the decision of the high court held that the appellant did not acquire any interest in the said property, because his own father's interest in that property was absolute under the relevant provisions of the HSA. The line of reasoning to reach this conclusion adduced by the apex court may be abstracted as under.

(a) In view of the overriding effect of section 4 of the HSA, there is a "sea change in the matter of inheritance and succession amongst Hindus."[15]

(b) Under section 8 read with section 6 of the HSA, as it stood at the relevant time, which lays down the general rules of succession, the

12 See also, "Father's self-acquired property: Its nature in the hands of inheriting sons," commenting upon *Makhan Singh (D) by LRs.* v. *Kulwant Singh*, AIR 2007 SC 1808, per BP Singh and HS Bedi, JJ, in Virendra Kumar, "Family Law and Succession", XLIII *ASIL* 308-16 (2007).

13 AIR 2008 SC 1490, per SB Sinha and VS Sirpurkar, JJ (Hereinafter, simply *Bhanwar Singh*).

14 *Id.* at 1491 para 10.

15 *Ibid.* para 11.

property of a male Hindu dying intestate devolves upon the heirs mentioned in class I of the schedule appended to the HSA.[16]

(c) In the said schedule, "natural sons and daughters are placed in Class I heirs, but a grand son, so long as father is alive, has not been included."[17]

(d) "Section 19 of the Act provides that in the event of succession by two or more heirs, they will take the property per capita and not per stripes, as also tenants-in-common and not as joint tenants."[18]

(e) Keeping in view the above, SB Sinha J (for himself and S Sirpurkar J) has held that "in terms of Section 19 of the Act, as Sant Ram and his sisters became tenants-in-common and took the properties devolved upon them per capita and not per stripes, each one of them was entitled to alienate their share, particularly when different properties were allotted in their favour."[19]

For their decision, the Supreme Court solely relied on the principle propounded earlier by it in *Commissioner of Wealth Tax, Kanpur and Others* v. *Chander Sen and Others*,[20] wherein, upon considering the changes effected by the Hindu Succession Act as also the implication thereof and upon taking into consideration the decisions of the High Courts of Calcutta, Madhya Pradesh, Andhra Pradesh, and Madras on the one hand and the Gujarat High Court on the other, it was held that 'a son who inherits his father's assets under section 8 of the Hindu Succession Act does so in his individual capacity and not as a Karta of the Hindu Undivided Family.'[21] This principle evolved in *Chander Sen* was reiterated by the Supreme Court in *Yudhishter* v. *Ashok Kumar*,[22] *Sunderdas Thackersay & Bros.* v. *Commissioner of Income-Tax*,[23] *Commissioner of Income-Tax* v. *P.L. Karuppan Chettiar,*[24] and *Additional Commissioner of Income-Tax* v. *M. Karthikeyan,*[25] the bench further added.[26]

The principal proposition propounded by the Supreme Court in *Chander Sen* - decided in 1986 - is now more than two decades old. Although this proposition clearly and categorically runs contrary to the well-established

16 *Id.* at 1192 para 11.
17 *Ibid.*
18 *Ibid.*
19 *Id.* at 1494 para 18.
20 AIR 1986 SC 1753, per RS Pathak and Sabyasachi Mukherji, JJ (Hereinafter simply, *Chander Sen*).
21 *Bhanwar Singh* at 1492 para 14.
22 (1987) 1 SCC 204.
23 [1982 (137) ITR 646].
24 1993 Supp (1) SCC 580.
25 1994 Supp (2) SCC 112.
26 See, *Bhanwar Singh* at 1493 para 15.

concept of *Mitakshara* coparcenary,[27] at least till the oncoming of the Hindu Succession (Amendment) Act of 2005, its veracity hitherto has never been questioned *directly* in judicial decision-making. Despite this position, however, one comes across cases and judicial statements that take the opposite view, which is in line with the view adopted earlier by the Gujarat High Court.[28] For instance, there was a very recent case of the apex court – *Ass Kaur (Smt.) (Deceased) by LRs* v. *Kartar Singh (Dead) by LRs*,[29] which abstracts legal statements showing the continued existence of *Mitakshara* coparcenary that tends to negate the propounding of the apex court in *Chander Sen*.

The apex court in *Ass Kaur*, while considering the overriding effect under section 4 of the HSA, which specifically excludes the application of customary law with respect to any matter for which provision is made in this Act, has taken the opportunity to reiterate the existence of the principle of *Mitakshara* coparcenary. SB Sinha J (for himself and Markendey Katju J), *inter alia*, states: "Property inherited from paternal ancestor is, of course, ancestral property as regards the male issue of the propositus, but it is his absolute property as regards other relations."[30] In support of this view, the court has abstracted the statements from the standard work, *Mulla's Principles of Hindu Law*:[31]

> If A inherits property, whether movable or immovable, from his father, or father's fathers, or father's father's father, it is ancestral property as regards his male issue. If A has no son, son's son, or son's son's son in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and he can deal with it as he pleases …..[32]

27 For instance, in *Bhanwar Singh*, SB Sinha J (for himself and VS Sirpurkar, J), by abstracting observations from *Yodhishter*, state the position under traditional Hindu Law:
This question has been considered by this court in *Commissioner of Wealth Tax, Kanpur and Others* v. *Chander Sen and Others* [(1987) 1 SCR 516] where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore, whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him.

28 *Commissioner of Income-tax*, *Gujarat-I* v. *Dr Babubhai Mansukhbhai* (*Deceased),* (1977) 108 ITR 417 cited in *Bhanwar Singh* at 1492-93 para 15 holding that in the case of a Hindu governed by *Mitakshara* law, where a son inherited the self-acquired property of his father, he took it as a joint family property of himself and his son and not as his separate property. This view was not accepted by the Supreme Court in *Chander Sen*.

29 AIR 2007 SC 2369, per SB Sinha and Markendey Katju, JJ. (Hereinafter simply, *Ass Kaur*).

30 *Id.* at 2375 para 32.

31 The Supreme Court has abstracted the following statements that were earlier cited by the apex court with approval and reliance in *Smt. Dipo* v. *Wassan Singh and Others*, (1983) 3 SCC 376, wherein the sister was held to be a preferential heir as it was found that the entire property was an ancestral property.

32 *Mulla's Principles of Hindu Law* 289 (15 the ed., 2005).

> A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, sons' sons, and sons' sons' sons, but as regards other relations he holds it, and is entitled to hold it, as his absolute property.[33]
>
> Again:
>
> The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession.[34]

After referring to these statements, the Supreme Court in *Ass Kaur* has further observed, rather assertively, that "[T]here is no dispute in regards to the aforementioned propositions of law."[35] As if to reinforce this view, the apex court cited[36] its two other earlier decisions, namely, *Dharma Shamrao Agalawe* v. *Pandurang Miragu Agalawe and Others*[37] and *Sheela Devi and Others* v. *Lal Chand and Another*.[38]

In *Bhanwar Singh*, however, SB Sinha, J (for himself and S Sirpurkar, J) distinguished *Sheela Devi* by observing that there was no proof as to whether the second son, in order to derive benefit as a coparcener, was born prior to the coming into force of the Hindu Succession Act and therefore his heirs were not entitled to take the benefit of coparcenary interest.[39]

Be that as it may, the view taken by SB Sinha, J (for himself and Markendey Katju, J) in *Ass Kaur* (2007), which is in consonance with the view hitherto accepted by the respected commentators on Hindu Law like JDM Derrett, it is submitted, is preferable to the view taken by SB Sinha, J (for himself and S Sirpurkar J) in *Bhanwar Singh*, relying upon *Chander Sen*. Since both the cases consider the impact of the provisions of the Hindu Succession Act on the Hindu joint family property, the rationale of *Chander Sen* needs to be critically examined afresh.[40]

Chander Sen is fairly a comprehensive judgment delivered by Sabyasachi Mukherji (for himself and RS Pathak, J). The apex court in this case squarely raised the question whether the income and asset, which a son

33 *Ibid.*
34 *Id.* at 291.
35 *Ass Kaur* at 2375 para 33.
36 *Id.* at 2376 para 33.
37 AIR 1988 SC 845.
38 2006 (1) SCALE 75.
39 *Bhanwar Singh* at 1493-94 (para 16).
40 The following critique of *Chander Sen* is being reproduced substantially from author's comments in *supra* note 12 at 310-316, which was undertaken in the context of a similar predicament in *Makhan Singh (D) by LRs.* v. *Kulwant Singh,* AIR 2007 SC 1808, per BP Singh and HS Bedi, JJ.

inherits from his father when separated by partition, should be assessed as income of the Hindu undivided family of the son, or his individual income.[41] For answering this question in the light of the provisions of the Hindu Succession Act the Supreme Court specifically directed its concern to examine the impact of the said Act on the hitherto prevailing provisions of the Hindu law.

In respect of the prevailing position prior to the Act of 1956, the Supreme Court summed up by stating that there was "no dispute among the commentators on Hindu Law, nor in the decisions of the Court that under the Hindu Law as it is, the son would inherit the same as Karta of his own family."[42] However, the real problem is in relation to the post-Act of 1956 position; that is, in terms of the impact of the provisions of the Act of 1956, including particularly the provisions of its section 8, on the un-codified law of Hindu undivided family.[43]

For determining this impact, the Supreme Court took into account the views expressed by the various high courts specifically on this very issue in hand. On its analysis, the court noted the divergent views[44] expressed by the Allahabad High Court in *Commissioner of Income-tax, U.P.* v. *Ram Rakshpal, Ashok Kumar*,[45] the full bench of the Madras High Court in *Addl. Commissioner of Income-tax, Madras* v. *P.L. Karuppan Chedttiar*,[46] the Madhya Pradesh High Court in *Shrivallabhadas Modan*i v. *Commissioner of Income-tax, M.P.-I*,[47] and the Andhra Pradesh High Court in *Commissioner of Wealth-tax A.P. –II* v. *Mukundgirji,*[48] on one side and the Gujarat High Court in *Commissioner of Income-tax*, *Gujarat-I* v. *Dr Babubhai Mansukhbhai*[49] on the other. In view of its analysis, the Supreme Court set in to examine the impact-issue *de novo*. The results of its analysis may be abstracted as under:

(a) The singular objective of enacting the Hindu Succession Act 1956, as indicated by its very Preamble, is "to amend and codify the law relating to intestate succession among the Hindus."[50] Here the use of the term "amend" means "to modify (the hitherto prevailing principles of Hindu law) where necessary."[51]

41 *Chander Sen* at 1756 para 10.
42 *Ibid.*
43 *Ibid.*
44 *Id*. at 1759 para 18.
45 (1968) 67 ITR 164, analyzed in *Chander Sen* at 1756 para 8.
46 AIR 1979 Mad 1, analyzed in *id.* at 1758 para 16.
47 138 ITR 673 analyzed in *id.* at 1759 para 16A.
48 144 ITR 18 analyzed in *id.* at 1759 para 17.
49 (1977) 108 ITR 417, analyzed in *Chander Sen* at 1758 para 15. (Hereinafter simply, *Dr Babubhai Mansukhbhai*).
50 *Chander Sen* at 1760 para 19. However, it remains an enigma as to why the legislature omitted to include a reference to 'Testamentary Succession', which is specifically dealt with in chapter III of the Act under s. 30.
51 *Id.* at 1760 para 20.

(b) Section 4 of the Act, "as noted by the Andhra Pradesh High Court," "makes it clear" "that one should look to the Act in case of doubt and not to the pre-existing Hindu law."[52]

(c) (i) Section 8 of the Act, which lays down the general rules of succession, provides in the very first rule that the property of male Hindu dying intestate shall devolve upon the heirs specified in Class I of the Schedule appended to the Act. These heirs (prior to the amending Act of 2005) include the following 12 in number: Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son, widow of a pre-deceased son of a pre-deceased son.[53]

(ii) A perusal of the list of heirs mentioned in Class I of the Schedule shows that it "only includes son, and does not include son's son, but does include son of a pre-deceased son."[54] In other words, while including son, and son of a pre-deceased son, the Class I heirs "does not include specifically the grandson."[55]

(iii) The inclusion of grandson along with the son despite his exclusion specifically would mean that when son inherits the separate property of the father, "he takes it as karta of his individual family" – a view subscribed by the Gujarat High Court in *Dr Babubhai Mansukhbhai*. Such a view, in the opinion of the Supreme Court, "is not possible" in the light of the provisions of section 8 of the Act.[56]

(iv) The Supreme Court, notwithstanding the contrary opinion expressed in *Mulla's Commentary on Hindu Law* (15th ed. at pages 924-26), dealing with section 6 of the Hindu Succession Act, as well as in *Mayne's on Hindu Law* (12th ed. at pages 918-19),[57] justifies its view mainly on two counts. One, it would amount to applying the old Hindu law (that is, enabling the grandson to get a right by birth along with the son in the property inherited by the son), which is "contrary to the scheme outlined in section 8."[58] Two, the acceptance of the view of the Gujarat High Court "would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it (that is, the inherited property) will be joint Hindu property vis-à-vis son, and female heirs with respect to whom no such concept could be

52 *Ibid.*
53 *Id.* 1756-57 para 10.
54 *Id.* at 1760 para 20.
55 *Id.* at 1757 para 11.
56 *Id.* at 1760 para 20.
57 *Ibid.* para 21.
58 *Ibid.* para 20.

applied or contemplated."[59] Such female heirs include widow, mother, daughter of a pre-deceased son, etc.[60]

In the light of the reasons as abstracted above, the Supreme Court in *Chander Sen* affirmed that "the express language [of section 8 of the Hindu Succession Act, 1956], which excludes son's son, but included son of a predeceased son, cannot be ignored," and "must prevail."[61] To this extent, the old Hindu law stands "amended." and, accordingly, the court accepted the view expressed earlier by the High Courts of Allahabad, Madras, Madhya Pradesh, and Andhra Pradesh, in preference to the contrary view taken by the Gujarat High Court.[62]

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

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

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

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

59 *Ibid.*
60 *Ibid.*
61 *Ibid.* para 22.
62 *Ibid.* para 23.

(D) The principle of survivorship is, however, defeated in a situation when a male Hindu dies leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative. In that situation, instead of surviving members taking the whole property by virtue of surviving the deceased, the deceased's interest in the Mitakshara coparcenary property shall devolve in accordance with the provisions of section 8. This is the impact of the proviso to the principal statement made in section 6.

(E) For crystallizing the interest of the deceased in the Mitakshara coparcenary property, a legal fiction has been introduced by appending Explanation I to the Proviso, whereby "the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not."[63]

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

(G) Having crystallized the interest of the deceased coparcener into a share allotted to him on partition, it would devolve upon the heirs in the order of succession as stipulated under section 8. According to the rules of this section, the Class I heirs, twelve in number that includes both males and females,[64] take precedence over all the rest.[65]

(H) Identifying the share of the deceased in the coparcenary property on the basis of notional partition – the partition resorted to only for a specific purpose of demarcating the share of the deceased – does not amount to partition among the surviving members of the coparcenary. They continue to live jointly as before. This is borne out from the appended Explanation II, which categorically provides that nothing contained in the proviso to section 6 (which makes

63 See also the author's view, "The Concept of Notional Partition: Its Functional Objective," commenting upon *Anar Devi and Others* v. *Parmeshwari Devi and Others*, AIR 2006 SC 3332, per BN Agrawal and PP Naolekar, JJ in Virendra Kumar, "Family Law and Succession" XLII *ASIL* 363-65 (2006).

64 See, *supra* note 53.

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

room for the daughter to claim a share in the property of deceased father) shall enable a person who has separated himself from coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein. This implies that the purpose of proviso is only to carve out a share in the property of the deceased for the benefit of daughters, and let the Hindu Undivided Family and coparcenary go on as usual.

(I) The retention or continued existence of coparcenary is further reinforced by the provisions of section 10 (read with section 8), which deals with the distribution of deceased's share in the coparcenary property carved out through notional, and not actual, partition amongst the heirs in Class I of the Schedule. A perusal of the rules provided in this section reveals that the distribution is to be done on the basis of per stripe or branch, and not per capita so far as the coparceners in Class I are concerned, which include son, son of a predeceased son, son of a predeceased son of a predeceased son. This is evident from the use of the term "branch," that is 'stripe', in Rules 3 and 4. In this respect, the position may be contrasted in relation to distribution of property amongst heirs in Class II of the Schedule under section 11, which nowhere uses the term 'branch' or per stripe in the mode of distribution. It simply says that the property of the intestate shall be divided between the heirs specified in any one entry in Class II of the Schedule so that they share equally.

(J) The provisions of section 19, which spell out the mode of succession of two or more heirs, do not discard the retention of the concept of Mitakshara coparcenary in certain specified situations. It provides that if two or more heirs succeed together to the property of an intestate, they shall take the property "*save as otherwise expressly provided in this Act*, per capita and not per stripes; and as tenants-in-common and not as joint tenants."[66] The Supreme Court did make a specific reference to the provisions of this section in *Chander Sen* by adding a special paragraph 12A.[67] But, somehow or the other, the italicized saving clause, which is of critical importance in the context of devolution of property has escaped the attention of the Supreme Court while considering the purport of this section. It appears that for its flawed incorporation, the Court relied upon the judgment of the Andhra Pradesh High Court in *Commissioner of Wealth-tax A.P.–II* v. *Mukundgirji*,[68] wherein there is an omission of the saving clause.[69] It is this omission, which led the court to conclude that whenever

66 Emphasis added.
67 *Chander Sen* at 1757.
68 See *supra* note 48.
69 See *Chander Sen* at 1759 para 17.

two or more heirs succeed together to the property of an intestate, they should always take the property as tenants-in-common and not as joint tenants. This means that the Act has chosen to provide that the property which devolved upon heirs mentioned in Class I of the Schedule under section 8 constituted the absolute properties and his sons have no right by birth in such properties.[70]

(K) A perusal of the provisions of section 19 reveals that two modes of devolution of property are clearly intended when it is specifically stated that devolution of property on two or more heirs would be per stripes if so expressly stated, and otherwise it would be per capita, that is if it is not stated specifically whether it would be per stripes or per capita. The dual mode had been necessitated by the operation of the provisions of section 6 of the principal Act (prior to their replacement by the Amending Act of 2005) read with the provisions of section 10.[71] In the process of devolution, the daughter is given a share in the property of her father without conferring the status of a coparcener on her, and as such she would get her share per capita, that is in her own individual capacity. On the other hand, the son acquires the property as Karta of the family, which is per stripe, in which his son would take interest by virtue of his birth. In view of this exposition, it would, therefore, does not seem to be right to assert, as has been done in by the Supreme Court in *Chander Sen*, that two modes of devolution of property are not intended under the Act of 1956.[72]

(L) However, after the Hindu Succession (Amendment) Act of 2005, which makes the daughter of a coparcener by birth a coparcener in her own right in the same manner as the son, and shall have rights in the coparcenary property as she would had if she had been a son, and be subject to the same liabilities in respect of the said coparcenary property as that of a son,[73] it is difficult to contend that the Hindu Succession Act of 1956, even prior to its amendment in 2005, intended to abolish the institution of Hindu Mitakshara coparcenary and thereby introducing only one mode of devolution of property whereby the inheritor takes it as per capita, and not per stripe. Had that been the emphasis, the daughters would not have been made the coparceners!

In view of the reasons as expounded above in the paragraphs from (A) to (L) on the basis of plain reading of the relevant statutory provisions, it is respectfully contended that the propositions laid down by the Supreme Court in *Chander Sen* need reconsideration by a larger bench of the apex court,

70 *Ibid.*
71 See *supra*, para 'I' of the reasoning.
72 *Chander Sen* at 1760 para 22 read with 20.
73 See the substituted new s. 6 by the amending Act of 2005 into the principal Act of 1956.

else the concept of Hindu *Mitakshara* coparcenary will continue to be shrouded with confusion.

IV AMPLITUDE OF SUB-SECTIONS (1) AND (2) OF SECTION 14 OF THE HINDU SUCCESSION ACT[74]

Section 14 of the Hindu Succession Act, 1956, is indeed a revolutionary measure of social reform. It instantly transforms the limited ownership of a female into absolute ownership. The amplitude of the application of this measure is provided under sub-section (1) of section 14 of the Act by stating: "Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner." The added explanation to this sub-section expounds the ambit of 'property' referred to therein by stating that it "includes movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act."

The wide amplitude of sub-section (1) seems to be arrested by sub-section (2) that provides clearly and categorically that nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

A conjoint reading of both the sub-sections of section 14 seems to convey that what has been given in sub-section (1) is taken away by sub-section (2) by the legislature. This sort of anomaly was removed by the Supreme Court in *V. Tulasamma and Others* v. *V. Shesha Reddy (dead) by LRs*.[75] In this case, the husband had died in the year 1931 in a state of jointness with his step-brother, leaving behind his widow Tulasamma. In 1944, she approached the court claiming maintenance against the step-brother of her deceased husband. Her claim was decreed. At the stage of execution of the decree, in 1949 a compromise was entered into, under which she was allotted the property to enjoy only a limited interest, with no power of alienation. Later on, after the coming into force of the Act of 1956, Tulsamma, the widow, alienated the property, which was challenged by Shesha Reddi on the ground that under the terms of compromise, she had only limited interest that did not permit her alienation of the property. This plea,

74 See also, "Section 14 of the Hindu Succession Act, 1956: Ambit of its sub-sections (1) and (2)," *supra* note 12 at 365-72.

75 (1977) 3 SCR 261.

however, was counteracted by the Supreme Court by holding that it was a case where Tulasamma possessed the property on the date of coming into force of the Act as limited owner having acquired the same by virtue of a compromise, and in the light of the explanation appended to sub-section (1) of section 14, it was a case to which section 14(1) applied, and section 14(2) could not be relied on to override the effect of section 14(1).

The legal consequences of *V. Tulasamma,* as summarised by the court itself in that case, has been recently recalled by the Supreme Court in *Santosh and Others* v. *Saraswathibai and Another*,[76] which may be abstracted as follows:[77]

(1) The Hindu female's right to maintenance against her husband flows from her marriage relationship.
(2) Such a right may not be a right to property but it is a right against property, and the husband has a personal obligation to maintain his wife out of his property.
(3) If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one.
(4) Even without a charge, the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognizing such a right does not confer any new title but merely endorses or confirms the pre-existing rights.
(5) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by the long needed legislation.
(6) Sub-section (2) of section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of section 14(1) materially. In other words, the proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by section 14(1) or in a way so as to become totally inconsistent with the main provision.
(7) Sub-section (2) of section 14 applies to instruments, decrees, gifts, etc. which creates independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights.
(8) The use of the express terms, like 'property acquired by a female Hindu at a partition,' or 'in lieu of maintenance,' or 'arrears of maintenance,' etc., in the Explanation appended to section 14(1) clearly makes sub-section (2) inapplicable to these categories excepted from the operation of sub-section (2).

76 AIR 2008 SC 500, per SB Sinha and HS Bedi, JJ (Hereinafter, simply *Santosh*).
77 *Id.* at 503-04 para 15.

(9) The words, 'possessed by a female Hindu' in section 14(1) are of 'the widest possible amplitude, and include the state of owning a property even though the owner is not in actual or physical possession of the same.'

(10) The words, 'restricted estate' in sub-section (2), are wider than limited interest as indicated in sub-section (1), and they include not only 'limited interest' but also any other kind of limitation that may be placed on the transferee.

The principles laid down in *V. Tulasamma* have been reiterated in a number of later cases, and have never been departed from. In *Nazar Singh and Others* v. *Jagjit Kaur and Others,*[78] for instance, applying these principles, the Supreme Court decided that if the suit lands were given to a female by her husband for her maintenance, she must be held as full owner thereof and not as a limited owner notwithstanding the several restrictive covenants accompanying the grant. Likewise, in *Mangat Mal* v. *Punni Devi*,[79] right to residence in a house property was held by the Supreme Court to attract sub-section (1) of section 14 of the Hindu Succession Act despite the fact that the grant expressly conferred only a limited estate upon her.

On fact matrix, in *Santosh* a male Hindu died in 1957, that is, after the coming into force of the Hindu Succession Act. He left behind two wives along with two children from the first and five from the second wife. The first wife filed a suit against her step son (a son of the second wife) for the possession of some of the properties of her deceased husband. A consent decree was passed in that suit, bearing a number of restrictive clauses, such as, that the plaintiff will not alienate the land which was given to her for her maintenance, and that after her land shall revert to the defendants. After the death of the first wife, her two daughters as legal representatives filed a suit and claimed the properties in their possession as full owner thereof in terms of section 14(1) of the Act. The suit was dismissed on the premise that the plaintiffs were not the owners, and therefore could not be said to be in possession of the said properties. On first appeal, the decision was reversed. The second appeal against the judgment of the principal district judge was dismissed by the high court. The Supreme Court, in special leave to appeal, affirmed the judgment of the high court in the light of "binding authoritative pronouncements"[80] by making a specific reference to *V. Tulasamma* and *Nazar Singh*. Clearly, in court's view, it is not a case where she had no right to possess the said land. If she had a right to possess land as co-owner, the question of divesting her of that right by invoking sub-section (2) of section 14 of the Act would not arise.[81]

78 (1996) 1 SCC 35. (Hereinafter, simply *Nazar Singh*).

79 1995 AIR SCW 3885.

80 *Santosh*, at 504 para 17.

81 *Id.*, at 503 para 13. Otherwise also, on the death of her husband, the first wife became co-owner of the property with the other wife, and as such succession thereof was governed by ss. 6, 8 and 12 of the Act.

The importance of this decision lies in the fact that it explains the wide amplitude of women's rights under sub-section (1) of section 14 of the Hindu Succession Act by expounding the sweep of the concept of 'possession'. Relying upon the decision of the Supreme Court in *Gummala-pura Taggina Matada Kotturuswami* v. *Setra Veeravva and Others*, [82] it is reiterated -

(a) The 'possession' in sub-section (1) need not be "actual physical possession or personal occupation of the property by the Hindu female, but may be possession in law" or "right to possess." For instance, the possession of a licensee, lessee or a mortgagee from the female owner or the possession of a guardian or a trustee or an agent of the female owner would be her possession for the purpose of section 14(1) of the Act.
(b) The word 'possession in section 14(1) of the Act has been used in a "broad sense," and in this context it means "the state of owning or having in one's hands or power." In this sense, it includes possession by receipts of rents and profits.
(c) Even the trespasser's possession of land belonging to a female owner might be regarded as being in possession of the female owner, provided the trespasser had not perfected his title.

Since the pre-existing maintenance right of the first wife was crystallized by reason of the consent decree in the form of land in her possession, the same stood instantly converted into her absolute ownership by virtue of sub-section (1) of section 14 of the Hindu Succession Act, her own daughter could not be deprived of the same under section 14(2) despite the restrictive covenants in the consent decree.

V MITAKSHARA COPARCENARY PROPERTY AND HINDU JOINT FAMILY PROPERTY

Both the concepts of 'Mitakshara coparcenary property' and 'Hindu joint family property' are often mistaken for each other. There may be some degree of overlapping between the two, and yet they are distinct from each other. The issue of their differentiation has come into focus in *Hardeo Rai* v. *Shakuntala Devi and Others*.[83] In this case, the appellant and the respondent's father entered into an agreement for the sale of some immovable property. The agreement carried a representation by the appellant to the effect that the "a partition of the joint family had taken place and each

82 [1959] Supp 1 SCR 968 approving *Gostha Behari* v. *Haridas Samanta*, AIR 1957 Cal 557, cited in *Santosh* at 502 para 12. See also *Shakuntla Devi* v. *Kamla and Others*, (2005) 5 SCC 390, and *Chandrika Singh (D) by L. Rs* v. *Sarjug Singh and Another*, 2006 (13) SCALE 408.

83 AIR 2008 SC 2489, per SB Sinha and VS Sirpurkar, JJ (Hereinafter simply, *Hardeo Rai*).

of the co-sharer had been in possession of separate portions of property allotted to them."[84] After the agreed price for the property was paid by the defendant, he was put into possession of the same. However, when the appellant despite the notice failed to execute the sale deed in favour of the defendant, he filed a suit for specific performance thereof. The appellant tried to resile from the agreement by alleging fraud and non-transferability of the 'joint family property.'[85] Disbelieving the appellant's defence, the trial court decreed the suit in favour of the defendant without entering into the question of joint-ness of the property.[86]

On appeal, the first appellate court allowed the appeal on the sole ground that the suit property was a 'joint family property.' On further appeal by the respondents herein, the division bench of the high court reversed the decision. In the final determination of the case, the Supreme Court in special leave to appeal dismissed the appeal and affirmed the decision of the high court on the basis of critical distinction between '*Mitakshara coparcenary property*' and 'hindu joint family property.' Since such a distinction is vital for understanding the whole gamut of the law of alienation of property under Hindu law, it will be profitable to recapitulate the distinction as spelled out by the Supreme Court in *Hardeo Rai.*

The various characteristic features, also termed as incidents, of 'Mitakshara coparcenary' and its property, as distinguished from simply 'Hindu joint family property', may be understood and crystallized as under:[87]

(a) A 'Mitakshara coparcenary' is a body of individuals created by law, unlike a 'joint family', which can be constituted by agreement of the parties. In other words, a coparcenary under Mitakshara Hindu law is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a coparcener with his adoptive father as regards the ancestral properties of the latter.
(b) A 'Mitakshara coparcenary' is constituted of 'the lineal male descendants [prior to the Hindu Succession (Amendment) Act of 2005] of a person upto third generation' who acquires on birth ownership in the ancestral property of such person.
(c) Such descendents can at any time work out their rights by asking for partition.
(d) Till partition each member of the coparcenary has got ownership extending over the entire property conjointly with the rest.

84 *Id.* at 2489-90 para 3.
85 *Id.* at 2490 para 7.
86 *Ibid.* para 10.
87 *Id.* at 2491 paras 17 and 18, citing *State Bank of India* v. *Ghamandi Ram (Dead) through Gurbax Rai*, AIR 1969 SC 1330, wherein the Supreme Court, while considering the notification issued by the Central Government of Pakistan in terms of s. 45 of the Pakistan (Administration Of Evacuee Property) Ordinance, 1949, cited the incidents of *Mitakshara* coparcenary from the textual authority of *Mitakshara* Chapter I; 1-27.

(e) As a result of such co-ownership the possession and enjoyment of the properties is common.
(f) No alienation of property is possible unless it be for necessity, without the concurrence of the coparceners.
(g) The interest of a deceased member lapses on his death to the survivors.

Thus, a 'Mitakshara coparcenary' is a matter of status, which is acquired by birth (or adoption), and in respect of property, there is community of interest and unity of possession. No member, so long he remains undivided, can predicate that particular member is entitled to that particular share. This implies that while being in the state of joint-ness, there is no question of alienation of coparcenary property by individual member for purposes other than that of the family. Any purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased.[88]

However, once in a coparcenary, the members are holding their separate possession (as in the instant case, the co-sharers, including the appellant, were holding their separate shares),[89] it is indicative of partition because under *Mitakshara* law it is merely severance of status, and not necessarily partition by 'metes and bounds' amongst the coparcenars.[90] In such an eventuality, though the members might be living together, yet they would not possess the property as 'joint tenants' but simply as 'tenants in common;'[91] they are the owners of their respective shares and as such can alienate the same by sale or mortgage in the same manner in which they can dispose of their separate property.[92]

VI ADOPTION BY A HINDU WIFE: DISCRIMINATORY PROVISIONS UNDER THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

The Hindu Adoptions and Maintenance Act of 1956 has brought about some very fundamental changes in the Hindu law of adoption. For the first time the Act has provided, for instance, that a male Hindu could adopt a daughter. For the first time again, it has created capacity in a female to take a son or daughter in adoption to herself. However, despite this seeming equalization, unfavourable discrimination continues on the basis of sex in the case of married woman. Such a stance has come to the fore in a precipitated

88 *Id.* at 2492 para 24, citing *MVS Manikayala Rao* v. *M Naraisimhaswami and Others*, AIR 1966 SC 470. Although a coparcener's right can be transferred, but only subject to the condition that the purchaser without the consent of his other coparceners cannot get possession. The purchaser acquires a right to sue for partition.
89 *Ibid.* para 20.
90 *Ibid.* para 21.
91 *Ibid.*
92 *Ibid.* para 22.

form before the Supreme Court in *Brajendra Singh v. State of Madhya Pradesh and Another*.[93]

Abstracted facts in *Brajendra Singh* are: A crippled lady having practically no legs was given in marriage by her parents to one able bodied young man some time in 1948. The solemnization of her marriage was necessitated because under the village custom, it was imperative for a virgin girl to get married. Evidence on record shows that soon after the marriage, she was abandoned by her husband and since then she was living with her parents. For her maintenance, however, the parents of the crippled girl had given her a piece of land measuring 32 acres out of their agricultural holdings. In 1970, she adopted the appellant as her son. Her husband died in 1974.

In 1981, under the law regulating the ceiling on agricultural holdings she received a notice from the state indicating that her holding of agricultural land was more than the prescribed limit. In reply she contended that she along with her adopted son constituted a joint family, and, therefore, both of them were entitled to retain as much as 54 acres of land. The sub-divisional officer disbelieved the claim of adoption on the ground, *inter alia*, that in the entries in educational institutions adoptive father's name was not recorded.

In 1982, she filed a civil suit seeking a declaration that the appellant was her adopted son. In 1989, she executed a registered will in favour of the appellant. Within a few months thereafter, she died. After about a decade, the trial court decreed the suit in her favour. The same was challenged by the state. The first appellate court dismissed the appeal and affirmed the judgment and decree of the trial court by holding that the appellant was her adopted son as the factum of adoption had been mentioned in the will executed by her.

On second appeal, however, the high court reversed the decision by holding that the adoption made by the married Hindu female, not being in conformity with the provisions of section 8(c) of the Act, was not valid. In appeal by the appellant to the Supreme Court, the whole scope of female's right and her capacity to take in adoption was analysed to take the decision in the instant case.[94]

Section 6 of the Act, providing for the requisites of a valid adoption, requires that the person who wants to adopt a son or a daughter must have the capacity and also the right to take in adoption.[95] Section 8 speaks about the capacity: any Hindu female who is of sound mind and has attained the age of 18 years has the capacity to take a son or daughter in adoption to herself in her own right provided that (a) she is not married; (b) or is a widow; (c) or is a divorcee, or after marriage her husband has finally renounced the world or is ceased to be a Hindu or has been declared to be of unsound mind by a

93 AIR 2008 SC 1056, per Arijit Pasayat J (for himself and P Sathasivam, J). (Hereinafter simply, *Brajendra Singh*).

94 See *Brajendra Singh* at 1058-59 paras 9, 10 and 11.

95 Cl. (i) of s. 6 of the Act.

court of competent jurisdiction to pass a declaratory decree to that effect. The provisions of section 11, dealing with 'other conditions' for a valid adoption, *inter alia*, provides for the right to take a son in adoption:[96] "if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son, or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption." After the commencement of the Act, all adoption by or to a Hindu are required to be in accordance with the relevant provisions of the Act, and "any adoption made in contravention of the said Act shall be void."[97]

In view of these clear and categorical provisions of the Act, the specific answer given by the Supreme Court about the validity of adoption in the light of the fact situation in the instant case is:[98]

> .... It is clear that only a female Hindu who is married and whose marriage has been dissolved, i.e., who is a divorcee has the capacity to adopt. Admittedly in the instant case there is no dissolution of marriage. All that the evidence led points out is that the husband and wife were staying separately for a very long time and Mishri Bai [the wife] was *living a life like a divorced woman. There is a conceptual and contextual difference between a divorced woman and [the] one who is leading a life like a divorced woman. Both cannot be equated*. Therefore in law Mishri Bai was not entitled to the declaration sought for.

Having thus borne in mind the clear and unambiguous legal position, the Supreme Court has observed that although the present appeal involves "a very simple issue," and yet "when the background facts are considered it projects some highly emotional and sensitive aspects of human life."[99] Culling out those aspects from the given fact situation, the court states:[100]

> Here comes the social issue. A lady because of her physical deformity lived separately from her husband and that too for a very long period right from the date of marriage. But in the eye of law they continued to be husband and wife because there was no dissolution of marriage or a divorce in the eye of law. Brijendra Singh was adopted by Mishri Bai so that he can look after her. There is no dispute that Brijendra Singh was in fact doing so. There is no dispute that the property given to him by the Will executed by Mishri Bai is to be retained by him. It is only the other portion to

96 Cl. (i) of s. 11 of the Act.
97 Sub-s. (1) of s. 5 of the Act.
98 *Brajendra Singh* at 1058 para 10. (Emphasis added)
99 *Id.* at 1057 para 1.
100 *Id.* at 1058-59 para 10.

the land originally held by Mishri Bai which is the bone of contention.

The projected legal position is that although Brijendra Singh was rendering all the requisite help to the totally abandoned crippled lady like an adopted son, but still he was not an adopted son in the eye of law: "A married woman cannot adopt at all during the subsistence of the marriage except when the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind."[101] Since her husband was not under any of such disqualification at the time of the so-called adoption in 1970 (her husband died in 1974), the wife could not adopt even with the consent of her husband, whereas "the husband can adopt with the consent of the wife."[102] Such a differentiation is apparent on mere comparison of the provisions contained in section 7 (which deals with the capacity of a male Hindu to take in adoption) and section 8 (which deals with the capacity of a female Hindu to take in adoption). This differentiation is indeed discriminatory against married Hindu woman as compared to the man in marriage.

The Supreme Court in *Brajendra Singh* recognizes this discrimination, but only obliquely when it permitted the appellant to be in possession of land for a period of six months which he happened to possess in the capacity of an adopted son of the deceased married Hindu woman.[103] Such a step was necessitated because the court on the one hand dismissed the appeal of the appellant claiming the land in his possession in the capacity of an adopted son, on the other hand allowed him to keep the possession of the same for a period of six months so that in the meanwhile he could convince the government of the legitimacy of his claim that the surplus land in his possession was *in fact* given to him in the capacity of an adopted son.[104] If the government could appreciate this fact that the surplus land came to the appellant in the capacity of an adopted son and that the appellant did nourish the crippled lady treating her to be his own mother, "that would set a healthy tradition and example."[105]

The fact situation in *Brajendra Singh* truly demonstrates that the discriminating provision contained in section 8 of the Act, which confers capacity on a married female Hindu, needs to be suitably amended by the

101 *Id.* at 1060 para 18.
102 *Ibid.*
103 *Id.* at 1060-61 para 20.
104 *Ibid.*
105 *Id.* at 1061 para 20: this was the plea made on behalf of the appellant and to which the Supreme Court, it seems, acquiesced in but without expressing an opinion. To this effect the Supreme Court has stated: "…. But while dismissing the appeal, we permit the appellant to be in possession of land for a period of six moths by which time the Government may be moved for an appropriate decision in the matter. We make it clear that by giving this protection we have not expressed any opinion on the acceptability or otherwise of the appellant's request to the State Government to allot the land to him."

legislature, enabling her to adopt to herself in the same manner as is permitted to be done in the case of married male Hindu.

VII READING OF IRRETRIEVABLE BREAKDOWN PRINCIPLE IN SECTION 13 OF THE HINDU MARRIAGE ACT 1955: AN EXERCISE OF POWER UNDER ARTICLE 142 OF THE CONSTITUTION[106]

Under article 142 of the Constitution 'for doing complete justice in any cause or matter pending before it' the Supreme Court may pass any order and thereby lay down any principle of justice, and all authorities are mandated to act in accordance with the said principle. In this wise, therefore, the apex court cannot be taken to usurp the legislative function; it rather facilitates legislation by showing the desired direction.

Once it is recognized that judicial law making interstitially is an integral part of the administration of justice, it is axiomatic to say that such principles of justice as are laid down by the apex court under article 142 in a field hitherto not occupied by the legislature for doing complete justice will constitute valuable precedents for all the courts in India under article141 of the Constitution. This position will continue to prevail till that field is occupied by the legislature.

In this respect, a situation has arisen before the Supreme Court in *Satish Sitole* v. *Ganga*.[107] In this case, the appellant was married to the respondent according to Hindu rites and customs. Within a couple of years of marriage, the respondent wife left the matrimonial home and went back to her parents and they have been living separately ever since. Soon after the separation, the appellant sent notice to the respondent asking her to return to her matrimonial home. In return, the respondent lodged criminal complaints against the appellant and his family members. All this led the appellant to file divorce petition against the respondent wife on grounds of cruelty and desertion under section 13(1)(1a) and (1b) of the Hindu Marriage Act, 1955.

The trial court, holding that although the appellant had proved his case for divorce on grounds of cruelty and desertion, yet thought it proper to grant the decree of judicial separation instead. On appeal preferred by the respondent against the decree of judicial separation passed by the trial court, and the cross appeal filed by the appellant seeking dissolution of marriage, the High Court of Madhya Pradesh reversed the judgment and decree of the

106 See also author's comment, "Dissolution of Marriage: A Shift from Fault to Irretrievable Breakdown of Marriage," *supra* note 63 at 357-63, commenting upon the three-judge bench decision of the Supreme Court in *Naveen Kohli* v. *Neelu Kohli*, AIR 2006 SC 1675, per BN Agrawal, AK Mathur, and Dalveer Bhandari, JJ, reversing the decision of the Allahabad High Court on consideration of the totality of facts, and the decision of the Supreme Court in *Vinita Saxena* v. *Pankaj Saxena,* AIR 2006 SC 1662, per Mrs Ruma Pal and Dr AR Lakshmanan, JJ reversing the decision of the Delhi High Court.

trial court holding that it was on account of the conduct of the appellant that the respondent was compelled to leave her matrimonial home. This meant that it was the respondent wife who was treated with cruelty by the appellant husband, and not vice versa. On such finding the high court dismissed the appeal filed by the appellant and allowed the appeal filed by the respondent wife and set aside the judgment and decree of the trial court.

In appeal against the said judgment of the high court before the Supreme Court, the critical question to be answered was, what approach should the court adopt in a matrimonial conflict problem in which out of 16 years of marriage parties have lived separately for 14 years, most of which has been spent in acrimonious allegations against each other in the litigation embarked upon by both the parties. Despite this hopeless situation, the apex court has tried to explore the possibility of reconciling the spouses.[108] In this wise, the court even used the presence of the male child "as a catalyst to an amicable settlement."[109] However, this also did not bring about reconciliation between the parties.[110]

In this backdrop, Altamas Kabir, J (for himself and Aftab Alam, J) unhesitatingly followed the approach adopted by the two-judge bench of the apex court in *Romesh Chander* v. *Savitri*,[111] where it was held that when a marriage is dead emotionally and practically and there is no chance of its being retrieved, the continuance of such a marriage would amount to cruelty. Accordingly, in exercise of powers under article 142 of the Constitution of India the marriage between the appellant and the respondent was directed to stand dissolved, subject to the condition that the appellant would transfer his house in the name of his wife.[112] Similar view had been successively taken by exercising the power vested in the apex court in *Anjana Kishore* v. *Puneet Kishore*,[113] *Swati Verma* v. *Rajan Verma and Others*,[114] and *Durga Prasanna Tripathy* v. *Arundhati Tripathy*.[115]

In view of these clear precedents, the apex court in *Satish Sitole* had no difficulty in holding that where the parties had been living separately for a long period of 14 years out of 16 years of marriage, and there was no possibility of reconciliation, the marriage is "dead for all practical purposes and there is no chance of it being retrieved, the continuance of such marriage would itself amount to cruelty, and accordingly, in exercise of our powers

107 AIR 2008 SC 3093, per Altamas Kabir, J (for himself and Aftab Alam, J (Hereinafter simply, *Satish Sitole*)

108 See also, author's, "Matrimonial Reconciliation: the Bounden Duty of the Court," commenting upon the Supreme Court's decision in *Jagraj Singh* v. *Birpal Kaur*, AIR 2007 SC 2083, per CK Thakker and Lokeshwar Singh Panta, JJ, in *supra* note 12 at 305-08.

109 *Satish Sitole* at 3094 para 6.

110 *Ibid.*

111 (1995) 2 SCC 7, cited in *Satish Sitole* at 3093, 3094 paras 1 and 9.

112 *Ibid.*

113 (2002) 10 SCC 194.

114 (2004) 1 SCC 123.

115 (2005) 7 SCC 352.

under Article 142 of the Constitution, we direct that the marriage of the appellant and the respondent shall stand dissolved, subject to the appellant paying to the respondent a sum of Rupees Two lakhs by way of permanent alimony."[116]

However, in a somewhat similar fact situation in *Jagdish Singh* v. *Madhuri Devi*,[117] the approach of the apex court was drastically different from that of *Satish Sitole*. In *Jagdish Singh*, the appellant and the respondent were married according to Hindu rites and ceremonies. After few years of marriage, a female child was born out of this union. Thereafter, the respondent left the matrimonial home leaving behind her minor daughter with the husband. Later, when their daughter grew up, and her marriage was arranged by the appellant, the respondent even refused to attend the marriage. Eventually this led the appellant husband to file a divorce petition under section 13 of the Hindu Marriage Act, 1955 on grounds of desertion and cruelty. The family court, after considering the evidence led by the parties, decided that both the grounds for divorce stood proved against the respondent wife and, accordingly, passed a decree of divorce granting dissolution of marriage.[118]

Being aggrieved by the decree passed by the trial court, the respondent wife preferred an appeal in the high court, which was allowed. It reversed the decision of the family court and dismissed the divorce petition instituted by the appellant husband. In appeal before the Supreme Court, an attempt was made to reconcile them through mediation by involving both the parties, but with no success. Thereupon the apex court analysed the mode and manner that led the high court as the first court of appeal to reverse the decision of the trial court. For instance, it found that the high court was wrong in observing that there were no specific instances of cruelty and desertion.[119] Likewise, the high court wrongly relied upon the defence evidence without considering the fact that the family court recorded reasons for not relying upon such evidence.[120] In short, the high court virtually reversed the decision of the trial court "without recording reasons in support of such conclusion."[121] In court's view, it should be borne in mind:[122]

> When the court of original jurisdiction has considered oral evidence and recorded findings after seeing the demeanour of witnesses and having applied its mind, the appellate court is enjoined to keep that fact in mind. It has to deal with the reasons recorded and conclusions

116 *Satish Sitole* at 3094-95 para 12. In addition, the apex court also directed the appellant to pay the respondent the costs of the appeal assessed at Rs. 25,000/-

117 AIR 2008 SC 2296, per CK Thakker (for himself and DK Jain, J). Hereinafter simply, *Jagdish Singh*.

118 *Ibid.* at 2297 para 6.

119 *Id.* at 2300 para 23.

120 *Ibid.*

121 *Id.* at 2302 para 34.

122 *Ibid.*

> arrived at by the trial court. Thereafter, it is certainly open to the appellate court to come to its own conclusion if it finds that the reasons which weighed with the trial court or conclusions arrived at were not in consonance with law.

In fact, the apex court has culled out from judicial precedents[123] the following three requisites or principles that should normally be present before an appellate court reverses a finding of the trial court:[124]

(i) it applies its mind to reasons given by the trial court;
(ii) it has no advantage of seeing and hearing the witnesses; and
(iii) it records cogent and convincing reasons for disagreeing with the trial court.

In its analysis the apex court has found that in the instant case, the high court had not taken these three requisites/principles into consideration while reversing the decision of the trial court. "So-called conclusions reached by the high court, therefore, cannot be endorsed and the decree passed in favour of the wife setting aside the decree of divorce in favour of the husband cannot be upheld."[125] Since there is non-consideration of these requisites or principles, "*the only course available* to this court is to remit to the high court so as to enable it to pass an appropriate order."[126] The reason for remittance rendered by the apex court is:[127]

> In our considered opinion, however, when the law has conferred the power of re-appreciation of evidence on facts and on law on the first appellate court [in the instant case on the high court], it would not be appropriate for this court to undertake that task. It would be better if we allow the appellate court to exercise the power, discharge the duty and perform the function under the code. We are, however, conscious and mindful that since about a quarter century, the parties are staying separately. We, therefore, request the high court to give priority to the case and decide it as expeditiously as possible.

It is respectfully submitted that in the resolution of matrimonial conflict problems the 'remittance' approach should not be considered as 'the only course available' to the deciding court. Such an approach tends to nullify the very objective of the special provision relating to trial and disposal of

123 See *id.* at 2300-02 paras 26-32, citing the various judicial precedents.
124 *Id.* at 2302 para 33.
125 *Ibid.* para 35.
126 *Id.* at 2302-2303 para 36. (Emphasis added).
127 *Id.* at 2303 para 37.

petitions for matrimonial relief or remedies as envisaged under the Hindu Marriage Act, 1955. Section 21B of the Act ordains:

(1) The trial of a petition under this Act, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.
(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.
(3) Every appeal under this Act shall be heard as expeditiously as possible and endeavour shall be made to conclude the hearing within three months from the date of service of notice or appeal on the respondent.

Moreover, there are similarly other provisions under the Act that have been incorporated to minimise the misery of the couples caught in matrimonial conflict by reducing the rounds of litigations as far as possible. To this effect are the other special provisions contained in section 13A (providing alternate relief in divorce proceedings), section 23A (providing relief for respondent in divorce and other proceedings), and section 21C (providing that no document shall be inadmissible in evidence in any proceeding at the trial of a petition under this Act on the ground that it is not duly stamped or registered).

In *Jagdish Singh*, the appellant-husband and the respondent-wife were already living separately for more than two decades with no possibility of their reconciliation; there is little purpose that remittance could serve. Moreover, the fact of their separation of more than two decades could not be obliterated by the high court with any amount of deliberation, logic and reasoning. It is submitted, that therefore, the approach of the apex court in *Satish Sitole* could have been more appropriate in salvaging the situation in *Jagdish Singh*.

VIII WELFARE OF CHILDREN: HOW TO DETERMINE ITS PRIMACY UNDER THE LAW OF GURADIANSHIP?[128]

The law relating to minority and guardianship among Hindus (the term Hindu is used in a wider sense) is contained in the Hindu Minority and

128 See also author's, "'Where the Minor Ordinarily Resides': the Determinant of Court's Territorial Jurisdiction," commenting upon the Punjab and Haryana High Court's decision in *Surjit, Widow of Sh. Mukesh Kumar* v. *Piara Lal and another,* AIR 2005 P & H 237, per MM Kumar, J in Virendra Kumar, "Family Law and Succession", XLI *ASIL* 319-23 (2005).

Guardianship Act, 1956. The provisions of this Act are to be supplemented by the Guardians and Wards Act, 1890 (8 of 1890).

Under the provisions of section 6 of the Act of 1956, the natural guardian of a Hindu minor (a person who has not completed the age of 18 years), in respect of minor's person as well as in respect of minor's property (excluding his or her undivided interest in joint family property) are, in the case of a boy or un-married girl, the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother."[129] Having provided this order of adoption, a supervening provision is added under section 13 of the Act, which lays down expressly that in the appointment or declaration of any person as guardian of a Hindu minor by a court, "the welfare of the minor shall be the paramount consideration."[130]

In the application of this overriding provision, however, the issue often arises, how to determine 'the welfare of the child' in a given fact situation. This issue has come to the fore before the Supreme Court in *Mausami Motra Ganguli* v. *Jayanti Ganguli*.[131] In this case, the appellant-mother and the respondent-father got married against the wishes of their parents. Within two years of their marriage a son was born out of this union. However, within a short time thereafter, the relationship between the two came under strain, and the appellant-mother allegedly was forced to leave her matrimonial home at Allahabad by leaving the infant child with the father. Later she filed a suit for divorce against the respondent at Calcutta, where she was living with her mother. The suit was decreed *ex-parte*. Since no appeal was preferred by the respondent against the said decree, it attained finality.

Soon thereafter the appellant moved a petition before the family court seeking declaration in her favour to be the lawful guardian of her minor under sections 10 and 25 of the Guardians and Wards Act, 1890, read with the relevant provisions of the Act of 1956. The application was hotly contested by the respondent. The family court, however, allowed the application and declared the appellant to be the lawful guardian of her minor son and the respondent father was directed to hand over the child to the appellant mother.

On appeal by the respondent father, the high court set aside the order of the family court and granted permanent custody of the child to him by taking into account the opinion of the Director of Psychology, Allahabad, who examined the mother, the father and the child, and also talked to the child

129 Cl. (a) of s. (6) of the Act of 1956. See also author's, "Right to Custody of the Minor Child: Needs Differentiation from the Right to Guardianship," commenting upon *Rakesh K Gupta* v. *Ram Gopal Agarwala and others*, AIR 2005 SC 2426, per GP Mathur, J (for himself and RC Lahoti, CJI), and *G Eva Mary Elezabath* v. *Dr Rukhsana and others*, AIR 2005 Madras 452, per M Karpagavinayagam and C Nagappan, JJ.

130 Sub-s. (1) of s. 13 of the Act of 1956. A similar provision is contained in s. 17 of the Guardians and Wards Act, 1890.

131 AIR 2008 SC 2262, per DK Jain, J (for himself and CK Thakker, J).

practically on every date of hearing.[132] The reasons for reversal of the family court order included: (i) the respondent is financially sound and able to cater to all the needs of the child for his development whereas the appellant is unable to provide the same since she is living all alone; (ii) the child is not able to reconcile with his uprooting from Allahabad and denial of love and affection of the father; and (iii) the questions which were put to the child and answers thereto indicate that the child wants to study at Allahabad. Having regard to the prevalent circumstances and the fact that the child had received his education from primary stage with his father at Allahabad, the court came to the conclusion that the welfare and development of the child and his future would be best served at present at Allahabad in the hands of the father.[133]

Handing over custody of the child to the father under the decision of the high court was challenged before the Supreme Court. The issue to be finally resolved was whether the father or the mother should have the custody of an almost ten years old male child.[134] For finding pragmatic solution, the apex court right in the first instance directed that the appellant mother and the respondent father would remain present in the court in person and the father should also bring the child with him on the date of hearing.[135] On the stipulated date both the parties were present along with the child. However, before beginning to hear the case, the judges interviewed the child in their chambers, and found that[136]

> [H]e (the child) was quite intelligent and was able to understand the facts and circumstances in which he was placed. He could comprehend matters and visualize his own well-being. He seemed to have no complaint against his father. He explicitly stated before us that he was not inclined to go with his mother and [wish to] continue his studies at Allahabad where he has quite a few friends.

In view of this background, the Supreme Court heard both the parties for the determination of the issue, namely, whether the circumstances in the instant case as high lighted by the parties warrant that the custody of the child should be changed from the father to the mother.[137]

For answering this question, the apex court crystallized the 'well-settled' principles, which may be abstracted as under:

(a) It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and

132 *Id.* at 2263 para 8.
133 *Ibid.*
134 *Id.* at 2262 para 2.
135 *Id.* at 2264 para 9.
136 *Ibid.*
137 *Ibid.* para 13.

the paramount consideration is the welfare and interest of the child and not the rights of parents under a statute.[138]

(b) Indubitably, the provisions of law pertaining to the custody of a child are contained in either the Guardians and Wards Act, 1890 (section 17) or the Hindu Minority and Guardianship Act, 1956 (section13) that also holds out the welfare of the child is of predominant consideration.[139]

(c) The question of welfare of the minor child has to be considered in the background of the relevant facts and circumstances of each case, and thus each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned.[140]

(d) It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody.[141]

(e) Better financial resources of either of the parents may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child, and *it is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, keeping in mind the welfare of the child as the paramount consideration*.[142]

(f) It should be borne in mind that the children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.[143]

(g) In relation to the custody or upbringing of a minor, a mother has the same right and authority as the law allows to a father, and the rights and authority of mother and father are equal and are

138 *Ibid.* para 14.
139 *Ibid.*
140 *Ibid.*
141 *Id.* at 2264-65 para 14.
142 *Id.* at 2265 para 14.
143 *Ibid.* para 15, citing a three-bench judgment of the Supreme Court in *Rosy Jacob* v. *Jacob A. Chakramakkal,* (1973) 1 SCC 840.

exercisable by either without the other in the interest and welfare of the child.[144]

In the light of the above principles and the consideration of the totality of facts and circumstances, the apex court has held that there is no ground to upset the judgment and order of the high court. The court has felt convinced that child's interest and welfare will be best served if he continues to be in the custody of the father, with visitation rights to the mother.[145] Accordingly, the appeal by the mother failed.

The merit of the judgment lies in the pragmatic approach the Supreme Court has adopted for determining the welfare of the child by equalizing the rights of the mother and father in the matters of custody.

IX SECTION 125 OF THE CODE OF CRIMINAL PROCEDURE : ITS AMBIT[146]

Connotation of the expression 'unable to maintain herself' in section 125

Under the provisions of section 125 of the Code of Criminal Procedure (No. 2 of 1974), if any person having sufficient means neglects or refuses to maintain his wife, who is 'unable to maintain herself', a magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife, at such monthly rate not exceeding five hundred rupees in the whole, as such magistrate thinks fit, and to pay the same to such person as the magistrate may from time to time direct.[147]

Any such allowance for the maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.[148]

If any person so ordered fails without sufficient cause to comply with the order, any such magistrate may, for every breach of the order, issue for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided no warrant shall be issued for the recovery of any amount due under

144 *Id.* at 2265 para 16, citing 13 *Halsbury's Laws of England,* para 809 (4th edn., 2005).

145 *Supra* note 131 at 2265 para 17.

146 See also author's, "Section 125 of the Code of Criminal Procedure: Its Scope and Ambit," commenting upon *Savitaben Somabhai Bhatiya* v. *State of Gujarat and others,* AIR 2005 SC 1809, per Arijit Pasayat, J. (for himself and SH Kapadia, J) in *supra* note 128, 323-26.

147 Sub-s. (1)(a) of s. 125 of Cr PC. Here the term 'wife' includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. See Explanation (b) appended to sub-s. (1) of s. 125 of Cr PC.

148 Sub-s. (2) of s. 125 of Cr PC.

this section unless application be made to the court to levy such amount within a period of one year from the date on which it becomes due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.[149]

No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under section 125 of Cr PC if she is living in adultery, or if, without any sufficient reason, refuses to live with her husband, or if they are living separately by mutual consent.[150] On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the magistrate shall cancel the order.[151]

In view of these clear and categorical provisions, the issue has arisen before the Supreme Court in *Chaturbhuj* v. *Sita Bai*[152] about the ambit of the expression "unable to maintain herself" in the light of the following fact situation. In this case, the appellant married the respondent about four decades back, and now for more than two decades they were living separately. The respondent had filed an application under section 125 of Cr PC claiming maintenance from the appellant on the ground that she was unemployed and 'unable to maintain herself.' The trial court after considering the respective incomes of both the parties from all sources directed the appellant to pay Rs. 1500/- per month to the respondent. The appellant filed the revision petition against the said order. The revisional court analysed the evidence on record and held that the appellant's monthly income was more than Rs. 10,000/- and the amount received as rent by the respondent wife was not sufficient to maintain herself. Accordingly, the revision was dismissed. The matter was further carried by the appellant before the high court by filing an application in terms of section 482 of Cr PC. Finding no merit, the high court also declined to interfere with the earlier order. This is how the matter has finally come up before the apex court by special leave to appeal.

In order to explore the ambit of the expression, 'unable to maintain herself,' the apex court has expounded the connotation of this expression in the light of the underlying objective of the maintenance proceedings under

149 Sub-s. (3) Explanation appended to this sub-s. provides that if the husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

150 Sub-s. (4).

151 *Id*. sub-s. (5).

152 AIR 2008 SC 530, per Arijit Pasayat and Aftab Alam, JJ.

section 125 of the Cr PC. The court's crystallization may be abstracted as under: [153]

(a) Section 125 of Cr PC is a measure of social justice and is specially enacted to protect women and children, and falls within constitutional sweep of article 15(3) reinforced by article 39 of the Constitution of India.[154]
(b) Its object is not to punish a person for his past neglect, but to prevent vagrancy and destitution by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support.
(c) It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife.
(d) It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves.[155]
(e) It entails two inseparable related conditions: the burden is placed upon the wife to show that the means of her husband are sufficient, and that she is unable to maintain herself.[156]

In the light of the above, the apex court has held that the phrase, 'unable to maintain herself,' in the instant case would mean that the means available to the deserted wife while she was living with her husband, and would not take within its ambit the efforts made by the wife after desertion to survive somehow or the other. The court has illustrated the latter stance by citing the case where wife was surviving by begging, which would not amount to her ability to maintain herself.[157] Likewise, it also be not said that the wife has been capable of earning but she has not been making an effort to earn.[158]

Thus, the true test is whether the wife is in a position to maintain herself in the same way as she was used to in the place of her husband, which is neither luxurious nor penurious.[159] Applying these principles, the court has held that in the instant case, the trial court, the revisional court and the high court have analysed the evidence and rightly held that the respondent wife was 'unable to maintain herself' and, accordingly dismissed the appeal.

153 *Id.* at 532-33 para 5.
154 *Id.* at 533 para 5, citing *Captain Ramesh Chander Kaushal* v. *Mrs. Veena Kaushal and Others*, AIR 1978. SC 1807. Art 15(3) empowers the state to make any special provisions for women and children, whereas art. 39 exhorts the state to adopt certain principles of policy in favour of women and children.
155 *Ibid*, citing *Savitaben Somabhai Bhatiya v. State of Gujarat and Others*, (2005) 2 SCC 503.
156 *Id.* at 533 paras 6 and 7.
157 *Ibid.* para 8.
158 *Ibid.*
159 *Ibid.*, citing *Bhagwati* v. *Kamla Devi*, AIR 1975 SC 83.

Whether provisions of section 125 of Cr PC applicable in case of 'irregular marriage' under Muslim law[160]

Most seemingly, the provisions of section 125 of Cr PC have been designed, *inter alia*, to prevent vagrancy and destitution of wives by compelling those persons who are obliged to support them by reason of their or marriage and also have the means to do so if they (that is, women in marriage) are unable to support themselves. In this context an 'interesting question' of law has arisen for judicial consideration before the Supreme Court for the first time after independence in *Chand Patel* v. *Bismillah Begum and Another*,[161] whether a person professing Muslim faith, who has contracted a second marriage with his wife's sister, while his earlier marriage with the other sister was still subsisting, is obliged to maintain such a woman (that is, the wife's sister to whom he has married). Since the obligation of a man under section 125 of CrPC towards a woman arises out of the relationship of his marriage with her, the question, therefore, to be answered in the first instance is whether or not the marriage of the appellant with the respondent is a valid marriage.

Under Muslim law, a marriage, which is not valid (*sahi*), may be either void (*batil*), or irregular (*fasid*). A void marriage is one which is unlawful in itself from its very inception, because the prohibition against the marriage being perpetual and absolute, as in case of a marriage with a woman prohibited by reason of consanguinity, affinity, or fosterage.[162] On the other hand, an irregular marriage is one where the prohibition is temporary or relative in nature, or when the irregularity arises from an accidental circumstances, such as the absence of witnesses, a marriage with a fifth wife by a person having four wives, a marriage with a woman undergoing *iddat*, a marriage prohibited by reason of difference of religion, and a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully inter-married.[163]

However, about the legal import of 'irregular marriage', hitherto there was an acute difference of opinion. The Calcutta High Court in *Aizunnissa* v. *Karimunissa*,[164] for instance, held the view that a marriage with a wife's sister while the earlier marriage was still subsisting was void (*batil*) from its inception and the children of such marriage were illegitimate, and were not entitled to inherit. This decision came to be considered by the Bombay High Court in *Tajbi Abalal Desai* v. *Mowla Alikhan Desai*.[165] Placing reliance on *Fatawa-i-Alamgiri*, the Bombay High Court held that a marriage with the

160 For the application of the provisions of s. 125 of Cr PC to Muslims in India, see author's comment, "Muslim Women (Protection of Rights on Divorce) Act, 1986: Its Broad Ambit," commenting upon the decision of the Supreme Court in *Iqbal Bano* v. *State of U.P.* AIR 2007 SC 2215, per Arijit Pasayat and DK Jain, JJ, in *supra* note 12 at 326-33.

161 AIR 2008 SC 1915, per Altamas Kabir and JM Panchal, JJ (Hereinafter, simply *Chand Patel*).

162 *Mulla's Principles of Mohomedan Law*, para 264, cited in *Chand Patel* at 1920 para 25.

163 *Ibid.*

164 ILR 1895-23 Cal 130, decided on 23.7.1895, cited in *Chand Patel* at 1919 para 22.

165 39 Indian Appeals 1917 at 603, decided on 6.2.1917, cited in *Chand Patel* at 1919 para 23.

sister of an existing wife was merely irregular (*fasid)*, and irregular marriage was not void (*batil*).

The Supreme Court in *Chand Patel* favoured the view of the Bombay High Court because it was amenable to reason. The reasoning adopted was that marriage with a permanently prohibited woman had always been considered by the exponents of Muslim law to be void and has no legal consequence, but marriage with a temporarily prohibited woman if consummated may have legal consequences.[166] Accordingly, a marriage with the sister of an existing wife (a temporarily prohibited woman) could always become lawful by the death of the first wife or by the husband divorcing his earlier wife and thereby making the marriage with the second wife lawful to himself.[167]

The Bombay High Court's view, based upon *Fatawa-i-Alamgiri*, is not only in consonance with 'the soundest practical principles,' but also supported by such great modern text-book writers as Bailie, Ameer Ali, Tyabji and Abdur Rahim.[168] Moreover, the Bombay High Court's view had been followed by the Oudh Chief Court in *Mussammat Kaniza* v. *Hasan Ahmad Khan*,[169] the Lahore High Court in *Taliamand* v. *Muhammad Din*,[170] and the Madras High Court in *Rahiman Bibi Saheba* v. *Mahboob Bibi Saheba*.[171]

In the light of the above, the Supreme Court in *Chand Patel* has concluded:[172]

> On consideration of the decisions of the various High Courts referred to hereinabove and the provisions relating to void marriages and marriages which are merely irregular, we are also of the view that the decision rendered by the Bombay High Court in the case of Tajbi's case is correct. Since a marriage, which is temporarily prohibited may be rendered lawful once the prohibition is removed; such a marriage is in our view irregular (*fasid*) and not void (*batil*).

On the basis of this propounding, the Supreme Court has held that under the *Hanifi* law, as far as Muslims in India are concerned, an irregular marriage continues to subsist till terminated in accordance with law, and the wife and children of such marriage would be entitled to maintenance under the provisions of section 125 of the Code of Criminal Procedure.[173]

166 *Chand Patel* at 1919 para 23.
167 *Ibid.*
168 See, *id.* at 1920 para 23.
169 92 Indian Cases 1926 at 82, decided on 24.11.1925, cited in *Chand Patel* at 1920 para 24.
170 129 Indian Cases 1931 at 12, decided on 16.7.1930, cited in *Chand Patel*, *ibid*.
171 ILR 1938 at 278, decided on 1.9.1937, cited in *Chand Patel*, *ibid*.
172 *Chand Patel* at 1921 para 27.
173 *Ibid.* para 28.