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FAMILY LAW AND SUCCESSION

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I INTRODUCTION

THE SURVEY of "family law and succession" for the year 2009 includes selected cases relating to the matrimonial causes including nullity of marriage, breakdown of marriage, mandatory conditions for divorce by mutual consent, right of earning wife to get maintenance from the husband, exercise of option of puberty, dowry death, the disputes between parents or between parent and maternal grand-parents for the custody of child issues relating to the jurisdiction of family courts and succession.

II MATRIMONIAL CAUSES

Nullity of marriage

In *Sowria Raj* v. *Bandaru Pavani alias Gullipaiii Pavani*,[1] the question for consideration was whether a marriage entered into by a Hindu with a Christian is valid under the Hindu Marriage Act, 1955 (HMA). The appellant husband, a Roman Catholic Christian, and the respondent-wife, a Hindu, solemnized their marriage on 24.10.1996 in a temple by exchange of "*Thali*". Subsequently, the marriage was registered on 2.11.1996 under section 8 of the HMA. On 13.3.1997, the wife filed a petition, under section 12(1)(c) of the HMA, for a decree of nullity on the ground that the appellant had misrepresented that he was a Hindu by religion.[2] A novel argument was advanced on behalf of the appellant that the HMA did not preclude a Hindu from marrying a non-Hindu. This contention was rightly rejected by the Supreme Court in view of the scheme of the HMA. This scheme was well illustrated by Altamas Kabir J. The court pointed out that the scheme indicated that the HMA was enacted to codify the law relating to marriage

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1 AIR 2009 SC 1085, *per* Altamas Kabir and Aftab Alam JJ.

2 The family court dismissed the petition against which an appeal was preferred by the respondent before the High Court, which allowed the appeal holding that the marriage between a Hindu and a Christian under the HMA was void *ab intio* and that the marriage was, therefore, a nullity. A few months later, the respondent married another man. Thereafter, the appellant filed special leave petition out of which the present appeal arose.

amongst Hindus. Section 2 which dealt with the application of the Act, "reinforces the said proposition". Section 5 also made it clear that a marriage may be solemnized between any two Hindus if the conditions contained in the said section were fulfilled. Interpreting the word 'may' in the opening line of section 5, the court categorically ruled that "the expression 'may' is not directory but mandatory." This in positive terms indicated that a marriage could be solemnized between two Hindus if the conditions indicated were fulfilled. "Section 7, is to be read along with Section 5, in that a Hindu marriage, as understood under Section 5, could be solemnized according to the ceremonies indicated therein", the court held. This case is also noteworthy for the proposition that "the registration of such marriage under Section 8 of the Act could not and/or did not validate the same."

Divorce by mutual consent

Can the statutory waiting period of six months under section 13-B(2) of HMA be waived by the court was the question before the Bombay High Court in a reference petition.[3] Attitudinal differences arose between the spouses and they started living separately. On 11.9.2007, the parties filed a petition in Nagpur under section 13-B of the HMA in the family court for a decree of divorce by mutual consent. Along with the petition, a separate application was also filed by them praying that the trial court should condone the period of six months as contemplated under section 13-B(2) of the Act and decree of divorce be granted instantaneously in the interest of justice. The matter was referred to the Bombay High Court for opinion and guidance by the principal judge Nagpur in view of divergent views expressed by a single judge of the same court. In a comprehensive judgment, Swatanter Kumar CJ, after discussing the concept of Hindu marriage and the law relating to marriage and divorce by mutual consent and recent view of the Bombay High Court on the constitutional validity of section 13-B, divergent views of various High Courts with respect to six months waiting period, ratio of *Sureshta Devi*,[4] divergent views of single judge of the same court, meaning and interpretation of section 13-B, wisdom behind the waiting period of six months and the mandatory nature of conditions stated therein, answered the reference in the negative. Dissenting from the view taken by the Delhi High Court[5] and overruling the decision of the single Judge of the Bombay High Court,[6] the court ruled that "the waiting period of six months (i.e. from the institution of the first motion to the moving of the second motion) is mandatory and cannot be waived."[7] Analyzing the mandatory nature of the condition, it stated

3 *Principal Judge, Family Court, Nagpur* v. *Nil*, AIR 2009 Bom.12.
4 *Smi Sureshta Devi* v. *Om Prakash*, AIR 1992 SC 1904.
5 *Abhay Chauhan* v *Ms. Rachna Singh*, AIR 2006 Del. 18 at 16.
6 *Sau. Sonali* v. *Nil*, 2007 (5) Mah. L.J.615 at 19.
7 *Id.* at 26.

that if this period of six months was treated as optional, condonable or could be waived at the request of the parties, then "it will not only be unjust but would be impermissible on accepted norms of statutory interpretation"[8] at least for two reasons. Firstly, the legislature had not provided any power of relaxation to the court in regard to the stated period of six months under section 13-B(2). Secondly, if this procedure was adopted at the behest of the parties by the court, it would amount to denial of a "statutory benefit of rethinking."[9]

Breakdown of Marriage

Can breakdown of marriage be considered a ground of divorce under section 13(1) of HMA? This is what seems to have been done by the Supreme Court in *Vishnu Dutt Sharma* v. *Manju Sharma*,[10] where the husband sought divorce on the ground of cruelty by the wife. The trial court and High Court concurrently held that it was the appellant husband, who treated wife with cruelty, rather than the wife. On appeal to the Supreme Court, it was argued by the husband that marriage between the parties can be dissolved on the ground of irretrievable breakdown. After having cited sub-section (1) of section 13, in a "passing judgment", the court observed that "on a bare reading of Section 13 of Hindu Marriage Act, 1955, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature."[11] It is disappointing that in the context of breakdown of marriage, the court was discussing section 13(1) with no mention at all to section 13(1A), which, in a limited manner, incorporates the concept of breakdown of marriage.

Remarriage within the period of appeal

The issue of remarriage, within the period of appeal came to be considered, incidentally, by the apex court,[12] in connection with the divorce case under HMA on the ground of cruelty. The decree of divorce, in favor of respondent-husband, passed by the trial court, and confirmed by the High Court, was appealed before the Supreme Court by the appellant-wife. Before the expiry of the period of filing special leave petition to the Supreme Court, the husband, however, entered into re-marriage with a third party and from

8 *Supra* note 4 at 21.

9 *Ibid.*

10 AIR 2009 SC 2254, *per* Markandey Katju and V.S. Sirpurkar JJ.

11 *Id.* at 2255. In the one and a half page judgment, when court referred to section 13, it actually referred to section 13(1) only, and not the whole of section 13, particularly section 13(1A). It may be noted that various clauses of sub-section (1) of section 13 incorporate the fault-disability theory, whereas the breakdown of marriage under section 13(1A) illustrates no-fault theory.

12 *Suman Kapur* v. *Sudhir Kapur*, AIR 2009 SC 589, *per* C.K. Thakker and D.K. Jain, JJ.

the said wedlock, he got an issue. Thus, the marriage had been performed within a period of 90 days of the order impugned in the present appeal. The Supreme Court confirmed the decree of divorce on the ground of mental cruelty as held by both the courts below. On the question of remarriage, it observed that, "the respondent husband should not have remarried before the expiry of period stipulated for filing Special Leave to Appeal in this Court by the wife."[13] Since the Constitution allows a party to approach this court within a period of 90 days from an order passed by the High Court, the court regretted that, no precipitate action should have been taken by the respondent-husband by creating the situation of *fait accompli*. However, on the facts and the circumstances of the case, to meet the ends of justice, the court directed the respondent-husband to pay an amount of Rs. five lakhs to the appellant-wife.[14]

It is pertinent to mention that simply because the respondent-husband had been directed by the court to compensate the appellant-wife by monetary relief, it cannot be inferred from the judgment, that the second marriage had become a valid marriage. A significant provision of HMA in this respect, missed out the attention of the Supreme Court. Section 15 of the Act deals with as to when divorced persons can remarry. It explicitly states that when a marriage has been dissolved by a decree of divorce, the parties cannot lawfully marry before the time for appealing has expired. Thus, it is only after the "conclusive decree of divorce" that the parties can lawfully marry. It follows, therefore, that if a decree for dissolution is set aside in appeal and a party remarries before the filing/disposal of the appeal, such marriage would be a nullity. *Chandra Mohini* v. *Avinash Prasad*[15] is a case on the point where the Supreme Court granted special leave against the decree for the dissolution of marriage and the appeal ultimately succeeded with the result that the remarriage became a nullity.

Maintenance

The Supreme Court in a "miniature judgment" of half page considered the vital issue as to whether an earning wife is entitled to maintenance from her husband. In *Minakshi Gaur* v. *Chitranjan Gaur*,[16] the husband and wife both were earning. Husband was earning Rs.20,000/- per month and the wife around Rs.9000/-. The petition filed by the wife under section 125 of the Code of Criminal Procedure, 1973 was dismissed by the Magistrate, (confirmed by the High Court) on the ground that the wife was a working lady and had income from other properties. On appeal to the Supreme Court, however, it was observed by the court that it was not possible for the wife

13 *Id. at* 599.
14 *Id.* 599-600.
15 AIR 1967 SC 58.
16 AIR 2009 SC 1377, *per* B.N. Agarwal and G.S. Singhvi JJ.

to maintain herself in the town of Agra with the income of less than Rs.9000/- per month. The husband, who was earning at least Rs.20,000/- per month, was held liable to pay Rs.5000/- per month to the wife by way of maintenance.[17]

III OPTION OF PUBERTY

Under Muslim law, if a Muslim minor has been married during minority by a guardian, the minor has the right on attaining majority to repudiate such marriage. This is called *khiyar-al-bulugh*, the option of puberty. Such a minor may be given in marriage either (1) by the father or grandfather, or (2) by any other guardian. Under classical Muslim law, a minor girl contracted in marriage by her father or grandfather cannot exercise the option of puberty. On the other hand, under section 2(vii) of the Dissolution of Muslim Marriage Act, 1939, a woman married under Muslim law is entitled to the dissolution of her marriage if she proves that (1) she had been given in marriage by her father or other guardian before she attained the age of 15 years; (2) she has repudiated the marriage before attaining the age of 18 years; and (3) the marriage has not been consummated. The question arises: Can such an option be exercised by her only in a substantive suit under the Act or can it be exercised by her in any other proceeding?

In *Smt. Khatiza Tul Qubra alias Tara Bano* v. *Iqbal Mohd.*,[18] the single judge of the Rajasthan High Court had an occasion to consider a similar question. When the option of puberty was opted by a lady by her conduct and the same was admitted by the opposite party, was it necessary for her to obtain a decree for dissolution of marriage from a competent court? The issue arose in connection with the petition of the plaintiff-husband for the restitution of conjugal rights. The wife was a minor at the time of her marriage with the plaintiff. After attaining the age of puberty, she repudiated the said marriage and remarried another man. During the course of proceedings, for restitution of conjugal rights, the *factum* of revocation or exercise of option of puberty was proved before the trial court. The single Judge of the Rajasthan High Court, relying on a previous division bench decision of the same court,[19] and a decision of the Lahore High court,[20] held that "it is not necessary for *Muslim lady* to obtain a decree for dissolution of her marriage after she exercises her option of puberty upon attaining puberty."[21] If the *factum* of such revocation or exercise of option of puberty was proved before the trial court even by the oral evidence and the court returned the findings of facts in her favor in a suit filed by the husband, even

17 *Id*. at 1378 para 4.
18 AIR 2009 Raj 82, *per* Dr. Vineet Kothari J.
19 *Mustafa* v. *Smt. Khursida*, AIR 2006 Raj. 32. *Id*. at 85, para 12.
20 *Mohd Baksh* v. *The Crown through Khuda Baksh*, AIR 1950 Lah. 133. *Id*. at 86, para 13.
21 *Supra* note 19 at 86, para 16, (emphasis added).

then "it should be sufficient satisfaction of requirement of Section 2 of the Dissolution of Muslim Marriage Act, 1939."[22]

In the instant case, according to the High Court, the findings of the trial court that father of the appellant wife had proved such repudiation of marriage with the plaintiff-husband was finding of fact and "complies with the requirement of Section 275 of Muslim Law as well Section 2 of the Dissolution of Muslim Marriage Act."[23] Therefore, the said findings of facts, unless found to be perverse could not be reversed by the appellate court. The court ruled that the "requirement to obtain independent decree by appellant wife by approaching Civil Court is not the *sine qua non* of law."[24] Therefore, in the first appellate court erred in reversing that finding merely on this ground and decreeing the suit for restitution of conjugal rights in favour of the plaintiff husband. The court substantiated its decision by further observing that "more so, when admittedly, the appellant-wife had married another man way back on 17-5-2000 and ever since was living with her husband therefore, she can not be asked to walk out of her *valid marriage* nor she can be forced to leave her peaceful matrimonial home now and abide by the decree in favor of the plaintiff-husband."[25]

It may be stated that section 2(vii) of the Dissolution of Muslim Marriage Act, does not make "option of puberty" as one of the grounds for dissolution of marriage. It legislates one of the grounds for dissolution, provided the three conditions mentioned in the clause, namely, (a) the marriage took place before she attained the age of 15 years, (b) she has repudiated the marriage before attaining the age of 18 years, and (c) the marriage has not been consummated, have been fulfilled. This clause does not refer to puberty; rather it refers to the age fixed i.e.15 years. A girl may attain puberty at the age of 14 years or 16. Now, if in any particular case, a Muslim woman attains puberty at the age of 16 years, and she is given in marriage by her father, at the age of '15 years 6 months', she cannot avail the above ground for the dissolution of marriage, even though she has not attained puberty at the time of marriage, for the simple reason that at the time of marriage, she was more than 15 years of age. Now, the pertinent question arises- can she repudiate the marriage by exercising the option of puberty, under the un-codified Muslim law. The answer appears to be in positive. The observation of the Lahore High Court, in this aspect is worth mentioning: "*The mere fact that Section 2 of Act VIII (8) of 1939, gives a right to a girl in this position to obtain a decree for dissolution of marriage does not imply that apart from the provisions of Section 2 she has no right to exercise the option of puberty in such cases.*"[26] In the case in hand, at the time of the marriage, in 1984, the girl was only 7 years of age. She never

22 *Ibid.*
23 *Id.* at 87, para 17.
24 *Ibid.*
25 *Ibid.* (*Emphasis added*).
26 Quoted in *supra* note 19 at. (*Emphasis added*).

lived with the plaintiff-husband and the marriage was never consummated. She repudiated the marriage after attaining the age of 15 years. In 2000, she remarried and was living with him since then, when the appellant filed the suit for restitution of conjugal rights. Now, if she had not filed a suit for dissolution of marriage with appellant under the Act of 1939, obviously, her marriage was not dissolved *under the said Act*. The next question is - has she validly exercised the option of puberty without the repudiation being confirmed by the court? This right of a Muslim woman is different from the right provided to the woman married under Muslim law, under the Dissolution of Muslim Marriage Act. According to the Lahore High Court as mentioned above "a Court's order is not essential for conferring validity on the exercise of the option of puberty. The Court's order would seem to be only necessary to invest it with the judicial imprimatur in order to avoid any possible dispute. In any case, a declaration can be given by the Court itself"[27]

Though the judge has delivered a sound judgment, at places he has mixed up the option of puberty under the classical Muslim law and so-called option of puberty under the Dissolution of Muslim Marriage Act. Further, the use of the expression "Muslim lady" by him is not appropriate. The correct legal expression is "woman married under Muslim law." A man in Hanafi law may validly marry a Muslim woman or a *kitabiyya viz.* a Jewish or a Christian woman. In such a case, the woman is not a "Muslim lady" but she is very much entitled to avail the grounds for the dissolution of marriage under the Act of 1939, as she fulfils the criteria of "woman married under Muslim law."

IV DOWRY DEATH

Demand of dowry clarified

Section 304-B of Indian Penal Code, 1860 (IPC) makes "demand of dowry" punishable. The explanation to section 304-B refers to dowry "as having the same meaning as in Section 2 of the Dowry Prohibition Act, 1961" In this background, could it be argued that to prosecute a person under section 304-B, IPC, agreement for dowry is to be proved? Confronted with such a situation, the division bench of the Supreme Court in *Baldev Singh* v. *State of Punjab*[28] ruled that "demand neither conceives nor would conceive of any agreement."[29] If for convicting any offender, an agreement for dowry is to be proved, the court cautioned, hardly any offenders would come under the clutches of law. When section 304-B refers to "demand of dowry," it refers to the demand of property or valuable security as referred to in the definition of "dowry" under the Act. The interpretation that the accused seeks that conviction can only be if there is agreement for dowry,

27 *Ibid.*
28 AIR 2009 SC 913, *per* Dr. Arijit Pasayat and Harjit Singh JJ.
29 *Id.* at 917, para 11.

according to the court, was misconceived. "This would be contrary to the mandate and object of the Act," the court emphasized.[30] The court rightly held that "Dowry" definition is to be interpreted with the other provisions of the Act including section 3, which refers to giving or taking dowry and section 4 which deals with a penalty for demanding dowry under the Act and the IPC. This makes it clear that even demand of dowry on other ingredients being satisfied is punishable. Thus, it is not always necessary that there be any agreement for dowry.[31]

Abetment of suicide

"The mere fact that the husband treated the deceased wife with cruelty is not enough to convict him under Section 306 IPC." This statement has been made by a division bench of the Supreme Court in *Kishangiri Mangalgiri Goswami* v. *State of Gujrat*.[32] The accused married the deceased in 1989. Soon after two years of marriage, the accused started inflicting mental and physical torture on the deceased and she was taunted by him for not bringing sufficient dowry in the marriage. He even wrote letters to the in-laws and demanded Rs. 40,000/- for purchasing a house. The demand was persistent; even threats were administered to the deceased and her family members. After 10 years of her marriage, in 1999, she committed suicide by burning herself after pouring kerosene on her body. As per the prosecution case, the appellant had committed the offence punishable under sections 498-A and 306, IPC[33] read with sections 3 and 7 of the Dowry Prohibition Act. A division bench of the Gujarat High Court upheld the conviction of the appellants for offences punishable under sections 306 and 498-A IPC. The Supreme Court, on further appeal, while sustaining the conviction under section 498-A IPC, set aside the conviction under section 306 IPC. Referring to some Supreme Court cases on the point and relying on *Mohinder Singh* v. *State of M.P.*,[34] the court reiterated that in cases of alleged abetment of suicide, there must be proof of some direct or indirect acts of incitement to the commission of suicide. Mere proof of cruelty is not sufficient to convict accused under section 306 IPC.

V CUSTODY OF CHILD

The principles, in relation to the custody of a minor child are well settled. In determining the question as to who should be given the custody of a minor child, the paramount consideration is the 'welfare of the child'

30 *Ibid.*
31 *Ibid*.
32 AIR 2009 SC 1808, *per* Dr. Arijit Pasayat and Ashok Kumar Ganguly JJ.
33 Indian Penal Code, 1860. Section 306 Abetment of Suicide- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.
34 1995 AIR SCW 4570. See 24 *Halsbury's Laws of England* 217 (4th edn.); 39 *American Jurisprudence* 34 (2nd edn).

and not rights of the parents under a statute for the time being in force.[35] There are various statutes, in India, which give legislative recognition to these well established principles. Guardianship and Wards Act, 1890 consolidates and amends the law relating to guardians and wards. The Act defines "minor" as a person who has not attained the age of majority. "Guardian" means a person having the care of the person of a minor or of his property, or of both his person and property. "Ward" is defined as a minor for whose person or property or both, there is a guardian. Section 7, an important provision of the Act, deals with the power of the court to make order as to the guardianship.[36]

Hindu Minority and Guardianship Act, 1956 is another equally important statute relating to minority and guardianship among Hindus. Section 2 of the Act declares that the provisions of the Act shall be in addition to, and not in derogation of 1890 Act. Section 6, an extremely important provision, enacts as to who can be said to be a natural guardian. Section 26 of the Hindu Marriage Act provides for custody of children and declares that in any proceeding under the said Act, the court could make from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

Flouting court orders - a serious consideration

In *Gaurav Nagpal* v. *Sumedha Nagpal*,[37] a 20 months old child was abandoned by the respondent mother.[38] Thereafter, in the garb of seeking custody several rounds of litigation were unleashed. The district judge allowing the petition of the respondent granted her custody of the child. The high court, affirming the lower court's order observed that the father inculcated fear and apprehensions in the mind of the minor against the mother and thwarted court orders with impunity, "the appellant cannot wish away his role, in the minor harboring such an irrational fear towards the mother."[39] In

35 See 24 *Halsbury's Laws of England* 217 (4th edn.); 39 *American Jurisprudence* 34 (2nd edn.).

36 *Power of the court to make order as to guardianship*- (1) where the Court is satisfied that it is for the welfare of a minor that an order should be made –(a) appointing a guardian of his person, property, or both, or (b) declaring a person to be such a guardian, the Court may make an order accordingly. (2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court. (3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

37 AIR 2009 SC 557, *per* Dr. Arijit Pasayat and G.S. Singhvi JJ.

38 After a few days, however, she filed a *habeas corpus* petition before the High Court. The petition was dismissed for want of territorial jurisdiction. The respondent thereafter filed a special leave petition before the Supreme Court, as also a writ petition under article 32 of the Constitution. Both these petitions were dismissed by the Supreme Court directing the respondent to avail her remedy before the guardian court.

39 *Supra* note 38 at 561, para, 10.

an illuminating judgment, the Supreme Court speaking through Arijit Pasayat J , after having cited the English law and American law on the point referred to the legal position in India and invoking the 'well settled' principle in this regard, observed that 'in determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of the child'.[40] Referring to the statutory provision, it stated the word 'welfare' used in section 13 of the Hindu Minority and Guardianship Act has to be construed literally and must be taken in its widest sense. Along with the physical well being, the court emphasized, the moral and ethical welfare of the child must also be weighed by the court. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its *parens patriae* jurisdiction arising in such cases.[41] Taking a very serious view of the matter that the father has managed to keep custody of the child by flouting orders of the court, the apex court rejected the plea raised by the father that wrenching the child from his custody would lead to irreparable mental trauma as, according to the court 'father cannot be a beneficiary of his own wrongs',[42] and confirmed the custody of the child to the mother with visitation rights to the father.

Charge under section 498-A IPC- a relevant consideration

The Supreme Court in *Nil Rattan Kundu* v. *Abhijit Kundu*[43] had an occasion to examine as to what extent a complaint against the father of child alleging and attributing death of its mother and a case under section 498-A of IPC was a relevant consideration for granting custody of the child. A civil appeal was filed before the Supreme Court against the order passed by the lower court and confirmed by the High Court of Calcutta directing the custody of minor child to the respondent-father. The trial court held that the respondent was the father and natural guardian of the child and the present and future of the child (who at that time was more than six years old) would be better secured in the custody of the respondent.[44] The maternal grandparents of the child pleaded before the Supreme Court that the approach of the courts below was technical and legalistic. It was contended that in such matters, paramount consideration which is required to be borne in mind by the court is welfare of the child and nothing else.

The Supreme Court after citing the English law and American law on the point came to analyze the Indian law and having given anxious and thoughtful consideration to facts of the case and applying the well settled principle of "welfare of child" held that the 'orders of courts below were not in accordance with law'.[45] The court lamented that the approach of both the

40 *Id.* at 565, para 35.
41 *Id.* at 566 para 43.
42 *Ibid.*, para 44.
43 AIR 2009 SC (Supp) 732, *per* C.K. Thakker and D.K. Jain JJ.
44 *Id* at 734, para 8.
45 *Id.* at 741, para 56.

courts below was not in accordance with law and consistent with the view taken by it in several cases. It proceeded further to illustrate the erroneous view taken by the courts below by quoting their views that the appellants (maternal grand-parents) are giving 'all love and affection' to the child but, it does not mean that the child will not get similar love and affection from his father; and that the father has a right to get custody of the child and he has not invoked any disqualification provided by 1956 Act.[46]

According to the apex court, what the courts should emphasis is not the 'negative test' that the father is not 'unfit' or disqualified to have custody of his son/daughter but the 'positive test' that such custody would be in the welfare of the minor, before exercising the power to grant or refuse custody of minor to the father, mother or any other guardian.[47] The courts are duty-bound to consider the allegations against the respondent (father) and pendency of criminal case for an offence punishable under section 498-A IPC.[48] One of the matters which is required to be considered by a court of law is the 'character' of the proposed guardian.[49] In the instant case, a complaint against the father alleging and attributing death of mother and a case under section 498-A, IPC are indeed relevant factors and a court of law must address the said facts while deciding the custody of the minor in favour of such person.

Right of natural guardian -not absolute

Under the Guardians and Wards Act, the natural guardian of the child has the right to the custody of the child.[50] However, in a catena of cases, the

46 *Ibid.* para 58.

47 *Ibid.* para 62.

48 *Id.* at 742, para 72.

49 Guardian and Wards Act, 1890, section 17.- *Matters to be considered by the court in appointing guardian*- (1) In appointing or declaring the guardian of a minor, the court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. (2) In considering what will be for the welfare of the minor , the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of the deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference. *Ibid.*

50 Hindu Minority and Guardianship Act, 1956. Section 6.- *Natural Guardians of a Hindu Minor*- The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property) are- (a) in case of a boy or an unmarried 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; (b) in the case of an illegitimate boy or an illegitimate unmarried girl- the mother, and after her, the father. (c) in the case of a married girl- the husband; Provided that no person shall be entitled to act as the natural guardian of minor under the provisions of this section- (a) is he has ceased to be a Hindu, or (b) if he has completely and finally renounced the world becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation- In this section, the expression "father" and "mother" do not include a step-father and a step -mother.

courts have held that, this right is not absolute and they are expected to give paramount consideration to the welfare of the minor child. In *Smt. Anjali Kapoor* v. *Rajiv Baijal*,[51] the appellant-maternal grandmother was taking care of the child since her birth, as the child lost her mother right at the time of her birth. The respondent (father) filed an application under the Guardians and Wards Act before the family court, asserting, *inter alia*, that being the father of the child, he is the natural guardian of the minor girl and, therefore, entitled to the custody of the child. The appellant contested by saying that the respondent had not come to see his daughter even once when the child was in the intensive care unit in the hospital, the financial position of the respondent was not good and he had taken loans from several persons, therefore the custody of the child should not be given to him. The Family Court, Indore, observed, that it could not be concluded that the respondent although had borrowed money from several persons, would not be in a position to bring up his daughter and bear her educational expense. Therefore, *'giving priority to the welfare of the child'*, the custody was granted by the family court to the respondent.[52] On appeal, the Madhya Pradesh High Court confirming the family court decision held that there were no compelling reasons on the basis whereof the custody of the child should be denied to the respondent (father).

On further appeal to the Supreme Court, it observed that the appellant has taken proper care and attention in the upbringing of the child, which is one of the important factors to be considered for the welfare of the child.[53] The court opined that the respondent might not be in a position to give comfortable life to the child, in view of the fact that he had borrowed money from several persons.[54] The court also pointed out that the respondent did not appear before the court personally or through his counsel, which showed his lack of concern in the matter.[55] It further took notice of the fact that he had got remarried for the second time and had a child too, and the minor child might have to be in the care of step-mother, especially since the father being the businessman would be out of the house frequently on account of his business.[56] The court emphasized that the child had remained with the appellant for a long time and was growing up well in an atmosphere which was conducive to its growth. It might not be proper to transplant the child at this stage from the environment to which the child family was used to. Therefore, it allowed the appellant-maternal grandmother to retain the custody of the child.

51 AIR 2009 SC 2821, *per* Tarun Chatterjee and H.L. Dattu JJ.
52 *Id.* at 2822, para 5 (emphasis added).
53 *Id. at* 2824, para18 and 19.
54 *Ibid*., para 20.
55 *Ibid.*
56 *Ibid.*

Marriage of widower father not necessarily against the welfare of child

In a case before the Andhra Pradesh High Court,[57] the mother of a two year old child committed suicide, as she felt humiliated in a family function by her sister-in-law. After about a month, the child was taken away from the father by the maternal grandparents of the child. Under these circumstances, the respondent father approached the district judge seeking a direction against the appellants to return the custody of the minor child to him, pleading that he being the natural father was entitled to custody of the child. The district judge allowed the petition of the father granting him the custody of the child.

In appeal to the high court, the appellants argued that the father had married a second time within one year of the death of the mother of the child and it was a strong circumstance against the respondent. Mentioning the legal position on the point, the High Court observed that the natural father undoubtedly stands on a better position than the maternal grandfather, provided there are no circumstances which disqualify the father from such custody. The interest and welfare of the minor child being the paramount consideration, the economic condition of the father and the status in the society also needs to be assessed vis-à-vis the maternal grandfather. The court emphasized that in a matter of this nature where the grandfather is seeking preferential custodial right over the natural father's claim for custody of minor child, it is essential for the grandfather to plead and establish that the natural father was unfit or was otherwise disqualified from being given the custody of the child.[58] On the analysis of the evidence, the High Court concluded that the respondent-father was highly educated and was in a comfortable financial position. He and his second wife had deposed before the court that, in order to look after the minor child, they had mutually agreed not to beget any child and for this purpose the second wife had *voluntarily undergone the tubectomy operation.*[59] The court aptly highlighted, that a sacrifice of this nature could not be ignored. The court found total lack of any allegation much less of any evidence on the part of appellants showing the respondent was in any manner unfit or disqualified from having the custody of the minor child[60] and confirmed the custody to the father.

VI FAMILY COURTS

The Family Courts Act, 1984 was enacted for adopting a human approach to the settlement of family disputes and achieving socially desirable results. Its preamble mentions that the Act was enacted by the Parliament to provide

57 *K. Venkat Reddy* v *Chinnapareddy Viswananda Reddy*, AIR 2009 AP 1, *per* A. Gopal Reddy J.
58 *Id.* at 4, paras 10 and 11.
59 *Id.* at 6, para 19 (*Emphasis added*).
60 *Ibid.*

for the settlement of family courts with a view to promote conciliation in, and secure, speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. The jurisdiction of family courts covers the entire jurisdiction exercisable by any district court or any subordinate civil court in respect of suits and proceedings of the nature mentioned in the explanation to section 7 (1) of the Act.[61] A family court for the purpose of exercising such jurisdiction is deemed to be a district court or such subordinate civil court for the area covering the jurisdiction of the family court.

Declaration of validity of marriage after death of spouse

In the light of explanation to section 7 of the Act the questions arise: whether a family court has jurisdiction to deal with disputes other than disputes arising between husband and wife? A division bench of the Kerala High Court in *Sayamala Devi* v. *Sarala Devi*,[62] had an occasion to consider a similar issue as to whether a petition for a declaration that the first respondent was the legally wedded wife and the second respondent was the son of the deceased Bhaskara Pillai could fall within the ambit of the nature of the dispute referred to in section 7 (1) (b) of the Family Courts Act. Bhaskara Pillai retired from the services and died on 5.9.2005. The petitioner who claimed to be his legally wedded wife contended that then marriage was solemnized after dissolving the marriage between the first respondent and the deceased. Since after the retirement of Bhaskara Pillai, the petitioner was receiving the family pension as nominee, necessarily the first respondent had to seek a declaration regarding her marital status with that of Bhaskra Pillai before proceeding to seek other incidental reliefs like pension, etc.

The division bench, after quoting section 7 of the Family Courts Act, stated that on a plain reading of the provision, it can be seen that the family court has jurisdiction exercisable by any district court or subordinate civil court under any law for the time being in respect of suits and other proceedings of the nature referred to in explanation (a) to (g).[63] Commenting on the nature of various clauses of the explanation to section 7, it is rightly observed that "some of the proceedings are in the nature of dispute between the spouses and some of them are in the nature of disputes relating to the

61 The suits and proceedings referred to in this sub-section are suits an proceedings of the following nature namely- (a) suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void, as the case may be, annulling the marriage) or restitution of conjugal rights, or judicial separation or dissolution of marriage; (b) a suit or proceeding for a declaration as to the validity of a marriage or as thereto the matrimonial status of any person; (c) a suit or proceeding between the parties to a marriage with respect to the property to the parties or of either of them; (d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship; (e) a suit or proceeding for a declaration as to the legitimacy of any person; (f) a suit or proceeding for maintenance; (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to any person.

62 AIR 2009 Ker 138, *per* R.R. Raman and C.T. Ravi Kumar JJ.

63 *Id.* at 140, para 5.

property of either of them or both, as the case may be."[64] Thereafter the court analyzed all clauses of the explanation to section 7 (1) and proceeded to state that clause (a) refers to the nature of the proceeding between the parties to a marriage and the relief is for a decree of nullity of marriage, or restitution of conjugal rights etc. as the case may be. This is a proceeding between the spouses. Clause (b) is in the nature of a proceeding relating to declaration as to the nullity of marriage or the matrimonial status of a person. However, the court clarified that, unlike clause (a), it does not say that such suit or proceeding should be between the parties to the marriage. In other words clause (b) is widely couched to "include the proceedings of the nature referred to regarding declaration of the validity of the marriage or it could be for a declaration of the matrimonial status of any person."[65] Therefore, the court ruled that, if a person claims himself to be the wife or the husband of another, a declaration could be sought for that she is the legally wedded wife or he is the legally wedded husband of the other. It need not necessarily be between the parties and *even after the death of either of them*, such question may arise and in case any necessity of giving such declaration arises, it is possible to comprehend such disputes as falling under section 7 explanation (b) of the Act.[66]

The court substantiated its ruling on clause (b) by further stating that clause (d) refers to a suit or proceeding for an order of injunction in the circumstances arising out of the marital relationship. Therefore, clause (d) will be attracted if the dispute arises out of marital relationship and need not necessarily be between the spouses. Commenting on clause (e), which refers to a suit or proceeding for a declaration as to the legitimacy of any person, it said that it may be possible, for a child born in the wedlock between A and B to claim that he/she is the legitimate child born in the wedlock between the two persons. It may be incidentally pointed out, that proceeding under clause (g) which refers to suit or proceeding related to guardianship of the person or custody of or any access to any minor could certainly take even in a proceeding not necessarily between the spouses.[67] If in a particular case, after the death of one of the spouses, a dispute arose as to the guardianship and if the child is in the custody of the grandparents of either of them, the question may arise as to who is to be the person to be the custodian of the child. There again, it need not necessarily be between the parties to the marriage, but it may be between even third parties who may have a better claim for custody of the minor children having due regard to the relationship they have with the child and for other good reasons relevant for consideration.[68] The court, thus concluded that, since the relief sought for

64 *Ibid.*
65 *Ibid*.
66 *Ibid.* (*Emphasis added*).
67 *Id.* at 140-141, para 6
68 *Id.* at 141, para 6.

is for a declaration as to the status of the first petitioner as the legally wedded wife and the second petitioner as the child born in the wedlock between the first petitioner and the deceased, there may not be any doubt that it will squarely fall under section 7 (b) of the Act.

Proceedings for maintenance

The issue as mentioned in the above case, relating to jurisdiction of family courts, also came up for consideration before the Guahati High Court in *Srimati Nishamoni Kalita* v. *Srimati Sarada Kalita*.[69] The petitioners instituted the suit in a civil court seeking partition of the properties left behind by the deceased father-in-law, as well as filed an application for maintenance, under section 19 of the Hindu Adoptions and Maintenance Act, 1956. The civil judge rejected the petition on the ground that the application in question could be adjudicated upon by the family court, and not by the civil court.

This order was challenged in a revision petition before the Guahati High Court under article 227 of the Constitution. The counsel for the petitioners submitted that the family court deals with the disputes between a man and a woman, who claim to be husband and wife and consequently, it could not deal with a dispute which did not arise between a husband and wife. The single judge framed the following questions for consideration- (i) Whether a family court constituted under the Act of 1984 had no jurisdiction to deal with any dispute other than matrimonial disputes or disputes arising between husband and wife? (ii) If a family court was already established at a given place, whether an ordinary civil court could grant maintenance on the basis of an application, made under section 19 of the Act of 1956, in a suit instituted by a widow claiming partition of the property left behind by her father-in-law? (iii) Whether a civil court other than a family court had the jurisdiction to entertain an application under section 19 of 1956 Act, when a family court was established under section 3 of the Act of 1984 for a given area? The judge rightfully held that the family court is empowered to decide not only disputes which may arise in a family consisting of husband and wife but also those which may arise besides the husband and wife.[70]

After citing section 7 of the Act, the court pointed out that a critical analysis of the relevant provisions contained in the Family Courts Act, made it amply clear that when a family court was established under section 3, no suit or proceeding for maintenance could be entertained by any district court or as the case might be, by any other subordinate civil court in relation to the area, which falls within its territorial jurisdiction. Viewed thus, it was clear that the family court at Guahati had the exclusive jurisdiction to deal with, amongst other, suits or proceedings for maintenance under *section 125 of the Code of Criminal Procedure* and neither the district court nor any

69 AIR 2009 Gua 62, *per* I.A. Ansari J.
70 *Id. at* 64, para 6.

subordinate civil court had the jurisdiction to adjudicate upon a suit or proceeding for maintenance.[71]

Declaration of illegitimacy of a child

Does the prayer for declaration of illegitimacy of a child born during the subsistence of a valid marriage fall within the sweep of explanation (e) to section 7 (1) of the Family Courts Act? This issue came up before a division bench of the Kerala High Court in *Laila* v. *Muhammedali*.[72] The marriage of first appellant with the respondent took place on 24.6.1985. A daughter was born on 13.7.1994. The marital tie was dissolved on 17.8.1995. Around five years therefore, the respondent husband alleged that he came to know that his name had been entered in the records of the local authority as the father of the child. He requested the local authority to reverse the entry regarding paternity in the records. On refusal to do so, he filed an application in the family court for a declaration that the child was not a legitimate child born to him in his relationship with the first appellant, the reason being that he was working abroad and had come back to India only on 17.12.1993 and the date of birth of the child was 13.7.1994, the gap being only of 209 days.

The counsel for the appellants contended that what was sought to be declared, in the instant case, was not the legitimacy of the 2nd respondent, but her illegitimacy, whereas the proceedings for declaration as to legitimacy of any person alone can be taken cognizance of by the family court under explanation (e) to section 7 (1) of the Act. The counsel for the respondent on the contrary, contended that the expression "declaration as to the legitimacy of any person" must necessarily include a declaration as to the illegitimacy of such person also.

The counsel for the appellants relied on para 6 of the judgment of the Supreme Court in *Renubala Moharana* v. *Mina Mohanty*,[73] wherein it had made the following observations: "The question of status of the child in relation to the parties to the petition can be incidentally gone into by the Family Court. However… the declaratory relief as regards the illegitimacy of the child cannot be granted. In effect, that is what the applicants want under prayer…."[74] Counsel for the respondent submitted that the Supreme Court in that case was concerned with the question as to whether declaration as to legitimacy of any person without any claim of marital relationship was entertainable by the family court.[75] Thus, he vehemently argued that the issue whether a child born in the matrimonial relationship between the spouses

71 *Id*. at 65, para 8. (*Emphasis added*). It may be noted that in this case application for maintenance was not filed under section 125 Cr PC, but it was filed under section 19 of the Hindu Adoptions and Maintenance Act. This casual approach of the judge in citing the relevant provisions of law is regrettable.

72 AIR 2009 Ker. 173, *per* R. Basant and Mrs. M.C. Hari Rani JJ.

73 AIR 2004 SC 3500.

74 As quoted in s*upra* note 73 at 175, para 14.

75 *Id.* at 176, para 15.

was legitimate or illegitimate would be maintainable under section 7(1)(e) of the Family Courts Act.

The High Court, distinguishing *Renubala*, aptly observed that "dispute between the parties about the legitimacy/illegitimacy of a child born admittedly during the subsistence of the marital tie is a dispute which can be taken cognizance of and adjudicated under Section 7(1)(e) of the Family Courts Act. A declaration of not only legitimacy but also illegitimacy of a child born to mother can be granted under section 7(1)(e) provided disputants have a claim to be legally wedded and the fact that they are legally married is admitted and proved."[76]

Maintainability of suit for divorce under Hindu Marriage Act, with respect to marriage registered under Foreign Marriage Act

In a case before the Bombay High Court,[77] the marriage between the petitioner and the respondent had been solemnized and registered under the Foreign Marriage Act, 1969. The husband filed a petition for divorce under section 13 of the Hindu Marriage Act before the family court which it entertained. In the revision petition before the high court, the single judge, rightly held, that the family court ought to have rejected the petition. Section 7 of the Family Courts Act, provides that it can exercise such jurisdiction as is exercised by the district court or any subordinate civil court under any law in respect of suits and proceedings. Therefore, the court said, the family court was bound to follow order 7 rule 11 and reject the petition, it having been filed under the Hindu Marriage Act. Once a marriage is registered under the Foreign Marriage Act, the court ruled that, the parties cannot contend that they are governed by any other Act than the Foreign Marriage Act. The court mentioned section 18 of the Foreign Marriage Act which provides that the Special Marriage Act, 1954 will apply in relation to marriages solemnized under the Foreign Marriage Act. Thus, relief was rightfully denied under the Hindu Marriage Act.[78]

Adoption outside purview of Act

'The Family Court has no jurisdiction to deal with the matters pertaining to the provisions under the Hindu Adoptions and Maintenance Act.' This ruling has been given by a single judge of the Madras High Court in *Udhayabhanu* v. *Ranganayaki*.[79] A civil revision petition was filed in the High Court to set aside the order of the family court providing relief of regularization of adoption, pleaded in the petition. The bottom-line contention was that the family court was not competent to deal with the issue of adoption. The single judge observed that in order to find out whether the family court had jurisdiction to deal with the affairs relating to adoption, section 7 of the Act had to be looked into. Scrutinizing section 7, he stated

76 *Id.* at 178, para 20.
77 *Minoti Anand* v. *Subhash Anand,* AIR 2009 Bom 65, *per* Smt. Nishita Mhatre J
78 *Id.* at 68, para 12.
79 AIR 2009 Madras 91, *per* S.Palanivelu J.

that, the family court should have the jurisdiction to decide the matter enlisted under the explanation to section 7. All of the above said categories, the court noted, are relatable to matrimonial affairs and apart from these, it will have no jurisdiction.

The areas covered by explanation to section 7, court examined, does not provide for dealing with matter of adoption. In case, if a family court is conferred with any other jurisdiction by the authority concerned under section 7 (2) (b) of the Act, then it may deal with that subject for which it was duly conferred with powers. But, there is nothing to show that it has been conferred with powers to take up the matter concerning adoption.[80] Commenting on the policy for the enactment of the Family Court Act, it observed that the primary object of establishing family court is to bring about cordial and amicable settlement in respect of matrimonial disputes. Those should be adjudicated in a congenial atmosphere in a court specially constituted for the purpose. Analyzing various clauses of the explanation to sub-section 1 of section 7, it noted that while the provisions of the Act are for the purpose of settling the issues with regard to guardianship of a person or to the legitimacy of any person there is no such mention as regards adoption. In short, the court concluded that "the concept of adoption could not be brought within the purview of the Act."[81]

Period of limitation

The period of limitation prescribed for instituting a suit or preferring an appeal or for making an application is governed by the provisions of the Limitation Act, 1963, which is of a general nature. Section 3 of the Act provides that every suit instituted, appeal preferred and an application made after the prescribed period of limitation shall be dismissed. However, by virtue of section 29, sub-clause (2) of the Act whereunder special or local Act, any different period of limitation is prescribed other than mentioned in the schedule attached to the Limitation Act, the same shall prevail over the Act. In other words, in view of section 29 (2) of the Limitation Act, the period of limitation provided in the special or the local act would take precedence over the period of limitation prescribed in the schedule of the Limitation Act. Special law is a law which is enacted for special cases, in special circumstances in contradiction to the general rules of law. For that matter, the Hindu Marriage Act, is a special law as it has been enacted to deal with the special cases in relation to matrimonial disputes amongst the Hindus and with the procedure of settlement of such disputes. Initially under section 28 (4) of the Hindu Marriage Act, the period of limitation for an appeal against the decree passed under the said Act was only 30 days. Subsequently, the period of limitation provided therein was increased to 90 days.[82]

80 *Id.* at 93, para 7.

81 *Ibid.* Reference was made to the Karnataka High Court Judgement *in the matter of Canara Bank Relief and Welfare Society*, AIR 1991 Kant 6.

82 w.e.f. 23.12.2003 vide Act No. 50 of 2003.

To ensure speedy disposal of family disputes, the Family Courts Act was enacted in 1984, and enforced, providing for the procedure of settlement of such disputes. However, the substantive part of the Hindu Marriage Act remained untouched. Thus, with the enforcement of the Family Courts Act, another special law came into existence dealing with the procedural aspects of settling family disputes. In districts, where Family courts were established, the jurisdiction of civil court to try such family disputes stood transferred to the family courts. Thus, two parallel systems have come into existence providing for the procedure for regulating such disputes i.e. one under the Hindu Marriage Act and the other under the Family Courts Act. Where family courts have not been established, the procedure as provided under the Hindu Marriage Act continues to operate and the appeals are to be preferred in accordance with the procedure thereto. At the same time, where family courts have been established, the procedure prescribed under the Family Courts Act is to be adopted and so also the method of appeal laid down therein. The period of limitation for filing appeal under the Family Courts Act is 30 days from the date of the judgment or order of a family court.[83]

At times courts are called upon to decide which of the two Acts viz. Hindu Marriage Act and Family Courts Act will regulate the period of limitation. In *Ashutosh Kumar* v. *Anjali Srivastava*,[84] the husband had initiated proceedings under section 13 of the Hindu Marriage Act. The order of the family court was appealed against before the High Court. The crucial issue before the division bench of the Allahabad High Court was whether the appeal was barred by the period of limitation, as the same had been filed beyond the period of 30 days from the order of the family court. In other words, the court had to decide whether the limitation period for preferring an appeal against the order of family court would be as prescribed under the Family Courts Act or the Hindu Marriage Act. The appellant submitted that the appeal was under section 28 of the Hindu Marriage Act read with section 9 of the Act. As the limitation for preferring an appeal under section 28 of the Hindu Marriage Act is 90 days and that being the special Act, the appellant argued, the limitation provided therein would prevail over the one

83 The Family Courts Act, 1984, Section 19,- *Appeals*- (1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 or in the Code of Criminal Procedure, 1973 or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and law. ….. (3) every appeal under this Section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court. (4) The High Court may of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under chapter IX of the Code of Criminal Procedure 1973 for the purpose satisfying itself as to the correctness, legality or propriety of the order, not being in interlocutory order, and , as to the regularity of such proceeding (5) except as aforesaid, no appeal or revision shall lie to any Court from any judgment, order or decree of a Family court. (6) An appeal preferred under sub section (1) shall be heard by a Bench consisting of two or more judges.

84 AIR 2009 All. 100, *per* S.K. Singh and Pankaj Mithal JJ.

which has been prescribed under the Family Courts Act.

The court noted that in the instant case, the order appealed against was that of the family court and, therefore, it was essentially one under section 19 of the Family Courts Act and could not be treated to be under section 28 of the Hindu Marriage Act.[85] Moreover, under section 28 of the latter Act, all appeals against the decrees made by the court under the said Act would lie to the court to which appeals ordinarily lie from the decision of the court given in exercise of its original civil jurisdiction. Therefore, it held that, this appeal could not be an appeal under section 28 of the Hindu Marriage Act, but an appeal strictly within the ambit of section 19 of the Family Courts Act.

Besides, "as there is inconsistency between the periods of limitation provided in the two Acts, the limitation provided under the Family Courts Act would prevail over the one which has been provided under the Hindu Marriage Act for the simple reason that the Family Courts Act is in the form of super legislation vis-à-vis the Hindu Marriage Act."[86] Taking support from section 20 of the Family Courts Act, the court pointed out that, insofar as the procedure for settling family/matrimonial disputes was concerned, the said section specifically provides that in the event of inconsistency between the provisions of that Act or any other law for the time being in force, the provisions of the Family Courts Act shall prevail.[87] Accordingly, the court concluded that where the family courts have been established and a judgment and order is passed by it, the appeal against such judgment and order would be one under section 19 of the Family Courts Act and not under section 28 of the Hindu Marriage Act.[88]

Appeal against order of family court to be treated as miscellaneous appeal

Another legal issue with respect to section 19 of the Family Courts Act is whether the appeals preferred against the judgment and order of a family court should be treated and recorded as first appeal or as miscellaneous appeal. The full bench of the Patna High Court had an occasion to consider this question of law in *Sunita Kumari* v. *Prem Kumar*,[89] The reference to the full bench was necessitated on account of two conflicting division bench judgments of the same court. In *Raj Kumar Saha* v. *Ritu Kala Saha*,[90] appeal preferred under section 19 of the Family Courts Act was labeled as first appeal as it was held to be in the form of a decree. In *Binod Thakur* v. *State of Bihar*[91] it was held that such appeal should not be treated as first appeal but as miscellaneous appeal.

85 *Id* at 101, para 8.
86 *Ibid.*
87 *Id*, at 102, para 8.
88 *Ibid*, para 9; see also *C. Govindaraj* v. *Smt. Padmini*, AIR 2009 Kant. 108, *per* S.R. Bannurmath and A.N. Venugopala Gowda JJ
89 AIR 2009 Patna 183 (FB), *per* Shiva Kirti Singh A.C.J., V.N. Sinha and Smt. Anjana Prakash JJ.
90 2008(2) PLJR, 211, *Ibid*. 2008(2) PLJR, 211, *Ibid* .184, para 3.
91 2008 (4) PLJR 545, *Ibid.*

The full bench, overruling *Saha* and approving *Thakur,* ruled that "appeals under Section 19 of the Act cannot be treated as appeals against a decree having been made in exercise of original civil jurisdiction"[92] and, therefore, such appeal under section 19 lie before the High Court as miscellaneous appeal and not as first appeal. The court noted that the word decree is conspicuous by its absence in section 19 (1) and the *non -obstante* clause therein clearly shows that the distinction made in the CPC between appeals from original decrees and those from orders have been done away with.[93] As a result, the provision for appeal under section 19 of the Act is meant to take care of all kinds of judgments and orders of family courts, not being interlocutory in nature, regardless of the fact whether such judgments and orders amount to a decree as defined under the CPC or not. The instances of various kinds of orders, from which appeals lie under section 104 of the Code indicate that many of such orders though made appealable do not amount to a decree as defined under section 2 (2) of the Code.[94] The provisions under section 19 of the Act, have a wider ambit so as to cover all kinds of judgments and orders made appealable by the express provisions of that section and not decrees as defined under the CPC. These appeals and similar other pending appeals, therefore, have to be treated as miscellaneous appeals and not first appeals.[95]

VII SUCCESSION

Gift by co-sharer in joint family property

Hindu Succession Act, 1956 provides that the property of a male Hindu dying *intestate* shall devolve according to the provisions of the Act, firstly upon the heirs being the relatives specified in class-I of the schedule and thereafter upon two other classes mentioned therein.[96] It further provides that where a male Hindu dies after the commencement of this Act, having at the time of his death an interest in *mitakshara* coparcenary property, his interest in the property shall devolve by survivorship upon surviving members of the coparcenary in accordance with this provision, but the said Act has been made subject to a proviso that if the deceased had left him surviving a female relative specified in class I of the schedule, then the interest of the deceased in the *mitakshara* coparcenary property shall devolve as per the provisions of the Act and not by survivorship.[97] Majority of the heirs in class I are females; the prominent among which are widow, daughter, and mother of the deceased.

92 *Supra* 88 at 187, para 15.
93 *Id.* at 186, para 12.
94 *Id*. at 187,para 12.
95 *Ibid*., para 15.
96 Hindu Succession Act, 1956, s. 8.
97 *Id*. s. 6, original version.

Section 19 of the Act specifically states that the heirs under the Act succeed to the property of an *intestate* as tenant-in-common and not as joint tenants. Despite this clear provision, an unsuccessful argument was put forth before the Patna High Court that heirs under class I are coparceners and, therefore, could not make a valid gift. In *Radhika Devi* v. *Rajesh Kumar Niranjan*,[98] after the death of the deceased in 1959, his widow and three daughters, being class I heirs, inherited the suit properties. The widow made a gift of her share to her two grandsons through one of the daughters. The validity of the gift was challenged by the appellant arguing that a coparcener under *mitakshara* law had no right to dispose of his share unless he was the sole surviving coparcener hence, it was contended that, according to Hindu law, the widow or any co-sharer was prohibited from disposing of his/her *undivided interest* in the property by gift. Therefore, the deed of gift could not be held to be valid document conferring any title upon donees.

The single judge very correctly ruled that "after the death of Ram Charan Pandit in the year 1959 his widow and three daughters did not become co-parceners, rather they can be legally deemed to be co-sharers in the joint family property"[99] and hence the widow was fully entitled to execute the deed of gift in favour of her grandsons with respect to her share.

Scope of 2005 Amendment to Hindu Succession Act

The Gujarat High Court had an occasion to consider the scope of 2005 Amendment to Hindu Succession Act, 1956 in *Virlkumar Natvarlal* v. *Kapilaben Manilal Jivanbhai*.[100] One Manilal Jivanbhai got property by way of partition from his father in 1959. Manilal had two sons and two daughters. He gave some property, out of this, to his two sons for maintenance and livelihood. In March 2004, the sons sold the property to appellant-Virlkumar Natvarlal. The respondent-Kapilaben Manilal filed a suit for a declaration and permanent injunction and for cancellation of the sale deed in favour of the appellant. She averred in the plaint that her brothers had no right to transfer the suit property as they were not the absolute owners and as per 2005 Amendment to section 6 of Hindu Succession Act,[101] she being the daughter had a share in the ancestral property and, therefore, any transaction against

98 AIR 2009 Pat. 109, *per* S.N. Hussain J.

99 *Id.* at 114, para 20.

100 AIR 2009 Guj 84, *per* M.R. Shah J.

101 Section 6 of Hindu Succession Act, 1956 as amended by the Act of 2005 reads as Devolution of Interest in coparcenary property-(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a joint family governed by the Mitakshara Law, the daughter or a coparcener shall- (a) by birth become a coparcener in her own right in the same manner as the son; 9b) have the same rights in the coparcenary property as she would have had she been a son; (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcenary shall be deemed to include a reference to a daughter of a coparcener; Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December 2004. …..

the interest of the plaintiff is null and void. The Trial Court held that the plaintiff had share in the ancestral property and sale in favour of the defendant no. 5 was against the interest of the plaintiff and without her consent.

The High Court, on appeal, however, quashed and set aside the order passed by the lower court. After citing section 6 as amended by 2005 Amendment, it observed that, on a fair reading of amended section any disposition or alienation of ancestral property which had taken place before 20.12.2004 shall not affect or invalidate such disposition. "Therefore *prima facie*, it appears that the sale deed dated 3.3.2004 cannot be declared invalid in view of the Proviso to Section 6 of the Hindu Succession."[102] Taking support from another fact, it held that, even otherwise there was a relinquishment deed executed by daughters relinquishing their right from land in question. The said relinquishment deed was also signed by the husband of the plaintiff. This relinquishment deed was executed simultaneously on the consent terms being arrived at between the father and sons on the basis of which consent decree came to be passed. Since, under the circumstances, there was no question of doubting the relinquishment deed, the High Court ruled that the trial court had materially erred in granting injunction in favour of the plaintiff daughter restraining defendant from transferring the property.

Property of a female Hindu

Under classical Hindu law, separate rules existed for the devolution of a woman's property. A female Hindu possessed two kinds of property, namely, (a) *Stridhan*, and (b) women's property. Over s*tridhan* she had full rights of ownership and on her death it devolved on her own legal heirs. So far as the property which she acquired as women's estate is concerned, her position was that of a limited owner and her power of alienation was limited. On her death, such property devolved not on her own heirs, but upon the heirs of the last full owner. This concept, however, was abolished by section 14 of the Hindu Succession Act,[103] which conferred on the Hindu female absolute ownership over her property howsoever acquired by her. In a number

102 *Supra* note 99 at 189, para 13.

103 Hindu Succession Act, Section 14.- *Property of a Female Hindu to be her absolute property* (1) 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. Explanation: In this sub-section, 'property' include both movable and immovable property acquired by a female Hindu by inheritance or devise, or at 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 s*tridhana* immediately before the commencement of this Act. (2) 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 by 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."

of cases courts, have been called upon to decide as to whether it is sub-section (1) or sub-section (2) of section 14 of the Act which would govern the particular case. One of such recent case is from the original jurisdiction of the Orissa High Court[104] in connection with the Consolidation Act.[105] One Suryamani was the widow of Purna Chandra, who pre-deceased his father Jadumani and grandfather Chakradhara. Admittedly, there was no partition of the joint family properties belonging to Chakradara by metes and bounds between his two sons Jadumani and Kasinath. Suryamani was the only survivor so far as Jadumani's branch was concerned, whereas Khirodini, the present petitioner no. 1, her late husband Lalsaheb and others, belong to the branch of Kasinath. There was no dispute on the matter that by a registered deed of settlement dated 3.11.1951, the disputed properties were allotted to Suryamani in lieu of maintenance. According to the terms and conditions of the deed of settlement, she was to enjoy the property during her life time for her subsistence, but she was prevented to alienate the same by way of sale, gift etc. She remained in possession of the said lands till the enactment of the Hindu Succession Act, 1956.

Under these circumstances, the main issue to be determined by the Orissa High Court was as to whether sub-section (1) or sub-section (2) of section 14 of the Act would be applicable to the present case. Citing the statutory text of section 14 and referring to the case law, the single judge pointed out that "divergent opinions prevailing with regard to right of a Hindu widow *vis-à-vis* the properties possessed by her towards maintenance was set at rest in the case of *Tulsamma* v. *Sesha Reddi"*[106] The court correctly emphasized that "the principle enunciated in the aforesaid decision has been reiterated in a number of decisions later, but has never been departed from."[107] Reiterating the law, the court observed that a cumulative reading of all the decisions leads to an irreparable conclusion that the provisions of sub-section (2) of section 14 shall apply only where the properties are acquired by a female Hindu for the first time as a grant without any pre-existing right under a gift, will, instrument, decree, order or award, the terms of which prescribe restricted estate in the property, whereas in consonance with sub-section (1) of section 14, any property given to a female Hindu in lieu of her maintenance before commencement of Hindu Succession Act would become her absolute property on the commencement of the Act provided the said property was possessed by her.[108]

Coming to the case in hand, it is noted that, after the death of the husband, the surviving heirs settled certain lands in favour of Suryamani towards her maintenance by registered settlement deed executed in the year

104 *Khirodini Mohapatra* v. *State of Orissa*, AIR 2009 Ori., 176, *per* A.S. Naidu J
105 Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972.
106 AIR 1977 SC 1944, *supra* note 103 at 179, para 10.
107 *Supra* note 103 at 180, para 11.
108 *Ibid*., para 14.

1951.She was in possession of the said lands and was maintaining herself out of the usufructs. Thus, she became the absolute owner thereof after the commencement of the 1956 Act in consonance with the provisions of sub-section (1) of section 14.[109]

VIII CONCLUSION

Though, in the area of "Family Law and Succession", the year 2009 has not witnessed any path-breaking judgment, yet some "innovative arguments" have rightly been rejected by the courts, holding that, a marriage between a Hindu and Christian, *under the definite scheme of Hindu Marriage Act*, is a nullity;[110] in order to prosecute a person under section 304-B IPC, agreement for dowry need not be proved;[111] heirs under the Hindu Succession Act became the co-sharers and not the coparceners in the joint family property;[112] declaration of illegitimacy of a child fell within the scope of section 7 (1) (e) dealing with the declaration as to the legitimacy of any person.[113]

The controversy regarding waiving of statutory waiting period of six months under section 13-B (2), Hindu Marriage Act, has been thoughtfully reflected, by the division bench of the Bombay High Court, ruling that the period specified by the legislature is a pre-requisite to filing and grant of a decree for divorce on mutual consent.[114] The 'passing judgment' in *Vishnu Dutt* case has not been delivered in the context of the relevant provision of law. The court discussed the ground of breakdown of marriage in the light of sub-section (1) of section 13 and had not at all mentioned section 13 (1 A) of Hindu Marriage Act, which incorporates and regulates the theory of irretrievable breakdown of marriage under Hindu law.[115] A complex issue relating to the difference between the (1) concept of option of puberty and (2) 'repudiation of marriage' as a ground of divorce under the Dissolution of Muslim Marriage Act has been, warily considered by the Rajasthan High Court.[116]

Majority of the cases relating to the custody of child had been between the parent and maternal grand-parents rather than between the parents of child. Though in such cases, the courts have reiterated the well settled principle of the "welfare of child," however, the application of this principle does not seem to be simple. *Gaurav Nagpal* is a classic case on the point.[117]

109 *Ibid*., para 15.
110 S*upra* note 1. (emphasis added).
111 S*upra* note 29.
112 S*upra* note 97.
113 S*upra* note 73.
114 Supra note 4.
115 S*upra* note 11.
116 S*upra* note 19.
117 S*upra* note 38.

In *Gaurav Nagpal* case, the appellant-father was not allowed to retain the custody of the child who was living with him for more than six years, mainly on the ground that the father had disobeyed the court's order with respect to visitation rights. The message is loud and clear- don't dare to violate the court's order. And that is commendable. However, when the matter was brought before the High Court, it unnecessarily and in a very unsatisfactory manner, observed that the child was tutored against the mother, and, therefore, it is not in the welfare of child to stay with the father. It is worth mentioning, that there was nothing on record to show on what basis the above finding had been made by the High Court. Had the child not been tutored by the appellant-father, could the decision of the court had been different? No. It was rightly observed by the Supreme Court that "simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him."[118]

118 *Id.* at 565, para 40.