16

HINDU LAW

*Poonam Pradhan Saxena**

I INTRODUCTION

IMPORTANT JUDICIAL pronouncements in the area of Hindu law of adoption, marriage and matrimonial remedies, minority and guardianship, classical law of Hindu joint family and Hindu Succession Act, 1956, have been briefly analysed in the present survey.

II ADOPTION AND MAINTENANCE

Adoption by a Hindu female

The Hindu Adoption and Maintenance Act, 1956, while systematizing and extensively modifying the classical adoption law has switched its primary purpose from purely religious/spiritual to secular. Thus prior to 1956, amongst females the capability to adopt a son vested in a Hindu widow but conditional upon the permissibility of the same coming from the deceased husband or his *sapindas.*[1] Post-1956, this qualified power was liberalized and she acquired competence to adopt a child in her own right. However, due to operation of the doctrine of relation back, the confusion persisted about the date of legal entry of the adopted child in the new family: Whether the child would be deemed to be born in the new family from the date of adoption or due to operation of the doctrine of relation back would be treated as in existence on the date of the death of the adoptive father, even though he in reality might not have been born. The issue arose[2] this year in connection with the family pension to be awarded to the next of kin of a freedom fighter, who died in 1952 leaving behind his widow and a daughter. The family pension as per rules was sanctioned to his widow that she received till her death in 1998. A little before her death, *i.e.* on 28.10.1997, she allegedly adopted a seven year old son of her own daughter through a registered adoption deed. This child, after her death, applied for the grant of family pension, which according to the rules could be granted to the widow of the freedom fighter and then to the minor son. This application was

* Professor, Faculty of Law, University of Delhi, Delhi.

1 See *Siddalingaiah* v. *H K Kariappa,* AIR 2009 (NOC) 888 Karn., wherein it was held that the consent of the *sapindas* was no longer required under the changed circumstances.

2 *Abhishek Sharma* v. *State of U.P.,* AIR 2009 All 77.

forwarded to the concerned authorities and the district magistrate in 2008 rejected the same on two grounds, *firstly*, that a Hindu woman cannot adopt the son of her own daughter, so the adoption in itself was invalid, and *secondly*, that this child born 45 years after the death of the freedom fighter was neither his son nor was entitled to any benefit due to the family of the freedom fighters by way of pension grants.

The court was confronted with three primary issues:

i) Can a person validly take her daughter's son in adoption?
ii) Was the adoption made by the widow valid? and
iii) What is the effective date of adoption in the light of legal fiction of the doctrine of relation back? Is it the date of adoption in the adoptive family or is it the date of death of the husband of the widow, more so where death was much prior to the date of adoption?

With respect to first and second issues, the court noted that the *shastric* Hindu law prohibited adoption of son of the sister, daughter or mother's sister. Only such son could be adopted who could have been begotten by the adopter through *Niyoga*, and no child could be adopted whose mother in her maiden state, the adopter could not have legally married. This invalidation of adoption on account of *viruddh sambandh* as also the impediment on the capacity of females to take a child in adoption was removed by the Act explicitly and presently such a child can validly be taken in adoption. On the third issue, the court held that in the instant case the legal fiction of doctrine of relation back would not be applicable, as the child was adopted 45 years after the death of the husband. The court observed:[3]

> There is specific change in the scheme of the Act as reflected in section 12. The adopted child is deemed to be the child of his adoptive father or mother with effect from the date of adoption. Earlier *shastric* law treated adoption as adoption even if the adoptive father died earlier. However the apex court in *Namdev Vyankat* v. *Chandrakant*,[4] with respect to the consequences of adoption held "it is plain and clear that an adopted child shall be deemed to be the child of his or her adopted father or mother for all purposes with effect from the date of adoption as is evident from the main part of section 12. The proviso of the same section in clear terms states that the adopted child shall not divest any person of any estate, which vested in him or her before adoption. The adopted child therefore is not to be treated as far as the date of inclusion in the adoptive family

3 *Id.* at 83.
4 AIR 2003 SC 1735.

> is concerned as the natural born child but he is deemed to be born in the adoptive family from the date of the adoption only.[5]

The present court chose not to pass any opinion on the exact date from which the adoption became effective but concentrated on the issue of the entitlement of the adopted son to the *swantratata sangram* family pension. The primary object of the pension was to take care of the widow and the minor children of the deceased but the instant case was a glaring example of an effort to defeat the object of the rules. The freedom fighter died in 1952, the widow died in 1998, the son was adopted in 1997, *i.e.* after 45 years of death of the freedom fighter. In such circumstances, the benefit of the pension, the court rightly said, could not be given to the petitioner and rejected the application for grant of the pension.

A contrary view on the same issue, however, came from the Bombay High Court wherein applying the doctrine of relation back the court treated the adopted child in existence on the date of the death of adoptive father. It resulted in his acquiring the interest of the adoptive father in his property to the complete exclusion of his natural born daughters. The facts showed that a Hindu man died in 1948,[6] leaving behind three widows and four daughters. Upon his death, his widows and daughters took possession of the property. However, one of the widows adopted a son a year later and then remarried. This adopted son filed a suit in 1950, for a declaration of his status as the adopted son of the deceased; an additional declaration that he was the sole owner of the complete property left by the adopted father and a further relief of recovery of possession of the property that was in the hands of the two widows and the daughters. The daughters contended that the property had already vested in them, and a subsequent adoption could not divest them of the property and the doctrine of relation back did not apply as adoption was effected subsequent to the death of the deceased father whose property he was claiming. The trial court ruled in his favour. Subsequently, according to the sisters, under a compromise entered into between them and their adoptive step-brother, he agreed to claim half of the property and surrender the other half in their favour. The possession thereupon was taken by the son and the sisters sued him for the other half of the property. The court held that only the son would be the exclusive owner of the property and the widows and the daughters of the deceased could claim only maintenance out of this property. The court further held that as the widows were not the owner of the property, in any capacity not even as the limited owner, these maintenance rights would not mature into full-fledged ownership rights in 1956. Consequently, the son alone would continue to be the owner of the property. The claim of the daughters were dismissed on the ground that due to the

5 In *Rajendra Kumar* v. *Kalyan* (2000) 8 SCC 99 : AIR 2000 SC 3335, also the submission that the adoptive child by legal fiction be treated to be born in 1919 when the adoptive father died was rejected.

6 *Nivrutii Kushaba Binnar* v. *Sakhubai,* AIR 2009 Bom. 93.

application of the doctrine of relation back, the adopted son was deemed to be in existence at the time of death of the adopted father. As the daughters were not heirs, there was no vesting of the property in their favour and to contend that adopted child cannot legally divest any person of the property already vested in them could not be applied here.

The pronouncement appears flawed here for two reasons. *Firstly*, because a consistent judicial trend favours a liberal interpretation to the patently discriminatory and unjust laws of the colonial era that deprived women of ownership of material assets and restricted their rights to a bare maintenance. It cannot be doubted that in lieu of their recognized maintenance rights and in light of the Hindu Women's Right to Property Act, 1937, these two widows were holding the property as limited owners. Till they were alive such property could not have been disposed off. Such possession was not only akin to limited ownership but is in fact in the nature of Hindu women's estate that would have matured into absolute ownership post-1956 and since they became full owners of the property their daughters would inherit the property on their deaths and consequently half of the property would vest in the daughters. *Secondly*, in comparison to the daughters and the widows of the deceased who owned the property, a male child brought from outside the family post his death could not have a better claim and to confer the title of the complete property on him to the total exclusion of the family members of the deceased appears to be incorrect as the genuineness of adoption would certainly be in doubt. It clearly appeared to be a property grabbing mechanism depriving the females of even a right of sustenance and the court should have dissuaded from according it a judicial approval.

Adoption by husband without consent of wife

Amongst married couples, adoption is an act based on a mutual decision and its unilateral exercise is limited to cases where one spouse suffers from a legal disability making his/her consent irrelevant. Legal permissibility to adopt vests in a single woman or a man, but amongst married couples, it is only the husband who can do so though only with the consent of his wife unless the wife is judicially disqualified to give her consent. If the wife refuses, the husband cannot go ahead legally with this adoption.[7] Identical rules apply where the child is given in adoption. The father can give the child but only with the consent of the mother unless her consent is not required in law.[8] An adoption where the child was given by the natural father but without the consent of the mother is invalid under the Hindu Adoption and Maintenance Act. The issue came up for adjudication before the court[9] in

7 *Sarabjeet Kaur* v. *Gurmel Kaur,* AIR 2009 NOC 889 (P&H).

8 The consent of the mother is not required if she ceases to be a Hindu; or has finally and completely renounced the world or has been declared by a court of competent jurisdiction to be of unsound mind.

9 *Deen Dayal* v. *Sanjeev Kumar,* AIR 2009 Raj. 122.

connection with the alleged adoption of an only son effected through a registered adoption deed but without the consent of the biological mother. The facts showed that an old lady who owned a house inducted tenants in the same but soon thereafter both the parties were embroiled in bitter multiple litigations. The lady filed, amongst others, a suit for eviction against the tenant. However, upon her death, a claim to the house was put forward by the tenant's son contending that when he was 12 years old, the deceased had adopted him through a registered adoption deed. The heirs of the lady refuted this claim on the ground that:

(i) The alleged adopted child and his family were neither the relatives nor knew the deceased before their induction as tenant in the disputed house.
(ii) Their relations towards each other were bitter, as the widow had filed several cases against the tenant in the court.
(iii) Their caste and *gotra* were different from that of the lady; the child was the only son having two sisters in the biological family.
(iv) No ceremony of giving and taking of the child in adoption was performed.
(v) No witnesses were present at the time of the alleged adoption.
(vi) And above all, even the mother of the child was neither present nor gave her consent to this alleged adoption.

The court rejected the claim by the tenant's son. It noted[10] that on the face of it, it appears highly implausible that a father would give his only son in adoption. Ordinarily an only son is neither given nor taken in adoption and there was nothing on record to show what persuaded him to do so. No witness was produced to confirm the giving and taking of the child in adoption even though all alleged witnesses were alive. Strangely, no neighbour or community person was invited at the time of adoption, for reasons best known to the plaintiff (child) and his father. Further, the adoption deed was drafted by a lawyer who was defending the plaintiff's natural father in several cases filed against him by this very widow including an eviction petition. In such circumstances, the alleged adoption seemed highly unconvincing and the court rightly rejected the adoption claim.

Limitation period to challenge the validity of adoption

The validity of adoption can be challenged within a reasonable time. However, often the *factum* of adoption is challenged when succession to the property is to be decided. By then, considerable time would have elapsed and it becomes difficult to bring in the proof of adoption, more so when the adoptive parent is dead. The Karnataka High Court held[11] that the moment

10 *Id*. at 126.
11 *Siddalingaiah* v. *H K Kariappa*, AIR 2009 (NOC) 888 Kar.

adoption deed is registered, the parties to the adoption would have a constructive notice of the same. Thus, a suit challenging this adoption, filed after 40 years after its registration, would be barred by limitation. Even if limitation is not set up as a defence, it becomes the duty of the court to take note of it and dismiss the suit. The court further held that there can be no bar to raise the plea of limitation even at the stage of second appeal.

It is noteworthy that all cases involving adoption had a dominant property tussle that appeared unfair on the face of it. The pious object of the pre-1956 adoption laws was to provide spiritual salvation to the adoptive father and in the post-1956, secular object of providing a home to the orphan and joy of parenthood to the childless couples has been totally sidelined by the nefarious designs of unscrupulous people for unjust enrichments by putting adoption as a tool, and, in the process, attempting to legitimizing their illegal claims.

III MARRIAGE

Applicability of the Act to parties married under the Foreign Marriage Act, 1969

Solemnization of marriages among Hindus in a temple or in accordance with the religious rites and ceremonies but at a non-religious place is a common phenomenon. However, with the globalization and increased mobility of Indians including settling aboard, an issue arises with respect to availability of appropriate matrimonial enactment for solemnization of marriage and in the event of a marital discord for a matrimonial relief. Complications do arise where the marriage was solemnized abroad in accordance with the customs or traditions prevalent in that country. Parties still want to avail the remedies of a domestic legislation applicable only to those who got married in accordance with the law prevalent in the native land. This area of conflict of family laws necessitates an inquiry into the issue of availability of the Hindu Marriage Act, 1955 (HMA) to Hindus only on grounds of their religion and not the place or the form of solemnization of their marriage. This Act governs and lays down rules for marriages solemnized between two Hindus and elaborates upon the conditions relating to validity of a Hindu marriage, explaining also the matrimonial remedies. This issue of conflict of matrimonial laws arose in connection with a case[12] where two Hindus, married in 1972 in Osaka in Japan. The marriage was performed at the *Sumiyashi* temple by a Japanese priest in accordance with the Japanese rites and ceremonies followed by its registration with the Consulate General of India, Kobe, under the Foreign Marriages Act, 1969. The parties later came to India and 31 years later, the husband (now living in Bombay), filed a petition under the HMA, seeking divorce on grounds of his wife's cruelty and also for equitable distribution of the spousal property at a family court in Bombay. The family court entertained the petition, heard

12 *Minoti Anand* v. *Subhash Anand,* AIR 2009 Bom 65.

it on merits and passed an order. It observed that as the marriage was solemnized in a temple and in accordance with the religious rites, a petition under the HMA was maintainable. The wife challenged the order contending that since the marriage was registered under the Foreign Marriage Act, 1969, relief can be obtained only under the Special Marriage Act, 1954 and not under the MHA. The court held that a marriage officer can register a marriage under the Foreign Marriage Act,[13] if its solemnization was on a foreign soil in accordance with the laws of that country. Upon registration, it would be deemed to be a marriage solemnized under the Foreign Marriage Act, and the matrimonial remedies and reliefs would be available to the parties only under the Special Marriage Act, and not under the HMA, even if the parties happen to be Hindus. Since the marriage certificate was issued by the consulate general, that in itself was a conclusive proof that the marriage was solemnized in a foreign land according to the law of that country. Terming it as an error on part of the family court to entertain the petition filed under the HMA, while it should have been filed under the Special Marriage Act, the Bombay High Court rightly dismissed the petition filed by the husband and ruled in favour of the wife.

Marriage of a Hindu and a Christian under the Act

The religion based multiplicity of matrimonial legislation often throw up inter-country and even intra-country issues of conflict of family laws. Amongst this maze of numerous diverse family laws and multiple availability criteria, which matrimonial law/legislation would be available to whom is in itself extremely intriguing. Section 5 of the HMA deals with the legal validity of a marriage solemnized under this Act.

A bare reading of the provision indicates that a marriage may be solemnized between two Hindus, and the status of marriage itself would be questionable if two persons get married under the HMA, when the girl is a Hindu but the boy is not, but the fact of his being a non-Hindu is withheld fraudulently by him from the Hindu girl. In such a scenario, would the marriage be a nullity *ipso facto* as both of them are not Hindus, or would it be a marriage that is voidable and can be annulled later by a decree of competent court on the ground of fraud. The matter came up before the apex court,[14] in connection with the marriage of a Roman Catholic man professing Christian faith with a Hindu girl in a temple by exchange of *thali* and without the presence of any representative of either of the party's community. This marriage was then registered under section 8 of the HMA, but 4-5 months later the wife filed a petition under section 12(1)(c) of the Act, praying for a decree of nullity on the ground that her consent was taken by fraud with respect to the social status of the husband and his religion. Her suspicions arose because though he told her that he was a Hindu, all his family members

13 See the Foreign Marriage Act, 1969, s. 17.

14 *Gullipilli Sowria Raj* v. *Bandaru Pavani*, AIR 2009 SC 1085.

were professing Christian religion. The husband admitted that he was a Christian yet maintained that a valid marriage can be solemnized between a Hindu and a non-Hindu under the HMA. The family court dismissed the plea of the wife and held that such a marriage can be performed under the HMA. The wife challenged this decision and the High Court, allowing the appeal, held that the marriage between a Christian and a Hindu is void under the provisions of the HMA and, therefore, a nullity. A few months later, the girl remarried but the husband through a special leave petition presented the case before the apex court. His main argument was that under the HMA, a Hindu can validly marry a non-Hindu. Quoting section 5, he argued that the phrase "may be solemnized between two Hindus" are merely directory and not mandatory and indicates permissibility for a Hindu and a non-Hindu to marry validly under the Act. The wife contended that the preamble clearly states that the Act is to amend and codify the law relating to marriage among Hindus and a marriage where only one party is a Hindu is not a valid marriage under the Act.

The apex court rejected the contention of the husband and held that a valid marriage can be solemnized under the Act only where both the parties were Hindus. It further clarified that the phrase "*conditions for a Hindu marriage*" in section 5, appears to be a misnomer having regard to the use of words "may" in the opening line of the section. This term "may" was optional but referable to marriage and not to party's religion and this marriage was a nullity as one of the parties to the marriage was not a Hindu. Even its registration under section 8 would not cure the defect of this otherwise impermissible marriage and would not validate the same.[15] The Supreme Court held that there was no marriage between the parties here due to the difference of religion and further held that this marriage was void.

A secular country like India gives considerable freedom to its citizens in matrimony, at the same time respect the diversity in personal laws or family matters. However, the rigidity displayed in making the matrimonial enactments available only on grounds of religion and rendering a marriage void where one of the parties does not come from the same faith, more specifically amongst Parsis and Hindus, show a water tight compartmentalization approach of the legislature. Inter-religious marriage such as the one in the present case could have been validly solemnized either under the Special Marriage Act, or even under the Indian Christian Marriages Act, 1872. Unfortunately, the parties in a hurry to get married failed to check the consequences of their actions or realize that even in these intimate and personal matters their course of action has to be guided by the letter of law. Not only they have to follow the law but their union has to adhere to a particular procedure or methodology. Awareness of the multiplicity of personal laws; their availability criterion and the solemnization are a must for youngsters who are eager to get married without the parental or societal approval.

15 *Id.* at 1088.

Agreement of marriage without formal solemnization

Solemnization of marriage among Hindus is primarily a family affair, deeply influenced by customs and traditions followed by them from time immemorial. The HMA gives a bare minimum guidance as to how a Hindu marriage may be solemnized, providing merely that solemnization can be in accordance with the customary rights and ceremonies of either the bride's or the bridegroom's community.[16] The apex court has held in earlier decisions[17] that it is not open to the parties to evolve their new ceremonies or perform mock ceremonies of marriage as that would not make the parties husband and wife. Thus, a Hindu marriage has to pass a valid solemnization test, *i.e.* all necessary rites and ceremonies should have been observed, and then it should not contravene any of the conditions mentioned in section 5 of the Act. A marriage that fails to pass this test cannot be a valid marriage. An issue arose this year whether an intimate relationship where no ceremonies of marriage were ever performed, but which was brought about by a registered agreement entered into between a man and a woman, both being adults and of sound mind before a statutory authority like the sub-registrar, would confer the status of husband and wife on them. Two residents of Kerala,[18] without performing any ceremony to formally cement their relationship, entered into an agreement of marriage written in Malayalam, executed on a stamp paper worth Rs 50/- and registered in the sub-registrar's office. This document was styled as an agreement of marriage and according to its recitals, the parties declared themselves as husband and wife. The issue before the court was: Was such a registered agreement tenable in the eyes of law as recognizing their spousal relationship? The court replied in the negative and held that such agreements, even though registered, would neither constitute a valid marriage nor make a man and a woman husband and wife. The court also observed that the government should seriously think of amending the registration rules, prohibiting registration of agreements styled as marriage agreements and cautioned that registration of marriages even otherwise should be made only before the local registrar of marriage and not generally before a sub-registrar.

Restitution of conjugal rights

Traditional perception of the husband as the provider and under a duty to establish a matrimonial home also visualized him as having a superior right to decide its location and command the services of even a gainfully employed wife. Where the wife lived apart from the husband owing to her employment, but without his consent, it was treated as a wilful withdrawal from his society without a reasonable excuse often resulting in the award of

16 See the Hindu Marriage Act, 1955, s. 7.

17 See, for example, *Bhaurao Shankar Lokhande* v. *State of Maharashtra*, AIR 1965 SC 1564 : (1965) 2 SCR 837.

18 *S M Syed Abdul Basith* v. *Assistant Commissioner of Police, Ernakulum*, AIR 2009 (NOC) 2413 (Ker).

a decree of restitution of conjugal rights in husband's favour, if he so desired.[19] It appears that with more married women sticking to their jobs, trends and perceptional shifts are inevitable, necessitating also a judicial recognition of the need for attitudinal changes. In this respect, a remarkable case came from Uttaranchal.[20] Here, the parties married in 2003 according to the Sikh community rites. The husband filed a petition praying for a decree of restitution of conjugal rights against the wife primarily on the ground that even though he maintained her, she was a woman of independent thought; she was a teacher at a government school and did not adhere to tradition and limitation. After the birth of a son, she went to live with her parents at the natal home and refused to join the husband. The wife, on the other hand, did admit that she was a teacher but alleged that she was virtually thrown out of the home by the husband following dowry related harassment and torture. She pleaded that she was working at a place different from the place of residence of the husband and her separation was also on this account. The trial court adopting a conservative attitude adhered to the stereotyping of the roles; dismissed her contention and held that considerations of employment would not amount to a reasonable excuse for the wife to withdraw from the society of the husband. The wife preferred an appeal on the ground that the fact of her employment was ignored by the lower court when it decreed the restitution petition prayed for by the husband. The High Court held that where the wife was working at a different place and was unable to join the husband due to this reason, it could not be said that she had withdrawn from his society and observed that the wife had, besides the considerations of employment, sufficient reasons such as cruelty on part of the husband to stay away from him and dismissed the restitution petition.

Concept of cruelty

Career obsession of a married woman

Cruelty is a ground for dissolution of marriage but its concept varies with facts and circumstances of each case. In the year 2009, can career obsession of a married woman be a ground for dissolution of marriage was an issue the apex court was confronted with.[21] Married on 4.3.1984, the parties lived together for a considerable time period. They had known each other since childhood and had studied in the same school. It was an inter-caste marriage with parents initially opposing it and then finally relenting. Differences arose after marriage between the parties with the husband alleging that the attitude of the wife towards the in-laws was humiliating and she was totally immersed in her career. He filed a suit in the court praying

19 See, for example, *Kailashwati* v. *Ayodhya Prakash,* 1977 CLJ 109 (P&H).
20 *Manpreet Kaur* v. *Devendra Pal Singh,* AIR 2009 Utr. 4.
21 *Suman Kapur* v. *Sudhir Kapur,* AIR 2009 SC 589.

for divorce on grounds of her cruelty and desertion. His basic contention was that she was totally and completely besotted to her career and thus deprived him of his conjugal rights and neglected her matrimonial obligations. She conceived thrice, but aborted the pregnancy without his knowledge/consent twice, and deprived him of the joy of fatherhood. She had made it clear to him that she did not want motherhood at the cost of her career and asked him to go ahead with adoption if he desired to be a father. The wife did admit that she was in service and interested in her career but at the same time she was not at all unwilling to perform her marital obligations. Both abortions, she maintained, were with the consent of her husband while the third time she had suffered a miscarriage. She had received a prestigious fellowship in USA and wanted to go there. The trial court rejected the case of the husband on ground of desertion but held that in having aborted the pregnancy twice without informing the husband, the wife was guilty of cruelty and noted a finding that the wife was not interested in living with the husband as *"for the wife it was her career and not matrimonial obligations that were most important."* The court held that it amounted to mental cruelty and granted a decree of divorce. The High Court confirmed the decree and the wife filed a special leave to appeal to the Supreme Court.

The main contention of the wife was that the factual situations amounted to a normal wear and tear of married life and was not of such a serious nature as to warrant a divorce decree. They were also leading a normal sexual life, a fact that was evident by the number of times she had conceived. However, before she could file this appeal, the husband remarried. This was strongly taken up by the wife to show that he had misused the situation to his advantage and did not deserve a divorce. The apex court after analyzing a large number of cases observed that in the absence of a statutory definition of cruelty and its variable nature dependant upon time, place and even individuals, each case has to be considered on its own merits. The legal concept of cruelty, the court noted, is identified with such a character as to have caused danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of the same. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered and this rule is of special value when cruelty consists of not violent acts but of injurious reproaches, complaints, accusations and taunts. Cruelty may be mental such as indifferences and frigidity towards the wife, denial of a company to her, hatred and abhorrence for wife or physical acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in such a manner which the other spouse could not in the circumstances be called upon to endure and that misconduct has caused injury to health or there was a reasonable apprehension of such injury. The letters written by the wife that *"she wanted to pursue her career and did not want to make any compromise"* were assailed by the court. It also accepted the evidence produced by the husband that she did not want to be the mother, thereby denying the joy to the parents of the husband who desperately wanted to be

grandparents. The Supreme Court confirmed the decree of divorce and, on the question of reversal of the decree as prayed by the wife, observed:[22]

> Since we are confirming the decree of divorce on grounds of mental cruelty as held by both the courts, *i.e*. the trial court as well as the high court, no relief can be granted so far as the reversal of the decree of the courts below is concerned. At the same time however, in our opinion the husband should not have remarried before the expiry of period stipulated for filing Special Leave to Appeal in this court by the wife…. In our opinion ends of justice would be met if we direct the respondent husband to pay an amount of Rs five lakhs to the appellant wife.

The specific time frame was fixed for the payment of this amount

The present judgment leaves little room for an Indian wife to pursue her career befitting her talents post-marriage without the consent of her husband. The judiciary does not realize the implication of its *dictum* on the socio-economic status of an Indian woman. Motherhood brings nothing but only oral glory and lots of practical impediments for a woman of today. Physical and mental challenges associated with child bearing and rearing cut severely into her career. Rare opportunities like prestigious fellowships that bring acclaim worthy of applause for any man irrespective of his marital status, become an illustration of a matrimonial misconduct for a married woman. A man's job or his physical and mental health is never affected adversely by his desire to have children. In this respect the comments of the court, that "*she wanted to pursue her career and did not want to make any compromise or for the wife it was her career and not matrimonial obligations that were most important to her*" are in-fact derogatory to women as they smirk of a deeply patriarchal notion. They seem to be postulating a compulsory maternity on her, totally unconcerned with the fact that if presently there is no difference in educational standards or gainful employment based on sex, post matrimony the traditional expectations of a woman sacrificing her hard earned education and an extremely coveted job, and in the event of her refusal to bow to the orthodoxy a destruction of her matrimonial home with full judicial approval would follow, would run against the constitutional values of gender parity. The fact that she was a brilliant scientist and had won a coveted fellowship is worth celebration and not reprimand or rapprochement. Judiciary should not insist and impose compulsory domesticity on intelligent women forcing them to severely compromise on their jobs. It is indeed extremely unfortunate that the Indian judiciary is instrumental in enforcing biological maternity on this woman clearly ignoring her aspirations and desire to excel in life more so since she is intelligent and can make a positive meaningful contribution to the

22 *Id*. at 599.

development of the nation. A woman like this should not have been deprived of the security of marriage. From centuries, an Indian woman has been making compromises on her career and aspirations for the sake of the institution of marriage while proving at the same time that her brain is no less than that of her male counterpart.

The facts of the present case clearly demonstrate that since wife had moved ahead in her career leaving the husband far behind, he harboured ill-will against her due to his male ego and jealousy because of an intellectually superior and immensely successful wife. Should a woman leave a prestigious fellowship only because the parents of the husband wanted to be grandparents? She had demonstrated her willingness for adoption, which was a perfectly feasible option. However, the parents of the husband wanted her to leave her career, be subservient to the less intelligent husband, bear his children and rear them so that his status in the patriarchal could be setup as a lord and master and a provider to the wife could be re-established. The judiciary seems to be telling Indian women: choose between matrimony and career, if the choice is of the career, then be prepared to lead a lonely life because the husband or his parents may want children. In India, there are innumerable instances where men are totally engrossed in their career, advance in their life, get public acclaim and even national recognition, while they are totally absolved of their family responsibilities by their caring wives. It is the time that judiciary should tell men to take at least some steps in this direction. Statements of Indian men told to the world with pride that behind their success lies the sacrifice of their wives should be a matter of condemnation and not inspiration or enforcement. These statements should be disapproved and not quoted with approval as they do a disservice to the cause of gender parity. It is a matter of research as to how many men have attained professional success by killing the career aspirations of their intelligent educated wives, who were not willingly prepared for it, rendering them as child bearing and rearing tools. With no other option available if a woman is forced to opt domesticity or a less challenging career, it does not give right to the judiciary to uphold and enforce the same on every Indian woman who is not prepared to do it. The notion that career advancement of the husband is for the family but of a wife is at the cost of the family cannot and should not be applied with the same force as was prevalent in olden times by the present day judiciary. Men and women both have to contribute in the process of national development with equal rigour. India should not be deprived of its best brains and meaningful contribution of its extremely capable workforce only because the holder of them are women who want to marry and have the security of their family support in the same manner as a man. The perception of a man‘s employment as a necessity and that of a woman as dispensable, a luxury or pass time that can be given up for smooth running or continuation of patriarchal notions of her place in the family and the society in matrimony and domesticity should never be endorsed by the constitutionally created and established highest pillars of the society. The remarks and the judgment of the apex court, therefore, are very unfortunate.

Cruelty with desertion

The Indian patriarchal set up works to the disadvantage of youngsters who in defiance of their parents' wish to choose their own life partners. Such decision is usually followed by disapproval expressed either by a complete boycott of the children or non-acceptance of the spouse of the child. The situation is specifically rough for a daughter-in-law as she is brought to the matrimonial home in an atmosphere of hostility and hatred. In a case from Bombay, the parties had a love marriage with the families of both living in the same locality in the near vicinity of each other.[23] Parents of the husband were unhappy with his choice of wife, so they got married in the court and the husband brought his wife to the house of his parents; insisted that she should live with them. He himself left to a different place for his avocation. The parents who never accepted her as their daughter-in-law humiliated and tortured her. The husband never took his wife to any place he served after his marriage right from Chennai, where he did his M Tech in Computers; Bombay, where he worked with TCS; Dubai or the US, where he was based at the time of the final breakdown. Gradually, due to persistent instigation of the parents, even he started neglecting her and nurtured hatred towards her. Ties appeared to be snapped with finality when the wife was forced to leave the matrimonial home and take shelter with her parents. Instead of bringing her back, he applied for divorce on grounds of her cruelty and desertion. The trial court disbelieved the allegations of beating and ill-treatment of wife by the husband in absence of any formal police complaint or grievance made by her parents to the in-laws in this regard. It was noted that except for her bare statement there was nothing to that effect on record and granted him divorce. On an appeal filed by the wife, the High Court reversed the decision and dismissed the divorce petition. Sharply criticizing the observations of the trial court, it held:[24]

> The above reasoning of the trial court is rather illogical. In matrimonial matters an attempt should be made to fathom mindset of the spouses. It is not at all expected that a newly married young woman would immediately rush to the police station to lodge any complaint or to otherwise commence tirade of allegations against her husband and his relatives. For there is danger to spoil the matrimonial relationship forever if such action is taken by her or her relatives. Conversely, it could be inferred that she did not ventilate grievances against his parents and other relatives and did not lodge any complaint with the police because she laboured under impression that one day or the other, there will be reconciliation . The tolerance of such newly married young woman cannot be treated as her intention to permanently abandon the matrimonial relationship

23 *Varsha Pravin Patil* v .*Pravin Madhukar Patil,* AIR 2009 Bom. 60.
24 *Id.* at 64.

. The entire approach of the Additional District Judge is somewhat queer and unrealistic.

The court did note that marriage in this case had irretrievably broken down, yet, the husband could not be granted the relief due to his own conduct. The court refused divorce and set aside the decree passed by the trial court.

Divorce by Mutual Consent

Divorce by mutual consent is increasing its popularity as a most appropriate and viable option to dissolve a marriage without any unpleasant bickering and leashing of vendetta against the spouse in public. The apex court also has special powers under article 142 of the Constitution to provide relief to the parties, which is otherwise not available in the given set of circumstances in the interests of justice.

The year under survey, the court[25] exercised its extraordinary powers in a situation where it felt that continuation of marriage and tying the parties to each other would be futile. Here, the parties owing to matrimonial differences filed a mutual consent petition. Six months later, both appeared before the court but while the husband wanted dissolution, the wife despite living separately and admitting serious differences between them, did not want the matrimonial relations to come to an end. The trial court dismissed the petition and denied the relief of divorce holding that the consent of both parties is an essential requirement under section 13B, HMA on both the hearings, and if the wife withdraws the consent, the court would not grant dissolution. Husband unsuccessfully took the matter to the High Court and then came before the apex court. He submitted that after filing the mutual consent petition, the parties had entered into a mutual settlement that was fully acted upon by him. Pursuant to this settlement, he had transferred the property in the name of his wife and that she was enjoying but then retracted her consent for divorce.

The apex court after analyzing the language of section 13B[26] observed that even from a bare reading of the section, it is clear that unless both the parties give their consent on both the occasions, *i.e*. the first motion and then the second motion to be made in between the time period of six months and

25 *Anil Kumar Jain* v. *Maya Jain* (2009) 12 SCALE 115.

26 Section 13 B reads: "*Divorce by mutual consent*: (1) Subject to the provisions of this Act a petition for dissolution may be presented to the District court by both the parties to marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.
(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section(1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime the court shall on being satisfied , after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

eighteen months from the date of the first petition, divorce by mutual consent cannot be granted. Taking stock of a number of cases,[27] the Supreme Court threw open two postulates: (i) Although irretrievable break-down of marriage is not one of the grounds indicated under section 13 or section 13B of the Act, the said doctrine can be applied under either of the two provisions but only where the proceedings are before the Supreme Court; (ii) In exercise of its powers under article 142 of the Constitution, the court can convert a proceeding under section 13 into one under section 13B and pass a decree for mutual divorce without waiting for the statutory period of six months. The apex court also cautioned that none of the other courts can exercise any of such powers and observed that in the instant case, the wife had made it clear that she would not live with the husband and at the same time was not agreeable to a mutual divorce. The separation had already extended to seven years and evidence showed that subsequent to the registration of property by the husband in her name, she took exclusive possession of the property and withdrew the consent for divorce and continued to live separately. The wife had declared in the open court that she had no desire to live with the husband at all. The court felt that in order to do complete justice in a situation where the marriage ties had completely broken down and there was no possibility whatsoever of the spouses coming together again, it would be travesty of justice to continue the marriage ties. Following its earlier decision in *Sureshta Devi's* case,[28] the court held that it was a fit case to exercise their powers under article 142 of the Constitution. The marriage was accordingly dissolved from the date of the judgment.

Of late, in light of apex court's dilution of the observance of the strict language of section 13B, instances of varied experimentation at the lower court's level are becoming increasingly visible. This year, in two cases both from Bombay, the family courts were virtually reprimanded for not following the letter of law strictly in accordance with the spirit of the legislation. The first case[29] related to a mutual consent petition for divorce filed initially by both the parties, but after six months, the husband failed to appear before the court. The matter had to be adjourned twice as proper summons were not sent to him. However, five days before the stipulated date of hearing, the wife made an application before the court praying that her case be heard on that very day despite the fact that the case was not listed on that date. The court heard her and passed an *ex parte* divorce on the pre-poned date in the absence of the husband and without his knowledge. The

27 *Sanghmitra Ghosh* v. *Kajal Kumar Ghosh* (2007) 2 SCC 220; *Jimmy Sudarshan Purohit* v. *Sudarshan Sharad Purohit* (2005) 13 SCC 410; *Swati Verma* v. *Rajan Verma* (2004) 1 SCC 123; *Anjama Kishore* v. *Puneet Kishor* (2002) 10 SCC 194; *Kiran* v. *Sharad Dutt* (2000) 10 SCC 243; *Sandhya M Khandelwal* v. *Manoj K Khandelwal* (1998) 8 SCC 369; *Ashok Hurra Rupa Bipin Zaveri* (1997) 4 SCC 226; *Chandrakanta Menon* v. *Vipin Menon* (1993) 2 SCC 6.

28 *Sureshta Devi* v. *Om Prakash* (1991) 1 SCALE 156.

29 *Smruti Pahariya* v. *Sanjay Pahariya*, 2009 (7) SCALE 331.

legality of this *ex parte* divorce was challenged by the husband in the apex court, which deliberated on four issues, namely:

i) Was the decree of divorce vitiated by procedural irregularity?
ii) Did the family court act contrary to the avowed object of the Family Courts Act, 1984?
iii) Whether from the absence of the husband on the listed dates, could it be presumed that his consent for the grant of divorce by mutual consent subsists as he had not withdrawn the petition for mutual consent?
iv) Can the court, on a proper construction of section 13B of the Act which speaks of motion "by both the parties", hold that the family court can dissolve a marriage and grant a decree of divorce in the absence of one and without actually ascertaining the consent of that party who filed the petition for divorce on mutual consent jointly with the other party?

The court pointed out that the primary basis in marriage is the consent and thus the revocation of the relationship itself must be consensual, as was its original formulation. The apex court also held that the presumption of continuing consent of the husband by the family court was totally erroneous. Here, though the summons were sent to the husband, they returned and the family court itself had noted a finding that the service of the summons was not proper, hence there was a fresh listing of the case. There was no evidence of a deliberate evasion of the summons by the husband. To pre-pone the matter in such a situation and pass an *ex parte* divorce decree without verifying the service of summons was improper. The Supreme Court strongly disapproved of the manner in which the proceedings were conducted in this case and observed that the court procedure must have a sanctity and fairness and it cannot and should not be conducted for the convenience of one party alone. When a date of hearing is fixed, it could not have pre-poned the matter on an *ex parte* prayer made by the wife and in response to her illegal and unjust demand granting a decree of divorce on that very day by treating the matter on the board in absence of the husband was a flagrant abuse of the judicial process. The family court did not discharge its statutory obligations under section 13B of the Act of hearing the parties and on this ground alone the court said, the decree deserved to be set aside. When a proceeding is pre-poned in the absence of a party and a final order is passed, immediately the statutory duty cast on the court is to hear the party who was absent. Therefore, the court held that the family court had not at all shown a human and a radically different approach which it is expected to have while dealing with cases of divorce by mutual consent.

Since the foundation of divorce by mutual consent is free consent, judicial evaluation of its voluntary nature is mandatory. Despite the appearance of the parties before the court twice, the allegations of consent being obtained by force, fraud or undue influence cannot be ruled out and

thus to avoid any confusion or malpractice, the courts have to record a finding of their satisfaction that the consent had been given voluntarily.

In the second case,[30] the parties filed for divorce by mutual consent. The statement put forward by the husband before the court for pleading divorce by mutual consent was allegedly written and signed by the wife wherein she had confessed her deep love for another man; dismissed all hopes for reconciliation or mediation; relinquished all claims of maintenance and for the custody of two of her sons. The statement also indicated her future plans of sharing an intimate life with her paramour in his house. The lower court as also the lower appellate court granted divorce by mutual consent basing it primarily on the statement of the wife. The wife filed an appeal in the High Court claiming that she was made to sign this self damaging and derogatory statement by fraud and that she did not want a divorce. Further, she stated that the mandatory period of one year separation was not satisfied in this case as she had been living with her husband. The High Court reversed the divorce decree holding that the lower courts had neither recorded a finding of their satisfaction about the voluntary consent of the wife nor had seen from which date they were living apart from each other nor had indicated whether any attempts were made for reconciliation or not. The court observed:[31]

> The obligation cast upon the court by legislature while dissolving the marriage is overlooked by the courts and its object has been defeated in this case. The institution of marriage is sacred and marriage tie is not to be easily broken. The requirement to verify the voluntary nature of consent, provision of a period of separation, duty to attempt to conciliate and waiting period of six months in court shows the seriousness with which the parties as also the court of law have to evaluate the facts. Here, both the courts acted mechanically thereby defeating the statutory protection extended to weak spouse by law.

The husband's lawyer had even demanded punishment for the wife for perjury. Dismissing his plea, the court held that under section 23(1)(bb), the court must satisfy itself that the consent for divorce by mutual consent has been given voluntarily. This application of the mind has to be on the very first date when court adjourns the matter for conciliation or for statutory period and must reveal itself that the matter fulfilled all the requirements of law relevant at that stage. The earlier order of the lower court and the appellate court did not show any such record showing their satisfaction. Even the date from which the parties separated was not recorded. There was no endeavour on part of the court to find out whether any reconciliation attempts were made or not. The court refused to confirm the decree of divorce holding that

30 *Sushama Pramod Taksande* v. *Pramod Ramaji Taksande,* AIR 2009 Bom. 111.
31 *Id*. at 116.

there was a mechanical application of mind and delivery of judgment by the lower court.

Non-compliance with decree of restitution of conjugal rights and taking advantage of one's wrong

The Act provides non-compliance with a decree of restitution of conjugal rights for a period of more than one year as a ground for dissolution of marriage.[32] However, on the issue of approachability of courts by a party guilty of non-compliance, in view of section 23 that mandates judicial refusal of a matrimonial remedy to a party trying to take advantage of his own wrong, the apex court in *Dharmendra* v. *Usha Kumar*[33] had ruled that mere non-compliance of a decree of restitution of conjugal rights would not amount to a wrong within the meaning of section 23.[34] However, the court overruled its own decision in the later case[35] and held that even section 13-IA has to be read and enforced in light of section 23. This issue arose again this year in a case before Kerala High Court where after around two and a half years of living together and a child between them, the wife aggrieved by the conduct of the husband filed a petition in the court for restitution of conjugal rights that was granted in her favour.[36] The husband had taken a job in the Middle East and left the wife with his parents at the matrimonial home. The wife alleged that her torture and neglect/desertion on part of the husband started thereafter. Despite the decree of restitution of conjugal rights passed by the court in her favour, the husband refused to obey it and give her company. A year later, the husband filed a petition praying for a decree of divorce on the ground that one year had passed and the decree had not been complied with, while all along he himself was responsible for its non-compliance. The consistent stand of the wife was that she wanted to be with the husband provided he allowed her to do so. The husband, on the other hand, made it very clear that he was not interested in furthering this matrimonial alliance. The family court denied the relief to the husband as he had not complied with the court's decree, and was taking advantage of his own wrong. The husband took

32 S. 13 IA provides: Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground –

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of (one year) or upwards after the passing of a decree for judicial separation in a proceedings to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of (one year) or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

33 AIR 1977 SC 2213.

34 S.23 provides: *Decree in Proceedings.* - (1) In any Proceeding under this Act, whether defended or not, if the court is satisfied that—

a) any of the grounds for granting relief exists and the petitioner (except in cases where the relief is sought by him on the ground specified in sub clause (a), sub clause (b) or sub clause (c), of clause (ii) of section 5), is not in any way taking advantage of his or her wrong or disability for the purpose of such relief, …

35 *T Srinivasan* v. *T Varalakshmi* (1998) 3 SCC 112.

36 *M Ajith Kumar* v. *K Jeeja*, AIR 2009 Ker 100.

the matter to the High Court in appeal, which differed with the verdict of the family court and held that mere non-compliance with the decree of restitution of conjugal right would not amount to a wrong within the meaning of section 23 and awarded divorce. The court observed:[37]

> Admittedly in this case it was the respondent (wife) who obtained a decree of restitution of conjugal rights. Of course she has deposed that she was always ready and willing for a reunion. Reluctance on part of the appellant –husband is also alleged. In such circumstances the court below should have considered the question as to whether there was any obstacle for the wife to join the husband, who could be regarded as the "wrongdoer" for the purposes of section 23(1)(a) of the Act and if it was the appellant/petitioner then whether he was attempting to take advantage of his own wrong *etc.* In short, without identifying the wrong doer, especially in view of the allegations and counter allegations as made in this case, it would not be possible to properly consider the question as to whether the appellant-petitioner is taking advantage of his or her own wrong.[38]

The facts of the case presented a strange scenario: The husband leaving the wife with his parents and himself going to Middle East, and then infuriated that she went back to her natal place when his own parents tortured her, he instead of helping her or taking her with him to his place of employment deserted her, a fact that was judicially established when the lower court granted a decree of restitution of conjugal rights in her favour. The girl watched helplessly as the husband mocked at the court's decree, refusing to comply with it and then had the audacity to approach the court for a divorce under section 13-IA. The fact that the court granted divorce on his asking shows that it erred on two counts: *First,* on the issue of burden of proof. The restitution decree was granted in favour of the wife who established the husband as the guilty party. It also proved that the wife was willing to join the husband but he withdrew himself from her society, and, therefore, it was the husband who was directed by the court to comply with the restitution decree and not the wife. The situation from the perspective of the wife remained unchanged. Thus, the burden of proof was not on the wife but on the husband to show as to what steps he had taken for its compliance. *Second,* the court appeared to have endorsed the medieval mindset of the wife's place as being the place where the husband keeps her and not where he himself is. Judicial deliberation should be directed on this issue as well. For Indian judiciary, husbands leaving their wives at their parent's place despite their yearning to be with them should be a matter of concern and not a routine matter of convenience in a patriarchal setup. The matrimonial relationship and the consequent remedies are recognized and enforced as between, and in relation

37 *Id.* at 103.
38 *Id.* at 104.

to, the spouses. The judiciary should have recognized the fact that all along, the husband deserted the wife for no fault of hers and when she sought judicial help to gain his company he flouted court's orders and then approached the same mechanism successfully to get out of this relationship that the court had asked him to protect. In other words, the husband here was guilty of committing the matrimonial misconduct of desertion that led to the pronouncement of the decree of restitution of conjugal rights and continued this matrimonial misconduct post-pronouncement of the decree as well. His prayer for a decree of divorce was rightly dismissed by the family court but the Kerala High Court virtually hunted for excuses to grant him relief. The lame statements like asking the family court to find whether there was any obstacle for the wife to join him is like adding insult to injury. This judgment, therefore, does not appear to be correct as not only it is in contravention of the apex court's judgment, it also failed to take into consideration the mandate of section 23 permitting the brazenly guilty party to take advantage of his own wrong. The fact that husband refused to comply with the decree of restitution of conjugal rights also shows not only the futility of this decree but also that the judiciary cannot control human actions or an obstination on part of the erring spouse through legal coercion

The Bombay High Court, on the other hand, effectively checked the nefarious designs of an errant husband to misuse section 13-IA to his own advantage where despite the wife obtaining a decree of restitution of conjugal rights in her favour, he instead of complying with it, walked out of the matrimonial home and started living with another woman as her husband and soon after the pronouncement of a decree of dissolution of marriage by the lower court, remarried her.[39] Here, after fifteen years of marriage, the wife filed a petition for restitution of conjugal rights and maintenance for herself and the child on grounds of husband's neglect, while the husband eleven months later filed a petition praying for a decree of divorce on grounds of wife's cruelty and desertion, seeking also the custody of his three minor children. By a common judgment, the family court granted restitution of conjugal rights in favour of the wife and dismissed the divorce prayer as well as the custody application sought by the husband. Instead of respecting the decree of the court, the husband walked out and started living with another woman. Two years after the grant of restitution decree and dismissal of his divorce petition, the husband again approached the court under section 13-IA, now contending that subsequent to the pronouncement of decree of restitution of conjugal rights, more than one year had passed without its compliance. Simultaneously, the wife also applied for maintenance under section 25 of the HMA. Again, a common judgment passed by the family court allowed divorce to the husband and directed him to pay maintenance to the wife. The husband now armed with the decree of divorce remarried but the wife meanwhile challenged the grant of divorce on the ground that in the first place he was the one who deserted her, and then when she secured the

39 *Kanchan Sanjay Gaur* v. *Sanjay Bhikan Gujar*, AIR 2009 Bom. 151.

restitution decree in her favour as against him, he left her only to live with another woman in an intimate relationship in gross violation of the court's order. Thus, he cannot be allowed to take advantage of his own wrong in this manner. The husband on the other hand contended:

(i) That his petition claiming divorce was based solely on the ground that one year had passed and there was no resumption of cohabitation between the parties post-pronouncement of decree of restitution, which was an uncorroborative fact.
(ii) There is no obligation placed by the statute on him for compliance with the restitution decree before asking for relief under section 13-IA of the Act.
(iii) Mere non-compliance with the decree of restitution of conjugal rights was not a wrong within the meaning of section 23 of the Act, and therefore, it could not be said that in praying for divorce on this ground, he was trying to take advantage of his own wrong.
(iv) Even a defaulting party can seek divorce if there was no restitution of conjugal rights for a period of one year or upwards after the pronouncement of the decree.
(v) Since, he has remarried after the expiry of the period of limitation to file an appeal, the second marriage should be respected and protected. A pragmatic/practical approach warrants that when one of the parties is already married after the period of limitation has expired, the second marriage is required to be protected.
(vi) To constitute a wrong in terms of section 23 of the Act, there has to be a positive act and/or action/conduct which is more than a disinclination to cohabit on the part of the husband and such a case has not been made out by the wife.
(vii) If the appeal is allowed, the second marriage would be destroyed. His first marriage has already ended *de facto* and if the appeal is allowed it would end *de jure* and dismissal of the appeal is in consonance with the law laid down in *Samar Ghose* v. *Jaya Ghose*.[40]
(viii) Subsequent events regarding pending appeal must be considered for doing complete and substantial justice.

The trial court held that the wife had failed to prove non-compliance of the decree by the husband. It further observed that pursuant to the 1964 amendment of the HMA, it is the absolute right of the party to get a decree of divorce. The present court disagreed with the family court's verdict, reversed it and held that the effect of the 1964 amendment on section 13-IA was that earlier the right to apply for a divorce was not available to the party against whom the decree for judicial separation or restitution of

40 (2007) 4 SCC 511.

conjugal rights was granted, but was available only to the party in whose favour it was conferred. Post-amendment, it can be obtained by the party against whom such decree was awarded. The object of section 13-IA was merely to enlarge the right to apply for divorce and not make it obligatory that a petition presented under sub-section 13-IA must be allowed on mere proof that there was no resumption of cohabitation or restitution for the requisite period.

It is noteworthy that in this case, the children had deposed against the father establishing clearly that the husband was constantly in the company of the other woman, maintained an intimate relationship with her, used to bring her regularly in his car to his home, went on holidays with her, while his own children and wife had to struggle in face of limited financial resources. In view of these facts, the High Court held that the family court was in error in putting the burden of proof on the wife to show that there was no resumption of cohabitation on part of the husband rather than putting it on the husband to demonstrate compliance with the decree. According to the High Court, the onus in the present case was clearly on the party applying for divorce under section 13-IA and not on the opponent party to prove what steps he/she had taken for resumption of cohabitation after the decree was passed and within one year of passing of such decree under section 9 of the Act if he/she claims that the petition for dissolution of marriage is not hit by section 23(1)(a) of the Act. In the instant case, the family court fell in serious error in shifting the onus on the wife to prove the steps she had taken for resumption of cohabitation after she obtained the decree of restitution while she was opposing the petition of the husband for divorce. The court further said that the family court totally misdirected itself in failing to assess whether the husband had committed a wrong even after restitution decree. It was clear that husband continued to live with the other woman as her husband and treated her as his wife. If the husband by his own acts has made resumption of cohabitation impossible or unworkable by living with another woman as her husband or in a close domestic relationship even after the grant of the restitution decree at the behest of the wife, his behavior would amount to a wrong or misconduct within the meaning of section 23(1)(a), thereby disentitling him to seek a divorce under section 13-IA. The husband, here, actually admitted that he was living with another woman but contended that even if he was a defaulting party, he had a right to get divorce in view of section 13-IA. The court reversed the order of divorce and, at the same time, imposed an exemplary cost of Rs. 50,000 on the husband to be paid to the wife within a period of two weeks.

An agreement of divorce

The present law enables parties to choose when to get married at their own convenience, but once a valid marriage is concluded, getting out of it is not within the hands of the parties and is dependent purely on the satisfaction of the court. Though customary divorce can validly put a marriage to an end, it has to be in a recognized form and cannot be through a mere agreement.

This year, a couple from Bombay[41] entered into an agreement for dissolution of their marriage. The agreement stipulated that they had dissolved the marriage owing to customary divorce under the prevailing customs. The issue arose in connection with the mutual consent petition for divorce filed by one of them with the other raising objections that there was no subsisting marriage between them owing to this dissolution agreement and the court does not have the power to entertain such petition. The court held that no weightage can be given to such agreements unless by appropriate evidence the parties are able to prove dissolution of marriage either by recognized customary practices, prevailing in the community to which they belong, or under the provisions of law.

Maintenance includes a provision for residence

The term maintenance has not been defined under the Act but is understood to have a monetary connotation and its quantum, enough to prevent destitution and vagrancy of the grantee. It is never intended to financially or economically strengthen the indigent spouse, but should be sufficient to take care of his/her primary needs. What are the basic needs is in itself a question that has been answered variedly by different courts in the light of the facts and circumstances of each case, but in case of the spouse who is thrown out of the home, should it also include a residence is a question that becomes very important from the point of view of an estranged wife as the first problem is that she is confronted with situations like where to go? Matrimonial home is usually in the name of the husband or his parents or is arranged by them. It is ironic that in Indian patriarchal society, customarily a married woman has very limited choice or rights over a home in her own right more specifically in case of a marital discord. Husband's continued residence post-marriage in the same home that he or his parents own accords him a security that can rarely be felt by an estranged wife. Usually, therefore, marital discords take a woman back to her natal home but in several cases with increased parental support, awareness and necessity of a secured roof, women are prompted to retain residences of the husband in totality or partially post-matrimonial discord as well. Statutory recognition to her rights of residence has also been accorded with the enactment of Protection of Women from Domestic Violence Act, 2005, but would they generally be included under HMA, was a question that arose before the apex court. Here,[42] a suit was filed by the owner for declaration of title to the property that he had purchased out of his own funds. The wife had taken exclusive possession of this house pursuant to a decree of maintenance. The High Court declared the husband to be the owner of the property; directed the wife to hand over the possession to him and observing that in view of the factual setting in the case when the relations between the husband and the

41 *Jatina Samir Shah* v. *Samir Mohit Shah,* AIR 2009 (NOC) 2149 (Bom).
42 *Komalam Amma* v. *Kumara Pillai Raghavan Pillai,* AIR 2009 SC 636.

wife are estranged, the wife cannot still claim a right of residence in the matrimonial home so as to resist a decree for possession, dismissed the second appeal preferred by the wife. The matter was taken to the Supreme Court, which endorsed the right of a woman to a residence as included in the general term 'maintenance' and observed:[43]

> Maintenance necessarily must encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less to which she was accustomed. The concept of maintenance must therefore include provision for food, clothing and the like and take into account the basic need of a roof over the head. Provision for residence may be made either by giving a lump sum in money or property in lieu thereof. It may also be made by providing for the course of the lady's life, a residence and money for other necessary expenditure.

The case was remanded back to the High Court with appropriate directions to reconsider it on merits keeping in mind that the wife's rights of maintenance include a right of residence in the matrimonial home as well.

Can maintenance under section 25 be granted in case of dismissal of matrimonial petition

The HMA contains two specific provisions dealing with maintenance of spouses involved in a matrimonial litigation. These provisions are not available to any of the spouse during the smooth running of marriage or upon a mere refusal of either of the spouse to maintain the other without any litigation. Two things are important in this connection, *first*, that maintenance can be claimed only when a matrimonial petition is either pending in the court awaiting disposal or has culminated into the award of a decree, and *second*, that maintenance can be claimed by either the husband or the wife dependant solely on the criterion of who is in indigent circumstances and who is financially secured. Section 24 deals with maintenance *pendent lite*, *i.e.* during the pendency of litigation[44] and, therefore, as the terminology itself indicates, it cannot be availed of by the parties if no matrimonial litigation is pending in the court. Similarly, section

43 *Id.* at 637.

44 Section 24 reads: *Maintenance pendent elite and expenses of proceedings*-Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife to the husband , order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable:
Provided that the application for the payment of the expenses of the proceedings and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of the notice on the wife or the husband as the case may be.

25 stipulates[45] that at the time of passing of any decree or at any time subsequent thereto, the court on the application made by either spouse, may pass an order directing one of the parties to pay to the other permanent alimony or maintenance. The opening words "passing of the matrimonial decree or subsequent thereof" are clearly indicative of the culmination of the matrimonial litigation into granting of the matrimonial relief by passing a decree. If the relief is refused and the petition is dismissed, section 25 is clearly not applicable and the party in indigent circumstances cannot avail its benefit. This question, whether a party can avail maintenance benefits under section 25 in the event of dismissal of the matrimonial remedy has been confronting the courts time and again. This year also the question arose in connection with a case that came from Andhra Pradesh.[46] Here, the parties had two children and lived together for a short time period after which they separated. The husband filed a petition for divorce and the wife successfully claimed maintenance for her and the children under section 24 of the HMA. She had also claimed maintenance under section 125 of the Criminal Procedure Code, 1973, that was granted in her favour but owing to its non-compliance by the husband, the wife filed an application for his arrest and detention in a civil prison. The matrimonial court passed an order granting maintenance to the wife and the children under section 25, even when the petition filed by the husband for divorce was dismissed by the court. The matter went to the High Court which overruled the maintenance order passed by the lower court on the ground that since the main matrimonial remedy had not been granted, the court cannot invoke section 25 of the HMA.

IV MINORITY AND GUARDIANSHIP

Custody battle between the father and a husband, in case of elopement of a minor girl

Parental rights in India include choosing a life partner for their children and the society strictly frowns upon young people trying to take their own decisions in matrimonial matters. Worst scenario is when a minor girl elopes with her boyfriend and marries him. The reaction invariably is the lodging of a kidnapping case against the boy with an appeal to the authorities to help the parents bring back the girl so that she can be married off without her consent to another unsuspecting bridegroom of their own caste or social hierarchy.

45 Sub-section(1) of S.25 provides that: *Permanent alimony or maintenance*- any court exercising jurisdiction under this Act may , at any time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be , order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and the property of the applicant (the conduct of the parties and other circumstances of the case), it may seem to the court to be just, and any such payment may be secured, if necessary by a charge on the immovable property of the respondent.

46 *Polavarapu Hanumantha* v. *Pollavarapu Siva Parvathi,* AIR 2009 AP 98.

The wishes of the girl are totally ignored and her decision branded as immature and hasty as an outcome of a mistake of youth. This year also a similar case arose before the Andhra Pradesh High Court but was taken a step forward by the determined husband.[47] Here, a minor girl and her boyfriend got married without informing their parents. An infuriated father lodged a complaint with the police against the son-in-law for having kidnapped his daughter and for her custody. The couple when produced by the police before the judicial magistrate emphatically stated that they were married, with their free and voluntary consent and wanted to be together. Despite the fact that the girl herself made statement to this effect before the police and also the magistrate, categorically and firmly that her marriage was with her consent, and she did not want to go back to her parents but wanted to live with her husband only, the magistrate ordered the girl to be sent to the state home for girls. The husband challenged the order of the magistrate and filed a writ petition in the High Court contending, *inter alia*, that though the wife was a minor he being her legally wedded husband was her legal guardian as per the law and thus entitled to her physical custody. The father, on the other hand, contended that as the girl was a minor, the marriage in itself was void and the boy was punishable under the provisions of the HMA. The court held that under the Act, the marriage of a minor is neither void nor voidable but perfectly valid and thus the wife being a minor, the husband is entitled to her custody. The High Court struck down the order of the magistrate terming it as erroneous and passed the orders for restoration of the custody of the wife to that of the husband.

Judicial stand in such cases has consistently shown a progressive trend. Parental outrage has been sidelined to accord approval to the wishes of the parties to the marriage. Ground realities, however, still display an extremely conservative and medieval mindset of the parents, who sometimes do not hesitate to take the lives of their own children attempting to salvage their non-existing "honour." In such a scenario, the positive and healthy approach of the court in cases like the present one should dampen the seething anger and frustration of the brethren of the parties and may prevent them from taking the law into their own hands.

Custody battle between father of the child and maternal grandparents amidst allegations of murder of the mother by the father

Serious and sensitive issues relating to custody and guardianship of the children more specifically in cases of serious marital discord or even amidst allegations of murder of the mother by the father deserve a humane approach on part of the judiciary. Tender hearts unable to distinguish parental love from complex spousal relationship as mute witnesses to the bickering and fights develop fear and insecurities and systematic consistent poisoning by grandparents further complicate matters making the judicial task more

47 *Kokkula Suresh* v. *State of Andhra Pradesh,* AIR 2009 AP 52.

daunting. In a case from Uttaranchal,[48] the mother died under mysterious circumstances and on a complaint filed by the parents of the deceased, the husband was charged under section 498A and 304B, IPC, but was later acquitted by the court, in May 2001. The children, a boy and a girl, were taken in by their maternal grandparents and in 1998, the maternal grandfather instituted a case before the district court for his appointment as their guardian. The trial court held that the father being the natural guardian and having been acquitted from the court of the criminal charges, cannot be deprived of his rights to the custody of the children. The matter went to the High Court, which acknowledged the settled principle of law that in matters of custody and guardianship, paramount consideration is the interest and welfare of the children and not the right of any parent. During the trial, the court assessing the wishes of the children noted that they were categorical and firm in their desire to live with their maternal grandparents and had no wish to be with their father. The court postulated two basic principles for determining the question of entitlement of guardianship of the father, first, his fitness to be a guardian and, second, the interests of the minors. Conceding that the father is the natural guardian of the minor children, and presently, he was absolved of the murder charges, the court nevertheless doubted his competence to be a fit guardian amidst mystery shrouding the death of the mother of these children. Ironically, the father never appeared in person during the entire trial but fought the case only through his counsel. On the other hand, evidence showed that the children were well taken care of by the maternal grandparents and were being educated at the Doon school. The court aptly appointed the maternal grandparents as the guardians of the children keeping in view their welfare. Similarly, in another case, the apex court denied custody of the child to the father upon his remarriage when his first wife died soon after child birth and the baby was taken in by the grandparents, and was brought up by them with proper care.[49] The father had not appeared in person here as well, even once before the court during the entire trial and the court felt that the welfare of the child necessitated continued custody with the grandparents. However, a different pronouncement came in another case from Andhra Pradesh.[50] Here, the mother committed suicide after suffering extreme humiliation at the hands of the husband at one of the functions held at his sister's house when the child was two and a half years old. Soon thereafter, the husband remarried. A bitter tussle over the custody of the minor ensued between the grandparents on one hand and the father of the child on the other. The main allegation of the maternal grandparents was that the father having ill-treated his wife and being responsible for her death and also having remarried was not fit to be entrusted with the responsibility of the minor more so as the

48 *Yogesh Kumar Gupta* v. *M K Agarwal*, AIR 2009 Utr. 30.
49 *Anajli Kapoor* v. *Rajiv Baijal*, 2009 (6) SCALE 597.
50 *K Venkat Reddy* v. *Chinapareddy Viswanandha Reddy*, AIR 2009 AP 1.

wife in her suicide note had indicated that the husband was leading an immoral life. The court disagreed with their contention and, acknowledging the father as the natural guardian of the minor child, observed:[51]

> (T)here is hardly any allegation against the respondent father except alleging that he was harassing his deceased wife for more dowry and he is alleged to have killed her.

The court noted that the father of the child was highly educated having several publications to his credit; was responsible and had a very comfortable position. He and his second wife categorically deposed before the court that in order to look after the minor, his second wife had voluntarily agreed not to beget any children even to the extent of her having undergone a tubectomy operation. The sacrifice of this nature, according to the court, cannot be brushed aside or ignored and they concluded that mere dislike of the father by the maternal grandparents was no ground to deny the custody to the father as there was no evidence that the father was unfit for being the guardian. The court thus awarded the custody of the child to the father despite the fact that he had remarried.

The present judgment showed a judicial acknowledgment of the fact of differential human relations with respect to varied persons including close family members. What the court actually meant was that even though he was a bad husband it could not be concluded that he would be a bad father as well. The noting of the court that there was hardly any allegation against the husband besides that of harassment and murder of the wife also depicted that they were trying to find an instance where the father had erred against the child. The general characterization of the father as a murderer and his haste in remarrying may show his apathy and soured relations with his spouse but, according to the court, they were not sufficient to have any reflection on his desire or competence to discharge his parental obligations. However, the court should also have taken into account the practical reality that bringing up of the child involves and necessitates a lot of patience, love and care and step-mothers do not enjoy a good standing in that direction, more specifically in comparison to the loving grandparents.

Plea of continuity of child with one parent

Custody battles make innocent children pawns in the hands of grown-ups who use practically every trick resorting to even abducting their own children and often displaying willful and deliberate disobedience to the orders of the court, thereby wasting years only to plead later that since the child is with them for a long time, in its interest, the custody should not be disturbed. In a case like this,[52] soon after the birth of the child in 1997, the husband

51 *Id*. at 6.
52 *Gaurav Nagpal* v. *Sumedha Nagpal,* AIR 2009 SC 557.

snatched the infant from the wife whereupon she filed a writ of *habeas corpus* petition in the Delhi High Court, which was dismissed for want of jurisdiction. She then filed a maintenance petition before the Delhi High Court and a petition claiming guardianship of the child. This was later withdrawn and later filed in a court at Gurgaon. The civil judge, in 2002, rejected the wife's application holding that any disturbance by changing the custody of the child would traumatize him as it would adversely affect his mental balance, the child having developed love and affection for his father and his family members. With a revision petition filed in the High Court, the wife secured visitation rights with specific fixed timings and dates and with specific references to the festivals. The father did not permit the mother to enforce the visitation rights and she filed a contempt petition resulting in the district court granting the child's custody to her. The husband now filed an appeal against this order that was dismissed. On appeal, the matter came up before the High Court. The father contended that the trial court had taken into account the fact that the child was with him for a continuous period of initial seven years and as he did not suffer from any infirmity nor any disability in the performance of his parental duties, the continuity should not be disturbed. Further, the sole consideration of the wife being the mother of the child cannot be the only basis of granting custody to her in such a situation. He stated that he was a good father and the criminal proceedings against him for violation of the court orders were owing to technicalities as he was not a criminal. He also supported his case with contention of his large income; sprawling house; plenty of company for the child in the shape of his mother, brother, his wife and three nephews in contrast to the two bedroom flat of the wife's parents; her meager income and isolation for the child. The wife on the other hand pleaded that the child was initially with her but was forcibly taken away by the father in 1999 and since then she has been doing the rounds of the court consistently but he had been successful in manipulating the situations and denying her the custody or even a chance to meet the child. She was a school teacher, had sufficient income and even though the child was poisoned against the mother, he would overcome the same within a short span of time. The High Court held that the daily trauma that the child faced in being tutored and poisoned against his mother would be far greater than the trauma that he would face when united with his mother and the father who poisons the child against another parent. They cannot be said to have acted in the best interests or welfare of the child. The father took the matter now before the apex court, which noted that his main argument was based on the continuity of the child with him and that the same should not be disturbed, but this was a fact that this continuation was to begin with due to forcible snatching of the child from the mother and then perpetuated by even flouting the court's orders. This plea raised by the father that wrenching the child from his custody would lead to its irreparable mental trauma was rejected by the court which held that the father cannot be a beneficiary of his own wrongs as he had managed to keep the custody by flouting the orders of the court consistently. Taking a very serious note of it, the court granted the

custody to the mother and held that the principles in relation to the custody of a minor child are well settled and the paramount consideration is the welfare of the child and not the right of any parent. The court cautioned that the issue of custody is to be viewed not on legalistic basis but on relevant human angles and ignoring the claim of the parties, a jurisdiction aimed at the welfare of the minor must only be exercised. The term "welfare" must be construed liberally and be taken in its widest sense including the moral, religious, ethical welfare of the child with full consideration to the ties of affection and should not be measured by only money or mere physical comfort. Though the provisions of the special statutes governing the rights of the parents/guardians may be taken into consideration, there is nothing that can stand in the way of the court exercising its *parents patriae* jurisdiction in desirable cases.[53]

Though the issue related primarily to the custody of the child, it prompted the apex court to express deep concern over the increase in breakup of marriages owing to human behavior and cautioned:[54]

> It is disturbing phenomenon that a large number of cases is flooding the courts relating to divorce or judicial separation. An apprehension is gaining ground that the provisions relating to divorce has led to such a situation. In other words, the feeling is that the statute is facilitating breaking of homes rather than saving them. This may be too wide a view because the actions are suspect. But that does not make the section invalid. Actions may be bad, but not the section. The provisions relating to divorce categorizes situations in which a decree for divorce can be sought for. Merely because such a course is available to be adopted should not normally provide incentive to person to seek divorce, unless the marriage has irretrievably broken. Efforts should be to bring about conciliation to bridge the communication gap which lead to such undesirable proceedings. People rushing to courts for breaking up of marriage should come as a last resort and unless it has an inevitable result, courts should try to bring about reconciliation. The emphasis should be on saving the marriage and not breaking it. This is more important in cases where the children bear the brunt of dissolution of marriage.[55] Marital happiness depends upon mutual trust, respect, and understanding. A home should not be an arena for ego clashes and misunderstandings. There should be physical and mental union. Marriage is something you have to give your whole mind to. If marriages are made in heaven, why make the matrimonial life a hell.[56]

53 Id. at 566-567.
54 *Gaurav Nagpal* v. *Sumedha Nagpal*, AIR 2009 SC 557 at 558, per Arijit Pasayat J.
55 *Id*. at 566.
56 *Id*. at 567.

The apex court granted the custody of the child to the mother and the appeal of the father was dismissed.

In a similar case, crossing international boundaries, the child was an American citizen by birth.[57] Owing to matrimonial discord, and a custody petition filed in the United States of America, the courts granted a joint custody to both the parents with specific directions that the child should not be relocated without the consent of the other parent. The mother brought the child to India and virtually disappeared with him. He was sent to different schools and moved from place to place with a view to deny access to the father. The father came to India, filed a petition for *habeas corpus* and prayed for the custody of the child and his passport but despite orders from the court for the production of the child, the wife did not relent. For full two years, the wife could not be traced despite notices and efforts of the police and the officials of different states. Ultimately, the husband had to take the help of CBI to find the mother and the child. With the lookout notices on an all India basis issued by the CBI, the mother and the child were ultimately traced in Chennai, and brought and produced before the court in Delhi. The court observed that even though the child was a US citizen, the courts in India could independently decide what was in its best interests and, in exercise of the summary jurisdiction, the application for the custody/return of the child should be made promptly and quickly after the child has been removed as the delay may result in the child developing roots in the country to which he has been moved. In the present case, the child was taken from one place to another; his schools were constantly changed and due to his constant shifting, it was unlikely for him to develop roots anywhere in India. Further, the father had filed the writ for *habeas corpus* promptly. The court held that they were satisfied that returning to the United States was in the interests of the child and therefore, the custody was granted to the husband subject to the condition of his financing the travel of both the wife and the child to the United States and dropping all the criminal cases against the mother of the child, to which the father agreed.

In both the cases, the approach of the court was pragmatic as the best interests of the child require love and constant/periodic company of both the parents. Even where the spousal relationship is bitter, the love for the vulnerable child should not be colored with maneuvering, planning, violating and circumventing court's orders. Award of custody to one parent unfortunately is often viewed as a victory over the other spouse, but is indeed saddled with a great responsibility. Parents who love their child often forget that in their obstination to teach the other spouse a bitter lesson, and thus denying him/her the company of the child, they are in fact doing a disservice to their own child. Adults can come to terms with adverse situations, but a child may develop lifelong insecurities that may irreparably harm its interests. For the court to ensure that post-culmination of litigation

57 *Dr V Ravi Chandran* v. *Union of India* (2009) 14 SCALE 27.

the child is not poisoned against the other parent and the other parent is not deprived of the visitation or company of the child, appears to be an almost impossible task as it is controlled by human emotions and actions and not merely by judicial pronouncements.

Custody battle between mother and grandmother of the child

Matrimonial discords have very distressing consequences as minor children deserving affection from the whole family are used as baits by the quarreling spouses and often even by the grandparents. In a case from Punjab,[58] the wife was a Canadian citizen. She came to Amritsar for her marriage to an Indian citizen, went to Canada and sponsored her husband's immigration. The husband thus reached Canada and his parents after sometime followed him. After the birth of their son, the mother now entrusted the minor to her mother-in-law, who brought the child to India with permission from the mother styled as "travel permission." The husband was in Canada and unemployed. Subsequently, pursuant to a matrimonial discord, the mother filed a petition in a court in Canada for custody and return of the child on the ground that her permission was for the child to visit India under the care and protection of the grandmother but did not extend for the child to be raised in India by the latter. The Canadian court held that the child must be returned to the mother and with access to the father. An appeal filed by the husband in this connection was dismissed. On the other hand, the grandmother filed a suit in India for her appointment as the guardian of the minor child that was dismissed by the trial court which also expressed dismay that the father of the child instead of looking after the wife and the child was in fact supporting the claim of the grandmother. When the grandmother refused to obey the order passed by the Canadian court in favour of the mother, the mother filed a petition for writ of *habeas corpus* for release of her son from grandmother as she was the natural guardian of the child. The present court ordered the grandmother to produce the child in the court and hand him over to the natural mother.

V JOINT HINDU FAMILY

Alienation of joint family property by father/karta for payment of his debts

Karta occupies an important position in a Hindu joint family and besides several responsibilities, is also entrusted with the job of managing the joint family property. An essential part of management also includes a decision to sell the property though for a permitted purpose even without the consent of the other coparceners. Under the law, a *karta* can validily sell the joint family property exceeding his own share and including the portion of the dissenting coparceners for a legal necessity, or for benefit of estate or for the performance of certain essential indispensable religious or charitable duties. Where the *karta* happens to be the father, he has wider powers of

58 *Gurmeet Kaur* v. *State of Punja,* AIR 2009 P&H 123.

alienation. An issue as to whether father as a *karta* can sell the joint family property, without the consent of his sons, in favour of his daughter for the satisfaction of the debts she contracted while looking after him in wake of neglect of the sons, came before the Patna High Court this year.[59] The father in the capacity of the *karta* purchased land. He had two sons and two daughters. In 1976, the father executed a registered sale deed in favour of his wife's brother and another deed of a different property in favour of his daughter. The sons, who in pursuance of these sales were dispossessed of the property, challenged the validity of both the sales pleading that the property was the joint family property; they were coparceners and without their consent such sales would be void and would not confer a valid title in favour of either the wife's brother or the daughter. The trial court held that as the property was the joint family property, the father alone was incompetent to sell it. Therefore, the sale was void and not binding on the sons. The matter went to the appellate court which held that *karta* had special powers of alienation of the joint family property and he can confer a good title on the alienee. The issue before the Patna High Court was whether father who also happens to be the *karta* of the joint family, has some special powers to dispose of the joint family property unlike an ordinary *karta* of the joint family. Answering the issue in the affirmative, the court held that the manager of a Hindu joint family has power to alienate for value joint family property so as to bind the interests of both adult and minor coparceners, provided the alienation is made for legal necessity or for the benefit of the estate. A manager (not being a father) can alienate even the share of a minor coparcener to satisfy an antecedent debt of the minor's father (or grandfather) when there is no reasonable course open to him. It is not necessary that the express consent of adult members should have been obtained in such cases. With respect to the powers of *karta*, when he happens to be a father as well, the court noted that a Hindu father as such has special powers of alienating coparcenary property which no other coparcener has. In the exercise of these powers, he may make a gift of the ancestral property or may sell or mortgage ancestral property whether movable or immovable including the interest of his son, grandson or great grandson therein for the payment of his own debt, provided the debt was an antecedent debt and was not incurred for immoral or illegal purposes. Thus, the powers of an ordinary *karta* and *karta* who happens to be the father are slightly different. In the present case, the court noted that it was in evidence that when the *karta* became old, the sons neglected him; did not maintain him and hence he was forced to live with his daughter and for meeting the costs of maintenance and his other necessary requirements including his debts, *karta* had to execute the sale deeds in favour of the wife's brother and his daughter. The court said:[60]

59 *Sunder Yadav* v. *Asha Kumari,* AIR 2009 Pat 131.
60 *Id*. at 136.

> The texts of Hindu law is very clear in that regard and provides an obligation upon the sons to maintain the father, specially when the father becomes old and needy, but here it has been found that the sons had neglected their father and failed to discharge their pious obligations due to which the father was forced to live with the daughter, but to pay the debt of his daughter which she incurred in his maintenance he had to sell the suit property as any self respecting person would do. Thus in the circumstances being the Karta, the father was perfectly justified and had full authority to sell the joint family property to the brother of the wife and to his daughter by sale deeds which were also binding upon sons and the purchasers validly acquired full rights, title, interests in the property and accordingly they were holding valid possession.

The court thus held the sales to be valid and alienation within the permissible purposes as legal necessity and presence of antecedent debts was proved by unambiguous evidence.

With the changing times and redefining of equations amongst close family members, property tussles are displaying an ugly side of human behaviour. This greed laced relationship bares an ugly consciousness of the entitlements and evasion of responsibilities making the old in the family extremely vulnerable. In addition, the dependency on only the son in a patriarchal society even in the presence of a concerned daughter willing to look after the parents in old age brings in the traditional issues of honour and prestige that can hardly be sustained in the materialistic and pragmatic world of today. The present case shows the courage on part of the father to break the stereotype and compensate the daughter for looking after him in old age and it also shows a judicial sensitivity to the whole issue in upholding the validity of the sale in favour of the daughter. A message that clearly tells the sons that benefits come with duties and failure to discharge the duties may result in forfeiture of the privilege. It is also a clear departure from the ruling of the Bombay High Court in *Jinnappa Mahadevappa* v. *Chimmava*,[61] wherein, Rangnekar J had held that under *Mitakshara* Hindu law, a father had no right to make a gift even of a small portion of Hindu joint family immovable property in favour of his daughter although it is made on the ground that she looked after him in his old age. The judge had observed:[61a]

> Undoubtedly the gift is a small portion of the whole of the property, but if one were to ignore the elementary principles of Hindu law out of one's sympathy with gifts of this nature, it would be difficult to say where the line could be drawn, and it might give rise to difficulties which no attempt could overcome.

61 AIR 1935 Bom 324.
61a. *Id.* at 326.

In the present case, the father had not executed a gift but the alienation of the property was by way of sale. However, the consideration for the sale was not adequate but far below what the property could have fetched in the market. In reality, it was in lieu of the amount that the daughter had spent on her father. Thus, it was akin to compensation. The court observed that even where the consideration was inadequate, this alone would not lead to a conclusion with respect to the invalidity of the sale if it was for an authorized purpose, and payment of one's debts was included in legal necessity, hence the sale was justified and valid.

Suit for partition by the minor coparcener

In a *Mitakshara* coparcenary, the right of an adult coparcener to demand partition of the joint family property leaves no choice of refusal with the *Karta*. Even the court has a little role to perform in such situations besides acting as a fair and equitable dividing authority. However, a demand of partition emanating from a minor necessitates a spokesperson acting as his next friend. In such a scenario, the role of the court is immensely important as it investigates into the factual situations and records a finding of whether a partition would be beneficial or would adversely affect the interests of the minor. Upon the satisfaction of the court that non-action on their part would adversely affect the interests of the minor; the court would order a partition and effect it. In a case from Bombay,[62] the senior-most male member acquired property through his efforts and then established a Hindu undivided family (HUF). He had two married sons. The property in the income tax records was shown as the HUF property. W, who was his daughter in law, had a matrimonial problem with his son. With the matrimonial litigation going on, she was awarded maintenance by the court under section 24 of the HMA. A son, born of this relationship, was also with the estranged mother since birth. She, on behalf of the minor son, sought partition of the HUF property as his next friend claiming one-sixth share. The husband contended that the sole object of the litigation was to make money as the interests of minor were adequately being taken care of. This suit, therefore, was an effort on part of the wife to extract more and more money from his family as the minor was also being maintained by the father. He also contended that the family was ready to maintain the child out of the share in the joint family property and there was no need of a formal partition as minor's financial interests were adequately protected by his father and other joint family members. The court cited with approval its earlier decision in *Kakamanu Pedasubhayya* v. *Kakamanu Akkamma*[63] and held that a partition of the joint family property through the filing of a suit by the next friend (in this case the mother) can be validly effected. The court has to be convinced in such cases that the partition would be in the interests of the minor and not

62 *Aryan Kamal Wadhwa* v. *Biharilal Wadhwa*, AIR 2009 Bom 80.
63 AIR 1968 SC 1042.

effecting a partition would adversely affect his interests. In the present case, as the parents were young, the court opinioned that the possibility of the father getting married again may not be ruled out. In that event, he would get other children and may not be in a position to take care of the interests of this minor. On the other hand, the mother offered to deposit the share of the minor in the court and to invest it according to the directions of the court showed bonafides on her part. The court called for the account of the total property, worked out one-sixth share of the minor which came to around 40 lakhs rupees and directed the Karta to hand it over to the grandson. This sum was ordered to be deposited in the court within a period of eight weeks with the specific direction for its investment in any nationalized bank during the minority of the grandson and with a prohibition on its withdrawal even on account of maintenance of the minor if he was otherwise maintained.

VI SUCCESSION

Who is a Hindu

Four different legislations, codifying the entire personal law relating to Hindus, were enacted during the years 1955-1956. All these enactments define/explain "who is a Hindu." According to the Hindu Marriage Act, 1955, a person would be a Hindu if both of his parents are Hindus, and if only one parent is Hindu, the legal requirement of his bringing up as a member of Hindu parent's tribe or community must be demonstrated. Thus, while the child of Hindu parents does not have to show his bringing up with any religious connotations, where only one parent is Hindu, his bringing up as a Hindu is a must and would have a material effect on his right to avail the beneficial provisions of law. This was the focal point of determination in a case before the Kerala High Court this year.[64] Here, the parties were subject to *Marumakkattayam* law. A Hindu lady during the subsistence of her marriage developed relations with a Muslim man, moved in with him without marriage and gave birth to two of his children. These two children claimed a share in the joint family called *tarvad* of which their mother was a member and wanted to invoke the benefit accorded to illegitimate children under section 16 of the HMA. The issue before the court was: Can such children claim the benefit of section 16 of the HMA, which is available to the children of void and voidable marriage? The court rejected their claim and held that for application of section 16, it must be proved, that there was a marriage between their parents that was either void or voidable under the Act and, secondly, that if one of the parent was a Hindu, such children were brought up as Hindus. It further held that here, neither there was a marriage under the Act, nor any proof or even a submission that they were brought up as Hindus, the children cannot be treated as Hindus, and in the absence of any

64 *Krishnakumari Thampuran* v. *Palace Administration Board, Kalikotta Port,* AIR 2009 Ker. 122.

marriage between their parents, the benefit of section 16 of the HMA was not available to them.

The focus of the case was determination of the religion of the children but with a view of assessing the availability of section 16 of the HMA, in the opinion of the court, that would have had a reflection on their eligibility to claim a share in the *Tarvad*. However, the court failed to note that in Kerala, the joint family concept was abolished in 1976 and the entire property available was the separate property that devolved under the Hindu Succession Act. In case of a female Hindu dying intestate, legitimacy of her children is unnecessary for conferring succession rights in her property and their claim can be granted irrespective of the application or non-application of section 16. Illegitimacy of children is no bar to their inheritance rights with respect to the property of their mother and it is not necessary whether or not they should have been born out of a lawful wedlock between their mother and their putative father. This case also throws up interesting questions that were not gone into such as what would be the religion of a child born of a Hindu mother and a Muslim father without a marriage in the circumstances where it is not clear whether the children were brought up as Hindus or not and secondly, can non-Hindu illegitimate children inherit the property of their Hindu mother in the absence of any specific provision in the Hindu Succession Act, 1956, prohibiting them to do so?

Notional partition: its reflection on *karta's* powers of management of the joint family property

The classical concept of coparcenary had three basic incidents, *viz.* unity of possession, community of ownership and application of the doctrine of survivorship. This was precisely the reason for fluctuation of interests in a *Mitakshara* coparcenary as the shares would increase with deaths and decrease with births of coparceners in the family. Under this law, no woman could be a coparcener nor own the coparcenary property. To correct this imbalance and to give visibility to close female relations in the ownership of coparcenary property, the Hindu Succession Act introduced the concept of notional partition in 1956 and, while doing so, the legislature made extensive inroads into the classical concept of coparcenary. According to section 6 of the Act,[65] on the death of an undivided coparcener in the *Mitakshara* coparcenary, the doctrine of survivorship would apply to begin with but in case he left behind a class - I female heir or a class - I male heir claiming through a female, it would be presumed that before his death he asked for partition irrespective of the fact whether he was capable to ask for partition or not and his share so calculated after effecting this notional partition would then be distributed in accordance with the laws of intestate succession in the absence of a will or through testamentary succession in case he left behind a will. However, right from the inception of this

65 As it stood before the amendment in 2005. This provision has further been modified by the Hindu Succession (Amendment) Act, 2005.

provision, confusion persisted with respect to its exact scope and effect on the status of the rest of the family members. On the issue of how to effect a notional partition, the legal presumption of its demand emanating from the deceased a little before partition, would result in division of property with a view to ascertain the deceased's exact share in the coparcenary property by the *karta* if he is alive, otherwise, by the family members. On the issue of effect of notional partition on the status of the rest of the family members, whether the shares of other members would also be fixed or would they continue to maintain a joint status, consistent but conflicting judicial deliberations have emerged in the past. Initially, connected with the sole issue of whether the females in this notional partition would get their shares or not, the apex court's verdict in *Gurupad* v. *Hirabai*,[66] threw some clarity by holding that the concept of notional partition is identical to a real partition and whatever consequences that flow from a real partition would also follow in case of a notional or presumptive partition. Confusion, however, persisted on the other issue as to whether on the death of a coparcener, with the notional partition, if the deceased's share is to be calculated and then females would also get their shares, would it mean that the entire joint family is disrupted? In such a scenario, where a coparcener dies, his share is calculated and the rest of the family members maintain the *de facto* joint status, would *karta* retain the power and duty to manage the joint family property as he used to before his demise?

This issue arose in a case[67] where on the death of one coparcener, *karta* continued to manage the joint family property and then sold a major portion of it for a legal necessity without the consent of the other coparceners. The coparceners challenged the validity of alienation on two grounds. *First*, that as per the apex court's *dictum* in *Gurupad* v. *Hirabai*,[68] notional partition is identical to a real partition, and with the death of a coparcener and effecting of notional partition, the members of the family would be presumed to be divided with the share of each becoming fixed and vesting in them, consequently, *karta* would lose the power to manage it, let alone sell the share of the coparceners that had already vested in them as a necessary consequence of the partition and *secondly*, the sale of the property was neither for legal necessity, nor for the benefit of the estate and thus *karta* exceeded his powers in selling the property even if assuming that it continued to be the joint family property. On the first issue, the court held that it is not necessary that on the death of one of the coparceners, and effecting of the fiction of notional partition, there would be a disruption of the joint family status with respect to the rest of the members. Rather, the rest of the family would continue to be joint and the property belonging to all the members

66 AIR 1978 SC 1239.

67 *Shankarlal Ramprasad Ladha* v. *Vasant Chandidasrao Deshmukh*,, AIR 2009 (NOC) 2367 (Bom).

68 AIR 1978 SC 1239.

would be under the management of the *karta* as before. The court said that the concept of notional partition is a legal device used for the purpose of demarcating interest of the deceased and like any other legal fiction, the fiction of notional partition is meant for a specific purpose. It is not a real partition by metes and bounds. It neither affects a severance of status nor does it demarcate the interests of surviving coparceners or of any female who is entitled to a share on a partition. The share of the deceased coparcener is required to be determined by notionally making an allotment of his share which he was entitled to at the partition on the assumption that he was alive on that day and thereafter to divide his share amongst the legal heirs. The joint status of the coparcener was not impaired due to introduction of section 6 and, therefore, the joint family is not disrupted. On the second issue, the court looked into the merits of the case and concluded that the sale of the property for meeting the marriage expenses of the daughter was justified. However, a mere plea that the sale was also for the improvement of the agricultural land without any remote evidence of the nature of improvement would not be permitted. Here, there was no evidence about whether any inquiry was made by the alienee for the benefit the family might have derived except the vague recitals in the sale deed that the sale was for the purposes of improvement of the land. The court held that this sale was not justified.

There is consistent ambiguity still prevailing with respect to the exact effect of operation of section 6 on the coparceners who survive the deceased and, consequently, on the joint family status as such. The limited scope of section 6 as pointed out in the present case as having no adverse impact on the coparceners permitting them to maintain a joint status goes contrary to the earlier apex court's verdict in *Gurupad* v .*Hirabai*.[69] On the precise impact of section 6, the court had held:[70]

> In order to ascertain the share of heirs in the property of a deceased coparcener, it is necessary in the very nature of things and as the very first step, to ascertain the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. Explanation 1 to section 6 resorts to the simple expedient, undoubtedly fictional, that 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 that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption once made is irrevocable. In other words, the assumption having made once for the purposes of ascertaining

69 *Ibid*.
70 *Id*., para 13.

> the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of heirs, through all its stages. To make the assumption at the initial stages for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle. All the consequences that follow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from each other and had received a share in the partition which had taken place during the life time of the deceased. The allotment of this share is not a processal step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition.

According to the apex court, after the demise of a coparcener, the shares of the rest of coparceners also become fixed and *karta* loses power to manage the same, let alone alienate it and that too without their consent. This interpretation is also in tune with the consistent legislative trends favoring extensive dilution of the concept of the Hindu joint family. The present pronouncement goes against this trend and the earlier apex court's judgment as well.

Effects of disowning a person on laws of inheritance

Family relations are delicate and in the Indian patriarchal setup, it is not uncommon for parents to disown their children, if they indulge themselves in a conduct that brings shame to the family or their name or honour. Often children marrying against the wishes of the parents are reprimanded by the parents who vow not to see their faces for the rest of their lives. Some turn them out of their homes and/or publically disown them, or banish them not only from their lives but from their property. A question arises: What is the legal sanctity of such proclamations which are sometimes even published in the local dailies disowning the children and disinheriting them from their property? Do they have any adverse repercussion on the inheritance rights of such children? More interestingly, once a parent disowns a child; severs publically the relationship with him, can such a parent then inherit the property of such disowned child or represent him in an ongoing property

litigation? This issue arose in a case from Himachal Pradesh.[71] Here, during the pendency of the litigation which involved a dispute relating to a share in the property, a man (defendant no. 1), his wife and a minor child died in a road accident. An application was filed for substitution in a pending litigation relating to property against another person, by his sister, on one hand, claiming this right as his class-II heir and, on the other hand, by his mother as his class-I heir. The mother earlier had snapped all the ties with her son and had published a statement to that effect in the local newspaper. Two issues confronted the court here: first, as all three, *i.e.* the man, his wife and their son, had died simultaneously and it was not clear who breathed his last in the end, the representatives would be reckoned with respect to whom and, second, what is the effect of the disclaimer published by the mother snapping all her ties with the son and also disinheriting him on her claim of representation in a property dispute that the son was involved in as its owner/ claimant?

It was held that according to the presumption applicable under section 22 of the Hindu Succession Act, 1956, in cases of simultaneous deaths, it would be presumed that amongst these three dying together, *i.e.* a man, his wife and their son, the first to die was the man himself, then his wife and the last would be their son and the representatives would have to be reckoned in reference to the son. On the second issue, the court held that the notice or the disclaimer of relationship cannot disinherit any statutory heir as such notice or disclaimer has no legal value and cannot override succession rules. Since succession had to be reckoned with respect to the youngest child who died later to his parents, the grandmother was held entitled to substitution, disclaimer of relationship notwithstanding.

Succession rights of an unchaste widow v. the second wife

With the imposition of compulsory monogamy, men desirous of entering into a second wedlock, have to legally dissolve their first marriage prior to contemplated remarriage. Failure to do so would lead to non-recognition of not only the second marriage but the second woman would be deprived of any inheritance rights out of the property of the deceased man. In a case from Punjab,[72] subsequent to the marriage, the wife (W_1) left the husband (H_1) and started living with another man (H_2) and bore him three children. She underwent a tubectomy operation and in the place where the name of the husband was to be written she wrote the name of her paramour. The husband, on the other hand, did not seek divorce on grounds of his wife's adultery but without putting an end to the marriage with the woman who had walked out on him got married to W_2, while he was posted in army in Mizoram. In his official records, he mentioned W_2 as his wife. On his death, W_1 filed a claim to his property that was resisted by W_2 on the ground that:

71 *Raman Khanna* v *Sham Kishore Khanna,* AIR 2009 HP 42.
72 *Daljit Kaur* v *Amarjit Kaur,* AIR 2009 P&H 118.

i) W_1 was already divorced by H_1 and she, *i.e.* , W_2 was the legally wedded wife,
ii) W_1 was unchaste as she had left H_1 during the subsistence of the marriage to live with her paramour and had three children from him;
iii) in the official documents, W_1 had shown another man as her husband, and thus she would be stopped from claiming the status of the widow of H_1.
iv) W_1 had shown the father of her children in the school records as H_2 and not H_1
v) H_1 had himself written the name of W_2 as his wife in the service records and a declaration to that effect would mean a valid marriage as between H_1 and W_2; therefore W_1 could neither claim the legal status of his wife nor any claim with respect to his property.

The court held that the second marriage would be valid only when it was proved that there was a divorce. The mere fact that a woman is abandoned by the husband and he enters into a second relationship or a man is abandoned by the wife and he gets married a second time would not prove an automatic divorce. Divorce can be granted only by a competent court and cannot be effected by declarations even when they are made in writing to the statutory authorities. With respect to the unchastity of the first wife, the court held that unchastity is a ground for divorce but not a disqualification for succession rights. The court, therefore, held that the succession rights of W_1 were unaffected by the chain of actual event

This pronouncement is problematic. The facts, though peculiar, established that on part of the first wife, it was not a stray act of deviance but was of abandoning of the husband coupled with the intention to permanently live in a marriage-like relationship with another man. Entitlements are based on legal relationships and the fact that the husband after the initial jolt entered into another union and tried to give it legitimacy by official declarations shows that the first marriage from his perspective was dead. Similarly, a woman who herself broke the marriage by walking out on the husband only to live with another man on a permanent basis, cannot and should not be allowed to claim benefits available under the dead and broken thread that she once shared with the deceased. Instead of a mechanical application of the legal provisions, the court need to apply the law to the facts of the case as were proved before it. Monetary or property benefits should not be granted to the guilty of grave matrimonial misconduct of the present nature, more so in a dead relationship. It is ironic that had this woman during the life time of the deceased had claimed maintenance from him, she would have been denied the same due to her conduct, but she could be successful in getting a title to his property post his death. The courts in India themselves have taken a judicious approach in some earlier pronouncements.[73]

73 *Krishnamma* v. *P Subramanyam Reddy*, AIR 2008 (NOC) 482 (AP).

Reference may be made to a case having similar facts from Andhra Pradesh where upon the death of a Hindu man, his wife claimed his property as his class-I heir. The wife had deserted the husband to live with her paramour, giving birth to her lover's children. On the question of her entitlement to claim her husband's property, the court held that the widow having left the family once and for all and having been under the roof of another and having begot his children cannot claim inheritance from the husband either in law or in equity. The fact remained that she was still the wife of the deceased and under the Hindu Succession Act, 1956, the character of the wife or her conduct does not legally debar her from inheriting the property. Here, the court in accordance with the principles of justice, concluded that the wife did not deserve to inherit the property and thus the court did not apply the rules of inheritance. If they had applied inheritance rules, she being a class I heir, would have succeeded to the property.

Succession to property of a female intestate preferring in-laws of married woman over her natal relations

In another important case[74], though again an extremely unfortunate decision, the Supreme Court held that the in-laws of a married woman have preference over her natal relations in succeeding to her property despite the fact that they had earlier kicked her out of the matrimonial home. The facts showed that a fifteen years old Hindu girl was married in 1955. Three months later, her husband died of snake bite and the in-laws threw her out of the matrimonial home branding her as a bad woman. She took shelter with her parents, who gave her education so that she could be financially independent. Taking a job as a school teacher, she acquired wealth by her hard labour and all through these days, the in-laws never bothered to even inquire for her, let alone look after her, and there was a complete snapping of relations. She died intestate in 1996, 42 years later, leaving behind huge sums in various bank accounts, besides her provident fund and a substantial property. Her mother sought the grant of a succession certificate, but her late husband's brothers, *i.e.* the same in-laws, who had kicked her out at the time of her becoming a widow, also filed a similar application. Later, on death of her mother, her brother replaced her as the applicant. Ironically, the claim of her mother and then the brother was negatived by the Supreme Court on the ground that as per the provision of the Hindu Succession Act, 1956, it is the heirs of the husband who have a legal right to inherit the property of an issueless married Hindu woman and her parents cannot inherit in their presence. The in-laws thus succeeded and were given the judicial nod to claim the complete property left by the deceased.

The case and the verdict both are unfortunate on two counts: the law itself and its implementation in the present case.

74 *Om Prakash* v. *Radha Charan*, 2009 (7) SCALE 51.

The Hindu Succession Act, 1956, provides for two different schemes of succession for male and female Hindu intestates.[75] It is pertinent to note that this law applies only when no will is executed by the owner of the property. Where a Hindu male dies, the property goes in the first instance to the class-I heirs.[76] If none of the class-I heirs is present, then the property goes to class-II heirs.[77] Next in line are the agnates and, then finally, the cognates. All these heirs are reckoned with respect to the deceased and none with respect to his spouse. Where, however, a Hindu woman dies, the property that is available for succession is divided in three categories. One, that she might have inherited from her parents, which, goes back to her father's heirs in case she dies issueless, the second that she might have inherited from her husband or deceased father-in-law and that goes to her husband's heirs from whom or from whose father she had inherited the property. The last category is general property that includes her self-acquisitions, property that might have been gifted or bequeathed to her by anyone. This property, in the first instance, goes to her children or children of deceased children and her husband. In their absence, the property goes to the heirs of her deceased husband with a presumption that it belonged not to her but to her deceased husband and his heirs would include the complete category of her in-laws. When none of the heirs of the husband is present, the property goes to her parents in equal shares. Next in line are the heirs of her father and finally, the heirs of her mother. It should be noted that in all the succession laws that apply to the various religious communities, except Hindus,[78] the general rule of inheritance goes in favour of blood relations only. Secondly, no other succession law including Muslim law gives statutory preference to the in-laws over a woman's blood relatives. All succession laws (with limited exception) provide a uniform scheme irrespective of the sex of the intestate and in which primacy is always given to the intestate's blood relatives. For example, if a Muslim, Christian or a Parsi woman dies leaving behind property, it is her blood relatives, her mother, her father who inherit her property even in the presence of her husband, or her husband's relatives. The deceased woman's husband's relatives can never be her heirs. The same rule applies for a Hindu man. Thus, when a Hindu man dies, none of his wife's relatives can ever inherit his property but if a Hindu married woman dies issueless, the property can never be taken by her parents or her blood relatives in the presence of even a remote relative of the husband.

75 See, ss. 8-13 and 15-16.

76 That include his mother, widow, children, children of predeceased children, children of predeceased children of predeceased children(except two), widow of a predeceased son and widow of a predeceased son of a predeceased son.

77 That include, the father, brother and sisters and their descendants, grandparents, maternal and paternal uncle and aunts and brother's and father's widow.

78 Parsi Law permits an intestate's lineal descendant spouses (widows and widowers) to inherit the property as well, but even here husband's heirs cannot inherit the property of a deceased woman.

None of the inheritance laws, anywhere in the world, confers inheritance rights in favour of the relatives of the spouse of any female intestate, even where leaving the natal place and joining the husband and the matrimonial home by a woman is a general phenomenon all over the world and more specifically in the Asian patriarchal families irrespective of religion. This unique feature of Hindu laws of giving preference to in-laws over blood relations of the deceased woman is, therefore, devoid of any rationality and logic and rather than questioning it, a confirmation of the same by the judiciary is extremely unfortunate.

The preference of husband's relatives and in their presence the elimination of a woman's parents and siblings happens only in cases of a married woman dying as issueless widow. It is a practical reality that despite the *dharamshastras* and the legislature proclaiming that after marriage, a married woman's permanent abode is the matrimonial home and that her natal or parental place is a thing of past as her ties are snapped totally from them, it is a practical reality that all these preaching's originate from a stark realisation that for any person let alone a woman forget her blood relations which is virtually impossible and also completely unnatural. All these hollow preachings are deliberately aired and sought to be imposed in the garb of religious dictates because transportation of a woman from the natal family to the matrimonial home is essential for enforcing patriarchal norms. Her complete absorption necessitates that she is made to, and told to, forget the natal family (except for the purposes of bringing gifts on festivals, other auspicious occasions and at time of birth of children) and make the matrimonial home her home for its betterment, yet in reality, her stay at the matrimonial home can never be a matter of her right and is totally dependent on the convenience of her in-laws. The near impossible and strenuous expectations translated into her religious and matrimonial duties of obedience, respect, tolerance, accommodation and subservience to the entire clan of her husband reproducing children, nurturing and rearing them and assumption of domestic responsibilities to their satisfaction becomes her fate. If her entry coincides with an unfortunate happening, it is she who is branded as responsible for bringing bad luck and for purification of the matrimonial home or for its wellbeing, she can be conveniently kicked out. Her stay at the matrimonial home is till the time it suits her in-laws and her coming back to her parents is when the in-laws have no use of her, and she is in trouble. Further, as even today less number of women go for remarriage, her survival for a long lonely journey in life poses a big issue. It is but natural that her blood relations would come to her rescue, help her out voluntarily or grudgingly, and in this scenario to uphold the rights of inheritance in favour of the same in-laws who kicked her out, by the apex is bewildering. This decision appears to be not only morally but also legally, inappropriate. Where the law appears on the fact of it to be inequitable, the Constitution has given the task to the court to apply the law as is just in accordance with the facts and circumstance of the case. The job of the courts is not to apply the law mechanically as it appears on the statute book, but in

accordance with the demands of justice, apply the law to the peculiar facts and circumstances of the case. The courts do not discharge their constitutional obligation to accord justice to people if they display their helplessness and take shelter behind antique and outdated patriarchal ideology enforcing laws.

The law of inheritance is not merely about entitlements but also about disentitling a person who in accordance with rules of equity, justice, good conscience and public policy should not inherit the property in the given set of situation. In such a case, this disqualified heir is presumed to be dead and the property passes on to the next mentioned heir. In the present case, the in-laws having thrown out the helpless girl of fifteen years were morally guilty. They, having abandoned the girl and abdicated their duty of looking after a family member, should not have been allowed to satisfy their opportunism based greed and unjust enrichments; they should have been estopped from claiming inheritance.

The actual effect of the judicial approval of laws is far reaching with the potential of assuming dangerous consequences as it is directly linked with son-preference among Hindus. The state judicial mechanism cannot take two diametrically opposite positions at the same time. On one hand, the parents cannot and should not indulge in son-preference while, on the other hand, the state itself gives a preferential treatment to men and their relatives, but relegates those related through a married woman to an inferior position. If from a son only his blood relatives can inherit but from a daughter the blood relatives would inherit only till she remains unmarried as different rules would prevail upon her marriage, it is discrimination linked to marriage of a Hindu female. Legislation/judicial stand should never reflect a gender biased scheme in light of its sincerity about curbing female foeticide. Parents of a girl (her marital status notwithstanding) should have the same security as the parents of a man. If the marital status of a Hindu man has no relevance in determining who his heirs would be, the same rule should apply to a married Hindu female. Leaving of the natal home upon marriage and joining of the matrimonial home should not result in the substitution of relations, as is not a unique feature of Hindus alone but prevalent worldwide. The legislature or the judiciary cannot choose or impose relatives on a married woman alone. It is determined by blood or through the ties of marriage but only as between the spouses and cannot extend to the relatives of the spouse. The proclamations of unity of spouses and the merger of the wife into that of the husband or her becoming a member of his family are outdated concepts that can be referred to as the cherished ideals of the bygone era and even in the name of preserving Hindu society cannot and should not be enforced by the Indian judiciary in the 21st century.

The present judgment is disappointing as the Indian judiciary is one of the major components of state mechanism empowered to dispense away justice in accordance with the constitutional principles and law enacted by the legislature. It is also viewed as upholders of gender justice and an effective tool for correcting defective and outdated laws that are against the

spirit of empowerment of women. Judicial activism has raised the hopes of the Indian society, restoring the faith of the common man in it, but the self-restraint that it has exercised in the present case comes as a big damper resurfacing the fears that perhaps the Indian judiciary still views the legal provisions and their implementation as a means of upholding traditional patriarchal values. The present pronouncement, in fact, sub-serves the ends of justice. Rewarding the undeserving is in itself appalling, but rewarding the guilty is like adding insult to injury. The present case was not whether the brother of the deceased should get his due, but in fact a case where the relations were snapped by the in-laws by throwing a girl of tender age of fifteen out of her matrimonial home only to legally claim the relationship when an opportunity arose to gain from her. It was an occasion for the apex court to show that it would not tolerate attempts by merciless and cruel in-laws for unjust enrichments. The atrocious situation in which the claimants to her property threw her out of the house only to be rewarded later by giving them her property shows want of understanding of real human values and bares insensitivity on the part of the highest pillars of Indian judiciary. Nothing can be more humiliating than taking a girl into a family upon marriage and, turning her out when her husband dies. She was a minor, virtually a child. The very term justice suggests the anti-thesis of what has been done by the apex court here. S B Sinha and Mukundakam Sharma JJ, while dismissing the contention that her late husband's brothers were not entitled to her property, observed:[79]

> It is now a well-settled principle of law that sentiment or sympathy alone would not be a guiding factor in determining the rights of the parties which are otherwise clear and unambiguous under the Hindu Succession Act.

The apex court also cautioned that any other interpretation based on sympathy would be contrary to the intent of Parliament, which has bestowed equality upon married and unmarried Hindu women in the matter of property.

The apex court's caution of sympathies having no place in law is correct, yet, at the same time, even the elements of inequity and injustice can never find a foothold in law thus necessitating the application of rules of estoppel. The courts can never be a medium for doing injustice and the judicial mechanism should not be used to accord rewards to the one deserving punishment. The judiciary is expected to come down heavily on those who first kick a fifteen years old girl out of the matrimonial home for no fault of hers and then lay claim over her hard earned property. The requirement here was of a judicial reprimand and a firm reminder to the greedy and unethical in-laws of their moral and legal duty to support a child, as their *locus standi* to claim her property was questionable. The courts first of all

79 *Id.* at 54.

are the courts of equity, justice and good conscience and the present judgment unfortunately fails to come up to expectations on all the three counts. It regrettably appears to be an unhealthy judgement that may result in shaking the confidence of an average Hindu woman, who needs to be treated as an independent individual capable to transmit her property to her blood relations rather than have her *persona* merged into that of her husband with the sole objective of stripping her of her true identity and a judicial imposition of superiority of her husband's entire clan over her own blood relatives in matters of succession to her property.

Conferment of absolute ownership in the property in favour of Hindu women

It has been 54 years since Hindu women were conferred full ownership in the property, yet it is amazing that cases under the 73 year old Hindu Women's Right to Property Act, 1937, keep on surfacing. Under the *shastric* Hindu law, a Hindu widow did not have any right in the property of her husband on his death as she was restricted only to maintenance. Here, in a case from Bombay,[80] a Hindu male died prior to 1937, leaving behind his widow, son and daughter. The mother took the possession of the property as the children were infant and died in 1990, after the commencement of the Hindu Succession Act, 1956. Thereupon, her daughter filed application for mutation of names with respect to half of the property, a claim that was resisted by her brother, who contended that as the death of the father had taken place before the coming into force of the Hindu Women's Right to Property Act, 1937, his mother had no 'limited estate/ownership" in the property but had only a right of maintenance and the same could not mature into an absolute estate and, therefore, he alone inherited the property of the father. The trial court agreed with the contention of the sister and granted half share in the property to her. The lower appellate court held that as the widow had no subsisting right in the property besides only a right to claim maintenance, this right could not mature into absolute ownership in 1956, and the complete right in the property vested in the son. The High Court of Bombay also agreed with the decision of the lower appellate court and granted the title to the brother exclusively. In another case from Allahabad,[81] in 1954, by a deed of family settlement, the joint family was dissolved and all the ancestral property was divided in three shares. W who was a child widow was given a share but with the condition that she would not transfer it to anyone except the parties to the family settlement or to their heirs. However, W in 1970 gave her entire share by way of a registered gift to X who was neither a party to the original settlement nor an heir of any such party. She said that the conditions imposed on her were oppressive and illegal and she was no longer bound by that and with the promulgation of the Hindu Succession Act, 1956, she had become the full owner of the property. The

80 *Jamunabai Bhalchandra Bhoir* v. *Moreshwar Mukund Bhoir*, AIR 2009 Bom 35.
81 *Vidya Devi* v. *Sri Prakash,* AIR 2009 All 85.

court held that section 14(1) and its explanation were couched in widest possible term and must be liberally construed in favour of female heirs so as to advance the object of the Hindu Succession Act, 1956 and to grant socio-economic rights sought to be achieved by the long needed legislation. Under section 14, restriction would be legally permissible but only where the restricted right was conferred in favour of a female for the first time under a court's order, decree, award, will, *etc.* but where the widow got the property under an instrument declaring her pre-existing rights of maintenance or of partition or for a share that she is otherwise entitled to, section 14(2) would have no application and such interest would be enlarged into absolute ownership under the 1956 Act. It was held that the gift was valid as W was an absolute owner of the property.

Partition of the dwelling house at the instance of daughters

Legislative sponsored discrimination against daughters was clearly evident as with an express provision, a daughter was denied right to claim partition of her own share in the inherited property against the wishes of her brother on whom the legislature conferred a legal right to use and occupy the share of the sister against her wishes. It has been now close to five years that this provision was aptly deleted from the statute books, but the issue as to the application of the amended provision to the pending suits, wherein daughters claimed partition and specification of their shares out of the family dwelling house, still keeps on surfacing. This year, two such cases[82] came up before the courts where sisters proceeded against their brothers who had refused to give them their legal shares taking shelter behind the legislative disability imposed on the females to enforce partition and ascertain their holdings in the dwelling house. In all cases, adopting a unanimous approach, the courts held that the effect of deletion of section 23 on the cases pending in courts awaiting disposal would be to remove this statutory disability imposed on the daughters. The court held:[83]

> No doubt Amendment shall have a prospective effect, but practically if the matter is viewed it is clear that as per Hindu Succession (Amendment) Act 2005, the plaintiff is entitled to a partition of the dwelling house property also and such an amendment has come into vogue during the pendency of the appeal. The appeal is deemed to be in continuation of the suit proceedings. It would be a mere hyper technicality if the plaintiff is driven to the extent of filing a fresh suit involving the said recent Hindu Succession (Amendment) Act 2005 and in such a case, the court said that it had no hesitation in construing that the erstwhile section 23 had no application and accordingly partition could be ordered in respect of one eighth share of the daughter.

82 *Prabhu dayal* v. *Ramsiya,* AIR 2009 MP 52; *M Revathi* v. *R Alamelu,* AIR 2009 Mad 86.
83 *M Revathi* v. *R Alamelu,* AIR 2009 Mad 86 at 87.

Thus, the court ordered a preliminary decree to be passed permitting the daughter to enforce partition and specify her share in the dwelling house.

Remarriage of the widows

Prior to amendment of the Hindu Succession Act in 2005, section 24 prohibited those widows who remarried before the opening of the succession from inheriting the property of the intestate. Post-2005, the section has been deleted but the confusion has now prevailed as to whether the widow of the son who remarries before the death of a Hindu male would be entitled to succeed to his property. Here,[84] a Hindu widow was in possession of the property in lieu of her maintenance rights prior to 1956. With the enactment of the Hindu Succession Act, 1956, as she was in possession of the property, her limited rights matured into full ownership. She was also a member of the joint family in which she held the share of her deceased husband all along and there was nothing on record to show that at any point of time, she was denied any share in it. Thus, in 1956, she became the owner of this one-third share that the family comprising of her father in-law and her deceased husband's brother held jointly. The widow then remarried in 1962 and sued for partition and handing over of her one-third shares in the property. During the litigation, her former father-in-law died and she claimed half of his share as well under the inheritance laws. The Bombay High Court held that in light of section 24 of the Act, as it was applicable prior to 2005, the widow was precluded from inheriting the share of the property of the former father-in-law as she had remarried before his death and had ceased to be a member of his family. The court said:[85]

> It may be noted that section 24 of the Hindu Succession Act, 1956 was in force till 9-9-2005 and is squarely applicable to the present case.

The observation seems to suggest that post-2005, the scenario in this regard is different and if the case had arisen after 2005, she might have been entitled to inherit the property of the former father-in-law. This is an erroneous assumption as the laws of inheritance are based on the general principles that only family members can inherit from the intestate. A person who enters the family by getting married to a male member of the intestate's family and upon the death of this male member continues to be a family member by remaining unmarried, in fact continues to belong to his family. However, if the same person re-marries and ceases to be a family member, then she cannot claim inheritance. Section 24 merely gave statutory shape to this fundamental rule of inheritance. It did not lay down a law and, therefore, its deletion has not made any difference to the legal position in this regard.

84 *Baliram Atmaram Dhake* v. *Rahubai,* AIR 2009 Bom 57.
85 *Id.* at 60.

VII CONCLUSION

The year 2009 saw important deliberations in the area of Hindu law by the apex court and several High Courts. The courts refused to uphold the illegal claims under feigned adoptions, adjudicated on the validity of inter-religious marriages under the Hindu Marriage Act, 1955 and determined its applicability to marriages among Hindus solemnized abroad in accordance with the procedure of foreign countries. Divorce by mutual consent dominated this year with the apex court exercising their powers under article 142 of the Constitution to accord relief to a husband trapped in an unhappy marriage when the wife refused to live with him yet did not agree to a mutual consent divorce. For restitution of conjugal rights, surprisingly, considerations of employment of the wife were not treated as a matrimonial misconduct sufficient to grant a decree to the husband. The courts also protected the rights and welfare of the children aptly coming down heavily on the parents trying to manipulate the situations and disobeying the court's orders to retain the custody with them. The concern and the humane approach of the judiciary was evident, yet unfortunate surprises sprung up throwing up fresh challenges laced with extreme disappointment. Two unfortunate pronouncements, both by the apex court, displayed an unconcerned patriarchal perspective and stereotyping of roles by them. In one, they endorsed with approval, the comments of the High Court made in relation to career aspirations of married Hindu women against the wishes of their husband and held it as amounting to a matrimonial misconduct enough to break her home, and in the other, the court refused to enforce the rule of estoppel against the in-laws of a married woman and permitted them to claim her property despite the fact that they had earlier kicked her out of their home for no fault of hers.