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HINDU LAW

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I INTRODUCTION

IMPORTANT JUDICIAL pronouncements relating to Hindu law of marriage, relationships in the nature of marriage, adoptions, custody and guardianship, maintenance, joint family and succession reported during the year 2010 have been briefly analysed in this survey.

II ADOPTIONS AND MAINTENANCE

Effects of adoption

Perceived as a religious and spiritual act under the classical law and post-1956, an extremely important facility for the childless couples yearning for parenthood, as also for the orphans to get a home of their own, the issue of adoption of late has become more of a property grabbing mechanism san the pious objectives. Feigned adoption deeds in order to lay claim over the property or clinging to the biological family despite being given in adoption, with an eye on the natural father's assets, are common features of materialistic world of today with relations having little solace for each other. In *Khidmat Singh* v. *Joginder Singh*,[1] the father had executed a will of his property in favour of one of the sons. The other, who had been given in adoption, challenged it saying that the father was incompetent to do so as the same were coparcenary property and thus he also had a share in it. The claim of the son was dismissed by the court citing two reasons: *first*, that post-adoption, the son had no right in the property of the biological father, and *second*, that it was not the coparcenary but the separate property of the father and thus he was competent to make a will of the same in favour of anyone. This judgment, though ended correctly, raises important issues of the effects of adoption, and bares the lack of clarification over the very legislative permissibility of testamentary disposition of coparcenary property by an undivided coparcener. Adoption under the present Act constitutes an irreversible act and once a child is given in adoption, presumption of his death for the biological parents, and

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1 AIR 2010 (NOC) 617 (P & H).

a re-birth in the adoptive family are legally conclusive. Where the adoptive family possesses coparcenary property, he becomes a coparcener with them, but the exit from the natural family would lead to a total negation of his rights in the biological father's property, whether separate or coparcenary, as his presumptive death results in the instant application of the doctrine of survivorship with the undivided share going to surviving coparceners. This loss of his interest makes him not only incompetent to claim any portion of it but also prohibits him from challenging any alienation or disposition of the same by the biological father. The only connection with the natural family that remains alive is the application of prohibited degrees of relationship on him if he desires to get married. He is prohibited from marrying anyone of the biological family, whom he could not have married had he remained in the family. Except for this link, he is deemed to be dead for all purposes for the natural family and once the *factum* of his adoption is proved, his status to challenge a disposition of the property by his natural father is questionable. He does not have *locus standi* to question any alienation effected by the father. The character of property in the hands of the father is immaterial as post-1956, with the enactment of the Hindu Succession Act, 1956, a coparcener is competent to make a will of his undivided share in the joint family property as well in favour of anyone. The law that upon the death of a coparcener, due to application of the doctrine of survivorship, the undivided interest vests in the other coparcener and the will, therefore, would be ineffective has been expressly abrogated by the Hindu Succession Act, 1956.[2] It is visualised as one of the major legislative encroachments on the classical law of coparcenary as it defeats the application of the doctrine of survivorship by permitting an undivided coparcener to execute validly a will of his undivided share in the coparcenary property. Under the present law, whether it was the separate property or a share in the coparcenary property, the father is competent to bequeath the same and a son, who ceases to be a part of the natural family after his adoption, cannot challenge its validity.

III MARRIAGE

Application of e Hindu Marriage Act, 1955 to Hindus in Goa

India has a multiplicity of personal laws the application of which primarily depends on the religion of the parties. Thus, a predominant section of Hindus are governed by the Hindu Marriage Act, 1955 (HMA), Muslims by the classical Muslim law, Christians by the Indian Christian Marriage Act, 1872 and Divorce Act, 1869 and Parsis are subject to the Parsi Marriage and Divorce Act, 1936. There is further divergence linked with the domicile and tribal status of Hindus. For instance, Hindus in the State of Jammu and Kashmir have separate laws and Hindus who are members of scheduled tribes are subject to

2 See s. 30.

their distinct uncodified family laws enjoying the constitutional protection of their identity and culture. Two territories in India that were previously subject to European countries' jurisdiction, *i.e.* Pondicherry that was under French rule and Goa, Daman and Diu that were Portuguese colonies, have different personal laws. While inhabitants of Goa, Daman and Diu, are subject to the application of the Portuguese Civil Code, 1867, with accommodation for special rules for Non-Christian inhabitants of these territories, the renocants of Pondicherry irrespective of their religion, are governed by the provision of the French Civil Code, 1804. In addition, secular legislations like Special Marriage Act, 1954 and Foreign Marriage Act, 1969, add to the already existing long list of matrimonial legislations. In this complex maze of multiple personal laws, to establish, which personal law would apply to whom in a specific territory in the given set of situations in itself is a daunting task, more so if the parties happen to be Hindus with each one of them domiciled in different territories.

It is pertinent to note that when the HMA was enacted in 1955, Goa was not even a part of India. The application of the HMA, in 1955, therefore, was confined to the then territories of India, subject of course to the exception carved out for Hindus domiciled in Jammu and Kashmir and members of scheduled tribes. Family laws of Goa, Daman and Diu applied and continue to apply uniformly to all inhabitants of the State of Goa and by virtue of the provisions of Goa, Daman and Diu (Administration) Act, the continuance of the then existing laws in these states was protected even post-annexation of Goa in 1962. As per section 6 of that Act, the Indian government, though could have extended the HMA to Goa, did not do so and, therefore, the question of its application to the Hindus in Goa is in itself worth examination. Can the extent of application clause contained in the enactment, namely the HMA, automatically extend to the State of Goa without the government formally exercising their powers under the relevant statute? This issue arose in connection with a case wherein though the marriage was solemnised in Goa, the wife wanted the matrimonial petition to be transferred to a court in Delhi under the provisions of the HMA. Here,[3] the marriage of a Sikh girl and a Hindu man domiciled in Goa was performed before the civil registrar at Vasco-de-gama at Goa in 2007 and the same was registered in the presence of three witnesses. Owing to marital differences, a petition by the husband was filed in Goa praying for a decree of nullity. The wife wanted the case to be transferred to a court in Delhi on the ground that she did not have any place of residence in Goa or any acquaintance there. The husband contended that as the civil proceedings relating to marriage were governed by the Civil Code of 1867, which was in force in Goa, a petition for annulment could be tried only in the State of Goa and nowhere else. Two issues confronted the court here: *first,* by which personal law the matrimonial remedies in the present case would

3 *Vinisha Jitesh Tolani alias Manmeet Laghmani* v. *Jitesh Kishore Tolani*, AIR 2010 SC 1915.

be governed? The husband was domiciled in Goa and the marriage was performed in accordance with the laws prevailing in Goa, that are distinct from those prevalent in the rest of India, and the Government of India had not formally extended the HMA to Goa; and *second*, can the proceedings be transferred at a place different from Goa, in view the convenience of the wife even in light of the law in Goa that expressly mandates the trial of matrimonial proceedings in Goan courts if the marriage was performed in Goa with one party domiciled in Goa? It was the husband who had filed a petition against the wife in this case.

With respect to the first issue, the apex court held that section 2 of the HMA extends the Act to the whole of India except Jammu and Kashmir and also applies to Hindus domiciled in the territories to which the Act extends who are outside the said territories and, therefore, it would apply to Hindus in Goa as well. With respect to the second issue, the court observed that the case can be heard by any court having jurisdiction within the territories to which it applies even outside Goa. Taking stock of the special situation prevalent in Goa, the court held:[4]

> Sections 5 and 6 of the Goa, Daman & Diu (Administration) Act, 1962, indicate that the Central Government has the authority to extend enactments applicable to the rest of the country. In other words, even if it were to be held that it is the customary law in Goa which would prevail over the personal law of the parties, the same could not be a bar to the transfer of the matter outside the State of Goa to any other State …. Notwithstanding the fact that the marriage between the parties had been conducted in Goa, the same having been conducted under their personal laws and under Hindu rites and traditions, we are satisfied that the claim of the petitioner is justified.

The apex court finally held that HMA applies even to Hindus in Goa and directed the proceedings to be shifted from the courts in Vasco-de gama to Tis Hazari courts at Delhi quoting with approval its earlier verdict in *Sunita Singh* v. *Kumar Sanjay*,[5] wherein it was held that since matrimonial proceedings were instituted by the husband against the wife, convenience of the wife had to be considered in contesting the suit and, accordingly, matrimonial proceedings ought to be shifted to the place of residence of the wife.

This judgment appears to be flawed as it is violative of not only settled principles of private international law, but also because it failed to take note of the legal position in Goa, its unique history, and the limited application of

4 *Id.* at 1919.
5 AIR 2002 SC 396 : 2001 AIR SCW 5193.

laws prevailing in rest of India to the territories of Goa, Daman and Diu in the light of statutory provisions of the Goa Damn and Diu (Administration) Act, 1962.

Goa was a Portuguese colony for over 450 years before it was liberated and became part of India again in 1961. It has a Uniform Civil Code, which is a self contained Code covering substantive law on the civil side comprising 2538 articles. Promulgated in Portugal by an enactment on 1st July 1867,[6] its application was extended to Goa, Daman and Diu with effect from 1st May 1870, safeguarding and later codifying the usages and customs of Goa, Daman and Diu to the extent they were not against the public order and morality.[7] The Civil Code is based on the Napoleonic Code and contains, *inter alia*, the law of domestic relations like family laws and succession. At the time of enactment of the Civil Code, there was monarchy in Portugal that was replaced by the Republic in 1910. Immediately thereafter, important laws on family matters were enacted to form part of the said Code.[8] A new legislation[9] in 1946 enabled the performance of Christian marriages before the Church authorities upon the production of a no objection certificate from the registration officer, appointed under Code of Civil Registration. The decrees of 1888, 1894 and 1912, respectively[10] protected the Hindus of Goa, Daman and Diu in respect of their special customs in marriage and succession that were at variance with the laws elsewhere in India. This was the state of affairs at the time of liberation of Goa, Daman and Diu in 1961. These territories became part and parcel of Union of India by the 12th amendment to the Constitution of India and all the laws in force were maintained by the Goa, Daman and Diu (Administration) Act, 1962. Section 5 of this Act reads:

> 5. *Continuation of existing laws and their application*.- (1) All laws in force immediately before the appointed day in Goa, Daman and Diu

6 Article 9 of the enactment empowered the government to extend the Civil Code to the overseas colonies. In exercise of that power, the government, by enactment dated 18.11.1869, extended the Civil Code to the overseas colonies by introducing amendments necessitated by the special circumstances of each colony.

7 Subsequently, a new enactment was promulgated on 16.2.1888 by which special and private usages and customs of Gentile Hindus of Goa were reviewed and codified in the said enactment, *e.g.* polygamy in a restricted sense and controlled by the courts, joint Hindu family, prohibition against succession of illegitimate issues except to a few persons, adoption, which were saved. The Decree dated 16.2.1888 replaced the Decree of 1852. Similar enactments dated 10.1.1894 and 19.4.1912 saved the usages of non-Christian inhabitants of Diu and Daman, respectively.

8 Such as dissolution of marriage was permitted by divorce, including one by mutual consent; law of succession was partly changed by enactment dated 33.10.1910. Law was enacted on 25.12.1910 to give protection to some of the laws dated 25.10.1910 to regulate the marriages, illegitimate children and their mothers. These were extended to this union territory on 26.5.1911 and the last on 30.10.1913.

9 Enactment No. 35 461, dated 22.1.1946 was promulgated with effect from 04.09.1946.

10 *Supra* note 7.

> or any part thereof shall continue to be in force therein until amended or repealed by the competent legislature or other competent authority.
>
> (2) For facilitating the application of any such law in relation to the administration of Goa, Daman and Diu as a Union territory and for the purpose of bringing the provisions of any such law into accord with the provisions of the Constitution, the Central Government may within two years from the appointed day, by order, make such adaptation and modifications whether by way of repeal or amendment as may be necessary or expedient and thereupon every such law shall have effect subject to the adaptation and modifications so made.

By virtue of section 6 of the Act, the central government was empowered to extend different enactments to Goa, Daman and Diu. Section 6 reads:

> 6. *Power to extend enactments to Goa, Daman and Diu*.- The Central Government may, by notification in the official Gazette, extend with such restrictions or modification as it thinks fit to Goa, Daman and Diu any enactment which is in force in a state at the date of notification.

Exercising powers under section 6, the central government extended the application of many enactments to this territory like the Transfer of Property Act, 1882, the Sale of Goods Act, 1930, the Contract Act, 1872, the Easements Act, 1882, *etc*. and, correspondingly, the provisions of the Civil Code stood repealed *pro tanto* with respect to these subjects, but the family laws continued to be in force. The Portuguese laws including the special codified rules for the Hindus of Goa, Daman and Diu are hence internal laws.

Law of marriage in Goa, Daman and Diu: All Goans, as per the law in Goa, are to solemnise their marriage before their respective officers of civil registration under the conditions and in the manner established in civil law and only such marriage would be valid. For Hindus, a religious ceremony is permissible but it would not be valid unless it is also registered as per the procedure.

Chapter 2, article 5 of the law of divorce dealing with contested divorce, provides for grounds and procedure of a contested divorce. Article 5 reads:

> A suit for divorce shall be instituted either in the Court of domicile or in the Court having jurisdiction over the place where the plaintiff has his residence; but should the plaintiff reside in a foreign country, the respective suit shall be instituted in the Court of Division of Lisbon.

In accordance with this provision, a suit for divorce by parties governed by the Portuguese family laws within the State of Goa can be filed in the court of domicile within Goa or in the court having jurisdiction over the place where the plaintiff resides (also within the State of Goa). The courts, in the rest of

India, would have no jurisdiction to entertain a suit (petition) under the provisions of the Portuguese family law pertaining to divorce.

Earlier pronouncements: Two earlier judicial pronouncements are noteworthy in this connection. In *Monica Variato* v. *Thomas Variato*,[11] it was held that the Special Marriage Act, 1954, (SpMA) did not have application in the State of Goa since the same had not been extended to that state. Here, the wife, a German national, married a Goan Hindu man under SpMA. They presented a petition for divorce by mutual consent[12] before the civil judge, senior division Mapusa, Goa under the provisions of the Law of Divorce, 1910. After a provisional order of divorce[13] was passed, the wife, after lapse of one year, filed an application seeking a final decree of divorce but the husband now raised an objection that as their marriage was solemnised under the provisions of the SpMA, their rights and obligations were governed by that Act and not by the Law of Divorce, 1910, as applied in the State of Goa. The husband's contention was accepted and the application for divorce was dismissed by the trial court, as also on appeal by the High Court while holding that the marriage was not transcribed before the civil registrar's office and thus there was no marriage between the appellant and the respondent under the law of the land (Goa). Further, the court opined that since the parties had married under the SpMA, the proper course was to apply for divorce under that Act before the court having jurisdiction. Since SpMA had not been extended to the State of Goa, the petition filed under chapter III of the Law of Divorce, 1910, as applicable in the State of Goa, was not maintainable. Again in 2008, a single bench of Karnataka High Court in *Saeesh Subhash Hegde* v. *Darshana Saeesh Hegde*,[14] had held that as the application of HMA had not been extended to Goa, the provisions of the same could not be availed of by the parties to the marriage and where the marriage was solemnised and registered in Goa, the marriage and matrimonial remedies would be governed by the Portuguese Civil Code and not by the provisions of HMA. Here, the parties were Hindus and had undergone a religious ceremony followed by its registration under the Goan laws. The wife then filed a petition seeking divorce on grounds of cruelty of the husband under section 13(1)(1a) and also sought maintenance from him under section 24 of HMA, in the family court at Belgaum. The husband pleaded, *firstly*, that since the marriage was registered in Goa and the same was a civil marriage, it was only the Portuguese Civil Code and not the HMA that would settle their disputes and, *secondly*, that the courts at Belgaum had no jurisdiction to try this case. The family court dismissed his contention. The husband filed an appeal before the Karnataka High Court. His main contention was that though a religious marriage was

11 (2002) 2 Goa LT 149.
12 Under article 36 of the Law of Divorce, 1910, as applicable in the State of Goa.
13 In terms of article 39 of the Law of Divorce, 1910.
14 AIR 2008 Kar. 142, as *per* A. Byrareddy J.

performed, per customary practices in Goa amongst Hindus, this did not imply that their marriage was to be governed by the HMA, as they were still governed by the Portuguese family law. Therefore, the matrimonial case filed under the HMA was not maintainable. In addition, the family court was not a court contemplated under the Portuguese family law which envisages a court constituted under Portuguese law. The family court, he further stated, had failed to appreciate that it was neither a court of domicile nor a court having jurisdiction over the place where the respondent resided within the meaning of article 5.[15] The questions before the court was whether the Portuguese family law or the Hindu law would be applicable to the parties and if Portuguese family law was applicable, which was the court having jurisdiction and whether the family court, Belgaum would have jurisdiction. The court held that the fact that the parties underwent a Hindu marriage ceremony at a later point of time would not have the effect of their becoming subject to the provisions of HMA. HMA not having been extended to the State of Goa as on the date of their marriage (26.12.2002), the said Act and the provisions thereunder would not apply. It further held that though the respondent (wife) then was living at Belgaum, on the premise that if there was a possibility of reconciliation, her domicile would be that of the petitioner (husband) at Goa, it could safely be said that a suit by the respondent would lie in the State of Goa in terms of article 5 before the court of domicile. The Portuguese family law would apply to the parties and the court having jurisdiction would be the court of domicile, within the State of Goa only.

The settled position with respect to family laws of Goa, therefore, is as follows:

i) That the family laws of Goa are distinct from those applicable to the Hindus in the rest of India, but are still an integral part of the Indian legal system. Thus, if the marriage is solemnised in Goa even amongst Hindus, the matrimonial remedies would be decided in accordance with the law of the land, and not the law to be adopted as per the choice or convenience of the parties.

ii) At the time when the HMA was enacted in 1955, Goa was not a part of India and, consequently, at the outset, its application could not be extended to Goa.

iii) The central government under section 6 of the Goa, Daman and Diu (Administration) Act, 1962 has power to extend the application of various enactments to Goa, Daman and Diu and all the enactments,

15 The Portuguese family law contains special provisions regarding dissolution of marriage with specific grounds under which a divorce can be granted which includes adultery, conviction in a criminal case, ill-treatment or serious injuries, complete abandonment of conjugal domicile, incurable unsoundness of mind, *de facto* separation, contagious disease and so on.

the application of which has been extended by the government to these territories, are applicable to Goa.

iv) The application of the HMA has not been extended to these territories and thus it cannot be automatically applied. The same would be a violation of the Goa, Daman and Diu (Administration) Act, 1962 according to which the application of all existing laws on this date were saved and adapted by the Indian government.

The case under review should have been decided in accordance with the laws of Goa, and at a court in Goa; neither the application of the HMA nor the transfer of the case outside Goa was appropriate. The pronouncement does not appear to be in tune even with the principles of private international law as had the marriage was solemnised in Goa, the matrimonial remedies would have to be worked out in accordance with the laws of Goa only; since the HMA had not been extended to this area, the same could not be availed of by the parties. For instance, in *K. Radha Krishnan Nayyar* v. *Radha*,[16] the parties were married at Madras and the petition for dissolution of marriage was filed at Jammu under the Jammu and Kashmir HMA, 1980. The petition was dismissed both by the lower court as also the High Court for want of territorial jurisdiction, the predominant question of law being the forum of jurisdiction, with the court holding that since the marriage was solemnised at Madras where the state Act was not applicable, their petition could not be entertained in Jammu for want of jurisdiction.

Marriage, relationship in the nature of marriage and live in relationships

Marriage as an institution is deeply cherished by Indians almost to the point of reverence. It legitimises sexual relations and the matrimonial obligations and rights arise, and become legally enforceable, only when a lawful marriage is proved rendering its importance unique and almost indispensable, the era of globalisation has seen emerging alternate forms of intimate physical unions. Presently, one can come across Indians entering into live in relationships, which are short of marriage, yet are in the nature of marriage. In this connection, the apex court recently made the following observation:[17]

> Parliament has taken notice of a new social phenomenon which has emerged in our country known as live-in relationship.

The distinction between a marriage and a live in relation is glaring in terms of entry into it and its culmination. For a marriage, the observance of proper rites and ceremonies from its inception and its judicial approval is mandatory.

16 AIR 1992 J & K 1.

17 *S. Khushboo* v. *Kanniammal* (2010) 5 SCC 600, para. 31.

A live in relationship, on the other hand, can be started at will and can come to an end either by consent or even unilaterally by one of the parties even where the other is desirous of continuing with it. There are no legal rights and obligations and no financial security which is otherwise guaranteed to a legally wedded spouse. Both the partners, as also the issue, are deprived of the rights of inheritance. Further, while marriages are essentially monogamous, live in relationship does not guarantee spousal fidelity or even monogamy. A couple of cases arose this year where interesting questions were deliberated upon, ranging from the right of one partner to enforce the claim of maintenance, claim of issue to inherit the property of biological father and even an attempt to prevent the other from getting married to another person. The apex court also deliberated on whether the newly enacted Protection of Women from Domestic Violence Act, 2005, (DVA) covers relationships in the nature of marriage, where both the parties are eligible to get married yet do not do so but live in an intimate physical union and pure and simple live in relationships where one of the parties has a subsisting marriage as well.

In the first case,[18] the issue of eligibility of a woman who entered into a relationship with a married man to a claim of maintenance from him under section 125, Cr PC as also under the DVA was explored by the apex court which also distinguished a live in relationship from a relationship "in the nature of marriage" as contemplated under the DVA. Here, a woman filed a claim of maintenance under section 125, Cr PC, stating that post-marriage, the husband lived with her for two to three years and then left for his native place and completely deserted her. The man denied his marriage with the claimant and maintained that he was already married to another woman in 1980, and his alliance with the claimant can at the most be called a live in relationship. The family court judge, as also the High Court, accepted his contention and dismissed the claim of marriage put forward by the petitioner who filed an appeal before the apex court. Ruling out her claim under the provisions of Cr PC because it was available only to a legally wedded wife, the court explored whether her case could be covered under the DVA. According to this enactment,[19] an "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent; and a "domestic relationship"[20] means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Such an aggrieved person can approach the magistrate for the grant of maintenance.

18 *D. Velusamy* v. *D. Patchaiammal* (2010) 10 SCC 469.
19 S. 2(a).
20 S. 2(f).

The expression 'domestic relationship' here includes not only the relationship of marriage but also a relationship 'in the nature of marriage'. Since definition of this expression neither exists in the Act, nor is there any direct judicial pronouncement, the apex court thought it necessary to interpret it. It also forewarned the certainty of the judiciary being confronted with a large number of parallel cases in near future. The Act, the court opined, has drawn a distinction between the relationship of marriage and a relationship in the nature of marriage, and has provided that in either case, the person who enters into either relationship is entitled to the benefit of the Act.

Distinguishing between the rights and obligations in a marriage and in a live in relationship, the court said that the law provides for alimony to be paid by the husband to a deserted wife, and the same is denied to a woman who had a live in relationship with a man without marriage. Western countries like USA, ensure maintenance rights to women living with their partners without marriage by providing 'palimony' [21], the basis for which could be contractual, *i.e.* supported by a written or oral agreement or even an implied or constructive contract that it would be given on their separation.

Equating a 'relationship in the nature of marriage' with common law marriage, *de facto* marriage, the court listed their requirements as that, although formally not married, (a) the couple must hold themselves out to society as being akin to spouses; (b) they must be of legal age to marry; (c) they must be otherwise qualified to enter into a legal marriage, including being unmarried; and (d) they must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time. Therefore, the same requirements must be fulfilled in a 'relationship in the nature of marriage' under the 2005 Act, in addition to the parties having lived together in a 'shared household' as defined in the Act[22] in order that the female partner becomes eligible to claim maintenance. Merely spending weekends together or a one night stand would not make it a 'domestic relationship'. Thus, not all live in relationships would get the benefit of the DVA. If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/ or as a servant, it would not be a 'relationship in the nature of marriage'. Though this interpretation would exclude many women, who had live in relationships, from the benefit of the Act, the court expressed its incompetence to either legislate or amend the law in the garb of interpretation as the Parliament used the expression 'relationship in the nature of marriage' and not 'live in relationship'. The case was remanded to the family court to determine whether the appellant and respondent had lived together for a reasonably long period of time in a relationship which was in the nature of marriage and to decide the matter afresh in accordance with law and in the light of the above observations.

21 See *Marvin* v. *Marvin* (1976) 18 C3d 660.
22 S. 2(s).

An interesting issue arose in one case from Delhi as to whether a partner of a live in relationship can force the other into marriage, and upon his refusal, can she bring a charge of rape as against him. In *Alok Kumar* v. *State*,[23] a man and a woman entered into a live in relationship while they were in London. They lived together for a period of five years, and the union ended as the man intended to get married to somebody else. The woman upon learning it was incensed and wanted to prevent him from getting out of this relationship and get married. When he was due to go back to London where he worked along with his fiancée, the woman followed him to the airport, quarrelled with him and lodged FIR against him that prevented him from taking the flight to England. She claimed that she was promised marriage by him and now in the wake of his breaking the promise the physical relations were without her consent and amounted to rape and, accordingly, she lodged a complaint of rape against him. The court, while quashing the FIR and dismissing the rape charges, distinguished between a marriage and a simple live in relationship. It said that a live in relationship is a walk in and walk out relationship with neither any strings attached to it nor creating any legal bond; a contract of living together which is renewed every day by the parties and can be terminated by either of them without consent of the other. In a marriage, on the other hand, the bond between the parties has legal implications and obligations cannot be broken by either party at will. Thus, people who chose to have live in relationship cannot complain of infidelity or immorality as live in relationships are also known to be between a married man and an unmarried woman and a married woman and an unmarried man. The court held that here the woman had entered into this live in relationship at the time when the man was already married and was going through a legal process of taking divorce from his wife. She herself was an educated lady, was married once and was not naïve as not to know the reality of live in relationship, *i.e.* it is not a marriage but relationship of convenience where parties decide to enjoy the company of each other at will and may leave each other at will. Despite that her intolerance and unacceptability of the eventuality of his marrying someone else and her actions in following him to the airport were with sole motive to prevent him from flying out from India and to teach him a lesson and smacked of malice in order to wreck vengeance. The court held that the man was free to terminate the relationship at will, could get married to anyone he desired without being accountable in law and was not guilty of rape. The former partner was without any remedy as she entered into this relationship with her voluntary consent, and as the relationship had no legal force, remained incapable to either prevent him from going out of it or bringing the relationship to an end.

The third case raised the issue of the claim of inheritance to the children born of a live in relationship from their biological father's property. In *Bharatha*

23 II (2010) DMC 286.

Matha v. *R Vijaya Renganathan*,[24] W, a married woman, without putting an end to her marriage started living with her paramour under a live in relationship and bore his two children. Upon his death, the brother of the deceased claimed that he died unmarried as the live in relationship with W could not be given a legal and valid effect in law and the children even though biological children of the deceased would be illegitimate and disqualified from inheriting his property. The woman contended that owing to this live in relationship, a presumption of marriage could be drawn which would be sufficient for the applicability of section 16 and for protecting the inheritance rights of the children. The court framed two issues: whether on the admitted long cohabitation of these partners, a legal presumption of a lawful wedlock was established and whether in view of their consistent live in relationship, the woman could have a claim over his property. Upon appreciating the entire evidence, it concluded that since the woman had a subsisting marriage, she could not validly remarry the deceased, and presumption of legitimacy under section 16 cannot be invoked in cases of pure and simple live in relationships without any marriage ceremony at all and further where one of them was not eligible to get married. The apex court held that children born of the live in relationship cannot claim right in the property of the biological father. The fiction of section 16 is limited to extent of conferring the right in property of parents but only where there was a marriage as between them that was either void or voidable but the fiction is not available when there was no marriage but it was a live in relationship.

In the fourth case, the husband himself in order to escape economic responsibilities pleaded being a party to a live in relationship short of marriage. In *Usha Charan Naskar* v. *Niva Rani Naskar*,[25] the parties lived together for twelve years and had three children. Thereupon, the man married another woman. The first woman claimed divorce and maintenance on the ground of his remarriage as amounting to cruelty. The man did admit paternity of the children born of this union but denied marrying her. He stated that she was his concubine and they lived in an exclusive intimate union akin to marriage, but with no marriage, as no ceremony was performed. However, his marriage was admitted by his own brother and mother and no witness was produced by him corroborating his stand. The court held in favour of existence of a marriage and said that merely because there was no evidence of the performance of *saptapadi* or *sampradan* after around 40 years of this alleged marriage was of no consequence and the husband in having married again was guilty of mental cruelty.

24 AIR 2010 SC 2685; see also *Neelamma* v. *Sarojamma (*2006) 9 SCC 612; *Jinia Keotin* v. *Kumar Sitaram Manjhi* (2003) 1 SCC 730; *Jinia Keotin* v. *Kumar Sitaram Manjhi* (2003) 1 SCC 730; *Rameshwari Devi* v. *State of Bihar*, AIR 2000 SC 735; *P.E.K. Kalliani Amma* v. *K. Devi,* AIR 1996 SC 1963.

25 AIR 2010 (NOC) 224 Cal.

Emergence of monogamous live in relationships though nascent presently are bound to see a surge in near future. Influenced by western style of maintaining independence and attempts to escape the rigid more duty and less pleasure oriented marriage, breaking out of which is extremely tedious, financially independent young Indian generation in metropolitan cities is increasingly attracted to this informal arrangement that takes care of the necessity of human company and physical satisfaction without any bondage and bickering of separation and extremely unpleasant post breakup legal consequences otherwise attached to a legal marriage. Women, however, must be cautious in entering these arrangements as they do not guarantee stability, economic security, fidelity and a control over a man's natural fickleness. According to judicial pronouncements, this relationship's curtailment can be unilateral and at the whims/wishes of either party and without legitimacy to children. Its temporary character also cuts severely into the hitherto perceived man/woman relationship as eternal and heavenly ordained.

Parties to the marriage must be Hindus

The Hindu Marriage Act, 1955 (HMA) is available and applicable only to Hindus and a valid marriage is impermissible if both or even one of the parties to the marriage is not a Hindu. Three cases, solely on the issue of validity of interreligious marriages under Hindu law, were adjudged by the courts. The identical issue based on variable circumstances revolved around a claim to maintenance and a prayer of nullity by women of such relationships, where men after being in their company till it suited them, walked away out of it virtually legally with no accountability. Women unsuccessfully attempted to clothe themselves with the status of legally wedded wives, while their relationship remained judiciously unsustainable for according to them any matrimonial relief under HMA. The introspection into the validity issues also led to an examination of authenticity of conversion and the modalities for the same. In Arife @ *Arti Sharma v. Gopal Dutt Sharma*,[26] W, a Muslim girl by birth, claimed to marrying H, a Hindu man, at the Arya Samaj Mandir in Delhi in 1988, in accordance with the Hindu rites and ceremonies, but their alliance lasted for one year as the man entered into wedlock with another woman. W claimed divorce as also *interim* maintenance under HMA but the same was resisted by the husband on the ground that since she was a Muslim by birth, never converted to Hindu faith, professed the religion of her birth till the presentation of the petition, her marriage not being permissible under Hindu law did not create a legal relationship, and hence no question of divorce or maintenance could arise. The court accepted his contention, dismissed the claim of the girl and held that a marriage between two Hindus only was contemplated under Hindu law. With respect to the validity of conversion it

26 II (2010) DMC 424; see also *Re Betsy and Sadanand* 2009 (4) KLT 631.

observed that a person born into a particular religion continues to belong to that religion subject to conversion to another religion, which basically requires a change of faith and is essentially a matter of conviction. A mere theoretical allegiance to Hindu faith by a person born into another religion or a bare declaration that he is a Hindu remains insufficient to convert him. Thus, no decree of divorce or any alimony was granted to her as there was no marriage in the first place. In *Margaret Palai* v. *Savitri Palai*,[27] a Christian woman married a Hindu man as per the Hindu rites and customs. The man died 14 years later leaving behind his share in the joint family property that she claimed as his wife. This claim was resisted by the other legal heirs primarily on the ground that she was a Christian and her marriage under Hindu law was neither permissible nor would confer any right in her favour. The woman pleaded that she had adjusted to Hindu way of life and the same would amount to conversion to Hindu faith entitling her to the status of a legally wedded wife and eligible to claim inheritance. The trial court held that under HMA, a marriage can be solemnised only between two Hindus and not when one of the parties to the marriage was a non-Hindu. Here, the wife being a non-Hindu would neither be entitled to a share in the coparcenary property held by her partner nor would she be empowered to succeed to his separate property. In the present case, even by her own admission, she was professing Christian faith at the time of her marriage. Her contention was that post-marriage, her adoption of Hindu way of life would be enough for her to be called a Hindu was not correct. Her claim was appropriately negatived by the court. In another case from Gujarat,[28] a Christian man married a Hindu woman in accordance with the rites and ceremonies as per Hindu rituals and a child was born to them. Thereafter, he deserted her and she filed a petition praying for a decree of nullity on the ground that at the time of her marriage, he was already married which was refused by the family court as the said marriage had already come to an end by divorce before the present marriage was solemnised. The matter went in appeal to the Gujarat High Court which held that it was only a marriage where both parties were Hindus that can be solemnised under the HMA. The use of the expression "may" in the opening phrase of section 5 did not make this mandatory condition optional. On the other hand, in positive terms, it indicates that a marriage may be solemnised between two Hindus if the legal conditions stipulated in section 5 are fulfilled but only when both the parties happen to be Hindus and not otherwise. The admission of the man that he was, at the time of marriage and later at the time of litigation, a Christian belonging to Roman Catholic denomination, the marriage solemnised in accordance with the Hindu rituals was a nullity and its registration under section 8 of the Act could not and did not cure the defect. The marriage was

27 AIR 2010 Ori. 45.

28 *Nilesh Narin Rajesh Lal* v. *Kashmi*ra *Bhupendrabhai Banker*, I (2010) DMC 442 (Guj.).

and continued to be void *ab initio* and, consequently, the court declared that no remedy could be granted to the woman.

Judicial separation on grounds of mutual consent

Post-1976, a decree of judicial separation can be granted by the court if any of the grounds under section 13 of the Act is present. Unlike a decree of divorce, this remedy does not put an end to the marriage but permits the parties to legally maintain a separate habitation under court's permission with protection of the legal status of husband and wife and mutual rights of maintenance and inheritance. In comparison to divorce, it also saves the marriage as well the misery of the parties from having to live with each other under a common roof. In addition, the judicial remedy can be availed of only on the satisfaction of court demonstrated by the parties upon the existence of a ground under section 13. If they do want to separate amicably, without bringing their relationship formally to an end, they can do so themselves without approaching the court, but a formal judicial separation decree can be granted only under a contentious litigation upon proving a matrimonial misconduct on part of the respondent to the satisfaction of the court and not otherwise.

The hesitation of a woman to live with the stigma or label of a divorcee appears normal in the Indian scenario and, therefore, in such a situation if the parties cannot live with each other yet do not wish to put an end to the marriage as well, a separation without a final ending of their marriage may be an appropriate solution. In *Prashant Singh* v. *Tanushree*,[29] the wife applied for judicial separation and the parties were directed by the family court to go for mandatory conciliation and mediation. The husband gave his consent and instead of a contentious litigation founded on the allegations of misconduct, the parties applied for judicial separation on the basis of mutual consent of the parties. The court dismissed their petition asking them to frame the grounds or charges under section 13 of the Act, holding that judicial separation on the grounds of mutual consent was not permissible under the Act.

Nullity petition and the conditions of time limit

A free and voluntary consent of the parties to the marriage is an essential pre-requisite for a valid marriage under the HMA, and where the consent is vitiated by force/fraud, the marriage is not valid but voidable and, at the instance of the aggrieved party, can be brought to an end by an order of the court by a decree of nullity. Strangely enough, both force and fraud have been equated under the Act as equally serious leading to identical consequences. A marriage after abduction or at gun point and marriage where consent is taken by deceitful representation are equally bad. Further, the Act permits relief

29 I (2010) DMC 766.

to the affected party upon the satisfaction of two primary conditions, *first*, that the petition must be presented to the court within a period of one year from the day the force ceased to apply or fraud was discovered and, second, that the petitioner should not have voluntarily cohabited with the respondent. The visualisation of a firm and determined intention to bring to an end an unwanted alliance is what the court requires and they cannot display ambivalence with respect to a desire to terminate this marriage that the claim has been brought about by force. In *Vikesh Sharma* v. *Shivani*,[30] a 19 years old girl was enticed by a man who married her and the same was registered on 21st August 2002. The father filed a missing complaint in the police station and with the intervention of the authorities, the girl was produced before the High Court, and handed over to her father on 25th September 2002. It was at that time that technically, the force ceased to operate and the girl rejoined her family. However, a petition praying for declaration of her marriage as a nullity was filed on 1st November 2004, *i.e.* more than a year after the force ceased to operate or fraud was discovered. The family court declared the marriage as null and void and the husband filed an appeal against this decision in the High Court. The court reversed the finding of the family court on the ground that as more than one year had already passed from the day the force had ceased to operate, the petition was time barred and the same could not be granted.

Divorce by mutual consent and waiver of mandatory six months period

Statutory recognition of the need of the parties trapped in an unhappy marriage to break free of it with minimum bitterness and maximum fairness was accorded in 1976, by introduction of divorce by mutual consent. It is important to note that a petition for divorce by mutual consent does not require alleging commission of any matrimonial misconduct by any of the parties. Of late, this provision has been used extensively by those who wish to separate without slugging it out in the court. The three-fold simple steps laid down clearly by this remarkable provision need to be fulfilled in order to avoid the mudslinging match in an ordinary extremely time consuming contentious litigation of divorce. The parties are to file a joint petition desiring divorce after a minimum of one year separation after which they have to wait for a mandatory period of six months before they file a second motion again by mutual consent. Thus, both the initial petition and the second motion after six months should be joint signifying the continuation of the mutual desire to put an end to this marriage. All the three requisites, *i.e.* one year separation, mutual consent based initial petition and, six months later, joint petition and the wait for six months as between the two petitions are mandatory and do not admit of any statutory exceptions. However, 35 years later, this provision has been subject to

30 AIR 2010 Utr. 76.

extensive experimentation by the judiciary[31] including the apex court granting speedy relief to couples sometimes even distorting completely the clear and unambiguous legislative provision. Elective exercise of their constitutional powers under article 142 has further compounded the confusion and clarity has become the biggest casualty in this zone. Suffering of each to him/her is extremely grave deserving in their opinion special treatment, bending of rules and exercise of special powers by the courts and thus with these hopes people have thronged to the courts for grant of what is now being labelled as "instant divorce". Consistency has always evaded judicial pronouncements, a fact that was clearly visible this year as well as two cases came before the apex court with respect to mutual consent based divorce, surprisingly, not for its implementation but requesting for its distortion and diluted application.

In *Anil Kumar Jain* v. *Maya Jain*,[32] the parties were living apart from each other for a period of over seven years before they filed a joint petition as per the statutory requirements seeking divorce by mutual consent. As part of the agreement, the husband transferred valuable property in favour of the wife. After registration of the property in her name and taking possession of it, the wife refused to give her consent for the second motion after a period of six months and maintained that she was neither interested in living with him nor would agree for a formal separation. The apex court exercising their powers under article 142 of the Constitution pronounced divorce, despite the fact that at the second motion the wife had refused to give her consent, and technically, it could not be called a divorce by mutual consent. However, in *Manish Goel* v *Rohini Goel*,[33] the court stuck to the rule book and declined to invoke its powers under article 142 to suit the convenience of the parties and refused to waive the mandatory requirement of six months waiting. Under article 142, of the Constitution, the court is competent to pass any order to do complete justice between the parties and grant decree of divorce even if the case may not meet the requirement of statutory provisions. Here, the parties, the husband a CA, and the wife, an MD in radio diagnosis, married and the marital breakup followed soon with the wife filing criminal cases against the husband. Later, due to intervention of the friends and mediation centre, they agreed to file a joint petition seeking divorce and at the same time prayed for waiver of six months time period so that an instant divorce can follow. As the family court rejected the prayer on the ground that no court other than the Supreme Court is competent to waive the time period, the parties approached the apex court under article 136 of the Constitution. Dismissing the petition, the apex

31 See, for example, *Sweety E M* v. *Sunil Kumar*, AIR 2008 Kar. 1, wherein the court not only entertained the petition for divorce by mutual consent within one year of marriage but also laid down specific criterion which may be followed in granting exemptions in future waiving one year mandatory separation requirement for the parties desiring early divorce.

32 AIR 2010 SC 222.

33 AIR 2010 SC 1099.

court observed with approval its remarks made earlier in *Laksmi Das Morarji* v. *Bhrose Darab Madan*:[34]

The power under Art. 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments. Though the supreme court would not pass any order under Article 142, of the Constitution which would amount to supplanting substantive law applicable to ignoring express statutory provisions dealing with a subject, at the same time these constitutional powers cannot in any way be controlled by any statutory provisions. However it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case. The power is to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice as between the parties. Therefore in exercise of the power under Art. 142, of the Constitution, this court generally does not pass an order in contravention of or ignoring neither the statutory provisions nor the power is exercised merely on sympathy.

The court took cognizance of the fact that the wife in the present case had approached the court in Gurgaon for dissolution of marriage after instituting several criminal cases against the husband and then this mutual consent petition was presented. The court held that where one of the petitions praying for a decree of divorce was presented before the court and while it was pending, the same parties approached the family court under section 13B for divorce by mutual consent, approaching different forums for the same remedy amounts to abuse of the process of the court. It appeared that they were very much eager to have dissolution of marriage with immediate effect. The apex court expressed its displeasure on this issue of a litigant pursuing two parallel remedies in respect of the same matter at the same time quoting with approval its earlier observations:[35]

> No litigant has a right to unlimited drought on the court time and public money in order to get his affairs settled in the manner he wishes. However, access to justice should not be misused as a licence to file misconceived and frivolous petitions.

The parties presently failed to convince the court of the existence of any obstruction to the stream of justice or any question of general public

34 (2009) 10 SCC 425 at 433.

35 *Buddhhi Kota Subbarao* v. *K Parasaran*, AIR 1996 SC 2687 : 1996 AIR SCW 3356; see also *Jai Singh* v. *Union of India*, AIR 1977 SC 898; *Awad Bihari Yadav* v. *State of Bihar*, AIR 1996 SC 122 : 1995 AIR SCW 3810; *Arunima Baruah* v. *Union of India* (2007) 6 SCC 120 : 2007 AIR SCW 4609.

importance or any injustice to the parties that was required to be eradicated by a grant of equitable relief. None of the contingencies which may require the court to exercise its extraordinary jurisdiction under article 142 of the Constitution was brought to their notice. It accordingly dismissed the petition holding that under article 136 in the widest possible terms a plenary jurisdiction exercisable on assuming appellate jurisdiction has been conferred upon the court, but it was an extraordinary jurisdiction vested by the Constitution with implicit trust and faith and thus extraordinary care and caution had to be observed while exercising this jurisdiction. Thus, there was no vested right of a party to approach the court for the exercise of such a discretion unless its exercise was warranted to eradicate injustice. The object of keeping such a wide power with the court was to ensure that injustice was not perpetuated or perpetrated by the decisions of the lower courts, additionally it should be a question of law of general public importance or a decision which shocks the conscience of the court that can be demonstrated by showing exceptional and special circumstances and that substantial and grave injustice had been done and that the case in hand features of sufficient gravity warranting review of the decision appealed against, otherwise such exercise should not be done. This power cannot be used as a shortcut or for bypassing the normal legal procedure and was to be used exceptionally and with abundant caution. Similar opinion was reiterated in *Poonam* v. *Sumit Tanwar*,[36] where the parties lived together for only two days and filed a petition 10 months thereafter desiring an instant divorce requesting the court to waive off the statutory six months waiting period. The family court did accept the petition but advised the parties to make efforts for conciliations in accordance with the statutory requirements holding that the marriage cannot be dissolved straightaway and if they were unable to reconcile, they could come up with the petition for the second motion after six months. Aggrieved by this order, the parties filed a writ petition in the Supreme Court under article 32 of the Constitution for waiving the statutory period of six months. The court noted with strong disapproval that the parties had failed to substantiate the maintainability of the writ petition before them while asking them to violate a statutory provision. They could not show any violation or infringement of their fundamental rights and without any sense of responsibility had filed the petition. It, according to the court, amounted not only to disservice to the institution but also adversely affected the administration of justice making the conduct of all including the counsel extremely reprehensible. The court stated that article 32 can be used only when the fundamental rights are violated and even if it was found that the writ petitioner alleging violation of fundamental right was too indirect or remote the discretionary writ jurisdiction may not be exercised. Here, the family court had passed an order strictly in compliance with the law asking the parties

36 I (2010) DMC 497 (SC).

to wait for a period of six months. Therefore, the maintainability of the writ petition was also incomprehensible. The marriage was a year and three months old and all they had to do was to wait for another period of three months before they became statutorily entitled to seek divorce. The court also noted that there was no delay on the part of the family court to dispose of the case and thus the petition had been filed with an utmost sense of irresponsibility and accordingly dismissed.

Marriage not to be dissolved lightly

The petitions praying for a decree of divorce are increasing at an alarming rate. Divorce is no longer a stigma and young people after realising that they are not suited to each other, separate and upon discovering that getting out of the matrimonial bond requires a judicial nod, look towards it for getting the relief of freedom and solace. A question arises: can the court sitting as an impartial authority understand the conflict of personality, clashes of egos and the appropriateness of the decision to separate in a better manner than the parties themselves? The treatment of young people as unbridled horses and attempts to tame them by the whole legal system including the judiciary by not letting them get out of a failed marriage easily is increasingly visible. Judiciary does not realise that in India, parties to the marriage in majority of cases are total strangers to each other in every sense of the term and often temperamentally not suited towards one another. Chosen and selected by parents on the basis of several criteria like caste, religion, social and financial status, amount of dowry exchange, the suitability is more social and financial than emotional or temperamental. Further, extensive interference by over possessive parents/family members fuels the already smothering fire. This arrangement ensures retention of parental control over their lives but is the root cause of the increase in breakups presently. Right from the time of selection of the life partner, to conducting of their marital life, and to decide their course of action in case of marital problems, the choice of parties is hardly given the weightage it deserves. The mistake is realised by the family members when it is too late and by that time, the life of the parties is either already ruined or is on the verge of a wreckage and when they look towards the judiciary for support, a rude shock awaits them in the form of technicalities, and a rigid and formal proof of their conduct, the documentation of which during the course of marriage is neither desirable nor feasible. If two people are not happy with each other tying them together by force despite their determination to separate does not seem to be serving any purpose. Protection of the institution of marriage is desirable only when there is life in marriage. Where the parties are separated with none of them willing to come back together, denying them the chance to come out of it only because the institution of marriage has to be protected is akin to whipping a dead horse hoping it would pull the carriage. Such a course should be avoided by the courts as the life of individuals is more important than institutions. These institutions which are supposed to provide security, solace, and happiness and bliss if turn into the major source of misery, insecurity, hatred and animosity,

should be brought to an end as soon as possible otherwise they would eventually turn into death traps for those who cannot wriggle themselves out of this nasty web.

In a case from Bombay,[37] after living together for three years and with a child in between them, the parties separated and the husband came to the family court with a prayer for divorce. He, however, failed to prove cruelty on his wife's part and the family court took 14 years to eventually dismiss his prayer for divorce. The husband preferred an appeal in the Bombay High Court on the ground that since it was not possible for the parties to live together; 17 years had already passed, marriage had irretrievably broken down and should, therefore, be dissolved. The wife was neither willing to live with him nor was amenable to divorce. The court lamented the fact that the parties of late had started treating the marriage bond lightly, which was neither a healthy nor a desirable scenario and held that merely because the parties were staying separately for a long time it could not be inferred that the marriage had irretrievably broken down. If one spouse leaves the company of the other on his or her own volition, it cannot be said that the marriage had broken down. Holding the husband as the erring party, the Bombay High court refused divorce observing:[38]

> Marriage between a man and a woman is considered to be a sacred ceremony. It is a social contract between two individuals that unites their lives legally, economically and emotionally. The husband and the wife perform marriage with a fond hope that they will stay together for the rest of their lives and both of them will have love and affection amongst each other and if any issues are born out of the said wedlock, they will be looked after by them. With this pious objectives the marriage under the HMA are taking place and that too in a sacred manner in the presence of a priest. Therefore the said ceremony is a sacred ceremony which is not required to be treated lightly by either spouse treating it as a child's play. It is said that marriages are made in heaven but they are broken on earth. Appropriate care is required to be taken to see that such marriages are not broken lightly and that is how laws are enacted for providing dissolution of marriages as per statutory grounds available. The manner in which various divorce petitions are filed creates doubts as to i) whether the marriages which are treated as sacred ceremony will still continue to be the same in future; ii) whether the tradition which is prevailing since time immemorial in this country will continue for a long time; and iii) whether the child who is born out of the said wedlock will be able to get the love and affection of the father and mother in case marriage is dissolved in a light fashion.

37 *Bajrang Gangadhar Revdekar* v. *Pooja Bajrang Revdekar*, AIR 2010 Bom. 8.
38 *Id*. at 16.

In the present case, lamenting the fact that if at the instance of one party, separation gets a judicial stamp, the sanctity of marriage would be destroyed, the court failed to note that for people trapped in unhappy alliances, there was no sanctity of this bond, rather it was the root cause of their misery. Though institution of marriage has a unique and unparalleled importance of its own, it is also true that while it provides happiness and a blissful fruitful fulfilment for some, it becomes a living hell for those who are not so fortunate. An unhappy marriage shatters a person's life, tormenting him/her and destroying their complete personality. If the agony is prolonged and freedom from the shackles of unhealthy bond is not accorded, the best part of a person's life are irrevocably ruined and virtually wasted. What purpose that empty shell will serve, if the parties have not been able to live together for a long time, yet are not allowed breaking free of such a suffocating life is worth examination. The inconsistent and sometimes erratic approach the judiciary has taken in such cases is unwarranted and does little good to the people except giving good business to family law lawyers. In the present case, the court was deliberating on whether to grant formal separation or not where the parties had already spend 17 years of their youth without each other's company and there was no hope of their coming back together. If even now the court was convinced that this was a case of hasty separation and by declining a divorce they could save the institution of marriage and guarantee love and affection of both the parents in favour of children, one wonders what would be the length of time for a well thought out fall out between the parties in the estimation of the court. With monogamy as the basic rule, a broken and empty shell should be brought to an end as early as possible. Emphasis must always be on preserving life and protecting people's happiness and judiciary should stop worrying about the fate and life of traditional institutions and adopt a healthy and realistic outlook. Healthy development of nation also requires tension free workforce and not a snail paced system where though the family court in itself took 14 long years to decide the case, higher court instead of being concerned about it chose to lament about hasty separations. By denying divorce to the parties, the judiciary could not secure any of the three concerns that they raised. Marriage to be treated as sacred and the traditions prevailing since time immemorial are cherished concepts of a bygone era. The emphasis in the present day context should be not merely on institutions that have already developed cracks but on securing happiness with fairness for the people. These patriarchal institutions that survive and thrive only on women's subjugation and subservience have very little life left in the days of constitutional guarantees of gender parity.

Unfortunately, a similar line was taken again by the apex court in *Manisha Tyagi* v. *Deepak Kumar*,[39] Here, the life of the marriage was very short and the parties had levelled allegations and counter allegations against each other.

39 AIR 2010 SC 1042.

The petition praying for divorce was presented by the husband on grounds of wife's mental cruelty. He alleged that the wife was very abusive to the point of being schizophrenic, refused to have sexual intercourse, had filed complaints against him to the office superiors; with the crime against the women cell and also the police, had his entire house searched while taking away the jewellery of even his mother and threatened to implicate the entire family in false cases as she and her father both were advocates. She did not spare even the counsel of the husband and filed cases against him and his son. The wife made allegations of dowry demand, torture and sexual perversity and of freaky and abnormal behaviour against the husband and abandoning the parental duty towards the small daughter. The trial court concluded that this was clearly a case of broken marriage with no chance of repair, but it refrained from granting them any relief as irretrievable breakdown of marriage is not a ground for divorce. The court also concluded that the situation of no return had reached due to the behaviour of the petitioner husband and since no party can be allowed to take advantage of his own wrong under the established principles of Hindu law, divorce could not be granted at his asking. The husband preferred an appeal to the Punjab and Haryana High Court against this decision which decided that both the parties were at fault, and observed:[39a]

> I must say here that the respondent had crossed "Lakshman Rekha". I do not deny that a woman has no rights after the lawful marriage. She expects love and affection, financial and physical security, equal respect and lots more but at the same time, the wife must remain within the limits. She should not perform her acts in such a manner that it may bring incalculable miseries for the husband and his family member. She should not go to that extent that it may be difficult for her to return from that point

According to the court, the wife exceeded the limits of decency when she went to the extent of lodging a false FIR and tried to humiliate the appellant (husband) in the eye of his superiors by writing a very damaging letter without bothering for its consequences. The High Court, therefore, granted an alternate remedy of judicial separation instead of divorce as prayed for by the husband with a hope that the parties would ponder over the matter and might be able to reunite for the sake of their small daughter. It also said that upon their failure to reconcile their differences, after one year either of them can approach the court for divorce. The wife went in appeal to the division bench, which noted that comparing the husband to a "barking dog" and describing him as "heavily drunkard", would amount to cruelty on her part and thus they granted divorce to the husband. The wife went in appeal to the Supreme Court against this judgement. The apex court observed that both the parties were at fault as there were allegations and counter allegations and hence the order for

39a *Id*. at 1045.

judicial separation instead of divorce was appropriate keeping in view the welfare of the child and, therefore, the division bench was supposed to deliberate on only this issue whether the decree of judicial separation granted in favour of the husband was proper or not. It was not supposed to modify the order and enlarge it into that of divorce. It should have confined itself into deliberating only on the point of appropriateness of the granted decree and should have refrained from giving a remedy that was not asked for. The issue before the court was not as to what appropriate remedy should be granted in this case at the instance of the respondent, but whether the decision taken by the single bench in granting judicial separation should stand or not. It exceeded the powers in not confining itself to the core issue and, therefore, if it was of the opinion that a decree of judicial separation was not proper, it would have allowed the appeal of the wife and the trial court order would have been reaffirmed. The court then dismissed the petition.

Both the cases involved broken marriages and despite being pushed around extensively in several courts, the litigation brought them back to the same point from where they had started with a hope of freedom from the suffocating bond. Extremely time consuming, emotionally frustrating and physically exhausting litigation many a times is totally futile shaking the confidence of the distressed parties in the judicial mechanism. If both spouses are at fault, it apparently and clearly would be a broken marriage and in refusing a remedy and subjecting the already traumatised parties to judicial sermons to protect the holy bond of matrimony is akin to double jeopardy.

Irretrievable breakdown as a ground for divorce

The introduction of irretrievable breakdown of marriage as a ground for divorce is perhaps one of the most eagerly awaited provision (yet to be introduced by the legislature) by the couples involved in unhappy marriages where either both parties are at fault or if one of them is neither keen on living with the other nor ready to leave the other free to start a life afresh. Despite its absence in the statutes, unfortunate parties still keep on trying to convince the courts of the genuineness of the need to dissolve their marriage on this ground. Some cases do meet with success while majority of them are dismissed. This year also few cases in this direction made their way to the courts. In a case from Uttranchal, the parties married[40] in 1985, and a male child was born in 1989 and they separated shortly thereafter. The husband first filed a petition praying for restitution of conjugal rights in 1992, withdrew it and, thereafter, presented a petition for divorce on grounds of her cruelty. The wife filed a counter claim for restitution of conjugal rights, and defended the allegations of cruelty made against her by the husband successfully. Consequently, the family court concluded that the wife was neither guilty of cruelty nor desertion and decreed restitution in her favour. The High Court also held against the

40 *D S Dogra* v. *Rajeshwari Singh*, I (2010) DMC 249 (DB) (Utr.).

husband. The wife produced some letters written by husband, the contents of which clearly showed that he repeatedly emphasised a desire to end the relationship; denied paternity of the child and insisted that the wife should agree to a separation by mutual consent failing which he would approach the court. The counsel of the husband also submitted that since the parties were living apart from each other for a period of more than 19 years, it can be presumed that the marriage had broken down irretrievably, and should be dissolved so as not to prolong the misery of the parties. The court held that even though the grounds of cruelty and divorce were not sufficiently proved, it was just and proper to dissolve the marriage between the parties on the ground that the marriage had irretrievably broken down. Considering the fact and circumstances of the case and also the economic status of the parties, the court granted a decree of divorce on the condition that the husband makes a onetime payment of alimony of Rs ten lakhs to the wife within a period of three months failing which the decree would be dismissed. Again, in *Sudhanshu Mauli Tripathi* v. *Meena Kumari*,[41] the parties after marriage lived for two years and then separated. By the time the matter reached the present court for final adjudication, the separation had extended a period of more than 23 years and all along they maintained that they were not willing to live with each other. The husband claimed that their marriage had irretrievably broken down as all efforts of reconciliation had failed. The lower court dismissed the petition and held that since no such ground was then available under the Act, the prayer cannot be acceded to. The husband had failed to substantiate any of the grounds of cruelty, adultery and desertion and the wife was neither willing to cohabit nor for any kind of formal separation. The matter went to Patna High Court which granted divorce and held: "Marriage is not just about chanting of hymns or taking rounds of fire, it is much beyond that. In fact as per the Hindu mythology, marriages are pre-ordained in heaven and the ritual performance is only the execution of what is pre-ordained."

It followed an earlier apex court's ruling[42] that where there was no chance of any patch up or reconciliation between the parties, they should be allowed to go their individual way rather than kept bound in an unwilling marriage and held that marriage had broken down irretrievably and the continuation of the same would amount to cruelty. However, in *M Pushpalatha* v. *M Venkateshwerlu*,[43] a contrary approach was taken by the A.P. High Court. Here, the husband claimed divorce on the ground of irretrievable breakdown of marriage. The wife had filed several cases against the husband and he had entered into another relationship, but it held that only the Supreme Court can grant a divorce on this ground that was not available under the HMA. The High Court did not have this power and the prayer was refused.

41 II (2010) DMC 615 (Pat.).
42 *Satish Sitole* v. *Ganja*, II 2008 DMC 167 (SC) : AIR 2008 SC 3093.
43 2010 (3) ALT 421.

Consequences of divorce

Patriarchal society imposes certain rights and obligations in favour of the husband and wife post-marriage. One of the common practices traditionally expected of the wife is to change her surname from her father's to that of the husband. Stripped of her true identity, a woman in India take pride in adopting her husband's family name, but in the event of marital breakup, can she continue using the name of the husband or must immediately switch over to her former name? A case arose this year in Bombay,[44] where an application was filed by the ex-husband seeking to restrain his ex-wife from using his surname since the divorce decree became final. This application was filed as an *interim* application in the fresh petition filed by the wife after divorce. The wife had her bank accounts opened during the subsistence of marriage in her marital/husband's name. As she did not immediately alter her name in the bank accounts, the counsel for the husband contended that it amounted to using her husband's name despite the fact that she was no longer married to him. He wanted an injunction to restrain her from using his name anywhere including the bank accounts, with the help of the direction from the family court that was granted in his favour.

A clear judicial pronouncement appears necessary in this regard. Can a woman upon marriage be compelled to change her surname and adopt her husband's name? Is it a mandatory requirement of law or merely continuation of the orthodox patriarchal practice that deprives a woman upon marriage from using her maiden name? Conversely, would this grandeur *act* of lending his name to his wife would also lead to an inference of an automatic withdrawal of his permission to use his name in the event of separation and revert to the use of her maiden name? Further, applying judicial pressure upon the failure of the woman to do so appears extraordinary. For a woman, right from birth, she is known by the name the parents give her and the same is depicted in her educational certificates, bank accounts including the investment related securities, stocks and shares, etc. All these have a permanent character and a change in the surname requires extensive paperwork and in many a cases adherence to technical procedure as well. While a change in the surname of a woman following marriage is considered normal and part of an accepted practice, a reversal of the same often requires a hesitation and an uncomfortable explanation driven accountability to strangers, a feature men never have to encounter in the gender imbalanced society. A proclamation to the world of a marital breakup becomes essential for a woman. This embarrassment laden stigma can be avoided if the mandatory switching of the surname is not enforced upon her. A man's name remains unaffected by his marital status and in the present times when education, career and investment options are all increasingly being exercised by both men and women alike, a frequent change in the surname of anyone may be to their own detriment.

44 *Neelam Dadasaheb Shewale* v. *Dadasaheb Bandu Shewale*, I (2010) DMC 344 (Bom.).

While a deception with respect to the marital status may be serious if intentional, the use of a surname can never be a serious enough issue to warrant a judicial *dictum*. The case, therefore, appears strange as it involved a completely avoidable issue.

IV MAINTENANCE

Interim maintenance

Multiple statutory remedies are available to the spouses ensuring their economic sustenance during the subsistence of marriage, during a suit awaiting a matrimonial remedy and post a final judicial break up. Legislative cognizance of financial dependence of a woman on her husband has resulted in her acquiring different forums and enactments to enforce her financial rights as against the husband. These statutes, however, have differential applicability criterions, and situation specific applications. For instance, under the HMA, two provisions deal with maintenance, namely section 24, providing for *interim* maintenance or maintenance during the pendency of a matrimonial petition and section 25, dealing with permanent alimony and maintenance, to be awarded only where a matrimonial relief has been granted. These provisions are gender neutral and available to either of the spouses. The other enactments available only to a Hindu wife are section 18 of the Hindu Adoptions and Maintenance Act, 1956 and section 125, Cr PC, the latter can be availed of by even a divorced wife subject to the fulfilment of certain conditions.

Under section 24 of the HMA, maintenance can be granted only during the pendency of a petition praying for the grant of a matrimonial relief. Three things are noteworthy here. *First*, that *interim* maintenance is to be granted to the indigent spouse only and the duration for which it can be granted as the term suggests is only during the pendency of the main proceedings and not beyond that. Once the main proceedings culminate, *interim* maintenance also comes to an end, and the indigent spouse has to proceed under other alternate remedies that have been provided to her in this regard. Second, that *interim* maintenance is for the aid of the spouse alone and the children on their own or through their mother cannot claim economic support under this provision and, third, that for the grant of *interim* maintenance, the conduct of the indigent spouse is totally irrelevant. All that the party needs to prove is her/his financial incapability to maintain herself/himself. Due to whose conduct/fault the matter reached the court or was entertained is not material. Conduct/misconduct is relevant at the time of adjudicating the main petition and till that is decided, no final verdict can be passed on the matter. Financial matters are to be treated on an urgent basis and, therefore, who is the guilty party and who happens to be the aggrieved are irrelevant considerations in an *interim* maintenance petition. In *Lata* v. *Neeraj Pawar*,[45] the matrimonial relations lasted for one and a half years when the husband allegedly threw the

45 I (2010) DMC 540 (P & H).

wife out of the matrimonial home in an advanced stage of pregnancy and then filed a petition praying for a decree of divorce/nullity on the ground that the wife had a subsisting marriage when she entered this wedlock with him. According to him, these multiple marriages would inevitably lead to a conclusion of her leading an immoral life and she would be estopped from claiming maintenance. The wife stated that she was married by her parents when she was studying in class 8th; had never visited her in-laws house and her husband expired before her remarriage. She prayed for *interim* maintenance upon her husband's refusal to provide for her and the issue. The court held that during the pendency of a matrimonial proceedings if one of the spouse is in indigent circumstance, she can claim maintenance from the other spouse and even if she is guilty of any matrimonial misconduct, that would be totally irrelevant in deciding the maintenance application. Once the proceedings come to an end, the agreement as to the payment of the *interim* maintenance also comes to an end and the party cannot insist on its payment under section 24 beyond the date of deposal of main proceedings. It also does not entitle the grant of maintenance in favour of children of the marriage as under section 24, it is only the parties to the main matrimonial petition, who can exercise their rights to claim *interim* maintenance. In a case from Andhra Pradesh,[46] pursuant to marital differences, the husband filed a petition praying for a decree of divorce and the wife claimed maintenance for herself as also for two children born of this wedlock under section 24 of the HMA. This prayer for *interim* maintenance was allowed and maintenance at the rate of Rs 15,000 per month was granted in her favour as also for the children. The petition of the husband was accepted and the decree of divorce was awarded to him in 2005. The family court directed the husband to pay the arrears of maintenance awarded in favour of the children as also to the wife.

Two issues were raised here, firstly, can maintenance be awarded to the children in the first place under section 24 and secondly, can the maintenance awarded under this section continue even where the original petition/ proceedings claiming the main matrimonial relief had been disposed off by the competent court? The decree of divorce was pronounced in 2005, and through the order dated 27th April 2009, the family court directed the husband to pay a sum of Rs 5 lakhs and eleven thousand and Rs four lakhs and thirty thousand, that included maintenance for the children and to the wife till the date of the passing of the order and a reasonable interest accruing on it, with an additional direction that if he committed default he shall be arrested. The husband challenged this order in the A.P. High Court which held that firstly, section 24, dealt with only *interim* maintenance, i.e. during the pendency of the proceedings and not general maintenance. It cannot be claimed if there was no petition praying for any of the matrimonial reliefs available under the HMA. Where a petition praying for a matrimonial relief was presented to the court,

46 *Arvind Chenji* v. *Krishanveni*, I (2010) DMC 545 (AP).

till it was finally disposed off either by grant or refusal of a relief, it was only for that duration that maintenance can be claimed. Once the proceedings came to an end, the *interim* maintenance order also came to an end. In no case can it be stretched beyond the date of the grant or refusal of the remedy. The disposal of main matrimonial petition would result in an automatic termination of the order passed for *interim* maintenance. If the indigent party so desired, an application seeking permanent alimony and maintenance could be made at the time of passing of the decree under section 25, or even subsequently. Thus, the grant of *interim* maintenance by the family court beyond 2005, and till 2009 was incorrect Secondly, *interim* maintenance can be prayed for only by the indigent spouse for herself and not on behalf of the children. The appropriate remedy for maintenance of the children happens to be the Cr PC and not section 24 or 25 of the HMA. Thus, both the order for grant of maintenance for the wife beyond the date of disposal of the main proceedings as also the order for the maintenance of children was bad in the eyes of law and could not be sustained. However, the wife's entitlement could not be denied to her during the period when the proceedings were pending in the court, and the court directed the husband to pay the dues till the date of the order pronouncing divorce in favour of the wife.

Incapability of an educated wife to maintain herself

The first and the foremost condition that the wife has to satisfy in order that she becomes eligible to claim maintenance from her husband is her incapability to maintain herself. Under the core Hindu law, while deciding the claim of husbands who sought maintenance from their wives, their ability to earn has always been taken into consideration and the mere fact that for the time being or temporarily they were not economically active has not worked in their favour. If the husband is an able bodied man or is highly or even modestly educated and is in a position that upon his earnest attempts to seek employment he would be successful, his claim of maintenance as against the wife would be dismissed.[47] A question arises: can the same yardstick be applied in case of educated wives, who were gainfully employed getting a matching or a decent income of their own but because of the pressures of domestic obligations, were forced to resign from a well paid job and became economically inactive? Can such a woman when later discarded and neglected by the husband, claim the status of an indigent spouse? Can her capability to earn and the fact that a job would be easily available to her if she makes sincere attempts in securing it and guaranteeing her a decent income would result in denial of her claim of maintenance? An issue arose in a case from Karnataka,[48] where the wife was gainfully employed at the time of her marriage. After marriage she sacrificed her career for the sake of assuming domestic

47 See, for instance, *Kanchan* v. *Kamalendra*, AIR 1993 Bom. 493.
48 *Tejaswini* v. *Aravinda Tejas Chandra*, AIR 2010 NOC 228.(Kar.).

responsibilities. However, the husband neglected/refused to maintain her and she filed an application under section 125, Cr PC claiming maintenance from him. His main objection was that she was an MBA graduate, had the capability of earning and this in itself would negate her claim of being a spouse incapable to maintain herself. The court rejected his contention and held that her education and also her previous employed status would not disentitle her from claiming maintenance from the husband. That she is highly educated and capable of earning is not a sustainable ground. A plain reading of the expression "unable to maintain herself" in section 125, Cr PC, the court said, keeping in view the meaning assigned to every word that appears in said expression cannot lead anyone to read such expression as to mean "capable of earning", *i.e.* the expression puts an emphasis on wife being unable to maintain herself and the emphasis is not on her capability to earn for herself. As such, it is not the potential earning of the wife that is contemplated under section 125, Cr PC and if "unable to maintain her" is read as "capable to earn", then the very purpose of section 125 would become redundant because it is always possible to say that in a given case, where the wife seeks maintenance, she has potential to earn something or that she is capable to earn for herself and if that interpretation is accepted, then it may be possible to reject almost every petition under section 125. This clearly was not the intention of the legislature. Holding that the court can neither add nor substitute any word that was not done by the legislature, maintenance was granted to the wife.

The pronouncement would also come to the rescue of several gainfully employed women who are forced to adopt compulsory domesticity despite high education and skills of engaging themselves in productive avocations. The gloomy prospects of desertion and neglect by their husbands even in light of sacrifice of this nature are an unfortunate reality of the stereotyping of roles. Indian society insists on enabling the husband to earn a livelihood without the hassles of domestic obligations. Earning the label of a provider, he commands respect from the family members while the wife having a matching or even a higher calibre is forced to adopt an unrecognised supportive role.

Evasion of economic responsibilities by bigamous husbands

Hindu law contemplates an exclusive matrimonial union with monogamy as the primary rule for Hindu men. Consequentially, both parties who violate this rule suffer though differently. A bigamous party attracts the penalty under section 494; fails to get the status of a legally wedded spouse and this deprival is not merely a denial of status but also of their mutual rights and obligations including their economic rights. In *Gurmit Kaur* v. *Buta Singh*,[49] the wife herself was guilty of getting married to the man while her first marriage was subsisting. The husband prayed for a decree of nullity and a declaration

49 I (2010) DMC 316 (P & H).

of the marriage as *non est, i.e.* non-existing in the eyes of law, and the wife filed a claim for maintenance as against him. The husband's primary contention was that wife was herself a guilty party and cannot be allowed to take advantage of her own wrong, consequently her claim of maintenance should not be entertained. The court dismissed his contention and followed an earlier apex court decision[50] wherein it was held that even in cases where marriage was declared null and void under section 11 read with section 5(i) of the HMA, the party was entitled to maintenance at the time of the passing of a decree. The present court thus awarded permanent alimony and maintenance to the wife as also costs of litigation to the tune of Rs 11,000. In complete contrast, in a parallel case,[51] the court denied maintenance to a woman who was an innocent victim of fraud played by the husband and thus becoming a party to a void marriage. At the time she entered into wedlock with her husband, he had a subsisting marriage. The present marriage lasted for 17 years after which they separated. All along, the husband's bigamy subsisted. Post-separation, the husband filed a petition for a declaration of his second marriage as a nullity owing to his marital status at the time of marriage, and wanted an injunction restraining her from visiting his home as also his workplace. The wife filed a counter claiming her ignorance of the first marriage of the husband at the time of her wedding; due solemnisation of her marriage in accordance with the rites and ceremonies; the husband's deceit in concealment of the first marriage and prayed for separate residence and maintenance, a relief that is available to a wife under section 18 of the Hindu Adoptions and Maintenance Act, 1956. The family court granted the injunction to the husband restraining the wife from visiting his home and workplace but refused to give the relief of declaration of the marriage as nullity as it concluded that the husband himself was a guilty party and cannot be allowed to take advantage of his own wrong and that there was also an unreasonable and unexplained delay in presenting the prayer. At the same time, it also refused any relief to the wife holding that since she was the wife of a second marriage, she was not entitled in law to any relief of maintenance, which was available only to a legally wedded wife. The matter went to the Bombay High Court, which again denied any relief of maintenance to the wife, because she could not be put into the bracket of the term "wife" within the meaning of either the Hindu Adoptions and Maintenance Act, 1956 or under section 125, Cr PC. The wife contended that as the family court had declined to declare the marriage a nullity, it became valid by default and she can be given the status of the "wife" and, consequently, her entitlement for a claim to maintenance could be sustained. She also argued that the interpretation given by the lower courts went against

50 *Ramesh Chandra Rampratapji Daga* v. *Rameshwari Ram Chandra Daga*, I (2005) DMC 1 SC : 2005 (1) ACJ 396.

51 *Mangala Bhivajilad* v. *Dhondiba Rambhau Aher*, AIR 2010 Bom. 122.

the legislative intent of protecting destitute and harassed women, but the court turned down both of her contentions observing that this may be an inadequacy in law which only the legislature can undo, but as the position of the law stands, there was no escape from the conclusion that "wife" under section 125 referred only to legally wedded wife. Legislature had thought of protecting the interests of illegitimate children and had expressly provided for it, yet it chose to be silent about the women who were party to the second marriage. Taking cognizance of the Delhi High Court's pronouncement in *Narender Pal Singh Chawla* v. *Manjit Singh*,[52] where on exactly similar facts, *i.e.* a case involving the second marriage of the husband which lasted for 14 years, the wife was granted monetary support from the husband, the Bombay High Court chose to differ from it and held that the wife was not entitled to any claim of maintenance and dismissed her petition.

The judgement regrettably is not a healthy pronouncement. In the present case, had the court wanted, it could have provided succour to the wife. If the Delhi High Court taking into account the wilful misconduct of the husband in concealing his marital status defrauding the wife could direct the husband to make a onetime lump sum payment, a similar approach could have been adopted by the present court as well. Cheated by the husband, saddled with the responsibilities of his children, with no roof over her head and no monetary support for no fault of hers, if even the judiciary fails to bring the husband to book, it amounts to punishing the wife for the wrong done by the husband who goes scot free. Maintenance is not merely a right of the legally wedded spouse, but a legal obligation of the husband as well. Where a man marries a woman, the obligation to provide financial security starts immediately and he cannot be allowed to escape the responsibilities on the ground that he himself was incapable of entering into the wedlock in the first place. If in going strictly by the statute book the end result is injustice to the innocent party, it is upon the judiciary as the courts of equity, justice and good conscience to find ways and means to provide relief. As the *factum* of marriage and sharing of marital life for a considerable span was in evidence and also admitted even by the husband, drawing parallels from the Delhi High Court's pronouncement, the court could have awarded monetary support to the wife by directing him to make even a onetime payment. A mechanical application of the law is never desirable more specifically where the issue is to prevent vagrancy and destitution. In not adopting an equitable approach, the judiciary in the present case failed to accord justice and allowed the brazenly guilty party to get away easily.

52 AIR 2008 Del. 7.

V CUSTODY AND GUARDIANSHIP

Welfare of the children, of paramount importance

An unfortunate reality in the event of matrimonial breakup is the insufferable trauma the innocent children have to face. Their welfare and natural upbringing necessitates the love and affection of both the parents. However, the insecurity of separated parents has a devastating effect on minor children. Caught in the tug of war between the fighting adults, they are used and misused by the over possessive parents, to satisfy their egos and in the process poisoning their impressionable young minds against the other parent, more specifically by the one who for the time being has their custody. This conduct stems from a fear that meeting with the other parent would strain their own relationship with the child and thus the hesitation to honestly execute visitation rights of the other parent is glaringly visible and meetings are strongly discouraged on one pretext or the other. In *Suman Bhasin* v. *Neeraj Bhasin*,[53] the spouses were living separately for three years with negligible chances of a reunion. The parties had two sons and the custody of both was with the mother. The elder son was around fifteen years; was very antagonistic against and rebellious of the father; did not show any enthusiasm to see him; was visibly very uncomfortable in his company and did not wish even to meet him except when he had to escort the younger brother to meet the father as per the agreed arrangement. The younger son, who was just seven years old, on the other hand, was quite comfortable with father and warmly spent time with him. The mother was quite clear and emphatic that the younger son should not meet the father all by himself and these visits should be as limited as possible for fear that the child should not come under his spell. She stated that the elder son was in the X class and it was difficult for him to spare time at the cost of his studies for the supervised visits. The court held that it would be unjust to deny to father any meeting with the son or to make it subject to the compulsory company of the elder son. The father was allowed to meet the younger son without the chaperon of the elder brother and take him out on Saturdays as ordered. The court also expressed the possibility of danger of a competition ensuing between the husband and wife to capture the mind and effects of younger son which was harmful for younger son as he could develop divided loyalties and eventually a divided personality and hoped that the parents would not create such a situation. In *Padi Trigunsen Reddy* v. *Jyothi Reddy*,[54] the parties married in 1992, when the husband was living in the US. The first child was moved to Hyderabad at the age of three years by the consent of both parents to live with the maternal grandparents. Some years later, the second daughter was also brought to Hyderabad when she was a month old. Though the children and the mother were frequently moving

53 AIR 2010 SC 1372.
54 AIR 2010 AP 119.

between India and US, owing to differences between the parties, they approached the US courts for divorce, which was granted to them. Father and both the children were US citizens, but the mother was only domiciled in US. She alone was technically subject to Indian laws. When the children were brought to India, they were on Indian visa that expired long back when the mother decided to remain back in her home country after her divorce. According to the directions of the US courts, both the parents had to share the custody of children for half a year each, but when the mother fled from US and started living in India, the father was totally deprived from the custody of the children and even meeting them in complete contrast to the orders that the wife was to obey. Moreover, as she filed several cases against the husband and his parents in Indian courts, they were afraid to come to India apprehending arrest. The father and the paternal grandparents filed a petition for the writ of *habeas corpus* to direct the mother to produce the two daughters before the court and be handed over to him to be returned to US, the country of their habitual residence and permanent domicile.

The court deliberated on three issues, *first*, whether the writ of habeas corpus was maintainable or not; *second*, what should be the proper course of action on their part when one parent abducts the children contrary to the orders of the US courts and brings them permanently to India and *third*, whether the children who were US citizens, can stay in India beyond the time prescribed in their passports and visa, and if so, what are the consequences?

The mother contended that the children were acclimatized to Indian conditions, were put in good schools, and the same should not be disturbed for their own good The court held against the arrests of the father and his parents and advised parties to work out the solution and remedies out of court. They held that the father can talk to the children on phone and maintain contact, but continuity would remain with the mother and observed that when the children were living in the association of either of the parent in a particular country, other than the one of which they are nationals, the court of the country of their residence has the jurisdiction to pass appropriate orders keeping in view the best interests of the children and while giving such preference to the welfare of the children, the aspect of enforceability of a judgment passed by a competent court in a foreign country also gets faded or becomes secondary. Nevertheless, the concept of comity cannot be overlooked in toto for the simple reason that a judgment passed by a competent court of a nation with the law of that land cannot be slighted in any manner and due regard to such judgment have to be accorded by another country. The welfare of the children cannot be subjected to sacrifice, reason being that children are not party to differences that ultimately led to estrangement of their parents nor are they parties to the lis before any court of law. The children are a distinct class that have all rights without any obligations. Obligations are on the parents. In the present case, the children who were moved to India when they were month/year old cannot in fact be subject matter of controversy between the parents. Therefore, having regard to facts and circumstances of the case, the plea of the father that he is entitled

to the care and custody of the children pursuant to the judgment rendered by a competent court in USA, was dismissed. The court held that children were being associated with mother and grandparents and it was desirable to have the same comfort and solace and the situation which had been in existence since many years was inexpedient to be disturbed after considerable length of time. Any deviation or disturbance from comfort that children have been enjoying would only amount to disturbing or interfering sometimes with welfare and comfort of the children. Further, after obtaining divorce in USA, husband had remarried and one of the concerns of the court was that if he was allowed custody, the children would find themselves in a company of the stepmother and that would in itself be a situation of discomfort for them. Therefore, the custody of the children was directed to remain with the mother, with the father having access to them.

Separation of the parents forces the children to be with either of them at a time which is bad for their healthy and natural development. Moreover, if free from each other, parents while trying to start their life afresh start exploring alternate options and move away from each other not merely mentally and physically but territorially as well. In such cases, the drifting away of the child from the other parent becomes inevitable. In *Vikram Vir Vohra* v. *Shalini Bhalla*,[55] divorce was granted by mutual consent and the terms and conditions for the custody of the son were written in the petition itself. The father had visitation rights while the custody was with the mother. Soon thereafter, the mother got a job in Australia, and sought modifications of the visitation rights of the father. She contended that the son was around 8-10 years of age, it was a formative and impressionable stage in his life; the child had expressed his desire to live with the mother; the right to develop is the basic human right of every person and right of mother cannot be curtailed on ground of prior order of custody of the child. The court held that custody and visitation orders in matter of children are interlocutory and can be moulded and changed as per the needs of the child. The plea that since the order as to custody and visitation rights are not mentioned in divorce decree and they cannot be changed were held as not tenable. Here, the parties had voluntarily agreed that the child would be with the mother, and hence the mother was permitted to take the child to Australia.

In *Vishnu* v. *Jaya*,[56] the husband remarried after the death of his first wife when he had a little son. When the son was 11 and half years old, he died of drowning under mysterious circumstances with the finger of suspicion pointed towards the stepmother. The younger son deposed against his own mother and stated in court that she had thrown the deceased into the well. The relationship that became strained soon ended in divorce and the mother sought custody of her two sons who were in constant company of the father. She

55 AIR 2010 SC 1675.
56 AIR 2010 SC 2092.

failed at the level of the trial court but the High Court decreed in her favour and ordered the father to give the children to her within a period of fifteen days. The father came to the apex court for continuation of the custody of the children, who were living with the father for the past seven years and during this period, the mother had neither access nor any brief meeting with them. The younger son was unable to even recall the name of the mother and both the children were very clear that they wanted to live with their father only. The court held that in such a situation to force the children to be with the mother would traumatize them and do no good to anyone. Keeping the welfare of the children as of paramount importance, the court granted visitation rights to the mother while custody was continued with the father.

Parents having the custody of the children at the initiation of the litigation seem to have an upper hand in retaining them. Lower courts verdicts usually prove futile as litigation being extremely time consuming, and the determination of the parents not to let go the children from their own protective umbrella for fear of losing them permanently ensures that the matter must land up at the doorsteps of the apex court. By this time the infant becomes an adolescent and a toddler becomes a teenager, the plea of continuity of the custody becomes a powerful argument. Alien surroundings in place of familiar familial setup needs considerable adjustments and judiciary as a rule hesitates to impose compulsory switching over of homes signifying its detrimental effect on the tender mind of the children.

VI CHILD MARRIAGES

Validity of child marriages and protection to minor couples

Adolescent immaturity coupled with impulsive infatuation often leads to undesirable and unwarranted consequences where children of impressionable age in moments of weakness, surrender to the physical demands of their bodies putting a very heavy shadow on their future. Some go a step ahead and elope with their equally irreprehensible boyfriends totally unconcerned about their families and marry at an age where besides the fulfillment of their biological desires the responsibility laden matrimonial life's requirements are beyond their young comprehension. Full of utopian fairytales silver screen ending visions in their starry eyes, a slip of their young steps mars their life for all times to come. With foolish obstination and a total lack of serious consideration, there is often no realization that matrimonial life is not a bed of roses, but a decision that should be taken with serious thought at a time when not merely physical but mental and financial preparation can be demonstrated. In India, a peculiarity in this connection is glaringly visible. Young girls married by their parents find themselves trapped in a valid marriage (with limited choice to get out of it as it is difficult to exercise this right without family support) but girls and boys eloping on their own find no family support for this alliance. They are hunted by their parents and desperately look for protection of the statutory authorities. Problems are further compounded when the parties are children, i.e. minors. In such cases, even courts are extremely cautious and

correctly adopt a protectionist attitude for their well being.

In *Amninder Kaur* v. *State of Punjab*,[57] a 16 years old Jat Sikh girl eloped with her boyfriend and they later married without the consent of the elders. Pursued by their parents, they filed a petition under section 482, Cr PC, seeking directions to protect their life and liberty which they alleged was threatened by the parents as they had married against their wishes. The girl claimed that as they belonged to different castes and married on their own, her life has been threatened by her own parents. With her life and liberty endangered, if the state does not provide them security, her fundamental right under article 21 shall be violated. She claimed that she had attained the age of discretion and her marriage despite being categorized as a child marriage was neither void nor voidable but perfectly valid. The court framed the following issues:

i) What is the legal status of a runaway marriage where the girl is admittedly a minor and has been enticed away from the lawful keeping of the guardian by her alleged husband against whom a case under section 363/366A, IPC is also registered.
ii) Whether the persons who are in some way party to such child marriage are also liable for punishment under sections 10 and 11 of the Act.
iii) Whether a person who has enticed/taken away minor from the keeping of lawful guardian and against whom a case under the provisions of IPC has already been registered can claim police protection in the name of protection of his life and liberty.

Here, two earlier judicial pronouncements were brought to the notice of the court wherein the validity of child marriages was upheld and, even though the girls were minors, had married without consent of their family members and they were eventually allowed to go with their husbands. In *Ravi Kumar* v. *State*,[58] a twenty-eight years old man, married a 16 years old girl and after her elder sister lodged a complaint with the police against him, was arrested for her kidnapping. The girl was sent to *nari niketan* as she was unwilling to go to her parental house. Meanwhile, the husband secured bail and filed a petition for the writ of *habeas corpus* and release of the wife from *nari niketan*. Now, the sister of the girl retracted her initial offensive against the husband by filing another application before the court stating that the FIR was lodged by her under a belief that the girl was enticed but now she had realized that the girl had voluntarily accompanied him thereupon the girl was released and allowed to join the husband. Again, in *Phoola Devi* v. *State*,[59] the mother filed a

57 II 2010 (DMC) 542 (P & H).
58 2006 (1) RCR(Cr) 41; II (2005) DMC 731.
59 WP (Cr) 1369/2005.

petition for the writ of *habeas corpus* alleging that the tenant had kidnapped her minor daughter and a case under section 363 of the Indian Penal Code was registered against him. The girl, when recovered, stated before the magistrate that she had married on her own accord. The mother prayed for her custody but she was sent to the *nari niketan*. The issue before the court was whether young girls who have attained the age of discretion but not majority can be sent to the protective custody of a remand home against their parental wishes. Ruling against it, the court held the marriage as valid stating that though this was a child marriage, it was neither void nor voidable but only punishable and the girl was allowed to go with her husband.

The present court noted that both the cases were adjudged prior to the promulgation of the Prohibition of Child Marriages Act, 2006, *i.e.* 1st January 2007 which ushered significant changes in the status of a child marriage. Presently, a marriage solemnized in violation of this Act is voidable generally and void under certain specific situations and even the state under the grab of protecting the children cannot declare the void marriage as valid. Here, the husband and the other parties who were responsible for the solemnization of this marriage were liable for punishment. The court observed:[60]

> The court is flooded with petitions filed by runaway couples in which the girls who have just attained the majority are filing petitions seeking protection of their lives and liberty allegedly threatened by their parents who could be seen waiting helplessly and haplessly chasing their daughters in the corridors of this court, who out of infatuation are marrying young boys who could hardly provide them any future.

The court declared the marriage as void and refused to grant them statutory protection. It rightly concluded that as at the time of the marriage, the girl was a minor and enticed away from the lawful keeping of her guardian and, therefore, this marriage was a nullity in light of the provisions of the Prohibition of Child Marriages Act, 2006.

The pronouncement would also have the effect of rendering all those marriages void where the minor (in majority of cases a girl) marries against the wishes of her parent/guardian. Indian society as also the judiciary believe in providing a firm hand to the parents in controlling the matrimonial life of the children till they attain majority but beyond that conflicting stands are apparent. Legislative and judicial approach accords primacy to the consent of the parties while societal perception of unlimited parental control over the choice of life partner for their children remains unshaken.

60 *Id*., para. 1.

VII CLASSICAL HINDU LAW

Right to challenge the alienations of joint family property

A Hindu joint family is a unique concept under Hindu law having no parallel under any other legal system in the world. The joint family property is also distinct from separate property as the title here vests in the coparceners who have a right by birth in the joint family/coparcenary property but the right of enjoyment of the property is with all the joint family members including the non-coparceners. Unmarried daughters till 2005 also had a right of marriage expenses out of the joint family funds. The right of alienation can be enjoyed by all the coparceners together but if any of the coparceners is a minor or withholds the consent for alienation, *Karta* can alienate the property exceeding his share in the joint family property even without the consent of the other coparceners, if the alienation is for legal necessity, would amount to benefit of estate or is for the performance of indispensable religious and charitable duties, but where the *Karta* exceeds his powers of alienation, the validity of the same can be questioned by the coparceners whose share has been alienated. It is noteworthy that under Hindu law, if and when a partition takes place, certain female members besides coparceners are entitled to get a share out of the joint family property. They cannot demand a partition and have to wait for the male members to destruct their joint status. Even the right to challenge the validity of alienation is not open to them and they can only watch helplessly if the entire property goes out of the family by an unauthorized alienation. In *Ananda Krishna Tate* v. *Draupadibai Krishna Tate*,[61] an alienation effected at the behest of a Hindu joint family was challenged by the mother and the wife of the coparcener. The court held that the mother and the wife did not have the competency to challenge the alienation as they were not coparceners. They do not have a right by birth in the coparcenary property. Their right to get a share out of the property arises only when a partition takes place but till then their rights are restricted to the right of maintenance only.

It is in fact an anomaly in law that the mother and wife, who even under the classical law were entitled to get a share out of the joint family property in the event of an actual partition, are incapable to protect the same and prevent it from going out of the family by an unauthorized alienation by Karta.

VIII SUCCESSION

Impartible property of erstwhile rulers/jagirdars

The Hindu Succession Act, 1956 applies to the property of a Hindu intestate. It, however, creates an exception in favour of the impartible property of the erstwhile ruler or *jagirdar* which even presently is subject to the rules of primogeniture. Section 5 of the Act reads:

61 AIR 2010 Bom. 83.

> 5. *Act not to apply to certain properties.* - This Act shall not apply to-
>
> (i) ……
>
> (ii)any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by terms of any enactment passed before the commencement of this Act;
>
> (iii) the Valiamma Thampuran Kovilagam Estate and the Palace Fund administered by the Palace Administration Board by reason of the powers conferred by Proclamation (IX) of 1124 dated 29th June , 1949, promulgated by the Maharaja of Cochin.

Therefore, in the hands of a ruler/*jagirdar*, two different categories of properties can be held simultaneously, *i.e.* his separate property that, on his demise, would be subject to the rules of inheritance laid down under the Hindu Succession Act, 1956 and, consequently, would be equally divided amongst his progeny and the impartible *jagir* property that would be governed by the rules of primogeniture. Since the impartible property can be fruitfully used/ invested by the *jagirdar* during his lifetime to either increase its volume/ quantum, or its worth, it is open to him to use either the *jagir* property or his separate property to enhance their value. However, the character of both is distinct from each other and the same cannot be blended or mixed at will so that they lose their individual character. Where more property is acquired with the help/aid of the *jagir* property, an issue arose in *R.R. Narpat Singh* v. *Yuv Raj Singh*,[62] with respect to the character of the acquired property. Would it be characterized as the *jagir* property or *jagirdar's* separate property as his efforts and labour are more important than mere nucleus? If this impartible *jagir* property is used for acquisition of more property by the current possessor, what would be the character of the added property? Here, the property in question was the impartible *jagir* property, subject to the rule of primogeniture in the erstwhile royal family of Jodhpur. The *jagirdar* acquired more property with the income of the *jagir* in general. With respect to the character of the acquired property, it was held by the Rajasthan High Court that the acquisition would not ipso facto become the property of the *jagir* and constitute the separate properties of the *jagirdar*. The court said that in the absence of any proof of blending, it would not be presumed to be part of *jagir* and thus the rule of primogeniture would not be applicable to it for succession. It is always open to a person including a *jagirdar* to impress that property with *jagir* nature so as to make it impartible, or to blend it with *jagir* property and confer the character of impartibility in which event the rule of primogeniture would be attracted. Such blending is a question of fact and in the absence of pleading

62 AIR 2010 Raj 15.

to that effect, the property would continue to retain the character of separate property of *jagirdar* and not be subject to the rule of primogeniture.

Both the judgment and the analogy of blending appear to be incorrect. It is a cardinal rule that unless there was a clear intention on the part of the *jagirdar* to use the *jagir* property as a loan for the business or for the purpose of investment with every intention of returning it, if he acquires more property with the aid of *jagir* property, the acquisition would automatically be added to the coffers of the *jagir* property. If the nucleus comes from the *jagir* property, acquisition with its help would also be *jagir* property as the character of property is determined in respect to the character of the nucleus and not in relation to the acquirer or his labour. There is no need to prove blending as the property started off as the *jagir* property, and the profits or acquisition will be impressed with the same character. Nevertheless, it is open to the owner of a property to convert his self-acquisition and impress them with the character of *jagir* property by proving blending. For that a clear indication of an intention to blend signified either by a declaration verbally or in writing is a must. Relinquishment of self-acquired property in favour of *jagir* property is permissible but the converse is not true.

Right of daughter to demand partition of coparcenary property post-2005

One of the radical changes effected in the Hindu joint family and Mitakshara coparcenary is to erode the exclusive preserve of sons to a right by birth in the coparcenary property. With opening of the hitherto closed gates of coparcenary for the daughters in the same manner as a son, the legislature has attempted to achieve normative equality and all rights in the coparcenary property that vested in the son are presently acquired by the daughters as well. Under Hindu law, a major coparcener has a right to demand a partition of the joint family property to specify his share and switch over from being a joint member to a separate person. It is at his discretion that he can culminate his undivided status in a Mitakshara coparcenary by expressing an unequivocal intention to affect a partition. It is his right and neither the *Karta* nor any other coparcener can refuse to accede to his demand. Even the court cannot say no if the coparcener institutes a suit desiring partition, its role being limited to calling of the account of the property and enforce an equal and equitable division of the property. Exercise of the right to demand a partition can be during the life of the father or *Karta* and a coparcener does not have to wait for the death of the father/*Karta* for demarcation of his status. As a matter of fact, the partition is demanded from *Karta* who manages the joint family property and unless the desire to effect a partition is communicated to the *Karta*, the partition cannot be enforced. Presently, this right is open to the daughters as well. I*n R Kantha* v. *Union of India*,[63] a Hindu girl desiring to marry a Muslim man converted to Muslim faith and

63 AIR 2010 Kar. 27

claimed her share in the coparcenary property by demanding a partition from the *Karta/father* which was refused by him. Thereupon, she instituted a suit for partition in the court claiming her share. Two issues confronted the court, namely are the rights of a daughter to claim partition of the coparcenary property affected adversely by her conversion to Muslim faith and can a daughter demand partition during the lifetime of the father?

With respect to the first issue, the court held that the right of the married daughter to demand a partition of the coparcenary property after the amendment of 2005 is absolute and not subject to any rider.[64] Even if she converts to Muslim religion after her marriage to a Muslim man, the right to ask for partition of coparcenary property cannot be defeated. As far as her succession rights are concerned, they are relatable only to the separate property of her father for which she has to wait till his death. Her conversion does not adversely affect her succession rights as it only disqualifies the descendants of the convert born to him/her after conversion while the convert enjoys statutory protection under the Caste Disabilities Removal Act, 1950. With respect to the second issue, strangely, the court held that a daughter cannot seek partition of coparcenary property during the life time of the father. It said that the Hindu Succession Act, 1956, deals only with intestate and testamentary succession and does not confer a right in favour of the daughter to demand a partition during the life time of the father and, thus, she has to wait till his death before she can claim her share. According to the court, daughter though entitled to get a share in the coparcenary property would get it only when the succession opens and not prior to it. Interpreting the word "devolve" as becoming operative only when the succession opens, the court held that during the lifetime of the father, the succession cannot open and it is only on his demise that the succession would open and the daughter also would get the property in the same manner as the son and dismissed the claim of partition of the daughter.

The decision is erroneous as the right of coparceners are effective even during the life time of the father. The coparceners get a right by birth in the coparcenary property in their own right and the death of the father, let alone of any coparcener, is not a pre-requisite for a right to seek partition and demarcation of their shares. In fact, every major coparcener has a right to demand a partition from the father or the *Karta*, as the case may be, and, therefore, the assumption of the court that till the death of the father, a daughter cannot ask for partition is not only incorrect but appears to be against the spirit of the newly created coparcenary rights in favour of the daughter.

64 *Ganachari Veeraiah* v. *Ganachari Shiva Ranjani*, AIR 2010 NOC 351 (AP).

Constitutional validity of proviso to s. 6(1)(c), Hindu Succession (Amendment) Act, 2005

The reformist approaches initiated in the first instance by the states and then at the central level to introduce daughters as coparceners in the Mitakshara coparcenary ushered the much awaited and desired gender justice to some extent, but it also led to certain unforeseen consequences later due to conflict and contradictions between the state's amendments and the central amending Act. The first contradiction was with respect to the marital status of daughters. While according to the state's amendments, it was only the unmarried daughter who found berth in Mitakshara coparcenary in the same manner as son, the central amending Act made an opening for all daughters, irrespective of their marital status. In the States of Andhra Pradesh, Karnataka, Tamil Nadu and Maharashtra, married daughters also benefited from the central amendment. The second contradiction, however, instead of benefiting the daughters, had an adverse effect on their rights. For example, once the daughter became a coparcener, in these states post-amendment, all the rights of a coparcener also vested in her, *e.g.* she acquired a right by birth in the coparcenary property; was empowered to hold the joint possession and joint title of the same; became competent to demand a partition of her share in the joint family property in her own right and could also challenge the unauthorised alienations of the coparcenary property effected by the *Karta* and thus protect and preserve her share. However, the central amendment expressly saved the partitions affected prior to 20th December 2004, and provided that the daughter would not be competent to challenge any alienation of the joint family property effected prior to that date. It is to be noted here that this restriction was not appended to a son. Thus, if there was an alienation of the joint family property effected prior to 20th December 2004, the son could challenge it if he so desired but the daughter could not. Now, even in those states, where she became a coparcener much earlier, the situation was same. For example, the amendment came into force in the State of Andhra Pradesh with effect from 5th September 1985 and a daughter became competent to challenge an unauthorised alienation of the joint family property by the *Karta* in the same manner as a son. She continued to possess this right continuously till the promulgation of the central amending Act when it was expressly taken away from her retrospectively by providing that a daughter cannot challenge an alienation effected prior to this date. Thus, for twenty years from 1985 till 2005, she could challenge an alienation but after the central enactment came into effect from 9th September 2005, it was provided[65] that a daughter, though a coparcener in the same manner a son, could not question a partition effected before 20th December 2004. It virtually means that an inequitable partition affected in the family of which the daughter was a

65 S. 6(1)(c), proviso.

coparcener in 2003 could be questioned by her soon after its taking place, but not after 9th September 2005, even though her rights were not barred by the law of limitation.

This restriction curtails the rights of a daughter only, even where she had acquired this right in 1985 or 1989, or 1994, and does not prohibit a son from challenging partitions or unauthorised alienations effected even prior to 20th December 2004. As the right is taken away expressly by the amendment to the Act in 2005, this gender friendly amendment actually resulted in gender injustice. Can a legislation, the result of which is against the gender parity concept, inculcated in the Constitution be given effect in law? An important judicial pronouncement in this respect came from the Karnataka High Court where the constitutional validity of the proviso to section 6(1)(c) of the 2005 amendment taking away the right from the daughters to reopen partitions effected before 2004 that were expressly vested in them by the Karnataka Hindu Succession (Amendment) Act, 1994 was challenged. The court held that this section was *ultra vires* the Constitution of India and thus void as it discriminated between the rights of coparceners on grounds of sex only. In *R Kantha* v. *Union of India,*[66] an unmarried daughter filed a suit of partition in the court upon the father's refusal to accede to her demand of demarcation of her separate share of the joint family property. She also challenged an allegedly unauthorised alienation of the joint family property affected by her father without her consent. The trial court was inclined to dismiss the petition suit on the ground that since the alienation had taken place prior to December, 2004, she could not challenge the same in light of the Hindu Succession (Amendment) Act, 2005. She then filed a writ petition in the Karnataka High Court challenging the constitutional validity of the proviso to section 6(1) (c) of the central amendment on the ground that it was violative of principles of gender parity under the Constitution and, therefore, void and inoperative on the grounds that a right that had accrued to her in 1994 cannot be taken away by virtue of the central amendment in 2005 by substitution of the Karnataka amendment; the proviso to section 6(1)(c) was not retrospective; the provision was arbitrary and unconstitutional for it discriminated between a son and a daughter for it was open to a son to question an alienation and a disposition prior to 20th December 2004 whereas a restriction was placed on the daughter's rights to question the same; and the restrictions placed on the daughter's right would also run counter to section 14 of the Hindu Succession Act, which is read with main section 6, in as much as that section provides an unfettered right by birth which cannot be whittled down on the specious reasoning that settled matters ought not to be unsettled when the very same reasoning does not appear to apply to sons in respect of property.

66 AIR 2010 Kar. 27.

The court framed the following two issues:

i) Whether the proviso to section 6(1)(c) of the Hindu Succession (Amendment) Act, 2005 was arbitrary and violative of article 14 of the Constitution of India as it denied an equal right to the daughter of a coparcener to question any disposition or alienation of property prior to 20th December 2004 vis-a-vis a son;
ii) Whether the petitioner, an unmarried daughter, could seek partition of undivided coparcenary property during the lifetime of her father notwithstanding the Hindu Succession (Amendment) Act, 2005.

The main contention of the daughter that the right to an equal share in the coparcenary property of her family had accrued to her under the Hindu Succession (Karnataka Amendment) Act, 1994 with effect from 30th July 1994 and the same cannot be taken away retrospectively by a subsequent amendment was rejected by the court on the following grounds:

i) The Karnataka amendment came with effect from 30th July 1994 and the central amendment came in force on 9th September 2005. Latter prevails over the former in light of article 254(1) of the Constitution, which enunciates the normal rule that in case of a conflict between a union law and a state law passed in exercise of power under any entry in the concurrent list of seventh schedule, the former prevails over the latter no matter that union law is later in time; union law would prevail and state law shall to the extent of repugnancy be void. It is subject to the exception grafted under clause (2) of article 254 of the Constitution.
ii) The petitioner had filed a suit for partition in 2007 when the amendment had already come in force and, therefore, could not draw sustenance from the Karnataka Amendment Act. The position would not be any different even in a pending suit prior to the coming into force of the 2005 amending Act and on the basis of 1994 Act.

The other contention of the petitioner that there was no basis under the proviso to section 6(1)(c) of the 2005 Act to restrict the right of the daughter of a coparcener from calling in question any disposition or alienation of coparcenary property prior to 20th December 2004 was accepted by the court. The court held that it was unable to decipher any rationale/basis to this proviso. Though the, main reasons for saving pre-2004 partitions and alienations appeared to be to provide protection to bonafide buyers taking property in good faith and for protection of vested rights, the reasons for exclusion of the daughters appeared more sociological and dowry related and were thus unjustified. The court noted that the preamble to the amending Act of 2005 also indicated that its objective was removal of discrimination against daughters as inherent in Mitakshara coparcenary and eradication of the baneful system of dowry by positive measures thus ameliorating the

conditions of women in the human society and concluded that clause (d) of section 6A of the Karnataka Act and clause (iv) of 29A of the other three Acts, *i.e.* Andhra Pradesh, Tamil Nadu and Maharashtra, respectively, should be deleted and the main object of the Acts should be only to remove discrimination inherent in Mitakshara coparcenary against daughters, both married and unmarried. The court further noted that there was no rational basis to restrict the right of a daughter when the avowed object of the legislation was to create equal rights as between a daughter and a son of a coparcener. Even if it can be accepted that the apparent object is to so restrict the right was in order to prevent litigation and to prevent settled positions from being disturbed, the same analogy ought to apply to suits that are brought by sons of the coparceners as well. The inconvenience and hardships would be no different. If alienations or other disposition that took place under the legal position as it stood prior to the amendment are protected, the result would be that a partition that could otherwise be re-opened to address the claims of the daughter with little or no legal complications is denied unreasonably. Similarly, an alienation in respect of which the coparcener can be held to account for in conferring the daughter her due is also immunised from challenge to the unjustified disadvantages of the daughter. The court concluded that there was no justification for the prescription of a cut-off date or a blanket ban on a daughter in enabling her to claim her due, hence the proviso to section 6(1)(c) of the 2005 Act was irrational, and had no nexus with the object of the Act. On the other hand, it would nullify its declared object. Thus the daughter would face no impediment in questioning the alienations and denial of the right to a share of the proceeds prior to 20th December 2004. Allowing the writ petition, the court held the proviso to section 6(1)(c) of the Hindu Succession (Amendment) Act, 2005, in so far as it pertains to saving of any dispositions or alienations prior to 20th December 2004 as violative of articles 14 and 16 of the Constitution, bearing no rational nexus to the object of the Amendment Act.

The judgment is completely in tune with the avowed objectives of removal of discrimination in a traditional patriarchal male superiority laden preserve of the Hindu joint family. A daughter's rights presently match that of the son and any different line of thought would have run contrary to the constitutional goals of securing gender justice.

Children born of a live in relationship and void marriages

The literal interpretation of the enactment[67] shows that it is only the legitimate progeny of a Hindu man who has the rights of inheriting his property. Children of valid marriages generally or of void/annulled voidable marriages are treated as legitimate for inheriting the property of their father.

67 S. 3 of the Hindu Succession Act, 1956, provides….. related means related through legitimate kinship.

Progeny of a defective marriage; casual or occasional relationship or even a prolonged consistent live in relationship is treated as illegitimate and ineligible to inherit the property of the father. In *Madan Mohan Singh* v. *Rajni Kant*,[68] the apex court held that children born of a live in relationship where the parties had lived together for a very long time and had projected themselves as husband and wife before the society would be entitled to inherit the property of their father. The issue arose in connection with a case wherein a widower having children from the first wife started living with another woman without getting married to her and fathered children from this relationship. On his death, the claim of the issue from the second union was resisted by his legitimate children on the ground that inheritance rights can be claimed only by the legitimate offspring and not by the illegitimate children. The court held that this kind of sustained relationship cannot be termed as a "walk in walk out" relationship and it was for the party opposing the presumption of marriage to prove the contrary in such cases. The court upheld the rights of these children, born out of the second relationship to inherit the property and observed that "if a man and a woman cohabit for a number of years it will be presumed under section 114 of the Indian Evidence Act that they live as husband and wife and the children born to them will not be illegitimate".

This judgment does not appear to be laying down correct proposition of law. Legitimacy is conferred by a valid marriage and nothing short of a valid marriage. This is precisely the reason why section 16 of the HMA, as a special case, confers legitimacy for the purposes of inheritance on the children born out of void or voidable marriages. The pronouncement would render section 16 meaningless. The existence of a marriage is a prerequisite for the applicability of section 16 that confers inheritance rights on children born of such marriages. The very fact that they restrict the rights of inheritance in such cases to only the parents and not any other relations of the parents shows adoption of a slight liberal legislative approach is adopted where the marriage has already been validly solemnized but fails the legal validity test. It is either void or voidable but a live in relationship is not a marriage at all and the partners to this intimate union cannot get the status of husband and wife. Where the statute clearly provides a double validity criterion for the validity of a Hindu marriage, *i.e.* it should be solemnized validly and should be in conformity with section 5 (that lays down conditions relating to the validity of a marriage), this judicial precedent appears to be in direct conflict with a specific and clear legislation. Unwarranted legislative and judicial contradictions should be avoided as much as possible as they only pave the way for undesirable and unnecessary confusions and uncertainties. Another case involving a bigamous man and his progeny's inheritance claim came from

68 AIR 2010 SC 2933; see also *Parmanand* v. *Jagrani*, AIR 2007 MP 242.

Bombay, where[69] four children were born of the marriage with a second woman while the first marriage was subsisting. He later died and was survived by his parents and a brother, both of his wives and these four children. The children, mother, and the first wife inherited his property. The children could do so in light of section 16 of the HMA that protects the inheritance rights of the children born of void marriages. However, when the grandmother of these children died, it was rightly held the children of her predeceased son would not inherit as they were illegitimate. Even section 16 could not protect their inheritance rights as they are deemed to be related only to their parents and not to any of the relations of the parents.

IX CONCLUSION

The year 2010 was unduly harsh on unhappy couples trying to bring some solace in their lives by formally attempting to put an end to their already dead marriage as the court considered the sanctity and institution of marriage more important than the sufferings and wastage of the entire lives of the unfortunate spouses. The judicial upholding of freedom in a live in relationship to walk out of it at will, by either party without any accountability to the other partner may attract youngsters to these intimate unions as a viable alternative to a formal traditional marriage. Statutory requirements of divorce by mutual consent continued to be axed at the convenience of the parties, with apex court diluting the essential ingredients, by doing away with the required joint consent at the time of second motion in one case and while waiving the mandatory waiting period of six months in another. Decisions on dissolving the marriage on the nonexistent ground of irretrievable breakdown of marriage continued to be inconsistent, as some met with success while others with dismissal. Welfare of the children was the focal point in determination of custody and guardianship issues. The constitutional validity of the Hindu Succession (Amendment) Act, 2005 came under judicial scanner, which declared the proviso to section 6(1)(c) as *ultra vires* the Constitution of India.

69 *Shahaji Kisan Asme* v. *Sitaram Kondi Asme*, AIR 2010 Bom. 24.