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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 have been briefly analysed in the present survey.

II HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

Adoption of a child who is above the age of 15 years

Statutory accommodation to contrary customs and availing their benefits in all eventualities may not be a smooth ride in the light of the requirement of their stringent proof. The Hindu Adoptions and Maintenance Act, 1956 provides the maximum age of the child as 15 years for a valid adoption, yet makes room for its contravention if the custom prevailing in the community permits so. The courts are often confronted with the issue of validity of adoption, where the person at the time of adoption was above 15 years but pleads a contrary custom in his community. Two important adjudications having this identical issue arose before the courts this year with diametrically opposite decisions. In the first case that came from Gujarat,[1] a Hindu woman W was working as a sweeper, in the municipal corporation on a permanent basis. Upon her death a 24 years old man sought this job on compassionate grounds claiming to be her adopted son. He maintained that W had adopted him a year prior to her death via a registered adoption deed executed as between the families. W had three biological children of her own, two daughters and one son but the son had died two years prior to the alleged adoption. The municipal corporation rejected his application for the job stating that since he was 23 years old at the time of this alleged adoption, the same was not valid in light of section 10 (iv) of the Hindu Adoptions and Maintenance Act, 1956. The man contended that there was the custom of adoption of males over 15 years in the *Valmiki* caste to which he belonged. In support of his contention he annexed an undated certificate issued by the managing trustee of *Jay Jagdamba Yuvak Mandal Trust (Valmiki Samaj) Sabarmati*, Ahmadabad, which stated that a *Valmiki* can adopt a person who is above 15 years and this custom has been prevailing since long. The court's deliberation was focussed

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1 *Amit Chandubhai Chauhan* v. *Ahemedabad Municipal Corporation*, AIR 2011 Guj 145.

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on whether to accept this certificate alone as proof of customary usage prevailing in this *Valmiki* community or not? It noted that this certificate was undated; was without any seal or even an affidavit of the person issuing it. The court said there was no recital in the adoption deed that there was a custom amongst the members of "*Valmiki* caste" and community to adopt a person above 15 years and, therefore, the presumption under section 16 is not available. The court also noted that, except the certificate issued by the managing trustee there was absolutely no other evidence authenticating such a custom. Thus, the court held against the validity of the adoption. The second case before the apex court,[2] involved the controversy surrounding the adoption of an 18 years old male. He filed a petition claiming the property of the alleged adopted father on the ground that since he died intestate, he being the adopted child was entitled to the complete property. The claim was resisted by the other relatives of the deceased who challenged the validity of adoption on the ground that since the claimant was above the age of 15 years on the date of adoption, the same would not be valid under the Act. Adoption was through a registered adoption deed that stated that the natural parents of the claimant aged 18 years had given him in adoption in presence of the elders to *Anne Seetharamaiah* who was issueless in accordance with the provisions of the Hindu Adoptions and Maintenance Act, 1956. It also recited that the adoption was in accordance with the customs prevailing in the *Kamma* community of Andhra Pradesh that were unrebutted and unchallenged. The court accepted the adoption as valid, in view of the statutory exception made in favour of the custom to the contrary.[3]

These two contradictory decisions bare the necessity of adhering and taking abundant precautions as far as the inculcation of appropriate terminologies in the adoption deeds. In the first case the absence of any reference to the prevalence of a contrary custom proved fatal to the validity of adoption while in the second case, an endorsement in the registered deed that re-iterated the presence of a custom enabling a boy above 15 years to be adopted was held sufficient by the apex court to adjudicate its validity. In both the cases there was neither any controversy nor any denial of the existence of such a custom, rather in the later case it was the claim of the family members, who obviously came from the same community that since he was above the age of 15 years, adoption was invalid. If both the persons claiming benefit of a contrary custom and the ones who challenged the validity of the custom came from the same community where the custom was supposed to exist the situation would be different, rather graver. However, in the first case, despite the certificate issued from the community representatives and absence of any rebuttal or contradiction in the nature of a claim by the members of their own community negating the prevalence of a custom that enabled adoption of a boy above 15 years was surprising. Here, the negative reaction was from the statutory authorities and there was no evidence that they either belonged to or had any knowledge of existence of any customary practices in the community of the claimant.

Adoption without the consent of the wife

It is a well settled rule that amongst married couples adoption is a consensual

2 *Atluri Brahmanandam* v. *Anne Sai Bapuji*, AIR 2011 SC 545.

3 The court here relied on *Ujagar Singh* v. *Jeo*, AIR 1959 SC 1041.

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act and is not to a particular individual. If the husband takes the first initiative, an affirmation by the wife is necessary and presently, as she is also competent to take the first step, if the wife takes a child in adoption, the consent of the husband is mandatory. Even though the patriarchal setup gives a superior power to men yet as the head of the family his decisions are to be aided actively by his spouse. Where he decides to bring a child to his family through adoption, proceeds to do so without consulting his wife on either on an equal footing or by confining the complete action to himself and reducing her to a mere spectator and relegating her to background, his actions would be rendered without any legal effects. Where the role assigned to her under law is that of an equal partner, her patriarchal subservience and consequently her presumed consent in all cases may nullify the husband's actions. Legal requirement makes the consent of the spouse absolutely mandatory unless the spouse is judicially disqualified. So, where the husband takes a child in adoption and expecting no resistance from his wife takes her consent for granted, would her meek physical presence at the time of adoption as a mute spectator fulfil the statutory requirement leading to validity of adoption?

The action here,[4] commenced at the initiation of a person A, who claimed that in the year 1959, he was given in adoption by his father through a registered adoption deed after observing due ceremonies. The adopted father (B), had inherited certain landed property from his late father and had gifted some of it to his wife and sold another portion of it to Y. A now contended that since he is the coparcener along with the adopted father, the father had lost the power to alienate any portion of the property in his possession that was ancestral in character. These transfer deeds were, therefore, fraudulent and intended to deprive him of his rightful share in the property. He filed a suit in the court for partition of the suit property, claiming one half share in it, and sought a direction from the court, that the adoptive father be asked to render complete accounts of the agricultural property in his possession, account of the produce and pay him his share.

Out of several issues formed by the court two were: Whether the adoption of A by B was in accordance with law and secondly, what was the character of the property in the hands of B. The answer to these depended primarily on the validity of the adoption. If the adoption was validly effected then A would be transported to B's family as his son for all purposes including becoming a coparcener, but if the court concluded that the adoption in itself was not valid, then the second issue needed no exploration. The trial court concluded that the properties in the hands of B were ancestral in character; the wife's presence at the site of adoption was equivalent to her consent perfecting adoption and since A was validly adopted by B, the deeds executed by him were without any legal force. The high court confirmed the same and declared A as the representatives of W, and owner of half of the property. The matter was then taken to the apex court. The counsel for A contended firstly, that since the courts below had consistently ruled in favour of validity of adoption the apex court under article 136 of the Constitution is not competent to interfere with the same. Secondly, the high court had rightly presumed the consent of the mother as she was present throughout the ceremony and did not challenge the same till the

4 *Ghisalal* v. *Dhapubai*, AIR 2011 SC 644.

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filing of the written statement. On the other hand, W contended that though she was present at the time of the alleged occurrence, she never consented to adoption and in fact was never even consulted nor had given her consent. Her consent could not be presumed by her mere presence. The whole issue presently was whether the mere presence of the mother would result in applying the presumption that she had consented to the adoption. Ruling against it, the apex court concluded that all the courts below had erred in holding that the adoption was validly effected. The wife of B was merely present at the time when the alleged adoption took place, while the requirement in law is that it is her consent that is necessary and not her mere presence. The court held that adoption was not valid as the statutory requirement of taking the consent of the wife was not fulfilled. Therefore, A was neither the adopted son of B nor entitled to question any disposition of the property made by him and observed thus:[5]

> Adoption is to be effected by the father but with the consent of his wife. Consent of the wife envisaged in section 7 Proviso should either be in writing or reflected by an affirmative /positive act voluntarily and willingly done by her. If adoption by a Hindu male becomes subject matter of challenge before the court, the party supporting adoption has to adduce evidence to prove that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that the wife had actively participated in ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or daughter in adoption. The presence of the wife as spectator in assembly of people who gather at place where ceremonies of adoption are performed cannot be treated as her consent, i.e., court cannot presume the consent of the wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to adoption.

The apex court thus laying down the correct legal position reversed the verdict of the lower courts. The line of approach taken by the high court and the lower court was erroneous and highlighted the gap between the legal and the practical rhetoric. It is no wonder, therefore, that the trial court's verdict here endorsed the conservative stance in the patriarchal families where unquestioned obedience by the wife to her husband's decisions are implied as a rule. Legal enhancement of her status as a party on more or less equal footing to the decision making process in such an important though family matter stands in sharp contrast to the practical reality where men by virtue of the ownership of material assets take decisions unilaterally and the other family members mutely obey them.

The trial court here had specifically recorded a finding that the wife was not a party to the deed of adoption, as she had neither signed the adoption deed nor consented to the adoption at any stage, but the court strangely presumed her consent by her mere presence. According to the evidence the adoption ceremonies had taken place, the child was given and taken in adoption but it was not in evidence

5 *Id*. at 652, para 20.

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that the wife of B had ever given the consent which proved fatal to its validity. The single judge had recorded that since the wife did not challenge the adoption, her consent can be presumed. This again was as an erroneous assumption.

Of late the effects of adoption have dominated its noble and pious purpose. Litigation surrounding adoption is focussed mainly on obtaining benefits under it either in the nature of enforcing property rights or getting employment or even trying to usurp property of another person.

III HINDU MARRIAGE ACT, 1955

Child marriages: Issues of validity and guardianship

For a country where not till recently arranged child marriage was a rule and their continuation is visible even presently, despite legislative and social activists efforts to curb it, a daunting task awaits the judiciary to adjudge their validity, which is further complicated where the adjudication is required in cases of elopement followed by marriage of minors without parental consent or in their ignorance/ disapproval. A sharp contrast in parental as also the societal behaviour is glaringly apparent in such cases. An arranged child marriage sought to be annulled by the parties require tremendous efforts more specifically by the female party as in practical socio-economic scenario, a firm decision at this age would not only be uncommon but rather unique as it would put both her in-laws and her parents as also the society on loggerheads with her. The intense hostility confronted by the girl and lack of support from virtually all the fronts is enough to subdue her spirit and force her into subjugation, as it is an extremely difficult task to fight everyone alone notwithstanding the fact that the marriage may be to her manifest disadvantage.

In cases of elopements in ignorance of parental knowledge or in defiance to their wishes the reaction is again of extreme hostility from all corners of the society but the togetherness of the couple and the support in their mutual fear can give them rare courage. Tender ages are faced with the stark reality that the actual reaction of the nurturers parallels the villains and the parents who would normally rush to their children's aid even if they sneeze, now would be after them with a desire to throttle them. While both become extremely vulnerable the boy faces an additional trauma of being branded a criminal with serious charges of rape and kidnapping slapped against him, if the girl's parents come to know of their cohabitation with mutual consent. An uncertainty of the validity of this union remains an added complication, parents crying nullity and spouses claiming its legality. The Supreme Court adjudicated upon the validity of such a union. Here,[6] H aged a little under 18 years and 16 years old W got married according to Hindu rites and ceremonies without informing her family members in 2010. W's family was strongly opposed to this marriage or her maintaining any connection with H. W apprehended a threat to her and her husband's life due to intense opposition of her father, paternal grandfather and paternal uncle. Her elopement, predictably, was followed by a swift lodging of an FIR by her father at the police station who later also added charges under section 376 against the son-in-law, after coming to know that they were living together as husband and wife. Two days post marriage a letter was

6 *Jitender Kumar Sharma* v. *State*, 2011 MLR 144 (SC).

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received at the police station written by W, that she had married H voluntarily; that no case be registered against him at the behest of her parents. However, both H and W were aprehended from their hideout; were produced before the court, which sent H to Juvenile home, and handed over W, to her parents, but she escaped and went to her in-laws house who welcomed her as their daughter-in-law. A second missing report by her father resulted in a prompt action by the police, as they "recovered" her from her in-laws's house, sent her to a women's home, only to be taken away by her parents forcibly despite the fact that she gave in writing that she went to the in-laws house voluntarily. In June 2010, the husband was released from juvenile home and 8 days later W's mother again approached the police station about her kidnapping by H. W again wrote letters to the authorities about her marriage, her going with H on her own with free consent and her apprehensions about her safety and her life at the hands of her father, uncle and her grandfather. When produced in the court, she firmly stated that she wanted to live with H, and did not want to go to her parents' home and when the court could not send her to her parent's home without her consent, she was again sent to *Nirmal Chhayya*. Her parents contended that as she was a child, her marriage to H was void in light of section 5 (iii) of HMA[7] as also the PCMA.[8] Thus the court had two issues to adjudicate upon: first the validity of her marriage and second, since she was a minor, appointment of her guardian? Incidental to the second issue, was the question; what if she does not accept the custody decision of the court? If she was a minor but of an age when she could express her intelligent preference; would a forced custody order, amount to violation of her fundamental rights to life and liberty under article 21 of the Constitution of India? With respect to the status of the marriage, the court held in favour of its validity under the Hindu Marriage Act, 1955. It quoted with approval earlier judicial pronouncements[9] and said:[10]

> Under Hindu law there are essentially two kinds of marriages, void and voidable. Under section 11, child marriage is not there, and under section 12 the marriage of a minor simpliciter is not voidable but can be declared void under certain circumstances.

The court observed that the validity of marriage is primarily to be determined with respect to the personal law of the parties and thus for Hindus, it would be in context of the Hindu Marriage Act, 1955, where it is valid as a marriage in contravention of section 5 (iii) and is not *ipso facto* void but could be void if any circumstances enumerated in section 12 of PCMA apply. PCMA, irrespective of personal laws makes every child marriage voidable at the option of the child party to the marriage, but only the child can file a petition for its annulment and nobody else. PCMA, makes a special provision for void marriages under certain specific

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7 The Hindu Marriage Act, 1955.

8 The Prohibition of Child Marriages Act, 2006.

9 *Kalyani Chaudhary* v. *State of UP*, 1978 CrLJ 1003; *SimranKaur* v. *State of HP*, 1998 (2) Crimes 168; *Ravi Kumar* v. *State*, 124 (2005) DLT 1 and *Manish Singh* v. *Government of NCT*, *Delhi*, AIR 2006 Delhi 37.

10 *Supra* note 6 at 149.

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circumstances but does not render all child marriages void. It also introduces the concept of a voidable child marriage, the flip side of which clearly indicates that all child marriages are not void, for one cannot make something voidable which is already void or invalid. Judicial conclusion was therefore in favour of the validity of this marriage.

With respect to the second issue, i.e., the custody of a minor married girl, the court opined that even though she had clearly and flatly refused to go with her parents, yet, she cannot be kept in *Nirmal chhayya* till she attained majority. Exploring the considerations necessary to be considered while appointing a guardian[11] under the Guardians and Wards Act, 1890, it concluded that two things were apparent,[12] namely, first that a guardian is not to be appointed or declared of the person of a minor married female whose husband is not in the opinion of the court unfit to be the guardian of her person and secondly, a minor is incompetent to act as a guardian of any minor except to his own wife. Further, in appointing a guardian for the minor the paramount consideration would be given to the welfare of minor and if the minor is old enough to voice her opinion or intelligent preference, that has to be given due consideration. The court directed the release of the minor from the home and to be sent to the husband saying that she was free to live with him and ordered the quashing of all FIRs filed against him by the girl's parents. It also quoted with approval its earlier observations as follows:[13]

> Before we conclude, we would like to point out that the expression "child marriage" is a compendious one. It includes not only those marriages where parents force their children and particularly their daughters to get married at very young ages, but also those marriages which are contracted by the minor or minors themselves without the consent of their parents. Are both these kinds of marriages to be treated alike? The former kind is clearly a scourge as it shuts out the development of children and is an affront to their individualities, personalities, dignity and, most of all, life and liberty…

The court declared the present marriage as valid and accorded the custody of the girl to her husband holding that even though a minor cannot be a guardian, he can be so for his minor wife. The court observed that the old and evil practices of parents forcing their minor children into matrimony subsists along with the modern day problem of children falling in love and getting married on their own. The latter may have been occasioned by aping the west or the effect of movies or because of the independence that the children enjoy in the modern era. Whatever is the reason, the reality must be accepted and the state must take measures to educate the youth that getting married early places a huge burden on their development. At the same time, when such marriages do occur, they may require a different treatment and hoped that the sooner the legislature examines these issues and comes out with a comprehensive and realistic solution, the better, or else courts will be flooded with *habeas corpus* petitions and judges would be left to deal with broken hearts, weeping

11 See ss.7,17, 19 and 21.
12 *Supra* note 6 para 20.
13 *Id*. para 25.

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daughters, devastated parents and petrified young husbands running for their lives chased by serious criminal cases, when their sin is that they fell in love.

As per the 205th Report of the Law Commission of India,[14] child marriages continue to be a fairly widespread social evil in India and in a study carried out between the years 1998 to 1999 on women aged 15-19 it was found that 33% were currently married or in a union. In 2000 the UN population division recorded that 9.5% of boys and 35.7% of girls aged between 15-19 were married.[15] The need to root out these unhealthy practices from our social fabric is mandatory, but the court is not oblivious to the fact of a burgeoning of cases of missing daughters and married daughters detained by their parents that is a serious societal problem having civil and criminal consequences. There is distinction between the problem of child marriages as traditionally understood and child marriages in the mould of teenage marriages. India is both a modern and a tradition bound nation at the same time, yet in cases of marriages of minors all by themselves, both tradition and modernity are thrown to winds and only a desire to finish both the life and the marriage remains uppermost in the minds of the parents. More than the voluntary marriage of minors, it is an arranged minor marriage that is dangerous and a blot on our nation, and the sooner it is wiped out, the better it would be.

Offence of bigamy and initiation of complaint by the second wife

In 1955, i.e., 57 years back, legislature pronounced monogamy as the basic rule for all Hindus subject to the provisions of the Hindu Marriage Act, 1955; brought the commission of bigamy under section 494 IPC, making it a criminal offence yet diluted considerably the intense seriousness of this crime by putting it in a different bracket from the general crimes. It was put under the heading offences against marriage. The lack of seriousness in tackling the menace of bigamy can be judged by the fact that the affected party here is the first wife and the offence is not against the society as such but only against her. If she chooses voluntarily to or is even forced not to take any action against the husband, he cannot be prosecuted because despite the fact that other persons such as her relations, or even a president of a social or a women's organisation are competent to lodge an FIR on her behalf, it is always on behalf of the first wife and if she does not agree to prosecute the husband, nobody else is empowered to take even this initial step. Societal perception towards commission of this crime is, therefore, predictably not only lenient but sometimes even shocking. Bigamous men are not seen as criminals, not even law breakers, but are often visualised as "macho" hinting that their actions are worth applaud and not reprimand. Political parties riding on the Indian culture and traditions woo, bigamous silver screen personalities, giving them tickets to fight elections or nominate them to the sacred parliament, where they take part in the law making process. Adopting double standards, these law breakers make laws riding on their economic and populist success, throwing caution to winds and shredding rule of law to pieces making them toothless tigers. It sends a clear message that here is a crime which even though within public knowledge would go largely unpunished if one is able to subjugate the first wife or convince her emotionally or

14 February 2008.

15 *Id*. at 15.

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through some other means not to take any action. The cause of action, therefore, arises only in favour of the first wife and nobody else. Of late even in those cases where married men enter a second wedlock through deception keeping in dark the second wife of their marital status, on the discovery of fraud, the second wife is incompetent to lodge an FIR against him and prosecute him. An additional trauma for her would be her inability to file a case of matrimonial violence under section 498A of IPC, since the second marriage would be void and she would not take the status of a wife and the protection available to a wife from domestic violence under the IPC would be denied to her. In this regard, important issues, such as can the second wife who was deceived into marrying a married man, file an FIR against him; can she also lodge a complaint against him under section 498A, arose in a case that came before the apex court. Here the petition[16] was filed by a Hindu woman that H had approached her for marriage and had made a representation that his first wife had died leaving behind two children who were studying and living in hostel, while the fact was that the first wife was alive. In the court of the first judicial magistrate, the case was registered under sections 494, 495, 498A and 420 as the woman had also alleged mental torture and harassment relating to dowry. The husband contended that a second wife cannot file a complaint under sections 494 and 495, or under 498A as she is neither the aggrieved party in the former case nor a legally wedded wife in the later case. The high court noted that the offence punishable under section 494 as amended by the state of Andhra Pradesh was made cognizable and though there was no corresponding amendment to section 198 of the Cr PC the investigating agency was entitled to investigate; police was competent to file the charge sheet and the magistrate could take cognizance of the said offence on report filed by the police. The court concluded that for the offence punishable under sections 417, 420, 494, and 495 this was in accordance with the law but as the victim was the second wife, the second marriage being void the offence under section 498 A cannot be made out.

The husband's primary contention was that the magistrate is incompetent to take cognizance of the offences under sections 494 and 495 on the basis of the police report because even though the amended state legislation made the offence cognizable, the legislation enacted by the parliament in respect of section 198 of the Cr PC remained the same and in the event of any repugnancy between the two legislations, the one brought in by the parliament would prevail. According to him, the high court also failed to take note of the fact that it is only a legally wedded wife or anyone on her behalf who can make a complaint to the magistrate for the offence under sections 494 and 495 and here it was the second wife who does not have the status of a legally wedded wife who had filed a complaint with the police. The prosecution on the other hand contended that since in the state of Andhra Pradesh, due to the amendment these offences have become cognizable, the aggrieved person acquired the competency to lodge an FIR and the magistrate can take action on the basis of such FIR. The court explored the substantive content of both sections 494 and 495 and noted that the solemnisation of marriage with a woman when the first marriage was subsisting and that too keeping her in dark about it, brings not only an

16 *A Subhash Babu* v. *State of AP*, AIR 2011 SC 3031.

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element of dismay due to fraud but attachment of serious legal disabilities upon her as well, such as incapability to claim maintenance even when there is inhuman treatment, or physical or mental cruelty; ineligibilities to claim inheritance, outrageous and absurd social stigma. It shatters her ambition to lead a comfortable life and brings untold misery on her by her own kith and kin as also the society at large. The court then proceeded to explore the legislative intent for enacting sections 494 and 495 in the Code and observed that through these sections, law introduced monogamy which is essentially a voluntary union of life of one man with one woman to the exclusion of all others and abolished polygamy and hypergamy, which in not so recent past had brought innumerable miseries for women and had been one of the major reasons for her subordinate status.[17] Section 494 was intended to achieve a laudable objective of monogamy, but this is possible only by expanding the meaning of the phrase "aggrieved person". For a variety of reasons the first wife may not choose to file a complaint against her husband e.g., when she is assured of reunion by her husband, when he assures her that he would snap ties with the second woman etc, but no filing of the complaint does not mean that the offence of bigamy is wiped out and monogamy sought to be achieved by means of section 494 merely remains in the statute book. Having regard to the prevailing practices in the society sought to be curbed through section 494, there is no manner of doubt that the complainant should be an aggrieved person. Section 198 (1) (c) of the Cr PC amongst other things provides that where a person aggrieved by an offence under sections 494 or 495 IPC is the wife, complaint on her behalf may also be filed by her father, mother, sister, son, daughter etc or with the leave of the court by any person related to her by blood, marriage or adoption. The court said: [18]

> The expression "aggrieved person" denotes an elastic and an elusive concept and cannot be confined within a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and extent of the prejudice or injury suffered by the complainant. Section 494 does not restrict the right of filing complaint to the first wife and there is no reason to read the said section in a restricted manner as is suggested by the appellant's counsel.

The court further said that section 494 does not say that the complaint for commission of the offence under this section can be filed only by the wife living and not by the woman with whom subsequent marriage takes place during the life time of the first wife. As here the man had concealed the first marriage from the complainant, therefore, she becomes an aggrieved woman and a complaint at her instance is maintainable. Under section 495, the offence is an aggravated form of bigamy due to concealment of former marriage. A married man who by passing himself off as unmarried induces an innocent woman to become as she thinks his wife, but in reality his mistress commits one of the grossest form of frauds known

17 *Id*. at 3037, para 10.
18 *Id*. at 3038.

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to law and, therefore, severe punishment is provided. Therefore, the wife with whom the second marriage is performed after concealment of the former marriage would also be entitled to lodge complaint for commission of offence under section 495 as she would be an aggrieved person within the meaning of section 198 Cr PC.

The court also came down heavily on the high court for quashing the proceedings pending before the magistrate under section 498A on the ground that since the marriage of the woman with the accused was void, she was not his wife and the issue of dowry related harassment would not arise. Such reasoning according to the court,[19] was quite contrary to law. The court said that a person who enters into marital arrangement cannot be allowed to take shelter behind the smoke screen of contention that since there was no valid marriage the question of dowry does not arise as such legalistic niceties would destroy the purpose of the provisions. Such hair splitting approach would encourage harassment to a woman over demand of money. If such restricted meaning is given it would not further the legislative intent rather on the contrary it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to the marriage. Legislation has not defined the term husband but the term is wide enough and would include a man who gets into a second marriage or a void marriage with another woman. The court held that a woman with whom the second marriage is solemnised by suppressing the fact of a former marriage would be entitled to maintain a complaint against the husband under sections 494, 495 and 498 A of the IPC.

The pronouncement is welcome as the offence of bigamy still goes largely unpunished. However, the ambit though slightly widened still has not been opened as desired. Legislative provisions should be seen as serious but that is possible only where there is scope for matching implementation. By confining the right to lodge an FIR, primarily with the first wife and now for the first time even the second wife still has a limited scope. Only such a second wife who was unaware of the existence of the subsisting marriage would be covered under the term "aggrieved person" but those situations are virtually microscopic. Predominant cases of polygamous marriages involve helpless and forgiving first wives and gullible women who for a temporary gain are misled by the husbands into believing that they would provide them with physical and financial security and usher in their life love and stability. No wonder when befooled by such promises a woman enters into wedlock with a married man knowing well his marital status, and the trauma that would befall upon his first wife, she cannot be called an aggrieved woman for the purposes of section 494, when even after a short or long honeymoon the husband throws her out. Attempts of bigamous husbands to evade their economic responsibilities that can otherwise be enforced as against them in a valid marriage in majority of cases are successful. If a married man induces a woman to marry him, his contention that he is not obliged to maintain her and cannot be prosecuted for matrimonial violence may have substance in absence of fraud/ collusion but not in cases of deception. If a woman gets married in accordance with law, she is assured of the protection of her person, economic and residential interests, but if she does not get married but lives with a married man when it is prohibited by law, she does it at her own peril.

19 *Id*. at 3043.

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Adultery as a ground for divorce and the plea for the DNA test on the child

For a matrimonial offence that usually takes place secretly, and in absence of the other spouse sometimes randomly and at other times in a planned manner, to bring in the direct proof is virtually next to impossible. With the advancement in scientific technologies a person having strong reasons to believe in the infidelity of the spouse leading to, in his perception fathering somebody else's child would normally be a nightmarish trauma that can now be authenticated with the DNA tests. This can either lay his suspicions at rest by negating his hasty conclusion or by confirming it. In the past the courts have always adopted a protectionist attitude towards ordering or subjecting a party to the DNA test for fear of what they term as "bastardising" an innocent child. Therefore, unless and until the husband convinces the court of non access to the wife at the time of the possible conception of the child, the court would not order the child to undergo a DNA test. If he fails to convince non access, the court would apply presumption of paternity under section 112 of Indian Evidence Act. In a case before the Madras High Court,[20] the husband, a construction labourer at Bangalore, filed a petition praying for a decree of divorce under sections 13 (i-a); 13 (1)(i) and (1) (i-b). Pending this petition he also filed an application under section 112 of the Indian Evidence Act, praying to the court to direct the blood test to be conducted upon the second son of the wife to find out its biological father as he suspected his paternity. The wife was residing at her parents place in Madepalli village all along and as he was working at Bangalore he had not visited her at the time of possible conception of the child, or at any time near it as such he suspected that the wife was having an affair with another person and was continuing the same. The wife disputed the claims of the husband and contended that it is a settled position that DNA tests cannot be ordered as routine in all the cases; as she was a married woman, the presumption of paternity cannot be disputed and an order of DNA test would amount to a violation of her rights of privacy and that the husband's sole objective in disputing the paternity of the child was to tarnish her image. The husband on the other hand contended, firstly, that in exceptional cases and his was one such exceptional case, a DNA test can be ordered and secondly as per the requirements of section 112 of the Indian Evidence Act, he had established non- access and made out a *prima facie* case.

The high court observed that a well settled principle in this connection is that a matrimonial court has the power to order a person to undergo a medical test and passing of such an order by the court would not be in violation of the right to personal liberty under article 21 of the Constitution, but the court should exercise such power if the applicant has a strong *prima-facie* case and there is sufficient material before the court. If despite the court's order the respondent refuses to submit himself/herself to medical examination, the court will be entitled to draw an adverse inference against him/her. It quoted some important earlier judicial pronouncements[21] wherein it was held that conclusiveness of the presumption under section 112 of the Indian Evidence Act cannot be rebutted by the DNA test and proof of non-access to each other is the only way to rebut that presumption. The

20 *Muniappan* v. *Ponni*, 2011 MLR 524 (Mad).

21 *Kamti Devi* v. *Poshi Ram* (2001) 5 SCC 311 : 2002 MLR 28.

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apex court in the past[22] had issued specific directions in this connection that were as follows:

i) that courts in India cannot order blood tests as a matter of course;
ii) wherever applications are made for such prayers in order to have roving inquiry, the prayer for having blood tests cannot be entertained;
iii) there must be strong prima facie case in that the husband must establish non access in order to dispel the presumption arising under section 112 of the Indian Evidence Act;
iv) the court must carefully examine as to what would be the consequences of ordering blood test, whether it will have the effect of branding a child as a bastard and the mother an unchaste woman; and
v) no one can be compelled to give sample of blood for analysis.

In the present case the court held that the husband here was successful in proving *prima facie* case of non access and that there was no harm in ordering of the DNA test and the same would not be violative of the constitutional rights of privacy guaranteed to the wife as an individual.

Though the pronouncement was appropriate in the light of the facts and circumstances of the case, but otherwise, the hesitation of the courts in ordering for a DNA test for fear of it having an adverse impact on the child, appears to be misplaced. Societal imposition of stigma and its adverse impact on the child is now an outdated concept. Present times recognise the right of a child to know who his real father is with the help of a DNA test and the same is being entertained by the courts in India. The child's first and intimate interaction is with the parents and what is perhaps of utmost importance for the child is their undiluted love and affection. Where the father suspects the paternity of the child, and he has strong reasons to believe it but they are short of non access, it would be in the best interests of the child to have a conclusive determination of who his father is.

Purchase of divorce decree

Though the legislature has considerably liberalised obtaining divorce, the court has to be satisfied with respect to the genuineness of the grounds specified in the Act but can it be obtained by a mere offer of payment of money to the unwilling spouse? In a case before the Supreme Court,[23] the marriage was solemnised in 1994, the parties lived together for only three months and then separated with the wife going back to her parents place. Three years later, the husband filed a petition in the court of law praying for a decree of divorce on grounds of her cruelty and desertion. Wife had filed cases under section 498A against the husband and his family members. Now she filed counter allegations of cruelty which the family court found as true but directed her to resume cohabitation under section 23 A holding as follows:[23(a)]

22 *Gautam Kundu* v. *State of West Bengal*, 1993 MLR 34: (1993) 3 SCC 418.
23 (2010) 10 SCC 222.
23(a) *Id*. at 223.

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> While rejecting the prayer for divorce, I pass a decree of restitution of conjugal rights and direct the wife to resume cohabitation with the husband within a period of three months and implore the husband to co-operate.

The matter was taken to the high court upon the failure of the wife to resume cohabitation as directed by the family court at the instance of the husband. Before the high court, he filed an affidavit declaring his willingness to pay rupees 10 lakhs to the wife for her life term maintenance and for marriage expenses of his daughter in consideration of dissolution of marriage and compounding of criminal cases instituted by the wife against him. Five lakhs, he said he would pay within four months from the date of passing divorce and the rest in equal instalments spread over a period of two years. The court paraphrased statements made by the husband made in his affidavits and made it the order of the court and granted divorce. Dissatisfied with it, the wife filed an appeal to the apex court which expressed surprise at the judgement of the high court and held that law does not permit the purchase of the decree of divorce with or without the consent of the other party. By setting aside the order of the high court and restoring the judgment of the family court, the apex court observed thus:[23(b)]

> No court can assume jurisdiction to dissolve a Hindu marriage simply on the basis of the consent of the parties de hors the grounds enumerated under section 13 of the Act, unless of course the consenting parties proceed under section 13 B of the Act.

The verdict shows an undue harsh side of the judiciary. What the court perceived as a purchase of divorce decree can well be termed a financial settlement in way of the guilt of the husband and the determination of the wife. This statement that "law does not permit a purchase of divorce decree with or without the consent of the other party" is surprising as the courts themselves have been granting and even putting up a time frame for the payment of the settlement amount. It is primarily to prevent the financially weaker party usually the wife from becoming more vulnerable. A breakup with the consent of both and with an adequate financial arrangement is perhaps the best possible solution. To term it as a purchase and giving a commercial connotation is undesirable. The courts must examine a basic question: is protection of institution of marriage more important than the lives of the individuals? Where in the present scenario the placement of both the parties was such that a reunion was an impossibility, to reverse the order of the high court, leading to revival of a dead marriage, what the apex court sought to achieve is perplexing in itself. In face of the reality, that these parties are not going to come back together, the court should have seen the strict time bound payment rather than keeping him legally tied to a woman who for may be her own conduct would never live with him. An offer of payment of this huge amount of money, i.e., 10 lakhs is usually a desperate measure taken by a man whose spouse not only does not wish to live with him, but also had entangled him and his family in several criminal cases. The approach of the court should always be to first attempt reconciliation leading

23(b) *Id*. at 224.

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to restoration of marital life and in the event of its failure an amicable separation leaving the parties free to try a second innings in family life. They should refrain from keeping them in state of perpetual misery or life would become a living hell for both of them for this one folly.

Divorce by mutual consent and a charge of collusion

Divorce, unthinkable in the past and condemned and grudgingly permitted through statute in 1955, saw considerable liberalisation in 1976, with introduction of divorce by mutual consent. This widening of essentially matrimonial fault/ misconduct/disability based approach recognised mutually incompatible parties as otherwise mature individuals capable of drifting apart with minimum public bitterness bypassing the avoidable ugly showdown in contentious litigation. A practical reality though shows that strained matrimonial relations often give rise to a clash of egos and absence of communication in this exclusive intimate relationship, where no third party should usually intervene, but for a possible course of future action, prominence is gained by these third parties, (relations and friends) and voices and concerns of parties themselves are drowned completely in the diverse opinions bombarded on them from all sides. This furthers drift between the spouses killing any future communication possibilities. Thus, representation replaces direct interaction and in majority of cases where contentious litigation is presented before the courts praying for a decree of divorce, the spouses meeting is sprayed with hostility and absence of any communication amidst futile judicial conciliation attempts. Legal requirements, however, speak of mutual consent of parties and on paper; this prayer has to be signed by both spouses. Though rarely but possibility of the parties actually sitting together and planning their future course of action or amicable separation cannot be ruled out. However, whether it is through friends or relations or independent of them, legal requirements do bring them together and enjoin upon them to take a consensual and not a collusive step. Section 23 makes it clear that the courts are empowered to deny the remedy of divorce to a couple who collude with each other in order to get such a remedy. Collusion hints lack of existence of grounds enumerated in the statute, and perceived by the legislature as grave or serious enough to call for dissolution of matrimonial bond. It also indicates that merely on the desire of the parties or to suit their convenience, marriage should not be broken. It reaffirms and reinforces the importance and sanctity of the institution of marriage in the Indian society. Therefore, where the situation appears that rather than existence of irreconcilable differences or matrimonial misconduct commission, the parties have deliberately decided in absence of any justifiable ground to further their nefarious designs, that would normally be unsustainable in law, the court would stop them and would deny them any relief. This year the court had to adjudicate on the difference between collusion and consensual action. The former is serious enough to warrant a rejection, while the later is advocated as the best form of effecting an amicable separation even by the judiciary. It is noteworthy, that divorce by mutual consent was introduced in 1976, while section 23 that discourages collusion, was put in the statute books right from the inception. It shows that with the passage of time, and altered perception of divorce, the separation is not as strictly frowned upon presently as in the past. This is precisely the reason why insistence on

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mandatory adjustment has been replaced by conciliation and upon its failure, a judicially approved dissolution. Here,[24] post marriage, the spouses lived together for only some time and then together filed a petition for divorce by mutual consent stating the required statutory requirements. They filed affidavits in support of the averments that the relations between them have soured to such an extent that they cannot live together. Strangely enough the trial court dismissed the petition stating that the parties are in collusion and as per section 23 of the HMA not entitled to a relief. The matter was then taken in appeal to the Uttarakhand High Court, where the primary issue was whether a conflict exists between sections 23 (1) (c) and 13 B. Section 23 (1) (c) cautions the court to dismiss petition on ground of collusion other than in suits under section 11 (void marriages); section 13 B on the other hand enables parties to file a petition for divorce by mutual consent. This provision was inserted in the Act with effect from 18.05.1976. If petition under section 13 B is dismissed on grounds of collusion, the object of inserting the provision would be defeated as in every case the parties are required to file a joint petition with mutual consent.[25] The court allowed the prayer for divorce and said that both sections 11 and 13 B are expressly exempted from the clutches of section 23 (1) (c) and held that the trial court had erred in law by holding that mutual consent amounts to collusion.

Waiver of one year mandatory time period

A one year mandatory separation is the primary requisite for presenting a prayer for mutual consent based divorce, but this is often viewed as unnecessary/ lengthy by parties desirous of an instant dissolution. Result usually is an application for condoning /waiver of this waiting period despite the fact of its impermissibility owing to statutory provisions. Stray instances of judicial condonation in past though in exceptional cases raise the hopes of impatient spouses wanting immediate freedom from this unwanted marriage. Even after the first rejection at the family court level they don't hesitate in appealing to the higher courts, without realising that the duration for the verdict for condonation would invariably outrun the statutory separation time period. This year again the court reiterated the mandatory requirement of section 13 B and held that one year minimum separation is mandatory and not directory and admits of no exception. The parties here[26] married in April 2010. The husband was working in a renowned food chain in Delhi and the wife was a flight attendant with Qatar Airways in Doha. Their stand was that right from the beginning of the marriage they realised that they were not suited to each other; stayed together for a very short time and without waiting for one year to expire, they presented a joint petition praying for a decree of divorce by mutual consent, that was dismissed by the family court in November 2010. The matter was then taken in appeal to the high court which also dismissed the waiver application holding that the waiting period of one year is not merely directory but is mandatory. The parties primarily relied on two earlier pronouncements namely, *Pooja Gupta* v. *Nil*[27] and *Tarun Kumar*

24 *Parma Jeet Kaur* v. *State of Uttarakhand*, AIR (2011) 9 Utr 5.
25 *Id*. at 6, para 5.
26 In the matter of *Mohin Saili*, AIR 2011 Delhi 65.
27 118 (2005) DLT 492.

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Vaish v. *Meenakshi Vaish*[28] and the exception permitted under section 14 of the Act. Section 14 provides:[28(a)]

> (1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of presentation of the petition one year has elapsed since the date of the marriage.
> Provided that the court may upon application made to it in accordance with such rules as may be made by the high court in that behalf allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

In *Pooja Gupta,*[29] the judiciary had opined that the legislative intent behind the amendment to section 14 proviso was expeditious disposal of divorce cases by way of mutual consent and had observed[30] that as long as the court was satisfied that an essential reason for exemption for filing a divorce by mutual consent prior to expiry of one year after the marriage is that, the prayer for dissolution is not under coercion/ intimidation or undue influence and there are no chances of reconciliation; the parties have fully understood the impact and effect of divorce by mutual consent and the continuance of such a marriage is bound to cause undue hardship to the spouses, they can dispense away with the one year requirement. The other relevant considerations which may be considered for granting the exemption from the passage of one year before filing a petition for divorce by mutual consent are, the maturity and the comprehension of the spouses, absence of coercion /intimidation /undue influence; the duration of marriage sought to be dissolved, absence of any possibility of reconciliation, lack of frivolity, lack of misrepresentation or concealment, and the age of the spouses and the deleterious effect of the continuance of a sterile marriage on the prospects of remarriage of the parties.

The present court differed from both the abovementioned cases and explaining the distinction between section 14 and section 13B observed that section 14 is applicable to those cases where the petition commences under section 13 of the Hindu Marriage Act, 1955, but section 13B stands on a totally different platform. The former provides for the time frame for the presentation of the petition and does

28 (2005) (2) Cur CC 353 (unreported).
28(a) See. s.14 Hindu Marriage Act, 1955.
29 *Supra* note 27.
30 *Id*. para 8.

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not lay down an ingredient for granting of divorce. The bar under it was initially for a period of 3 years till 1976 but was then reduced to one year. Section 13B was introduced in 1976, and provided for one year separation before the petition could be presented in the court. The nutshell effect of the cumulative provision is that while under section 14 the legislature in itself makes room for its dilution by providing the leniency in exceptional circumstances, there is no parallel provision under section 13B. It requires mandatory separation of one year before the petition can be presented. The waiting period of 6-18 months interregnum is intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. Thus the period of one year as living separately in section 13B (1) is a part of substantive law for seeking divorce by mutual consent and not a procedural formality that can be done away with. Therefore, the condition of living separately for one year is not directory but mandatory and the plain meaning and requirement of law stated under these provision should be satisfied before the court gives any relief. Hence it cannot be permissible to mould the requirement of a provision and that too only on the ground of the convenience of the parties. The proviso to section 14 that provides for the presentation of petition even before the lapse of one year cannot be read into the provision of section 13 B and both are independent of each other. Hence the legislative mandate of one year separation under section 13 B cannot be waived off as it is a prerequisite and cannot be given any different interpretation to the contrary that would defeat the very intent of the legislation.

Section 13 B has been consistently before the judicial scrutiny to adjudicate on prayers for waiver of each of its essential requirements. Ironically what was perceived as a clear cut provision with no scope of admittance of any exception and giving the parties a fair and honourable way of separation, has seen several attempts to dilute each of its limb in the past. In numerous cases, wavier of the first part, i.e., mandatory one year separation is requested; once that is over, the rethinking period, i.e., six to eighteen months period is requested to be diluted, and finally the requirement of the joint or mutual consent at the time of the second motion is requested to be dispensed away with. It shows a typical Indian mindset that rules are meant to be broken for individual convenience as there is no reason why a simple, logical and reasonable rule that allows parties to go their separate ways with minimum bitterness and maximum fairness should be twisted. Inconvenience of each is projected as the epitome of abject suffering and even a slight scope of leniency/ bad precedents or deserving cases in the past are seen as a firm rule susceptible of further deviation that must be applied in each and every case. The present pronouncement, therefore, is not only healthy but a very balanced one as it reinforces the apt application of a clear rule with no distortion of its essential pre-requisites.

Waiver of six months period as between the two motions/petitions

According to the provisions of section 13 B of the Hindu Marriage Act, for a petition praying for a decree of divorce by mutual consent after the first joint petition the parties have to wait for a period of six months but not later than 18 months before they file a second motion reaffirming their desire to obtain divorce. On the issue of waiver of the six months intervening petition the court relaxed and waived

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it off in a case from *Uttrakhand*. Here,[31] the parties married in 2009, lived together for a period of fifteen days without consummating the marriage and filed a petition praying for a decree of divorce after demonstrating a separation of one year. After this petition, both of them filed an application for waiver of the six months waiting period before they could file the second motion. The trial court rejected their prayer as not maintainable in law but the high court held that the waiting period can be waived, primarily influenced by the fact that the negotiations of the second marriage of the wife were being held up on account of the delay in obtaining the decree of divorce. The wife had already accepted rupees 4.5 lakhs as alimony or settlement from the husband. The court explored decisions of several high courts[32] in the past and held that section 13B (2) is merely directory in nature and the decree of divorce can be passed even before expiry of waiting period of six months by waiving the period if the circumstances so require. The matter was remanded back to the family court to proceed without any further delay. The Uttarakhand High Court here deviated from the clear provisions of section 13 B twisting its requirements completely. Legal provisions should not be bent to suit the convenience of the parties to hop out of the marriage so as to hop in into another alliance quickly. 15 days cohabitation, one year separation; then demonstration of impatience and demanding for judicial waiver of a statutory provision under which they wanted dissolution and the court amazingly acceding to such request etc. appear as perplexing as the audacious demand in itself. Six months is not an awfully long time and its wait was in conformity with the statute. There is no hint anywhere in the Hindu Marriage Act, 1955, to show any kind of relaxation in the procedure to be followed under section 13B. Judiciary should implement the clear legislative provision and desist from creating uncertainties on flimsy grounds. It is undeniable that it is desirable to adopt a humane rather than a technical approach in sensitive matters that concern people intimately, but the law enabling parties to culminate their marriage should be adhered to seriously. Bending rules shows a casual approach unsuited to the Indian judiciary and sends a wrong signal. It must be avoided lest deviation becomes norms with scope for further openings as appears from the verdict of the Uttrakhand High Court.

Consent of the parties at the second motion

The third requirement of section 13B is presenting a joint petition at the second motion after a wait of six months. Thus a petition for divorce by mutual consent requires involvement of the parties at two important stages, first at the time of moving the joint petition itself and then after a mandatory wait of six months. In majority of cases, it is a practical reality that the parties after filing of the first joint petition would enter into agreement with respect to settlement of the property which may be acted upon as between them, but till the second motion actually culminates into pronouncement of a divorce decree, the subsistence of the marriage cannot be

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31 *Samardeep Singh* v. *Randeep Kaur*, AIR 2011 Utr 22, as per Prafulla Pant J.

32 *Abhay Chowhan* v. *Rachna Singh*, AIR 2006 Del 18; *Roopa Reddy* v. *Prabhakar Reddy*, AIR 1994 Karn 12; *K Omprakash* v. *K Nalini*, AIR 1986 AP 167; *Dhirran Harilal Garasia* v. *N Mansu*, AIR 1988 Guj 159 and *Dhanjit Vadra* v. *Beena Vadra*, AIR 1990 Del 146.

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disputed. It is not the agreement and acting upon it that may have any bearing on the subsistence of or culmination of marital relations, as a marriage would come to an end only by a decree of the court and nothing short of it. Failure to bring in the second motion would result in continuation of the status of the husband and wife despite the fact of their separate habitation and acting upon the settlement of property /money in contemplation of divorce. Where the first joint petition has been filed, settlement entered and acted upon, six months have passed and the parties had every intention to present the second motion reaffirming their desire to obtain a judicial finality of the dissolution of their marriage, but before they could do so, one of the parties dies, then the first joint petition would become infructous. The fact that during the period of six to eighteen months neither party has withdrawn or resiled from it is immaterial. A settlement that might have been arrived at amongst parties during their lifetime in separate proceedings cannot have bearing for an order being brought into existence.[33]

In *Hitesh Bhatnagar* v. *Deepa Bhatnagar*,[34] the issue was whether the consent given at the time of the first motion continues *ipso facto* to the second motion as well or has to be expressly given post six months, a second time? Here the parties married in 1994, were blessed with a daughter in 1995 and separated from each other in 2000 due to temperamental differences and in 2001, filed a petition praying for a decree of divorce by mutual consent. Before the grant of divorce at the time of the second motion, the wife withdrew her consent. The District Judge, Gurgaon, dismissed the petition though the husband insisted on divorce. The high court dismissed it in 2006 and the husband came in appeal before the Supreme Court. The main issue before the court was, whether the consent once given can be withdrawn and secondly, can the court grant divorce even if one party withdraws the consent?

The wife maintained that at the time of filing of the initial petition she gave her consent under duress and mental stress. She never wanted divorce and was even at this stage ready to live with him as his wife. The husband claimed that as between the two motions there was a settlement that he would pay to her a sum of rupees three and a half lakhs of which one and a half lakhs have already been paid and he was ready to pay the rest as well. He was also ready to take care of the child and ensure her future. He further contended that since they are living separately for the last eleven years, the marriage should be taken to have been broken down irretrievably and hence should be dissolved. The court held that the most important consideration is that the consent of both the parties should be free and voluntarily given and unless the court is completely satisfied it would not pronounce divorce. The court distinguished the present case from *Anil Jain* v. *Maya Jain*,[35] and held that there the wife had taken the money but was firmly against living with him, but in the present case she wanted to live with him and protect her marriage for the sake of the child. It further said that it would be travesty of justice to dissolve the marriage as having broken down as one of the parties was keen to continue it. Though there

33 *Chikkamuniyappa* v. *Ramanarasamma*, AIR 2011 (NOC) 42 (Karn).

34 AIR 2011 SC 1637.

35 AIR 2010 SC 222.

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was bitterness amongst the parties and they were not able to resolve their differences; had not lived together for the past about eleven years, the court hoped that they would give this union another chance if not for themselves but for the future of their daughter. The court concluded by quoting the great poet George Eliot:[35(a)]

> What greater thing is there for two human souls than to feel that they are joined for life –to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in silent, unspeakable memories at the moment of the last parting.

The facts here were in fact similar to the case that the court distinguished it from. As per the settlement terms the wife had already accepted part of the money and was living separately from him for the past eleven years. In *Anil Jain's* case the wife openly demonstrated her determination not to live with the husband but here it could be correctly inferred from the length of the separation, despite the fact that she outwardly maintained her willingness to protect the marriage. That there was a mismatch between her statement and her conduct can well be gauged by the fact that if the parties genuinely desire a reunion they can do it themselves and the possibility or permissibility of it is not dependent upon the judiciary giving a direction only to the erring party. If she wanted to protect her marriage for the sake of her child but without living with him there was no use in protecting this empty shell. The child would not be in a position to secure the love and affection of the father where the parents are physically separate. If it is apparent that the separation time period is lengthy with no hope of its end, it should be a natural and logical conclusion leading to the death of the marriage. Though the court's hesitation in relaxing the requirements of section 13B can be well understood and appreciated past deviation set an unhealthy trend and perceived situational similarities further encourage parties into expecting a zone of belief and judicial relief.

Conversion of contentious litigation into a mutual consent petition

Matrimonial problems need a solution that is provided by the legislature in form of either conciliation or a formal separation. In majority of cases post matrimonial turbulence, the scope for sitting together and finding a mature solution is inconceivable due to hurt egos, and mutual mistrust also laden with a desire to get on to each other. Thus a contentious litigation is presented where not only the consent of the other is not required to be taken but the desire to drag the other party to the court also appears dominant. Accosted with the harsh reality of actual involvement with the adversarial litigative system in India is enough to bring the egoistic parties to their senses, and thus during the trial it is not uncommon for them to bury their differences and take a realistic and practical look to their present and a possible future course of action. The courts as courts of equity, justice and good conscience and with a practical approach to this human behaviour often come to their succour. In a case from Gujarat,[36] the husband after the strained matrimonial relations, went to the court with a prayer of divorce by the wife on the ground of non-discharging of the matrimonial duties. The wife did appear through her counsel

35(a) *Supra* note 34 at 1644.

36 *Uday Narendrabhai Bhatt* v. *Shivangi Narendrabhai Shastri*, AIR 2011 Guj 156.

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but later both decided to file the application for putting an end to their marriage with mutual consent without making any allegation against each other. They thus presented an application before the court for conversion of their contentious divorce petition into that of mutual consent under section 13B, but the same was refused by the family court on the ground that the court lacks competency to do so. The parties presented an appeal with the same request to the high court. Their original petition was presented to the court in 2009 and it was almost two years that the matter had already reached the court. The wife categorically stated that she did not want to live with the husband and that there was no life left in this marriage. She contended that the court is always empowered to convert a contentious litigation into that of mutual consent based petition if the remedy asked for is the same and both the parties agree to it. The court noted that the parties were living separately from each other since 2008, all efforts for reconciliation had failed and both of them had agreed to put an end to their marriage with mutual consent. It also observed that ordinarily such petitions are not filed in the high court but the proper forum for this would be the lower courts and if the matter has reached the high court with such a prayer, it usually would refer the matter back to the lower court with appropriate directions but in exceptional cases the court may itself order for dissolution of marriage by a decree of divorce by mutual consent on a joint application filed by the parties. The parties specifically pleaded that the matter should not be sent back to the lower court as if after relegation to the lower court, they have to file the mutual consent petition afresh, it would mean additional litigation expenses; secondly, the court would not dispense away with the waiting period of six months and thirdly, that it was only a difference in the form while the substantive content or the prayer is for an identical relief. The complete file of the parties was before the high court and, therefore, it was only a matter of hyper technicality to refer the matter back to the trial court. In the present case the court said that judicial approach should be to avoid putting the parties to unnecessary inconvenience or subjecting them to heavy expenses of litigation. Where the file was before the court and when the provisions of the section 13B (2) are not imperative, the court said it failed to see,[37] what useful purpose would be served in sending the parties to the trial court for getting the marriage dissolved by a decree of divorce by mutual consent. This approach, the court felt can be adopted in cases where an abrupt/hasty decision is taken by the parties to put an end to their marriage but not where there is no scope of any rethinking of the course of action. In the present case the court said, there was no chance of a reunion, the husband had come with the draft of permanent alimony along with the terms of settlement, that was also accepted by the wife. The parties were living apart from each other for a period of more than two years, and a relegation to the lower court for getting their marriage dissolved by mutual consent would consume further time. Thus taking into account the totality of the facts, divorce was pronounced without referring the matter to the lower court.

In another case from Bombay,[38] the parties married in 1993, had two children from this marriage and then separated in 2006. The wife presented a prayer for

37 *Id*. at 158.

38 *Parkash Alumal Kalandri* v. *Jahnavi Parkash Kalandri*, AIR 2011 Bom 119.

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divorce on the ground of husband's cruelty, but pursuant to counselling, during the pendency of the petition they decided to go for divorce by mutual consent. Accordingly, the consent terms were executed and signed by both the parties and then they jointly filed an application for conversion of this petition into a joint petition for divorce by mutual consent. As per the consent terms, the husband agreed that the custody of both the children would be with the wife and she on the other hand agreed to give access of both the children to him during weekends and vacations including temporary custody. Husband also agreed to pay Rs. 5000/- as maintenance to children but the wife waived her maintenance rights, alimony and *stridhan* and withdrew all civil and criminal proceedings that she had filed against him. After filing and agreeing to these conditions in the consent terms, the husband withdrew his consent on the ground that the wife had failed to provide him access to the children. He contended that as consent of both the parties at both the motions is relevant so divorce cannot be granted if he withdraws his consent. The family court held that in this unique scenario, the husband cannot be allowed to withdraw his consent, rather divorce by mutual consent is inevitable on the basis of consent terms. The matter then went to the high court which held thus:[39]

> If the petition is filed simpliciter under section 13B of the Act for divorce by mutual consent, the court must satisfy itself that the consent given by the parties continues till the date of granting a decree for divorce. Even if one of the parties unilaterally withdraws his/her consent, the court does not get jurisdiction to grant a decree of divorce by mutual consent in view of section 13B. However, the situation would be different if the parties in the first instance resort to petition for relief under section 9/13 of the Act and during the pendency of such petition they decide to invite decree for divorce by mutual consent.

On the basis of an agreed arrangement if the parties were to execute "consent terms" and then file a formal application to convert the pending contentious petition to be treated as having been filed under section 13B of the Act for grant of decree of divorce by mutual consent, then in latter proceedings before the decree is passed, one party cannot be allowed to unilaterally withdraw the consent if the other party has already acted upon the consent terms either wholly or in part to his/her detriment i.e., the court will have to be satisfied that there is sufficient good and just cause for allowing the party to withdraw the consent lest, it results in permitting the party to approbate or reprobate; and that the other party would not suffer prejudice which is irreversible due to withdrawal of the consent. If these twin requirements are not satisfied, the court should be loath to entertain the prayer to allow the party to unilaterally withdraw his/her consent.

The petition under section 13B, therefore, stands on a completely different pedestal as the procedure is well defined and is in the nature of a self contained code whereas if the petition is under section 13 the rules of section 23 would apply. The impact of the pronouncement is that where the petition is filed under section 13B, all the requirements specified therein would have to be adhered to strictly, but

39 *Id*. para 16.

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if the petition is initiated under section 13 as a contentious litigation and then converted into one by mutual consent with the permission of the court, upon execution of consent terms and acting upon it, divorce is inevitable. It is a sound approach as efforts of the courts must always be directed towards amicable separation if reunion becomes impossible.

In another case from Bombay,[40] the parties married in 2005 and started living apart from each other a year later. The husband filed a suit under section 13 praying for divorce on the ground of his wife's cruelty a year later. The reconciliation attempts were undertaken and the parties settled their disputes and withdrew allegation against each other and filed consent terms with respect to grant of divorce; for withdrawal of the allegations and grant of lump sum alimony to the wife. Thereafter, they made a joint application for waiver of the six months period for acting upon the consent terms and obtaining divorce by mutual consent. Their application was rejected on the ground that the period cannot be waived of and the petition has to be adjourned for six months. The parties filed a writ in the high court and the court while allowing it held that section 13 B was enacted to allow the parties to file petitions for divorce by mutual consent upon the grounds stated therein. The waiting period enables them to reconsider their decision to dissolve their marriage. If a petition under section 13 has remained on the file of the court for as long as three years as in this case, the parties require no respite period to reconsider their decision to dissolve a broken marriage in which various allegations based upon the grounds under section 13 have been made and later withdrawn upon seeing reason.[41] In addition, the court pointed out that the family court is enjoined,[42] to consider the alternative mode of reconciliation between the parties which if successful would enable a reunion and if a failure, would pave way for an amicable settlement. If that is followed the parties would settle their disputes and withdraw the allegations and if in the meanwhile a period of six months has transpired, the statutory period of respite is availed of by the parties. Consequently, the literal interpretation of section 13B (2) would not be required in such cases. Any other interpretation, the court said would mean punishing the parties who attempt a settlement of their disputes. As they had gone through the process of divorce in the court for more than six months, during the pendency of the petition and only modified their views upon settlement of the disputes, hence such a petition though for divorce by mutual consent would be allowed. The writ petition was allowed and the case was remanded back to the family court for necessary action under section 13B.

IV MAINTENANCE

Application of the Hindu Adoptions and Maintenance Act, 1956 to members of scheduled tribes

The Hindu Adoptions and Maintenance Act, 1956, applies to Hindus but a specific provision excludes members of scheduled tribes from its application. If

40 *Rakesh Harsukhbai Parekh* v. *State of Maharashtra*, AIR 2011 Bom 34.

41 *Id*. para 7.

42 As per s. 9 of the Family Court Act, 1984; s. 89 of the CPC that applies to family court further enjoins the court to follow the resolution of the dispute by an alternate mode, including the mode of mediation.

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they marry in accordance with Hindu rites and traditions, would this fact be sufficient to bring them within the application of the Act? If two members of scheduled tribes, who are not obliged to marry or follow the provisions of the Hindu law, do so, would they be governed by the provisions of Hindu law even though an express provision takes them out of its application? Here,[43] the parties belonged to the *Santhal* tribe, which is a scheduled tribe within the meaning of section 2(2) of the HAMA. Both of them were Hindus, and were following the Hindu traditions and customs. They married in accordance with the rites and traditions of Hindu law, but subsequently the wife along with the minor daughter was thrown out of the house by the husband. She claimed maintenance from him under the HAMA. He disputed the marriage and contended that being a member of the scheduled tribe he is not subject to its application. The court held firstly, that strict proof of marriage was not necessary to sustain the claim of maintenance by the wife and secondly, since the parties married in accordance with the provisions of Hindu law, the wife can claim maintenance under HAMA. They directed the husband to deposit the maintenance amount by a fixed date failing which, execution proceedings would be initiated against him.

The pronouncement here is socially powerful but incorrect academically or literally. Moved by the benevolent object of prevention of destitution and vagrancy of legally wedded wives, the judicial outreach becomes evident in granting of statutory benefits even where there is a clear and specific exemption. HAMA like its other three sister enactments on Hindu law,[44] in clear language exempts members of scheduled tribes from its application even when they marry under Hindu law. Legislature does take into cognizance the fact that the parties are Hindus yet because of the constitutional protection of their culture and identity, they are granted the exemption from the application of the mainstream legislations. If they profess Hindu religion, it is but natural that their marriage performed in accordance with their customary rites and ceremonies would be called a Hindu marriage or the one that is performed under Hindu law, but Hindu law here is not exactly the Hindu Marriage Act, 1955 as the Act in itself does not lay down a standard form of marriage. Thus merely because the parties marry in accordance with their customary rites and ceremonies and profess Hindu religion, they would be subject to the provisions of statutory law even in light of a statutory exemption contained in that very enactment appears farfetched. For example, even if a tribal man marries according to Hindu rites and ceremonies a second time during the subsistence of the first marriage, he cannot be held guilty of committing bigamy under section 494 of the IPC, as the provisions mandating compulsory monogamy under Hindu Marriage Act, 1955, cannot be applied to him. Similarly, the HAMA cannot have any application over Hindus who are members of the scheduled tribe as they enjoy constitutional protection of their culture and identity. Judicial concern over economic rights of a legally wedded wife and according her an appropriate relief is laudable, but could have been achieved even within the legally permissible framework without taking

43 *Lakhan Murmu* v. *Gurubhai Murmu*, AIR 2011 Ori 13.

44 The Hindu Marriage Act, 1955, the Hindu Minority and Guardianship Act, 1956 and the Hindu Succession Act, 1956.

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recourse to legislative impermissible provisions. The entire legislative scheme ensuring availability of maintenance to legally wedded wives under several provisions both under religious based family laws and also secular laws makes evasion of these economic responsibilities by the husband virtually impossible. Section 125 of the Cr PC, as also the Domestic Violence Act, 2006 makes it incumbent upon the husband to provide maintenance to his economically dependant wife irrespective of his religion, tribal status or domicile. The only requirement under former statute is that of a legally recognised marriage and under the later, even a relationship in the nature of marriage. If the claim is presented under an enactment where it is not permissible for the simple reason of existence of an exemption clause, it does not mean that the wife would be left without any claim, but the proper forum would be to advice her to proceed under the appropriate legislations and a judicial outreach of looking for awarding remedies under a statute not available to her would be highly inappropriate.

Claim presented by the partner of a live in relationship

Economic responsibilities can be imposed on a person only through the instrumentalities of law and relationships of people's own making short of legal recognition would give rise to no mutual rights and obligation that are legally enforceable. Intimate physical relationships may stem from love and affection and a mutual desire to cohabit, but unless and until they are preceded by legally recognised rituals and ceremonies of marriage, this affectionate tie has no statutory force. Despite promises of faithfulness, love and caring for each other's physical or economic requirements, a breach of the same would result in affixing of no responsibilities. Economically insecure women, therefore, entering into such a relationships do it at their own peril as in cases of desertion by their partners; law does not guarantee them any sustainable financial rights as against the male partner/ friend. In a case from *Jharkhand*,[45] the application was filed by a woman claiming maintenance from the man on the ground that she was his wedded wife, a claim that she could not substantiate. The man, on the other hand, was able to convince the court that he never married her and at the most, the relationship can be equated with the live in relationship. The claimant, a married woman with four children after the death of her husband had started living with this man. J D K Sinha of the Jharkhand High Court reemphasised the importance of marriage before a claim of maintenance can be entertained from a woman, and equated it with live in relationship. He said that a legal and valid marriage was not proved as between the parties and the concept of live in relationship in the background of Indian culture and societal sanction is yet to be interpreted by the larger bench of the apex court. The court refused to widen the language of section 125 of Cr PC to include a partner within the meaning of the term "wife" and dismissed her petition claiming maintenance.

Maintenance claim by an able-bodied husband

Law in theory treats both the spouses with equality in matters of claim of maintenance. However, the provision cannot be disassociated with the social reality

45 *Vineeta Devi* v. *Bablu Thakur*, 2011 MLR 805 (Jhar).

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and accepted familial behaviour in a patriarchal society. In case the prayer for claiming maintenance emanates from a woman as against her husband and she claims to be either a home maker or even gainfully employed but with meagre income, her able bodiness or capability to secure a gainful employment fetching her a good income is not a matter of serious concern for the judiciary as her economic dependence on the husband still remains predominantly the rule. A man's status as that of a provider makes it mandatory, on the other hand, for him to earn a livelihood and an able-bodied man sitting at home or without making a living is perceived as displaying a sign of an abnormal behaviour bordering to delinquency. Such a person would be looked down upon and advices from all walks of life would pour in enjoining upon him to mend his ways. Though advocacy of self sufficiency are desirable for every person yet the force or rigidity of its application is glaringly apparent in case of a man than that of a woman. A consistent judicial stand further corroborates it. In a case under the survey,[46] the husband filed a petition praying for a decree of divorce and then made an application under section 24 of the HMA, claiming interim maintenance and litigation expenses from his earning wife. He pleaded that he had no source of income. The wife was able to prove that he was well qualified, but had deliberately left his job. His father had retired as a school teacher and his mother was working in a government school. The trial court on the application of the husband had granted maintenance to him to the tune of rupees 500 per month and an additional rupees 2000 as the litigation expenses. On appeal, the high court reversed the judgment of the trial court and held that a person who is able-bodied, capable to earn but incapacitates himself deliberately is not allowed to claim maintenance from the spouse.

Maintenance obligations: daughter-in-law *vis-à-vis* the father-in-law

The rights of maintenance of the wife by the husband are universally recognised. While husband's obligation towards the wife is well entrenched in Hindu law, statute gives some relief to genuinely financially distressed husbands from their economically secure wives as well, but beyond the spousal relations and responsibilities, the extended /joint family system saddles other relations with the financial/maintenance liabilities as well. A widowed daughter-in-law in this connection assumes an important place. Being a member of the family, can the father-in-law be brought under a legal obligation to maintain her and if the answer to this question is in the affirmative, can in appropriate situations a daughter-in-law be directed to maintain the parents in law? In our son centred economy, heavily reflected in the patriarchal society if the son dies and the compensation package including a job on compassionate grounds goes to the spouse it may leave the parents of the deceased son totally helpless. In *Bharati Mahanta* v. *Narahari Mahanta*[47] a couple's only married son died. He was working as a peon in a school, which after his death, provided his widow with employment as a peon under the rehabilitation scheme in his place. The entire pension and other related benefits upon the death were availed of by the widow. The parents in law claimed maintenance

46 *Monika Rana* v. *Yogeshwar Singh Sapehia*, AIR (2011) 7 HP 54.
47 2011 MLR 509 (Ori).

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from her, but she denied any obligation on her part to maintain them. Her main contentions were: firstly, that parents in law had sufficient income to maintain themselves and thus their basic eligibility to claim maintenance from anybody else does not arise; secondly, the language of section 125 of the CrPC is very clear and binds only children with maintenance obligations and a daughter-in-law cannot be called a child. Section 125 obliges a person to maintain his wife, son, daughter or parents who are incapable to maintain themselves and the statute does not use the term daughter-in-law or parent-in-law. Thirdly, it cannot be said that she has stepped into the shoes of the husband as she did not inherit any of his property nor enjoyed any share in the ancestral property belonging to him or belonging to the family in which he had a share. She cannot be equated and placed on the same footing as a son. The court dismissed all of her contentions held her responsible for maintaining the parents of the deceased husband and said that section 125 not only conceives of an order of maintenance but is essentially a measure of social justice with a view to protect persons who do not have sufficient means for survival. Social justice is not a mere constitutional claptrap but fighting faith which enlivens legislative texts with militant meaning and illustrates its functional relevance as an aid to statutory interpretation. Keeping this in mind, if any person having sufficient means neglects or refuses to maintain his father or mother who is unable to maintain him or herself an application under section 125 is maintainable. Thus section 125, that entitles a neglected wife, child and parent should be widely interpreted to include other members of a family. Since the term "family" includes a group of people related to each other by blood or marriage, even a married daughter is liable to maintain parents if they do not have any sufficient means to maintain themselves and there is no justifiable reason whatsoever for a daughter-in-law not to be saddled with similar responsibility in the event of the death of the son, especially when she obtains all the death-cum-pension benefits including employment under the rehabilitation scheme. It is interesting to note that all the three courts, i.e., the trial court; the lower appellate court and the high court, here adopted a consistent line of reason and awarded maintenance to the parents in law as against the daughter-in-law.

In another case[48] having a reversal of the facts, the parties married and the husband died in a motor accident. Next day, the wife left the matrimonial home. The parents in law went to her natal home; brought her back but she returned after two/three days back to her parents. She received around one lakh as the insurance claim; applied for her husband's share in the property in the court of *tehsildar*, got a favourable order; got the share, and she sowed paddy in it. Thereupon, she claimed maintenance from her father-in-law. The family court rejected her claim firstly, because she was voluntarily residing at her parents' house without any sufficient reasons and secondly, under section 19 of the HAMA, the obligation of the father-in-law to maintain the daughter-in-law is not personal but is depended upon the coparcenary property in his hands. Even in cases where the father-in-law has coparcenary property in his hands, his obligation to maintain the daughter-in-law is subject to the condition that:[48(a)]

48 *Dayali Sukhlal Sahu* v. *Anjubai Santosh Sahu*, AIR 2010 Chh 80.
48(a) *Id*. at 81.

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i) the daughter-in-law is unable to maintain herself out of her own earnings or other property of her own;
ii) she is unable to obtain maintenance from her son or daughter or his /her estate,
iii) that father-in-law has coparcenary property in his hands/possession out of which she has not obtained any share,
iv) that coparcenary property has sufficient income, and
v) that the daughter-in-law has not remarried.

The high court noted that in the present case, as she had already taken her share, she was not entitled to claim maintenance from her father-in-law.

V HINDU MINORITY AND GUARDIANSHIP ACT, 1956

Battle for custody of child

In a strange twist of family relations, a woman neglected her child; entrusted it to her mother but the mother refused to hand over the child to her later. The facts showed[49] that after a matrimonial discord between a woman and her spouse, she left her husband to come and stay with her mother along with her infant son. She was gainfully employed and had odd duty hours. She then remarried and started living with her second husband. The father of the child was not at all interested in gaining any access to the child or seeking his custody. The child since he was 25 days old was being looked after by his maternal grandmother and at the time of the court's hearing, was around 16 years old. The trial court gave the custody of the child to the maternal grandmother with visitation rights to his mother, but the child was unwilling to meet or visit his mother and was very comfortable with his maternal grandmother. Till the claim of custody reached the court corridors, the child had already been in constant care and protection of the grandmother for 14 years. The court re-iterated the most important consideration in custody cases as the welfare of the child, that includes stability, security, living environment, understanding, care and guidance, noted that the child was very good in studies; had performed very well; and was about to appear for his intermediate examinations and that it would not be advisable to disturb him from the familiar environment. Moreover, he was also at an age where he could express his intelligent opinion that he had done very effectively at the trial court level, which after interacting with him had recorded the findings of his unwillingness to either go with or even meet his mother. In his cross examination the child had stated that:

> While my grandmother will look after and take care of my interest even though she is old, after I grow I will take care of myself and my grandmother.

He was very emphatic and said that there was no pressure exercised on him by his grandmother or anyone else not to join the mother and that it was purely his volition. The present court quoted its earlier ruling[50] where the maternal uncle

49 *G Vishnudevendramma* v. *G Padmaja*, AIR (2011) 5 AP 70.
50 *Kirtikumar Maheshanker Joshi* v. *Pradip Kumar Karunashanker Joshi*, 1992 (3) SCC 573: AIR 1992 SC 1447.

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retained the custody of two children aged 13 and 11 years after an interview with them showed their desire to be with him rather than the father and held here, that the trial court had not approached the issue from a proper perspective. The court further held that as the grandmother had never refrained the child from going to mother, non-compliance on part of the order of the court regarding interim custody cannot be said to be disobedience warranting issuance of contempt proceedings. Retention of custody in favour of maternal grandmother was upheld in another case where the other claimant was the father of the child. Here the child was in the lawful custody of the maternal grandmother since the death of his mother and was aged around 6 years at the time of trial.[51] The father of the child had remarried and was also facing charges for abetment of suicide of the wife /mother of the child under section 306/34 of IPC, who had died of burns under mysterious circumstances. The minor had not spent any time with his step mother till then. The court noted that the minor had remained with the maternal grandmother for a long time; was growing up well in an atmosphere which was conducive to its growth; she was taking care of his needs and was also imparting good education to him and there was no evidence that the welfare of the child was in peril and called for any interference. Therefore, the court saw no reason to disturb the custody of the child, but did grant visitation rights to the father who had claimed custody on grounds of him being the natural guardian; his sound financial situation and the inadequacy of the maternal grandmother to be the guardian.

In another custody battle,[52] with respect to a male child the parties entered into a compromise soon after their matrimonial problems became grave, as per which the wife was to have physical custody of the child and the father had the visitation rights. Post compromise the wife did not permit the father to meet the child and thoroughly tutored and poisoned the four year old against the father. The father filed contempt proceedings in the court against the mother. The court did note that she was totally at fault but did not order for her arrest. Rather they opined that the father was entitled to pursue the custody matter in a court unhindered by the compromise decree.

The judgment shows the utter futility of court orders when a parent having physical custody of the tender child violate them with impunity. Litigation is a time consuming process and the child under the umbrella of a single parent imbibes the inherent insecurities of that parent and its whole thinking process is coloured very effectively by the poisoning as against the other parent. When relations are bitter, denying access to the other parent is perhaps the worst form of revenge resorted to by the custodial parent without realising the physiological damage of its effect on the child. Ruthlessness combined with an extreme self centeredness/ selfishness of the delinquent parent has a negative impact on the child hampering his overall development. In such a scenario, the paranoid parent becoming extremely possessive treating the child as its exclusive property rather than a human being is not an uncommon sight. The trauma that the child undergoes through pushes him in a pitiable state rather than being the recipient of love and affection. Tender years and

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51 *Bholaram* v. *Parwati Sahu*, AIR 2011 CHH 38.

52 *Ashish Ranjan* v. *Anupama Tandon*, 2011 MLR 432 (SC).

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lives are wasted in this tug of war between the warring adults and very frequently, the child attains adolescent age or even majority while the parents are still fighting over its custody with one triumphantly retaining it while the other virtually being denied parenthood. Judicial helplessness is evident as despite parents flouting their directions, it is the courts which exercise restraint in ordering contempt proceedings against the defaulting parent for the sake of the child.

Conflict of laws and jurisdictional issues

The era of globalization and migration to foreign shores is increasingly becoming a common feature in India. Highly qualified, young professionals, with the dreams of a better tomorrow migrate to western countries and try to chalk out their course of lives. A start up is often followed by a resident permit and then sometimes a citizenship, but smooth sailing is often bitterly disrupted with matrimonial discord and one spouse fleeing to the country of origin with the baby in tow. The spouse who remains ashore takes resort to local courts, get favourable orders, but the attempts to execute them in the domestic front involves complicated issues of inter-country jurisdiction, and enforceability of foreign awards. In *Deepti Mandlaws* v. *State Government of NCT, Delhi*,[53] the couple married in 2000 in Delhi, thereupon the husband applied and was granted Canadian immigration under the skilled category professional workers. Meanwhile, a son was born to him and both the son and the wife on dependant VISA left for Toronto in 2009, where the wife also took a job. In 2010 they travelled to India with three tickets, bought "to and fro," but the husband decided to stay here; got the child admitted in a local school and cancelled the return tickets. He then applied for sole guardianship of the child. Meanwhile, the wife filed for a divorce in Canada, freezing of husband's assets, sole occupation of matrimonial home and the custody of the child, and got a favourable order with respect to all the prayers from a Toronto court. She then filed a suit in a Delhi court for issuance of a writ of *habeas corpus* directing the husband to produce the minor child before the court and handing over of its custody to her. Two issues required court's adjudication here: firstly, whether the Delhi court had jurisdiction to try the case, to which the court held in the affirmative as all three were Indian citizens, and the second, that whether the retention of the child's custody by the husband despite the Canadian court's order was unlawful, to which the court's reply was in the negative. It said that the parties were in Canada for a short time period but were Indian citizens by birth and the welfare of the child has to be decided on a regular basis. The wife had cited day-care and help in Toronto, but in India the set of grandparents and relatives of the father were aplenty.

In another similar case,[54] the spouses were born in India, migrated to US and the son was a US citizen by birth and was around 11 years at the time of litigation. All three came to India, and the wife along with the child decided to stay in India. The husband upon his return to US filed a petition praying for a decree of divorce and got his son's sole custody order from the court. Meanwhile, the wife admitted the child to DPS, international at Delhi, but the husband sent an email to the school

53 2011 MLR 667 (Del).

54 *Ruchi Majoo* v. *Sanjeev Majoo*, AIR 2011 SC 1952: (2011) 66 SCC 479: 2011 MLR 742 (SC).

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authorities accusing the mother of abducting the child and asking them to refuse admission to the child referring to the US court's sole custody order. He then sent through email as also through post, summons to the wife for appearing before the US court. The mother pleaded that the courts in US had no jurisdiction to try the case as the minor was in Delhi. The superior court at California county of Ventura, USA's verdict led to issuance of a red corner notice based on allegations of child abduction levelled against the mother by the father. The wife procured an interim custody order from the trial court at Delhi under the Guardians and Wards Act, 1890, but the husband proceeded under article 227 of the Constitution of India before the High Court of Delhi praying that all issues relating to custody of child ought to be agitated and decided by court in America and not in Delhi, not only because it had already passed an order to that effect in favour of the father but because all the parties were American citizens. The high court accepted the contention of the husband and dismissed the custody petition on the ground that the child, an American citizen was not an "ordinary resident" of Delhi. The matter was then taken to the apex court. The apex court was again confronted primarily with two issues: whether the high court was justified in dismissing the petition for custody on the ground that the child was not ordinarily residing in India; and whether the grant of custody by the trial court needed modification like grant of visitation rights to the father? The mother had invoked the jurisdiction of the Delhi court on the ground that on the day of seeking custody of the minor, the minor was residing in Delhi. Thereupon, she moved another application under section 12 of the Guardian and Wards Act, 1890, to restrain anyone from removing minor from her custody. She further convinced the court with the help of emails written by the husband that her visit and stay in India was with his consent as she wanted to explore career options here and it was their mutual decision to put the child in a US-Indo school at Delhi. The husband's allegations of procurement of his consent under a threat of lodging of proceedings under section 498A were not accepted by the court and they held that habitual residence is the main factor in jurisdictional matters and since the minor was at the time of invoking the jurisdiction of the courts in India was residing in Delhi, the courts at Delhi had the jurisdiction to try the case.

The decision appears slightly strange as all the three parties were American citizens, were habitually residing in the US, the courts in US had already decided the custody application, and the child was brought and retained in India under a shadow of marital bickering between his parents.

VI HINDU LAW

Acquisition of joint family property

It is a unique feature of Hindu law that permits a Hindu to hold two different kinds of properties, *viz*, the separate property and a share in the joint family property or ancestral property. The former is exclusively owned by him while the later usually has multiple owners. Prior to 2005, a son had a right by birth in the ancestral property, and the daughters were left out under the classical Hindu law. As far as coparcenary property is concerned, the settled position is that if any property is acquired with the aid of joint family property the acquired property would also bear the joint family property character. Similarly, if a partition of the joint family property takes

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place, the property or share that comes to an individual male would be separate *qua* his former coparceners but would be joint or coparcenary property with respect to his male descendants. The reason is that the moment a Hindu male is born he becomes a coparcener in the family of his father (presently the same situation is applied in case of daughters as well). The concept of coparcenary, that has male members up to four generations confer an interest in the coparcenary property in their favour from the time of their birth. Where the property is being managed by *karta*, as the head of the joint family, he does it because of his superior position in the family, and not because he is the sole owner of the property. This property that is possessed by *karta* contains the share of all the coparceners in the family upto four generations. Where a partition of the joint family property takes place, in the first instance the shares are divided as amongst the father/*karta* on one hand and the sons on the other hand. The share of the father now becomes his exclusive or separate property as through this partition, he separates from his sons, but the sons on the other hand through this partition separate from their father and also from each of the brothers, but remain joint with their descendants. The share in their hands, therefore, is not their separate property but contains the respective share of their male descendants as well, which the later had acquired by virtue of their birth in this joint family. This small joint family that each of the son constitutes after severance from the father, will confer upon them the status of *karta*, and the character of the property, that they received after partition as the joint family property. Some cases that arose this year dwelled on this issue with conflicting and in some cases also incorrect conclusions.

In the first case,[55] a Hindu man died after losing his entire family except his wife in 1930 in a plague. His wife who was left all alone adopted a boy soon thereafter. In course of time the adopted son grew up, married and had children of his own. He took possession of the deceased adopted father's property and started a business with it. He had no property or income except the one left by the adopted father. In 1963, out of the profits that he earned in business, he along with his son started an industry with the name of Yashwant Metal Industry. Later on more property was acquired and purchased out of this income in the name of the son, his wife and children. His daughter D, filed a suit for partition and possession of her share out of this property after his death in 1992 claiming that since the complete property was the joint family property, her father died as an undivided member of *Mitakshara* coparcenary, she was entitled to the property out of her father's share. During the pendency of this suit, the Hindu Succession (Amendment) Act, 2005 came in and she sought the benefit of that also claiming now an enhanced share. The court held firstly, that the complete property available with the family despite the fact that some of it was in the exclusive names of the son and his wife, was the joint family property as the nucleus came from the joint family property itself. The court noted that here not even a single member of this family had any independent income of their own. Secondly, despite the fact that the daughter had filed a suit much before the amendment, she would get its benefit and was, therefore, granted an enhanced share in the property as a coparcener.

55 *Phulawati* v. *Parkash*, AIR (2011) 8 Karn 78.

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The case raises a couple of important issues, firstly, that if the property is acquired with the aid of the joint family property the character of the entire acquisition would be called the coparcenary or joint family property and secondly, despite the fact that the coparceners have been treating the coparcenary property as their separate property and making acquisitions in their exclusive name, the character would not change and the property would continue to bear the joint family or coparcenary character and thirdly, a female presently introduced as a coparcener is entitled to the same share as a male in the joint family property irrespective of the fact that she had filed a partition suit much earlier. The conclusions are appropriate and within the legal framework. The pronouncement in the second case, however, was extremely disappointing. Here,[56] a Hindu man F as the *karta* of the joint family comprising of him and his four sons had in his hands certain joint family property. As the father/*karta*, he affected a partition of this ancestral property amongst himself and his four sons, each of them getting a 1/5th share. The distribution of the property amongst the sons was through a consent decree. S was one of the sons of F. He had a wife W, two sons SS_1 and SS_2 and a daughter D. S transferred the entire property in favour of his wife. SS_1 challenged this transfer and filed a suit in the court for declaration of title and for possession of his share out of this property contending that since it was the joint family property, both he and his brother SS_2 had a right by birth in it and S alone was incompetent to transfer it, let alone in favour of his wife. The trial court held that when the property was partitioned by F and each son had taken his respective share, the character of the property was converted from ancestral to separate so S alone became the exclusive owner of it; SS_1 had no claim over the property and cannot challenge any alienation effected by his father. Upon an appeal to the lower appellate court, it reversed the verdict of the lower court and held that upon partition the character of the property would remain the same and SS_1 and SS_2 had a right by birth in it. The character of property in the hands of S would be his separate property *qua* his brothers as also his father only, but would be coparcenary with respect to his own male descendants and unless the alienation is for legal necessity he would be incompetent to effect the same. The court, therefore, decreed the claim of SS_1. The matter then went to the high court which held that after partition by the father during his lifetime of the coparcenary Hindu joint family property, the share falling to each of the son through consent decree had the effect of converting the joint family property into separate property in the hands of S and said thus:[57]

> It may be noticed here that the father during his life time had partitioned the coparcenary Hindu joint family property and the share falling to each of his son was transferred, the acquisition is therefore not by way of inheritance. The property became self acquired property of Ujjagar Singh and lost the character of joint property.

It further held that SS_1 was incompetent to challenge the alienation by way of consent decree in favour of the wife of S. It reversed the judgment of the lower appellant court holding the character of the property as separate in the hands of S.

56 *Mohinder Kaur* v. *Pargat Singh*, AIR (2011) 9 P&H 117.

57 *Id*. para 27.

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Here again the court fell in grave error in reaching this incorrect conclusion. The line of reasoning by the lower appellate court was correct. The character of the joint family property after partition with respect to the male descendants of the coparceners is coparcenary/joint family property. It becomes separate only with respect to those members who were originally joint with him, but became separate after this partition. Thus one fifth share of S here was the joint family property of the family of which he was the *karta* and his son had a right by birth in it. He was neither the sole owner of it nor had any exclusive or absolute rights of its alienation. His both sons had a right by birth and an equal ownership of the property. To reverse a correct decision and supplant it with an incorrect one is extremely unfortunate.

The second observation of the court was even more astonishing. The court's noting that since it was partitioned and acquisition was not by way of inheritance and thus it was separate is totally an incorrect statement. The correct legal position is exactly reverse. It is amazing how the court appears to be in ignorance of the statutory provisions of the Hindu Succession Act, 1956, and the apex court's rulings,[58] that the property that a son inherits from his father constitutes his separate property, but the share of the joint family property that he receives on partition continues to bear the same character. Where F was the *karta* and he had partitioned it amongst him and his sons even at that time only these five persons were not the owners of it. The sons of S, namely, SS_1 and SS_2 had a right in this property as in the coparcenary property male descendants up to four generations acquire an interest by birth. Till all of them were joint , F was the *karta* and subsequent to partition, amongst the five of them, instead of F, it was S who became the *karta* of his smaller joint family comprising of him, his wife, two sons and daughter, and each one of them had one or the other right over this property. Any change in the character of the property would mean wiping of the shares of the sons and the rights of the females in it which is contrary to the law governing the hindu joint family. The rules are clear and do not permit the father to convert the joint family property into his separate property. As the *karta* of his joint family, any alienation affected must be for either legal necessity, benefit of estate or for performance of certain indispensable religious or charitable duties and for no other purpose. The father does not have any legal competency to alienate/bequeath the joint family property in favour of his wife as it is not his sole property but includes the shares of his sons as well. The high court in reversing the judgment of the lower appellate court laid down an incorrect proposition of law which is shockingly contrary to the substantive law.

Claim of a share in mother's second husband's joint family property

An interesting issue was deliberated upon by the apex court, that when a woman

58 *Makhan Singh* v. *Kulwant Singh*, AIR 2007 SC 1808; *Commissioner Wealth Tax* v. *Chander Sen* (1986) 161 ITR 370: AIR 1986 SC 1753; *Commissioner of Income Tax* v. *P L Karuppan Chettiar*, 1993 Supp (1) SCC 580; *Gaurav Sikri* v. *Kaushalaya Sikri*, AIR 2008 Del 40; *Commissioner of Income Tax* v. *Virender Kumar*, 2001 (252) ITR 539 (Delhi); *Commissioner of Income Tax* v. *Ram Rakshpal Ashok Kumar* (1968) 67 ITR 164; *Shri Vallabhdas Madani* v. *Commissioner of Income Tax* (1982)138 ITR 559 and *Commissioner Wealth Tax* v. *Mukundgiriji* (1983) 144 ITR 18: 114 ITR 523.

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having a son gets married another time, would this son born to her from her previous marriage claim a share in the joint family property of the second husband even indirectly? A step son is neither a member of the step father's joint family nor would be a coparcener with him and thus his claim over the property belonging to the joint family of the step father would raise crucial issues. Here,[59] a Hindu man A, died leaving behind two widows, three daughters and one son S. A had married thrice and S was born to him from W who had predeceased him. W_2 to whom A married, was married previously and had a son B from her first marriage. Upon the death of A, W_2 promised to her son born to her from her first marriage, that $1/5^{th}$ share of this property belonging to A's joint family would be her share and that she would transfer it to him. B then filed a suit against his own mother for declaration of title, with respect to the land in her possession and to have the revenue records corrected by the mother by effecting a mutation of the land in his favour. In this suit, there was virtually no contest from the mother, and it was decreed in favour of B. This appeared unfair on the face of it, as B was neither a member of the joint family which owned the land, nor was it partitioned with the mother being allotted a share. He was also not an heir of A but was given $1/5^{th}$ share most probably with the connivance of his mother. Pursuant to this, S, the son of A, filed a suit for declaration of the order recognising B's claim over $1/5^{th}$ property as a nullity, that was affirmed by all the courts till the apex court on the ground that since no one can alienate in excess of their legitimate claim W had no power to do so, firstly as there was no formal partition of the property post death of A or demarcation of the share of anyone and the extent of her share was not determined and secondly, her entitlement in this property was far less than the share that she gave to B. The trial court did correct calculations and determined the entitlement of S as ½+1/10+1/100, correctly, and consequently, the share of W came to be $1/20^{th}$ of the total property. It also held that as she had a mere $1/20^{th}$ share in the property she could not pass a title exceeding her share. The appellate court proceeded to incorrectly treat the property as the separate property of A and gave to S $1/5^{th}$ and $1/10^{th}$ on death of his mother. The apex court, however, did not dwell on the entitlement of each of the claimant, treating it as coparcenary property and holding that in absence of any unequivocal intention being expressed by the coparceners and bringing it to the notice of *karta*, no partition could be affected and the family would be presumed to be joint. They quoted relevant passage from *A. Raghavamma* v. *Chenchamma*,[60] and *Kalyani* v. *Narayanan,*[61] to demonstrate that for an effective partition, at the instance of a joint family member, a definite and unequivocal declaration of his intention to separate from the family and enjoy his share in severalty and its communication to the affected persons is mandatory. The court in response to the contention of the counsel of the wife that her share was $1/5^{th}$ held, that as after the death of A, the shares were not specified nor demarcated as there was no demand for a partition, there could not be a conclusive finding on what her share was. Moreover, the court said, the shares could not have been determined without bringing

59 *Man Singh* v. *Ram Kala*, AIR 2011 SC 1542.
60 AIR 1964 SC 136.
61 1980 (Supp) SCC 298: AIR 1980 SC 1173.

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in the daughters. The court set aside the determination of shares by the high court and held that it would be open to the parties to get the determination of their respective shares in accordance with law. The court said:[62]

> We are afraid, in the absence of any pleading or evidence in the suit filed by the appellant that shares among heirs of Soran were determined by agreement or otherwise, the share of Shingari was not identified and thus she could not have alienated 1/5th share in the property of the appellant. In any case determination of the shares in the absence of the three daughters of Soran who were also class-I heirs in schedule appended to the 1956 Act could not have been done. All the three courts fell in grave error in determining the share of Shingari and the first respondent (son) even though the three daughters were not party to the suit. The whole exercise by the three courts in this regard was unnecessary, uncalled for and in violation of the principles of natural justice.

The line of approach taken by the apex court is unusual. Here the sole issue was whether the widow of A after his death, transferred in favour of her son, a share in excess of her entitlement or not? If yes, the mutation and order confirming his title would both be invalid, but if the widow was in fact entitled to receive the property after the death of her husband, that she transferred in favour of her son, both the mutation and title of the son would be valid. Thus the first point that needed to determine was distribution of this property among the survivors of A and to ascertain their respective shares. The trial court had proceeded correctly and the apex court's observation that even after the death of A, a partition of coparcenary property could not be effected unless there was a demand of the same by the coparcener followed by its effective communication was incorrect. Both the cases quoted by the apex court referred to the appropriate method of demanding a partition at the instance of a major coparcener, but in the present case the situation was entirely different. Here, there was no demand of partition but even then, a partition had to be statutorily effected upon the death of A because of section 6 of the Hindu Succession Act, 1956. Section 6 provides clearly that if a coparcener dies as a member of *mitakshara* coparcenary having an undivided interest in the coparcenary property and leaves behind a class-I female heir, his share (to be ascertained after effecting a partition), would go as per the laws of intestate and testamentary succession as the case may be and not by survivorship. This concept of notional partition or fictional partition is a legislative concept and cannot be brushed aside by the apex court. Here, A died as a member of undivided *mitakshara* coparcenary and was survived by his wife, three daughter and a son, i.e., class –I female heirs. So A's share had to be ascertained by effecting a notional partition presuming him to be alive so that it can go by inheritance. It is again a settled rule that under *mitakshara* law, where a partition takes place between a father and a son, his wife (W_2 in the present case) would get a share equal to the share of her son and she has to be given that share which would come to her at the time of effecting a notional partiiton. The apex court erred in saying that *the entire exercise was unnecessary,*

62 *Supra* note 59 at 1547.

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uncalled for and in violation of the principles of natural justice. It is only after affecting a notional partition can the share of A be ascertained and that would constitute his separate property and would go to his heirs under laws of inheritance. The heirs here would include W as well. These shares become fixed and do vest in the heirs the moment A dies and the fact that there was no physical division of property cannot prevent the owners from transferring the same in favour of anyone. Law has conferred absolute ownership in favour of a Hindu woman, and if she inherits the share of her husband she does so as an absolute owner thereof and has the capacity to transfer this property in favour of anyone including her son. Thus the focus should have been as was done correctly by the trial court to find the extent of her share. The observation of the apex court that it was coparcenary property was again incorrect in view of section 6 of the Hindu Succession Act, 1956, which specifically provides for a statutory demarcation of the share of the deceased coparcener, thereby converting it into separate property so that it can eventually go by inheritance rules. Therefore, there was neither any need to go into the modalities of affecting a partition nor of quoting the case of *Raghavamma* v. *Chenchamma*,[63] by the apex court. It appears to be a clear case of an incorrect decision reversing a correct one, that too by the superior court.

VII HINDU SUCCESSION ACT, 1956

Succession rights of children born of void and voidable marriages

Existence of a valid marriage as according legitimacy to the children is one of the fundamental requirements and its reflection on their succession rights is clearly evident in the Indian legal system. As a specific case of statutory protection, children born out of void and voidable marriages have been conferred statutory legitimacy, via section 16 of the Hindu Marriage Act, 1955, enabling them to inherit their parent's property, but the proviso of the same section makes them incapable to succeed to the property of any of their other relatives. Further, they cannot file a suit for partition of the joint family property during the life time of their father as it can only be exercised by the coparceners and from out of the joint family property.[64] The focal point in a couple of cases this year, was the succession rights of children born of bigamous marriages.[65] In *Revanasiddappa* v. *Mallikarjun*,[66] a Hindu man had two children from his first wife and two sons from the second wife with whom he married during the life time of the first wife making the sons from the second wife statutory legitimate. The first wife along with her two sons filed a suit for partition of the joint family/coparcenary property in the hands of A. The trial court held that the first wife and her two sons were entitled to 1/4th share each of the coparcenary property and decreed the same in their favour. It also held that the second wife and also her two sons though statutory legitimate are entitled only to

63 *Supra* note 60.

64 *Sadasiva* v. *Purushothama*, AIR 2011 (NOC) 40 (KAR).

65 *Nanda Santosh Shirke* v. *Jayashree Santosh Shirtke*, AIR 2011 (NOC) 286 (Bom); see also *Sarita Bai* v. *Chandra Bai*, AIR 2011 MP 222.

66 (2011) 11 SCC1.

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the separate property of A but would not be eligible to claim any share in the coparcenary property. The lower appellate court followed an earlier Karnataka High Court ruling,[67] and also upheld the same. The high court endorsed the judgments of both the lower courts and held that as the second marriage was void, the second wife and the children could not take any share from the coparcenary property. The children from the second wife could inherit only the separate property if A died intestate. The court, however, ruled that the first wife would not be entitled to claim any share from the coparcenary property and it is only the sons, who would get 1/3rd of the joint family property. The matter then went to the apex court, which was confronted with the primary issue of whether the illegitimate children are entitled to any share in the coparcenary property held by their putative father? The court analysed section 16 of the Hindu Marriage Act, 1955, and said that the provision make it very clear that illegitimate children can claim the property of their parents only and of no one else. It then discussed a plethora of old cases predominant among them were four judicial pronouncements[68] wherein the rights of illegitimate sons born from a permanently kept concubine were recognised in the coparcenary property and observed that by introducing section 16, the legislature has:

1. removed the stigma of illegitimacy by referring expressly to the children as legitimate;
2. the section uses the term property and does not qualify it as separate or ancestral;
3. the Hindu Marriage Act brings in the social reform;
4. law has to change with changing times; and
5. the parent's folly should not have a reflection on children's rights as they are innocent.

The court further observed that the legislature in section 16 has used the term property without qualifying it as either the separate or joint family property. By the use of the term property the legislature has kept it "broad and general". In view of the amendment, the court said that there was no reason why such children will have no share in the joint family property as well, since they are equated under the amended law with legitimate offspring of a valid marriage. The only limitation continuing even after the amendment seems to be that during the lifetime of their parents such children cannot ask for partition but they can exercise this right only after the death of their parents. The court differed from their earlier ruling in *Jinia Keotin* v. *Neelamma,*[69] and said:[70]

> The court has to remember that relationship between parents may not be sanctioned by law but the birth of a child in such relationship has to be

67 *Sarojamma* v. *Neelamma*, 2006 MLR 75: ILR 2005 Karn 3293.

68 *Kamulammal* v. *T B K Visvanathaswami Naicker*, AIR 1923 PC 8; *Raja Jogendra Bhupati Huree Chundun Mahapatra* v. *Nityanand Mansing*, 1889-1890 Indian Appeals 128, quoted by the apex court in the present case; *Gur Narain Das* v. *Gur Tahal Das*, AIR 1952 SC 225 and *Singhai Ajit Kumar* v. *Ujavar Singh*, AIR 1961 SC 1334.

69 (2003) 1 SCC 703.

70 *Supra* note 66 at 10.

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> viewed independently of such relationship of the parents. A child born in such relationship is innocent and is entitled to all the rights which are given to other children born in a valid marriage… The court cannot interpret a socially beneficial legislation on the basis as if the words therein are cast in stone. Such legislation must be given a purposive interpretation to further and not to frustrate the eminently desirable social purpose of removing the stigma on such children. The court should have regard to equity and directive principles of state policy under the Constitution.

Quoting article 39 (f) of the Constitution of India, that mandates the states to ensure that children are given opportunities and facilities to develop in a healthy manner the court said that they are constrained to take a different view than *Jinia Keotin*,[71] and the matter should be reconsidered by a larger bench. Accordingly, the matter was referred to be placed before the CJI for constitution of a larger bench.

The inclination of the court in the present case was to grant parity of status between the children born of valid marriages and those born of void and voidable marriages, which would mean that the marital relationship of the parents, should have no reflection on the legitimacy of the children or on their succession rights. Two main reasons that led the court to come to such conclusion were firstly, that the legislature has used the term property in section 16 without qualifying it as separate or joint family property and second that with changing social norms of legitimacy in every society including ours, what was illegitimate in the past may be legitimate presently. Law takes its own time to articulate such social changes through a process of amendment. This is why in a changing society law cannot afford to remain static. The second reason can have a different face as well. For example, what was legitimate in the past may well be illegitimate presently. Unlimited polygamy conferring perfect legitimacy on the issue of multiple marriages was recognised in the past but the present concept of compulsory monogamy has made them statutory illegitimate. With respect to the first reason, it has to be noted that while section 16 does use the term property without qualifying it as separate or joint, leaving scope for further clarification and interpretation, the proviso is clear and is unsusceptible of differential meaning. It disentitles a child of a void marriage from claiming the property of any of the relations of the parents, signifying the personal character of the relationship between the parents and their children. The statutory exception granting legitimacy to them had a limited role that cannot be stretched beyond the permissible limits. The logical interpretation would be to confer a share in the personal property of the father but not in the joint family property. Having restricted the rights, legislative intention to accord personal benefits to such children is clear. This personal relationship thus has a specific indication to the conferment of the right only in the personal property of the parents and not a share in the joint family property where other members of the family are also involved. The court itself noted that the amendment equated the children with legitimate children but did so with a qualification. This qualified legitimacy or statutory legitimacy is clearly distinguishable from a perfect legitimacy as the

71 *Supra* note 69.

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legislature itself limits its scope by inserting a proviso to section 16. To grant a right by birth in the coparcenary property would not only make the proviso redundant, but would also be analogous to insertion of a non existing clause in section 16 making such children legitimate for "all purposes," that clearly was not the intention of the legislature. Even in the name of a socially beneficial provision, the interpretation should not totally twist/distort a clear provision. Equating a statutory legitimate child with a perfectly legitimate child would also have an adverse impact on the importance of the institution of marriage and would make a mockery of the legal conditions stipulated in the enactment for validity of a Hindu marriage. In majority of cases the children would be of bigamous unions that are clearly prohibited in law. As it is this offence has been treated very lightly even by the legislature as severe proof of solemnisation of marriage and commencement of the action only at the behest of the first wife are the factors that are tilted in favour of a bigamous man. It is perplexing that this crime rarely attracts punishment and notwithstanding the fact that this marriage is categorised as a nullity, the judiciary is inclined to acknowledge it on par with a valid marriage by treating the offspring as perfectly legitimate. The softness towards the children of void marriages would send a wrong signal and an inevitable suspicion that perhaps for Indian judiciary, bigamy is not a serious crime.

Daughters as coparceners and entitled to the share by asking for partition

The central enactment introducing daughters as coparceners has ushered in a revolutionary concept in the area of gender justice. However, this legislative encroachment in the classical concept of coparcenary has not fundamentally altered the concept of joint family but has merely added more members in it. In *Prema* v. *Nanje Gowda*,[72] a person A filed a suit for partition and separate possession of his share that was calculated as 2/7th of the total property by the trial court and that of his sister D as 1/28th of the total property. By the preliminary decree dated 11th August 1992, the shares were specified by the court. An appeal filed by the defendants against this determination was dismissed on 20.03.1998 and the second appeal was dismissed again on 1st October 1999, as barred by limitation. A, filed for a final decree but now D filed an application for amendment of the preliminary decree and grant of a declaration that in terms of section 6A of the state amendment,[73] she had become a coparcener and her entitlement is the same as that of her brother, i.e., 2/7th of the property. She was unmarried on the date of the promulgation of the amendment and as per the provisions of it, she became a coparcener in the same manner as a son. The daughter contended that in a partition suit the preliminary decree passed by competent court does not become effective till the suit property is actually divided in accordance with law and the same can be modified for good or sufficient reasons, but the son contended that with the passing of a decree for partition and separate possession, the suit property loses its character of joint family property and the daughter is not entitled to claim anything from the shares already allotted to other members of the erstwhile joint family property.

72 AIR 2011 SC 2077.

73 The Karnataka Hindu Succession (Amendment) Act, 1994.

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The lower court held that she was not entitled to claim the rights as a coparcener as she had not filed an application for enforcing the right accruing to her under section 6 A during the pendency of the first and the second appeals and had not challenged the preliminary decree by joining the defendant in filing the second appeal. The apex court held in favour of the daughter and said that even though by the preliminary decree, the shares of the parties were determined but actual division of the property had not taken place, therefore, the proceedings instituted by the respondent cannot be treated to have become final so far as actual partition of joint family property is concerned. It was thus open to the daughter to claim enhancement of her share in the joint family property because she had not married till enforcement of the Karnataka Act.[74] The court said,[75] that by virtue of the preliminary decree passed by the trial court, which was confirmed by the lower appellate court and the high court, the issue decided therein will be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully and completely decided only when the final decree is passed. If in the interregnum any party to the partition suit dies, then his /her share is required to be allotted to the surviving parties and this can be done in the final decree proceedings. Likewise, if law governing the parties is amended before the conclusion of the final decree proceedings, the party benefitted by such amendment can make a request to the court to take cognizance of the amendment and give effect to the same. If the rights of the parties to the suit change due to other reason, the court ceased with the final decree proceedings is not only entitled but is duty bound to take notice of such change and pass appropriate order. In the present case, the Act was amended by the state legislature for achieving the goal of equality set out in the Preamble of the Constitution of India. Section 6A came into force on 30.07.1994. As on that day the final decree proceedings were pending, therefore, the appellant had every right to seek enlargement of her share by pointing out that the discrimination practised against the unmarried daughter had been removed by the legislative intervention and there is no reason why the court should hesitate in giving effect to an amendment made by the state legislature in exercise of the power vested in it under article 15 (3) of the Constitution. The court further held that even if the trial court has passed final decree it should be amended in light of this judgment.

The present judgment appears to be incorrect in light of the law of partition of the joint family property. Despite the fact that a daughter has been introduced as a coparcener, it has not affected nor modified the law with respect to the modalities of affecting a partition nor the time the severance of status take place amongst the members of coparcenary. A major coparcener has an enforceable right to demand a partition and the moment he forms an unequivocal intention to separate and communicates it to the *Karta*, then and there he becomes a separate member and his share in the joint family property becomes fixed and cannot be altered. *Karta* now is incapable to touch his share or alienate it even if there is a legal necessity as his status is that of the separate person. This de jure partition thus affects an instant severance for the simple reason that law does not make anyone competent to negate

74 *Supra* notes 72 at 2083.
75 *Ibid*.

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this demand. *Karta* is bound to accede to this demand and once severance /partition takes place it is an irrevocable act and the share of the separate member cannot and would not devolve by doctrine of survivorship upon the other male members in the family if post demand of partition and before actual physical division of property he dies. Since the management and possession of the joint family property is legally with the *Karta*, it is he who effects a physical division of the property by affecting a de facto partition. The remedy provided to the coparcener whose demand of partition is not accommodated by the *Karta* is to then approach the court and file a suit for partition. *Karta's* knowledge with respect to the demand of partition is the time when severance takes place. Even the court is incompetent to say no to the demand of partition presented by an adult coparcener. Their role is limited to and is confined to facilitating the effecting of a de facto and not de jure partition, as that takes place the moment the demand comes to the knowledge of *Karta*. De jure partition is not affected either by a preliminary decree or the final decree of the court. It takes place instantaneously when the demand comes to knowledge of *Karta* through the medium of the suit right at the initial level. The coparcener is already a separate member with his share fixed even before the issue has formally reached to a level of pronouncement or grant of a decree. The difference between de-jure and de facto partition is that the former not only demarcates the status (joint or separate) but also results in affixing the share of the separate member. The formality of actual physical division of the property is what the de facto partition is about and the court facilitates that. A preliminary or final decree merely acknowledges or accelerates that but the shares are already determined. It is also important to note that as per the amendment, a newly introduced female coparcener is not competent to reopen the partition that had already taken place prior to the promulgation of the amendment and thus where the suit was instituted before the amendment severance of status and fixation of shares as far as the coparcener demanding partition is concerned had already taken place. Thus, the observation of the court that till the final decree is passed a partition has not taken place is incorrect.

Succession to the property of a female Hindu

Under the Hindu Succession Act, two entirely different schemes of succession are provided for, depending upon the sex of the intestate. Where a female Hindu dies there is a further divergence linked with the source of the property, that is available for succession. Where the property was received by her through a Will it is categorised as her general property and is inherited in the first instance by her surviving spouse, her children and children of any pre-deceased children. What is important here is that the term children do not include step children of the deceased despite the fact that at one time the property which is presently available for succession was owned by the step children's father. In *Raj Rani* v. *Bimla Rani*,[76] a Hindu man married twice, one after the other and had daughters from both the wives. He bequeathed his entire property in favour of his second wife and his own daughter was left out altogether. Upon the death of the second wife, the property was to be distributed as per the laws of inheritance under the Hindu Succession

76 AIR 2011 Del 170.

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Act, 1956. The trial judge held that besides her two daughters, the daughter of A from his first marriage, i.e., the step daughter of the deceased would also be entitled to the property in equal shares. He accordingly granted 1/3rd share to all the three claimants. The daughters of the deceased female then approached the Delhi High Court contending that from a Hindu female only her daughters can inherit and not the step daughter. The court cited and analysed section 15 and concluded that the property presently available for succession was the absolute property of the deceased female. The term daughter according to the Delhi High Court would include a daughter born out of the womb of the female by the same husband or by different husbands and includes an illegitimate and even an adopted daughter but if the legislature had felt that the word daughter should include the word "step daughter," it would have said so in express terms. Thus, the word daughter under section 15 (1) (a) would not include a step daughter and such a step daughter in the view of the court would fall in the category of an "heir of the husband" as referred to in section 15 (1) (b).

The court thus reversed the judgment of the lower court and held that it is only the daughters of the deceased female and not the step daughter who would be entitled to inherit her property. The term daughter does not include a daughter-in-law as well as the two relations stand on entirely different footing. In *Santosh Kumar Diwan* v. *Sitabai*[77] the issue again was whether on the death of a Hindu female, amongst the two categories of survivors, her deceased daughter's children and the widow of her predeceased son, who would inherit her property? The court held that it is the children of her deceased daughter who would be eligible to do so and not her daughter-in-law.

Succession to the share of a Hindu female in the coparcenary property

The amendment to the Hindu Succession Act empowered the daughters economically and brought in the much desired gender justice concept. It, however, failed to take note of certain basic facts that needed to be tackled at the legislative level. These loopholes that the legislature left are now surfacing and the judiciary is giving its own interpretation though an incorrect one in substance to the situations emerging presently in this context that could not have been foreseen in the previous scenario. One of the primary loophole that the legislature overlooked was that it made daughters as coparceners, made them competent to demand a partition of the joint family property in their hands, ascertain it and possess it by way of their own property but failed to provide as to what would happen to this share in case the woman dies issueless. Would it be treated as her general property, in which the husband is a primary heir or would it be treated as a share in the coparcenary property that would go to the surviving coparceners as per the application of doctrine of survivorship, or would it be treated as the property inherited from the parents, a situation that appears incongruent, as the parents may be alive and the share can be ascertained by a Hindu female during the lifetime of the parents as well through manifestation of a demand of partition. Even though the legislature by the amendment introduced daughters as coparceners in the same manner as sons, they failed to take

77 AIR 2011 MP 161.

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note of the fact, that it in itself treats the two unequally. If the son dies, the category of heirs is different from the situation when a woman dies. It is this difference of two entirely different schemes of succession and further source of acquisition related divergence in case of woman intestate that has made both the sons and daughters inherently unequal.

The legislative schemes of trying to conserve the property acquired by a female from her father and its restoration to the family of the father, and her capability to acquire the property of the husband or her father-in-law, and its restoration to the same family after her death, in absence of a similar mechanism in case of a male intestate has created complications and confusions, totally unwarranted in the present day scenario. An interesting question arose in this connection in a case from Karnataka.[78] Here the court through an incorrect pronouncement held that a share in the joint family property upon the death of a Hindu female in absence of her children would not go to her husband but would revert back to her father's heirs under section 15(2). In this case a Hindu married woman filed a suit claiming partition after the death of her brother as against his wife and children of her brother. Her case was that her father had several joint family properties in which she and her elder brother had shares as coparceners. Upon the death of her father and then her brother the possession of these properties continued with the widow and his children. They, on the other hand, contended that the property in question was separate and not the joint property of the father and secondly, a partition of the same had taken place in 1984, after her marriage, a claim that they could not substantiate.

The trial court held that the property was not the separate property but the joint family property in the hands of the father of the claimant; that no partition had taken place and she being the coparcener was entitled to one third of the property. The matter was taken in appeal to the high court. During the pendency of the trial before the high court, the daughter died and her husband filed an application for representation as her heir. The application was not allowed by the court as they held that after her death the property would go to her father's heirs, i.e., the wife and the children of her deceased brothers, who would succeed as "heirs of her father". The court held that the question as to whether the daughter /her husband is entitled to 1/3rd share or not at all was the main question raised by the application. The plaintiff died during the pendency of the suit, and, therefore, the entire exercise undertaken by the trial court was an exercise in futility for the reason that the plaintiff while had sued for partition being a female member of the joint Hindu family and she having died even during the pendency of the suit, and her husband having come on record as her legal representative in terms of an order made by the trial court, and the suit having been continued by the legal representative of the deceased plaintiff i.e., her husband. The court said: [79]

> We find whole exercise is futile for the simple reason that admittedly without dispute original plaintiff having no children nor begotten a son or a daughter, provisions of section 15(2) of the Hindu Succession Act, 1956 applies to

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78 *Sangappa* v. *M M Siddamma*, AIR (2011) 8 Karn 125.

79 *Id*. at 127, para 14.

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> the situation and outcome is that the joint family property even if it should have come to the plaintiff on her death not leaving behind a daughter or a son reverts to the heirs of her father, which is the situation that emerged in this case when the original plaintiff died. Nothing survived in this suit as the share even if the plaintiff got any would have reverted back to the defendants. Husband could neither have continued the suit as representing the estate as nothing remained of estate nor can he claim anything out of it.

The confusion, a glaring instance of inapt legislative drafting is bound to raise its head and would eventually force another amendment. The decision is totally incorrect as it helped the brother to retain the share of the sister first illegally and then with an incorrect judicial ruling baring lack of clarity on the issue of joint family and law governing partition. Here again the moment a suit is filed by the coparcener, in this case the sister, in the court of law asking for a partition from her brother, she becomes a separate member and her share becomes fixed. The result of court's pronouncement would merely facilitate handing over of her share to her that was illegally retained by the brother, she being the rightful claimant. The court's pronouncement does not determine entitlement but merely enables the demarcation and its fair transfer to the rightful claimant. Thus, the partition suit presented by the sister here had resulted in severance of her status from the joint family of which she and her brother were members and her half share was fixed right from the commencement of the litigation and was not dependent upon its outcome. As a coparcener, it was her right to demand partition and demarcation of her share that was illegally denied to her by her brother. Thus, the moment the suit is presented the matter is taken cognizance of by the court, her status is formally determined as a separate member and her entitlement over one half of the properly is recognized. The correct approach should have been for the court to order a formal division of the property directing the brother to take steps in this direction so that her share could be handed over to her rightful heirs.

The second error and a graver one committed by the court here was with respect to the devolution of this one half share that was determined as hers. The application of section 15(2) in the present case by the court was wholly inappropriate. Section 15 (2) applies only where a Hindu female dies leaving behind property that she had inherited from her parents. Inheritance refers to the situation where either her father or the mother dies and she, in the capacity of their daughter inherits the property under section 8 or section 15 of the Hindu Succession Act, 1956. It does not refer to her share in the coparcenary property that presently she acquires by birth and its acquisition is not dependent upon the death of either of her parents. Inheritance vests in her only on the demise of her parents but a share in the coparcenary property she gets the moment she is born in this world. Further the demand of this share can be even during the lifetime of the parents while for inheritance she has to wait till their death. The expression used in section 15(2) is "inherited" and not "received" and any property that she receives from her parents or their family by any mode that differs from inheritance would constitute her separate or general property on which section 15 (1) would apply. In presence of her spouse upon her demise, it is he who would get the complete property and not her brother. It is only that property

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that she gets by way of inheritance that reverts back to her father's heirs if she dies issueless. Even if she receives property from her father or parents under a Will or gift or any other mechanism including a share in the coparcenary property it would be covered under her general property that would attract the application of section 15(1) and not section 15(2). By no stretch of imagination can inheritance and acquisition of a share in coparcenary property be equated. It is amazing that the error of law has been committed by the court. Judiciary cannot rewrite the clear statutory provisions nor distort the meaning of a clear term like inheritance. Acquisition of a share in the coparcenary property and inheritance are totally different concepts with different modes of devolution and mingling of the same did result here in travesty of justice. It appears that there is a lack of clarity with respect to the law of Hindu joint family, partition and succession or else the illustration of bad precedents would further compound the already prevailing confusion.

VIII CONCLUSION

The year 2011 saw some interesting judicial pronouncements in the area of Hindu law. While courts effectively thwarted unjust attempts to reap benefits under the law of adoption shadowing its otherwise noble purpose, custody issues saw adjudication of crucial issues in the realm of conflict of laws. Divorce by mutual consent dominated with prayers for deviation of statutory provisions leading to contradictory outcomes from different courts. A major cause of worry remains that this year the courts displayed a lack of clarity with respect to the substantive law governing the Hindu joint family, partition and succession. Consequently, incorrect decisions did lead to deprivation of rightful claims and resulted in judicial approval of illegal retentions virtually rewarding the guilty.

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