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# HINDU LAW

*Poonam Pradhan Saxena**

## I INTRODUCTION

IMPORTANT JUDICIAL pronouncements in the area of Hindu law relating to marriage, adoptions, maintenance, custody, guardianship, Hindu joint family and succession reported during the year 2012 have been briefly analyzed here.

## II HINDU ADOPTIONS AND MAINTENANCE ACT

**Giving of child in adoption without the natural father's consent**

According to the Hindu Adoptions and Maintenance Act, 1956, a child can be given in adoption with mutual consent and although initiation of its process is no longer the exclusive prerogative of the father, the consent of both parents is mandatory to complete it. The legal position prior to 2010 placed the father in a dominant position in comparison to the mother as he alone was competent to initiate and affect the entire process of adoption (both giving and taking of the child) and the role of the mother was confined to giving of her consent or withholding it. Procurement of her consent was mandatory for validation of adoption and an adoption through even a registered deed but effected without the consent of the mother was invalid. The consent could be dispensed away with only if the mother was judicially disqualified *i.e.*, she had ceased to be a Hindu after conversion to another religion, or had been declared by a court of competent jurisdiction to be of unsound mind, or had finally and completely renounced the world. A mother was competent to give a child without consulting the father only if he suffered from any of the above stated three disqualifications; otherwise she was not permitted to even initiate the process of adoption. Presently, it is a consensual act with placement of parents on an equal footing. Thus any of the parent can start the process but the other can never be ignored altogether and adoption whether of giving or taking of the child must be supported with the other parent's free and voluntary consent. Therefore, if the father gives the child in adoption, the consent of the mother is a must and if the mother gives the child in adoption, the consent of the father would be mandatory. The child cannot be given by one parent alone if the other is alive and capable of giving the consent by reasons of him or her being judicially competent to give it. The situation remains unchanged irrespective of whatever remains the parental equation *vis-a-vis* each other. Their matrimonial relationship, whether

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

normal or strained has no bearing on the application of legal principles governing adoption, yet practically can have far-reaching and unforeseen consequences as far as the children are concerned. The desire of the parents to retain the custody of the child may come in conflict with the legal technicalities and further compound the confusion. In the eventuality of dissolution of marriage by divorce the relationship of the spouses culminates enabling them to explore afresh the possibility of entering into another matrimony yet the relationship of the individual parent with the child now in the company of estranged /former spouse subsists, as the parental child relationship is for all times to come till it is terminated on the demise of one of them. Physical separation owing to custodial order at the instance of the court or due to a mutual agreement entered into as between the former spouses and resulting relinquishment of the custody and also the visitation rights by one parent does not and cannot affect adversely the legal relationship. The biological father remains the father despite his separation from the mother of the child and cannot be replaced unilaterally by the mother when legal technicalities require him to take decisions in the best interests of the child including a decision on whether the child now in the custody of the mother should be given in adoption to a third person. The biological father may voluntarily give up his rights to nurture the child yet at the same time the mother remains incapable to replace him and substitute him with another father unilaterally even through a registered adoption deed. An interesting issue arose this year as to whether the provisions of the Hindu Adoptions and Maintenance Act be relaxed in case of divorced parents and adoption be allowed to be effected by one parent having the custody of the child unilaterally in favour of the new spouse (step parent) without seeking the consent of the biological parent. In a case from Delhi,[1] pursuant to matrimonial difference the couple sought and obtained divorce by mutual consent. They had a daughter. According to the settlement entered into as between the two, the mother (W) would maintain the child and she would not claim maintenance for the child and in return the father relinquished the custody and visitation rights or any meeting rights with the two year old daughter for all times to come. He also agreed that he would not interfere in any manner whatsoever regarding rearing up of the child by the mother. Two years pursuant to the divorce and this mutual agreement, W married $H_1$ and thereupon she gave the daughter through a registered adoption deed to the second husband, without seeking the consent of her biological father. The child later applied for a passport and in place of the father wrote the name of the stepfather now adopted father. The application was refused by the regional Passport officer on the ground of a government circular,[2] that read as under:

> In the event of remarriage after divorce, the name of step-father/step mother cannot be written in the passport of the children from his previous marriage. The relationship of the child to his biological parents subsists, even after divorce by parents. It is also not possible to leave the column of father or

1 *Teesta Chattoraj* v. *Union of India*, II (2012) DMC 25: 188(2012) DLT 507.

2 Rules of Ministry of External Affairs Circular No. VI/401/01/05/2008 dated 05.10.2009, serial no. 4(2).

mother blank in the passport in such cases. Therefore, such applicants must write the names of their biological parents in the application form. However, if the step father or step- mother is appointed by a court as legal guardian, the name of such step-parent can be written as legal guardian.

The petitioner filed a petition challenging this refusal order of the regional passport officer (RPO) on two grounds firstly, that RPO has no authority to challenge the validity of an adoption, he cannot question or sit over judgment over the validity or otherwise of the adoption that has taken place through a registered adoption deed as the RPO does not function as an adjudicating authority who could rule on the validity of such issues and the ground on which he is competent to reject an application does not include invalidity of adoption deed and secondly, even otherwise the adoption is in accordance with the Hindu Adoption and Maintenance Act and is perfectly valid. On the other hand, it was contended by the counsel on behalf of Union of India, that as the passport form mentioned the name of the adopted father in the place of the father, it was necessary to see the adoption deed and the same was found to be invalid after scrutiny. The counsel submitted that from a bare perusal, it was clear that the natural father of the child though alive had not consented to the adoption and he was neither a party to it nor had given any consent to it.

It is a practical reality that often people with failed marriages in an attempt to make a fresh start try to bury the past for all purposes without realizing that relations created in a culminated marriage do continue for limited purposes and whenever legal provisions require parental name or former spouses' consent to provide the same is legally mandatory. A biological parent cannot be substituted by the step parent unilaterally by the former spouse having exclusive custody of the child and the child can be given in adoption only with the consent of both the natural parents. The child here contended that as the father had given up his custodial and visitation rights it would be akin to renunciation of the world as far as the child and parental relationship is concerned. The court dismissed this contention and held firstly, the term 'renounce' means to give up or abandon formally and renounce the world means abandoning the society or material affairs and not merely an undertaking to the mother as part of a settlement, not to seek the custody of the child or not to interfere in her future affairs, it would not mean that a person has renounced the world. Legal responsibilities include a careful and mature decision on whether or not one's child be given in adoption and must be taken by the biological parents as a consensual act and can never be done by one parent alone where the other parent is judicially fit to make a fair assessment of the child's future welfare. Thus the court held this adoption to be invalid as it was done without the consent of the father of the child.

## III HINDU MARRIAGE ACT, 1955

**Applicability of the Hindu Marriage Act, to members of the scheduled tribe**

The constitutional protection given to members of the scheduled tribes enables them to be governed in personal matters by their customary laws and despite them professing Hindu religion; they are exempted in family matters from the application of the statutory law governing Hindus. Thus none of the four enactments governing

family law of Hindus, namely, the Hindu Marriage Act, the Hindu Minority and Guardianship Act, Hindu Adoptions and Maintenance Act and Hindu Succession Act is applicable to members of the scheduled tribes who profess Hindus religion. This may give rise to interesting aspects of the conflict of personal laws in the arena of domestic relations. What if two Hindus marry and only one of them is a member of schedule tribe, and pleads in the event of a matrimonial dispute an exemption from the application of the Hindu Marriage Act. In *Anam Apang* v. *Geeta Singh*,[3] the parties, who were Hindu by religion, married in 1991 in accordance with the customs and rituals of the husband's community, *i.e*., the Adi tribal customs. Due to deteriorating matrimonial relations, the wife in 2002, filed a petition praying for a decree of divorce on the grounds of his cruelty. At the time of the solemnization of the marriage as also at the time of the presentation of the petition none of them was a member of the Scheduled Tribe. Subsequent to the presentation of this petition, the Constitution (Schedules Tribe) Order, 1950 was amended,[4] thereby including the Adi Tribe from Arunachal Pradesh, *i.e*., the husband's tribe as a Scheduled Tribe. Thus it was subsequent to the presentation of the matrimonial petition seeking dissolution of the marriage, that the tribe of the husband was declared as a scheduled tribe and pursuant to that he wanted to have a benefit of the exemption. The main issue before the court was, when the matrimonial petition was presented both the spouses being Hindus were subject to the application of the Hindu Marriage Act but subsequent to the presentation of this matrimonial petition, the husband's tribe was included as a scheduled tribe in the Constitution and thus can he be exempted from the application of the Act? The court held as against him holding that at the time of marriage and at the time of presentation of petition he was governed by the Hindu Marriage Act, and as far as this marriage was concerned he would continue to be governed by the provisions of the Hindu Marriage Act, despite the constitutional protection of the identity and customs of his tribe. The court drew parallels from the situation where a Hindu post marriage converts to another faith but continues to be governed in matters of his marriage solemnized under Hindu law by the Hindu Marriage Act and dismissed the plea of the husband.

**Bigamy after concealment of first marriage and a charge of rape**

Bigamy is unlawful and concealment of the first marriage from the second woman is a separate offence under the IPC. Where a married man conceals his marital status and on the other hand convinces the woman that he is eligible to get married to her; goes ahead and solemnizes the marriage inducing her with a belief of a legitimate wedlock and consummates the marriage, is he guilty of the offence of rape as he procures the consent of the wife through deceitful means? In *Mahesh Kumar Dhawan* v. *State of MP*,[5] a woman, W filed a criminal complaint that H married her concealing the fact that he was already married and had a 15 year old son. Post her marriage she found some documents that revealed both his marital status and that he had a son. This discovery of fraud led to fierce and bitter arguments

3 I (2012) DMC 433 (DB) Gau.

4 On 08.01.2003.

5 2012 (3) Crimes 417.

and after harassing her he sent her back to India a month later from Dubai where they were living. She alleged matrimonial cruelty, fraud, cheating and rape owing to his first subsisting marriage and filed an FIR before the Superintendent of Police, Gwalior.

In wake of the two charges brought in by W, H took two defenses primarily. Firstly, he contended that a second wife irrespective of who is responsible for the fraud, cannot be given the legal status of 'wife' within the meaning of section 498A of IPC, so she remains incompetent to prosecute him under this section and secondly, with respect to the rape charges he claimed that India does not have any concept of marital rape and since sexual relations between them happened post marriage, he being her husband cannot be accused of committing rape upon her. Thus he pleaded his status as that of a legally wedded husband for claiming exemption from rape charges and pleaded her illegal status as a wife to escape charges under section 498A. These two diametrically opposite stands to escape penal liabilities were added with a third plea, that since all the alleged offences if any, were committed outside India prior permission from Government of India was mandatory to initiate prosecution as against him. The court accepted all his contentions and dismissed the entire case against him. With respect to the first issue, *i.e*., application of section 498 A to H, the court said that:[6]

> Marriage was solemnized at Gwalior; was consummated there and then both went to Dubai. While at Dubai misbehavior or harassment was only when the complainant had come to know about the first marriage of the man and therefore if the marriage of complainant with him is taken to be solemnized, she being the second wife, the allegation of misbehavior or harassment will not fall under the category of offence punishable under s. 498A IPC.

With respect to the second issue relating to charges of rape the court said, that the alleged intercourse was a result of marriage of complainant with the petitioner therefore firstly, the intercourse with the wife does not fall in the category of rape and secondly, if the intercourse has been committed under suppression of the fact of the first marriage it may fall under the category of offence under sections 493 and 495 of the IPC and does not fall under the category of offence under section 376 of IPC. Further, the cognizance of offence punishable under sections 493 and 495 of IPC cannot be taken on the basis of police report and even if all the above circumstances are treated as legal the trial court is not competent to proceed with trial in absence of any previous sanction of the central government under the provisions of section 188 of Cr PC as all the offences have been committed outside India at Abudhabi where the complainant lived with the petitioner. Since the cognizance of offence under sections 493 and 495 of IPC cannot be taken without the complaint of the victim therefore the prosecution against the petitioner for those offences is a nullity. Holding that the offence of rape was not committed, the court said:[7]

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6 *Id.* at 423.

7 *Id.* at 421.

> a bare perusal of provisions of section 493, 495 of IPC show that the bodily relationship or sexual intercourse by a husband with his second wife falls under the category of offences under section 493, and 495 of IPC and it cannot be treated as rape as defined in section 375 of IPC. It is an independent offence, the cognizance of which can be taken by the court on the basis of a complaint filed by the complainant herself and is also against the settled principles of law.

The decision raises certain crucial issues and appears strange. The verdict of the court that since IPC has already taken cognizance of and contemplated this offence and has made a specific provision for it under sections 493 and 495 the same cannot be covered under sections 375 and 376 as well appears incongruous. This almost absolute exemption from the charges of rape in a marriage that has no legal validity, *i.e*. neither recognized nor permitted and more specifically where the situation and the predicament of the woman is one of husband's making is bewildering in itself. Each separate action of H here amounts to an independent offence, while inducing a woman to marry him through deceitful means, *i.e*., concealment of first marriage remains an offence under section 495, establishing sexual relations with a woman inducing a belief of both being a lawful husband and a lawful marriage while in fact there is none is another offence and does amount to rape as well. In his own defence he claimed that she cannot be called his wife as she was a party to the second marriage and cannot prosecute him under section 498A yet adopted a contradictory saving device in claiming the status of a husband to escape charges of rape. There can never be a more twisted situation. Either there is a legal marriage or it is not there. Therefore, either he is her husband or he is not and if he is a husband for claiming exemption from rape charges he is as well a husband to be penalized under section 498A if proved guilty otherwise. The marriage cannot be deemed to be existing for some purposes and not existing for some others and more specifically when it helps the guilty escape serious criminal charges. If the marriage is deemed to be non existing or is illegal for the purposes of application of section 498A , it would be deemed to be non existing for the purposes of legitimizing sexual relations as well and hence the charges of rape must not only be taken judicial note of but should also be slapped against the man.

It is ironical how lightly the offence of bigamy is perceived by the judiciary and the legislature alike. When there are no mutual rights and obligations in a second marriage, there is no presumption of consent of the woman for establishing and continuing sexual relations. When a man establishes sexual relations with a woman and he knows that neither is he a lawful husband nor is the woman his legally wedded wife, and makes her believe that he is lawful husband and she a party to a legal marriage and armed with all the legal rights that flow from a lawful marriage, the offence of rape is squarely committed. For example, she cannot be called his wife under Hindu Adoptions And Maintenance Act, should she proceed to claim maintenance from him, she would not be called his wife if she seeks maintenance under section 125 Cr PC, even in light of the verdict of the Supreme Court,[8] she would be disentitled to claim sustenance under the Domestic Violence

8 See for example *D Velusamy* v. *D Patchiammal* (2010) 10 SCC 469.

Act, and she would not be his 'widow' in case he dies and the issue arises with respect to succession to his property so there is no reason why she should be treated as his wife only because the man could claim exemption from the charges of rape more specifically when she was kept in dark about the factum of his earlier marriage. Judiciary needs to tackle the issues of consent of women seriously and sensitively. The scheme of the Act shows that though except for providing a protective umbrella of statutory legitimacy to the children born of void and voidable marriages, a woman cannot exercise civil remedies if she is a party to a void marriage. If the second marriage of a man is taken cognizance of under criminal law for penalizing him under sections 493, 494 and 495, there is no reason why he should not be held guilty of rape charges as well. The fact that the court accepted these diametrically contradictory contentions of the man here to virtually absolve him of all criminal charges is extremely disappointing.

**Registration of marriage and deception with respect to marital status as amounting to fraud within the meaning of section 12**

Hindu marriage Act provides for optional registration of the marriage and a proof by way of a public document for its solemnization was never insisted upon. Solemnization of a Hindu marriage has always been a gala affair with considerable participation from family members, relatives, friends and society but with the concepts of marriage now becoming a private affair, presently proving when there is none or disproving when there is marriage is not a tedious task. Legislative[9] and judicial[10] efforts towards making registration mandatory for all marriages solemnized in India is being hailed as a progressive move by providing a clear proof of solemnization of marriage that none of the parties may dispute and which would clear the confusion in cases of claims of maintenance, succession and other death benefits, however, judicial attitude toward acceptance of registration certificate as a proof of marriage has shown considerable ambivalence as many a times they insist on supplementary proof besides registration for recognizing the validity of the same. In a case from Madras,[11] pursuant to the marriage in 2005, a son was born amidst marital discord and the husband filed a petition for restitution of conjugal rights as against the wife. During the pendency of this litigation, he discovered that she had an earlier marriage in 1998, *i.e*., seven years prior to the solemnization of this marriage, with someone else and the same was registered as well under the Tamil Nadu (Hindu Marriage Registration) Rules. The husband filed a petition praying for a decree of nullity on the ground that his consent to the present marriage was obtained by fraud by the wife as she suppressed the fact of being earlier married and made him believe that it was her first marriage. The court held that the marital status of a person at the time of marriage is a material fact and a deception with

9 The recent Registration of (Marriage, Births and Death) Bill, 2012.

10 See for example, *Seeman* v. *Ashwani Kumar*, wherein the apex court has directed the state to take necessary steps to provide compulsory registration of all marriages. The direction stems from the argument that compulsory registration would furnish adequate proof of its solemnization and none of the parties would be in a position to dispute it later.

11 *V D Grahalakshmi* v. *T Prashanth*, AIR 2012 Mad 34.

respect to the same would amount to fraud and granted a decree of nullity in favour of the husband.

However, with respect to proof of marriage through production of the certificate, the court held that mere registration certificate would not conclusively prove that a marriage has been solemnized. It held that registration is only for the purposes of facilitating proof of a marriage and nothing more and would not be a substantial proof of marriage, if one of the party repudiates the same, the rationale being that registration pre-supposes a valid marriage and its performance in accordance with the Hindu rites and ceremonies, therefore the extract of Hindu marriage register , which is the statement of particulars of marriage, is not a substantial evidence to prove the marriage when one of the parties to the document negates it. It may be a proof for all other purposes concerning the third parties to the marriage, but once, one of the parties to the contract denies it, then it is for the other party to prove the very fact of the marriage either under section 7 or section 7A. Merely because the marriage is registered or the particulars relating to the marriage are entered in a Hindu marriage register, it would not be enough to show that a marriage was solemnized as per the conditions laid down in the Act. Therefore, registration of marriage is not a substantial proof of a Hindu marriage, if one party repudiates the same. The effect of production of a certificate is only to the extent that the parties have made statements before the public authority.[12] The wife here had alleged cruelty and torture along with dowry demand as against the husband and had insisted that the story of a prior marriage was floated by the husband in collusion with a third party in order to defame her. She had specifically denied the marriage.

Registration certificate of marriage issued by the registrar is a public document and to call for a substantiating proof in case of availability of a public document appears strange. The court did not go into the question as to whether there existed an earlier marriage of the wife with someone else or not but did take note of the fact that an earlier marriage was registered. Since the wife denied having married earlier, the question whether it was subsisting at the time she remarried or not could not be gone into. She was not even asked whether or not she was present at the time of registration of an earlier marriage before the registrar and whether she had filled in, and signed on the performa required to be filled in at the time of such registration. The court evaded this entire question, and did take into account the certificate for the purposes of formal but not substantial proof of marriage. The issue therefore was not whether there was an earlier marriage existing at the time of the second marriage or whether the earlier marriage was solemnized properly in accordance with the requisites rites and ceremonies but it was that as the wife was a party to an earlier marriage whose existence, status and time of termination was doubtful, concealment of registration of an earlier marriage and obtaining the consent of the husband keeping him in dark about it would or would not amount to fraud? The court here held that concealment of registration of an earlier marriage from the husband amounted to taking his consent by fraud and, therefore, the husband was entitled to a nullity decree.

12 *Id.* at 40.

**Divorce by mutual consent and plea for relaxation of its procedural requirements**

Matrimonial discords are unlike property disputes and have to be decided not mechanically but with sensitivity and carefully keeping in mind that the parties' sufferings under the trauma of broken marriages. The courts' awareness of the practical reality leads to often a display of a practical and liberal attitude while adjudicating upon these matrimonial issues. In *Rekha Devi* v. *Abhishek Mishra*,[13] the parties separated after three years of marriage and a year later filed a petition praying for divorce under section 13. However, the ground on which it was sought to be dissolved was mutual consent, which is specified in section 13B and has a distinct procedural requirement. The family court refused to grant such a decree holding that section 13 does not admit of any such ground as it is a matrimonial misconduct, fault or disability based section. The matter then went to the high court where the parties contended that since after the inception of the suit, two years had passed, they should not be forced to undergo the trauma of litigation by filing the suit once again under section 13B and as all the requirements of section 13B and section 14 were fulfilled the technicalities should not be adhered to and the marriage should be dissolved. The court noted that in such cases normally the matter is relegated to the family court but in the present case it felt the need for change in the judicial process and the need to keep pace with the requirement of times lest the system is rendered obsolete,[14] and people start exploring extra judicial methods. Thus, it was imperative that the faith of the people in judicial system be kept alive by interpreting the laws to procure justice to the litigants speedily. The court then called the parties; and asked from each of them about the feasibility of protecting the marriage and when there was an emphatic no, rather they requested the court to relieve them from the torture of this marriage and a chance to start their lives afresh, and the court adopted a sympathetic attitude. It noted that the parties were highly educated, mature; had no children; were emphatic in not continuing together; were living separately for more than a year and the petition had been presented after the lapse of a period of one year and thus all the requirements of sections 13B and 14 were met and the marriage needs to be brought to an end despite the fact that they had not proceeded under the relevant section. Explaining that the purpose for granting time to live separately was to ensure that the parties had not taken a decision for divorce in haste and if they are allowed some time to live together then tempers may cool down and they may be able to see the things more clearly; and in a pragmatic manner, the court said,[15] that if they are able to live separately for a specified time without any contact then their decision would appear to be of determination and it can be believed that their marriage has broken down irretrievably and the marriage is dead. If educated people like the present one, after living separately for a long period are to be sent back to the lower court for technical formalities perhaps it will defeat the purpose of section 13B of the HMA.[16] Paying glorious tributes to the institution of marriage, and the need for its protection,

13 AIR 2012 All. 124.

14 *Id.* at 125.

15 *Ibid.*

16 *Supra* note 13 at 126.

the court observed that it was envisaged for a happy companionship with both considered to be complimentary to each other and in a country like India the home of a happily married couple was considered to be heaven. The statutory provisions have always tried to protect such an institution and, therefore, divorce was considered an exception. However, in cases where the perpetuation of the marriage would result in causing misery to the parties, dissolution of marriage appears to be the only way to provide peace of mind and future to the young warring parties. Justice in the present case lies in protecting their lives separately rather than forcing them to live together under stress and frustration. The court thus dissolved the marriage between the parties and held that they shall be free to live separately and shall be considered divorced for all legal and practical purposes.

In accordance with the provisions of the HMA, a petition praying for a decree of divorce has to be presented in the court only after the expiry of one year from the date of solemnization of the marriage. This provision is also in accordance with section 13B where a petition for divorce by mutual consent must be preceded by the couple's one year separation. An issue arises; whether the two can be clubbed together, which in fact would mean making 13B subordinate to or subject to section 14 that allows exception in cases of exceptional hardships and permits a couple to approach the court within a period of one year? In *Gijoosh Gopi* v. *Shruthi*,[17] the marriage lasted for a period of less than a day and remained unconsummated. The wife made it clear that she never intended to get married to the husband and had done so only under the pressure from her parents as she wanted to get married to somebody else. Pursuant to the refusal of the wife to both live with the husband or cohabit with him, a panchayat was called and an agreement ensued as between them at the behest of the mediators and they filed a petition praying for divorce by mutual consent in the court. Explaining the factual situations in detail they also filed simultaneously an exemption request under section 14 as it was filed within a period of one year. The Family Court at Alappuzha dismissed the petition saying that section 13 B does not admit of any petition within one year based on exceptional depravity or circumstances. The matter went in appeal to the Kerala High Court which admitted the application and granted the exemption. It held that where an exemption application is filed under section 14, the court is bound to look into whether any circumstances of exceptional hardships are present warranting grant of leave to avoid hardship or depravity of the nature mentioned in the proviso of section 14. As in the present case the marriage did not last even for a day and was not even consummated and the inability to continue with the marriage was demonstrated amply in the mutual agreement, the court held that there was no reason why the marriage should not be brought to an end. As prima-facie there was no indication of any fraud, misrepresentation or concealment of any kind, the lower court was directed to treat the initial petition as the first petition and grant divorce enabling the party to make a second motion under section13B(2) on the expiry of the period of six months.

In complete reversal of the present decision, on parallel facts the Delhi High Court,[18] went strictly by the rule book and refused to deviate from the triple

17 III (2012) DMC 756 (DB) (Ker): ILR 2012 (4) Kerala 329.

18 *Sunny* v. *Sujata,* AIR 2012 Del 146.

requirements of section 13B, that are, first a demonstration of one year of separate habitation, second, post the joint mutual consent petition, a mandatory wait for a minimum of six months and third, a second joint motion reaffirming their plea for a divorce. Here, the parties after realizing their unsuitability post marriage decided to put an end to the matrimony by settling all their clams *vis-à-vis* each other and presented a petition praying for divorce under section 13B before the expiry of one year from the date of solemnization of their marriage and simultaneously moved an application under section 14 for relaxation of its provisions on the ground that they never lived with each other and as mature persons they were firm in their mind and serious enough to appreciate the complete consequences of their action and both with their voluntary consent had decided to put an end to their marriage. Analyzing the language of section 13 B the court held that one of the mandatory condition for the application of section 13 B is that before the presentation of the petition, the parties must have lived apart from each other for a period of more than one year and since this condition is a statutory one and does not admit of any exception, the same not having been met with in the present case, divorce could not be granted to them. A division bench of Altamas Kabir and Chelameswar JJ, held otherwise in yet another case again coming from Delhi.[19] Here petition for nullity was filed by the husband just three months after the solemnization of the marriage. During mediation, they were advised to convert their nullity petition into one seeking divorce by mutual consent. The parties were not living together and by the time the matter reached the apex court it was already more than one year of separation. Here the first requirement of section 13 B was met with and the parties pleaded relaxation with respect to the second requirement. The court deliberated on whether the statutory cooling period of six months could be dispensed away with to suit the parties. Holding in the affirmative they concluded thus: [20]

> In our view, this is one of these cases where we may invoke and exercise the powers vested in the Supreme Court under Article 142 of the Constitution. The marriage is subsisting by a tenuous thread on account of the statutory cooling period, out of which four months have already expired. When it has not been possible for the parties to live together and to discharge their marital obligations towards each other for more than one year, we see no reason to continue the agony of the parties for another two months. We accordingly allow the appeal and also convert the pending proceedings under section 12 of the Hindu Marriage Act, 1955…into one under section 13B of the aforesaid Act and by invoking our powers under Art 142 of the Constitution we grant a decree of divorce to the parties and direct that the marriage between the parties shall stand dissolved by mutual consent.

**Irretrievable breakdown of marriage as a ground for divorce**

Judicial ambivalence continued this year as well with some courts adopting a practical outlook and giving relief to parties from a life of misery and suffering

19 *Davinder Singh Narula* v. *Meenakshi Nangia,* AIR 2012 SC 2890.

20 *Id.* at 2893.

while others refusing a remedy by citing non existence of irretrievable breakdown as a ground for divorce as the chief reason for refusal to grant an escape from an unhappy bondage. The Chhattisgarh High Court refused divorce to the parties on two counts, one that the husband cannot be permitted to take advantage of his own wrong and second that till now irretrievable breakdown of marriage simpliciter was not a ground for divorce under Hindu law.[21] However, a liberal approach of the court was displayed in another case,[22] where it held that if the marriage is dead for all purpose yet one of them is not willing to allow divorce to another and at the same time not willing to live with him as well, it would in itself amount to cruelty. Gauhati High Court held that the continuance of the shattered marriage constitutes cruelty attributable to spouse who resists the prayer for granting divorce. Thus, the agony of breakdown of marriage cannot be excluded from the realm and category of cruelty. Here the parties married, the wife was in gainful employment while the husband for a while was unemployed. After the birth of the twins, the situation deteriorated with the parties making allegations and counter allegations, with the husband approaching the court with the charges of cruelty against the wife. The wife contested the petition and flung unsubstantiated allegations of adultery against the husband. The parties were living separately for 12 years without any hope of the revival of the marriage and all attempts of reconciliation at the hands of the well wishers failed miserably. The lower court granted divorce on the finding that the marriage was dead and even though irretrievable breakdown of marriage was not a ground for divorce, if they were forced to continue with this union it would be detrimental to their interests. At the high court level, the wife contended that since irretrievable of marriage is not a ground for divorce and the husband was not successful in proving cruelty on her part, the lower court's judgment ought to be quashed. Alternately she argued that it is only the apex court which in exercise of its powers under article 42, can allow divorce on ground that marriage has broken down irretrievably in the deserving cases. The high court does not possess such a power and since the legislature consciously has not provided irretrievable breakdown of marriage as a ground for divorce no court except the Supreme Court can dissolve the marriage on this ground, otherwise the action would be contrary to the intentions of the law. The present court dismissed this contention and held thus:[23]

i) It is no more *res integra* that the power of the appellate court is not confined and restricted to the findings of the court subordinate to it but the appellate court has the power to pass any decree and make any order which ought to have been passed or made and to pass or make such further order as the case may require and this power may be exercised by the court notwithstanding the fact that the appeal is against the whole or part of the decree.
ii) That cruelty alleged may largely depend upon the economic and social conditions and the quality of life the parties are accustomed to and the culture and human values to which they attach importance.

21 *Brajendra Singh* v. *Renu Singh,* AIR 2012 Chh 152.
22 *Bhulu Rani Rani* v. *Rabi Dey,* AIR 2012 Gau 128.
23 *Id.* at 134.

iii) As the wife had forsaken the martial relations despite interference of the well-wishers on several occasions the fractured relations indicated irretrievable breakdown and thereby a new category of cruelty against the respondent was established. Even if irretrievable breakdown of marriage cannot be availed of as the ground for seeking divorce, the same can be availed of as cruelty within the meaning of section 13 if it is demonstrated that continuance of such dead marriage perpetrates insurmountable agony.

The court thus dissolved the marriage by confirming the decree of the lower court.

## IV CHILD MARRIAGES

The issue of child marriages raised its head again with prime focus on its validity and entitlement of a major husband to be appointed as a legal guardian of his minor wife before the full bench of the Madras High Court.[24] Here, a 17 years old girl fell in love and on discovering this; the parents proceeded to arrange her marriage with her maternal uncle against her wishes. She on her own went with her boyfriend and married him in a local temple without informing her parents. Her father filed a missing complaint with the local police and slapped kidnapping and rape charges against the boyfriend as he was a major. The girl appeared before the court and stated emphatically, that her marriage and accompanying the husband was purely voluntarily. She further deposed that, she as a bride and also her marriage was accepted by her husband's family members and thus the allegations of illegal detention, kidnapping and rape were entirely baseless. The court sent her to the children's home and the boy was detained by the police. He being a major filed for the custody of his wife and claimed that he being the lawful husband of the wife was her legal guardian and entitled to her custody. The girl maintained that she had attained the age of discretion and was capable of both forming and expressing an intelligent decision, and on her own wanted to be with the husband and categorically refused to go to her parents. The main issues before the court were:

1) Whether a marriage contracted by a person with a female of less than 18 years of age could be said to be a valid marriage and the custody of the said girl be given to the husband if he is not himself in custody?
2) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go to their custody
3) If yes can she be kept in the protective custody of the state?
4) Whether in view of the provision of the Juvenile Justice (Care and Protection of Children) Act, 2000, the court dealing with a writ of *habeas corpus* has the power to entrust the custody of the minor girl to a person who contracted the marriage with the minor girl and thereby committed an offence punishable under section 18 of the Hindu Marriage Act and section 9 of the Prohibition of Child Marriages Act, 2006?

24 *T Sivakumar* v. *Inspector of Police Thiruvallur Town Police Station,* AIR 2012 Mad 62 FB.

5) Whether the principles of sections 17 and 19(a) of the Guardians and Wards Act could be imported to a case arising out of the alleged marriage of a minor girl admittedly in contravention of the provisions of the Hindu Marriage Act?

While the case was pending the husband and his father preferred an application before the court to allow the minor girl to be admitted in the college for an engineering course that was granted. The girl expressed her desire to attend the college from the college hostel and not from her parent's home. The court rejected the guardianship claim of the husband and permitted her to take admission and at the request and assistance of a non-governmental organization to live at their shelter home and attend college in the company of a female constable.

The court traced the entire development of child marriages in India and noted that the original Child Marriage Restraints Act, 1929, that was reformist in character prohibited the solemnization of child marriages but made it neither void nor voidable under this or under the relevant personal laws. The present Prohibition of Child Marriages Act, 2006,[25] PCMA makes a child marriage expressly voidable that can be annulled by a decree of court, though only by the party who was a child at the time of the marriage within two years of attaining majority which would continue till attainment of the age of twenty years. Nobody else is competent to pray for such annulment. Thus this marriage would be deemed to be subsisting until it is annulled by a court of competent jurisdiction and if it is not annulled by that time it would become a full fledged valid marriage but till the lapse of the time period within which it can be annulled it would remain a voidable marriage. Once annulled it would become null and void from retrospective effect, *i.e*., from the date of solemnization of the marriage and would be deemed to be not existing for any time. So with respect to section 11 of the HMA, there is only a declaration of its nullity by the court, under section 12 there is annulment of marriage and unless there is a positive decree passed by a competent court annulling the child marriage, the marriage shall be subsisting.

The court also noted a very important aspect, that the HMA, classifies marriages into three categories, *viz*, valid, void and voidable. It is noteworthy that while in a valid marriage, invoking the remedies of restitution of conjugal rights and for praying for a decree of divorce, the legislature has used the expression 'husband and wife' to denote the spouses but in void marriage under section 11 and voidable marriages under section 12 the expression 'husband and wife' is not used by the legislature and the parties to the marriage have been described as 'either party to the marriage'. This in the opinion of the court depicts the intention of the legislature not to grant a full fledged status of 'husband and wife' to parties to a void or voidable marriage. They observed thus:[26]

> The expressions 'husband and wife' have not been defined anywhere in the Act. But in sections 9 and 13 of the Act these two expressions have been used. Incidentally, we may notice that reliefs under sections 9 and 13

25 Hereinafter referred to as the PCMA.

26 *Supra* note 24 at 72.

> of the Act are available only to parties to a valid marriage. It is by virtue of such valid marriage, the parties to marriage acquire the status of husband and wife. Obviously, this is the reason why in sections 9 and 13 of the Act, the legislature used the expressions husband and wife. But the legislature has intentionally omitted to use these expressions viz husband and wife in section 11 and 12 of the Act. In section 11, the expression used is either party thereto against the other party. In section 12, the expressions used are "petitioner" and respondent. There can be no doubt that parties to a void marriage do not acquire the status of husband and wife at all since the marriage is *ipso jure* void. It is because of this reason in section 11 of the Act the legislature has consciously omitted the expression husband and wife and instead has used the expression 'either party thereto against the other party'.

Similarly, the court said that in section 12 of the Act had it been the intention of the legislature to give the parties to a voidable marriage, the full status of husband and wife the legislature would have used the expression husband and wife. The omission to use these two expressions in section 12 perhaps would only reflect the intention of the legislature not to give the full status of the husband and wife to the parties to a voidable marriage. Sections 9 and 13 are in *pari materia* in so far as the expressions referable to the parties to the marriage are concerned whereas sections 11 and 12 are in *pari materia* in terms of the expressions referable to the parties to a voidable marriage. Even in PCMA the legislature has consciously omitted the expressions 'husband and wife' and have instead used the expression 'contracting party'. Thus to some extent PCMA is *pari materia* with HMA as far as the use of the expressions in section 11 and 12 are concerned. The court said that it would strengthen their conclusion that 'the male who contracts a child marriage of a female child cannot attain the full status of a husband like a husband of a full fledged valid marriage, but by the said marriage, though he burdens himself with legal liabilities arising there from, he acquires only limited rights and thus concluded that even though a child marriage is voidable and though such voidable marriage subsists and though some rights and liabilities emanate out of the same until it is either accepted expressly or impliedly by the child after attaining the eligible age or annulled by a court of law such voidable marriage cannot be either stated to be or equated to a 'valid marriage' *strict sensu'*.

With respect to the second issue as to whether the custody of a minor girl in a voidable marriage be given to the husband if he is not in custody himself, and where the minor wife has attained the age of discretion and refuses to go into the protective custody of her parents, the court explored the arena of natural guardians under the HMGA and also the Guardian and Wards Act and noted that in case of a minor wife the lawful guardian is her husband. However, differentiating the situation from that of a lawful marriage and a void or voidable marriage, it noted that a child marriage is generally voidable and can become valid only after the attainment of the age of majority and two years thereafter, and in certain cases a child marriage can even be void and in such a situation where the marriage is not perfectly valid, the husband cannot be considered a lawful guardian of his wife. Similarly, a male

who contracts a marriage with a minor wife such marriage being voidable is not a husband of the minor in the legal sense and, therefore, as per the HMGA, he will not acquire the status of the natural guardian of such child at all. The court observed that for the first time under PCMA the status of child marriages has been clarified. Thus till 10.01.2007 all child marriages that were treated as valid were thereafter made voidable generally whether solemnized before or after the commencement of the Act and void under certain specific circumstances. So the husband took the status as a natural guardian of a minor wife till the status of the child marriage was perfectly valid, but post enactment of PCMA, the situation has changed and despite the fact that section 6 (c) of the HMGA has not been expressly repealed and is present on the statue book it needs to be relooked in light of the provisions of the PCMA declaring the marriages as voidable and even void. In addition the fact remains that child marriage is an offence and the same is cognizable without a police report. Upon any information therefore, the police is bound to register a case and investigate the matter. The scheme of the Act perceives an adult man marrying a minor girl as an offender and, therefore, punishable. Therefore, an adult male who marries a female child cannot be allowed to enjoy the fruits of such marriage because the solemnization of the marriage itself is an offence in so far as he is concerned. If such a husband is also to be treated as the lawful guardian of a minor wife it would amount to giving premium for the offence committed by him. A law cannot be interpreted so as to make it redundant or unworkable or to defeat the very object of the Act. The court held that by committing the offence of marrying a child wife, the adult male cannot be called her lawful guardian and to this extent after the coming into force of the PCMA, section 6 (C) of the HMGA stands repealed impliedly.[27]

The court further held that even in view of the provisions of the HMGA, a minor wife cannot be given in the custody of the adult man claiming to be her husband unless she is already in his custody with the consent of her parents. Thus unless the twin conditions, namely, the consent of her parent and she being in the custody of the husband already are met with under HMGA, the man cannot claim even the temporary custody of the child wife. In a parallel case,[28] a full bench of the Delhi High Court was again confronted with the issue of validity of the child marriages wherein a minor girl on her own after eloping with her boyfriend had married him without parental consent raising the issues of his criminal liability and at the same time his assertion for his custody as her natural guardian. Holding the marriage as voidable, the court observed that the object behind enacting PCMA was to curb the menace of child marriages which is still prevalent in the country and is most common in rural areas. On the other hand, majority of cases of child marriages that are brought before the court are the ones where young girls primarily in the age group of 14-18 elope with their boyfriends and their parents promptly lodge missing reports and criminal cases against the boyfriends. Thereupon a second tussle ensues between the parents on one hand and the husbands on the other hand claiming custody of the minor girls with fiercely demonstrating the unwillingness

27 *Id.* at 74-75.

28 *Court on its own motion (Lajja Devi)* v. *State*, III (2012) DMC 510 (DB).

to go to the parents and choosing to be with the husbands. The court noted that[29] very often these marriages are inter-religion, inter-caste and take place in spite of formidable and fervid opposition due to deep-seated social and cultural prejudices. In such cases, the courts face a dilemma and a predicament as to what to do. This question is not easy to answer as no straight jacket formula or answer can be given and it depends upon the facts and circumstances of each case. The decision will largely depend upon the interest of the boy and the girl, their level of understanding and maturity, whether they understand the consequences, *etc*. The attitude of the families or parents has to be taken note of, either as an affirmative or a negative factor in determining and deciding whether the girl and boy should be permitted to stay together or if the girl should be directed to live with her parents. Even though the last direction may be legally justified, but for sound and good reasons, the court has option(s) to order otherwise. In many cases, such girls severely oppose and object to their staying in special homes, where they are not allowed to meet the boy or their parents. The stay in the said special homes cannot be unduly prolonged as it virtually amounts to confinement, or detention. The girl, if mature, cannot and should not be denied her freedom and her wishes should not get negated as if she has no voice and her wishes are of no consequence. The court while deciding, should also keep in mind that such marriages are voidable and the girl has the right to approach the court under section 3 of the PCMA to get the marriage declared void till she attains the age of 20 years. In those cases where the girl, does not want to go back to her parents, question may arise as to whether in such circumstances, the custody can be given to the parents of the husband with certain conditions, including the condition that husband would not be allowed to consummate the marriage. If the girl is more than 16 years, and makes a statement that she went with her consent and the statement and consent is without any force, coercion or undue influence, the statement could be accepted and court will be within its power to quash the proceedings under section 363 or 376 IPC. Here again the court has to be cautious and no straight jacket formula can be applied and attending circumstances including the age, maturity, and understanding of the boy and the girl, their social background have to be taken into consideration. However, where the girl is below the age of 15 years, consummation is an offence under section 375 and no exception can be made to the said constitutional mandate and the same has to be strictly and diligently enforced. Consent in such cases is completely immaterial, for consent at such a young age is difficult to conceive and accept. It makes no difference whether the girl is married or not or is subject to which personal law. Therefore the girl, if mature, cannot and should not be denied her freedom and her wishes should not get negated as if she has no voice and her wishes are of no consequence but in cases of a very young girl, her consent does not matter and an offence under section 376 IPC is made out. The charge sheet cannot be quashed on the ground that she was a consenting party.[30] In such cases where the husband is an offender, he cannot be appointed as her legal guardian.

29 *Id.* at 78-79.

30 *Id.* at 79.

The reasoning and the conclusion of both the courts are more or less similar and clarifies and sets at rest the confusion and conflict of the status of a child marriage under the PCMA and the relevant personal laws to which the parties are subject to. It is high time that the legislature makes the law certain by removal of inconsistencies leading to uncertainties of law by making appropriate amendments.

## V MAINTENANCE

**Claim of maintenance under section 125 Cr PC by a woman of an annulled marriage**

Marriages under Hindu law are categorized in three categories, valid, void and voidable. A wife of a valid marriage is always entitled to claim maintenance from the husband, during the subsistence of the marriage and also post its termination till she remains unmarried. After the culmination of the marriage, the rights of an ex-wife to claim maintenance from the husband are well secured through the HMA. As stated earlier and also under section 125 of the Cr PC section 125 of the Cr PC, includes within the term 'wife', a divorced wife as well. It does not, however, include a woman who has been a party to a voidable or a void marriage. The entitlement of a woman to claim maintenance after she obtained annulment of her marriage was one of the focal issues in a case from Kerala. Here,[31] a woman after securing a decree of nullity claimed maintenance from the former spouse under section 125 of the Cr PC. The main issues before the court were:

1. Is the wife in a voidable marriage annulled under section 12 of the HMA entitled to claim maintenance under section 125 of the Cr PC?
2. Can the statutory compassion in favour of women in distress in a terminated marriage and the legislative anxiety and concern to prevent vagrancy against women persuade the courts to bring such women in an annulled marriage within the sweep of the definition of deemed wife in expl(b) to section 125 Cr.PC.
3. Can the changing norms in society evidenced by subsequent statutory instruments persuade the courts to expand entrenched concepts in society.

In the present case five months post marriage, the wife prayed for a decree of nullity on grounds of impotency of the husband and also applied for maintenance under section 125 of the Cr PC. Both were granted in her favour as *ex parte* decisions and the husband was directed to pay Rs 1000/- per month to her. The husband applied and prayed for restitution of conjugal rights that was dismissed in view of the nullity decree. He did initially pay the directed maintenance amount to the wife but later stopped paying. The wife then filed another application for recovery of the balance and for continuing maintenance. The man chose to contest this application of the woman by contending that the order of the magistrate granting maintenance to the ex- wife was void in light of the language used in section 125 of the Cr PC that includes only a divorced wife and does not include a woman who has been a party to a voidable marriage. The court dismissed his contention and ruled in favour of the wife on two counts. Firstly, that since he did comply with the

31 T *K Surendran* v. *Najima Bindu*, 2013 (1) crimes 1.

order initially without challenging it, he cannot later retract from it and secondly, that a woman in a voidable marriage is entitled to claim the benefit of section 125. The court said:[32]

> Orderly procedure and discipline must persuade this court not to reopen the old and stale challenges which have not been promptly raised in accordance with law. Jurisdiction under section 482 Cr PC and/or Art 226 /227 of Constitution cannot be invoked by the litigants who have slept over their rights for a substantially long period of time and have complied with the impugned order without demure all along.

On the second aspect the court explored the object of section 125 and observed that in a socialist welfare state, the state has the obligation as *patron patriarch* to prevent destitution and as it may not have the means and schemes to discharge that duty, it outsources that obligation by legislation to near relatives having sufficient means. Legislature's true intention, therefore, was that the expression 'divorced wife who has not remarried' actually means wives of terminated marriages. The court observed that a woman under the patriarchal structure is treated as a sub-person always in need of support and patronage from another and the unfortunate plight of such deprived, underprivileged or marginalized feminine section of humanity cannot be ignored.

On the technicality of interpretation the court said that as the ascertainment of legislative intention, through words used is often inadequate, the mission of the interpreter/adjudicator, who should not be unequal to the task, should have the constitutional vision and, therefore, must resonate to the frequency of the legislative idealism. The court further noted with concern the limitations of words and semantics and that no legislature can use a language which covers all situations and can offer precise and specific resolution for the myriad and varied situations that may arise before the adjudicator/interpreter when law actually operates. The axim that the legislature uses appropriate language and that the intention of the legislature is fully expressed in the language used in the statue is trite. These are doctrines of expediency and not invariable truth, but all this cannot persuade an interpreter to abdicate his jurisdiction and obligation to decipher the meaning of meanings and reasons of reasons. An interpret must have the trained competence to jump over insignificant fences and lead the polity to the legislative destinates. An interpreter who succumbs to technicality and throws his hands up too easily lacks the requisite constitutional commitment, foresight and vision of the promised constitutional statutory destinations. Imperfections and inadequacies of language cannot deter an interpreter when the legislative intentions and purposes are clearly identifiable.

Comparing the valid, void and voidable marriages, the court proceeded to treat their effects and rejected the contention that nullity and dissolution under section 13 are different and leads to differential consequences. They observed that there was a very narrow or no difference between the status of a divorced woman and the women whose marriage has been annulled by a decree of nullity. It then drew parallels from the Prevention of Domestic Violence Act, 2000 (DVA) and observed that in

32 *Id.* at 6.

an annulled marriage it could be said that the woman was living with the husband in a relationship in the nature of marriage that was duly solemnized and would therefore be entitled to claim maintenance from him. The court also rejected the contention of the husband that once a marriage is annulled under section 12, it ceases to exist in the eye of law and, thereafter, it is impermissible to reckon such voidable marriage as valid for any purpose whatsoever and observed that once a marriage is solemnized it cannot be wiped off totally and restore the parties to the former status as they had before their marriage and overruled a number of earlier judicial precedents in this regard.[33] The court also lamented the fact that in India, virginity of the girl is given due importance and therefore whether the marriage is dissolved by a decree of annulment or by divorce, her maidenhood is presumed to be lost and her chances of entering into matrimony a second time are as socially inconvenienced as it would be in the case of divorce. Her transformation from a maiden to a woman with her remarriage an uphill and difficult task would practically leave her in lurch till such remarriage. The court then drew comparisons from section 16 of the HMA noting that children born of void and voidable marriage are legitimate and said:[34]

> All that we intend to take note is that the legislature itself has equated the consequences of a decree annulling marriage under section 12 to a decree for dissolution (divorce) under section 13 of the HMA for a specific purpose. ..So far as the legitimacy of children born, section 16(2) declares that there is no distinction between a marriage annulled under section12 and a marriage dissolved under section 13 That to our mind is of crucial relevance.

The arguments of the court can be summed up as follows:

1. The object of the legislation is to prevent vagrancy and destitution of woman in terminated marriage.
2. The concern of the legislation in delegating their powers of providing means of support to unfortunate women on their husbands or other male relations is within the realm of section 125 of the Cr PC.
3. The phrase 'divorced woman' actually means 'women in a terminated marriage', as even inclusion of divorced wife in section 125 is due to legislative technique of inclusive fiction as despite their inclusion they are not wives "strict sense" and thus such inclusive fiction should not be restrictive.

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33 *Surendran TK* v. *State of Kerala*, II (2009) DMC 863: 2009 (3) KHC 569 which was a case under DVA; *Madan* v. *State of Rajasthan,* 1993 (3) Crimes 372; *K Sivarama Krishna Prasad* v. *K Bharath,* 1986 CrLJ 317; *Thulasi Bai* v. *C V Manoharan,* 1989 (3) Crimes 391; *Jose* v. *Alice*, 1988 (2) KLT 890 and *Amina* v *Hassan Koye,* 1985 KLT 596. See para 47 of this case wherein the court had observed while denying maintenance to a woman who was five months pregnant at the time of marriage the court observed: We find it difficult to direct a person who has innocently gone through the process of a contract of marriage with a lady pregnant by whoredom to pay maintenance allowance to her.

34 Para 48.

4. No legislation is perfect and has to be meaningfully interpreted by the interpreter not mechanically but to further the obligation and intention of the legislature. It is possible to be selective in picking out that interpretation out of the two alternatives which advances the cause.
5. There is no distinction between an annulled marriage and a marriage dissolved by divorce as far as the consequences on a woman are concerned with respect to the social stigma and her chances of remarriage as despite annulment the wife cannot for practical and societal purposes be restored to the unmarried status or as a maiden. In the societal perception, loss of virginity would be presumed and her remarriage would be saddled with all its inadequacies and inconveniences.
6. There is no distinction between the children of divorced parents and those born in annulled marriages under section 16 of the HMA.
7. A de-facto wife is also entitled to claim maintenance from her partner under the DVA,[35] and what is important is the formal entry to the legal and valid institution of matrimony and mere relationship in nature of marriage have to be distinguished from formal or legal marriage.[36]

The present judgment creates a fictional inclusion in section 125 and its attempt to include such non existing phrases in a criminal enactment is totally unwarranted. A wife in an annulled marriage cannot take benefit of section 125 as it mentions categorically the term 'wife' and it including a 'divorced wife'. No other category of wife has been included here and thus neither the party to a void nor of voidable marriage can avail this section. While it cannot be disputed that the intention of the legislature is prevention of vagrancy and destitution more specifically of women who have been part of a lawful marriage yet the classification of marriages into valid, void and voidable and the resulting consequences can neither be ignored nor obliterated. The three categories of marriages are well defined and while the void marriage does not require a permission of the court for its annulment, a voidable marriage cannot be terminated save by a competent court's decree. The grounds on which a voidable marriage can be annulled are again clearly specified and are sharply distinguished from the grounds of divorce. The annulment grounds indicate the defective nature of marriage where the very entry to it was either through deceitful means or where maintaining a healthy sexual life was impossibility due to impotency of one of the parties to the marriage. The grounds of divorce on the other hand are based on the unlikelihood of continuity of marriage owing to post marital incompatibility resulting primarily due to the misconduct /disability associated with one spouse or by a mutual consensual decision for its termination. Secondly, while in a prayer of annulment the constraint of time limits under section 14 are not applicable and the affected/aggrieved party can file a petition even soon after its solemnization, for presenting a prayer for a decree of divorce, the spouses have to wait for a minimum period of one year, before they become entitled to even approach the court unless the case is of extreme hardship. The term extreme hardship and the exception created in such eventualities clearly demonstrate the

35 Herein after referred to as the DVA.

36 Para 28.

perception of situation under which a marriage if solemnized would-be termed voidable as of extreme hardship that can be avoided as soon as possible. Thus judiciary tends to discourage hasty decisions of separation but only when there is a prayer of grant of a decree of divorce but they never apply the same yardstick in case of a voidable marriages. On the other hand, in complete contrast /reversal of the situation postulated, section 12 (c ) and (d) require the affected party to present a petition praying for an annulment of their marriage within one year of discovery of fraud or cessation of force, indicating that a defective marriage be annulled as soon as possible. The remedy of annulment is lost if the time limit is not adhered to. Thus the conclusion of the court that there is no difference between a marriage that is annulled or is dissolved by a decree of court is incorrect.

The second apprehension of the judiciary in the case was with respect to the prevention of vagrancy or destitution in cases of women who have been party to a voidable marriage and is appears to be again unfounded. The legislature in its wisdom and rightly so has taken care of it adequately. Section 125 is not the only provision enabling a woman to claim maintenance. As far as Hindu women are concerned the scheme enabling them to enforce their maintenance rights as against the other party to the marriage are clearly earmarked and in the nature of affairs plenty and sufficient. The judicial anxiety of a woman becoming destitute and vagrant if section 125 Cr PC is denied to her is totally misplaced and unreasonable extension or widening of a clear provision is thus unwarranted. Once the marriage is solemnized, woman in each category of marriage, *i.e*., valid, voidable and void enjoy secured maintenance rights as against the male party. In case the marriage is valid, sections 24 and 25 of the HMA, 1955, section 18 of the HAMA, 1956, section 125 of the Cr PC and now the DVA can be availed of by her. Where the marriage comes to an end by a decree of divorce, section 18 of the HAMA, 1956 ceases to be available to her but sections, 24 and 25 of the Hindu Marriage Act, 1955, section 125 of the Cr PC and the DVA can still protect her and where the marriage was void or voidable sections 24 and 25 of the Hindu Marriage Act, 1955, and the DVA will come to her aid. Just like section 18 of the Hindu Adoptions and Maintenance Act, 1956, cannot be availed of by a divorced woman, similarly, section 125 Cr PC cannot be used by a woman who has been a party to a void or voidable marriage. Thus the apprehension of the judiciary that unless the interpretation of section 125 is distorted, a woman in a voidable marriage would become either destitute or vagrant is totally unfounded.

The third reasoning of the court that the real meaning of the term 'wife' includes a woman who has been divorced or separated from the husband includes and means a woman of a terminated marriage as well appears flawed. The term divorce and termination of marriage are not synonymous and refer to two entirely different situations legally. A voidable marriage is deemed to be non existing from its inception when annulled while in a divorce, marriage culminates from an effective date of pronouncement of the decree of divorce and has a strong bearing on the status of a woman of such relationship as also the children born of such union. The reasoning of the court that due to section 16 there is presently no distinction between the rights of children of valid and void/voidable marriages is again incorrect. The proviso to section 16 itself creates a distinction and creates classes of legitimacy from amongst the children of the three categories of marriage. If there was no

distinction between children born of annulled marriages and marriages that have been dissolved by a decree of divorce there was no necessity for the legislature to confer statutory legitimacy on children of voidable marriages as no explanation is required in case where parties are divorced and have children. Secondly, while children of divorced parents continue to inherit the property of not only their parents but of all the relatives of the parents in case of their demise if and when the occasion arises; enjoy the coparcenary rights as well by being members of the joint family of the father or the mother as the case may be, children of annulled marriages by a clear statutory exclusion,[37] are specifically denied inheritance rights in the property of the relatives of the parents confining the statutory recognition of their relationship with only the parents. Such children can neither be coparceners nor can be members of the joint family of their parents as that extends and establishes their relationship beyond that of their parents with every member of the family including coparceners.

The categorization of marriages into these three classes is not a mere technicality but is based on reasoning and justification. Marriages brought about by force or fraud or where the consent is tainted because of mental disorder /impotency of one of the parties to the marriage stand on a totally different platform than valid marriages, where the fault /misconduct /incompatibility comes post marriage. These are marriages where the consent or entry is voluntary so its inception was lawful / legitimate. Its termination is always linked with post marital misconduct while the very fact or the way voidable marriages are performed is unlawful. These are marriages brought about without the consent/willingness of the parties and are terminated by the court which in fact is helping the aggrieved party to put an end to the misery and relationship brought about by force/fraudulent means. Where parties willingly enter into a lawful union and an incapability to continue with the marriage dawns on them post marriage, due to situational or behavioral adversity, it is differential as establishing a relationship in the first place through force or deceitful means as this necessitates a total wiping of or complete erasing of this farce through judicial termination. Elements of patience, adjustment or normal wear and tear of married life recognized in a valid marriage and sometimes even advocated are anti-thema in a voidable marriage. The court's concern for prevention of vagrancy and destitution of women in an annulled marriage has resulted in twisting clear provisions that appears to be unnecessary. Lawyers are supposed to proceed under appropriate sections, as in this case either section 25 of the HMA or the DVA, are clearly applicable to help this category of women. Instead of guiding litigants to proceed under relevant provisions of law, clarity and certainty of a legal provision should not be sacrificed at the altar of misplaced sympathy.

**Entitlement of a woman living in adultery**

Entitlement of a woman to claim maintenance in a valid yet failed marriage was again the focal point in another case from Bombay.[38] Here, post marriage the parties lived together for a period of four years and during this time period a girl

37 See the proviso of s.16 of HMA, 1955.

38 *Subhash* v. *Sangita Subhash Pote* III (2012) DMC 265 (Bom): 2013 Bom. Cr (Cri) 225.

child was born to them. Thereupon, the wife along with the baby left the husband and moved an application under section 125 of the Cr PC, claiming maintenance that was granted in her favour. The husband complied with the order and paid maintenance. Six years later, he applied for divorce and got it ex-parte in 1998. The wife who was unaware of the said divorce challenged it ten years later in 2006 but the same was dismissed due to delay and latches. Meanwhile the husband came to know that after leaving him, his wife had started living with another person who was a widower having two children. The husband now stopped paying maintenance to her. The wife continued living with her paramour till his death in 2002. In 2006, she moved an application against the husband whom she had left to live with her paramour for execution of the maintenance order that was passed in her favour in 1997. The husband in the face of the execution of maintenance order at the instance of the wife sought its cancellation on the ground that the wife was openly living in adultery with another man and thus had forfeited her rights to claim maintenance from him. The court held that if the wife was living in adultery with another person for a few years after she obtained orders of maintenance under section125 of the Cr PC against her husband, she is still entitled to continue similar rights of maintenance after she stops such living in adultery. As and when a wife starts living in adultery, it is necessary for the husband to approach the court and get the earlier order cancelled but here he did not do so and now he cannot deny the obligations to maintain her as she is still his wife. The court further noted,[39] that with the death of her paramour, her status as live in partner of such person came to an end, *i.e*., she stopped living in adultery. In such a situation if she proves that she is destitute and has no source of income she is entitled to look to her husband for maintenance and section125 does not prohibit such a demand.

The decision appears to be harsh and out of sync with the spirit of section125. Recognition and entitlement of rights in an intimate physical relationship are recognized only by a legal marriage. Secondly, mutual rights and obligations are enforced upon considerations of fidelity and cohabitation more specifically in cases of claim of maintenance under section 125 Cr PC and her conduct remains relevant even if she is divorced. Section 125 Cr PC provides:

> Order for maintenance of wives, children and parents.
>
> (1) If any person leaving sufficient means neglects or refuses to maintain-
>
> (a) his wife, unable to maintain herself, or …….
>
> Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.
>
> Explanation. If a husband has contracted marriage with another woman or

39 Para 5.

keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

The term used here is 'living in adultery' and the case is squarely covered here. A husband or a former husband cannot be saddled with the responsibility of maintaining an ex-wife who had been openly and brazenly living with another man. Even under the civil law, *i.e*., section 25 of HMA, 1955, post divorce conduct is extremely relevant and even a single act of sexual indiscretion may result in the forfeiture of the rights of maintenance of such a woman. The legislature keeps the tests of sexual fidelity as one of the conditions of eligibility to claim maintenance even during the subsistence of the marriage and post its culmination. The facts of the case showed that the wife pleaded ignorance of an ex-parte divorce and to begin with continued receiving maintenance from him while living with somebody else in an intimate physical relationship. Marriage and matrimonial duties are based on sound philosophy of law that this unique relationship carries some rights and along with it responsibilities as well. No right is without a matching obligation and enforcement of rights cannot and should not be allowed to be realized only owing to notional ceremonial bondage. Where the wife without the fault of the husband walks out on him taking away his daughter as well to live with her paramour in a marriage like relationship, she by her conduct forfeits her rights to claim maintenance for herself from the husband. Laws can never be enforced creating an inequity. A man who is gainfully employed is under a legal obligation to maintain his dependant wife. Section 125, shows that he can offer to do so on the condition that the wife lives with him and he would be under no obligation to maintain her if she does not live with him without a reasonable cause or where she is living in adultery. Secondly, it is a well entrenched rule of natural justice that any party who approaches the court for a remedy must approach the court with clean hands. A woman living in adultery while the husband is not at fault cannot and should not be allowed to saddle him with responsibility of her maintenance, so that she can continue the liaison with another man. Such an approach is anachronistic and reactionary. Even upon the death of the paramour she cannot be allowed to claim maintenance again from the man whom she left in the first place for no fault for his. A balanced approach must be taken by the court and granting maintenance to her appears not only illogical and irrational but illegal as well. It is like adding insult to the injury to the former husband. Where legal provisions put severe constraints on a woman who is guilty of desertion or adultery there is no reason why judicial widening of a clear provision be made to enrich undeserving claims. Past behavior becomes imperative to

determine glimpses of future eventualities and must be analyzed adequately and fairly. If the past conduct was irreprehensible, courts as courts of equity, justice and good conscience cannot ignore it and it would be highly inappropriate to saddle a man with economic responsibilities of maintaining a woman who walks out on him, lives with her paramour defying legal obligation of cohabiting with the husband and then post death of the paramour and post divorce claims sustenance from him. Judiciary needs to be extremely vigilant in tackling cases of this nature and should not be seen helping or facilitating women abuse the whole process of law at their convenience.

## VI HINDU MINORITY AND GUARDIANSHIP ACT

**Custody and Guardianship**

In all custodial battles, the predominant deciding consideration remains the welfare of the child. Though popular perception leans in favour of the mother as the preferential guardian, the courts hesitate to disturb the continuity of the child with the current custodian. Where the child is of the age /discretion with ability to clearly demonstrate or express his views or indicate her preferences, the courts usually give in to such wishes. Thus where,[40] the children, (two daughters) pursuant to matrimonial discord between the parents, followed by a quick divorce remained with the father and during court's interaction expressed categorically their desire to be only with the father the court respected their wishes. The court noted that the daughters had practically no contact with their mother for a very long time, and if in accordance with the prayer of the mother to regain their custody, the daughters were directed to go with her, it may adversely affect them and it was in their welfare that their continuity should not be disturbed and their wishes be considered and observed. The court held thus:[41]

> We feel that if the children are forcibly taken away from the father and handed over to the mother undoubtedly it will affect their mental condition and it will not be desirable in the interests of their betterment and studies. In such a situation the better course would be that the mother should first be allowed to make initial contact with children, build up the relationship with them and gradually restore her position as their mother.

Taking cognizance of the importance of the mother in the life of the daughters, and the need for both mother and daughters to establish a connection with each other, the court granted visitation rights to the mother to meet the daughters at the Supreme Court's mediation center. Similarly, the apex court in another case[42] preferred the father over the mother taking into account the welfare of the children. Here, two children who bore the maximum brunt of their parent's matrimonial discord were virtually on the verge of being separated from each other if the parents had their way. Two sons aged 15 and 9 were closely bonded together. In an interaction

40 *Gayatri Bajaj* v. *Jiten Bhalla* AIR 2012 SC 541.

41 *Id.* at 342.

42 *Shaleen Kabra* v. *Shivani Kabra,* AIR 2012 SC 2467.

with the judge in his chamber, the elder son expressed his strong desire to be with the father. The father who was a civil servant and living with his own father, the court said was in a better position to look after the children. The husband had contended that the mother would not be in a position to give a healthy atmosphere of upbringing to the children both due to financial disparity in their status and due to allegations of adulterous conduct. The court said that the paramount consideration in cases of custody of the children is their welfare and nothing else. In the interest of both the children, their growing up together was highly desirable. The father was granted the custody of both the children despite the protests from the wife that he himself being in a very senior position, would not be able to look after the children personally. The husband dependency on his educated though old father to support him in looking after the children was accepted by the court in the interests of the children. The mother was granted visitation rights in the Supreme Court mediation center and three days company of the children during vacations. Judicial ambivalence and uncertainty of law bared by another decision coming from Bombay High Court[43] saw ruthless separation of brothers of tender ages of five and two and a half years. Both the children were with the mother who like countless Indian women was unemployed and pursuant to matrimonial discord went back to her parents place in a village with a tag of complete dependency. The husband had a secured economic status with 12 acres of land and a regular job. The younger son was suffering from paralysis of one leg. The husband's secured status and the ability to provide a better future prompted the judge to come to a bizarre decision. He separated the brothers, and held that the elder would go to the father and the younger who is suffering from paralysis would go to the mother as he needed constant attention of the parent. The elder would be in a position to be well educated because of the company of financially secured father and with the chance of being in a big city. He was being giving education in a convent school till he was with the father. However, the place where the mother resided was a village with no good facilities for the growing children in terms of education. The father contended that he had sufficient income to educate both the children and the mother did not challenge his custody application. The family court had granted the custody of both the children to the mother, and the money that she received from the father, was spent on purchasing books, bags etc for the children, but virtually reprimanding the family court the present court said that the family court had lost sight of the fact that the father was earning enough to provide food , shelter and clothing for his children; the six years old elder son was hale and hearty and the younger son had paralysis in one of his legs and observed thus:[44]

> ….. It would not be in the interests of justice to grant custody of both the minor children to the father as the mother and father should equally have the company of their children. Since there are two sons born to the parties, in the interest of justice, it would be necessary to grant the custody of the elder son to the father and permit the mother to have the custody of the

43 *Deepak Satyanarayana Sharma* v. *Kanchan,* AIR 2012 Bom 175.

44 *Id.* at 177.

> younger son, as the elder son can be looked after by his family members when he is at work. The elder son can also be better educated in the progressive city like Nagpur as he is not suffering from any ailment like the younger son. Since one of the legs of the younger son is paralyzed, he would throughout require the attention of one of the parents.

The court further observed that it was better if the custody of the younger son is retained by the mother so that she can look after the son in a better way and also educate him in a village since he suffers from paralysis and said[45]: "that is so because Mohit, the younger son may not be in a position to cope up with other normal students studying in the city like Nagpur."

The judgment is sad, as it is both inhuman in substance and disrespectful to the children with disabilities. When there are two siblings who become the tug of war between the parents, in their interests, they should never be separated more so when they are of such tender ages as 6 and 3. To separate both the kids from each other would have a devastating effect on the child psychologically, and for a son of around six years to be separated both from the mother and the younger brother would cause irreparable harm to him. Secondly, people with disabilities and their interests must be tackled with extreme sensitivity by the judiciary. The observation that the elder child being healthy can be better educated in a big city and would be at a disadvantage while in a village and the younger with disability can be well educated in a village and would not be able to cope up in a big city with normal children is both shocking and condemnable. The court thus said:[46] "Family court had lost sight of the fact that educational facilities at Nagpur would be better than the educational facility at Mangwadi…"

A child with physical challenges is perfectly normal and to hint otherwise is inappropriate. There cannot and should not be any disparity between the educational standards of two siblings with such closeness in their age. To suggest that for a physically fit child city education is desirable and his interest would be adversely affected as villages are not in a position to provide good education and for a slightly physically challenged, a village education would be alright is preposterous. A child with physical challenges would as well require the same kind of educational levels as any other sibling of his.

Secondly, to separate the children of such tender ages who can find solace in the company of each other after being left with only one parent is directly against their interests or welfare, a golden rule that must be adhered to in cases of deciding the custody issues. A child needs the support of not only his mother but more of his brother as he is of comparable age and elder to him. Siblings can be a source of tremendous support and for a slightly challenged boy of 3 years, separation from an elder brother whom they always consider a great mentor would be like a major blow and for an elder brother to be deprived of the younger one, would be the same. Children are not like material assets to be distributed like objects as between the parents in the event of their separation. For the court to observe that since there are two sons of the parties in the interests of justice it would be better that each one

45 *Ibid*.

46 *Id*., para 8.

of them gets a child, shows that this decision appears to be taken not in the interests of the children but is from the point of view of the parents and the issue appears to be whether the parents should or should not be deprived of the company of both the children. In rejecting the argument of the father that since the younger son required medical treatment, was already getting it at a good hospital in Nagpur, and for the court to order such child's removal from Nagpur and to be at a village where medical facilities are not available, is like punishing the child with disabilities more so when the mother had not even opposed the custody application of the father. The father had wanted the custody of both the children, for the elder son to provide him with good educational facility and for the younger that probably was not till then in a school to provide and continue providing good medical facilities. The present decision is highly condemnable both in substance as also in spirit. This mechanical approach goes against the interests of the younger son, as he was separated from his elder brother, was deprived of the chances to have medical facilities and good education. To add insult to the injury, the court's suggestion that a person with disabilities would not be able to cope up with normal children is highly deplorable. The court must keep in mind that they are dealing with children of tender ages who have their whole future ahead of them. Their interests can be best served if siblings are kept together, are given the same levels of educational and developmental opportunities and medical facilities.

The rule of the welfare of the child was again completely ignored by the court adopting a hyper technical approach in another case,[47] and the fact that the father as the natural guardian of the minor daughter had ignored, neglected or abdicated from his responsibilities, the court refused to appoint in his place the maternal uncle as the guardian even in the clear circumstances where his appointment as a guardian would have benefitted the minor. Here, the husband and the wife had matrimonial differences and out of the two children, the daughter was with mother and the 12 year old son was with the father.[48] The daughter was nearing 18 years and was keen to study medicine and was preparing for the same. The father had neglected the daughter, evinced little or no interest in her future development and stated that 'he could not dance to the tune of the mother and daughter'. Mother's brother *i.e*., maternal uncle who was an NRI; was in the UAE applied for appointment as her guardian. Can at the instance of the mother, the maternal uncle be appointed as the guardian when the father is unwilling and the mother financially handicapped to take care of the daughter was the issue before the court? The court dismissed the application of the maternal uncle and held that since both the parents of the minor are alive and none of them is unfit, no one else can be appointed as the guardian of the minor. The decision appears strange, as the father had clearly said that he could not dance to the tune of the mother and daughter and the court had itself noted that the father had evinced little or no interest in the career or future of the daughter and the mother was financially vulnerable, but there was this maternal uncle who was financially well of, was an NRI and was ready and willing to act as the guardian of the child. The court noted that it appeared that the girl wanted to avail the NRI

47 *Deepa Sasikumar* v. *Sasikumar,* 2012 (1) KLT 312.
48 *Id.* at 315.

quota for admission to the medical college and appointment of the maternal uncle as guardian could have helped her yet held that legally it is the father and after him the mother who can be the lawful guardian of the child, if the father is away but if both the parents are present then despite the lack of interest shown by the father to be a guardian, since none of the parent are unfit no third person can legally be appointed as the guardian. The court said:

> We see absolutely no material to hold that the father of the girl cannot continue as the natural guardian. He is not liable to be removed from that capacity. May be the mother, for reason best known to her, would not be interested to act as the guardian of the girl in lieu of the father. We also see no rhyme, rationale or reason for a maternal uncle to be declared as guardian of his niece to support her for higher studies. Sublime love would necessarily prompt a motivated person to help out another human being more so when the recipient of such support is related by blood. In the case in hand there is no material on record to denude the father of his statutory status, eligibility and entitlement to be the natural guardian of his daughter.

The verdict here that the father and mother if not legally unfit cannot be replaced by another person appears to be hyper technical and gave weight to their rights and pushed the welfare of the child in the background. A disinterested father's statement affirming and clearly demonstrating his abject detachment, both emotionally and even monetarily with respect to his own daughter in complete contradiction to a person sharing a normal father and daughter relationship would further erode their relationship and it would be perfectly natural for a girl having her whole life in front of her to lean on a concerned relation for her betterment. The court should not put further obstacles in the path of the development of a minor girl who wants to educate herself and lead an economically empowered life. There have been ample instances in the past where despite presence of the father or the mother or both, a maternal grandmother and even maternal uncle have been appointed as the guardian of the minor child if the interests of the child so demands. It was in her interest that her educational opportunities could best be explored to her advantage if that appeared to be the motive for such a guardianship application. If she wanted to gain admission in a medical college and none of the parents could support her, there is no reason why a blood relation willing to be the guardian and more so when his appointment as a guardian was in the interest of the child not be appointed as the guardian by the court.

## VII HINDU JOINT FAMILY

**Alienation of joint family property**

A Hindu joint family is an institution that possesses property, which is managed by the *karta*. His position is unique and despite the fact that his title and quantum of ownership in the joint family property is equal to that of other coparceners, his powers of alienation of the joint family property beyond his share in specified legal eventualities are well recognized. *Karta* is usually the senior most male member in

the Hindu joint family and normally can be trusted in managing the joint family affairs and, therefore, legally his powers of management of the joint family are supreme and ordinarily outside the scope of judicial review. Where *karta* decides to alienate the joint family property for a legal necessity he has the competency to do so and bind the share of even minor sons. The situation here stands on a different footing in comparison to cases where a guardian attempts to sell the property of a minor. In such cases he cannot do so without the prior permission from the court as a transfer of minor's property by the guardian without prior approval of the court is voidable at the option of the minor when he attains majority. In *M Harish* v. *Sindhu,* [49] the father as the *karta* of the joint family sold the joint family property for legal necessity. His minor son through the legal guardian (maternal grandfather) filed a suit for partition and possession of the property, contending that the father sold his share without obtaining the permission from the court as is necessary under the Guardian and Wards Act. The property sold here to X carried a specific mention in the sale deed recitals that it was effected in order to repay the loan borrowed from the bank. The court held here, that payment of debts is a part of the obligation of the joint family when it is incurred towards legal necessities, *i.e*., for the development of the joint family. Normally, a guardian needs permission of the court to alienate property of minor even for necessity but in the event of the property belonging to the joint family in which the minor also possess a share *karta's* powers are extensive and include amongst others selling it for legal necessity. The sale was rightly held as valid.

**Partition of the joint family property**

Legislative and the judicial interpretations have played havoc with the classical concept of Hindu joint family and of its partition. In accordance with the *Mitakshara* law, an unequivocal demand from a major coparcener made to the *karta* of the Hindu joint family is enough to affect his severance from the joint family and a determination of his status as a separate member in contradistinction from the joint family member. Thus partition *de jure* is affected the moment a coparcener who is major and is of sound mind expresses his clear and unambiguous intention to separate from the joint family and this intention is effectively communicated to *karta* who has the legal possession of the joint family property. It also enjoins upon the *karta* to take steps as soon as possible to divide the property and hand over the share of the separated person resulting in the *de facto* partition. Thus a person becomes separate once he expresses the demand of partition and the *de facto* partition or actual physical division of the property is followed soon. To affect a partition in law, *i.e*., determination of status and fixing of shares, the first step alone is sufficient. If after expressing this clear demand of partition, and communicating it to *karta*, the coparcener dies, he dies as a separate member and actual physical division of the joint family property and handing over of his share calculated as on the date he demanded his share to his natural heirs must follow. His status as that of the separate member is not depended or conditional upon the *karta* dividing the property and handing him his share but upon his expressing a clear intention to separate to *karta*. The reason being that a coparcener is the owner of his part of the share, that due to

49 AIR 2012 Karn 1.

the concept of Hindu joint family such share is in possession of the *karta* for the purposes of its management and he merely asserts his intention to manage his own share individually as an independent person. He already possess the title to the property which is merely joint with other coparceners and it is not as if with a partition, the *karta* vests the title to the property in his favour for the first time. Therefore, *karta* can legally neither refuse to accede to his demand or even make him change his mind. The ownership right includes a right to either allow the *karta* to manage it or do it himself individually and therefore the moment he declares his intention to separate from the joint family, *karta* becomes legally incapable to even touch let alone manage his share despite *de facto* partition still not being affected. If after such a demand is expressed and communicated to *karta*, the *karta* instead of dividing the property and handing him the share, sells the joint family share including his share even for a legal necessity, the sale would be invalid to the extent of the share of such person who demanded partition and can be declared so by the court. Thus, the severance of status is not depended upon the actual physical division of property or handing over of the share or actual mutation effected in the statutory records. These are procedural matters that do not have any bearing on the status of a major Hindu male who decides to separate from his erstwhile joint family. Once he becomes a separate member, he acquires the competency to effect a disposition of the property as a separate or exclusive member. The disposition would be with respect to the fraction of the share that becomes his the moment he demands partition, but becomes specific upon affecting a *de facto* partition. The transferee then steps into the shoes of the Hindu male and can even demand a *de facto* partition from the *karta*. While continuing as a joint family member, a coparcener remains incapable to gift his undivided share but the moment he becomes a separate member, he acquires this capacity and a disposition made by him by way of a gift of his share in the joint family property before the *de-facto* but after *de-jure* partition would be valid. In a case from Patna,[50] A executed a gift in 1919, in favour of B. B's son C filed a suit for partition and claim of determination of the share in the joint family property and simultaneously executed a deed of gift in 1989 on the same day. The lower court held that since by filing a suit for partition, C became a separate member, the deed of gift executed by him was a valid one. This finding of the trial court was reversed by the lower appellate court and then the same was upheld by the high court which gave a different reasoning for declaring the gift as void. The high court held that since C was a coparcener and was joint with the other coparceners, a gift deed executed by him of his undivided share in the joint family property was void. The contention of C that he separated from the joint family in 1982-1983 was not accepted by the courts. With respect to the filing of the suit of partition in 1989, the court said that merely filing of the suit for partition would not effect a severance of the status of the joint family member and observed thus:[51] In a Hindu undivided family the partition is complete only when the title over the joint family property which is vested in the coparcenary is transformed into different titles of the co-sharers after allotment of their shares and putting them in exclusive possession of

50 *Subhamati Devi* v. *Awadesh Kumar Singh,* AIR 2012 Pat 45.

51 *Supra* note 49 at 47.

the same.

The court also followed an earlier decision of the division bench of the Patna High Court, wherein it was observed as under:[52]

> ……this principle follows from the fundamental concept of joint ownership and possession giving each joint owner a right to transform this joint ownership and possession into several and independent ownership and possession , but this transformation cannot in the eyes of law be held to have been brought about unless and until the entire process of transformation starting from the ascertainment of the share of each joint owner and ending in the actual delivery to him of the property given to him forming his share of the joint property has been gone through; so long as this does not take place, the title and possession of all co-sharers continues to be joint. It is only when the last stage has been completed that each owner ceases to be a co-sharer with the other….

The present court noted,[53] that mere assertion of separation was not sufficient to entitle a coparcener to alienate the coparcenary property by gift. The decision on the basis of the facts was correct but the entire line of reasoning was incorrect. A mere assertion which is clear and unequivocal by the coparcener is sufficient to sever him from the joint family and is effective in bringing about partition of the joint family. The illustration and the approach of the court can be applied to co-ownership generally but is inapplicable to the case of Hindu joint family. The concept of coparcenary and the transition of a coparcener from the state of jointness to an individual are entirely distinct from the cases of ordinary joint ownerships and therefore, the same yardsticks cannot be applied to a Hindu joint family.

## VIII HINDU SUCCESSION ACT, 1956

**Grant of succession certificates in favour of partners in a live in relationship**

A lawful wedlock creates mutual rights of succession as between the parties even amongst the scheduled tribe communities that are outside the application of the Hindu Succession Act, and where conditional polygamy is permissible, conferment of succession rights would be in favour of the spouses and not partners of live in relationships. Amongst the *Sangsarek* (non-Christian) *Garos*, conditional polygamy is permissible. A man can have more than one wife but in all cases of subsequent marriages, the consent of the first wife and her *chra*, *i.e.*, male relatives is a must. If the marriage is without their consent, the husband forfeits the right to his authority over the property of his first wife. In the case under survey,[54] the first wife deserted her husband but he did not approach her *chras* to arrange another wife for him. The husband was a *Sangsarek* and a non Christian. Upon being deserted by the first wife, another woman came into his life and they started living together in an intimate union without getting married and without complying with the *Garo*

52 *Santan Nr Tewary* v. *Saran Nr Tewry,* AIR 1959 Pat 331.

53 *Id.*, para 7.

54 *Arat Marak* v. *Legal Heirs of Balbila@Mailani Sangma,* II (2012) DMC 697 (Gau.)

customary law. Upon his death, the second woman, filed a claim for succession to his property that was dismissed by the court on the ground that the claimant cannot be termed as his wife in absence of a valid marriage and would be disentitled to his property. The woman tried to prove presumption of marriage owing to factual cohabitation and cited an apex court ruling wherein it was held,[55] that when a man and a woman lived together for 50 years a strong presumption would arise in favour of their wedlock. However, the court held that when a marriage as a custom was not permissible, even a presumption of marriage cannot be applied and since succession rights are vested in favour of a widow and not partner of a live in relationship, the same cannot be granted in her favour. In another case,[56] H and W1 were married and two daughters were born out of this wedlock. Pursuant to the death of H, W1 and both the daughters filed for succession certificates. W1 had married H when his first marriage was existing and therefore, she being the second wife did not have the legitimate status of the first wife and was not entitled to claim the benefit of inheritance rights. However the children born of the second wedlock were held entitled to claim the property as also a share in the gratuity and provident funds. Death of another polygamous man witnessed a familiar scene when,[57] two women W and W1, claimed the status of his legally wedded wives. The second woman came with the contention that her marriage was solemnized with the deceased after the mysterious disappearance of his first wife followed by a customary divorce by the Panchayat in accordance with the custom of *Kapu* community, enabling him to remarry. The court in view of the evidence produced negated both the existence of the custom and dissolution of marriage by the Panchayat and instead focused on the issue: if the wife was unheard of by those who would naturally have heard of her if she had been alive for more than seven years, and the husband marries again, does this give rise to a presumption of death under section 108 of the Indian Evidence Act, making the second wedlock valid? The Indian Evidence Act, places the initial burden on the plaintiff to show that the first wife was not heard of for seven years by those who if she had been alive would naturally have heard of her. When the said burden is discharged by adducing the requisite evidence to the satisfaction of the court, then the burden shifts on the first wife to prove that she was alive and the fact of her being alive was within the knowledge of the plaintiff. Here on the other hand, the second wife failed to prove that the disappearance of the first wife and therefore, her marriage solemnized during the subsistence of the first one was void and she was not entitled to claim any benefit out of his property. However, where the second marriage was performed after the death of the first wife, both the widow and the children born from the second wife would be entitled to inherit the property of the husband.[58]

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55 *Badri Prasad* v. *Deputy Director, Consolidation,* AIR 1978 SC 1557. See also *Radhamma* v. *UOI,* AIR 1998 Kant 364. In *Savitaben Samabhai Bhatiya* v. *State of Gujarat* (2005) 3 SCC 636 it was held that term wife means only a legally wedded wife.

56 *Sarita Bai* v. *Chanbdra Bai,* I (2012) DMC 320 (MP) : 2011(2) MPLJ 609.

57 *Pilla Appala Narasamma* v. *Record Officer for OIC Records, Madras Regiment,* I (2012) DMC 493 (AP).

58 *Vijay Kumar* v. *Nilam Kumari,* AIR 2012 Pat 129.

**Daughters as coparceners**

Post 2005 induction of daughters as a coparcener finished the theoretical inequality in matters of ownership of ancestral property. Her marital status fails to adversely affect her rights in ancestral property and where the partition takes place subsequent to her marriage she is entitled to get a share out of the joint family property.[59] 'In *Ganduri Koteshwaramma* v. *Chakiri Yanadi*,[60] the son filed a suit impleading his father, brother and two sisters in respect to ancestral property claiming 1/3rd share out of the ancestral property and 1/5th share from the properties belonging to his deceased mother that was decreed in his favour. Meanwhile the father died and out of the share of the father, the son's entitlement to the extent of 1/4th of the total property was also granted. The preliminary decree to this extent was passed in his favour in 2003 and in furtherance of the preliminary decree an application was made for passing of the final decree but before the passing of the final decree the Hindu Succession (Amendment) Act, 2005 was enacted and coparcenary rights were created in favour of daughters as well. Now, the sisters made an application claiming enhancement of their shares in view of the amending Act, and for passing of the preliminary decree in their favour with respect to the joint family property and its division into four equal shares, one each going to each of the child irrespective of their sex. The brother contended that as the amending Act had come after the preliminary decree had already been passed, partition had taken place and cannot be reopened and the sister's share would not be enlarged.

The court held[61] that the right accrued to a daughter in the property of the joint family governed by *Mitakshara* law by virtue of 2005 amendment Act is absolute, except, where an alienation or disposition including a partition or a testamentary disposition has taken place before 20.12.2004. Explaining the meaning of the term 'partition' the court said, that it means a partition through a partition deed duly affected through a registered document and not an oral partition. In the present case partition was not through a registered document and the only stage that it had reached in the suit for partition filed by the son was the determination of the shares vide the preliminary decree. Explaining the implications of a preliminary decree, the court said,[62] that a preliminary decree determines the rights and interests of the parties in the suit for partition, but the suit is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of the Hindu joint family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum, *i.e*., after passing of the preliminary decree and before the final decree is passed the events and supervening circumstances occur necessitating changes in shares , there is no impediment for the court to amend the preliminary decree re-determining the rights and interests of the parties having regard to the changed situation. Thus, even if after the preliminary decree the circumstance so justify that it needs to be modified the court has the power to do so. The shares of the sisters

59 *Maritangewa* v. *Anusuya,* AIR 2012 Kar 32.
60 AIR 2012 SC 169.
61 *Id.* at 172.
62 *Id.* at 172-173.

were determined in accordance with the provision of the amending Act. The court did say that ordinarily a final decree has to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the passing of the final decree cannot be altered/amended or modified. The court further observed that a suit for partition continues after the passing of the preliminary decree and the proceedings in the suit get extinguished only on the passing of the final decree and, therefore, to say that once a preliminary decree is passed it is not capable of modification is not a correct statement of law.

In complete contrast to the logical interpretation put on an amendment hailed as achieving gender equality, the Bombay High Court denied coparcenary rights to daughters born prior to the effective date of the amendment, holding that the coparcenary rights would be conferred only on those daughters of the coparceners who were born post 09.09.2005, *i.e*., the day the amendment came into effect, and daughters born prior to that would become coparceners only on the devolution of the coparcenary interest.[63] The action commenced here with the sole coparcener, a Hindu male mortgaging the joint family property in the nature of a residential flat in Mumbai to the bank for raising a loan that remained unpaid and the bank initiating the recovery proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. His two daughters now sought to protect their shares to the extent of 2/3rd in the flat on the ground that since the coming into force of the amendment, they became coparceners from 9-9-2005 and owners of the shares of the flat in the same manner as the father and the proceedings could be initiated only as against the 1/3rd share of the father and not against their own share. They claimed that the suit property was purchased out of the nucleus of the joint family property.

The court said thus:[64]

> It may be mentioned therefore that *ipso facto* upon the passing of the Amendment Act all the daughters of a coparcener in a coparcenary or a joint HUF do not become coparceners. The daughters who are born after such date would certainly be coparceners by virtue of birth but for a daughter who was born prior to the coming into force of the Amendment Act she would be a coparcener only upon a devolution of interest in coparcenary property taking place.

The court noted that the title of the section[65] was *devolution of coparcenary property* and devolution takes place only on the death of a coparcener. Till a coparcener dies no devolution of property would take place. As the first clause mentions expressly that *on and from the commencement of the amending Act*, a daughter would become a coparcener in the same manner as a son. It means that if a daughter is born after this date then only she would become a coparcener, otherwise not, because no act or amendment can be retrospective. The second situation in

63 *Vaishali Satish Ganorkar* v. *Satish Keshorao Ganokar,* AIR 2012 Bom 101.

64 *Id.* at 104.

65 S. 6, The Hindu Succession Act, 1956.

which the daughter would become a coparcener if she was born prior to 09-09-2005 was when a coparcener would die and the devolution of coparcenary property would open. In that event a daughter even though born earlier to the date of the amending act would become a coparcener. The court further said dispelling the contention of the daughters that section 6 of the amending act is retrospective in nature and hence all daughters of coparceners would have the interest devolve upon them even if they were born prior to the amendment Act and even if succession opened earlier than the amendment Act and held that the language makes devolution of coparcenary property a precondition for any claim to coparcenary interest. Prior to the amendment, daughters had no interest in the coparcenary property and were not coparceners by birth. This, in the opinion of the court she got only "on and from" the commencement of the amending act. The basis of the right is, therefore, the commencement of the Act and the same is denoted by the use of the term "shall" as the section says that the daughter of a coparcener shall by birth become a coparcener. Thus if the birth is post 2005 she would become a coparcener, as, if the legislature intended the section to be retrospective than it would have used the term in the past tense such as 'was', or 'had been',[66] and not the term 'shall' and concluded that since the father was alive, the coparcenary interest could not devolve on the daughters and since they were born prior to 2005, *i.e*., the effective date of amendment, they would not be coparceners. It further said that in the amended Hindu Succession Act, mere protection is not granted to the daughters; they are given a substantive right to be treated as coparcener, upon devolution of interest to them and even otherwise by virtue of their birth. This grant would affect vested rights as in this case when alienation and dispositions have been made. Hence retrospectivity such as to make the Act applicable to all the daughters born prior to the amendment cannot be granted when the legislation itself specifies the posterior date from which the Act would come into force. The court further said,[67] that the interpretation of retrospectively would promote the mischief of dishonest litigation by claiming an interest in a coparcenary property as in this case rather than suppress the mischief of discrimination and noted that the present suit by the daughters that they are the owners of 2/3rd of the interest in the suit flat and nullity of an equitable mortgage created by the father lacks *bonafide* and was instituted as a last resort by the father who had put up his daughters with a dishonest intention to deny the claim of the bank upon the alienation made since 2008 and finally held thus:[68]

a) It may be mentioned that section 6 creates substantive rights in favour of a daughter as a coparcener; it would therefore be ordinarily prospective.
b) There are no express words showing retrospective operation in the statute and in fact the express worlds are 'on and from' denoting prospectively.
c) The plain normal grammatical meaning of the worlds 'shall become and 'shall be deemed' shows the future tense and the total absence of any past participle. The words must be given the grammatical meaning as per the grammatical tense.

66 *Supra* note 63 104-105.
67 *Id.* at 108.
68 *Ibid.*

d) The section is incapable of two meanings; it cannot mention that all the daughters born before the amendment would be included and that only daughters born after the amendment would be included.
e) The absurdity of making all the daughters born before or after the commencement of the amending Act included in the amendment Act would not only be directly against and diametrically different from the express provision of making the section applicable to daughters who shall be coparcener by birth only on and after the amendment but would make the applicability of the Act so all perversive that the entire populace who are Hindus and have any HUF property of the family would be encompassed setting at naught various transactions entered into by coparceners creating vested rights as in this case.

The judgment of the Bombay High Court appears to be incorrect and all the perceived apprehensions appear to be unjustified. For the court to conclude that if all living daughters (not necessarily born post 2005) are treated as coparceners it would set at naught various transactions, it must be clarified that the amending act clearly specifies that the newly inducted females as coparceners cannot challenge any alienation effected by the joint family members prior to 20.12.2004. It was done primarily to not to unsettle, settled claims , which means that this does not affect her coparcenary rights but made her incapable to challenge those alienations. The present court failed to note in this connection a detailed analysis of section 6 in *R Kantha* v. *Union of India*[69], where constitutional validity of section 6(1)(c) was successfully challenged before the Karnataka High Court.

Secondly, the central enactment of 2005, logically took forward what was progressively provided earlier by the four states enactments, *i.e*., the Andhra Pradesh (Hindu Succession Amendment) Act, 1985; the Tamil Nadu (Hindu Succession Amendment) Act, 1989, the Karnataka (Hindu Succession Amendment) Act, 1994 and the Maharashtra (Hindu Succession Amendment) Act, 1994. Under these enactments the same expression "daughters born on or after the effective date of amendment" was used and daughters were made coparceners in the same manner as a son, a language that is identical to the present amending act. However, the legislature chose to clarify that daughters married on the effective day of amendment would not become coparceners. If the amendment was prospective and conferred coparcenary rights in favour of only those daughters who were born on or after the effective date of amendment, the statutory provision depriving married daughters was redundant as no question of a daughter being married prior to her birth would arise. The fact that unmarried daughters were conferred the coparcenary rights means that the legislature visualized that from amongst the daughters living on the date of the promulgation of the amendment, some would be married and some unmarried. If only those born post effective date of amendment were to be granted coparcenary rights in all cases all of them would be unmarried on the effective date the amendment came into force, as no daughter will be born married. Marriage is always post birth and can never be prior to birth. The present interpretation, therefore, appears totally incongruous. Grant of coparcenary rights in favour of unmarried

69 AIR 2010 Karn 27.

daughters conferred in them an ability to retain the coparcenary rights post marriage as well, but a daughter who was married on such date could not do so. This shows the legislative intent of including all unmarried daughters as coparceners born before or after the effective date but married post the date of the amendment. Similar is the intent displayed under the central enactment. A daughter in existence on the date of the amendment i.e., 09-09-2005, is a coparcener in the same manner as a son. The Act grants coparcenary rights even in favour of married daughters

Thirdly, the term "born on or after 2005", does not qualify the term "born" but is indicative of the time of her induction in the erstwhile male zone of coparcenary. It is from this date that coparcenary ceased to be an all male club and therefore her induction is clearly prospective. It is from this date that rights are conferred in her favour which till date was unavailable to her. Daughters of coparceners who were born at any time, even prior to 09-09-2005, but were in existence on this date, from this date became coparceners. The fact that she cannot challenge any alienation of the joint family property or cannot reopen any partition or disposition including a testamentary disposition effected prior to a cut-off date also shows the prospective conferment of the rights but in favour of all daughters. If the coparcenary property is in existence, was not subject to any partition or alienation, a daughter born before 2005, would be entitled to claim a share in it irrespective of whether her father is alive or dead. If the intention of the legislature was to make a daughter born post 2005 only as a coparcener, there was no need for them to make them incapable of challenging the alienation effected prior to 20-12-2004.

Fourthly, the interpretation of the present court if accepted as it is, would lead to an absurd conclusion. It would actually mean that on the present date, no daughter above the age of eight years could be a coparcener. In the state of Andhra Pradesh, unmarried daughters become coparceners from 1985 taking the maximum age of a female coparcener as 28. If the interpretation of the present court is accepted, since the central enactment prevails over a state enactment in cases of inconsistency, a 28 years old female coparcener from the state of Andhra Pradesh, living on the effective date, *i.e*., 09-09-2005, would cease to be a coparcener, as she was born prior to this date. Such an intention was never even contemplated by the legislature.

Fifthly, the legislature uses the term 'a daughter of a coparcener shall be a coparcener in the same manner as a son'. The term daughter of a coparcener shall by birth, become a coparcener was necessary to avoid distorting the meaning of concept of coparcenary. A person becomes a coparcener by birth under the classical law and never post birth except when his induction in the Hindu joint family was by way of adoption. In such cases irrespective of his age he is deemed to be born in the adoptive family from the date of adoption. Similar is the position of the daughter. She was not a coparcener under the *Mitakshara* law and her acquisition of coparcenary rights are only due to legislative intervention. Thus her birth as a coparcener is 'on or after 2005', irrespective of her actual age. It is at this time, that coparcenary rights are conferred in her favour. It is the time of the birth of equality, of gender parity in coparcenary property and any other interpretation would frustrate the entire objectives of this legislation and would make it *ultra vires* the provisions of the Constitution.

The legislature by way of amendment had brought the legal provisions governing

the Mitakshara *law* of joint family and coparcenary within the constitutional principles of gender equality and in accordance with the such principles of gender parity an interpretation, that for the sons to be coparceners, the date of birth is immaterial but for daughters it must be post 2005 would be discriminatory in view of the basic provisions and ultra vires the provisions of the Constitution and void.

Further the apprehension of the court that the present suit filed by the daughters was not *bonafide*, should not lead to distortion of the gender friendly amendment negating its impact. The Act stipulates that any alienation effected prior to 2005 cannot be challenged by daughters and secondly, father as *karta*, is competent to bind the shares of all the coparceners by alienating the property for legal necessity that includes an alienation effected for the benefit of the family and the rights of the alienee, in the present case the bank, cannot be compromised by other coparceners colluding with *karta*, by challenging the alienation effected by him. Malafide challenges can always be checked by the courts but for ensuring cases of special hardships, progressive legislations cannot and should not be made retrogressive by incorrect interpretations making them *ultra vires* the provisions of the Constitution.

**Enlargement of limited estate into absolute estate**

The historical disability standing in the way of a Hindu woman to hold full rights in the property was corrected in 1956 with the grant of absolute ownership in the property that she held till then as a limited owner thereof.[70] Despite around more than 66 years the issue refuses to die and the courts continue to deliberate on the character of ownership that vest in favour of a Hindu woman when she receives an interest in the property as a limited owner under a Will. If the interest created in her favour was in lieu of her pre existing rights of maintenance the same would mature into an absolute ownership but if it was an interest created for the first time in her favour through a gratuitous disposition, it fails to enlarge and would remain exactly the same as it stood on the date of making the disposition. An interesting issue arose in a case before the high court as to whether in a relationship that is not brought about by marriage but was a live in relationship between a man and a woman; this woman would have a right of maintenance from the man? In other words, whether a concubine has a pre-existing right of maintenance from her paramour or after him, from his estate.

Whether grant of such limited right of maintenance by the paramour to her during his life time, gets enlarged into an absolute estate under section 14(1) of the HSA, 1956? The facts showed that a Hindu man, A, in 1945, gifted a piece of agricultural land to his kept mistress creating life interest in her favour and a vested remainder with donor and his heirs.[71] Despite this being a life interest the woman sold the property in 1978, and died. The heirs of the original donor sued for a declaration and possession of the property. The alienee of the woman however claimed that pursuant to the enactment of the Hindu Succession Act, 1956, in accordance with section 14 the limited interest of the woman enlarged into an absolute estate and since she became full owner of the property, she also became

70 *Bishnupriya Mohanty* v. *Pravat Kumar Das,* AIR 2012 Ori 132.

71 *Singamsetty Narayana* v. *Konatham Lakhsmmam,* II AIR 2012 AP 54.

empowered to sell the house. She died in 1985 and the heirs of the donor claimed the property under the original gift deed executed by A. The trial court as also the high court held in favour of the alienees, holding that since the kept mistress under Hindu law had a pre- existing right of maintenance against her paramour, thus the property settled on her by her paramour for her maintenance would mature into an absolute estate under section 14. Explaining the position under Hindu law, the court held that even though the concubine or mistress did not enjoy the same status as that of the wife, she was entitled to be maintained by her paramour and therefore any property settled on her by him would be for her maintenance and since it is in lieu of her pre existing rights of maintenance it would mature into absolute ownership under section 14. The court also said that the expression used in section 14 is not a 'Hindu widow' but a 'woman' and a concubine would be covered in that. The lower appellate court had reversed the judgment of the lower court and had held that the concubine did not have a pre existing rights of maintenance from her paramour and therefore any property settled on her in which she was given a life interest in the property would be covered under section 14 (2) and not under the first clause of section 14.

The decision of the lower appellate court was correct, while the present court appears to have erred in coming to this erroneous conclusion. The erstwhile patriarchal practices giving considerable liberty to a man in matrimonial matters never gave legal sanction to the institutions of concubinage and extramarital affairs. These indiscretions of a man for sexual gratification were merely tolerated by the society but never gained a legal acceptance so as to create rights in favour of women who entered into exclusive physical need based arrangements with a man. His relationships with such women were till his pleasure and her inability to gain either any permanency or compel him legally to continue in this relationship against his wishes was a well established fact. These relationships were totally dependent on his pleasure and convenience and the continuity and sustainability could neither be enforced through the medium of the court nor even under any judicial settlement. These relationships were always considered immoral and were in the nature of vices, and by no stretch of imagination could have any legality or enforceable right attached to it. Social acceptance or tolerance of an immoral practice cannot be translated into legal recognition. For a court to say that a woman had a pre-existing right of maintenance in a concubinage relationship is simply amazing.

In another case from Himachal Pradesh, one H had two sons and four daughters from his first marriage. After around 15-16 years of the death of his first wife, he remarried and executed a will of his land giving a life interest in favour of his second wife in 1980 and after her death; the property was to go ultimately in favour of his son. The relevant portion of the will read as under:

> After my death my property X would go to $S_1$, to the extent of $2/3^{rd}$ of the property and $1/3^{rd}$ of it would go to $W_1$(second wife) but with a condition that Smt Murtu my wife shall have life interest or till her remarriage. She will have no right to mortgage, sell, and gift or bequeath or alienate the property in any manner. After the death of Murtu her share in the property will go to my son Lal chand, who shall be the owner of the property like

me. In addition my remaining property……

As she had only a life interest in the property received under the will, she was incapable to alienate the same, however she executed a gift of the said property in 1997 in favor of X. H's son challenged the validity of this gift on the ground that since what was bequeathed under the Will in her favour was a limited estate she could not have alienate the property and the gift executed by her was void. The court dismissed his contention and held that even if a limited interest was created by the husband the same by virtue of section 14 would enlarge into an absolute estate. The court said thus:[72]

> As W had pre-existing rights of maintenance in the property of her husband, H, so even if the share bequeathed to her was for her life, it would blossom into an absolute ownership under section 14 of the Hindu Succession Act. Once she is the absolute owner of the property bequeathed to her she has every right to gift it to X.

The court based its decision on the argument that since she had a pre-existing right of maintenance and this right were not created in her favour for the first time through the will, it would ripen into an absolute estate. The court ignored an earlier apex court ruling,[73] where the widow of a Hindu man was granted a life-interest and then the property was to go to the nephews, and the court held that her limited estate could not mature into absolute estate as the absolute estate was cut down by the provision that was made in favour of the nephews ultimately. The present case was similar as the limited estate created in favour of the widow was followed by an express disposition of the estate in favour of the son.

**Exclusion of the husband from the property of wife inherited from her father**

The Hindu Succession Act, 1955, provides for two entirely different schemes of succession depending upon the sex of an intestate. In case of female intestates, there is further divergence linked with the source of acquisition of the property of the propositus. Where the property available for succession was inherited by her from her deceased father in the capacity of his daughter, upon her dying intestate, it goes to her children or children of deceased children only and her widower, even if alive cannot inherit such property. The intention of the legislature predominantly portrayed by this provision appears to be to conserve the property for the benefit of the children of the female intestate and in their absence, reversion of it to the same family from where the female had inherited it. In a case from Himachal Pradesh,[74] a Hindu female died and was survived by her husband and five daughters. The wife during her lifetime had inherited the property from her father and now upon her death, her husband as her legal heir claimed 1/6$^{th}$ share in her property. His claim was contested by his daughters who contended that as the property which was subject matter of succession was inherited by the deceased mother from her father,

72 *Id.* at 54.

73 *Sadhu Singh* v. *Gurudwara Sahib Narike,* AIR 2006 SC 3282.

74 *Puran Chand* v. *Bholi,* AIR 2012 HP 32.

her husband cannot inherit it. The court held here that the father was incapable to inherit such property as per section 15 and 16 of the HSA, as where the property was inherited by a Hindu female from her father upon her death it is only her issue who are empowered to inherit it. Her husband even if alive is not competent to inherit such property.

**Meaning of the term 'son and daughter' of a deceased female**

Whenever the term son and daughter are used in relation to succession to the property of a deceased, the term ordinarily refers to the legitimate progeny of the intestate unless otherwise qualified. In section 3 of the HSA, the term 'related' is used as denoting 'related through legitimate kinship' and in case of a female Hindu, the children include even her illegitimate children. However, the only thing relevant for this purpose is the legitimacy or illegitimacy and the Act nowhere specifies that the child of the deceased should be only through lawful wedlock. With the permissibility of remarriage after the culmination of one marriage, the HSA does not qualify the children as born from the first or the second or the third marriage. For example, if a Hindu man gets married, gets a son and remarries after the death of his first wife; gets children from her, upon his death, the maternity of the children is immaterial to determine their succession rights. All children would be categorized either as the sons and daughters of the deceased and will not have a differential classification based on their mothers. Can the standard and yardstick be different if the deceased is a Hindu woman? If she has a daughter born from a marriage that terminates and upon remarriage she dies, can the differential standards be applied if the legislature itself uses the term 'son or daughter of the deceased' and does not mention at all son and daughter of a particular husband. In this connection section 15 was interpreted though incorrectly, in a case from Chhattisgarh.[75] Here upon the death of her first husband a Hindu woman got married a second time. She had a daughter from her first marriage. Upon the death of her second husband, she inherited the property in the capacity of his widow and later died. Her daughter on one hand and the brother of her deceased husband on the other hand claimed her property. The court upheld the claim of her brother in-law and dismissed the claim of the daughter of the deceased, by saying that where the property is inherited by a Hindu woman from her husband, then her daughter born to her from a previous husband cannot inherit her property and it is only the heirs of her husband who would be the rightful claimant to the property. Section 15(2) (b) reads as under:

> Notwithstanding anything contained in sub section (1)—
>
> (a)…….
>
> (b) any property inherited by a female Hindu from her husband or from her father in law shall devolve, in the absence of *any son or daughter of the deceased* (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub section (1) in the order specified therein, but upon the heirs of the husband.

75 *Reetu Bhadha* v. *Hira Kumar,* AIR 2012 Chh 157.

The term used in the section therefore is in the absence of any son or daughter of the deceased**,** and does not supplement it with from which spouse. 'Children of the deceased' means 'children of the deceased female' and this phrase is not susceptible to a differential interpretation. She is at the time of determination of heirs an individual and how many children from which husband she had is not even required as her son and daughter are to be reckoned with respect to her and not from anybody else. Even otherwise, interpretation is required by the courts only in cases of confusion or ambiguity. Where the statute is clear the judiciary has no business of twisting the terms used by the legislature and give it a different meaning then what was intended. The judiciary is not empowered to substitute or insert terms and words not present in the Act. Despite the fact that the efforts were to conserve the property of the deceased female in the family from where she had inherited the property, application of such provision is subject to two important limitations, first that the reversion applies only where she inherits the property and not when she receives the property in any other form such as by way of gift, or settlement or even through a will, and second that she dies issueless. Whether the deceased has a son or daughter is to be reckoned with respect to her and not with respect to her husband. Legislature clearly says son or daughter of the deceased and has no reference to the paternity of her children. In this connection, even an illegitimate child of the deceased would prevent the reversion of the property to the heirs of the husband. The term son or daughter means son or daughter of the deceased and have no differential meaning depending upon whether it is with respect to the father or the mother that it is being used. When a Hindu man dies his son or daughter born from even different wives are on the same footing. Similarly, in case a Hindu female dies then all her children including illegitimate children inherit irrespective of their paternity. Her children means her children and neither the judiciary nor the legislature should be obsessed about hunting for their father and take matters to illogical conclusions by their patriarchal and orthodox mindset. 'Her husband's property should not go to her child born from another husband, was never the intention of the legislature.' Absolute vesting of the property is what was intended by the legislature through section 14. Once the property vests in her it can revert back only in one eventuality, and that is when she dies issue less, *i.e*., without a son or daughter and the legislature does not qualify it by saying born from where and born from whom. It is the imagination of the judiciary that the legislature means from the husband whose property she inherits which is totally incorrect. A woman's capability to transmit the property to her own children is well recognized presently and post 2005, her induction into the erstwhile exclusive male zone of coparcenary has placed her on a different footing yet the Indian judiciary's determination to push her back to the early 19th century with their rewriting of a clear provision appears extremely disturbing. Further, with this interpretation the court has gone and created the impermissible conclusion which is ultra vires the provision of the Constitution. The Constitution prohibits sex discrimination and by adopting this interpretation the court has brought in sex discrimination and that too by twisting the interpretation of a clear provision. Succession rights are created in favour of the children of the deceased and here the petitioner was the daughter of the deceased. When she was a class I category heir, the interpretation cannot ignore it and pass

the property to the class-II heirs. Secondly, if a Hindu male inherits the property of his wife and dies, his daughter born from a previous marriage other than the deceased woman, is entitled to inherit the property, and the situation is parallel when it applies to a Hindu woman, but if the Hindu female dies, leaves behind the property that she had inherited during her lifetime from her husband, and the court rules that only when her daughter was born of the husband whose property is subject matter of inheritance then only she would be entitled to get the property seems preposterous and even unconstitutional. Any interpretation that goes against article 14 of the Constitution cannot be sustained more so when it is incorrect in the first place.

Citing two earlier judgments the correctness of which is highly doubtful, one an apex court,[76] and the other the Gauhati High Court,[77] ruling, the judiciary lay down yet another bad precedent even when it had the occasion to correct the mistakes committed earlier. A clear understanding of the fundamental principles of succession is wanting here and such display of ignorance of interpretation of statutes is surprising. Opportunities to remedy past mistakes should not be missed and perpetuating them on the other hand is neither desirable nor in tune with legal principles.

## IX CONCLUSION

The year 2012 witnessed familiar judicial ambivalence creating uncertainties of law, with liberal and strict, and correct and incorrect interpretations marching together. While generally the parties in an unhappy marriage had to go back disappointed for lack of existence of irretrievable breakdown as a ground of divorce, the apex court in a lone case did provide relief by exercising its powers under article 142 of the Constitution of India. Swayed by the notions of gender justice excessive activism prompted judiciary to confer maintenance rights in favour of women who were parties to annulled marriages and also who openly flouted marital promises, by walking out on husbands and living in adultery with extensive twisting of the interpretation of section 125. This approach was carried further by holding that a concubine of a married man had pre existing rights of maintenance under the classical law and the same would mature into absolute interest. Fathers retained an upper hand in custody battles this year, but the court displayed a lack of sensitivity by handing out a very shabby treatment to a child with disabilities removing him from his elder brother and a financially secure father thus depriving him of chances of having a good education and medical treatment. Maximum causalities were in the area of Hindu joint family and succession. Bombay High Court proceeded to deny coparcenary rights to all daughters save those who were born after 09.09.2005, and Chhattisgarh High Court denied to a girl a right to inherit the property of her mother by restricting the inheritance rights in favour of the deceased's husband's brother.

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76 *Lachman Singh* v. *Kirpa Singh* (1987) 2 SCC 547 and *Bhagat Ram* v. *Teja Singh,* AIR 2002 SC 1.

77 *Dhanistha Kalita* v. *Ramakant Kalita,* AIR 2003 Gau. 92.