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HINDU LAW

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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 2013, have been briefly analyzed here.

II HINDU ADOPTIONS AND MAINTENANCE ACT

Adoption by a Hindu widow prior to the commencement of the Hindu Adoptions and Maintenance Act

Classical Hindu law permitted adoption for according spiritual benefit to the father. Its religious oriented utility necessitated adoption of only a boy from within the family. Additionally while a man's capability to take an independent decision in this connection during his lifetime remained beyond challenge, post his death his widow was permitted to adopt only after his authorisation for same or after obtaining the consent of his *sapindas*/coparceners after his demise. This law was amended, substantially modified, systematized, and codified in the year 1956 with the enactment of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as HAM Act; 1956). Around 67 years later, this year the courts adjudicated the validity of an adoption effected under classical Hindu law by a Hindu widow in the present state of *Uttarakhand*,[1] covered under the erstwhile Banaras school of *Mitakshara*. Here, upon the death of A, a Hindu man, who was a *Mahant/grahasth Gosain* in 1932, his widow, W according to the custom in their community became the *Mahantani*/owner of his property[2] as his legal heir. Her inheritance and title was contested by her step-daughter,[3] with litigation, but the same[4] was judicially affirmed in W's favour. In 1982, W executed a lease deed of this property in favour of X. At this time, one S, a biological son of the employee of W, pleaded that W, had adopted him as her son through a registered adoption/ chela deed in 1955. Thus the lease deed executed by W was void as she had no right of alienation of the property in absence of any legal necessity with an abysmally low consideration.

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1 *Ram Puri, Chela* v. *Usha Sharma* AIR 2013 Utr 96.

2 The property included his *GADDI*, known as *GADDI* of late *Maharaja Raghuwansh Puri*

3 Daughter of A, born to him from his first wife.

4 The title as a Mahantani as per the custom.

The present court was confronted mainly with the issue of validity of adoption claimed by S through a registered adoption/chela deed that was produced in evidence. The court explored the relevant classical Hindu law of adoption prevalent prior to 1956 and analysed and compared the inter school difference in *Mitakshara* relating to capability of a widow to adopt and noted that in Bombay a widow could adopt in her own right without any legal obligation to demonstrate any permission or authority from the husband or anyone else while, elsewhere a Hindu widow could adopt with the prior authority of the husband given to her during his lifetime, or with the consent of his *sapindas*, if he was separate from his family and if he was a joint family member than with the consent of the other undivided coparceners, except in *Mithila* School, where her incapability to adopt was absolute.

As present day Uttrakhand was under the Banaras school of *Mitakshara* law, a valid adoption by the widow could be effected only with a prior authority from her deceased husband. Here the alleged adoption deed was executed 23 years post husband's death and there was little evidence on record to suggest the existence of his express authorization/ consent. W to begin with had specifically denied that she ever adopted or made S her chela. Interestingly, her denial of executing an adoption deed was effectively countered by production of registered adoption deed that carried her signatures and it was only later that she contended, *firstly* that she had cancelled this registered adoption deed and *secondly* that she was incompetent to adopt for lack of spousal consent. S also had produced the copies of his high school and intermediate certificates that had in the place of the name of the father as that of A. As at the time of the alleged adoption S was only five years old and not only post adoption he was known as the son of A, he was so similarly shown more specifically in the school documents much before the execution of the lease, the court found it hard to believe that there could have been at that point of time any misrepresentation by such a small boy. However, the registered deed showed that S was adopted as a chela (not a son), by W.

Nevertheless, the court negated the claim of S on two counts, first that adoption of a child by a widow was impermissible in Banaras school, save with the consent of the husband which was neither procured by her, nor could it be presumed as there was a long gap between the death of the husband and the act of adoption. Second, as far as the custom of making a boy one's chela was concerned, it was only a sanyasin (one who has renounced the world) who could make another her chela. Since the widow here was not a *sanyasin* but, *grahasthin*, (a domesticated person who has her family and who has not renounced the world), that being so accepting S as her chela by W though proved was not valid. Thus even if she had treated S as her child, or that he had all along presumed himself to be her son, legally, he was neither the adopted son as there was no evidence of her obtaining the consent of the husband and neither a chela as she was not a *sanyasin*. The case of S was dismissed as W being a full owner of the property had every right to dispose it off in accordance with her wishes and S had no locus to either interfere in that or challenge the same.

Accommodation of a contrary custom

Statutory law governing adoption at places does uphold a custom contrary to the general norms provided in the law but this accommodation is confined to specific

areas, such as the age and marital status requirement of a child to be adopted. Besides these concessions, legal rules cannot be deviated from. The Act[5] clearly provides that though the child to be adopted should be below the age of 15 years and unmarried, if there is a custom to the contrary in the community to which the parties belong which permits adoption of a child above the age of 15 or of a married person such adoption would be valid. Thus contrary customs in deviation of written provisions are accepted but only when saved by the Act itself, otherwise, statutory laws can never be substituted by a contrary custom. The Act clearly stipulates that with its enactment, all contradictory customs and practices in relation to adoption would stand abrogated, which makes adherence to a customary practice in conflict with a statutory provision as no longer permissible. In a case before the apex court,[6] the issue revolved around the enforcement of a custom, contrary to the express provision of the HAM Act, 1956. Here, Shri *Sant Eknath Maharaj*, a holy man treated with great reverence died and his son S inherited the exclusive rights to carry his *palki* and *padukas*. Upon the death of S, the widow of S, SW, legally acquired the sole rights to carry the *Palki* and *Padukas*, in presence of the collaterals of S (hereinafter referred to as DS). She then expressed a desire to adopt a child. DS, objected, claiming that as per a custom in their family, in case of the need of adoption, the boy must be chosen from within the family and no child from outside the family could be adopted. To restrain her from adopting a child contrary to their advice, they filed a suit in a court of law seeking an injunction to this effect. While this suit was pending, in May, 1971, B was adopted by SW, after performance of all requisite ceremonies conducted in presence of huge crowd. The process of giving and taking of the child was completed by the parents of B and by SW. The performance of this ceremony was supervised by a priest and was documented with several photographs. The adoption deed was drafted; signed by SW, the biological parents of the child and also by five witnesses and registered on the same day. Post adoption, both SW and adopted son, B carried the duties of carrying the *Palki* and *Padukas* of the deceased but DS tried to create hindrance in the performance of these duties, forcing SW to file a suit seeking a decree of perpetual injunction preventing them from causing any obstruction or interference in exercise of their exclusive rights. The main defence of DS to the suit was that adoption being contrary to their family custom was invalid and the so called adopted son had no right to carry the tradition of the deceased nor could he be termed a legitimate heir to the property in the hands of the widow after her death.

The trial court held the adoption as valid, but the same was reversed by the first appellate court which stated that DS had proved the existence of a custom prohibiting an adoption from outside the family. The high court also affirmed the order of the first appellate court. The apex court holding in favour of adoption, observed that if a person giving the child in adoption comes and testifies and proves the factum of adoption, the court must accept the same. Here the opposite party had neither challenged the validity of the registered deed of adoption nor

5 The Hindu Adoptions and Maintenance Act, 1956.

6 *Laxmibai* v. *Bhagwantbuva* AIR 2013 SC 1204.

had made any reference to that at all. In fact the giving and taking of the child was also adequately proved, but what was disputed was that the adoption was invalid due to violation of custom by the widow. It was a strange situation as a legally permissible action was sought to be nullified due to a contrary custom. The line of argument and the decision of the first appellate court and the high court were incorrect. Even, the apex court did an elaborate exercise into finding authenticity of a custom, when does it become law and then analysed the custom that was put forward by the opposite party; an exercise that was totally unnecessary and futile.

Here, all the adoptions that were brought to the notice of the court to prove the existence of a custom were spread over a period of 375 years and were prior to the enactment of the Hindu Adoptions and Maintenance Act, 1956. Under the law as it stood prior to 1956, the permissibility of taking a child extended to only a male child and that too from within the family As the purpose of adoption was to accord spiritual salvation to the father, it was provided in the *Dharamshastras*,[7] that he was empowered to bring in the family a son if he did not have a son provided that the son who was so brought in the family must have a likeness of his own son, hence the requirement of taking a son from within the family and also from the paternal side was recommended. Consequently no female or generally an abandoned or orphan child could be taken in adoption .This custom stood abrogated specifically after the enactment of the Hindu Adoptions and Maintenance Act, 1956, as the primary purpose of adoption in itself was switched from religious to secular, *i.e.*, to provide a home to an orphan or abandoned child or to provide the joy of parenthood to a childless couple. After enactment of Hindu Adoptions and Maintenance Act, 1956, a girl child and a child from within or outside family could also be adopted. The erstwhile rule of taking a child from within the family stood specifically abrogated therefore and the Act provided that a custom contrary to this legislation would no longer be valid. In light of this express provision; for the appellate court and also the high court to uphold a custom directly contradictory to the legal provision was surprising. The very fact that this custom was against an enacted law would make it illegal more specifically when not only it was nowhere saved by law, rather it was expressly provided that with the enactment of the adoption law, contrary customs, traditions and practices would be repealed.

In another case,[8] despite the evidence of the giving and taking of the child, adoption was challenged for lack of a registered adoption deed. Here, pursuant to the death of a truck driver, in course of his duty, his adopted son claimed compensation from the employer and the insurance company before the Commissioner under the Workman Compensation Act, 1923. His *locus standi* was challenged by both on the ground that he was neither a son nor a dependant of the deceased employee.

The court noted that for a valid adoption, law necessitates the transfer of the adoptive boy from one family to another with appropriate ceremonies of giving

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7 Are the ancient law books of Hindus which formed the basis for the social and religious code of conduct. They throw light on the Hindu law, marriage, divorce, loans and partnerships various kinds of crimes and punishments and judicial procedure.

8 *Param Pal Singh* v. *National Insurance Co.* AIR 2013 SC 974.

and taking, and no particular form of ceremony is prescribed by law. On lack of registration of adoption deed the court clarified that as per the requirement of the HAM Act, 1956 as also the provisions of the Registration Act, 1908 an adoption deed need not be registered. In the present case there was an unregistered adoption deed, which clearly stated, that the deceased who was unmarried and issueless, wanted to adopt this two years old boy so that he can be taken care of in future. This deed was duly signed by both the adoptive father as also the biological parents and by three attesting witnesses. The apex court held in favour of the adoption and categorically said that there is no requirement of any registered deed of adoption and if the giving and taking of the child is proved, this in itself would be sufficient to indicate a valid adoption.

Adoption of two daughters

The erstwhile exclusive prerogative of Hindus to adopt a child has been extended presently to other communities. While the legal provisions of HAM Act, 1956 available only to Hindus restrict the number of children one can validly adopt, the other two enactments permitting adoption namely, Guardians and Wards Act, 1890 and Juvenile Justice (Care and Protection) Act, 2000, (hereinafter referred to as JJAct), do not put any embargo on either the number of the children one can take under the guardianship or adopt respectively or lay down restrictions on the basis of the sex of the children. The HAM Act, 1956 provides that a person is permitted to take a son or a daughter in adoption, but if he/she has a biological or adopted Hindu daughter or daughter of predeceased son, he cannot take another daughter, and if he has a biological or adopted Hindu son, son of a predeceased son, or a son of a predeceased son of a predeceased son, he cannot take another son in adoption. This clause has been interpreted to mean that the permissibility is of adopting either a son and a daughter or a son or a daughter. The term a son or a daughter has been interpreted to mean a son and a daughter and a Hindu therefore cannot adopt two sons or two daughters. In the case under survey,[9] the issue related to adoption of two sisters of tender ages, who were abandoned by their parents and were rescued by the adoption placement agency and put under its care and protection.[10] These minor girls were declared fit and free for adoption as per the procedure, and as both were being reared by the adoption agency as siblings the lady under whose foster care arrangement they were together, applied for their adoption. The Orissa State Council for Child Welfare wrote on this application in one line that under the HAM Act, 1956, this adoption was not permissible. The trial court accordingly denied the permission to adopt two sisters. The matter went in appeal and the feasibility of two siblings to be adopted was explored

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9 *Secretary, Subhadra Mahatab Seva Sadan of Kolathia* v. *State of Orissa* AIR 2013 Ori 110.

10 This adoption agency was recognized by the state and was also recognized as specialized adoption agency unders. 41(4) of the Juvenile Justice (Care and Protection) of Children Act, 2000.

under the JJAct and court noted that in the present case the application was preferred under the JJAct and not under the Hindu adoptions and Maintenance Act, 1956, that carries restrictions on the children of same sex to be adopted. Here all the requirements postulated under the JJAct were met with; hence the lady was competent to adopt two sisters. Further, as per the Ministry of Women and Child Development, notification,[11] which govern the adoption procedure of orphan, abandoned and surrendered children,[12] siblings who are being reared together, as far as possible be placed in the adoption in the same family and should not be separated. As the lady had already entered in to a foster care agreement with the agency and was bringing up both the girls, the court allowed her to adopt them legally.[13]

III HINDU MARRIAGE ACT, 1955

Right to be part of live in relationship

Traditionally perceived and treated with an unmatched reverence, the institution of marriage is presently witnessing a deferential challenge of the nature of a varied relationship but of its resemblance with fewer restrictions, increasing acceptability though minus any of the security. Young people's perception towards the extensive bondage in marriage and their helpless trappings in it in eventualities of its failure due to tedious and judicial sanctioned exit has lost its sheen considerably and an attraction towards and experimentation with intimate

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11 *Avail able at*: http: //adoptionindia.nic.in/guideline-family/notification.pdf. (Last visited on July 10th 2014).

12 The new guidelines have drawn support for the provisions of JJAct; Supreme Court ruling in *Lakshmikant Pandey* v. *Union of India* AIR 1984 SC 469; UN Convention on human rights of the child, 1989; The Hague Convention on Protection of children and cooperation in respect of inter-country adoption, 1993.

13 Under the JJAct, the primary responsibility for providing care and protection to children is that of the family, but adoption is facilitated for the rehabilitation of the orphans, abandoned or surrendered children through legal mechanism postulated in detail. Children may be given in adoption by a court after satisfactory investigations. For this purpose the state government has been entrusted the responsibility to recognize and identify, institutions or voluntary organizations in each district as specialized adoption agencies for the placement of orphan, abandoned or surrendered children for adoption after ensuring that such children are declared free for adoption by the community. They would then refer all such cases to the adoption agency in that district for placement of such children in adoption. Ordinarily a child can be offered for adoption, after two members of the committee declare the child legally free for placement in the case of abandoned children; and in case the parents surrender their children, after the time of two months given to the parents for reconsideration of their decision is over, and where the child to be given is adoption is of an age who can understand and express his consent for it. While giving the child in adoption the sex of the adoptive parent and the number of children he/she may already having is immaterial. Under the JJA therefore, it is only the Child Welfare Committee who is authorized to declare a child free for adoption and law does not require any other agency be it the state council for child welfare or anybody else.

relationships without the bondage of marriage is emerging as a viable option. An interesting question emerges here: though law cannot compel anyone to compulsorily enter matrimony, nor can it deny the bliss of marital happiness to anyone, people, who of their free choice scoff at the traditionally accepted social and legal institution of marriage, desire and prefer to live in an intimate marriage like physical relationship, do so; can they then seek judicial and police protection in wake of intense hostility and threats by their own kith and kin? Would they be entitled to any such judicial protection? In the current practical scenario, it is pertinent to note that the societal reaction is generally less tolerant towards live in relationship and the familial reaction still continues to be predictable extensively hostile; more specifically if a girl dares to challenge the stereotypes in a patriarchal society raising serious concerns of their safety and security. In a case from Allahabad,[14] a girl on her own decided to enter into a live in relationship with a man, without getting married to him. In wake of intense opposition from her family members, she applied for police protection, pursuant to which the matter went to the court, which ruled in favour of the couple and directed the state to provide them police protection to ensure that no harm is caused to such young couple. The court however cautioned that judicial acknowledgment of existence of this relationship and their concern for their life and safety should not be construed to mean either its judicial recognition or its acceptance as a relationship in accordance with law. Despite the court's caution, it is apparent that with changing times, the court's concern to ensure judicial protection has indicated a judicial tolerance to the existence of live in relationship.

Live in relationship and a relationship in the nature of marriage

Legislative recognition to a relationship at variance with marriage but in the nature of marriage came in 2005 with the enactment of the Protection of Women from Domestic Violence Act, 2005, (hereinafter referred to as the DVA). With the legislative inclusion of the phrase 'relationship in the nature of marriage' in DVA, 2005. confusion is created with respect to its concept and its distinction from a validly solemnised marriage. While marriage and its validity depends on adherence to proper ceremonies for its solemnization, and compliance with legal requirements specified under each of the personal laws to which it is subject to, a relationship in the nature of marriage, is presently without any definition, explanation or concept, is covered under none of the personal laws, has no boundaries of religion; no insistence of adherence to any legal requirement or ceremonial formality. The apex court in a case[15] falling primarily under the DVA, 2005 explored in detail the conceptual framework of the relationships as encompassing within the category of relationships in the nature of marriage. The issue here involved the relationship between a single woman and a married man, who after living together for a period of around 18 years separated though not amicably as the woman filed a case under the DVA, 2005 claiming several reliefs including prohibitory orders, rights of

14 *Nandini* v. *State of UP* 2013 (1) ADJ 591.

15 See *Indra Sarma* v. *V K V Sarma* AIR 2014 SC 309.

residence at his cost in the shared household that stood in his name and economic sustenance. She claimed that financial contributions from her side in the initial phase of their relationship helped him extensively in bringing economic prosperity to his first family including opening of business for his wife and financing education for his child.

Marriage, the court said, is a concept that is internationally recognized and often described as one of the basic civil rights of man/woman. It is voluntarily undertaken by the parties in public in a formal way and once concluded, recognizes the parties as husband and wife. As per common law, it is a contract between a man and a woman in which they under take to live together and support each other with three basic elements, *viz*, an agreement to be married; living together as husband and wife, and holding out to the public that they are married. Sharing of common household and duty to live together form part of the '*Consortium Omnios Vitae*' which obliges parties to live together, afford each other reasonable marital privileges and rights and be honest and faithful to each other . One of the most important invariable consequences of marriage is the reciprocal support and the responsibility of maintenance of the common household, jointly and severally. Marriage as an institution has great legal significance and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, succession, *etc*. Marriage therefore, involves legal requirements of formality, publicity and exclusivity. As far as relationship in the nature of marriage is concerned, it is a heterosexual relationship between two persons who live or have lived together in a shared household when they are related by consanguinity; marriage; through a relationship in the nature of marriage, adoption or family members living together as joint family. The court said that the term 'relationship in the nature of marriage' used in the definition,[16] means a relationship which has some inherent or essential characteristics of a marriage, though not a marriage legally recognized and hence a comparison of both will have to be resorted to determine whether the relationship in a given case constitutes the characteristics of a regular marriage. The court said that the definition or concept given under the DVA, 2005 of relationship in the nature of marriage is exhaustive and restrictive. The essential characteristics of a relationship in the nature of marriage according to the court are as follows:[17]

i. The duration of relationship should be for a considerable time period; it should not be a walk in and walk out relationship or for shorter time duration.

ii. The existence of living in a shared household is mandatory.

iii. There should be pooling of resources, it can be either indicated by existence of joint bank account, purchase of property either in joint names or in the name of the woman, investments in business jointly or purchase of shares and stocks etc.

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16 See s. 2, the Protection of Women From Domestic Violence Act, 2005.

17 See *supra* note 15 at 327, 328.

iv. There should be a domestic arrangement such as entrusting the responsibility of running a home to the woman and she performing tasks like cleaning , cooking, maintaining or up keeping the house

v. Marriage like relationship refers to a sexual relationship not merely for pleasure but for emotional and intimate relationship for procreation of children so as to provide emotional support, companionship and material affection, caring etc.

vi. Having children is a strong indication of a relationship in marriage. Parties therefore intend to have a long standing relationship by sharing the responsibility of bringing them up and supporting them

vii. Socializing in public with friends etc by holding themselves as if they are husband and wife.

viii. Common intention of parties as to what their relationship is to be and to involve and as to their respective roles and responsibilities

The court explored the relationship that the parties were having in the instant case and the major factors that went against the woman were that she entered into a relationship with a married man with two children. The status of the woman therefore was that of a concubine,[18] due to a legally impermissible relationship. The presumption of a valid marriage, the court said is instantaneously destroyed the moment the relationship is polygamous and such a relationship can never be termed as a relationship in the nature of marriage. Here, the woman had claimed that her pregnancy was terminated by the man as he did not want to have children from this relationship, he never took her out on social outing nor projected her as his wife, and though the relationship extended for a period of 18 years, it was against the law being a bigamous one. The court therefore held *firstly*, that this relationship could not be covered under the term relationship in the nature of marriage and the woman would not be entitled to any relief or benefit that she prayed for and *secondly*, coming down very heavily on the woman the court held that as she had intentionally committed a tort by entering into a relationship with a married man by alienating him from his legally wedded family and his child, resulting in loss of marital relationship, companionship assistance and consortium *etc*, the first wife and the child may proceed against her for claiming damages.

The language or the tenor of the judgment depicts anger towards the woman who had approached the court for the remedy and there are strong reasons to doubt that the court appears to be blaming her alone for the entire mess. The language is clearly suggestive that the first wife and children can proceed against her for an intentional tort for her crime of alienating the man from his family. The court held thus:[19]

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18 *Ibid.*

19 *Supra* note 15 at 330.

> Marriage and family are social institutions of vital importance. Alienation of affection in that context is an intentional tort which gives right to a cause of action in favour of the wife and the children to sue the second woman for alienating the husband/father from the company of his wife/children knowing fully well they are legally wedded wife/children of the man.

Ironically, there is not even a single word of reprimand for the man in the present case. On the other hand the court acknowledged that married men often support women either for sexual pleasure or even for emotional support, and women often suffer from disadvantages, prejudices and is regarded as less worthy than the married women and suffer social ostracism. The woman if at all is guilty of committing a tort is because she and the man were in a relationship for 18 years and surely this could not have happened without his consent. If she is guilty of alienating him from his family he is equally guilty of voluntarily abandoning them. The relationship though not legally permitted could not have been one sided. For judicial anger to be focused on only the second woman and to remain silent on the conduct of the man is astonishing. Men are more to be blamed for the illegal liaisons, as a marital status and marriage brings responsibility and as the head of the family, it is he, who is responsible to ensure the dignity of family with his conduct, bring economic sustenance by being economically active and productive and be faithful to his wife in order to fulfill the promises of marriage. His involvement is more questionable than the involvement of a single woman into relationship of this nature. He is more if not equally guilty of tort than the second woman. Judicial dictates like these help men in such situation to get out of the relationship with least sanctions or accountability. Bigamous men shrug off their responsibility of providing economic sustenance to the second women on grounds of their incapability of getting married under law. The term relationship in the nature of marriage was probably coined to cover these situations. A woman is not benefitted but merely protected and to say that if a woman is given protection in a bigamous relationship would be harsh on the first wife and child is preposterous. With control over material assets, there is no guarantee that a man who keeps a mistress would be financing the requirements of his legitimate wife and child and if a woman goes out of his life, the share of the wife and child would increase.

While legal requirements can never be compromised, while distinguishing a marriage from a relationship in marriage, the concession appears to be given as far as formal solemnization is concerned. Further at no point of time is there any indication of partnerships that are in clear violation of the legal requirements that are formally a part of the statute. Thus if a person governed by a personal law, where monogamy is the primary norm, enters into a polygamous union that is short of marriage or even after solemnizing it through a marriage, this relationship is not covered under the term relationship in the nature of marriage as appearing in the DVA, 2005.

Application of Hindu Marriage Act, 1955 to Hindus residing outside India

Globalization and increased mobility of Indians often leads to complication of legal issues in the event of marital discord both in terms of jurisdiction of the

courts and also of the relevant law that needs to be applied for providing judicial remedy to them. Problem is further complicated when more than one country has been visited by the couple and they acquire the domicile of one country, without renouncing the domicile of their country of origin. An interesting issue was deliberated this year before the apex court[20] involving jurisdiction of Indian court in granting matrimonial relief to parties, who were by birth Indian citizens; had married in India, but had acquired the domicile of Sweden where the husband worked for some time, then went to Australia, and last resided together in Australia, and pursuant to a matrimonial problem one of them returned to India with the children.

The parties here married in Bangalore, and the husband left for Sweden in 1989, where both the children were born. They acquired Swedish citizenship in 1997. The couple thereupon moved to Mumbai due to husband's job for a brief period and then went to Sydney as part of his official assignment. Due to matrimonial discord the wife came to India in 2003 along with the children and filed a petition before the Family Court at Mumbai praying for a decree of judicial separation and for the custody of their children. The husband questioned the maintainability of the application on lack of jurisdiction of Indian courts to try the dispute. He contended that though they originally were Indian citizens but had become Swedish citizens currently domiciled in Australia and consequently, only Australian courts have the jurisdiction to try their matrimonial disputes. Further, as the parties had come to India on an un-extendable tourist visa they no longer had Indian domicile and therefore cannot be governed by the provisions of the Hindu Marriage Act, 1955(herein after referred to as HMA, 1955). The wife on the other hand contended that she on her own had never abandoned her domicile of origin, and even if she had obtained the domicile of Sweden as a domicile of choice at no stage it can be said that the domicile of origin was abandoned, and alternatively even if she had acquired Swedish domicile, the moment they acquired the residence of Australia, the Swedish domicile was revoked and Indian domicile, *i.e.*, domicile of origin was automatically revived.

The family court accepted the contention of the husband and dismissed the petition of the wife, but the high court on an appeal filed by the wife accepted her contention and held that her petition was maintainable due to failure of the husband to establish that he had ever abandoned his domicile of origin and acquired the domicile of Sweden along with its citizenship. Rather, he abandoned the domicile of Sweden and in this way the domicile of India got revived. The matter thereupon went to the apex court.

The husband did not contend that the courts in Sweden would have jurisdiction to try his case, his contention on the other hand was that though he was domiciled in Sweden but was currently a resident of Australia so courts in Australia would have jurisdiction to try the case even though his stay in Australia was owing to his long term permit and not on account of his domicile by moving to Australia. The court held that when Swedish (acquired) domicile was abandoned, the domicile of origin was revived automatically and since he was staying in Australia on a long

20 *Sondur Gopal* v. *Sondur Rajini* AIR 2013 SC 2678; II (2013) DMC 833 (SC).

term permit and not as a domiciled citizen, he would continue to have his domicile of origin *i.e.*, India and hence the matrimonial courts in India have the competency to try their case. On the question of application of the HMA, 1955, the apex court observed that the HMA, 1955 has extra territorial application and applies to all Hindus, living in India or abroad,[21] provided they are domiciled in India.

The primary principle in private international law is that the place where the marriage is solemnized, the law of that land would govern their matrimonial rights and remedies. Application of this principle would also directly confer the jurisdiction in favour of the Indian courts and application of Indian law under which they married in the current case the Hindu Marriage Act. Here the issue of domicile is not as important as it was made out to be.

Registration of marriages: exemption from personal appearance for Hindus residing abroad

There have been of late considerable discussions and deliberations for bringing in a central legislation for mandating compulsory registration of marriages not only for furnishing an effective proof of marriage but also for checking and curbing the practices of child marriages and bigamy. Registration of marriage however, has to be in conformity with certain rules and procedures specified in this connection by the legislature. In several instances without realising the importance of a marriage certificate, parties marry and leave abroad without registering their marriage. Problems arise later in the event of requirement of documentary proof of their marriage, the irony is that in several instances people want a deviation of rules as per their convenience, and a lenient stand taken in one case encourages similarly situated or less inconvenienced parties to claim a sympathetic stand. On the other hand exceptional hardship cases do require adjudication from a humanitarian angle. This year in an interesting case, judiciary adopted a practical approach and used aptly and extensively the technological and scientific advancement to grant relief to the parties without bending the rules or deviating from them. Here, the petitioners, *i.e.*, husband and wife were Swedish and Australian citizens respectively residing in London, in United Kingdom along with their infant son.[22] They had married in Ranchi, Jharkhand, in India in 2002**.** The problem arose when they wanted to come to India to attend some family issues and the child could not be brought here due to denial of the Swedish authorities to issue him a *visa*. According to the Swedish rules, if a child has a Swedish father but a non Swedish mother, for the grant of *visa* to the child, it must be proved that there was a marriage between the parents, a fact that can be proved only with the help of a marriage certificate. So, now, they wanted to apply for a marriage certificate from the Indian authorities, but in accordance with the rules of registration of marriages, in the state of Jharkhand,[23] the application for registration of marriage is required to be personally

21 The application of it however does not extend to the state of Jammu and Kashmir.

22 *Upasna Bali* v. *State of Jharkhand* AIR 2013 Jhar 34.

23 The Jharkhand Hindu Marriage Registration Rules, 2002, provides procedure for registration of the Hindu marriage. See sub-rule (3) of R. 4 of the aforesaid rules of 2002.

presented before the registrar concerned. However in this situation it was pleaded that though the parties could have come to India, they being part of a unitary family could not have left the 8 months old child back in London with no one to take care of him. At the same time without a passport the child could not travel to India. They made an application to the court for permitting their attendance before the registrar through the facility of video conferencing for the purpose of issuing of marriage certificate that was allowed by the court due to special and peculiar reason.

The advance in technology finally came to their rescue and the court adopted a humanitarian and practical approach. Personal presence the court said may not be actual physical presence but can be through video conferencing as well and held that the application of registration of their marriage could be accepted by the power of attorney and their presence could be assured through video conferencing.

Declaration of a marriage as a nullity and a claim of maintenance filed by the wife

A lawful wedlock confers a number of rights in favour of the spouses, including a provision for economic sustenance. This right to claim maintenance is conditional and the same cannot be enforced as matter of right by a woman who is a party to a void marriage due to contravention of monogamy clause of the HMA, 1955.[24] However, if a woman claims maintenance in the capacity of a legally wedded wife and the husband counters her claim, pleading that she had a subsisting marriage at the time when she married him, can the issue of her eligibility to claim maintenance legality of her marriage be adjudicated by a court while entertaining maintenance application. In a case before the apex court,[25] a claim of maintenance under the DVA, 2005 was presented by a woman against her husband that was opposed by him on ground that their marriage was void, as she was party to a subsisting marriage at the time she got married to him. To substantiate his case, he produced the marriage certificates of wife's earlier marriage that was allegedly solemnised under Special Marriage Act, 1954.

The court dismissed his contention giving two primary reasons, first that in order to prove that the present marriage was void, he should have produced a decree of nullity from a competent court and in absence of such a decree his contention would not be accepted and second, this being a maintenance application, the court is not competent to decide the larger issue of validity of marriage. Rejecting the marriage certificate , the court said that mere production of a marriage certificate issued under section 13 of the Special Marriage Act, 1954, in support of the claimed first marriage of the wife was not sufficient for any of the courts to render a complete and effective decision with regard to the marital status of the parties and that too in a collateral proceedings for maintenance. As such until the invalidation of the marriage between the parties is made by a competent court it would only be correct to proceed on the basis that she continues to be the wife of

24 See ss. 5,11 and 17, the Hindu Marriage Act, 1955.

25 *Deoki Panjhiyara* v. *Shashi Bhushan Narayan Azad* AIR 2013 SC 346.

the man so as to entitle her to claim all the benefit and protection available under the DVA, 2005.

The main substance of the judgment is that though in a void marriage the declaration of it as a nullity is optional, it can be made compulsory or necessary for deciding the marital status of the parties in certain special cases like the present one. Here the marriage of the parties took place in 2006 and the wife filed an application claiming maintenance and damages from the husband that was granted in her favour to the tune of Rs/- 2000 per month. The husband then filed an application for recall of that order, on the ground that he subsequently came to know that at the time of his marriage W was already married to somebody else and due to this subsisting marriage his marriage became void and as such he was under no obligation to provide any monetary support to her. To substantiate his contention, he produced a marriage certificate issued by the competent authority under section 13 of the Special Marriage Act, 1954, in which she was shown as the wife of another man, H1. The trial court rejected the application of the husband but the same was on revision accepted by the high court which held that a certificate issued by the competent authority under section 13 of the Special Marriage Act, 1954 was a conclusive proof of marriage and as at the time of marriage with H she was already married she was not entitled to claim any maintenance from H. The matter thus came before the Supreme Court, which did accept that for putting an end to a void marriage it is not necessary that a formal decree of the court be obtained, but to put forward a claim of void marriage in a court of law to defeat the claim of maintenance of the erstwhile wife or wife, if the husband denies validity of marriage, the same should be substantiated with a nullity decree obtained by the court and a mere certificate even though issued by a competent authority would not be enough. Secondly, the court discouraged finality on the legal validity or status of marriage where the main claim was that of maintenance. In the present case, the wife had denied the fact that she was earlier married. The court allowed the appeal of the wife and held that this issue of validity of marriage cannot be taken up in collateral proceedings of maintenance more so in the face of denial of its continuity by one of the parties to the marriage.

Adultery as a ground for divorce and the plea for the DNA test to be performed on the child to substantiate the same

Despite the advancement in science and technology, judicial insistence on proving non access to the wife beyond reasonable doubts through independent means puts a heavy burden on the man to dispute paternity. In one of such dispute[26] relating to paternity of the child, the husband made allegations of non access and substantiated it with the help of an ultrasound report of the wife. He disclaimed paternity and sought a DNA (Deoxyribo Nuclleuc acid) test to be conducted on the child to be sure of its parentage. The court termed the allegations as vague and held that the husband must establish non access to the wife at the time of possible conception of the child and bring about a prima facie case or else his prayer for DNA test would not be accommodated. Similarly, in another case, it was held that

26 *Jyoti Savita* v. *Pawan Kumar Sen* AIR 2013 (NOC) 443 (MP).

in absence of *prima facie* proof regarding truth of allegations made by the respondent, petitioner should not be directed to undergo DNA test to prove or disprove his paternity.[27]

For a matrimonial offence that usually takes place secretly, and in absence of the other spouse sometimes randomly and at other times in a planned manner, to bring in the direct proof is virtually next to impossible. With the advance in scientific technologies a person having strong reasons to believe in the infidelity of the spouse leading to, in his perception fathering somebody's else's child would normally be a nightmarish trauma that can presently be authenticated with the DNA tests. This can either lay his suspicions at rest by negating his hasty conclusion or by confirming it. In the past the courts have always adopted a protectionist attitude towards ordering or subjecting a party to the DNA test for fear of what they term as 'bastardising' an innocent child. Therefore, unless and until the husband convinces the court of non access to the wife at the time of the possible conception of the child, the court would not order for a DNA test. If he fails to convince non access, the court would apply presumption of paternity under section 112 of Indian Evidence Act, 1872. In some earlier judicial pronouncements[28] it was held that conclusiveness of the presumption under section 112 of the Indian Evidence Act cannot be rebutted by the DNA test and proof of non-access to each other is the only way to rebut that presumption. The apex court[29] had issued specific directions in this connection that were as follows:

i) that courts in India cannot order blood tests as a matter of course;

ii) wherever applications are made for such prayers in order to have roving inquiry the prayer for having blood tests cannot be entertained;

iii) there must be strong prima facie case in that the husband must establish non access in order to dispel the presumption arising under s. 112 of the Indian Evidence Act;

iv) the court must carefully examine as to what would be the consequences of ordering blood test, whether it will have the effect of branding a child as a bastard and the mother an unchaste woman; and

v) No one can be compelled to give sample of blood for analysis.

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

27 *Pathukala Sakkariya* v. *Salman Faris* I (2013) DMC (CN) 16 (Kerala High Court).
28 *Kamti Devi* v. *Poshi Ram* (2001) 5 SCC 311; 2002 MLR 28.
29 *Gautam Kundu* v. *State of West Bengal* 1993 MLR 34; (1993) 3 SCC 418.

access, it would be in the best interests of the child to have a conclusive determination of its paternity. To deny to the father, a chance to know whether the child is his or not, is detrimental not to the father but to the child. A suspicious father would never love the child who in turn would be deprived of the love and affection of the father and sometimes even his property even in those cases where the fears of the father are unfounded. In such a scenario, if his suspicion is laid at rest by a positive or a negative result, it would lead to clarity of the situation. It would be travesty of justice where despite there being reasonable ground for suspicion, the plea of DNA test is not accommodated because of an archaic provision and its application in the present era by a modern judiciary. If the husband is able to prove non access, more than half of the dispelling of the presumption under section 112 is automatically fulfilled. In such a case judiciary should have no objection, logically as most likely in all such cases the child would have been fathered by someone else. Judicial task is not heavy in those eventualities. However, instances of a married woman involving herself in an affair leading to the conception of a child, where she lives with the husband or where there is only his sporadic absence are more serious in nature and do call for judicial intervention. In such a case the offending party is guilty of a much more serious offence and should never be allowed to get away with it, taking benefit of a century old ancient provision guarding secrecy of fatherhood only because mankind had not advanced scientifically to have a conclusive determination through accurate means. The fear of the judiciary that court must examine what the consequences would be *i.e.*, the wife would be branded an unchaste woman and the child a bastard, shows that if upon revelation of true fact through conclusive determination *via* DNA test this may be the consequence and therefore it should not be ordered is bewildering. Truth kept under wraps so that the surface lie can be perpetuated and forced upon an innocent man is extremely dangerous. The wife would be branded as an unchaste woman and the child a bastard only when they in fact fit the description and when truth is discovered as against them. There is no danger of application of neither these derogatory and presently irrelevant and meaningless terminologies when the wife has either not been unchaste nor the child a bastard in fact. The advantage of these scientific technologies is that the father can neither deny nor be imputed paternity unreasonably. Law must never force a child on a man making him responsible for its financial upkeep in cases when he has not fathered it. It would be like a rule of double jeopardy. Cheated by his clever wife, if he looks at the court with hopeful eyes to get justice, only to be told that since the wife had been unfaithful to him while living with him, to father somebody's else child would not only be his fate but he would also be under a legal obligation to provide financial help to him would be a tough and tight judicial slap on his face. 24 hours /365 days surveillance/monitoring of one's spouse movements are neither feasible nor desirable. Cohabitation also necessarily has scope for some individual space and time. Where the husband in majority of cases has to leave the matrimonial home whose charge he entrusts to the wife, the wife also in increasing number of cases has shown increased mobility for the purposes of gainful employment or otherwise. This matrimonial relationship that is based on trust of sexual fidelity is shred to pieces leading to an irreparable damage, if the wife conceives and gives birth to a

child of someone else other than the husband, or if the husband fathers a child outside wedlock with another woman. A concealed illicit affair during matrimony or cohabitation is the gravest form of matrimonial misconduct and the added complication is that it is also the hardest to prove before impartial judges. Spousal indulgence in marital intercourse when and how many times will be within their private knowledge and such intimate details are hardly shared with anyone else. The best possible evidence (uncorroborated) and with no scope of confusion remains a DNA test of the child that would conclusively establish the guilt of the wife and would set at rest the suspicions of the husband. It is only the man and the woman living together under the same roof, who would be able to authenticate and verify the possibility of the conception and nobody else. Why should the court protect a woman who while living with the husband has been not only maintaining secretly another relationship but gives birth to the paramour's child as well? It is strange that when a man is duped by his wife, the court in the name of imputation of a possible stigma chooses to protect the wife, and the child rather than the discovery of real facts. A chaste wife would never be branded an unchaste woman and a legitimate child would never become illegitimate with a DNA test. It is an illegitimate child and an unfaithful wife, who would be exposed. A suspicious husband, who makes unfounded allegations of character assassination of his wife, with a conclusive contrary determination of paternity of his chid, would also get a firm fist of truth across his jaw. No one can stop a jealous unreasonable husband from defaming his wife who respects marital fidelity and the society eager to believe even a dishonest man would label such a woman as discarded and the one who has fallen from the favour of the husband making her an object of pity and unworthy of respect. A determination of paternity would mean a victory for the self respect of such a wife and defeat of the husband. Ordering for a DNA test would therefore be never against the interests of any party but would be beneficial to all concerned and a judicial hesitation for the same is unwarranted. A conception at the time of separation of a couple leading to the birth of the child would invariably be illicit and substantiation of the same with such a test would merely reaffirm a very high degree of already existing probability, but a serious requirement of discovery of truth that would further the ends of the justice would be in cases of genuine confusions, where despite marital cohabitation, the wife remains the defaulting party or the husband unreasonably suspicious.

Cruelty as a ground for divorce and maintenance to the wife

Cruelty can be physical or mental.[30] Staying together under one roof is not a precondition for cruelty and a party can be guilty even where they are not living together. In the case under survey,[31] the wife lived away from the husband but sent a number of vulgar and defamatory letters/ notices and filed several complaints continuing indecent allegations and initiated a number of judicial proceedings making his life miserable. She made a false and scandalous allegation in the written

30 *M Sukender* v. *S M Shirisha* AIR 2013 AP 117.
31 *K Srinivas Rao* v. *D A Deepa* AIR 2013 SC 2176.

statement (that was later countered by her own mother) that the mother in law had asked her to sleep with the father in law causing deep anguish and humiliation to the husband and his entire family. She filed cases against the husband and his family members forcing them to apply for anticipatory bail. Upon investigation all the allegations were found to be false and the police thus filed a closure report. Thereupon she filed an appeal to the high court against their acquittal. All along her with her family members also filed complaints against the husband with an intention that he loses his job. Holding her guilty of cruelty and granting divorce to the husband, the court noted that:[32]

> …(h)er conduct in filing complaints, making unfounded, indecent and defamatory allegations against her mother in-law, in filing revision seeking enhancement of the sentence awarded to husband, in filing appeal questioning his and his parents' acquittal indicated that she made all possible attempts to ensure that he and his parents are put in jail and he is removed from his job.

However on the issue of award of maintenance, it said that they were aware of the plight of the wife as she was fighting the litigation for 10 years and the husband being an assistant registrar in the high court was drawing a good salary. The husband was directed to pay a sum of Rs/- 15 lakhs as permanent alimony to the wife as her future, the court said must be secured by him. Giving her the benefit the court said that in the destruction of marriage the fault may not lie with one person alone and it is possible that the wife was desperate to save the marriage and in that desperation she lost her balance and went on filing complaints. The court further held:[33]

> It is possible that she was misguided; perhaps the husband should have forgiven her indiscretion in filing complaints in larger interest of matrimony. But the way the wife approached the problem was wrong. It portrays a vindictive mind. She caused extreme mental cruelty to the husband. Now the marriage is beyond repairs.

The approach of the apex court appears to display wider contradictions. The staggering amount of Rs/- 15 lakhs, which would have been the gross salary of the husband for full one year for an assistant registrar was on a very high side, more specifically as not only the wife's cruelty was proved and judicially accepted but her subsequent vindictiveness was bared before the court by her numerous attempt to harm and humiliate the husband and his entire family and to make him lose his job. A woman who first ruins a marriage and tries her best to and successfully

32 *Id.* at 2184.
33 *Id.* at 2186.

causes mental trauma to finally get a sum of Rs/- 15 lakhs as permanent alimony at his expense appears unjust. The observation of the court that perhaps the wife wanted to save the marriage and filing of the cases was an act of desperation again is unbelievable. This act of vindictiveness and her matching actions display the perception of the death of a relationship and never an act of revival.

Petition for divorce presented within one year of marriage

A petition praying for a decree of divorce cannot be presented within one year of solemnisation of the marriage unless the case is of exceptional hardship,[34] *i.e.*, if the suffering is of extreme nature and not one as a natural outcome of a failed marriage. Where the bride soon after marriage, was subjected to cruelty and was administered harpic, a toilet cleaner forcibly by the members of the matrimonial family namely the brother in-law, mother in law and sister in-law and when she fainted and was hospitalised, was threatened by them not to disclose it before the magistrate who was to take her statement,[35] it would be categorised as a case of extreme hardship and she would be permitted to present the case seeking divorce within one year of solemnisation of her marriage. In another case[36] the parties were doctors by profession. The wife presented a petition praying for divorce seven months after the solemnisation of the marriage pleading a case of exceptional hardship without obtaining the prior leave from the court. The husband made a counter plea that in absence of both exceptional hardship and permission from the court, such a petition would fail as obtaining leave from the court is *sine quo non* for filing the petition prior to one year of marriage as the provisions of section 14 are mandatory and not merely directory. The court dismissed his contention holding that section14 is merely directory, and not mandatory, Further, even if the divorce is granted on a petition presented before one year, it can be made conditional to take effect only after the lapse of one year. The court then proceeded to examine the facts in order to ascertain the factual reality and an assessment into the claim of exceptional hardship. The wife proved that he made a demand of Rs/- 10 lakhs from her parents at the time of negotiations of marriage and had agreed to perform the marriage, only after receiving eight lakhs out of it. Post marriage he made an additional demand of Rs/- 60 lakhs and a Honda city car on the pretext that his parents had taken a loan for his education and had to repay it with the dowry amount. The wife further proved that the parties had agreed to present a divorce petition by mutual consent but the husband was adamant that unless a house was purchased in his name to the tune of Rs/- 40 lakhs he would not sign the divorce papers. The court rightfully concluded that the situation was one of exceptional depravity and hardship and the wife's petition presented before one year could be accepted.

A husband accepting that he made dowry demands despite their equal educational qualifications but pleading that the same could not be treated as of

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34 See the Hindu Marriage Act, 1955. s. 14.

35 *Renu* v. *Rakesh Kannojia* I (2013) DMC 782 (DB) (Uttrakhand High court).

36 *G Ganesh Babu* v. *A P Arthi* I (2013) DMC 49.

exceptional hardship speaks volumes of continuation of evils of dowry and their acceptability in our society.

Presenation of petition for divorce by mutual consent within one year of marriage

Experimentations with a clear provision continued this year as well with judicial pronouncement sacrificing clarity and certainty and bringing in the avoidable uncertainties and ambiguities. Despite the clarity of the legislation both in language as also in intent, it's distortion in the name of convenience of the parties is unwarranted.

Section 13 B provides the necessity of demonstration of minimum one year separation by the parties, for divorce by mutual consent. In a case from Kerala,[37] the parties realisation of their unsuitability dawned on them right on the wedding day resulting in non-consummation of their marriage. The wife confessed that she wanted to marry somebody else and had entered present matrimony under intense pressure/compulsion from her parents. After failed mediation attempts, pursuant to an agreement they filed a petition for divorce by mutual consent after one month and seven days of their marriage. They submitted the affidavit stating the facts and circumstance and pleaded that exceptional hardship would be caused to them if the petition was not entertained. The family court dismissed their application for want of compliance with legal provisions, but on appeal the present court accepted their contention and permitted acceptance of their petition despite the fact that one year had not elapsed since the date of their marriage. The main reason influencing the court was that the marriage did not last even for a single day; remained unconsummated, and all attempts of mediation failed. Thus a case of exceptional hardship could be made out and an impossibility and futility of continuance of this relationship any further was amply demonstrated. Secondly, there was no case of misrepresentation, or concealment or fraud. The court also said that the lower court should have allowed the application and ordered that the first date of filing of the application should be treated as the date of the first application so that after six months the second motion could be filed by the parties.

Solemnisation of marriage under the Jammu and Kashmir Hindu Marriage Act, 1980 and availing Jurisdiction under Hindu Marriage Act, 1955

The multiplicity of personal law system in India displays unique challenges. Matrimonial laws vary on considerations of religion of the parties as also on the region, they come from. In the state of Jammu and Kashmir, Hindus are subject to the provisions of the Jammu and Kashmir Hindu Marriage Act, 1980, while elsewhere majority of Hindus are governed by the HMA, 1955. It is a fundamental principle of matrimonial jurisprudence that if a marriage is solemnised under one enactment, the remedies including the jurisdictional issues of that enactment only will govern the parties. Here,[38] the parties were married in Jammu, where the husband was domiciled according to Vedic rites. For a period of fifteen years they lived in Jammu

37 *Gijoosh Gopi* v. *Sruthi* AIR 2013 Ker 94.

38 *Shashi Leekha* v. *Sheila Shashi Leekha* AIR 2013 Bom 86.

and were blessed with two sons. The wife thereupon moved to Mumbai and filed a petition for divorce;[39] custody of the minor children; permanent alimony of Rs two crores and return of all of her items. The husband made a preliminary objection that since the solemnisation of marriage was at Jammu, under the provisions of the Jammu and Kashmir Hindu Marriage Act, 1980, and the parties had last resided together at Jammu, the marriage and the matrimonial remedies would be governed by the provisions of the Jammu and Kashmir Hindu Marriage Act, 1980. Consequently, the courts in state of Jammu and Kashmir would have the exclusive jurisdiction to entertain the petition for dissolution of their marriage. Hence the family court at Mumbai did not have the competent jurisdiction to try the case. The wife sought application of the HMA, 1955, (that has no application to the marriage solemnised in the state of Jammu and Kashmir), and contended that that as per the provisions of HMA, 1955 she was residing at Mumbai and the courts in Mumbai would be a court of competent jurisdiction. Further as she was a Hindu she could avail the provisions of the HMA, 1955 and it was not necessary that it is only the Jammu and Kashmir Hindu Marriage Act, 1980, that would govern their case. The court was confronted with the issue of solemnisation of marriage under one law and the attempts by one of the parties to avail another law that specifically provided its non application to the region where the marriage was solemnised.

The family court dismissed the application of the husband challenging its jurisdiction on the ground that as he was domiciled in Jammu he could not challenge the jurisdiction of the Family Court at Mumbai being domiciled of the state of Jammu and Kashmir as these provisions of civil procedure code (CPC) were not applicable to state of Jammu and Kashmir. On the other hand the court said that the HMA, 1955 has been amended to empower a wife to file a petition at her place of residence and thus the petition presented at Mumbai was within the permissible limits of law.

The decision of the family court was based on three main reasons: *first*, that the parties are Hindus, one is domiciled in Jammu and the other in Mumbai; *second*, the marriage was solemnised in accordance with Hindu rites and the wife being a lady residing in Mumbai, the court at Mumbai has jurisdiction to try the case; and *third* that the wife was a Hindu, was domiciled in Maharashtra at the time of marriage. Thus at the time when she married she being a Hindu was subject to the application of HMA, 1955 and by getting married to a man who is domiciled in Jammu and solemnising the marriage at Jammu, she will not cease to have any protection of the Central Act, *i.e.*, the HMA, 1955, more specifically to which she was entitled to before her marriage. It concluded that the Act extends to whole of India except the state of Jammu and Kashmir, but because it also applies to those Hindus who are outside the territories to which the Act extends the wife would be governed by the provision of this Act

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39 S. 13(1) of the Hindu Marriage Act, 1955.

The court allowed the application of the wife and dismissed the contention of the husband on two grounds; first that the rights and remedies provided in both the enactments, *viz*, the HMA, 1955, and the Jammu and Kashmir the Hindu Marriage Act, 1980 are more or less identical substantially; both deal with the subject of Hindu marriages and both give option to the parties to invoke the jurisdiction of the court of their choice and secondly, that the place of solemnisation of the marriage is not the decisive criteria for application of the concerned enactment and it is enough for the application of the HMA, 1955 that a valid marriage should have been solemnised between two Hindus and it is not necessary that the marriage must have been solemnised within the jurisdiction of the place where the HMA, 1955 applies. Thus, so long as a person remains a Hindu, he can avail the provisions of the HMA, 1955 if the marriage was a valid marriage irrespective of wherever it might have been solemnised, within or outside the territorial limits to which the Act extends. Thus, merely because the marriage was solemnised in Jammu and under the Jammu and Kashmir Hindu Marriage Act, it would not mean that the wife now and at the time of marriage as well living in Maharashtra, cannot present a petition praying for divorce under the HMA, 1955.

The present judgment appears to be incorrect as it is not only against the statutory provisions but against the rules of conflict of personal laws. It must be noted here that the wife had not only proceeded under the jurisdictional clause of the HMA, 1955, but also had sought a remedy of divorce under it. It was in clear violation of law, and the court committed a grave error in not applying the settled principles of application of personal law over the parties. It is the law of the place of solemnisation of marriage and the law under which the marriage is solemnised that is the relevant law under which the remedies can be obtained and not the domicile of the wife or that of the husband before their marriage. If the marriage was solemnised in Bombay, then the husband could never have been in a position to invoke the provisions of Jammu and Kashmir Hindu Marriage Act, 1980, and the relevant law would have been the provisions of the HMA, 1955. In light of the clear mandate that the HMA, 1955, is not applicable to the state of Jammu and Kashmir, its application to or against anyone who is domiciled in Jammu and Kashmir, gets married in Jammu and Kashmir, is against the written rule of law that the courts should specifically refrain from postulating.

Interestingly, an earlier judicial pronouncement of the Jammu and Kashmir High Court[40] was ignored when brought to the notice of the present court, wherein the parties who were married in Madras, had presented a petition praying for matrimonial remedy in Jammu and Kashmir but were denied the same on the ground that since the marriage was solemnised in Madras, the court in Jammu and Kashmir are not the courts of competent jurisdiction. The court therein had held that the jurisdiction has to be decided keeping in view the place of solemnisation of the marriage and not the domicile of the parties and the court had actually cautioned

40 *K Radhakrishna Nayyar* v. *Radha* AIR 1992 J &K 1.

that the forum of jurisdiction for seeking relief under the Act cannot be left to the discretion of the parties in as much as they may choose to approach different courts, one governed by the central Act and the other by the state Act, in that event not only the passing of conflicting judgment cannot be ruled out but it may lead to disastrous results owing to failure of justice. Thus the factum of place of solemnisation according to the court was the decisive factor.

Family laws are enabling laws. They do not compel any one to marry under one particular enactment. Every Indian has an option to marry either under the religious based law or opt for a marriage under the Special Marriage Act, 1954 but the cardinal rule in matrimonial jurisprudence is that if a marriage is solemnised under the provisions of one particular enactment then the matrimonial remedies available under that enactment only can be availed of by the parties to the marriage. One cannot marry under one enactment and avail the remedies available under a different enactment. It would be catastrophic and would create uncertainties and imbalance as far as application of family laws is concerned. It is a very serious matter requiring certainty and clarity and not judicially introduced ambiguity. The scenario of multiplicity of family laws system works within specified domains and according to established rules of private /personal law and should not be reduced to a shopping forum for the parties to choose the application of one law over them in accordance with their convenience against the legal provisions.

Recognition of a foreign decree of divorce

Increased global movement; acquisition of residence in foreign shores, security of jobs and happy matrimony are dreams cherished by millions of people most specifically from those in the third world countries including many Indians. These dreams are rudely shattered in the event of matrimonial discords and problems are further compounded where local courts are resorted to for solutions to the matrimonial problems, decisions are procured only to be told later that though the matrimonial problem arose in the foreign land; decision and solution to matrimonial problems was procured by local courts on the criteria of their residence there, since the marriage was solemnised in India, the decree of divorce obtained from such courts may or may not be recognised in India. For a common man, courts are courts and the rules of private international law, providing conditional application of foreign decrees is baffling. In a case under survey, the issue was with respect to a decree of divorce granted by the courts in England and their recognition and enforcement in India.[41] The parties here met in England but got married in Delhi in 2005. They went back to England thereafter but four years later, the wife filed a complaint of domestic violence, cruelty and assault against the husband in a police station in England. She thereafter came back to India and lodged an FIR against him for committing an offence under section 498A as well. The husband filed a petition for divorce in the court at England, pleading that she had misbehaved with him and he cannot reasonably be expected to live with her. The wife filed a suit claiming a permanent injunction restraining the husband from pursuing or continuing with the divorce petition in London and filed for divorce

41 *Pritam Ashok Sadaphule* v. *Hima Chugh* AIR 2013 Del 139.

on grounds of his cruelty in India. Three months later to the filing of this petition in Delhi, the courts in England passed a decree nisi stating that the marriage between the parties had broken down irretrievably and ordered that the same be dissolved unless sufficient cause is shown within six weeks as to why the same should not be made absolute. The wife filed a detailed representation before the court in England and opposed the making of divorce decree absolute, but the courts did make the decree absolute despite such representation. She then challenged the validity of this foreign decree on number of grounds predominant amongst them being, first, that at no point of time she had submitted herself to the jurisdiction of the English courts; second, she was not represented in this litigation resulting in the pronouncement of divorce; third, she had made an application that the decree should not be made absolute and wanted to contest the petition of the husband; and fourth, that the ground on which the marriage was dissolved by English court was not a ground recognised by the Indian statutes. The ground on which the marriage was dissolved was irretrievable breakdown of marriage. The husband on the other hand pleaded that since the wife had not obtained any declaration from any court in India that this decree obtained by him in England was a nullity, the same is valid and operative. He added that summons were adequately served on the wife, she had knowledge of the proceedings, and she had also made an application to the court that was rejected, and clearly she with full knowledge of proceedings chose not to contest it. Therefore it cannot be said that she had not submitted herself to the jurisdiction of the English courts, as by simply not appearing before the court despite service of summons, she cannot later take the plea of absence of representation.

The present court analysed the relevant provisions of the CPC with respect to enforcement of foreign decrees in India,[42] A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:

a) Where it has not been pronounced by a court of competent jurisdiction;
b) Where it has not been given on the merits of the case;
c) Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
d) Where the proceedings in which judgment was obtained are opposed to natural justice;
e) Where it has been obtained by fraud;
f) Where it sustains a claim founded on a breach of any law in force in India.

and said that only that court would be a court of competent jurisdiction which the Act/ the law under which the parties are married recognise as a court of

42 S. 13 read as under: when foreign judgments are not conclusive.

competent jurisdiction to entertain the matrimonial disputes. Any other court should be held to be a court without jurisdiction unless both parties voluntarily and unconditionally subject themselves to its jurisdiction. Further, it is necessary that the decision of the foreign court should be on a ground available under the law under which the parties are married and the decision should be a result of contest between the parties, the later qualification fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the court. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the court, or an appearance in the court either in person or through a representative for objecting to the jurisdiction of the court should not be considered as a decision on the merits of the case. The third requirement is that only that law can be applicable to the matrimonial disputes under which the parties are married and no other law.When therefore a foreign judgment is based on a jurisdiction or a ground not recognised by such law, it is a judgment which is in defiance of the law and therefore it is not conclusive of the matters adjudicated therein and hence unenforceable as such a judgment would be in breach of the matrimonial law of the country. The other ground on which foreign judgment would be unenforceable would be that the proceedings in which it is obtained are opposed to natural justice, which means that the respondent does not have necessary expenses to bear the cost of travel and accommodation and represent effectively her case, as this is primarily the reason why as a rule of private international law, there is an insistence on filing of the case at the place where the defendant resides.

In the present case the court said that since both the parties are Indians, their marriage was solemnised in India under the Hindu Marriage Act, 1955, but the ground on which divorce was granted was irretrievable breakdown of marriage which is not a ground available to the parties if the relevant law to which they are subject to would have been applied, and from the chain of events it was evident that though summons were served on the wife, she did not at any point of time submitted herself to the jurisdiction of the court in England and her application not to make the decree absolute was clearly in protest to the entire litigation, hence it can be concluded that she was not represented at all in the litigation let alone an equal representation, and therefore this decree in light of section 13 of the CPC would not be enforceable in India.

IV HINDU MINORITY AND GUARDIANSHIP ACT, 1956

Custody and guardianship to the maternal grandfather in presence of the father of the child.

Notwithstanding the legislative provision that the natural guardian of the child is the father, and after him the mother, in matters of contested custody and guardianship claims of tender children none of the parties have a right to be a guardian. It is always the welfare of the child that is the most important criteria to be kept in mind. The welfare of the child cannot be measured by money or by physical comfort alone. The word welfare must be taken in its widest sense and

includes the moral and religious welfare as well as its physical well being, ties of affection, age, sex and religion of the minor, the character and capacity of the proposed guardian, nearness of kin to the minor, any existing or previous relations of the proposed guardian with the minor, claims and wishes of parents, risks, choices and other circumstances. All of these are to be taken into account and weighed, in order to adopt a course which is most in the interests of the child's welfare. The main question before the court should be what order could be passed for securing the welfare of the minor; with whom will they be happy: who is likely to contribute most to their well being and look after their health and comfort? The interest, well being and the happiness of the minor ought to be the main and paramount consideration in selecting the guardian. It is also a settled rule that if the minor is of an age, where he can show the willingness or an intelligent preference, the same must be taken into consideration. In normal circumstances while the natural guardian is alive the guardianship cannot be claimed by anyone else, but, due to peculiarities of events, in presence of the father, some other concerned and competent relation may be appointed as the guardian if the interest and welfare of the child so demands. In a case from Bombay,[43] post unnatural death of the mother, the infant, a baby girl was taken by the maternal grandfather on the day the mother died and was being raised by him. The father faced murder charges and was in jail/custody. The child for a continuous period of six months was with the maternal grandfather, who was around 61 years old; was supported in taking care of the child by his 52 years old wife; had a reasonably good income and had one financially independent married son who with his wife lived with him. The child therefore had a family in which to grow up comprising of grandparents, maternal uncle and aunt. The father on the other hand had six sisters but none of them had evinced any interest in the upbringing of the baby. One of the paternal aunts then filed an application for the custody of the child as also for its guardianship. She was 49 years old; was married with two grown up children and a retired husband. The main contention of the aunt in making a preferential custody and guardianship claim was based on sameness of sex and religion. The parents of the minor here had an inter-religious marriage under the Special Marriage Act, 1954, father being a Roman Catholic and the mother a Hindu. Post marriage the mother had refused a request by the father to convert into Christian faith and had continued to profess her Hindu religion. The child also lived with the father for three years till the death of the mother, but the baptism ceremony as per the tenets of Christianity that is required to be preformed within a few days from the birth of the child or if later within three years was not performed in this case. The aunt argued that the child must be brought up as a Roman Catholic Christian as her father belonged to christen faith and not as a Hindu. Catholic rituals must be performed and that the child must attend a convent school where the ideals of Christianity would be taught. The maternal grandfather being a Hindu was not capable of inculcating the same faith in her

43 *Rajan Chawla* v. *Lisbon John Miranda* AIR 2013 Bom 29.

To begin with the court raised serious doubts and rightly so about the acceptability of the child in the home of the paternal aunt, who by her own admission had not acted on her own but had done so under the instructions of the child's father who was in jail and held, that:[44]

> A child is not a chattel. Custody of the child cannot be altered upon the instructions of the person who cannot claim custody in view of his unfitness and cannot be thrust upon another who herself does not desire to have it and has not taken any action in that behalf of her own accord. The child who is the ward of the court would not require any special needs but a home and a caring environment.

The court re-iterated that the welfare of the child is the prime concern of any court in passing any order for the child. The guardian is put in the position of her parent. It would be akin to adoption; hence all the aspect must be separately considered, namely: age; sex; religion, character and capacity of the guardian; nearness of kinship and wishes of the deceased parent. With respect to the first consideration, the court noted that the child was barely 4 years old and at such a tender age she should be allowed to grow where she is accustomed. Appointing the aunt as a guardian would require the child to be uprooted from her present environment and abode. As far as the sex of the child and that of the guardian is considered the court out rightly rejected the argument of the aunt that the sameness of sex of her and that of the child should be a major factor. Drawing parallels from the statutory position the court held that law makes father of even a female baby her first and foremost guardian despite him being from a different sex and if in a given scenario a female baby would be exposed to an environment having a single male guardian with no females in the residence, it may not be an appropriate relationship or setting and sex may be determining factor but in a close-knit, healthy happy family which is the norm in our society, sex is not intended to be made a barrier to the appointment of the guardian.

Since, religion in this case was a major contentious issue, interestingly, the court observed that the child would not get the idealism of Christianity from a father who has been imprisoned during her minority having been charged with murder of her mother and cruelty towards her and stated that the concept of religion was totally misread and misinterpreted by the claimant. The concept of religion does not contemplate that in our patriarchal society only the religion of the husband must prevail as this would not only be directly contradictory to the freedom of religion guaranteed under the Constitution of India but would also be gender discriminatory where each individual is allowed to profess and practice the religion of his or her choice and respect for all religions is enjoined.[45] A minor who has been brought upon in accordance with the tenets of any of the religion be not disturbed by thrusting upon her the tenets of any other religion causing stress and

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44 *Id*. at 31.

45 *Supra* note 43 at 33.

trauma during the delicate years of her growth. In the present case the mother of the minor was by birth a Hindu; practiced Hindu faith throughout her life and died as a Hindu. This child was being cared by a Hindu mother and a Christian father, and post death of her mother was being taken care of by her Hindu natal family and there was no cogent reason for any upheaval by any disturbance of that state of affairs. The minor was exposed to the Hindu religion and the application of the aunt that certain ceremonies of Christianity hitherto not performed are now required to be performed demonstrated the desire to disrupt the peaceful environment and surroundings of the child. Thus it would be in the interest of the child that she be kept away from any religious dogma to which she has not been exposed in her infancy so as to leave her childhood carefree and stress free.

With respect to the character and capacity of the guardian to take care of the child, the court noted that though the character of the father cannot be vouched for, the character of the aunt and that of the maternal grandfather was not in dispute and while the capacity and willingness of the grandfather was amply demonstrated before the court, the fact that the aunt had not acted herself but had done it only at the asking of and at the behest of the father of the child, would be a factor that would tilt the scales in favour of the grandfather. With respect to nearness in kinship the court held that a maternal grandfather would be nearer to the child in kinship in comparison with a married maternal aunt, more so when she had not shown any relationship before the filing of the application for the custody of the child. As far as the wishes of the deceased parent were concerned the issue again was decided in favour of the maternal grandfather as the mother had resisted conversion. The court ruled in favour of the maternal grandfather of the child and as against the paternal aunt, on all considerations and appointed him as the guardian of the person and properties of the child.

Custody battle between the mother of the children and their paternal grandmother

The pre-requisites for applying for custody or access to the child even by a parent are under the premises of acceptance of responsibility and not exercise of a right. Hence an applicant must demonstrate parental responsibility if he desires to have any contact with the child. As aforesaid, it is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take its care are some of the relevant factors before the court while deliberating upon the issue of a minor's custody. The desire, interest and welfare of the minor is the crucial and ultimate consideration that must guide the determination required to be made by the court.[46] The tug of war over the custody of the children in the case under survey[47] was between the mother of the children and their paternal grandmother. It was a tragic tale of the marriage going wrong within five years of marriage with two children. The mother left the matrimonial

46 *Gayatri Bajaj* v. *Jiten Bhalla* AIR 2013 SC 102.
47 *Murari Lal Sidana* v. *Anita* AIR 2013 Raj 100.

home leaving behind three years old son and a two years old daughter with the father and the paternal grandmother. A year and half later, the father committed suicide and the paternal grandmother took it upon herself to bring up both the children. Now the mother applied for their custody and guardianship. The lower court ruled in her favour applying the presumption that a mother is always the well-wisher of the children notwithstanding the fact that she had abandoned them soon after their birth. The children at the time the issue came before the present court were 13 and 12 years old respectively. The court reiterated that the welfare of the child is of paramount importance. Children tend to be sensitive, and require emotional and materialistic support that provides a feeling of well being, of developing his potential strengths and to throw it into unfamiliar surroundings is not appropriate as the child should not be made a victim of the judicial process and every effort should be made to protect and promote his innocent life and his sacred ambitions. Here after the split of the couple, the children were left in the care and protection of the grandmother and as between them an intimacy and emotional bonding for over a decade as also with the family environment, school, friends and neighbourhood, must have developed with only a faint memory of their mother as they never interacted or developed an emotional bonding with her The children categorically stated that they wanted to live with their aunt and grandmother rather than their own mother. They were even ready to be with their aunt and her husband in case the grandmother died. The mother on the other hand claimed that she was in a position to look after the children but she was full of anger against her in-laws and therefore the court declined to apply the presumption that the mother always has the interests of her children at her heart. The court also noted that the mother never applied for the custody of her children during the life time of the father but applied for succession certificates for claiming his money. Since the children in the present case felt safe, comfortable and confident with their grandmother, the mother was denied custody.

In the present case as the relations between the mother and the grandmother were very strained, the court denied even visitation rights to the mother as that could cause emotional and psychological trauma to the children who would have to comply with the court order and it was for their welfare that no emotional disturbance should be caused to them.

As the concept of custody and guardianship is closely related to parental responsibility, a person who has no inherent right to be appointed as a guardian cannot claim the right to custody and access of the minor. In a case from Bombay,[48] at the time of divorce, the parties executed an agreement under which the father relinquished all his rights over his child including that of custody, guardianship, visitation and access even under changed circumstance like the mother's remarriage. In lieu of the guardianship and custody of the minor, she waived her rights to claim child support by giving a written undertaking to maintain the child. Subsequently, the husband's parents moved an application seeking access to the

48 *Nirali Mehra* v. *Surendra Kumar Surana* AIR 2013 Bom 123.

child, custody and visitation rights. They however, did not apply for appointment as its guardian. The court dismissed their application on the following grounds:

i. Guardianship is not a right but matter of responsibility.

ii. A person who has no authority to be a guardian cannot legally claim access, custody and visitation rights.

iii. It would not be in the welfare of the child to be tossed from one place to another in the name of visitation rights.

iv. The father having abdicated the responsibility of looking after and maintaining the child cannot make an entry through backdoor by fling an application for the visitation rights through his parents.

The court said that a father who neglects, dodges and evades his own parental duties and responsibilities, may easily give up custody rights to his child so as to be free from the obligations of parenthood as has been done in the present case may from the backdoor gain entry and access to the child through his parents agitating on his behalf in another garb. On equitable principle this cannot be allowed as none can do anything indirectly which he cannot do directly. A child cannot be used for mental satisfaction of another as that could go totally against the mandate of safeguarding and promoting its welfare. The mother here had shown that her marriage had broken down due to the grandparents of the child; the father had refused to maintain the child and thus she had accepted the entire responsibility as a single parent to bring up the child. The court dismissed the claim of the grandparents to have visitation rights/access to the child and advised them to work out the differences with the mother of the child for what they may do with the child for its best interests.

V HINDU LAW

Devolution of property under the Hindu Women Right to Property Act, 1937

Under the classical Hindu law, a widow's right to claim maintenance were well recognised, but a statutory shape to the same came in 1937, under the Hindu Women Right to Property Act, 1937. It was for the first time that a Hindu woman could gain entry though indirectly into the erstwhile exclusive zone of male bastion described as coparcenary. The doctrine of survivorship stood modified, and affected to a large extent the concept of coparcenary property ownership in a Hindu joint family. According to the Act, upon the death of coparcener if he was survived by his widow or widow of a predeceased son or of predeceased son of a predeceased son, his right in the ancestral property would be taken by such widow but only during her lifetime or till she remarries. This conferment of even a limited interest in the joint family property was perhaps the first concrete step taken by the legislature towards economic empowerment of women in the then existing times. Its culmination in the eventualities of remarriage or death could only help the reversioners and till she was alive, the male collateral of the deceased husband

could not lay any claim over it. The constraint on her ownership of the property was in the nature of her incapability to alienate it, except for legal necessity. In a case from Chhattisgarh,[49] the issue started with the death of a Hindu man A in 1950, who owned two items of property, one an agricultural land and the other a residential house. His only son, S had predeceased him leaving behind his widow SW and four daughters. Upon death of A, the name of SW (A's daughter in law) was entered/recorded in the agricultural lands. SW took possession of the land and then sold it to one of her son in laws, DH_4 and died in 1982. The remaining three daughters filed a suit to the effect that the property originally belonged to their grandfather A, and their mother SW, had acquired only a limited interest in the said properties. As she had parted with the possession of the property by an impermissible alienation, her limited interest could not mature into an absolute interest with the coming of the 1956 Act. Further what she had conveyed in favour of the alienee under the imperfect alienation was a limited interest and the same came to an end with her death. Since the property originally belonged to A, their grandfather, in absence of reversioners, it would devolve as per the inheritance laws in favour of his class-I heirs, and they being his grand daughters, daughters of predeceased son S, they (the three daughters) are the owners of 3/4th of the property. Hence the share should be partitioned amongst them. They also claimed a declaration that the sale deed executed by SW in favour of one of her son in law was void as she had no absolute title to the property and had only a limited interest in it.

The lower court accepted the case of the plaintiffs in totality and decreed the sale as void and their entitlement to the extent of 3/4th share in the property. The first appellate court however, after scrutinising the fact concluded that as far as the agricultural land was concerned, the relevant law that governed devolution of agricultural property provided that if a man died without leaving a male issue the property passed to the state. So in the present case because A had died without a son, the state succeeded to the property. The state then allotted the same property to SW, the widow of the predeceased son of A as an exclusive owner not through inheritance but as an independent owner under the Madhya Pradesh Land Revenue Act, 1959 and thus as far as the agricultural property is concerned she had a right to dispose it off but the dwelling house that she obtained through inheritance conferred in her a limited ownership. In that, she could neither confer nor convey a valid title in favour of anyone else. The lower appellate court therefore, confined the relief of the petitioners in only the dwelling house and not agricultural property, holding that the sale of the agricultural property is good while the one for dwelling house was bad. The present court explored section 3 of the Hindu Women Right to Property Act, 1937 and held that since A had died in 1950; succession to his entire property would be governed by the Hindu Women Right to Property Act, 1937 and not differently under different legislations. In other words, the devolution of agricultural property would also be through the Hindu Women Right to Property

49 *Dukhdayibai* v. *Matibai* AIR 2013 Chh 112.

Act, 1937 and not through the land legislation applicable to agricultural property in that area. As she was only a limited owner, she was not competent to transfer the property to anyone unless it was for legal necessity which did not exist in this case. Therefore, what she conveyed to the alienee's was only a limited interest which terminated upon her death as she could not convey a larger interest than what she had in the property. Upon the death of the limited owner the property would revert back to the reversioners if any, otherwise the property is treated as the property of the deceased male from whom a limited interest was inherited by the widow, in this case A, and it would be presumed as if A had died on the day of the death of the limited owner and the property would go to his heirs in accordance with the laws of inheritance to which he was subject to. Thus if A had died in 1982, according to the class-I heirs category, plaintiffs would be the granddaughters *i.e.*, daughters of predeceased son of the intestate and all of them would inherit the property as class-I heirs.

Hindu Gains of Learning Act, 1930

The classification of the properties into two, separate and joint family property continues for Hindus even till date. The separate property belongs exclusively to the owner and no one can claim any right over it without his permission, but in the Hindu joint family property also known as coparcenary property or ancestral property, the son and now the daughters also have a right by birth, the quantum of their share being equal to that of the father/karta. As far as acquisition of coparcenary property is concerned, any property acquired with the aid of the joint family funds also takes the character of the coparcenary property and not the separate property of the acquirer. Thus any property acquired when the nucleus came from the joint family or it was acquired to the detriment of the joint family property would also acquire the character of the coparcenary property. However, if a person receives his education with the aid of the joint family funds, and then gets an employment, his salary would always be categorised as his separate property.The position in this regard has been clarified statutorily in the year 1930 itself with the enactment of the Hindu Gains of Learning Act, 1930. The issue arose this year before the Madras high court in respect to a suit filed by A, a Hindu man claiming partition from two sets of properties as against B, his elder brother.[50] Here, the family originally comprised of the father and two of his sons, A and B. The joint family property in the father/karta's hands was taken by both the sons jointly on his death. This property was termed as property X and constituted the joint family property. During his lifetime the father had used funds from the joint family property to educate his son B up to the level of his acquiring an MA and also a B.Ed degree. With the help of this degrees/education, B acquired a job and started getting a salary. With the salary he purchased an item of property described as property Y. A, his younger brother, filed a suit for partition against B demanding half share in both X and Y property. His claim to property Y was with a plea that B had acquired property Y using funds from his salary but since his entire education

50 *K Govindarajan* v. *K Subramanian* AIR 2013 Mad 80.

was financed by the joint family funds and his capability to take up an employment and get a salary was due to utilisation of joint family property to his benefit, his salary would also constitute joint family property and he would have a right to claim a share in it. What A wanted was, that B, should render accounts of his earnings and put all the properties he had acquired out of such learning into the common hotchpotch. With respect to property X, his claim was admitted and recognised by B as well but with respect to property Y, the claim was resisted by B on the ground that it was his separate property. The trial held that since, property A was joint family property, the claim of A would be accepted but since property B was the separate property of B, A was not entitled to claim any share in it. A then preferred an appeal in the high court and contended that since anything acquired at the detriment of the joint family funds also takes the character of the joint family property, property B would be the joint family property. The high court dismissed the claim of A and noted here that B had not acquired any property directly from out of the income of the joint family nucleus. If that be so the matter would be entirely different and thus he cannot be called upon to put his property into the joint family common hotchpotch. The court held that education might have been out of the joint family funds but there was no nexus between the acquisition of the property with aid of his salary and funding of his education with the joint family funds. The court did not elaborate on the provisions of the Hindu Gains of Learning Act, 1930 which clearly provides an answer to the issue like the present one. It specifically mentions that notwithstanding the fact that education might have been received by a person using the joint family funds, if a person acquires property utilising his education financed earlier with the help of coparcenary property, the acquisition would constitute his separate property and not the joint family property. [51]

VI HINDU SUCCESSION ACT, 1956

Application of Hindu Succession Act, 1956 to members of scheduled tribes

The Hindu Succession Act, 1956, applies to Hindus, generally but the legislation in itself provides an exemption in favour of Hindus who are member of scheduled tribes. As far as intestate succession to their property is concerned, they are governed by their customary laws of inheritance irrespective of their religion. Where the law of inheritance of a particular tribe is not certain or is not known,

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51 S. 3 reads as under: Gains of learning not to be held , not to be separate property of acquirer merely for certain reasons: Notwithstanding any custom, rule or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of:

a) his learning having been , in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the joint family funds of any member thereof, or;

b) himself or his family having while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

what law can be applied to their property was an issue that arose before the Chhattisgarh High court this year.[52] Here the property was jointly owned by two brothers after the death of their father F. These brothers, A and B died and were survived by two daughters of A, an illegitimate grandson GS and daughter in law of B, SW. All laid their claim over the property of the deceased. The parties belonged to *Gond* [53] caste and tribe; were members of the scheduled tribe and according to them Hindu Succession Acts, 1956 was not applicable to them. They could not prove before the court any concrete evidence of the law of succession applicable to their community but maintained that according to their customs, daughters had no right of inheritance. Therefore it was the grandson and the daughter in law who maintained that they were the rightful claimant of the property. The main issue before the court was, whether in absence of a concrete and proven customary law of succession applicable in their community, the principles of the Hindu Succession Act, 1956 are applied to the members of the scheduled tribe.

The court observed that in the present case, as the parties failed to prove the existence of laws of inheritance or clear or certain custom prevailing in the *Gond* caste in absence of any such law the courts are required to decide the rights according to justice, equity and good conscience and the daughters would be best entitled to inherit the property left by their father in comparison to the other surviving relatives of the deceased.

Succession rights of children born of live in relationship and defective marriages

The legislative protection accorded to the children of void and voidable marriage has not been extended to those born of intimate relationships without any marriage. Biological connection does not help the child as inheritance rights flow from a valid marriage and not merely by blood relations. In a case under survey,[54] the issue was with respect to the succession rights of a child born of a live in relationship between his father and mother. Upon the death of the first wife, A, a Hindu man brought W to his house and started living with her and a male child, S was born from that relationship. No marriage ever took place between them. A was a member of Hindu Joint family along with his two other brothers and had a share in the joint family property. Upon the death of A, a suit of partition was filed by S and W, claiming A's share in the ancestral property but their claim was rejected on the ground that W was not the legally wedded wife of A and S was not his legitimate progeny. As there was no marriage but only physical relationship between W and A, S cannot take the benefit of application of section 16 of the HMA, 1955. The case highlights the importance of solemnisation of marriage. If the marriage is solemnised validly, then despite its contravention with legal requirements, the children's rights of inheritance from the property of the father are well protected. In *Chandramathi K* v. *B N Usha Devi*,[55] an application of a

52 *Sarwango* v. *Urchamahin* AIR 2013 Chh 98.

53 The term Gond refers to tribal peoples who live all over India's Deccan Peninsula. Most describe themselves as Gonds (hill people) or as Koi or Koitur.

54 *Babulal* v. *Natthibai* AIR 2013 MP 134.

55 AIR 2013 Kant 1.

daughter born of a second marriage of a man for succession was fiercely contested by the brother of the deceased on the ground that she being an illegitimate child was not capable to inherit the property of her putative father even if he had acknowledged her as his daughter and her mother and father were living as husband and wife and in the school register in the column meant for writing the name of 'father', the name of the deceased was mentioned. Though the factum of solemnisation of the marriage was disputed by the brother of the deceased it was in evidence that it was a bigamous marriage. His contention was that as the girl here was born of a void marriage, she being illegitimate was not competent to inherit the property of her father was rejected. The court ruled in favour of the daughter and gave her the benefit of section 16 of the HMA, 1955, holding that a child of a void marriage can inherit the property of his putative father.[56]

Succession rights of a convert

One of the primary principles applicable under the classical Hindu and Muslim law and has been continuing till date though statutorily modified is the essentiality of sameness of religion as between the intestate and the heir. Under the classical law, if a Hindu converted to another faith he lost his right to inherit the property of his Hindu relations irrespective of the closeness of the relationship between him and the intestate. Similar was the position under the Muslim law. This rule saw legislative modification with the enactment of the Caste Disabilities Removal Act, 1850, an Act aimed at removing the disabilities associated with conversion and ex-communication of a person. Post promulgation of this enactment, with the removal of the disability, despite conversion, a person retained the inheritance rights in the property of the intestate. An interesting question arose this year in a case from Madras, wherein the issue took the courts to the factual developments as they emerged from 1946. Here,[57] in 1946 in Madras a marriage took place between H and W, as per the customs and ritual of the community to which they belonged. H died within three months of his marriage and W took possession of his property as his heir. W then took up training in nursing, secured a job as a midwife and then married a second time, in 1956 to a Christian man H1, according to the Christian rites. Though there was no formal evidence of her conversion, the court accepted the fact that prior to her marriage to H1 she converted to Christian faith. Post her second marriage she sold the land that she had inherited from her first husband to X. The collaterals/reversioners of her first husband, filed a case against her challenging her succession of the property from her husband on the ground that as she was a Christian she could not have validly inherited the property from a Hindu husband. Their main contention was that W had forfeited her rights over the property upon her remarriage and conversion to Christianity. She also ceased to be member of the family of the deceased husband. The court observed that the acquisition of the property by the widow here was under the application of the Hindu Women's Right to Property Act, 1937 Act. Further, her conversion to

56 *Shailendra Singh* v. *Nitendra Kumar* AIR 2013 (NOC) 167 (Chh).
57 *K Sivanandan* v. *Maragathammal* AIR 2013 Mad 30

Christianity did not adversely affect her rights over the property due to Caste Disabilities Removal Act, 1850. Therefore, as she had retained her rights over the property despite conversion, alienation of the property at her behest was valid and conveyed a good title to the buyer.

In the present case, it was not clear from the facts or from the judgment, as to whether her marriage to a Christian man was prior to the enactment of the Hindu succession Act, 1956 or post it. This angle was not taken up by the court, nor was there any mention of, whether her limited estate transformed/matured into an absolute estate. As even if her conversion did not affect her rights over the property, if she married before the coming into force of the Hindu Succession Act, 1956, that could have resulted in the forfeiture of her rights over the property, but if her limited interest had matured into an absolute interest, her subsequent conversion would have no impact on her inheritance rights.

Succession rights of a woman in a polygamous marriage

Post enactment of the HMA, 1955, absolute monogamy has been made the primary rule for all Hindus subject to the provisions of this enactment. A bigamous marriage is void and the parties do not get the status of husband and wife. As a convenient expression the woman is described as a second wife though the term 'wife' connotes only a legally wedded wife. In *Laxmibai* v. *Anasuya*,[58] a childless married man without putting an end to his first marriage remarried W1, after the enactment of the 1955 Act. Upon his death a dispute arose over his property between both of his wives. The second wife here raised an interesting but absolutely untenable argument, that the Hindu Succession Act, 1956, places the widow of the intestate as a class-I heir, but section 10, rule 1 says, *if there are more widows than one, the entire widow together shall take one share.* According to her contention that was strangely enough accepted by the trial courts. 10 contemplates a situation of the intestate surviving multiple widows and providing rules for distribution of the property as amongst them. In the present case she said there were two widows left by the intestate, and the share of each should be half and thus she pleaded that her half share be handed over to her, a contention that was vehemently opposed by the first wife on the ground that the expression 'widow', means a woman who was a party to a valid marriage with the intestate only, and since this woman was a party to a bigamous marriage that has not only be declared as void by the civil laws, it has been made a penal offence under the criminal law of the country with stringent punishments, she cannot be given the status of a widow of the intestate.

The present court in detail explored the concept of void marriage, status of bigamy in India; its consequences both civil and penal, punishment for committing the offence of bigamy, permission of unlimited polygamy for Hindu men prior to the enactment of the Act of 1955, and held that section 10 refers to a situation, where a man married prior to 1955 and dies post 1956, leaving behind more than one widow. In such cases all such marriages being valid, each of them can take the label of a widow within the meaning of section 10 but this is the only situation that

58 AIR 2013 Karn 24.

is contemplated under this section. By no stretch of imagination, can it include within its fold a woman who has been a party to a void and prohibited marriage under the Hindu law. Thus her claim to inherit the property along with the first widow of the intestate was dismissed rightly by the high court.

The case though saw a right culmination, raises deep concern owing to a totally incorrect lower court pronouncement. Considering the fact that in India, more than 90% of the cases are settled at the trial court level, had it not been the determination of the first widow, a frail 63 year old woman, there was a likelihood of injustice being done in the name of the law through an office created to dispense away justice? Hindu Succession Act, 1956, cannot be read in isolation and has to be read along with the matrimonial legislation in this regard. Succession rights flow from a valid marriage only that confers legitimacy on the rights of the children. The high court rightly described the judgment of the trial court as perverse, contrary to law and therefore liable to be set aside.

The high court also deliberated upon an interesting fact. Nowhere in the plaint had the claimant mentioned the year of her marriage whether it was after coming into force of the HMA, 1955, or prior to it, but she claimed her status as the widow of the intestate. The court noted that at the time of the litigation before the court in 2008, she was only 45 years old as per her age depicted in the plaint. Thus if she was born in 1963, her marriage could not have been solemnised prior to 1955, when polygamous marriages amongst Hindus were permissible.[59]

Character of property inherited by the son from his father in his hands *vis a vis* his son

One of the major distinguishing features of Hindu Succession Act, 1956, and the classical law relating to Hindu joint family is with respect to the character of the property in the hands of the son that he inherits from his father under the Act. Under the classical law, a well settled rule was, that property that a son inherits from three of his immediate paternal ancestors, namely, father, father's father and father's father's father would be joint family or ancestral property in his hands so that his son can have a right by birth in this property and could demand a partition from it during the lifetime of the father. In fact the son did not inherit the property in his individual capacity or exclusively but did it in the capacity of the Karta of the joint family comprising of him and his descendants. The situation continued under the classical law, but after the promulgation of the Hindu Succession Act, 1956, despite retention of the *Mitakshara* joint family system, a statutory scheme of succession was provided under the Act, that applied in case a Hindu male died intestate. The Act nowhere provided expressly nor clarified the character of the property inherited by the son from his father, but the letter and the spirit of the Act shows that it did bring in a change. In a case from Delhi,[60] upon the death of the father in 1957, the property was inherited by his six children, two sons and four daughters. One son and all the daughters relinquished their shares in favour of one son A. Thus A became the absolute owner of the entire property left

59 *Id.* at 29.

60 *Prem Bhatnagar* v. *Ravi Mohan Bhatnagar* AIR 2013 Delhi 20.

by his father due to the respective relinquishments by his siblings in his favour. A married twice, but both of his wives predeceased him, and from both these wives he had five sons and two daughters. He left his entire property under a registered will in favour of one of his sons B and died in 1995. The challenge to the will was by the brothers; half brothers and the wife and son of one of another brother of B on the ground, that since the property in his hands was inherited by A from the father, the same was ancestral and A was not competent to execute a will of the same. Secondly, they being male descendants of the deceased/coparceners had a right by birth in the ancestral property and had a share equal to the share of B in the property. Making elaborate calculations and treating the will as invalid they had submitted the claim. The main issue before the court was the validity of the will, which again was dependent upon whether the property in the hands of A was separate or ancestral. If it was separate, the competency to execute a will was beyond doubt. The court held that the property inherited by the son from his father under the Hindu succession Act, 1956, is separate in his hands and he is competent to hold it and dispose it exclusively or bequeath it under a will. Customary/classical Hindu law in this connection ceased to apply, once the Hindu Succession Act, 1956, was promulgated and made a specific provision. The suit property was owned by the grandfather and parties did admit that the acquisition of this property by the grandfather was with his own funds, So, upon his death in 1957, the scheme under section 8 of the Hindu succession Act, 1956, would apply, and all his class-I heirs would inherit the property individually as heirs with absolute and exclusive rights of enjoyment over it. The fact that the other siblings had relinquished their respective shares in favour of A further strengthened his capability to hold the property as its exclusive owner. The power of relinquishment arises only with respect to separate property which none of the claimants here challenged. On the other hand there was an attempt to gain from this relinquishment as their claim to the property being ancestral extended to the complete property including the relinquished share. While calculating their shares and pleading that it was coparcenary property they had included even the relinquished share of the siblings of their father but there was a conspicuous silence on the capability of the siblings to so relinquish the shares. If the property inherited by A was ancestral, the character would not have been different from as regards those who relinquished their shares in favour of A. Relinquishment can be of only the separate property and not of the coparcenary property. So the claimant sought the benefit of relinquishment (which was a clear pointer to the character of the property being separate in the hands of each of the child) and at the same time challenged the competency of their father to execute the will on the ground of it being ancestral. It actually meant that out of the six children who inherited the property of their father, for the five of them it was separate property but for the sixth that happened to be their own father it was ancestral property. This preposterous and contradictory stand was rightly rejected by the court.

In another case from Chhattisgarh,[61] after the death of the father, his property under the Hindu Succession Act, 1956, was inherited by his two sons S1 and S2

and his widow each getting one third of his property. S1 later sold the land to X. His son SS filed a suit against the father (S1) for a declaration of the sale as invalid as it was not for any legal necessity. The court held that in the separate property of the father, the son has merely a *spes successionis* and has no right at all to question its alienation and re-iterated that the character of the property inherited by a son from his father post enactment of the Hindu succession Act, 1956, is separate property and not coparcenary property. The court also followed the earlier pronouncements of the apex court,[62] wherein they have ruled that property inherited by the son is separate in his hands qua his own son as the term used in the Act to describe the class-I heirs is son, son of a predeceased son and not son and grandson together. This gives a clear indication that the property inherited by the son from his father belongs exclusively to him and the grandson cannot claim a right by birth in it. The present Act in the preamble clearly says that the Act is to amend and codify the Hindu law of joint family and succession. The part of Hindu law prior to the commencement of the Act that gave to the son a right by birth in the property that his father had inherited from his own father has specifically been amended by the Act. Thus in the present case the plaintiff had no right or title in the suit lands in the life time of his father and therefore had no right to challenge the alienation or claim joint possession of the same.

Character of property received by the father under a partition in his hands *vis a vis* his son

Since the legislation has kept alive the concept of Hindu joint family and joint family property, the categorisation of property into two continues, *viz*, separate and joint family property raising multifarious issues of the alteration of its character with passing of hands from the father to son. In the present case,[63] A, a Hindu man was in possession of property and he affected a partition of it as amongst himself and his three sons, each of them getting one fourth share. In addition out of the share he so received, he bequeathed a third of it to each of the son and upon his death his sons received the rest of the property that formed part of his share by inheritance. One of his sons S, after obtaining his share executed a sale of the same in favour of X. The son of S filed a suit, challenging the validity of the same and the competency of the father to execute it terming it as the joint family property. It was held that the property that a person acquires from his father under a partition, would be separate qua his brothers but would be coparcenary property as far as his own son is concerned. The court held that if upon partition an ancestral property remains in the hands of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose it off but if a son is born subsequently the alienation made by him before the birth of the son though cannot be questioned, the property becomes coparcenary property and the son would acquire an interest in that and become a coparcener. Thus the sale deed and the release deed executed by S to the extent of the complete coparcenary property post birth of his son in favour of X would be illegal as there was no legal necessity for the same.

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61 *Vedram Hukum Singh* v. *Tikaram* AIR 2013 Chh 107.

62 *Commissioner Wealth Tax* v. *Chander Sen* AIR 1986 SC 1753; (1986) 3 SCC 567 and *Yudhister* v. *Ashok Kumar* AIR 1987 SC 558; (1987) 1 SCC 204.

Partition of dwelling house at the instance of married daughters post 2005

Despite deletion of section 23, of the Hindu Succession Act, 1956, with its amendment in 2005, pending cases under the deleted provision have kept an examination into the provision alive. In a case from Delhi, upon the death of H and W who were the owners of the property, their four sons and two daughters inherited their property, each one of them being entitled to 1/6th share in it.[64] The family of the sons occupied the complete property ignoring the claim of the daughters of the intestate. The daughters then filed a suit claiming partition and possession of their respective shares. The heirs of the sons contested this suit on the ground that as this was the only dwelling house of the family, they being married daughters (though were the owners of the property) are incompetent to present a suit for partition and for demarcation of their shares. The trial court decreed the suit in favour of the daughters and the same was upheld by the appellate court which directed the appointment of a local commissioner for the purpose of exploring the modalities of a partition by metes and bounds. The appeal was filed by the descendants of the sons, in the year 2010, though by this time section 23 was deleted from the statue books and after service of summons on all the parties, two more years had passed. The court did not decide the case in light of the amended law but analysed section 23 as it stood before the amendment and observed that the contention of the male class-I heirs that it was the only dwelling house available was incorrect as a large portion of it was under tenancy and thus it was not wholly occupied by the heirs of the male descendants of the deceased as was the requirement of section 23 to put an embargo on the rights of the female class-I heirs to effect a partition of the same. If a portion and that too, a substantial portion of the dwelling house were let out to tenants or third parties the prohibition did not apply under the old law. The court also observed that since section 23 has been deleted, with effect from 09.09.05, the necessary effect of this deletion is that any pending matter which involves a question which was earlier covered by section 23 of the Hindu Succession Act, 1956, would also not be taken as an embargo on the right of the daughter to claim partition in respect of the dwelling unit, meaning thereby that after the amendment a daughter has been put at par with the brother to claim partition in respect of a property inherited by the sibling of a person. The court thus ruled in favour of the daughters. In another case from Andhra Pradesh,[65] despite the fact that the succession opened prior to 2005, the court took into cognizance of the fact that since the amendment has deleted section 23 , the case has to be decided in light of the amended provision and not under old law. Here, A died in 1970 and was survived by four children, *viz*, two daughters and two sons. The two sons took possession of the house and partitioned it among themselves without giving anything to the daughters. Their respective portions had different door numbers and they had separate voter I cards depicting their separate dwelling. To the application for partition and demarcation of their 2/4th share in the property

63 *Rohit Chauhan* v. *Surinder Singh* AIR 2013 SC 3525.

64 *Krishan Sharma* v. *Raj Rani Bhardwaj* AIR 2013 Del 136.

65 *Prathipati Jogayyamma* v. *Vobhilineni Veera Venkata Satyanarayana* AIR 2013 AP 163.

by the sisters, the brothers contended *firstly*, that there was no partition of the dwelling house and it was merely a convenient arrangement that they had thought of to respect each other's privacy and *second*, that despite the amendment in 2005, the same would be only prospective and cannot be retrospective in character. So the sisters cannot take the benefit of the amendment and consequent deletion of section 23. The court followed an earlier apex court ruling,[66] wherein it was held that even if there was any embargo at the time of filing of petition at the time of seeking partition, the same was lifted with the amendment in 2005 while the litigation was still pending and consequently it will cease to apply. The court noted that the parliament intended to achieve the goal of removal of discrimination not only as contained in section 6 of the Act but also conferring an absolute right on a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided for in the terms of section 23. The court had observed that section 23 was omitted so as to remove the disability on female heirs contained in the section. It sought to achieve a larger public purpose. If even the disability of a female heir to inherit the equal share of the property together with a male heir so far as joint coparcenary property is concerned has been sought to be removed, they failed to understand how the disability can be allowed to be retained in the statute book in respect of property which had devolved upon a female heir under section 8. They further said that the restrictive right contained in section 23 of the Act cannot be held to remain continuing despite the 2005 amending Act. The present court held that since section 23 was omitted in 2005 by the amendment to Hindu Succession Act, 1956, it is not relevant to continue to apply the restrictive provision preventing the female heirs from ascertaining the share that they have inherited. The court allowed the appeal of the daughters and passed orders for allocating the shares and partitioning of the property.

Murderer disqualified

Section 25 of the Act disqualifies a person from inheriting the property of an intestate if he had either committed the murder of the intestate or had done so in furtherance of the succession. Where a person was accused of committing the murder of the intestate but is acquitted by the criminal court, would this enable the heir to succeed to the property in that case was an issue that arose this year in a case from Rajasthan.[67] Here a Hindu man died and his insurance amount was claimed by his wife and daughter to the tune of Rs/- 2 lakhs and eighty thousand. Both the widow and daughter pursuant to receipt of the claim died under mysterious circumstances and it were the parents of A who were charged with their murder. They were however acquitted from the criminal court as charges could not be proved as against them. The court permitted them to acquire the property of both the widowed daughter in law as also the granddaughter and said that this disqualification operates against a person who commits murder or abets the commission of murder from inheriting the property of persons murdered, but in the present case though charges were framed against them for murdering the

66 *G Shekhar* v.*Geetha* AIR 2009 SC 2649.

67 *Mool Ram* v. *General Public* AIR 2013 Raj 207.

widowed daughter in law and the granddaughter, after trial they were acquitted by the competent sessions court from the said charges and therefore it cannot be said that they have committed murder or abetted the commission of murder which is the main requirement of law. So, they cannot be disqualified from inheriting the property of the deceased.

VII CONCLUSION

The issues relating to law of adoption varied ranging from capacity of a widow to adopt under classical law; to validity of adoption of children of same sex under the JJ Act. Matrimonial law threw up interesting propositions with respect to the recognition of divorce obtained from a foreign court, as also the issue of competency of parties to elect a law of their convenience against the clear mandate of the principles of application of personal laws. The courts in the later case did end up postulating an incorrect precedent bringing about a situation of conflict of family laws. Welfare of the child continued to be the primary factor in cases involving their custody and guardianship. Deliberations on Hindu joint family and succession threw interesting issues requiring an examination into our antique though existing legislations, while character of the property acquired through inheritance by a son from his father remained the primary focus in the cases relating to Hindu succession Act, 1956.