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HINDU LAW

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I INTRODUCTION

IMPORTANT JUDICIAL pronouncements in the area of Hindu law *viz.*, marriage, adoptions, maintenance, custody, guardianship, Hindu joint family and succession reported during the year 2015, have been briefly analysed here.

II HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

Presumption of validity of adoption

A valid adoption creates ties equivalent to natural birth, displaces the natural line of succession and therefore if challenged has to be proved. Though required to be established in the same way as any other fact in normal situations, if there is a long gap between the date of adoption and the time of its questioning, the possibility of unswerving authentication would be feeble, nevertheless, a person claiming a title on the foundation of adoption needs to establish the observance of necessary rites and ceremonies of giving and taking. The burden however, shifts to the person contradicting adoption to disapprove it, when on account of long lapse of years direct evidence of giving and taking has disappeared but during all these years, the conduct of the adopted child and the other relations is in consonance with his assertion of adoption. The behavioural pattern based on relations created through adoption, that actually substantiate and uphold the veracity of a claim of adoption are a powerful testimony in themselves and if the facts are indicative of the same, then the person contesting the adoption has to establish the invalidity of adoption. If direct evidence of such invalidity is available or it somehow even comes out during trial and shown then the burden would not shift and the person asserting title on the basis of adoption must discharge the burden, but the method of appreciation of evidence regarding this old adoption would not be that strict as in the case of an adoption of a recent origin. In the case under survey, the facts showed that one A, had five sons, and his first son, S had two daughters. S had allegedly adopted a boy B in the year 1952,[1] but after his

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1 *Sarat Chandra Behara* v. *Santosh Kumar Behara,* AIR 2015 Ori 185.

death, his wife executed a registered deed of acknowledgment of adoption. This deed was not a deed of adoption but of acknowledgment of adoption and was neither signed by the natural father nor by adoptive father. On the issue of validity of adoption the court framed the following question: whether presumption of validity of adoption recorded through a registered deed under the Act,[2] would be applicable to a document acknowledging a previous adoption in light of the fact that the document was created after the death of the adoptive father and which did not contain any recital of giving and taking of the child in adoption. The court was of the view that this adoption needs to be proved by the claimant.

There were in all two eyewitness to the adoption and one documentary evidence in the nature of an acknowledgment of adoption deed, that were adduced by B in support of his claim of adoption. However, the two eye witnesses to this adoption and *namkaran sanskar* were at the time of the ceremonies has taken place were only three and four years old respectively. Both claimed that they were physically present there and not only saw but understood and remembered vividly the nature of the ceremonies and their implications. The adoption had taken place in 1952, evidence was given in 1990 and then in 1998. The court dismissed their testimony holding that it was very unlikely that they, as children of tender ages of three and four years could remember things unambigously and meticulously even after around 46 years. The adoption acknowledgment deed as the only document that was relied upon was executed by the alleged adoptive mother. She argued that it is a settled presumption that whenever any document registered under any law for the time being in force is produced before the court to record an adoption and is signed by the persons giving the person and taking the child in adoption, the court shall presume that the adoption is in compliance with the provisions of the Act unless and until it is disproved. In the present case as the deed was executed after the death of the adoptive father of the child, hence it did not carry his signatures, but strangely enough the signatures of even natural parents were also missing, except an endorsement with signatures of the natural father with regard to the adoption. This deed contained neither any mention of the giving and taking of the child in adoption nor any mention of the age of the child nor of the date of adoption. Due to these crucial missing material facts, the court said that as adoption has to be proved by establishment of the fact of giving and taking of a child, simple assertions of adoption and the evidence adduced presently neither proved nor resulted in a valid adoption. The tests of effectively discharging the burden of proving the factum of adoption were thus not satisfied. The court then analysed an earlier apex court's pronouncement,[3] indicating that in case of an ancient adoption, it

2 The Hindu Adoptions and Maintenance Act, 1956, s. 16 reads as under: Presumption as to registered documents relating to adoption. — Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

3 *Venkata Ramarao* v. *Kesaparagada Bhasararao,* AIR 1969 SC 1359.

stands to reason that after a long gap a variety of transactions of open life and conduct upon the footing that the adoption was a valid act, could be taken into account. It then distinguished the facts of the present case and ruled as against the adoption observing that merely because the alleged adoption took place a long time back, an automatic conclusion cannot be reached with respect to its validity as the attending circumstances and the complete relevant conduct are extremely significant, to evaluate the validity of the adoption. During this period of interregnum, multiple events as a necessary follow up of the consequences of a valid adoption are imperative and form the determining factors but they in the present case hinted as against the adoption. The adoption therefore was held as not proved.

The issue of validity of adoption arose in another case before the High Court of Rajasthan.[4] Here, a 37 years old man filed a suit for a declaration that he was the adopted son of A, who to begin with was his paternal uncle (biological). He claimed that his paternal uncle (alleged adoptive father) had three daughters but no son, and thus adopted the petitioner, *i.e.*, 16 years old son of his younger brother in accordance with the rites prevalent in their community. In support of his averments, he produced a registered document styled as adoption deed, but that was executed after i) the death of his natural father and ii) after 20 years of taking place of the alleged adoption. This deed was signed by both, the natural and the adoptive mother but by no one else. Strangely enough all three of the parties; the plaintiff claiming to be the adopted son of defendant, the defendant himself and the alleged adoptive mother, entered the witness box and deposed that adoption had indeed taken place some 35 years back; were consistent on the date and also of the fact that after the death of the natural father of the plaintiff, there was a quarrel between the adoptive father and the adopted son, whereby the adopted father desired to revoke this adoption and adopt someone else. The dispute was later resolved, but in order to ensure that it does not re-occur in future, the adoption deed was executed. However, none of them were cross examined. The adoption took place in 1984; his natural father died in 2004.

The court held that since the adopted father himself had testified before the court about the adoption there was no cause of action that arose in favour of the petitioner as such but they refused to give the prayed declaration for three reasons; *firstly* his conduct contradicted the theory of adoption as all through he had indicated, his biological father as his father which in itself belied his adoption claim. He failed to produce any evidence that could show that he had ever used the name of his adopted father as his father. Non production of voter's list ration card, employment and education related document that could have supported the theory of adoption were not produced at all. These documents could have had a major bearing on the conduct of the parties and could have given an insight into whether the adoption was actually acted upon or not? In addition, not even a single instance to the satisfaction of the court was shown besides the verbal statement of the parties themselves that the adoption was in fact acted upon except. What raised the concern of the court was that despite

4 *Anil Kumar* v. *Ashok Kumar,* AIR 2015 Raj 16.

the claim of adoption, he was still using the name of his biological/natural father as his father which negated the claim of adoption. The documents could have proved very helpful in determining whether their actual conduct for all these long years matched the claim of adoption or not. *Secondly*, the natural mother of the plaintiff was neither examined nor gave any testimony to the effect of adoption which was an added reason for suspicion about its genuineness. *Thirdly,* as per his own admission, his age at the time of the adoption was 16 years, which in itself violated the provisions of the Hindu Adoptions and Maintenance Act, 1956 (HAMA). An additional failure to show the existence of a custom to the contrary in the community that permitted adoption of a child above the age of 15 years as mandated by the Act, also went against his claim. The adoption was thus held as invalid and the prayer for declaration of his status as the adopted son was denied/rejected.

Determination of the religion of the child to be adopted

Adoption is purely a voluntary act and the parent/ guardian who gives a child in adoption should actually intend to do so. Conduct with matching documentary evidence can form sufficient material for gathering convincing intention. However, communication challenges due to one being differently-abled may make determination of cogent intention tedious. In such a situation to gather legally acceptable determination to give the child in adoption in itself becomes a challenging task. The problem is further compounded if the child's paternity is not known. Peculiarity of circumstances, however lead to unforeseen and strange consequences and in such cases the best interests of an infant may guide the adoption modalities.

In *Sohan Lal* v. *Additional District and Sessions Judge Court No 9, Lucknow*,[5] a deaf and dumb inmate of a women protection home was brought to the hospital in an advance stage of pregnancy and delivered a baby boy. The conception and paternity of the child remained a mystery. Her conduct made it apparent that she was neither in a position to bring up the baby nor was willing to do so. A total lack of attachment and neglect was apparent. Accordingly the committee for monitoring the work of the women protection home desired to declare the baby as fit for adoption and published a notice to this effect, in the newspaper. A financially affluent and otherwise fit to adopt Hindu couple responded to this notice. Here two difficulties loomed before the home, for completing the adoption. If they proceeded to do it under the Hindu Adoptions and Maintenance Act, the child had to be Hindu, and secondly since the mother was alive, the home could not act as its guardian unless the child was declared as an abandoned child. On the other hand, if they proceeded under the Juvenile Justice (Care and Protection) Act, 2000 where the religion of the child is irrelevant, the situation contravened the provision, that the combined age of the intending parents should not be above 90 years, which in this case was 91. Nevertheless, the applicant (the Women Protection Home and the mother of the child) filed an application with the court of the additional sessions judge, under the H seeking permission to give the child in adoption. This application was dismissed by the court on the ground that due

5 AIR 2015 All 33.

to the presence of the mother the child could not be labeled as an abandoned child and therefore, the women protection home on its own is incompetent to give the child in adoption and secondly, since no information about the religion of the father was available, the child could not be treated as a Hindu, and therefore the HAMA cannot be availed of. The matter was taken in appeal before the High Court of Allahabad, and the main issues before the court were:

i) whether the child is a Hindu so that the adoption can be facilitated under the Hindu Adoptions and Maintenance Act, 1956;
ii) whether in presence of the natural mother of the child, the Women protection home in the capacity of the guardian can seek permission of the court to give the child in adoption;
iii) whether adoption would be for the welfare of the child; and
iv) whether the intending parents have competency to adopt?

The court answered all the issues in the affirmative and permitted the couple to adopt the child. The judgment is commendable as it is apparent how the court sidelined the technicalities virtually overcoming them with reasoned interpretation in order to provide a home to a helpless baby and solace to a childless couple.

With respect to the first issue, in the first instance the court noted that for the application of the HAMA to begin with, it is necessary that, all parties to the adoption, *i.e.*, those intending to give a child in adoption, those desirous of taking the child in adoption and also the child himself /herself must be Hindus. It then explored section 2 (bb) of the HAMA that explains who is a Hindu and said that it also includes within the definition, a child who has been abandoned by his parents and whose religion is not known or who has been abandoned by his parents and has been brought up as a Hindu". Such a child for the purposes of adoption may be treated as a Hindu. Additionally, since the mother could not communicate, deciphering her religion was primarily circumstantial. In this connection the court asked the superintendent to observe the conduct, behavior, general life pattern and gestures expressed by the mother at the home and based on her observations, file her affidavit. In compliance with the court's direction, the superintendent of the home furnished a declaration on affidavit based on her observations, and deposed that an interaction with the mother of the child and her behavior as observed by her, formed and revealed enough material to decipher that the mother and also the child were Hindus. The court then held that despite non availability of any information about the whereabouts or the religion of the father; since the mother was a Hindu; and she raised the child in accordance with Hindu traditions, and even the religion of the child as per hospital records was written as Hindu, it could be concluded that the child was Hindu and eligible on this account for adoption under the HAMA.

With respect to the inability of the women's home to act as the guardian in presence of the mother, the court noted that the mother had neither renounced the world nor was declared by any court of competent jurisdiction as of unsound mind, so adoption of her child could not ordinarily be effected without her consent and the guardian can only seek permission to give the child in adoption if the child is an

abandoned child, hence it was necessary to establish that she had abandoned him. The matters were complicated as she could not communicate, and thus reliance again had to be placed on the evidence of the head of the home where she was lodged and who could testify how the biological mother was treating the child. According to her testimony the abandonment of the child was established again by the mother's conduct that she did not want to do anything with the baby not only due to her physical disability and destituteness but due to actual willful abandonment and desertion of the child. She through sign language and gestures actually expressed that she had no longing for him. This all amounted to abandonment of the child. As far as the competency of the women protection home to be the guardian of the child was concerned, the protection home was taking care of both the mother (being a destitute woman), and the child as well and therefore as both were in care and protection of the women protection home, the head of such home could very well be said to be the guardian of the child as well.

The third issue was with respect to the welfare of the child. The fact was that since this was a female protection home meant exclusively for them, male children even of female inmates beyond the age of seven years had to be moved out of it. This futurist separation at the tender age of seven from the biological mother was also envisaged as detrimental to the interests of the child for its continuity at home.

With respect to the competency of the intending parents, the child welfare commissioner had submitted a very positive report, regarding their social, financial, health and their intention to provide a good care to the child. At this time proceeding under the Juvenile Justice (Care and Protection) Act, 2000 (JJ Act) provided a practical technical difficulty. The superintendent of the state women protection home had initiated the process of adoption by following the procedure prescribed by the central adoption resource authority created under the JJ Act, The guidelines for the adoption to be observed in case of adoption under this enactment are that the composite age of the intending parents should not be more than 90 years but in this case it was 91, and therefore the judge had rejected the application. This couple had been married for 19 years; had a son who unfortunately died and at this age could no longer beget another child. The court however had noted, that no such age is provided under the HAMA the child is a Hindu, is abandoned by her mother with unknown paternity, the intending parents are well meaning and capable and willing to provide a good upbringing for the child and it was clearly in the interests of the child that he be given in adoption.

The court also concluded that the welfare of the child and his future interests could be adversely affected if he was allowed to continue in the protection home. Satisfied with the capacity, intention and capability of the prospective parents, and considering the fact that remittance of the case back to the trial court might result in wasting valuable time the court on its own permitted the superintendent of the protection home to give the child in adoption to the intending couple.

Adoption of a girl by a Hindu female having a biological daughter

The law as is applicable to Hindus desirous of adopting a child under the Act, puts an embargo, making the intending parent having a child as incapable to adopt

another child of the same sex. Thus a boy and/ or a girl can be adopted, provided the adoptive parents do not have a Hindu daughter, daughter of a predeceased son, or a Hindu son, a grandson or a great grandson through son, as the case may be. However, the Guardian and Wards Act, 1890 (GWA) as also under the JJ Act are more flexible enabling an intending couple to adopt any number of children of any sex in addition to their own biological or adopted children. However an application if made under the HAMA, should be rejected in totality by the court on the ground that the intending parent wanted to adopt a girl child but already had a biological daughter or can it by itself be treated as one filed under the GWA or the JJAct to facilitate the process of adoption was the focal point in *Darshana Gupta* v. *None*.[6] Here, a responsible female government officer, well educated, Hindu by religion and having a female child, applied to the court for adoption of a baby girl, Pinki, under section 9 (4) and (5) of the HAMA, from *Rajkiya Balika Garh/Visheshak Dattak Grahan Agency, Bal Adhikarita Vibhag*. The baby to be adopted was already under her physical care and she was nursing her for a period of seven months before her application was rejected by the court on the ground that since under the HAMA adoption of a child of the same sex as one already has is not permitted, the same could not be allowed. She filed an appeal to the High Court of Rajasthan. The court allowed her appeal, permitted adoption and held that since the coming into force of the JJ Act the need is to harmoniously construct both the enactments permitting adoption of children, *i.e.*, the HAMA and the JJ Act. If adoption of children of same sex is permitted under the JJ Act, the same can be allowed even under the HAMA. JJ Act, the court said enables a person to adopt a child irrespective of marital status and the number of living biological sons or daughters. Therefore, the embargo for adopting a child as envisaged under section 11(ii) of the HAMA has actually done away with under the JJ Act for adoption of the orphaned, abandoned, surrendered , or children in destitution with the solemn objectives of their rehabilitation and their social integration. Appreciating the efforts of the intending adoptive parent, the court said that her efforts or endeavors were to be appreciated and deserved encouragement by the law courts sans technicalities. Looking at her social status and the fact that she was maintaining the child for the past seven months as part of her family there was no doubt about her credentials and intentions. Additionally, the court pointed out that in the changed social scenario, the Act of 1956 and the Act of 2000 are liable to be construed harmoniously to ensure rehabilitation and social reintegration of orphaned, abandoned and surrendered children and said that even if there is a conflict between the two legislations, the Act of 2000 is to prevail on the strength of legal maxim *generalia specialibus non derogant* , which means that special provisions will control general provisions. This legal maxim is ordinarily attracted where there is a conflict between a special and a general statute and an argument of implied repeal is raised. The court applied the same to the facts of the present case and pronounced the woman having a biological daughter as not only fit to adopt yet another baby girl but went ahead and declared her the adoptive parent

6 AIR 2015 Raj 105.

with all the rights , privileges, responsibilities and consequences under the law, and remarked that she was expected to take utmost care about the welfare of the child and bring her up in a profound and healthy atmosphere congenial for her rehabilitation and social re-integration.

III HINDU MARRIAGE ACT, 1955

Applicability of the Act to inter religious marriages

A marriage may be solemnized between any two Hindus under the Hindu Marriage Act, 1955 (HM Act). If only one of the parties is a Hindu, the marriage can neither be solemnised nor can the parties avail the provisions of the Act for seeking any matrimonial relief. In *Viraf Phiroz Bharucha* v. *Manoshi Viraf Bharucha*,[7] the marriage of a Hindu woman was solemnised in accordance with Hindu rites and ceremonies, with a man who by birth professed Zoroastrian faith. He never converted to Hindu religion at any point of time before, at the time of solemnization of marriage or during its subsistence. Twelve years later he filed a petition under section 13 of the HM Act seeking divorce from his wife on grounds of her cruelty and desertion but withdrew it soon. Thereupon he filed a second petition, praying for a decree of nullity pleading that their marriage was void on account of the fact that one of the parties, to the marriage *i.e*., himself, was a non Hindu at the time the marriage was solemnised, while the Act requires both the parties to be Hindus. So, on one hand, he contended that he was a Parsi by birth; remained so at the time of his marriage, that was solemnised in accordance with Hindu rites and ceremonies and that this marriage was no marriage in eyes of law due to non fulfillment of the religion clause, but on the other hand, he claimed a relief of nullity under the same enactment, that he initially said could not be applied to this marriage. The issue before the court was: can this marriage be declared a nullity if the Act cannot be availed of by a non Hindu party, more so at his instance? The family court dismissed his petition holding that no cause of action under the HM Act arose in his favour and the petition was barred by law. The matter was then taken in appeal to the High Court of Bombay, which made the following observations:

i) the provision of HMA can be availed of and are applicable only when both the parties to the marriage are Hindus and it does not apply to any party who is a Muslim, or a Christian or a Parsi.
ii) As per section 11, that deals with void marriages, the three conditions are available on which the marriage can be declared a nullity or void but it does not include the ground that one of the parties to the marriage was a non Hindu at the time of solemnisation of marriage.
iii) Both for availing the substantive provisions of the Hindu Marriage Act, 1955, as also for presentation of the petition seeking any remedy, the adherence to Hindu religion by both the parties is

7 AIR 2015 Bom 42.

> mandatory, except where the petition is presented under section 13 seeking divorce on grounds of apostasy or conversion of respondent from the Hindu religion.

The court expressed surprise at the petitioner's case and observed,[8] that by his own admission that he was a Parsi by birth and continued to profess his faith but filed the petition before the family court under the HM Act, seeking nullity that too after a delay of 12 years and fathering a baby boy.[9] No reason whatsoever was evidenced by him to demonstrate, the compulsion or sudden realization that he belonged to a different religion and the marriage should be annulled. On the other hand these pointers hinted at his attempts of taking advantage of his own wrong.[10] The court accordingly dismissed his appeal.

The issue of marriage between two persons one of whom only was projected as Hindu surfaced before the High Court of Gujarat,[11] though with differential facts. Here the matter commenced with the presentation of a petition praying for a decree of judicial separation by the wife on grounds of her husband's cruelty and neglect. The man filed a counter stating, that though the wife was a Hindu by birth, she had embraced Islam to marry a Muslim boy, given birth to his son, and post divorce without reconverting to Hindu faith got married a second time to him, (defendant) in accordance with Hindu rites and ceremonies. The second marriage was duly registered with the registrar of marriages. Since a marriage between a Hindu and a non Hindu is impermissible under HMA, this marriage has no recognition in eyes of law and she is incapable to seek any remedy under the Act. The wife's defence that she was a Hindu to begin with , had converted to Islam for the purposes of marriage but had reconverted to Hindu faith after the first marriage was over was not accepted by the family court judge which said that with no shuddhi ceremony, there would be no reconversion. Without holding any inquiry, the Family court, dismissed her petition seeking judicial separation whereupon she filed an appeal to the High Court of Gujarat. The high court expressed astonishment at the family court's automatic acceptance of a charge of non conversion of the wife by husband without any inquiry of their own and reversed the decision of the lower court on the ground that the court did not go at all into the question of authenticity of her reconversion claim. The High Court of Gujarat observed that the family court should have taken into account the contention of the woman seriously and should have directed specific inquiry into whether she had reconverted or not; if yes what were the modalities of it and if not then only the petition should

8 *Id.*, para 5.

9 *Id.*, para 18.

10 In *Niranjani Roshan Rao* v. *Roshan Mark Pinto* (2014) DMC 124(DB) (Bom); 2014 (5) All MR 292; 2014 (2) ABR 321, the wife had filed a petition for declaration of the marriage as null and void on the ground that she was a Christian and the court had held that the HM Actis not applicable in case of inter religious marriages. See also *Neeta Kirti Desai* v. *Bino Samuel George*, AIR 1998 Bom 74; 11 (1998) DMC 134 (DB); 1998 (1) Bom CR 263.

11 *Beena* v. *Kalpeshbhai Amrutlal Lavingla*, AIR 2015 Guj 49.

have been dismissed. The matter was accordingly remanded back to the family court to decide afresh after taking into account the evidence with respect to her claim of reconversion to Hindu faith.

Solemnisation validity of marriage

Solemnisation validity of marriage involves two facets; first observance of the ceremonies, and second, a matching intention to get married, *i.e.*, a willingness to observe these ceremonies. It should not be a mock act or pretence. The next step is to ensure its documentation if at all a proof is required for its solemnisation. The order cannot be reversed even if the marriage is performed in accordance with very simple permitted rituals. One such ceremony for solemnisation validity of a Hindu marriage is provided under section 7A of the HM Act. This section is a part of the state enactment and is applicable in the State of Tamil Nadu and Pondicherry. It enables valid solemnisation of a Hindu marriage in siyamaryuthai and seerithirutha form and involves very simple ceremonies that have been specified in the Act. The ceremonies do not require the presence of a priest and can be completed in presence of witnesses, by exchange of rings and tying of thali or mangalsutra and making a declaration in presence of two witnesses in the language that is understood by them stating, I take you as my husband, and the husband saying, that I take you as my wife. The marriage is complete upon their statements. However simple these rites/ceremonies may appear or seem, the observance of them is necessary with an intention to observe them. These marriages can then be registered with the marriage registrar. In this connection a very strange case came this year before the High Court of Madras.[12] The issue revolved around the marriages solemnised in the chambers of advocates of the High Court of Madras, amongst young persons, who concealed the same from their parents. Majority of such marriages were solemnised in the months of April, May and June, when the colleges would close for the vacations and majority of those who married in such chambers were college students or pass outs. The situation would come to light when either of the parties to the marriage would file a petition praying for a decree of restitution of conjugal rights but the other would deny any marriage or where the marriage of any of such parties would be fixed by the parents to be solemnised with a person whom they had chosen for their ward.

The case commenced with the filing of a *habeas corpus* petition in the court by a man in his twenties contending that he had fallen in love with a girl G, with both marrying in a temple and then registering their marriage in the office of the marriage registrar, Chennai north. However, even post marriage, her parents prevented her from joining him and kept her in their illegal custody. The girl appeared before the court; acknowledged that the boy was known to her but denied that she ever married him. On a careful consideration the court also found discrepancies between the place of solemnisation of marriage as contended by the petitioner in his affidavit and what was written on the marriage certificate. In another writ petition filed by a different

12 *S Balakrishnan Pandiyan* v. *The Superintendent of Police ,Kanchipuram* (2014) 7 MLJ 651.

boy, a similar marriage was alleged, with the similar consequences, and what compelled him to approach the court, he alleged was the fact that the parents not only kept the girl in their custody against his and her wishes but were trying to fix her marriage to some other person. Here again the marriage was registered and was said to have been solemnized and registered with the office of the registrar of marriages, Chennai, North. The girl again testified before the court that the man claiming to be married to her was known to her but denied the claim of marriage. She stated that he had taken her to a god man to ensure her success in civil service examination and had asked her to participate in some ceremonies. The marriage certificate was issued by an advocate whom she claimed she had never met nor ever visited his office. The address where the marriage was solemnized and the certificate was issued was actually the address of the office premises of an advocate. There was another testimony from a third person who deposed before the court that he was also a victim of a bogus marriage. The victims were therefore persons of both the sexes and not merely girls alone.

The court noticed that besides the Sub Registrar Royapuram, who had issued this certificate, there were two other institutions, *viz.,* a Christian organisation functioning in Royapuram, Chennai and a Hindu organisation functioning in Kodambakkam, Chennai who do solemnise marriages and issue certificates as well, but in most of the cases the girls deny the marriage despite the marriage certificates and the court after taking a serious note of it passed an order directing the Director General of Police to appoint a competent officer not below the rank of superintendent of police to enquire into the matter and submit the report in 30 days *i.e.*, to find out the modus operandi of these offices as to how they issue marriage certificates , whether the parties appear before them and sign any register, and whether the consent of the girl is obtained *etc*.

The police upon investigation submitted the report that revealed that around 120 advocates with their office address were responsible for registration of around 1559 marriages during 2013 alone. The peak season was April, May and June. They apprehended that those who had gone for this kind of marriage were nearly all from outside Chennai, were studying in colleges and were initially romantically involved and before leaving for their respective homes would approach these advocates and get married by them by issuance of a certificate. These marriages were later registered in connivance with the staff of the registrar's office and sometimes the advocates involved would get the certificates. The evidence produced revealed that a group of advocates had taken solemnisation and registration of marriages as a special branch of practice. The court did note it and also conceded that in accordance with section7A of the HM Act, 1955, the Tamil Nadu Amendment, the marriages performed in the chambers of advocates in the State of Tamil Nadu would be valid if they conform to the requirements laid down in section 7A, yet pronouncing such marriages as void despite a certificate of registration, the court said that marriages in order to be valid must have some "public domain". They should not be performed in secrecy.

The Government of Tamil Nadu had enacted the Tamil Nadu Registration of Marriages Act, 2009,[13] making registration of marriages performed under all religious faiths compulsory with limited exceptions, such as registration with postal memorandum of registration with reasons to be recorded in writing in case of Pardanashin ladies of Muslim community, or in cases of proven inability of a party to the marriage to be physically present due to compulsion of returning abroad owing to exigencies of work. Registration, without the presence of the parties must be accompanied with reasons to be recorded in writing. However, the statute imposes a duty on the registrar to scrutinise the documents accompanied with the memorandum and authenticate, that i) the marriage of the parties is performed in accordance with the personal law of the parties or customs or traditions; ii) the identity of the parties or those of the witnesses testifying the identity of the parties is established, iii) the documents prove the marital status of the parties, or he may call for further evidence or even seek help from the police and if he is satisfied that the performance of the marriage is not established beyond reasonable doubts, may refuse registration of such marriage.

The court did express their amazement as to how the registrar did not have any suspicion when just one lawyer got 676 marriages registered with his office in one year and were constrained to observe that:

> It would not be inappropriate to say that the same was nothing short of a scam or a scandal wherein the unscrupulous members of the honorable profession of Bar/ lawyers were involved.

The court went on to hold that even though marriages performed in this manner may be otherwise technically valid but if they are performed in secrecy and the female party denies the marriage the same would have to be treated as a sham marriage and said,:[14]

> Our declaration of law that marriages performed in secrecy in the office of advocates and Bar Association Rooms cannot amount to solemnization within the meaning of sections 7 and 7A of the Hindu Marriage Act, cannot be used as a sword by the males for cutting the nuptial knot in matrimonial proceedings, but can be used only by the fair sex to get liberated from sham marriages of this nature. We also hold that the certificate of solemnization issued by advocates will not be per se proof of Solemnization of Marriage in a matrimonial dispute.

The court summed up their final decision as follows:

13 The Act was enacted in accordance with the directions issued by the apex court in *Seema* v. *Ashwani Kumar,* AIR 2006 SC 1158.

14 *Supra* note 12 at 666.

i) Marriages in order to be valid should have a public domain;
ii) Marriages performed in secrecy in the chambers of advocates and bar association rooms, will not amount to solemnization and only women who are victims of such marriage can question the same in matrimonial proceedings before the appropriate court as question of fact. A man cannot deny such marriage.
iii) No registration of marriage can be done under the Tamil Nadu Registration of Marriages Act, 2009 without the physical presence of parties to the marriage before the registrar, except under special circumstances after recording the reasons.
iv) If a complaint is made by a party to the marriage to the Bar Council of Tamil Nadu and Pondicherry against a priest-cum-advocate, the bar council shall take appropriate action in accordance with law.
v) On complaints lodged by the Registering Authorities seeking protection, the police are directed to afford sufficient protection immediately.

The judgment raises some questions. The verdict shows that in case the marriage is denied by the female party the same despite its registration and attended circumstances would be declared void. Once a marriage is solemnized validly, is it open to any party to avoid it on the ground that it was performed in secrecy? In two cases before the courts, the girl denied the marriage, but was she confronted by the witnesses as to whether she was in fact present before the lawyers at the time of marriage or not? Was there any fault at the registrar's office? Here not only the certificate showed the solemnisation of marriage but also its registration. Can it really be believed that a girl was taken to a god man and was made to take part in some ceremonies for success in civil services examination without her knowing anything or remembering anything beyond that? A girl preparing for civil services examination would be an educated, well informed girl and in a position to know the state of affairs she is subjected to. It is the willingness and consent to enter into marriage that is important and once the marriage is complete, a second thought is permissible not with a unilateral denial but only with judicial approval.

Secondly, what is a sham marriage? Can a marriage where initially for whatever may be the reason, the girl and the boy decide to tie the knot in secrecy, becomes a sham marriage if later she has a change of heart. If the boy wants to get out of it, what can be the reason for denying him a chance if both are identically placed? Is the judiciary succumbing to the notion that an entry to a "secret" marriage may be potentially disadvantageous only for a girl, or that avoidance of marriage at the instance of the girl is to her benefit, but avoidance by the boy would be to his or her detriment? This was never the case before the court that she was made to enter in it against her consent, as that makes her entitled to avail legal remedies of nullity making the marriage voidable. If there was no compulsion, she should not be allowed to avoid it, and if there was force or fraud, than judicial remedies under section 12 are available to her. If her case was that she never married this man, the court must give to the man a chance to prove solemnisation and not assume or presume that a marriage had never taken place, as he was the one who approached the court for a remedy.

Thirdly, what is a public domain and when is a marriage performed in secrecy? The normal practice of a marriage with extensive family participation, is clearly distinct from the marriages performed of young persons whose alliance is opposed by the parents due to a variety of reasons some of which may not be legal but stem from undesirable but socially prevalent practices. A marriage solemnized in the presence of close friends, but in absence of family members or parents in the chambers of lawyers would be valid or not? Can a registered marriage be ever called a secret marriage as without having a public domain?

If the "Public domain" involves parental and societal approval that usually furthers and perpetuates socially inappropriate practices and extensive wasteful expenditure, it should be discouraged in strongest possible terms and should not be made mandatory for validity of marriage, that too by the judiciary. The facts based on the police inquiry had revealed that couples in love themselves had approached the lawyers for solemnization of their marriage. It is likely that lawyers having the knowledge of substantive law, would have advised them to go for a simple marriage and it is nobody's case that they were lured by the lawyers. Therefore, if a young couple, in love and while studying or finishing college approaches the lawyers, the possibility of them taking the help of a professionally competent person, so that they don't go legally wrong in tying the knot when the parents don't approve of their choice may not be ruled out and on the other hand depicts their clear, honest and determined intent. The decision was that of the young couples, the participation of people, such as friends or lawyers was also there, but the people missing were the parents and relatives. The law requires the consent of the parties to the marriage but nowhere makes the presence of the parents mandatory for its solemnisation validity. On the other hand countess cases of parents forcing their children into marriages against their wishes performed in full public domain do not attract societal or even judicial ire. If in India, a girl above 18 and a boy above 21, are competent to marry, it is because, they possess mental capability to understand the consequence of their actions. With increased attraction towards alternate forms of intimate sexual unions, people marry only when they want to, otherwise not. The instances of innumerable young persons living together prior to marriage for physical craving are not uncommon nowadays. The judiciary must understand the life pattern of young Indian society and even if it does not merit a judicial recognition, it cannot be brushed aside. Finishing college indicates a level of familiarity with the worldly and general affairs. They are not illiterate, ignorant or vulnerable persons who cannot be expected to take a decision about themselves, but are educated, college going/ finishing adults. Further, the court to assume that a girl was lured in marriage so that she should be given a escape route from a legal bond stands in sharp contrast to the determination that they expect her to display not to bow before the familial blackmail and emotional drama to which she would be accosted with once the marriage is discovered by the parents. The observation of the court appears to be suggesting that marriages solemnized with the participation of family members are different than those solemnised in presence of strangers such as lawyers. Every person, including young Indian girls and boys must be taught the importance of any step that they take including those that relate to matters of their heart. Marriage if

once solemnized must be brought to an end only though the instrumentality of the courts, and should not be allowed to be brought to an end on the ground that it lacked public domain. This seeming benefit based on selective gender is incorrect and would actually re-enforce the already deeply entrenched parental control in marriages of youngsters. Competent, educated girls are still visualised not as independent thinkers, capable to make an informed choice about their lives, but simple, gullible, easily lured infants, that need extreme parental and even judicial protection in matrimonial matters. Rudimentary considerations of castes, community, financial and social suitability always rules in marriages brought about after extensive negotiations by parents bathing in satisfaction of community approval and pseudo respect. The present judgment unfortunately, bares the gap between the reality and judicially expected behavior of youngsters in matters of marriage.

Presumption of marriage

The validity of a Hindu marriage has to be tested both for its ceremonial validity *i.e.*, it conformity and compliance with the rites and ceremonies requisite for its valid solemnization and post its affirmation its legal validity. However, in several cases proof of adherence to the compliance with formalities of solemnisation is not available. In such cases where the proof of solemnisation is required for establishing their succession claims and that too after a long time period, it becomes difficult for the parties to give a satisfactory proof of its solemnisation in absence of registration of marriage.

In *Karedla Parthasaradhi* v. *Gangula Ramanamma*,[15] the parties were living together as husband and wife for a period of thirty years before the death of the man. During this time period, the woman got pregnant twice but her pregnancy was terminated with his consent. Later they adopted her sister's son; shifted to another place; got a house constructed, performed puja and threw a house warming party post which lived together as husband and wife; her name carried his surname and was included in the voter's list as that of his wife. The neighborhood treated them as husband and wife and testified that their relationship was that of spouses. They made joint deposits in the bank and here again her name carried the surname of the man and not her natal family name. There were clear instructions from him to the bank to have the amount paid to her after his death. The age difference of twenty years between them as suggestive of only a physical relationship and short of marriage was dismissed by the court. Couple of letters written by the man imploring her to perform puja without bothering for the expenses and taking good care of their adopted son; asking him to study hard were produced to substantiate her claim of a wife. What actually led the court to conclude in favour of the legality and legitimacy of their relationship was an additional fact that the letter addressed to her carried the suffix of his family name rather than the surname of her natal family. The issue whether they were married or not arose after the death of the man in relation to succession to his property. His

15 AIR 2015 SC 891.

brothers claimed his property on the ground that he never married this woman. It is interesting to note that on one hand there was a long association of the deceased with this woman claiming the status of his wife for a period of 33 years and on the other hand the brothers who claimed the property on the ground that he died as a bachelor admitted, rather confessed that they had severed all his relations with the deceased for about four decades and had neither visited nor helped him by making any financial contribution when he constructed his house, which clearly revealed that they might not have had any detailed or authentic information about his personal life, including his marriage or adoption. The court leaned in favour of presumption of solemnisation of this marriage on account of long association of the parties; their projection to the society as husband and wife and also from the attending circumstances in the long course of their cohabitation. It said:[16]

> There is an extremely strong presumption in favour of the validity of a marriage if from the time of the alleged marriage the parties are recognized by all persons concerned as man and wife and are so described in important documents and on important occasions. Similarly the fact that a woman was living under the control and protection of a man who generally lived with her and acknowledged her children raises a strong presumption that she is the wife of that man..... on account of long association of the first defendant with the deceased for more than 33 years and on account of the conduct and affection shown by the deceased towards first defendant , it can be said that she was married to him[17] ... The totality of circumstances would indicate that (she)D1 was the legally wedded wife of late Satyanarayana, therefore she is entitled to the house property being class-I heir.

It was held that the parties were married and the representatives were allowed representation to continue the suit.

Competency of succession court to decide disputes of marriage and matrimonial status

The issue of validity of marriage may often arise after the death of one of the parties to the alleged marriage for succession related matters. As a rule, men primarily own material assets, and upon their death, the claims of the woman for succession to the property are countered by collaterals contending that the deceased died as an unmarried person and therefore the woman cannot be regarded as his legally wedded wife and therefore the claim of the property in their favour is superior. The contentions usually are twofold, one that he was never married, second, if there are children, then there was no valid marriage and the woman was merely into a live-in relationship and thus the children are illegitimate. In these cases therefore the first question to be decided is whether the claim of the woman to be a legally wedded wife is genuine?

16 *Id*., para 18.

17 *Id*., para 21.

The succession court has limited scope and they cannot decide these issues as the nature of matrimonial relations is to be decided primarily by the family court. In *Dwipen Saikia* v. *Jitumoni Saikia*,[18] a Hindu man A died leaving behind four of his sons. The widow of his third son was not given any share and hence she filed a claim seeking one fourth share in the property left by her father in law. In the joint statement issued by all the defendants that included the brother and nephews of the late husband, it was claimed that her claim could not be sustained as she was never married to their brother/uncle and could not be called his widow. The trial court while framing the issue had also framed one issue with respect to her claim ; as to whether she was the legally wedded wife of the deceased and therefore entitled to his share in the property?

For supporting her contention as the widow of the deceased, she submitted death certificate of the alleged husband, the legal heir certificate issued by the DC, Kamrup; the voter's list *etc*. The court held that the issue requires a detailed investigation into the facts and was outside the scope of the succession court.

Nullity and dissolution of marriage: distinction

A decree of nullity and a decree of divorce bring a judicial culmination to a marriage. However, the grounds for both as also their consequential differences are disparate. Post grant of nullity, the marriage is void retrospectively and is therefore, treated as never taking place at all. The parties revert to their unmarried status but in case of divorce, the marriage is dissolved and its existence till date of dissolution of marriage is well recognized. The theoretical difference of a void marriage as non existing and a dissolved marriage as it did exist but is now over and the reversal to unmarried status or labelling as divorced persons has practical implication as well. In *Rekha Mathur* v. *Manish Khanna*,[19] post marriage the wife, presented a composite petition for dissolution of her marriage as also seeking its nullity on grounds of husband's cruelty; and failure to consummate the marriage on account of his impotency respectively. The petition submitted by her however, was titled as "petition under s. 13(1) (ia) read with s. 12 (1)(a) of the Hindu Marriage Act, 1955, for divorce on grounds of cruelty".

The wife's case was that for almost two months after solemnisation of marriage, the husband was not allowed to stay with her. After around three months, she discovered that he was impotent due to physical defect. She felt cheated due to non disclosure of his sexual condition/deformity and contended that the primary purpose of the marriage for her was frustrated. The resulting altercation she pleaded developed in the husband and the mother in-law, inflicting beatings and torture on her leading to a complete breakdown of marriage. Bringing these two independent causes of action together she filed for a decree of nullity on grounds of non consummation of marriage owing to his impotency and divorce on grounds of his cruelty. The husband contended that both the parties were comparatively mature in age and were Sai devotees, if the man

19 AIR 2015 Gau 134.

20 AIR 2015 Del 197.

had a physical defect, the girl also was not beautiful, thus making it a marriage of adjustments and procreation was never an objective, and since procreation was never an objective, impotency cannot be a ground for declaration of this marriage as a nullity. Even otherwise a charge of impotency is a serious blur on the manhood and as it was neither proved very strictly by medical evidence of her virginity, no decree of nullity, he contended can be granted. The trial court after due deliberations passed a decree of divorce, dissolved the marriage but dismissed her claim of a decree of nullity on grounds of her husband's impotency. She preferred an appeal to the high court. The issue before the court was, that the marriage between the parties had already come to an end by a decree of divorce passed by the court, so should the insistence of the wife. That a decree of nullity be passed additionally in her favour be accepted or not?

The present court discussed the difference between a decree of divorce and a decree of nullity, the consequences and dismissed the preliminary objections as to maintainability of the suit primarily on the ground that the title of the petition and the prayer cannot be read in isolation or out of context. The pleading according to the court had to be read as a whole to ascertain its true import and it is not permissible to cull out sentence or a passage. Thus the substance has to be read and not merely the form and the intention of the parties is to be gathered from the tenor and terms of his pleadings and merely because the heading of the pleadings does not say that it was a petition to seek a decree of nullity, it does not mean that the petition has been brought under section 13 for divorce alone while in the petition a prayer for decree of nullity was also actually made. The court also rejected the contention of the husband because he himself had admitted a physical defect and a challenge to his sexual organs, and in addition had failed to comply with a specific direction from the court to undergo a medical examination within three weeks. The court drew an inference of the confirmation of the allegations leveled by the wife with respect to non consummation of marriage due to his impotency and held that there can never be a marriage without a major component of it being ability to perform the act of marital intercourse as a normal sexual life is the basis of a marriage. Distinguishing the two matrimonial remedies, the court said that by a decree of divorce, a valid marriage is dissolved: whereas a decree under section 12 (1) (a) declares the marriage to be a nullity, *i.e.*, there was no marriage in the eyes of law right from inception. The status of the petitioner in the second case - post decree is that of an unmarried person. The said status has different connotation for the petitioner in the society and the future marriage prospects hinge on the nature of relief granted by the court, in case she wishes to remarry. Thus the different connotations in eventuality of feasibility of another marriage have a direct impact on the nature of these two matrimonial remedies. A decree of annulment of marriage relates back to the date of marriage, *i.e.*, is retrospective, but the decree of divorce operates only prospectively. Thus it is not merely an academic exercise when the petitioner seeks a decree of nullity of marriage under section 12(1) (a) even though a decree of divorce under section 13 (1) (ia) has already been granted.[20]

20 *Id.*, para 27.

The court further said, that both sections 12 and 13 deal with different causes of action; the nature of the relief that can be sought under both is also distinct and qualitatively different, *i.e.*, of annulment and dissolution; the former impinging on the marital status of the petitioner, meaning that she/he was never legally married and the later granting the status of divorcee to the petitioner. Non consummation of marriage on account of the impotency of respondent enables the petitioner to seek a decree of nullity and not divorce. Rejecting the argument that to annul an already dissolved marriage would be purely an academic exercise, the court said that the two remedies and the relief granted therein are premised upon qualitatively and materially different fact situations. The status of the parties in the first case, of a divorcee, and in the second case, of an unmarried person has different connotations in the society, and the future marriage prospects in case he/she wishes to remarry. Observing that it is not merely an academic exercise but has practical cogent implications, the court passed a decree of nullity in favour of the wife.

It is interesting to note that earlier judicial pronouncement,[21] with parallel facts, equated the social and practical consequences of an annulled and dissolved marriage as on an identical footing. Even the petitioner, a woman in that case herself contented that despite bringing the marriage to an end by a decree of nullity, her position should be equated with that of a divorced wife to enable her to claim maintenance under section 125 of the Code of Criminal Procedure, 1973 Cr PC. The facts were comparable. A woman sought and obtained a decree of nullity on the ground that her marriage was not consummated owing to the impotency of the husband. She then claimed maintenance from him not under section 25 of the HM Act but under section 125 of the Cr PC. This provision is available to a legally wedded wife and even a divorced wife but not to a woman whose marriage has been annulled by a decree of nullity. She contended that there might be a legal difference of terminology and impact of nullity and dissolution but for all social and practical purposes it means only a terminated marriage and thus she should be held entitled to claim maintenance as a divorced woman. Comparing the valid, void and voidable marriages, the court taking a diametrically opposite stand, proceeded to treat their effects and rejected the contention that nullity and dissolution are different and lead to differential consequences. They further observed that there was a very narrow or no difference between the status of a divorced woman and the woman whose marriage has been annulled by a decree of nullity from a social perception as also from the possibility of her remarriage. Accordingly her claim of maintenance under section 125 of the CrPC available to a divorced woman was accepted.

Nullity and divorce are two distinct matrimonial reliefs available to Hindus legally, but the commonalities are solemnisation of marriage and their judicial culmination. These are two unwipeable social and practical realities. Both annulment and dissolution are legal remedies available on two distinct grounds but the fact remains that in both cases marital relations continue to subsists, except in some case of impotency, of one

21 See *T K Surendran* v. *Najima Bindu*, 2013 (1) Crimes 1.

of the parties, as the parties live together, cohabit and then separate if they mean to. Another difference is the retrospective statutory legitimacy imputed on the children of annulled marriages and continuation of perfect legitimacy in case of dissolved marriages. But having said that, the observation of the court that the status of a party of an annulled marriage and of a dissolved marriage has different connotation in society does not appear to be correct. There may be disparate legal connotations but for the society, the parties have undergone a marriage and then pursuant to differences have separated. An ordinary society does not differentiate between technical legal jargons of nullity and dissolution, and separation post marriage has the same social connotation. The difference is understood in detail only by those having understanding of family law and not many in normal ordinary life are interested even in knowing it. As far as the prospects of remarriage are concerned, an annulment or dissolution owing to impotency and non consummation of marriage can always be explained without going into the technicality of nullity or divorce. Parties desirous of getting married listen to each other understand the happenings of past experience including matrimonial experiences, and the fact that one of them was a party to an annulled marriage is a material fact to be shared with the future spouse. Technical or legal reversion to the status of unmarried person does not make him or her unmarried in the practical or social sense of the term.[22]

DNA tests in matrimonial disputes to prove adultery

The courts proceed with extreme caution when faced with a prayer to order for a DNA test to be performed on the child so as to avoid endangering its legitimacy and only where facts and circumstances indicate the essentiality of findings of a DNA test to prove the commission of a matrimonial misconduct, having a direct bearing on the paternity, the court may order the DNA tests. The apex court in earlier judicial pronouncements have clearly specified the rule that no one can be compelled to undergo such tests but an unjustified refusal may lead the court to apply adverse conclusions. In case of charges of infidelity levied by the husband as against the wife, a plea of the man to perform DNA test of himself and of the child born to the wife during the subsistence of the marriage would be proper as that would be the only way to substantiate or refute the allegations of adultery committed by the wife. In *Dipanwita Roy* v. *Ronobroto Roy*,[23] the couple had a daughter born to them pursuant to which they separated with the gainfully employed wife resuming habitation with her mother. The husband alleged that she led a fast life, incurred heavy bills, and supplied his address to the creditors causing him considerable harassment at the hands of the creditors and the recovery agents. In addition she further developed illicit relations

22 In *B Madhan* v. *N S Shanthakumari*, AIR 2015 Mad 78, the wife presented a nullity petition on the grounds of husband's impotency and prayed that the husband be directed to be examined by a competent urologist and gynecologist to ascertain his potency. The court had granted annulment remedy on the basis of adverse presumption when he failed to get himself examined.

23 AIR 2015 SC 418.

with another man, (whom he named) and gave birth to his child as well. For establishing and substantiating the claim of her adulterous conduct he sought a DNA test of the child born to her post separation from him. The wife denied all his allegations, labeled this move as false, frivolous, vexatious, motivated and designed in a sinister manner to cast a slur on her reputation. She claimed that they had a normal marital relationship including marital cohabitation, and therefore, he is estopped from denying the paternity of the child, he having access to her all the time including the time of its conception, but she vehemently opposed the plea of a DNA test and argued that it cannot and should not be ordered as birth during marriage is a conclusive proof of the child's legitimacy. The family court dismissed the husband's prayer for the DNA test but the High court accepted it and directed the wife to accompany the son to the laboratory for the test, with the expenses to be borne by the husband. The result of the tests was to be provided to both the parties and to the trial court. The wife preferred an appeal to the Supreme Court against this direction of the high court. The apex court traced the substantive content of the presumption under the Evidence Act, 1872 and noted that the earlier judicial pronouncements had held that the result of a genuine DNA test though scientifically accurate was not enough to escape from the conclusiveness of section 112,[24] a strong presumption of legitimacy of the children born from a lawful wedlock, cannot be displaced by mere balance of probabilities or any other circumstance creating doubt. They had disregarded even an evidence of adultery by wife as insufficient to repel this presumption and not justifying the findings of legitimacy or of husband's access.[25] The court then re-iterated, that disputed paternity of a child born during lawful wedlock and exploring truth by the use of DNA test is an extremely delicate and sensitive aspect.[26] Presently, there are two feasible approaches, one that when modern science gives the means of ascertaining the paternity of a child there should not be any hesitation to use those means whenever the occasion requires, and the second is that the court must be reluctant to use such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child as sometimes the result of such scientific test may bastardise an innocent child even though his mother and spouse were living together during the time of conception. There was an apparent conflict between the right of privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, and therefore the court must exercise its discretion only after balancing the interests of the parties and on due consideration only when the DNA test is eminently needed.

Thus, it has been affirmed and reaffirmed that the courts cannot and should not order conduction of blood tests as a routine matter and such prayers cannot be

24 *Kamti Devi* v. *Poshi Ram,* AIR 2001 SC 2226.

25 *Sham Lal @ Kuldeep* v. *Sanjeev Kumar,* AIR 2009 SC 3115.

26 In *Bhabani Prasad Jena* v. *Convenor Secretary, Orissa State Commission for Women,* AIR 2010 SC 2851.

granted to have roving inquiry and that there should be a strong prima-facie case and sufficient material for its order. The present court thus examined the issue from a practical perspective. It did observe that the presumption under section 112 was enacted at a time when the scientific tests of DNA were not even within the contemplation of the legislature. Moreover, in the present case there were claims and counter claims of whether the husband had access to the wife at the time of the possible conception of the child or not? It was not established that they were living together at the time of the possible conception of the child. On the other hand, he pleaded that once she left the matrimonial home, he had no access to her thereafter and therefore the child conceived when he had no access to her raises a strong case for a confirmation through DNA test for denial of paternity, but the wife had contested his claim. In such a situation the truth could be established only with the help of a DNA test. The apex court therefore upheld the order of the high court that directed the wife to bring the child for the DNA test to be conducted at the cost of the husband but with a caveat that she was at liberty to obey or disregard the directions. In case of her acceptance of the directions, the DNA test will determine conclusively the veracity of the accusations leveled by the husband against her, but in case , she declines to comply with the directions issued by the high court , the allegation would be determined by the concerned court by drawing an adverse presumption.[27]

Consistency of disputes and debates as to the desirability of ordering a DNA test in cases of the father harboring doubts on fidelity of his wife and paternity of child is necessary, as to apply in all cases where the husband has access to the wife or where he cannot prove non-access, the conclusive presumption of not merely legitimacy but paternity as well appears to be farfetched. Scientific accuracy of parentage came subsequent to the enactment of the Indian Evidence Act, in 1872 and this accuracy is nothing but a conclusive determination of truth. Presumptive paternity and certainty of maternity are losing their authenticity with advance in medical technology and the need of the hour is to adopt methods scientifically proven and accurate and discard presumptions with full chances of possible erroneous conclusions. Presently, rather than conjectures, hints, presumptive circumstantial conclusions, exact truth and nothing but truth through a scientific mechanism should be adhered to. New impartial and accurate scientific mechanism leading to a final and conclusive truthful statement of facts deducted from a DNA analysis goes without saying should be preferred choice of evidence rather than presumptions under an archaic and ancient law.

Grounds for divorce

The change in the society and dilution of the patriarchal stereotyping of roles are becoming visible in some of the judicial pronouncements. The Indian society has

27 Indian Evidence Act, 1872, s. 114, see illustration (h), reads as under: Court may presume existence of certain facts: The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events , human conduct and public and private business in their relation to the facts of the particular case. illustration (h): if a man refuses to answer a question which he is not compelled to answer by law, the answer if given would be unfavorable to him.

come a long way from the 1970s where refusal to prepare tea for the friends of the husband was a judicially concluded instance of matrimonial cruelty.[28] The year 2015 has seen considerable differential judicial perception of women and an altered expectation of matrimonial roles. In *Amarjit Singh* v. *Gurmeet Singh*,[29] the allegations of the husband against his wife of refusing to prepare meals for him was held as not amounting to cruelty, with the court observing that the mere fact that wife refused to cook meals cannot be a ground of cruelty.

The husband's prayer of divorce was however allowed on grounds of wife's desertion as despite being served repeatedly the notices including their publication in the newspapers, she chose neither to appear nor defend the case, and the charge of desertion remained uncontroverted.

Legalisation of sexual intercourse and procreation of children remains one of the major incidents of marriage. While marriage for companionship and for looking after each other emotionally with contentment without sex is never ruled out, sex remains a major factor in any marriage. Where due to denial of marital intercourse by one of the parties, the marriage remains unconsummated, it is actually indicative of a problematic marital relationship. In a case from Madras and before the apex court,[30] the parties married in 2005, went to London , lived together for around a year and then visited India after which the wife refused to accompany the husband to United Kingdom. This led to intense litigation, the man filing for divorce on grounds of wife's cruelty while she denying the allegations, filing a counter for restitution of conjugal rights that was granted in her favour. She blamed the husband for non consummation of the marriage, contending that he did not want a child for two years, a claim that was dismissed by the court that held her responsible for non consummation. The court observed that well educated spouses can always avoid conception of a baby by adhering to precautions such as use of contraceptives, but persistence denial of sexual intercourse by a partner without sufficient reason by in itself amounts to mental cruelty to the spouse. The court directed the husband to pay a onetime alimony of Rs. 40 lakhs to the wife and brought the marriage to an end.

Maintenance

One of the primary consequence of a matrimonial break up remains a grant of maintenance to the financially dependent wife and children by the husband. Labeled as a financial settlement, the trend now a days is to insist on a lump sum amount avoiding monthly or periodic maintenance with attending risk of its non compliance in future with eventuality of another round of unpleasant litigation. The first litigation is in itself very tedious and complications surface due to ignorance of the parties and surprisingly their lawyers, to approach the court under appropriate provisions of law. Remedy however can be provided by a positive approach of a helpful court. In *K*

29 See for instance *Kalpana Srivastava* v. *Surendra Nath Srivastava*, AIR 1985 All 253.

30 AIR 2015 (NOC)1301 (P&H).

31 *Vidhya Vishwanathan* v. *Kartik Balakrishnan,* AIR 2015 SC 285.

Narsinga Rao v. *K Neerja*,[32] married in 1996, the parties had a daughter, the husband unsuccessfully approaching the court for a grant of divorce on grounds of cruelty, whereupon he took the matter in appeal. During the pendency of appeal the wife filed an affidavit stating that she had no objections to him getting divorce, as 17 years had passed, and the marriage had broken down, yet she insisted that she should not be held guilty of cruelty. All through she educated her daughter with a mere Rs. 3,500 per month as maintenance from her husband while he earned more than Rs.60, 000 from his salary and from other sources. She now prayed maintenance to the tune of Rs. 25 lakhs as a lump sum payment and Rs. 20 lakhs for herself and for her daughter's education and marriage expenses.

Since the petition was moved under section 25 of the HMA, the claim of the divorced wife could be entertained but the section does not accommodate the maintenance claims of the children of the marriage. Wanting to give relief to the daughter as well the court used section 26 of the HM Act, where under it, can pass an order for the maintenance and education of minor children by way of a decree or by way of an interim order, in case the proceedings for obtaining the decree are still pending can be passed. Since the daughter in the present case was an engineering student, and was still under the age of 18 years, the court directed the husband to pay her, Rs 7500 per month till attainment of the age of 18 years. The court also granted alimony to the wife to the tune of Rs 15 lakhs, and ensured its payment through attachment of his retrial/terminal benefits.

Waiver of mandatory six months time period in petition for divorce by mutual consent

Divorce by mutual consent has come across as one of the most appropriate method of putting an end to a failed marriage. Legislative procedure for availing the remedy is very clearly stipulated in the statute. The requirement of approaching the courts twice within a span of 6-18 months is a mandatory requirement, but the demonstrable haste and prayers for sidelining the rules according to the convenience of the parties have become so routine that clear written modalities are in the danger of being customized. In a petition filed for grant of divorce by mutual consent, once the joint petition is presented before the court the parties have to wait for a period of minimum six months and not later than 18 months before they can make a joint motion before the court again. In *Swapnil Verma* v. *Principal Judge, Family court, Lucknow*,[33] two years after marriage the parties separated and the baby girl of the marriage was with the mother. Matrimonial differences apparently were irreconcilable due to filing of several cases by the wife against the husband in the criminal courts. Five years of separation led them to a compromise and they decided to dissolve their marriage through divorce by mutual consent. As per the procedure the family court judge posted the application for a second hearing after six months, but the parties wanting an instant dissolution and thus feeling aggrieved by a denial, filed a writ urging the court to

32 AIR 2015 Hyd 163.
33 AIR 2015 All 153.

waive the six months period and praying that in view of irretrievable breakdown of marriage, divorce should be granted expeditiously. The main argument was that parties are similarly aged, have no intention to live together due to failed reconciliation attempts, and irrecoverable relations, a decree of divorce should have been passed immediately without making them to wait for another six months. A number of judicial pronouncements were quoted in support of their contention.[34] The primary issue before the court was whether under article 227 of the Constitution of India, it has power to direct the family court to decide the mutual consent petition filed under section 13 B by waiving off the mandatory waiting period of six months?

The court observed that it ordinarily does not have the power to waive off the six months period as this interregnum was intended to give more time and opportunity to the parties to reflect on their move, may be seek advice or rethink about their decision and preserve their marriage and concluded that the grievance of the petitioners for truncating the statutory waiting period of six months envisages under section 13 B for the reason that the marriage has broken down irretrievably is therefore not within the scope of adjudication of this court, considering that such power can be exercised only by the apex court under article 142 of the constitution. It also quoted with approval an earlier apex court judgment,[35] wherein despite observance of the consent terms by the husband, and the wife availing the financial benefits and taking the property had withdrawn the consent at the time of the second motion, the court had allowed divorce by mutual consent. However the Supreme Court had made it clear that only the apex court can exercise this power under article 142 of the constitution of India and that none of the high courts were empowered to do so. The prayer for the waiver of six months time period in between the two, i.e., the first petition and the second motion and therefore the grant of divorce immediately on the filing of the first petition itself, was dismissed.[36] Similarly, in *Soni Kumari v. Dipak Kumar*,[37] the parties pursuant to matrimonial discord filed a petition praying for divorce by mutual consent. However, they also immediately filed an application for waiver of the six months' time period mandated by the legislation as compulsory that was rejected by the family court. The matter was then taken in appeal to the apex court. It is noteworthy that there was a financial settlement of Rs 11 lakhs. The husband was working and was employed abroad and the parties argued that once he leaves, it would not be possible for him to come back within stipulated time period to India, and till the time he comes

34 *Payal Jindal* v. *A K Jindal,*1995 Supp (4) SCC 411; *Re Gandhi Venkata Chitti Abbai,* AIR 1999 AP 91; *Dinesh Kumar Shukla* v. *Neeta,* AIR 2005 MP 106; *Anita Sharma* v. *Nil,* AIR 2005 Delhi 365.

35 *Anil Kumar Jain* v. *Maya Jain,* AIR 2010 SC 229.

36 *Gunal Sudhir Sangani* v. *Ishita Sangani,* 2016 (5) ALLMR 948. Here, pursuant to a matrimonial discord the matter went to the court which referred the same for mediation and as a fruitful result of mediation efforts, the parties agreed to file a petition for divorce by mutual consent and entered into a settlement with respect to custody and visitation rights of their child, a daughter and also a huge financial settlement.

37 2016 (1) ALD 180.

back and they jointly file a second motion, the marriage would continue to exist and the parties would not be able to remarry. The apex court looked into the matter ,expressed satisfaction that the relations have reached to a point of no return, as the mediation attempts had failed, terms of financial settlement were satisfactory and no useful purpose would be served by making the parties wait for another six months and they exercising their powers under article 142, waived off the six months time period and the marriage was dissolved, but in another case coming from Bombay, the plea of waiver of the six months time period on the ground that remarriage of both the parties has been fixed was rejected as no particulars of undue hardship to be caused to them due to passage of six months were given.[38]

Youngster's perception of marriage, getting in and getting out of it has undergone a sea change. In the event of matrimonial relations going sour, the eagerness, the haste, the impatient and desperate yearning to resort to their pre-marital status propels the present day couples to explore all possible options and seeking exemptions from waiting even for a period of six months. The reasonable time period of one and a half years seem to them of endless agony and avoidable litigation adds to the pile of already enormous backlog of cases. The pace at which they rush to give the marriage a quick burial speaks volumes of the futility of the legislative and judicial advice of a patient wait, a relook and a preservance of the matrimonial bond. Secondly, the way section 13 B is continuously being tampered by the judiciary is unfortunate. It is a matter of practical reality that access to apex court is an expensive proposition and usually beyond the reach of a common man. Yet the power to waive off the statutory period of six months can be exercised only by the apex court. Suffering of an individual can be understood and experienced by only himself and is always considered extreme. Individual considerations of wanting to remarry would almost be universal in every situation. Thus if it can be established that there is satisfaction with financial settlement, desire and avenues of remarriage, and also most importantly no intention to get back together to each other and failed mediation, the family courts should either be given the power to waive off the six months time period or the waiver should be as restricted as possible. As it is, it contributes to the already existing excessive workload of the courts and adds to the number of litigation pending in the court and favours those who can afford to go to the apex court. It is unfortunate that the estimation of apex court judges should be perceived as different from the family court judges in this matter.

IV HINDU MINORITY AND GUARDIANSHIP ACT, 1956

Unwed mother as guardian of her child: mandate of compulsory disclosure of father's name

The social set up is rapidly changing and the legal provisions have been unable to keep pace with them. Emerging issues, inconceivable in the past have thrown up new challenges before the judiciary to glance at the century old legislations through

38 AIR 2015 NOC 1087.

the prism of changed social scenario. An interesting case came before the High Court of Delhi and reached the level of the highest judicial podium for redressal of grievance of a modern Indian woman. Her case she was an unwed mother, employed, economically independent, wanted to raise the child herself and did not want to bother or implicate the biological father as he was a married man with a family and openness with respect to her relationship would have an undesirable repurcussion for him. She wanted her child to be a nominee for her deposits/ savings and insurance policies and when she proceeded to complete the necessary formalities she was informed that she must either declare the name of the father or get a guardianship certificate from the court. The child was five years old by then. Upon the refusal of the bank to accept her application of the nomination without the name of the father that she refused to disclosed or without an order of the court certifying that she was the guardian of the baby. She moved the court but the lower courts also interpreting the GWA, came to the conclusion that where an application for appointment as a guardian is filed, it is imperative on part of the court to give a notice to the parents and for that the mother must disclose his name and address of the father. The mother published a notice of the petition in a local daily newspaper, but still displayed strong aversion to revealing the name of the father. She did not want to emotionally distraught the child as the father was already married elsewhere, and a revelation of his paternity could have an adverse impact on his family life. Further, the father on his own had not evinced any interest in the child or his upbringing, therefore she decided to bring him up on her own without his help. However she was open to and not at all averse to the voluntary involvement of the father, if he so wanted in any of the child's affairs. To demonstrate honesty of her submissions, she filed an affidavit that in the possible future eventuality of the father objecting to his guardianship, the same may be revoked or altered, but the guardian court still directed her to reveal the name and whereabouts of the father and consequent to her failure to do so, dismissed her application. The matter went to the high court which also refused to entertain her guardianship application unless she revealed the name and address of the father. Her assertion of being a single parent could only be decided after notice was issued to the father as a natural father could have an interest in the welfare and custody of his child even if there was no marriage and that no case could be decided in the absence of a necessary party. The matter was then taken to the Supreme Court. Upon her request, her and her child's identity was protected. The main contentions of the mother were:

i) that she did not want the future of her child to be marred by any controversy regarding his paternity which would indubitably result in the eventuality of the father's refusal to acknowledge the child as his own. This she said was a brooding practical reality due to the father's marital status and any such publicity might have pernicious repercussions to his present family. In addition there could be severe social complications for her as also for the child;
ii) her own fundamental right to privacy would be violated if she is compelled to disclose the name of the father of her child; and
iii) the only consideration for appointment of a guardian for the child is the welfare of the child and his best interests. The rights of the parents are always subservient

to such welfare concept. The interests of the child she contended would be best served if the mother is immediately appointed as its guardian.

The state on the other hand contended that

i) a notice is required to be given to the parents of the minor before a guardian can be appointed, for that disclosure of the name and address of the father is a must; and
ii) a guardian cannot be appointed if the father of the minor is alive and is in the opinion of the court not unfit to be the guardian of the child.

The court looked into various other legal systems and concluded that in disparate personal laws of India and also family laws prevalent in other countries, in cases of unwed parents, mother always has a preferential claim over the legal custody of the child. The father has to prove his paternity for claiming custody of the child and in some legal systems even execute an agreement with the mother for such claim. While the court felt that the child has a right to know the identity of his parents including that of the father and thus impressed upon her to disclose the identity of the father to the son. The woman accordingly disclosed the name and particulars of the father to the court, which was placed in a duly sealed envelope with specific directions that the same be read over only pursuant to a specific direction from the court. The court as part of their *parens patriae* obligations were greatly perturbed by the fact that the woman had not obtained the birth certificate for the child who had become five years old. Even though for both admission to schools and for an application for issuing of a passport, the mandatory furnishing of the father's name is no longer the rule, but furnishing of the birth certificate is. The court assumed that if the reason for not obtaining it was an apprehension of the requirement of disclosure of the name of the father which she was unwilling to do, it directed that as the identity of the mother is never in doubt, if a single parent/unwed mother applies for the issuance of a birth certificate for a child born from her womb, the authorities concerned may only require her to furnish an affidavit to this effect and must thereupon issue the birth certificate unless there is a contrary court direction. They emphasised that it was the responsibility of the state to ensure that no citizen suffers any inconvenience or disadvantage merely because the parents fail or neglect to register their birth, rather it was the duty of the state to take necessary steps for recording every birth of the citizens. It also clarified that this direction of theirs pertaining to the issuance of the birth certificate was intently not related to the circumstances or the parties before them. The court also came down heavily upon the lower courts, observing that they had failed to discharge their *parens patriae* jurisdiction by dismissing the petition without considering all the problems, complexities and complications concerning the child brought within its portals. Allowing the appeal filed by the mother they directed the guardian court to examine the application of the mother without requiring the notice to be served on the father.

Father as natural guardian

In matters relating to custody and guardianship the welfare of the child is always to be taken into account and not the right of the parents. Courts have re-iterated that, *Firstly* parents have only responsibilities/obligations and only the child has rights. Thus, it is not only the financial superiority of one of the parties, which can be the sole consideration of granting him the custody.[39] *Secondly*, since the welfare of the child is of paramount importance, parents including father despite being statutorily the natural guardian cannot enforce his custodial rights over the child where it is being looked after well by the maternal grandparents, specifically where he himself neglected the child after the mother's death and evinced no interest in her welfare.[40] If in such cases, the court concludes that the maternal grandparents are providing good education and a decent upbringing to the child and in child's interests and in accordance with her wishes, the continuity of the custody would be beneficial, the same would not be disturbed and the father would be denied the guardianship of the child. Similarly, where a minor girl was the tug of war between the maternal and paternal grandparents, and since the death of her parents, the child was with her maternal grandparents, and not only was looked after by them well but also desired to be with them, while on the other hand the paternal grandparents never bothered to seek her company but tried to include her name in the legal heir certificate, their conduct was held as adverse to the interests of the minor and maternal grandparents were allowed to retain the custody.[41] Where for eight years, the minor sons remained with the mother who without a regular employment, took good care of them, educated them, while the father neither bothered to bring them back or provide maintenance to them, he would be denied guardianship and their custody with the mother would not be disturbed.[42] However, where the father died, and the children were taken care of by the paternal grandparents after the mother left the house due to difference with them, her application filed later for claiming custody of the children was granted as she was a government employee, was 35 years old, and was a fit person to look after the children.[43]

Custody orders by multiple courts

Despite complete unanimity, that the best interests and welfare of the child is of paramount importance, complications arise owing to trial by multiple courts conflicting jurisdictions, having global ramifications. If the child is subject to jurisdiction of the foreign courts from where an order is obtained but one parent brings the child to India, with a prayer to avail jurisdiction of domestic courts, how far would the decree or order of a foreign court can be enforced in India was the issue that arose this year

39 *Soma Das* v. *Ranjit Das,*AIR 2015 Gau 109.

40 *Jitendra Barik* v. *Kaliapada Apat,*AIR 2015 (NOC) 1300 (Ori).

41 *Bimla Sahoo* v. *Binayak Sahoo,* AIR 2015 (NOC) 1218 (Ori).

42 *Paramjit Kaur* v. *Baljinder Singh,* AIR 2015 (NOC) 1302 (P&H).

43 *Gurmukh Singh* v. *Amardeep Kaur,* AIR 2015 (NOC) 1172 (P&H).

in *Surya Vadanan* v. *State of Tamil Nadu*.[44] Here the father presented a writ of habeas corpus for production of his children to enable them to be taken to UK since they were the wards of the court in UK, for a decision on their custody. The high court in the first instance denied the writ but the Supreme Court ordered for its issuance. The parties; the husband a British and the wife an Indian citizen married in 2000. Moving to her matrimonial home in UK with her husband she acquired both gainful employment as also British citizenship. Two children born to them were also British citizens. 12 years later, she along with the children came to India with return tickets but refused to go back; starting living with her parents in Coimbatore and then filed for divorce at a local court without informing the husband. Upon their failure to return to UK, the husband came to India; stayed with her natal family and the children were admitted to a local school with his consent, while all along, he was given no hint of the pending divorce proceedings, but when he got the notice of the court proceedings officially, he initiated the legal action in the court in UK for making the children the wards of court, supplementing it with the payment of fees receipts for the schools in UK and informing the court that the children's studies should not be disrupted. The high court of justice in 2012 passed an order making the children the wards of the court during their minority or until such time as the order of theirs was varied or alternatively discharged by any further order and required the wife to return the children to the jurisdiction of the court. The mother was informed by the father through his solicitors with a direction to lodge the passports of the children. The order of the court read as under:[45]

> and this hon'ble court respectfully requests that the administrative authorities of the british government operating in the jurisdiction of India and the judicial and administrative authorities of India, including the Indian High Commission in England, assist in any way within their power and control in ascertaining the current whereabouts of the children herein, who have been made wards of court, and in assisting in repatriating them to England and Wales, the country of their habitual residence.

The wife did not comply with the order but filed a written statement in response to it. The court then passed another order, repeating its earlier direction and renewing its request to the administrative authorities of the British Government in India and the judicial and administrative authorities in India for assistance for repatriation of the wards of the court to England and Wales, the country of their habitual residence. The mothers as also the grandmother were directed to produce the children and see to it that they return to UK. Upon their failure to comply with this order as well, the husband filed a writ in the High Court of Madras that the wife had illegal custody of the children and they be produced before the court. The court dismissed his petition holding

44 AIR 2015 SC 2243.

45 *Id*., para 14.

that the only determining factor to assess where the child should stay is 'the welfare of the child' and not the right of any parent. The court further said that stay of children with the mother even in defiance of the order passed by a UK court would not make their stay illegal; and on specified days the father could meet the children. The father aggrieved with this order preferred an appeal to the Supreme Court.

The court took note of five major recent judgments[46] concerning the inter-country custody issues involving multiple courts and having parallel or similar facts. In *Sarita Sharma* v. *Sushil Sharma*,[47] in defiance of an order passed by the District of Texas regarding custody and care of the children of the couple in the midst of matrimonial differences the wife along with children came back to India. The husband obtained a divorce and a custody order from the foreign court and then filed a petition in Delhi which ruled in his favour and directed the wife to hand over the passport of the children to him. However on appeal the apex court noted that the husband was an alcoholic and was guilty of domestic violence but also observed that the conduct of the wife was also not satisfactory as she had violated the court's order and removed the children from the US in contradiction to the order. Two principles were approved by the court: namely that the modern theory of the conflict of laws recognises or at least prefers the jurisdiction of the state which has the most intimate contact with the issues arising in the case and secondly, even though law constitutes the father as the natural guardian of a minor son, the provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. The domestic court will consider the welfare of the child as of paramount importance and the order of a foreign court is only a factor to be taken into consideration. On the merits of the case, the court observed, that the matter of custody has to be inquired into from the perspective of the welfare of the child and therefore the husband was asked to initiate the proceedings in Delhi court.

With respect to the principles for dealing with a foreign judgment,[48] namely: (i) The principle of comity of courts and (ii) The principle of the best interests and the welfare of the child, the present court also re-eterated that a foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. The principle of "comity of courts" should not be jettisoned, except for special and compelling reasons specially in a case where only an interim or an interlocutory order has been passed by a foreign court. Situations in which an interim or an interlocutory order of a foreign court may be ignored are very few, such as one parent invoking the jurisdiction of a court but

46 *Sarita Sharma* v. *Sushil Sharma,* AIR 2000 SC 1019, *Shilpa Aggarwal* v. *Aviral Mittal,* AIR 2009 SCW 7694; *V.Ravi Chandran* v. *Union of India,* AIR 2010 SC Supp 257 ; *Ruchi Majoo* v *Sanjeev Majoo,* AIR 2011 SC 1952 and *Arathi Bandi* v. *Bandi Jagadrakshaka Rao* (2013) 15 SCC 790.

47 AIR 2000 SC 1019.

48 Code of Civil Procedure, 1908, s.13.

without obtaining any substantive order in his/her favour and the other parent invoking the jurisdiction of another court but getting a favourable substantive order before the first court. In such an event, due respect and weight ought to be given to the substantive order passed by the second court since that interim or interlocutory order was passed prior in point of time. Secondly, a violation of an interim or an interlocutory order passed by a court of competent jurisdiction must be viewed strictly for maintaining rule of law and no litigant can be permitted to defy or decline adherence to an interim or an interlocutory order of a court merely because either it does not suit them or in their perception the order is incorrect as that has to be judged by a superior court or by another court having jurisdiction to do so. If the violation of an interim or an interlocutory order is not viewed seriously, it will have widespread deleterious effects on the authority of courts to implement their interim or interlocutory orders or compel their adherence, but at the same time, merely because a parent has violated an order of a foreign court does not mean that that parent should be penalised for it. In a given case, it might be appropriate to have an elaborate inquiry to decide whether a child should be repatriated to the foreign country and to the jurisdiction of the foreign court or in a given case to have a summary inquiry without going into the merits of the dispute relating to the best interests and welfare of the child and repatriating the child to the foreign country and to the jurisdiction of the foreign court.

If there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

(i) The nature and effect of the interim or interlocutory order passed by the foreign court.
(ii) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.
(iii) The repatriation of the child does not cause any moral, physical, social, cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India such as his or her probable arrest.
(iv) The alacrity with which the parent moves the concerned foreign court or the concerned domestic court is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.

The court said that the mere fact that the children were admitted to a school in India, with the consent of the father is not conclusive of his consent to the permanent or long term residence of the children in India. It might be because he did not want any disruption in the education of his children. It further held that since there was no final determination on the issue of their best interests and welfare by the UK court, nothing can prevent the mother from contesting the correctness of the interim order

as upon proper representation, interlocutory orders may be vacated or modified or even set aside. There was also no evidence that any prejudice will be caused to the children if they are taken to the UK and subjected to the jurisdiction of the foreign court or that they will be prejudiced in any manner either morally, physically, socially, culturally or psychologically if they continue as wards of the court until a final order is passed by the foreign court. Since the foreign court is competent/capable of taking a reasonable, just and fair decision in the best interests of the children and entirely for their welfare, the court directed that the wife and children be taken to the UK to take part in the proceedings before the court in UK but the cost of taking them were to be borne by the husband, who was also asked to pay them maintenance and make provision for their comfortable stay in UK *etc*.

V HINDU SUCCESSION ACT, 1956

Daughters as coparceners: condition of father being alive

The Hindu succession Act was amended in 2005, and it has been nearly eleven years, yet the introduction of daughters as coparceners, its effective date and the conditions that her rights are subjected to continue to be deliberated in the Indian courts. Removal of hurdles and inequities has seen differential interpretations and the issue refuses to settle down. Precedents are created only to be overruled by another, bringing uncertainties in law. Even where the law appears to be clear and the interpretations have to be in accordance with the spirit of the amendment, technicalities weigh more in comparison to clarity. Technical legislation sees technical interpretation and thus law appears to be different than what it is. Natural and logical consequences that flow from the statutory principles get projected as new or innovative principles with lawyers and academicians scratching their heads trying to figure out and grasping the new principle. *Prakash* v. *Phulwati*,[49] is yet another case where overruling the high court judgment, the apex court introduced two basic qualifications for implementation and application of the amendment of 2005 to daughters. One, incorporated in section as a general principle, that a daughter remains incapable to re-open a partition that took place prior to December 20, 2004 and the other that though the statute confers coparcenary rights in her favour from September 9, 2005, she would be a coparcener only when her father was alive on this date. While the first is a legislative provision the second does not find any place in the legislation directly, and thereby is visualised as a principle laid down by the apex court for the first time. However, it is actually perfectly in consonance with the legislation, and is a natural consequence of the continuation of the pre-amended legal provision based on the concept of notional or presumptive partition. The principle that her father should be alive on the day the amendment was promulgated actually refers to the time when father as an undivided coparcener died and his undivided share in the Mitakshara coparcenary property devolved on the members of the family. If the father died prior

49 AIR 2016 SC 769.

to the promulgation of the 2005 amendment, the law as applicable on the day he died would govern devolution of his property including a share in the coparcenary property. In accordance with the provision of section 6 of the Hindu Succession Act, 1956, as was applicable from 1956 till 2005, upon the death of an undivided Mitakshara coparcener, if he dies leaving behind him a class-I female heir or a male heir claiming through a female then his share in the Mitkshara coparcenary does not devolve upon the other coparceners in accordance with the principles of doctrine of survivorship but goes in accordance with intestate and testamentary succession as the case may be. For ascertaining his share in the Mitakshara coparcenary, it is to be presumed that immediately before his death, a partition was effected at his instance irrespective of whether he was competent to ask for partition or not and his share so calculated will then go as per intestate or testamentary succession as the case may be. This presumptive or fictional partition through which his share is calculated is to be treated as a real partition. This rule applies in every case where a male Hindu dies as an undivided member of Mitakshara coparcenary. For a daughter to be eligible to be a coparcener, no partition of the joint family should have occurred. Now if upon the death of the father, a notional partition which has the effect of a real partition is to be statutorily enforced, the daughter would remain incapable to claim her share as the joint family has come to an end by the notional partition. It will happen in every case the moment the father dies without any exception as it is a mandate of law and does not depend upon the will of the parties as is the case in a normal partition effected at the instance of any one of the coparcener. So a daughter, whose father is alive means that the joint family is intact and no partition has been effected of it, and if the father is dead, the joint family does not exist, as a partition has already taken place. The law in this connection had also been explained by the apex court in *Gurupad* v. *Hirabai*,[50] wherein Chardrachud J, as he then was, had held that upon the death of an undivided member of a Mitakshara coparcenary the joint family comes to an end and all those who otherwise were entitled to get a share if and when an actual partition had taken place would become entitled to receive their shares. The issue there was with respect to the purpose of a notional partition, whether it is to be treated as a real partition, or a fictional one designed only to calculated the share of the deceased coparcener and stop at that and the rest of the family would continue to maintain the joint status, or to be treated as a real partition with its complete consequences. The court had said that a notional partition in every sense of the term is to be treated as a real partition with its complete effects.

The issue is therefore not whether the amendment would have a prospective or a retrospective effect. Her becoming a coparcener depends only on the fact of existence of a joint family and Mitakshara coparcenary. If Mitakshara coparcenary exists, she becomes a coparcener, if it does not she cannot be conferred coparcenary rights with the death of the father prior to September 2005, the coparcenary would come to an end and so would her right.

50 AIR 1978 SC 1239.

Succession and effect of mutation

Conferment of title and ownership are an integral part of transfer of property through succession. When one inherits the property, he does it with all incidents of ownership and there is an automatic transfer of ownership of property in theory. Many a times, for the purposes of payment of taxes or other statutory liabilities, before an actual physical division of property inherited by multiple sharers amongst them, property is mutated in the name of one person so as to discharge effectively dues on the property. These responsibilities associated with the property such as payment of taxes to the government are statutory responsibilities, invite heavy penalties in case of non payment and cannot therefore wait for a formal partition. As a convenient mechanism though often with consensus, one sharer agrees to discharge it despite the fact that this duty is that of the owners individually. Joint-ness of estate and the technicalities of formal actual division of property are often time consuming, and even though mutation of each portion of property should normally be done on individual ownership basis, for payment of taxes mutation is effected with the sole purpose that the person whose name is entered in to the records could conveniently pay the taxes. As usually, the name of title holder only is entered into the records of the statutory authorities conversely, it is often presumed therefore that the one whose name is appearing in the records of the authorities after mutation is the legal and sole owner. In case the property is owned by multiple persons, the fact that the property is mutated in the name of only one person is not indicative of the fact that the others have automatically or even explicitly surrendered their rights in his favour The position in such cases was clarified by the apex court in *H Lakshmaiah Reddy* v. *L Venkatesh Reddy*.[51] Here the property belonged to a Hindu woman and stood in her name. She had a son, S and her husband H. Upon her death, the property was mutated in the name of the son in 1990, as per the revenue entries and the father neither objected nor challenged it, but at the same time he never ever formally relinquished his share in the property. He then remarried and had four children from his second marriage. The son, post mutation of the property in his favour, started treating the entire property as his own, and refused to acknowledge the claim of the father over the other half of the property on the basis of the mutated document contending that mutation amounts to proof of ownership, and since the father initially did not object to mutation, this in itself amounts to a relinquishment of his share in his favour. The father then approached the court, which held that both the son and the father had inherited one half each of the share of the deceased woman's property and mere mutation does not make the son, the sole owner of the entire estate. This finding of the lower court was reversed in appeal by the high court which granted the claim of the son over the entire property. The matter was taken to the apex court. The father claimed that he had never relinquished his share in favour of the son but had merely consented before the revenue authorities for change of name in the Katha to enable him to pay taxes, and therefore, the son's assumption of his ownership extending to the whole of the property was

51 AIR 2015 SC 2499.

incorrect. He further contended that mutation entry can never be considered relinquishment of his right or title. The Supreme Court said:[52]

> the assumption on the part of the High court that as a result of the mutation , 1st defendant divested himself of the title and possession of half share in suit property is wrong. The mutation entries do not convey or extinguish any title and those entries are relevant only for the purpose of collection of land revenue.

Mutation entries in the revenue records therefore does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. Thus the assumption of the high court that the father by his conduct had acquiesced and divested himself of title in his half share in suit property was erroneous and was set aside by the apex court which also ruled that the father was the owner of half of the assets left by his wife.

Succession to the property of a Hindu female

Since the three fold classification of the property owned by a woman continues under Hindu law for the purposes of succession, the issue sees endless litigation. In *Laxmidhar Sahoo* v. *Batakrushna Sahoo*,[53] should the property that is inherited by a woman from her parents, be inherited by her husband or not if she leaves behind an issue was again adjudicated. Here a Hindu woman having a husband and an adopted child died. She had left behind property that she had earlier inherited from her mother and some other property. The complete property that she possessed and was available for succession was earlier or to begin with, was purchased by her parents. Some of it was transferred by her parents in her name during her life time while part of it was retained by her parents with themselves. The portion of the property that they had purchased and retained with them was inherited by her later upon her parent's demise in the capacity of their daughter.

The possession of the property that she had inherited from her mother was immediately taken by her husband, who also sold it, within four days of her death. This was done to the complete exclusion of the son. The petition was filed on behalf of her minor son who was with his maternal uncle, with respect to declaration of the complete sale as invalid with respect to his share. He contended that the father was not entitled to succession rights as the property of a Hindu woman that she inherits from her parents under law, can be inherited only by her issue and her husband remains incompetent to inherit the same. The husband on the other hand contended that he along with the minor son inherited the property jointly; upon inheritance the character of the property became the joint family property; he was previously also the *Karta* of the joint family comprising of himself, his wife and the adopted son who was staying

52 *Id.* at 2500.

53 AIR 2015 Ori 1.

with the maternal uncle for the purposes of his education, and the inherited property was added to the corpus of the joint family property that he headed. As Karta, he sold the property for legal necessity, for performance of shradd of his wife and for construction of the house and had immediately upon the execution of the sale delivered the possession of the property to the transferees who were put in possession of the property. The sale therefore he contended was perfectly valid and cannot be challenged now. Both the lower courts held that since the property was inherited by the deceased from her mother the husband had no right in it and the entire property would be inherited by her son. Accordingly, the husband lacked competency to execute a sale of any portion of the property.

The present court explored section15 and held that where the property which is the subject matter of succession was inherited by a Hindu female from her parents in accordance with the exception under section 16, it reverts back to the heirs of her father but only in absence of her issue. If she leaves behind an issue, the order of succession does not change and the property is inherited in terms of the order of succession provided under section 15 *i.e.,* on the issue and the husband .Thus since in the present case the deceased left behind a son, and a husband the property irrespective of whatever its origin may be would be inherited by both her son as also her husband. Therefore, the husband when he executed a sale of the property could do it with respect to his share in it. The second contention of the husband that he had alienated the property as the *Karta* of the joint family for legal necessity was rejected by the court which held that the property did devolve on both the father and the son, but at no point of time it took the character of a Hindu joint family property. The share of the son would be distinct from the share of the father and merely because the two of them had inherited the property together from the same source, the character of the property would not changed into joint family property. It was and continued to be the separate property of the child with full ownership of him over it and the father was incompetent to sell the property even as a guardian without the permission of the court which was not obtained in this case. The sale was held to be voidable to the extent of 50 % of the property, *i.e.,* the share of the son. The court however failed to take note of an earlier apex court pronouncement,[54] where on comparable facts, the court had held that the husband was not empowered to inherit the property of the wife that she had earlier inherited from her father. Here a Hindu woman had died leaving behind a daughter and her husband. The daughter was held as entitled to the complete property to the exclusion of the husband.

VI CONCLUSION

The year 2015 saw an interesting mix of cases forming part of the survey. The four cases on adoption, had a deferential handling with contrasting conclusions by the courts. In two cases, establishment of a claim of adoption was at the behest of adult men years after the alleged adoption took place. Inability to present cogent

54 *Radhika* v. *Anguram* (1994) 5 SCC 761.

evidence authenticating the claim of adoption and the violation of statutory principles led to the rejection of their respective petitions. However, another set of two cases of adoption involving infants depicted remarkable sensitivity and positivism by the courts by sidelining technicalities and overcoming them with reason facilitating in both cases adoption of these babies of tender ages to suitable intending parents. The issue of interreligious marriages under Hindu law witnessed interesting observations, as with parallel facts, the decree sought by a non Hindu man was refused owing to his inability to avail the remedies under the HM Act while the defense of a Hindu man that his marriage was a nullity as the wife's reconversion to Hindu faith was questionable was rejected on factual grounds. The court's anxiety over marriages of youngsters performed without the consent and knowledge of their parents and in secrecy, such as in advocate chambers led to an unprecedented but questionable judgment as they declared that the marriages despite its legal solemnization and registration at the registrar's office must have a public domain and strangely enough ruled that a female party to the marriage would be entitled to avoid this marriage, but the male cannot. Distinction and differential consequences of matrimonial remedies of nullity and divorce were explained with conclusions contrasting from earlier judicial pronouncement. The struggle of a modern Indian Hindu woman wanting to singlehandedly raise a child born to her without a marriage came to surface with the court coming to her aid, as archaic provisions continue on the statute books making disclosure of the identity of the father mandatory in guardianship cases and the effective date of conferment of coparcenary rights in favour of daughters continued to be debated in court.