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HINDU LAW

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I INTRODUCTION

IMPORTANT JUDICIAL pronouncements in the area of Hindu law relating to marriage, adoption, maintenance, custody, guardianship, Hindu joint family and succession reported during the year 2017, have been briefly analyzed here.

II HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

Validity of adoption

Post adoption, the adoptive parents acquire the responsibility of nurturing and securing the present as also the future rights of the adopted child. A challenge to the validity of adoption is often raised much later in point of time than the occasion of effecting an adoption thus the prescribed documentation and carrying out of the necessary alterations in the official records remains a very important step to protect the rights of the child. It also aptly frustrates the attempts of unscrupulous persons who wait for the time to pass and then bring in a challenge to usurp the child's rights. In such cases a co-operation from the authorities is absolutely imperative. In *Rajesh Sharma* v. *State of Himachal Pradesh*,[1] the natural parents gave their child in adoption to the adoptive parents after observing all necessary rites and ceremonies. In addition, an adoption deed duly signed was executed in presence of two witnesses and the sub-registrar. Thereafter the adoptive parents made representations before the President, Gram Panchayat, Sub Divisional Magistrate (Rural) and Deputy Commissioner for carrying necessary correction of revenue records, but the same was refused, hence he filed a writ petition seeking court's help in further securing the rights of the adopted baby. He prayed for issuance of necessary directions from the court to be issued to the authorities for carrying the desired corrections. The court accepted his prayer, and observed that all rituals of adoption as per Hindu law were followed, further, the adoption deed carried the photographs of both the adoptive as also the biological

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1 AIR 2017 HP 35.

parents, and hence adoption was valid for all intents and purposes. As far as the contention of the revenue authorities that necessary procedure and format for recording adoption in revenue records was not followed, it was termed by the court as trivial and they held that the same would not take away the accrued right of adoption. This existence of a specific rule laying down the procedure was a technicality that would not cast any adverse shadow on the validity of adoption and they issued necessary directions to authorities to correct records. As normal prudent parents, inability to adhere to the technical formalities followed by refusal of the authorities to a simple correction of records could have seriously jeopardized the interests of their baby. The court's stance in the present case was highly appropriate as inapt or incomplete filling of complicated forms should not be allowed to cloud the legitimate created relationships and the rights of the adopted child.

The twin reasons for the permissibility of adoption remain providing the joy of parenthood to a childless couple and a loving home with a conducive environment to a baby who might have been rendered vulnerable by becoming an orphan or abandoned by the natural parents. But these pious objectives unfortunately appear to be considerably hijacked by a distinct and premeditated monetary angle. With an eye on the property of another person, bizarre adoption claims make their way to the court which interestingly in several cases are fiercely contested and even blatantly denied by the very individual who the litigant claims is the adoptive father. The claimant in many cases comes from within the family of a childless couple, with a dubious intention to usurp their property. In *K M Subramaniam* v. *Parvathiammal*,[2] a Hindu man A and his brother B were living as part of the joint family. A was childless while his brother B had a wife, one son, S and six daughters. A filed a suit for partition and demarcation of his share in 1991, but during the pendency of litigation he died. The son of B pleaded substitution and a claim to his entire property, putting forward an unsubstantiated claim that the deceased had taken him in adoption during his lifetime. The time of adoption with the records produced by him reflected that at the time of the alleged adoption, S was 20 years old. He was unable to establish any custom in their community that permitted an adoption of a person elder to the legislative permissible age of 15 years. The court also observed that the factual situation depicted that he was the only son of his biological father amongst six sisters and it was highly unlikely that the natural father could have given him in adoption. The claim of adoption was dismissed by the court. It was apparent that the plea of adoption was made with an eye on the paternal uncle's property and that this attempt was correctly thwarted by the court.

On the other hand, the claim of adoption may be genuine yet be denied by the adoptive parents. Since adoption is an irrevocable act, once a valid adoption takes place it can neither be later revoked nor cancelled. In many cases the adoptive parents

2 AIR 2017 Mad 37.

struggle to negate a valid adoption in the event of strained relations between them and the adopted child. This mutual deterioration in the relationship demonstrates the desperate attempts of the disillusioned parents themselves, trying to culminating it by wriggling out of the relationship, by denying that the alleged adoption ever took place or trying to alienate their property so that the adopted child may not lay his hands on it. In a case coming from Delhi,[3] strange facts emerged where on one hand a person claimed to be the adopted son of a couple, but the couple denied both, the claim of adoption as also the execution and signing of the adoption deed. Here a Hindu man S put forward a plea that when he was 18 months old, he was taken in adoption by H and W. The recording of the fact of adoption was made through execution of a deed subsequently and much later in point of time when the adopted child had already gained 17 years of age. The necessity for the present judicial declaration of adoption status, he contended was owing to unauthorized alienation of the joint family property without his consent by the adoptive father. S also simultaneously challenged the sale as invalid on the ground that he being the adopted son was entitled to a share in the property as the same was ancestral in character and he was a coparcener. S after adoption for his major part of life was living with H and W as their son. The documentary proof that he produced to justify his claim of adoption were in the nature of firstly, the adoption deed the second page of which did mention that the ceremony of *datta homum* was performed when the child was adopted fifteen years back. It was not that adoption was taking place with the help of this deed but it was that the deed recorded the fact of adoption that had taken 15 years back. Other documents included the ration card of H in which his name was written as a family member and as the son of the adoptive father; his motor license, the water bills etc. and even his wedding invitation card that carried the name of his adoptive father. The court held that the best proof of adoption can be gauged from the fact that it was acted upon and noted that the adoption deed was a record of a past event, and the subsequent conduct of all the parties with ample documentary proof established that not only a valid adoption had taken place but it was also acted upon. Hence a bare denial of adoption by the adoptive parents would not be sufficient to disprove adoption if it is proved through documentary evidence. The court held the adoption as proved validly. A similar approach was also taken by the Rajasthan high court in *Kailashchandra* v. *Sant Ramtaram Guru Sant*,[4] where the facts stood in sharp contrast to the earlier case. Here despite putting forward a claim of adoption, the evidence showed that the name of the alleged child did not appear in the ration card of the alleged adoptive father. There was neither any adoption deed nor any photograph documenting the ceremony of adoption. The alleged adopted person claimed that his uncle and aunt were present on the day of the ceremony but they were not examined as witnesses. The court held that adoption was not proved.

3 *Satish* v. *Om Bati,* AIR 2017 Delhi 15.

4 AIR 2017 (NOC) 1060 (Raj).

In another case from Orissa,[5] a person prayed for a declaration of him being a legal heir of a Hindu couple, H and W. The court observed that if a person wants to disturb the natural line of succession claiming adoption, then the proof that the adoption was effected validly must not only be strong but irrefutable as well. Additional consideration has to be given to the time gap between the date of adoption and the time when it is required to be proved. If the gap is huge the conduct of the parties becomes a very strong pointer. Whether the alleged adoptive parent and their relatives treated the child as their own owing to the changed relationship? In addition, it is also to be seen whether the adoption conforms to the statutory requirements. In the present case, performance of funeral rites of the deceased was done by the alleged adoptive son. However, the age of the adopted son was found to be ten years senior to the adoptive mother, which the court said stood in sharp contradiction to the statutory requirements of the age difference of 21 years between the adoptive mother and the son. Though the plaintiff contended that there was giving and taking of the child ceremony, he lived all his life with the adoptive parent's post adoption and also performed the funeral rites, yet the glaring discrepancy remained that he was ten years senior to his adoptive mother which threw a heavy shadow of this adoption being in conflict with several of the statutory provisions. What was age at the time of adoption became a material factor which remained unproved, and this claim of adoption was dismissed by the court. The decision appears to be correct in light of the facts of the case but the observation of the court that the statutory requirement of the law is that the adoptive mother should be senior to the adoptive child by 21 years is incorrect, as it is situational specific and is inapplicable if the adoption is by a Hindu couple. There is no such requirement of minimum age difference in case both the adoptive parents are alive at the time of adoption. It is only when a single woman or a single man takes a child of the opposite sex in adoption that the minimum age difference requirement needs to be adhered to. If a single man takes a baby girl in adoption than he has to be senior to her by 21 years. Similarly, if a single woman takes a baby boy in adoption then law stipulates that she must be older to him by 21 years. But this qualification is not mandated if the adoption of a baby of either sex is by the couple. Nevertheless, in the present case though there was technically no violation of the legal provisions contrary to the observation of the court, the impossibility of a relation where the mother is ten years younger to the alleged adopted son bared the hollowness of this bizarre claim.

The claim of adoption would also be dismissed by the court if such claim is made without any pleadings or any direct evidence that the natural parents had given the child in adoption. Thus where except a bare claim of adoption, there was no mention, rather there was complete silence about the year of adoption and the only information provided in the plaint was that the child was five years old at the time of the adoption, such claim would be dismissed.[6]

5 *Dhoba Behara* v. *Jagabandhu Behara,* AIR 2017 Orissa 6.

6 *Sadhu Charan Pattanaik* v. *Sukhdev Pattanaik,* AIR 2017 (NOC) 430 (Ori).

Adoption of person above the age of 15 years

The legislature clearly stipulates that it is only a child under the age of 15 years who can validly be taken in adoption. At the same time, it makes room for and accommodates a contrary custom prevalent in the community to which the parties belong. The contrary custom must be proved emphatically. In two cases under survey, at the time of the alleged adoption the age of the adopted person was found to be more than 15 years and in both cases the court held as against the validity of adoptions being in contradiction with the statutory provisions. In *Tapadhyan Negi* v. *Radhika Negi*,[7] the plea of adoption was put forward for seeking a share in the property of another person who actually denied that the child was ever taken in adoption by him. Interestingly when the school records were scrutinized for ascertaining his age at the time of the alleged adoption, it turned out that he was 17 years old at the relevant time. His natural/biological father, who strongly supported his claim, unsuccessfully pleaded that he was in fact of fifteen years old at that time but the discrepancy was due to the fact that he himself had given wrong information to the school, by deliberately showing him as two years elder. His prayer therefore that the school records should not be relied upon, was rejected by the court who negated the claim of adoption as being contrary to the legal provisions mandating that the age of the child to be adopted should be below 15 years. The whole fabrication of adoption amidst incorrect claims was to grab the estate of an issueless deceased Hindu woman whose natural heir had taken the property. In *Ratanlal* v. *Sundarabai Govardhandas Samsuka*,[8] not only the claimant pleading adoption was more than 15 years at the time of alleged adoption but was also married. This man was proved to be 32 years old and married at the time when he claimed he was adopted by the Hindu couple. He then tried to prove unsuccessfully a custom in the community to which he belonged that permitted adoption of married persons above the age of 15 years. However, two basic facts aroused the suspicion of the court that ultimately negated his adoption claim. One that despite putting forward the adoption claim he was continuously using his biological father's name in place of his father throughout and secondly, the so called adoptive mother herself denied and actively contested his adoption claim. The court observed that customs when pleaded are mostly at variance with general law and therefore they must be adequately proved in clearest and unambiguous manner. It must be shown that alleged custom has characteristics of genuine custom viz, that it is accepted willfully as having force of law and is not a mere practice more or less common. Acts required for establishment of custom at variance with law ought to be plural, uniform and constant. Custom evolves by conduct and it is therefore a mistake to measure its validity solely by element of express sanction accorded by courts of law. An essential characteristic of a great majority of customs is that they are essentially non-litigious in origin. They arise not from any conflict of rights adjusted, but from practices prompted by convenience of society. Judicial decision recognizing custom

7 AIR 2017 Ori 180.
8 AIR 2017 SC 5797.

may be relevant, but these are not indispensable for its establishment. When custom is proved by judicial notice, relevant- test would be to see if custom has been acted upon by court of superior or co-ordinate jurisdiction in same jurisdiction to extent that justifies court, which is asked to apply it, in assuming that persons or class of persons concerned in that area look upon same as binding in relation to circumstances under consideration. Court was also constrained to observe that experience of life shows that just as there have been spurious claims about execution of a Will there have been spurious claims about adoption having taken place and therefore, the court has to be aware of the risk involved in upholding the claim of adoption if there are circumstances which arouse its suspicion and the conscience of the court is not satisfied and that the evidence preferred to support such an adoption is beyond reproach. In the present case as there were glaring contradictions in the testimony of witnesses, the court held that both the adoption as also the variance of custom was not proved.

III MAINTENANCE

Liability of the father to maintain major children: differential criteria for a son and a daughter

The legal imposition of the duty of maintaining the children upon the parents is well entrenched in any society. The duty is stringent and also heavy for a man as in Indian scenario, even presently, it is a man who is usually economically active and the dependence of all family members upon him for their sustenance is a reality and a general rule rather than an exception. He is the chief breadwinner for the family. While generally parents on their own discharge this responsibility sometimes even beyond their means, the assumption of its role for securing the financial rights of the children by the courts is necessitated in case of deliberate or voluntary abstinence by the parents from doing so. Legal stipulations that a man having means to do so is under a legal obligation to maintain his wife unable to maintain herself, his legitimate or illegitimate children and his old and infirm parents add clarity and weight to this responsibility. The right to claim maintenance therefore, is an enforceable right and the evasion of this financial legal duty attracts both civil and criminal consequences. In case of children the differential treatment as far as a daughter and a son is concerned was very evident in two cases under survey this year. While attainment of majority by the son operates as a disqualification on his right to seek financial support from his father, because he being a major is supposed to chalk out a living for himself, for a daughter, it is not her age but her marital status which is the relevant consideration to determine her eligibility to claim maintenance from her father/parents. This legal assumption of dependency for both sexes puts them on a different platform. In a case from Gujarat,[9] the spousal separation led to the 11 years old son leaving the matrimonial home with the mother. She claimed maintenance from the husband for herself as also

9 *Nitaben Dineshkumar Oza* v. *Dineshkuma Ishwarlal Oza,* AIR 2017 Guj 1.

for the child, that was granted by the court and also enhanced from time to time at her request. While the grant of maintenance for her was general, for the child the order was age specific. The boy attained majority in 2013 and the father stopped paying him that was also in tune with the order of the court. The wife again approached the court highlighting the father's failure to provide for the son and the court directed him to deposit Rs. 78,000 as arrears of maintenance, to which he objected on two grounds, first that as the son had already attained majority, the application should have been filed by him and not by his mother on his behalf and second, that after attaining majority, he, as a father was under no obligation both in law and as per the directions of the court to pay maintenance to an adult son. The court held that a major son who is not infirm is not entitled to claim maintenance and accepting the contention of the father dismissed the claim of the mother. However, in *Ashish Ray* v. *Sonali Ray*,[10] the issue was with respect to the claim of maintenance emerging from an unmarried daughter who had attained majority, as against her father. She claimed that the father who was working as a head clerk in the Railways had deserted her and her mother, thus she for the purposes of higher education needed financial assistance. The father questioned her status as a dependant under section 20 of the HAMA. Two preliminary objections from the father were, that the daughter has failed to demonstrate that she is incapable to maintain herself and second, that she was a major above the age of 18 years, hence he is under no obligation to maintain her. The court held that it is the right of the unmarried daughter to claim maintenance from her father. The court remanded the case back to the family court to decide it expeditiously in accordance with their directions.

Marriage expenses of unmarried daughter

The entitlement of an unmarried daughter to her marriage expenses has been both legislatively and judicially recognised. Even under classical Hindu law, the Karta is under a legal obligation to provide for the marriage expenses of unmarried daughters in the joint family. This is also classified both as a legal necessity as also an indispensable religious duty, empowering the Karta to sell even the joint family property in order to meet the marriage expenses of the daughters in the family. Modern law specifically puts the obligation on the father to provide for her marital expenses. Can a daughter who is economically active and is in a position to maintain herself demand maintenance from her father was the focal point of adjudication in *Adish Suri* v. *Richa Suri*.[11] The daughter of an estranged couple was regularly paid 6000 rupees by her father. She presented a case against him for claiming her marriage expenses to the tune of Rs. 3,50,000/ and contended that section 3(b) of HAMA provides that the term 'maintenance' includes the marriage expenses of an unmarried daughter. Further, section 20 (3) of the same Act also postulates that the father of an unmarried girl who

10 AIR 2017 Utr 156.
11 AIR 2017 P&H 112.

is unable to maintain herself due to her-own earnings or other properties is under a legal obligation to provide maintenance to her. Here what she needed to demonstrate to the satisfaction of the court was that she was unable to perform her marriage out of her earnings and other properties. The court ruled that the father here was under an obligation to provide her maintenance and over and above it, her marriage expenses as well.

The facts demonstrated that the father was 58 years old and was due to retire in two years. The daughter on the other hand had completed her master's course in physiotherapy after that she worked at the Army hospital and was drawing a handsome salary. Thereafter she resigned from her job with a view to start her own clinical practice and better prospects. Her mother was an accomplished lawyer with 11 years of standing. The court did not go into the question of whether the daughter and the mother were in a position to meet her marriage expenses, but held that despite her and her mother's financial status the responsibility of the father was primary in meeting the marriage expenses of the daughter. In the present days, the re-enforcement of differential maintenance standards for the sons and daughters are an imposition and strengthening of the economic subjugation. The practical reality remains that the age of majority in India is not ripe for any child to make a living and any one of them boy or a girl, would not be in a position to maintain themselves on their own. On the other hand, this is the age when both of them require financial assistance for their higher studies which is increasingly becoming very expensive for any middle class person let alone a boy or a girl of 18 years. Secondly, our rudimentary society still expects a boy to gain economic sufficiency before he gets married. This is primarily the reason why a boy remains incapable to demand his marriage expenses from his father, while a daughter can do it all the time. This legislative difference is actually an acknowledgment of a stark reality that considerable but wasteful expenses are to be incurred in the wedding of a daughter as she is presumed to be economically inactive. While for the boy the responsibility of providing for his own marriage expenses is a societal expectation that hint at the passing of this burden to the bride's family. The day we clearly acknowledge the equality in terms of incurring expenditure for both the children, equality may be achieved in true sense. Taking the issue further in *S Ajit Singh* v. *Kawaljit Kaur,*[12] the man was held responsible for providing maintenance to his son born to him from his second marriage. The court held that even though his second marriage was void, the child born to him would be legitimate and therefore entitled to claim maintenance from him.

IV HINDU MARRIAGE ACT, 1955

Bigamy

Absolute monogamy is mandated for all Hindus since the promulgation of the Act in 1955. If the first marriage is subsisting, in whatever form it might have been

12 AIR 2017 P&H 114.

solemnised, the second marriage performed during its sustenance would be void *ab initio* and the party guilty of committing bigamy would also be punishable under the penal law of the land. It is irrespective of whether the first marriage was solemnised in accordance with the customary rites and ceremonies of the same religion or under a different religion altogether. In *Neelam Kumar* v. *Kamal Kumar*,[13] a couple married at Kolkata in 1998 in accordance with Hindu rites and ceremonies and post solemnisation got the marriage duly registered. Soon thereafter they were blessed with a daughter and started living in a different city. Two years later the husband learned that prior to his marriage, his wife, W had married a Muslim man after embracing Islam, and while there was some matrimonial dispute that had reached the level of the court. Now whether the first marriage was subsisting or not at the time when she married a second time to him was not clear. He filed a suit praying for a decree of nullity on the ground that since the marriage of W was subsisting at the time when she got married to him, the same was void. The lower court after appreciating evidence on record found the contention of the husband correct and brought the marriage to an end by granting him a decree of nullity. The wife filed an appeal to the higher court. She did not deny the fact of her polygamy but contended that the second husband knew about her previous marriage with a Muslim man after she had embraced Islam. The court held that H was entitled to a decree of nullity as W failed to prove that the earlier marriage with first man was culminated and as the former husband was still alive and it was not in evidence that the first marriage was brought to an end before she entered into second marriage in light of section 5 of the Act, the second marriage was void. In another case before Bombay high court,[14] the issue was again with respect to the alleged commission of bigamy by the wife. Here, due to strained matrimonial relations the wife filed a case for restitution of conjugal rights as against the husband while, he filed as a counter a case praying for a decree of nullity. According to the husband, post solemnisation of his marriage in 2013 at Akola, the parties started living in Delhi, the place of his posting. He later came to know that the wife was already married to one B in 1989; had given birth to a son in 1990, but had left her first husband without divorcing him. Upon realising that his marriage to her was void due to subsistence of the first marriage he filed a petition for its declaration as nullity. So according to him the wife had married twice, once in 1989, and then later after 24 years in 2013. The wife admitted that her first marriage was a failure and therefore it was decided to put it to an end and that the custom in that community did permit the same. Accordingly the first marriage was terminated through a customary settlement by executing *Farkatnama* on a stamp paper as per the custom prevailing in their community as a form of customary divorce with full community approval. The issue was whether such termination of the first marriage and solemnisation of the second marriage was valid or was in contravention of section 5 (i) of the Act? The trial court held that the wife had failed to prove the existence of a custom bringing the marriage

13 AIR 2017 Jhar 115.

14 *Shalini Dhanraj Shirsat* v. *Dhanraj Tukaram Shirsat,* AIR 2017 Bom 116.

to an end, and therefore her first marriage was still subsisting and the second marriage would be void in light of the Act. Though one of the witnesses testified in the court that he was present at the time of the execution of the *Farkatnama* and that it did carry W's signatures, but the court held against the wife observing that she failed to prove the existence of any such custom whereby the marriage can be successfully brought to an end by executing such a *Farkatnama*. There was no document filed by her with respect to that. Though section 29(2) protects customary divorce, it is obligatory on part of the party relying on the said custom to prove the existence of a custom that is ancient, certain, reasonable and does not oppose public policy. The said party is under an obligation to prove that divorce had in fact taken place in conformity with such custom. The contention of wife was dismissed and the husband was granted a decree of nullity.

Nullity of marriage

A marriage can be brought to an end by a decree of nullity under section 12 of the Act, if the consent of either party to the marriage was obtained by force or fraud with respect to either the nature of ceremony or a material fact relating to the respondent. The remedy is gender neutral generally and can be exercised by either the husband or the wife. As an extreme case of fraud, the legislation also enables a husband to terminate his marriage by filing a petition praying for a decree of nullity in case his wife at the time of marriage was pregnant by a person other than him and he was unaware of this fact. Since marriage is based on trust and faith and the beginning of it should not be tainted with deception, an escape is provided in such cases to the innocent party to the marriage. Two conditions however must be satisfied to avail the remedy in such cases, one that the husband should be ignorant of the fact of pregnancy of the wife at the time of marriage and second that since discovery of this factum of pregnancy, the parties should not voluntarily cohabit. In *Kumari Pooja* v. *Nandan Kumar*,[15] the husband filed a petition praying for a decree of nullity as also divorce on the ground that at the time of marriage his wife was pregnant with the child of some other man and he was ignorant of the fact. Six months later she gave birth to a baby girl. Attempts of reconciliation through mediation failed as she did not appear. The marriage was accordingly dissolved. In instances of this nature, expecting an amicable solution in the nature of reconciliation is an exercise in futility, wasting energies and precious time of both the parties as also the court. Cases of glaring deceit in marriage where it's very foundation is shattered by a scheming entry stand on a totally different footing than post marital dispute between the spouses. Disputes do stand the chances of a settlement or reconciliation through negotiations or with the healing of wounds through sound advice. Protection of marriage becomes highly desirable amidst chances of its survival but not in cases where its commencement is flawed. Admittedly the wife was three months pregnant at the time of marriage, a fact that she did not disclose to the

15 AIR 2017 Jhar 182.

husband. Where one of the pre-requisites for availing this remedy is that the parties should not live with each other voluntarily since the discovery of pregnancy of the wife, to insist on a formal reconciliation would be destructive of the very matrimonial remedy that the husband prayed for and a total futile and unwarranted exercise.

Presumption of marriage /child marriage void or voidable?

Despite enactment of the Prohibition of the Child Marriage Act in 2006, judicial ambivalence is still evident as regards the status of a child marriage. Additional compounding confusion is due to its permissibility as valid under the major personal laws. The legislation has not come out with any clarification provisions under these personal laws and the judicial ambivalence have ranged from declarations of child marriage as totally void or valid or voidable. Such pronouncement of the marriage as void has also led to defeating of the claims of matrimonial remedy of the child bride. In *M Janaki* v. *K Vairamuthu*,[16] the wife presented a petition for divorce claiming that their marriage was solemnised in 1995 and they were blessed with two children and the husband after picking up vices treated her with cruelty. The lower court dismissed her petition stating that she was not married to this man against whom she had moved the court. The man contended that as per her date of birth she was around 16 years at the time when she entered into an agreement with him. The nature of the agreement was that she will live with him throughout his life and would attend to his needs. There was neither marriage invitation card nor photographs to prove the relationship of husband and wife. The court accepted his contention and dismissed her petition seeking divorce from him. Upon appeal, the Madras high court held that in absence of a concrete proof that a marriage was solemnised between the two a presumption of marriage may arise even on prolonged cohabitation. Here the parties had lived together for a long time and had two children in between them. Secondly, as far as her age was concerned, the court observed that a child marriage is neither voidable nor void under Hindu Marriage Act, and is merely voidable under the PCMA. The marriage can be annulled at the instance of only the child party to the marriage. The Hindu Marriage Act, 1955, also provided it as a ground for divorce by repudiation if at the time of the marriage the child was below 15 years. Since all these facts required a detailed examination, the case was remanded back to the lower court for re-trial on merits.

Cruelty

Cruelty is a ground for divorce, but what conduct of the spouse amounts to cruelty depends on multiple factors. Though no concrete definition of what would amount to cruelty can fit into all cases, the considerations vary depending upon the social, financial, educational and family background. Cruelty can be physical or mental, the former relatively easier to comprehend. The difficulty in proving the mental trauma

16 AIR 2017 Mad 25.

however presents a different scenario. In a case from Delhi,[17] the husband prayed for a decree of divorce on the ground that the wife having left his company without any rhyme or reason was guilty of cruelty. The contention of the wife on the other hand was that when she became pregnant the in-laws insisted to have the sex of the foetus determined as they wanted a male child. Upon her refusal and also owing to some complications in her pregnancy, she was sent to her mother's place to have a safe delivery. The allegation of the husband that she was guilty of cruelty in leaving his company was dismissed by the court, but they also held that an insistence on sex determination of the foetus with a view to abort it amounts to cruelty.

Divorce by Mutual Consent

Conversion of contentious petition into one by mutual consent

It remains an unfortunate reality that contentious litigations are extremely time consuming and mentally, physically and financially exhausting. Therefore to ensure minimum bickering and maximum fairness, divorce by mutual consent becomes the best option. The major challenge here involves the sitting together of the parties at cross roads which is a horrendous task. Often parties after spending considerable part of their lives and finances in court battle realise the futility and mammoth challenges of such contentious litigation, view the whole perspective with precision and maturity and attempt to seek solutions rather than fighting with each other. Conversion of this contention litigation into a petition for divorce by mutual consent provides them such a remedy. It is noteworthy that such conversion permissibility is judicially created and does not find any mention in the legislation. Therefore, the same needs express request by the parties, adherence to a specific method and cannot be done on its own by the judiciary. The courts are also bound by the specific terminologies used in the plaint in reference to the remedy prayed for and the procedure adhered to for it. In case one of the spouses prays for a matrimonial remedy based on the specific matrimonial misconduct of the other, it would be incorrect on part of the court on its own to convert it into a petition for divorce by mutual consent if the same is not prayed for by the parties together. In *Dattatray Salvi* v. *Charu Dattatray Salvi*,[18] the wife presented a petition before the family court praying for a decree of divorce on grounds of cruelty by the husband. Married in 1992, the couple had two daughters born in 1995 and 1997 respectively. She also claimed maintenance from the husband. The family court after hearing the matter, proceeded to grant divorce to the wife, but strangely enough it was not on the ground of husband's cruelty instead it passed a decree of divorce on ground of mutual consent under section 13 B. The judge did it based on the answers given to the questions put to the husband during his cross examination, treating the answers given by him as his consent to divorce. The present court did set aside the decree passed by the family court, on the ground that till all the

17 *Anil Kumar Sharma* v. *Manju Sharma,* AIR 2017 Delhi 3.

18 AIR 2017 Bom 97.

three ingredients laid down in section 13 B are not fulfilled and the petition is a joint petition filed by both the parties, a decree of divorce under section 13 B cannot automatically be given.

Waiver of six months period

The three essentials requisites for a prayer of a mutual consent based divorce is the requirement of an initial joint petition, a mandatory wait for a period of at least six months and a second joint motion after six months, before the expiry of eighteen months. A period of six months must lapse before they approach the court the second time for a final decree of divorce. This wait for six months is a part of clear statutory provision and applies strictly. However, its dilution at the instance of the Supreme Court has led to a surge in applications filed by the couples asking for such waiver. The length of six months appear to be too cumbersome for the warring parties and judicial pronouncements accommodating such prayers even in a minority of cases acts as a catalyst giving them hope for ending their misery and an escape from being trapped in unhappy marriages. In *Amardeep Singh* v. *Harveen Kaur*,[19] the parties married in 1994 and two children were born to them in 1995 and 2004 respectively. They separated in 2008 and were maintaining separate habitation since then. Finally in April 2017, a settlement was reached at and the wife settled for a one time permanent alimony of 2.5 crores, with a stipulation that the children would be with her. They filed the petition for divorce by mutual consent and simultaneously prayed for waiver of six months waiting time period as their separation had already extended to a period of more than eight years. An additional plea was the possibility of jeopardising their amicable settlement due to inordinate delay. The apex court waived off this six months period and granted them divorce, and further held that this cooling off period of six months is not mandatory and is susceptible to a permissive waiver under certain circumstances. They noted that the object of this provision was to enable the parties to dissolve the marriage by consent if the marriage had irretrievably broken down and to facilitate their rehabilitation as per available options. The spirit stemmed from the philosophy of futility of forcible perpetuation of marital status between warring or unwilling partners. The primary object of cooling off period was to safeguard against a hurried decision if there existed a possibility of reconciliation of differences and not to perpetuate a purposeless marriage to prolong agony of parties in absence of reconciliation feasibility. Though exploration of every possible effort to protect the marriage is highly recommended, yet in light of lack of perceived chances of reunion, Court should not be powerless in enabling parties to have better option. Where a court dealing with the matter is satisfied that a case is made out to waive statutory period under section 13-B (2), the considerations to be kept in mind for the necessity of such an order for waiver can be as follows:

19 AIR 2017 SC 4417.

(i) Statutory period of six months specified in section 13 B(2) in addition to statutory period of one year under section 13 B(1) of separation of parties is already over before the first motion;
(ii) All efforts for mediation /conciliation including efforts in terms of Order XXXIIA, Rule 3, CPC/section 23(2) of the Act/section 9 of Family Courts Act to reunite parties have failed and there is no likelihood of success in that direction by any further efforts;
(iii) Parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties; and
(iv) Waiting period will only prolong their agony.

Waiver application can be filed one week after first motion, giving reasons for such a prayer. The Court further said that if the abovementioned conditions are satisfied waiver of waiting period for second motion will be at the discretion of concerned court. A similar line of approach was taken by the Bombay high court,[20] wherein the six months period was waived off. Here, the parties were separated from each other for a period of two years, in their marriage of four years with two daughters who were residing with their father with mutual consent of the parties. The petition for waiver was also jointly filed by both the parties. The father wanted to remarry and the court observed that even such a desire cannot be a ground for refusal to waive off the six months' time period, and the request for waiver was accommodated favourably.

Withdrawal of consent by one of the parties

The petition for seeking divorce by mutual consent involves two stages and on both occasions the requirement of joint consent should necessarily be demonstrated. The interval of six months notwithstanding, if on the second motion one of the parties fails to appear or expressly withdraws her/his consent, decree for divorce based on mutual consent cannot be granted. Though in the past this provision has been extensively diluted, normally the courts do not deviate from it, unless the circumstances make it imperative. If one of the party does not appear at the time of the second motion or actually and formally documents his/her unwillingness to continue with the second motion, divorce by mutual consent cannot be granted. In *Chiliveru Sai Ram Sagar* v. *Bandaru Haripriya*,[21] husband and wife filed a joint petition before the family court praying for a decree of divorce by mutual consent in 2015. The case was then posted for the next hearing to July 2016. The wife then represented to the court that she was not interested in seeking divorce by mutual consent expressing her wish to continue the relationship with the husband and filed a memo to that effect. The husband on the other hand claimed that as per the settlement the amount of settlement

20 *Nitin Sudhakar Zaparde* v. *Nil,* AIR 2017 Bom 270.
21 AIR 2017 Hyd 17.

money agreed was paid to her accompanied by her complete jewellery and therefore her backtracking after he had acted on the settlement should not be permitted. Contending that she had taken undue advantage of the whole process, he prayed that an inquiry into the *bonafide* of the wife's claim be held by the court before taking any decision. The court dismissed his contention and held that the inquiry under this section is intended to ascertain the correctness of the averments in the petition for grant of dissolution of marriage by mutual consent and not for inquiring as to whether the unwillingness of one of the parties for dissolution of the marriage was *bonafide* or not. The words "if the petition is not withdrawn in the meanwhile" would clearly indicate that once the petition is withdrawn, the jurisdiction of the court to proceed further with the case ceases. As the petition was filed by both the parties, withdrawal of the same by one amounts to withdrawal of the petition within the meaning of section 13 B (2). The memo of the wife expressing her unwillingness to seek divorce, the court said would be treated as the withdrawal of the petition as far as she is concerned and once such withdrawal is made the court has no option but to dismiss the petition. Again in *Pravakar Muduli* v. *Satyabhama Muduli*,[22] the court observed that in divorce by mutual consent the consent must continue to decree *nisi* and must be valid consent at the time of its hearing. The decree cannot be passed if any party at interregnum stage resiles from consent so given. Where the wife resiled from her consent given for divorce on ground that permanent alimony as agreed between parties was not received, it would disentitle the husband to obtain divorce on grounds of mutual consent.

Second motion after 18 months

The third mandate that needs to be adhered to for those seeking divorce by mutual consent is that second motion must be filed after a period of six months but before the expiry of eighteen months. The understanding usually is that if the parties fail to appear within this time period to reaffirm their decision to seek divorce by mutual consent, they forfeit the chance to seek divorce and if the couple rethink their decision to approach the court once again it can be through filing of a petition afresh as the first petition after a gap of eighteen months would lapse necessitating filing of another petition. In *Manish Dhyani* v. *Mitali Dhyani*,[23] the couple filed a joint petition praying for a decree of divorce. They were supposed to make a second motion after six months but before the expiry of eighteen months. They failed to approach the court within this statutory period of eighteen months but approached the court 102 days after eighteen months, i.e., after a gap of around more than 21 months. The Family court dismissed their petition as it was filed 102 days after the period of 18 months with the reason for dismissal as that on the second date fixed, none of the parties had appeared and a period of 18 months had elapsed since its filing. The matter went in appeal to the Allahabad high court. The issue before the court was

22 AIR 2017 (NOC) 4 (Ori).

23 AIR 2017 All 115.

whether in a petition presented for divorce by mutual consent, inaction by the parties, for a period of more than the stipulated 18 months' time, would result in a dismissal of their case and rendering of the first joint petition meaningless or useless automatically. The court observed that the object of providing an initial wait for six months and maximum of 18 months is to provide a cooling period enabling parties to rethink their decision and if possible to save their marriage. The court held that since the petition was not withdrawn, the court is obliged to hear it on merits. It said that the period of 18 months is to enable the parties to withdraw the petition and is not meant for the court to decide on it, and observed:[24]

> The aforesaid period of 18 months is not a period provided for deciding the petition. The aforesaid provision does not lay down that after expiry of above period the petition would be rendered useless or infructuous.

Stating that the Family court was in error in refusing to entertain the petition they further observed:[25]

> In such circumstances the Family court committed an error of jurisdiction in dismissing the petition on the ground that it has become meaningless as the period of 18 months from its filing has expired.

Both the parties here prayed that they could not appear before the family court due to unprecedented reasons but had no intention to avoid the same. The settlement was worked out, and they wanted to part ways through divorce by mutual consent and the high court allowed the same.

The provisions of divorce by mutual consent are clearly stipulated. The legislative intent is also amply demonstrated that here is a matrimonial remedy that is comparatively quicker, with minimum bickering and maximum fairness giving equal opportunities to both the parties to amicably separate. Even a bare reading of the provision contained in section 13 B would demonstrate the necessity of adhering to all three statutory requirements. These are not mere procedural formalities but mandatory in character. They must be adhered to and the courts are supposed to respect them. Recent judicial attitude displays unfortunate accommodation of delusionary request in a divorce by mutual consent, making presentation of a joint petition only at the initial stage as imperative. Cases after cases, six months waiting time period has been waived and presently the court has also negated and in fact has extended indefinitely the time frame within which the second motion has to be made. If the case can be heard at any point of time despite the expiry of eighteen months, then there remains no longer any reason or meaning of the inclusion of the stipulation of the specific time period of eighteen months by the legislature.

24 *Id.* at para 14.
25 *Id.* at para 15.

Section 13 B reads as under:

Divorce by mutual consent

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the District court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made *no earlier than six months after the date of the presentation of the petition referred to in sub section (1)* and *not later than eighteen months after the said date*, if the petition is not withdrawn in the meantime, the court shall on being solemnised and that the averment in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

It is clear from a bare reading of the section that the initial wait for six months is mandatory and also that the time for filing of the second motion commences after six months and culminates after eighteen months. That is the meaning of the term "not later than eighteen months after the said date". The judiciary has deliberately and incorrectly twisted the language of the section. Provisions that are clear in their application should not be diluted as judicially created uncertainty and ambiguity is unwarranted.

Remarriage of divorced persons

Exploring new options post a failed marriage is perfectly normal for any human being. Putting the past behind, the parties' first reaction after legal separation is one of immense relief, a sense of freedom or liberation and then getting onto with the life with rejuvenation. With passage of time, the familial pressure again exerts them to go in for marriage. As the age of marriage in India is confined to specific years and if the best part of one's life is spend in litigation with its culmination in sight, parties themselves are many a times eager to remarry hoping better luck. Section 15 of the Act enables the parties to remarry soon after divorce when the time for filing appeal is over and appeal has not been filed. In *Ranjana Rani Panda* v. *Sanjay Kumar Panda*,[26] the issue was whether the parties after seeking divorce can marry immediately or do they have to wait for any specific time period. The court held that they can marry soon after getting a decree for divorce but only if there is no right of appeal. Where the husband married during the time period of appeal the same would be unlawful. In the

26 AIR 2017 Orissa 25.

present case the wife had filed an appeal but within that time period the husband had remarried. The court held that this marriage would be unlawful but since the wife was not interested in living with the husband, no adverse order was passed for the conduct of the husband. The judgment is strange as the wife had gone in appeal against the decision of the court granting divorce to the husband. How and under what circumstances the court presumed or concluded that the wife was not interested in living with the husband when she had already challenged the verdict of the court by filing an appeal is amazing. Moreover, factual situations should not have reflection on the violations of the written provisions and the related consequences of such violations. If a remarriage is not permitted during the filing of an appeal, it shows that the first marriage was existing at the time when the husband remarried. It was clearly bigamous in character and the mere intention of the wife assessed correctly or incorrectly by the court, that she did not want to live with the husband would not change the character of the marriage from void to valid. Refusal of the wife to live with the husband during the subsistence of the marriage and a remarriage by him would attract the same consequences as in this case as a marriage is deemed to be subsisting during the pendency of appeal. The court itself had noted that such marriage would be unlawful but refrained from pronouncing it as unlawful making way for the husband to make a mockery of the dictate under section 15.

V HINDU MINORITY AND GUARDIANSHIP ACT, 1956

Custody of minor child

The paramount consideration in deciding custody disputes continues to be the welfare of the child, and while ascertaining what constitutes welfare of the child, the factors in favour of the mother are weightier than those in favour of the father. Continuous habitation with one parent, though an important factor may become manipulative in effect. Often it is managed by the parent having initial custody by disobeying court's orders either by itself or by taking the matter to the higher courts on one pretext or the other. The other parent watches desperately and helplessly the whole scenario making innumerable futile visits to courts in a hope to even catch a glimpse of the child. In *Vivek Singh* v. *Romani Singh*,[27] the petition for custody was presented by the mother of the child who since the tender age of 21 months till 8 years and three months was with the father. Married in 2007, the couple lived together till three years and a baby girl was born to them. They separated thereafter and the incident of separation of the parents was very turbulent. The mother testified that the husband/ father in a drunken state gave beatings to her and threw her out of the house. She had to call the police personnel, who in turn called the military police and a complaint was lodged. When turned out of the house, she was preparing to accompany her parents along with the baby. Her parents took hold of the child and when they were

27 AIR 2017 SC 929.

about to leave, the husband/father snatched the child from the hands of her mother; went inside the house and locked himself. He was drunk at that time. The police suggested not to do anything for fear of harm to the baby and assured the mother that the child would be returned to her in the morning. Both the parties were instructed to come to the police station along with the child, next morning. The father not only did not bring the child to the Police station as directed but also threatened her that he would not give the child to her ever. Since then, she was running from pillar to post to get back her child but he blatantly refused to hand her over to her. The wife further pleaded that the husband lived all alone as he was an army officer and the baby was being taken care of practically by his male servant. On the other hand, she was a teacher and was in a better position to look after her personally. The husband contested her application and was able to convince the family court that he was taking good care of the baby and therefore the family court allowed the custody to remain with her father. The mother preferred an appeal to the high court which granted custody to the mother as the child at that time was below five years on the ground that the baby of such tender age requires her mother more than the father. Instead of complying with the order of the High Court, the husband preferred an appeal to the apex court. His main contention was that since birth, the child was with him, was being taken good care of and the continuity of residence and environment including the custodial continuity of the parent should not be disturbed as that may adversely affect the interests of the child. The court taking note of this argument of the father held that though the argument appears attractive, but the same overlooks a very significant factor, that the father had managed to keep the custody of the child by flouting various orders, leading even to initiation of contempt proceedings and therefore he cannot be a beneficiary of his own wrong.

The Supreme Court granted the custody of the baby to the mother and observed that it was to ensure that the child grows and develops in the best environment. They observed that the mother in the prevailing circumstances, could not be blamed at all, if the custody of the child remained with the father, after the separation of the parties. The Court noted that it was only because father manipulated to have continuity in custody of the baby that she from the tender age of 21 months remained with him till 8 years and 3 months. Obviously, because of this reason, she was very much attached to the father and naturally would like to remain in the same environment and with the same parent. The assessment and perception of the baby were one sided. A child, who has not seen, experienced or lived the comfort of the company of the mother and thus is naturally, not in a position to comprehend that the grass on the other side may turn out to be greener. Only when she is exposed to that environment of living with her mother, that she would be in a position to properly evaluate as to whether her welfare lies more in the company of her mother or in the company of her father. The Court endorsed with approval the observations of the high court as:[28]

28 *Id.* at para 31.

> The role of the mother in the development of a child's personality can never be doubted. A child gets the best protection through the mother. It is a most natural thing for any child to grow up in the company of one's mother. The company of the mother is the most natural thing for a child. Neither the father nor any other person can give the same kind of love, affection, care and sympathies to a child as that of a mother. The company of a mother is more valuable to a growing up female child unless there are compelling and justifiable reasons, a child should not be deprived of the company of the mother. The company of the mother is always in the welfare of the minor child.

The court granted the custody of the child to the mother and dismissed the contention of the father.

Custody battles are extremely traumatic for the child who feels tormented because of the strained relations between the parents. A child ideally needs the company of both of them, and it becomes, at times, a very difficult decision for the court to choose as to whom the custody should be given. No doubt, paramount consideration is the welfare of the child, but at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts. While a breakdown of marriage shatters even the adult parties to the marriage the worst sufferers are the children. Parents treat them as their prized possession and their possessiveness and desire to be one up has led to many parents flouting the orders of the court with impunity sometimes even poisoning the child against the other parent that may result in grave emotional and psychological distress to the innocent child who is unaware of the ways of the world. To turn the child against her own parent is the biggest disservice they do the child yet they desperately try to prove their own suitability in the name of the child's welfare and pretend to demonstrate that the child would be least affected by the outcome. The child is often left to grapple with the breakdown of this adult institution. The inevitability of the uncertainty that follows regarding the child's growth lingers on till the new routine sinks in. The effect of separation of spouses, on children, psychologically, emotionally and even to some extent physically, spans from negligible to serious, which could be insignificant to noticeably critical. It could also have effects that are more immediate and transitory to long lasting, thereby having a significantly negative repercussion in the advancement of the child. While these effects don't apply to every child of a separated or divorced couple, nor has any child experienced all these effects, the deleterious risks of maladjustment remain the objective of the parents to evade and the court's intent to circumvent. This right of the child is also based on individual dignity. Another father from Jharkhand in *Nagesh Kumar Pathak* v. *Krishna Pathak*,[29]

29 AIR 2017 Jhar 120.

lost the custody battle of his son to the mother. Married in 2001, the couple was blessed with a son, who after the marital discord was with his mother, being brought up by her. The mother now went back to her natal family and was nurturing the child with financial support from her own mother. The father of the child made unsubstantiated allegations that his wife suffered from mental ailment. The child was studying in class-IV at a good school and was being looked after by the mother and grandmother well. He deposed that he wanted to live with his mother and did not want to go to the father as he used to beat him. The court held that in matters of custody of the children the paramount consideration is of their welfare and thus custody was allowed to be retained by the mother. In *Somnath Das* v. *State of Jharkhand*,[30] the custody battle between the parents again took an ugly turn. The mother had the custody of the daughter while the father had defined visitation rights. The father was to bear the complete expenses of the education and other necessities of the baby daughter. He was keen on admitting her to a good school that needed some adjustments as far as her age was concerned. For this purpose the child was required to be taken to Bangalore, which the court permitted but these judicial orders permitting him to take the child were flouted by the mother who neither allowed the child to meet the father let alone take her to Bangalore. The court noted that the attitude of the mother was very hostile and even though she was present in the court on the date as also on previous occasions, when orders were passed by the court (and also affirmed by the Supreme Court) permitting the father to have access to the child and to take her for educational purposes to a different city, she was bent upon somehow or other to disobey these orders with impunity. They acknowledged that even though the mother having given birth to the child can naturally feel a sense of the child belonging to her, the role of the father cannot ordinarily be negated and the child cannot and should not be deprived of the love and affection, care and protection of the father. The court took a very serious note of her disobedience and observed that till that date she had not permitted the father to take the child to Bangalore nor did she let him admit her in the chosen school. The court held that this position was not acceptable and that they were of the view that the father was also entitled to visit his child and since the mother had willfully disobeyed the judicial orders, they were even inclined to take action against her for contempt of court. They observed that the court though was not taking any coercive steps it was otherwise perfectly competent to do so and directed that the child shall accompany her father to Bangalore and the mother should prepare her to go with the father. The mother who was present in the court readily agreed for the same. The father was supposed to take her in February and then return her positively back in March when her results were to be published. The court also made it very clear that if the mother in violation of the court order does something or prevented the father from taking the daughter, the father was entitled to take the help of the superintendent of Police who would ensure that the custody of the child was handed

30 AIR 2017 Jhar 99.

over to the father and for that matter even if some coercive methods were to be taken by the police the court permitted that. The court also said that if the mother wanted to accompany the daughter while the father was taking her to Bangalore from Jamshedpur, she was free to do so and the cost of her travel was to be borne by the father, and her accommodation was also to be arranged by him.

Territorial Jurisdiction

Cases of child abduction and custody battles are of an extremely serious nature when the habitation cuts across boundaries in different countries. Not only the issues of deferential orders but also the issues of conflict of laws and jurisdictions arise in such cases. In *Salini Sreenivasan* v. *Umasankaran Sivasankaran*,[31] after the marriage was solemnised in Kozhikode in 2010, the parties moved to Dubai where the husband was gainfully employed. A son was born and post matrimonial turbulence, the wife started living separately and sought his custody. The wife made visits to India but chose to live with her parents. She once in 2014 lived with her in-laws, where the problem arose. Her case was that her child was taken away from her and thus she wanted the court to be appointed his legal guardian. The issue was which court is the court of competent jurisdiction and what would be the place of ordinary residence of the minor in the present case? The court held that the place where the marriage was solemnised, i.e., the place of residence of the parents of the wife was the place of residence of the minor and thus the court of that place would be the court of competent jurisdiction.

In *Nithya Anand Raghavan* v. *State of NCT of Delhi*,[32] parties two Indian citizens married in Chennai according to Hindu rites and ceremonies and shifted to UK immediately after marriage in 2007 and then lived there only. A daughter was born out of the wedlock in UK, but owing to matrimonial discord she was taken by the mother and brought to India against the wishes of the father. The child had a heart ailment and the mother contended that she needed the constant company of the mother. A writ of habeas corpus was filed by the father of the minor girl in Delhi high court as against the mother who had removed the child from his custody in violation of the order issued by the High Court of Justice, Family Division, Principal Registry, United Kingdom UK. It had directed the mother to produce the child within three weeks from the date of the order. The Indian court allowed the custody to be retained by the mother in the interest of the baby but directed her to participate in the proceedings pending before the foreign court.

VI HINDU LAW

Application of doctrine of survivorship under Mitakshara Law

Hindu Succession Act, 1956, extensively modified the Mitakshara law of coparcenary as also the Hindu joint family. The concept of Mitakshara coparcenary in

31 AIR 2017 Ker 32.
32 AIR 2017 SC 3137.

a modified form was given statutory recognition with express retention of the doctrine of survivorship in case an undivided coparcener died leaving behind an interest in the Mitakshara Coparcenary. But by an express provision in the Hindu Succession Act, itself, the Act provides that it is not applicable to the members of the Scheduled Tribe who therefore are governed by the uncodified Mitakshara Hindu law if they are Hindus. This uncodified law remains untouched by the legislation and incorporates and provides the application of doctrine of survivorship unconditionally and absolutely. Thus, daughters who are subject to the application to Hindu Succession Act, and whose presence dilutes the application of doctrine of survivorship have acquired better rights in comparison to those daughters who are subject to the provisions of the traditional Mitakshara law of Hindu joint family and coparcenary. In *Subha Mallik* v. *Nitie Chandra Bhoe*,[33] a Hindu man was the Karta of a Hindu joint family and managed its entire joint family property. Upon his death in 1940, the property devolved on two of his sons. One of the sons had a daughter and he died in 1950 with his widow remarrying after his death. The little girl of three years was taken by the paternal uncle who brought her up. The girl later filed a suit as against the paternal uncle claiming half share in the property that was her father's at the time of his death. It was held that the death of the claimant's father had occurred in 1950 and the parties were governed by the principles of Mitakshara Law. Since no partition had taken place between the claimant's father and her paternal uncle, the doctrine of survivorship would apply because they both held the property jointly and the parental uncle would be entitled to get the complete property under the doctrine of survivorship. Accordingly, her petition seeking partition was dismissed on the ground that since the paternal uncle was the owner of the complete property as per law she had no share in it.

Ancestral property: determination of character

Hindu law recognises two kinds of property holdings: separate property and a share in the coparcenary property. The exclusive control and the cumulative ownership remain a distinguished feature of these two holdings. Character of property is an extensively litigative issue under Hindu law. Where the property is purchased out of the separate earnings, it would be held as separate property[34] but property obtained after the partition of the Hindu joint family or acquired with the aid of the joint family property would in itself take the character of the ancestral or coparcenary property. In *Adiveppa* v. *Bhimappa*,[35] the focus was on whether the property in the hands of a Hindu man was his separate property or was a share in the undivided coparcenary property with the right of other coparceners in it? Here, a Hindu man, A was the holder/Karta of the joint family property. He had two sons S_1 and S_2, and a daughter, D. S_1 had two sons, SS_1 and SS_2. After the death of A, an oral partition was effected between S_1 and S_2 and they separated from each other along with their families. Upon

33 AIR 2017 (NOC) 891) Ori; 2016 SCC Online Ori 780.

34 *Balumani* v. *Samiyathal,* AIR 2017 Mad 284.

35 AIR 2017 SC 4465.

the death of S_1, a dispute started as between the sons of S_1 and their paternal uncle S_2. SS_1 and SS_2 filed a suit in the court and prayed that the property in their possession be declared as their self-acquired property with them having an exclusive title to it. On the other hand, S2 contended that this was ancestral property, and there was an oral partition during the life time of S1 itself, and the shares of each and every member were defined. Furthermore, the same was also acted upon as each member had taken possession of their respective shares. The trial court held as against the character of the property being self-acquired. The apex court observed that the property was joint family property as it was obtained after affecting a partition of the ancestral property. Further, the claimants failed to prove that the source of acquisition of this property was with their separate funds and therefore no decree for declaration of title was granted to them. The apex court also held that in absence of proof of disintegration of a Hindu family by a formal partition, a presumption as to jointness in food, worship and estate continues to operate and in such cases, the burden lies upon a member, who after admitting existence of joint family asserts that some properties out of the entire lot of ancestral properties are his self-acquired property. Here, since it was proved that oral partition had taken place and had also been acted upon by all family members, the failure of the claimant to adduce documentary evidence and with nothing on record to show source of its acquisition would lead to an inevitable presumption that the property was ancestral property.

Karta

The father and in his absence the senior-most male member in the family is the Karta. The position of Karta is *sue generis*, it is regulated strictly by seniority and it is a well settled rule of Hindu law that so long as the senior most male member is alive a younger person cannot become the Karta. The law in this connection was well explained by the apex court in *Nopany Investments (Pvt) Ltd.* v. *Santokh Singh,*[36] wherein the Court had clearly said that it is only in exceptional situations that in absence of Karta a junior member of the family can act as Karta. The specifications are clearly outlined by the apex court and leave no room for confusion. This year the same issue arose in a case from Orissa. In *Rasananda Sahoo* v. *Prafulla Kumar Sahu*,[37] the issue was whether the elder brother in the family in presence of the father was the Karta and secondly, whether the business that he was managing/conducting was the family business or his exclusive business? Here the family comprised of a Hindu man A, and his sons. A was feeble, hard of hearing, devoid of clear vision and was bed ridden due to his old age. He had also taken considerable loan which he was unable to repay. B was his eldest son and was around 17 years elder to his younger brothers. He arranged money without any support from his father to start a business on his own and was successfully carrying it. As he was active, he sold his father's property to repay the loan that the father had taken. It was in evidence that he was managing the

36 AIR 2008 SC 673.

37 AIR 2017 (NOC) 81 (Ori).

affairs of the family as his father was incapable of doing so. As an elder brother, even in presence of the father, he took it upon himself to educate his younger brothers, allowed them to stay in the property that he had acquired. The younger brothers filed a suit against him claiming a portion of the property that he had acquired through his business contending that he was the Karta of the family and the business that he was conducting was also a part of ancestral property in which they also had a share. However they were unable to demonstrate whether there was any contribution from the joint family funds towards the running or starting of the business. On the other hand they did admit that the landed property even prior to its sale was not yielding any income. B deposed before the court giving in detail how he had acquired money to start his business and to successfully carry it on. The court held that an act of generosity shown by the elder brother cannot lead to the conclusion that he was the Karta of the joint family at least during the life time of the father as there was no evidence that the father had relinquished his right to be the Karta. They also held that the business was the exclusive business of the elder brother out of the income from which the suit land was purchased by him and the younger brothers did not have any share in it. After the death of the father, the suit land was already sold to repay his debts and he had purchased it out of his separate income.

Suit for partition

The karta as the representative of the Hindu joint family is empowered to alienate a portion of the joint family property under certain specific circumstance without even consulting the other coparceners. This qualified situational specific power can be exercised validly by Karta if considered necessary by him in course of management of the joint family property. The three situations are: legal necessity, benefit of estate and performance of certain indispensable religious and charitable duties. The coparceners who oppose such an alienation can challenge the validity of such alienation once it has been effected or completed but cannot ordinarily obtain an injunction restraining Karta to alienate the property. Once it is so challenged the court looks into the merits of the case and if it comes to the conclusion that the sale was effected without any justified purpose, it may declare the sale as void. In such cases the property comes back to the family and again forms part of the joint family assets. In case of a subsequent partition of the joint family property the property so alienated, but brought back to the family through the court's pronouncement, would also be subject to the partition. However where either the sale is not challenged by the coparceners as void or impermissible or where the validity of the sale was challenged but its validity was upheld by the court, the property remains with the alienee and cannot form the subject matter for a partition by the joint family members. In *Devidas Raghunatha Rao Potedar* v. *Gangadhar Balakrishna Naik*,[38] the issue was whether an item of the joint family property that was sold for legal necessity can still be called back and form the

38 AIR 2017 Kar 141.

substantive property for partition? If the alienation of the property was not void, the alienee would have a superior right over the property. The court held that once a valid alienation is effected, that property would no longer be available for partition and the alienee would have a right to take its possession.

Gift in favour of daughter

A gift of a small portion of joint family immovable property is permitted if effected either by the father/Karta or the brothers in favour of the daughter/sisters. The court in *Gauramma* v. *Malllappa*,[39] and then later in *R Kupayyee* v. *Raja Goundar*,[40] has clearly laid down that if the gift is of a specific small portion of the property made by the father in favour of his daughter, it would be valid. No one else in the family has a power to validly execute a gift of even a small portion of joint family property in favour of the daughter. A gift of separate property can always be executed by the owner but since joint family property has multiple owners, the same cannot be gifted. In case of separate property, the property should be sufficiently identified and demarcated before a gift can be executed. Without demarcation an unspecified portion of the property cannot be made the subject matter of gift. In *Karsanbhai Dahyabhai Parmar* v. *Dahiben*,[41] the issue was with respect to the validity of execution of a gift deed of an unspecified portion of the property in favour of the daughter by her widowed mother. Here under the Baroda Hindu Nibandh, 1937, upon the death of a Hindu man, his son and widow inherited his properties as joint owners. The status continues so, till a partition demarcates the shares of each, but before the demarcation the property remains undivided. The court held that till the property was partitioned the widow had no right to make a gift of a segment of the property as it would not be clear as to what would be her portion. Even though the widow died in 1972, the court held that a gift executed by her did not convey in favour of the donee, i.e., her daughter a right seek a partition of the property.

Plea of oral partition

The classical law permitted a partition to take place among the family members either at the instance of a major coparcener or at the instance of karta/father. There was no mandatory requirement for a partition to be effected through a registered document and it could be completed even orally. However, an oral partition though perfectly valid had to be proved in case of dispute. The concept of a registered partition was introduced through the Hindu Succession (Amendment) Act, 2005 in connection with recognition of the claim of a daughter but otherwise validity of an oral partition has not been affected even by this amendment. A document evidencing partition is the most appropriate evidence to prove that a partition had taken place in the Hindu joint family, but in case of an oral partition a mere plea may not be sufficient to draw

39 *Gauramma Bhratar Chanbasappa Deshmukh* v. *Mallappa Chanbasappa,* AIR 1964 SC 510.
40 AIR 2004 SC 1284.
41 AIR 2017 SC 3857.

an irresistible conclusion of destruction of the joint status of the family. In *T Vishwanatha Mehta* v. *Krishna Bai*,[42] there were claims that an oral partition had taken place between two brothers of the ancestral property that devolved upon them after the death of their father. The court held that in case of claims of an oral partition, to determine its authenticity the evidence of subsequent conduct of parties becomes material in law. Here two brothers had separated from each other in pursuance of an oral partition of the joint family property. One of the brothers A started enjoying the property exclusively under this partition for several decades with knowledge of the other brother B. After a long time, B filed a claim that there was only a partial partition and the properties under the possession and control of A were joint family properties and claimed a share out of them. The court held that the conduct of the parties establishing oral partition and enjoyment of two properties without demur by A for several decades was in evidence and therefore the plea of partial partition by B that out of four items of property, only two items were divided amongst brothers and remaining items were treated as common property, the court said was unbelievable and no order was needed to be passed to divide the property by metes and bounds.

VII HINDU SUCCESSION ACT, 1956

Abolition of Hindu Joint family in state of Kerala

The concept of Hindu joint family though expressly retained by the parliament and incorporated indirectly in section 6 of the Hindu Succession Act, 1956, was abolished in the state of Kerala in 1976. Since the coparceners acquire an interest in the ancestral property by birth, the question arises can a coparcener still acquire an interest by birth in the coparcenary property post 1976 in Kerala. Coparcenary is a narrow institution but within the broader institution of Hindu joint family. It does not have any independent existence. With the abolition of the concept of Hindu joint family, the concept of coparcenary would also be extinguished in the state of Kerala. In *Kali Ammal* v. *Valliyammal Dorairaj*,[43] the issue was about acquisition of a right by birth in the coparcenary property after 1976. The court held that since in the state of Kerala, the Hindu joint family was abolished in 1976, there would be no question of anyone acquiring any interest by birth in the property post that date and it is only the heirs born before 1976 who would have a right by birth and a share in the coparcenary property if it remains un-partitioned. The court further held that with respect to devolution of interest in coparcenary property, coparcenary consists of only those who obtain interest in property of holder by birth. Coparcenary commences with a common ancestor and includes holder of joint property. The interest of the coparceners is a fluctuating interest that can be enlarged by deaths in the family and diminish by births in family. No coparcener can predict his exact share whilst joint

42 AIR 2017 (NOC) 462 (Mad).
43 AIR 2017 (NOC) 211 (Ker).

family property remains undivided. Post 1976, the concept was expressly abolished by the legislature and whichever joint family was in existence prior to this date also stood partitioned, and therefore the concept of coparcenary also culminated.

Share of the daughter

The enactment of the Hindu Succession Act in 1956, protected and retained the concept of Mitakshara joint family system and the concept of coparcenary. For protection of the concept of Mitakshara joint family and coparcenary, in the first instance it was provided that where a coparcener dies and at the time of his death he was an undivided member of Mitakshara coparcenary, his interest in the coparcenary property would go by survivorship to the surviving coparceners and not in accordance with the provisions of the Hindu Succession Act. In 1956, only males could be coparceners and thus if doctrine of survivorship was applied, it was only the coparceners who could get the share and no female thus was entitled to participate in the coparcenary property ownership. The whole scheme was unfair to women as after partition if the males got their respective shares, for the females even her sustenance and maintenance was a tedious task. Realising that a daughter gets a raw deal under this concept while the sons acquire a right by birth in the ancestral property, a mid way was carved for the first time by the legislature in the shape of introduction of the concept of notional partition. It is interesting to note that the term notional partition is not used anywhere by the legislature but is a phrase used extensively by the judiciary to denote that immediately before the death of a coparcener he had asked for partition. It is a presumption designed to achieve a specific object which is to find out the extent of interest the deceased had in the coparcenary property. This interest of the deceased undivided coparcener would be deemed to be the interest that he was to obtain on a partition and it goes not under the doctrine of survivorship but in accordance with the scheme of intestate or testamentary succession as the case may be i.e., to the class-I heirs or under a testament if the deceased had executed one. This deviation from application of survivorship and the concept of notional partition was to be applied only in case the deceased had left surviving him a class-I heir or a male heir claiming through a female. Thus, where a Hindu man dies and is survived by his widow, son and a daughter, due to application of section 6, since he had left behind him, his widow and daughter who happen to be his class-I heirs, his interest would not go by survivorship but this interest would go to the class-I heirs. For calculating his interest the first partition would be affected between him and his son, his wife also getting the share and the 1/3rd share as the interest of the deceased would now be distributed amongst his three class-I heirs who would get 1/9th each of the property. The daughter would also get 1/9th share in the property, which was not possible under the law as it stood prior to the enactment of the Hindu succession Act in 1956.[44] It must be remembered that the legislature by creating the fiction of a presumptive partition intended to confer upon the daughter a share out of the interest that her father had in

44 *Ramesh Verma* v. *Lajesh Saxena,* AIR 2017 SC 494.

the joint family property. Her right to claim such share arises therefore not during the life time of the owner of the property but only after his demise.[45] After such partition is effected each person possess property with unfettered rights and is entitled to alienate the share and hence alienation would not be illegal. This section with the formality of effecting a notional partition does not apply to the separate property of a deceased male which goes to the class-I heirs directly.[46]

Separate property

Since 1956, a daughter inherits the property of her parents in the same manner as a son. One of the disqualifications that no partition of dwelling house could be effected at her instance was deleted with the 2005 Amendment and therefore legal parity in inheritance laws has seen the light of the day. In *Malabika Bhattacharyya* v. *Amitava Mukherjee*,[47] a Hindu woman was conducting her business in 50% partnership with her son. The business was started by her with her son out of her husband's income without any other contribution from any one. She had a daughter and a son. It was held that after her death the partnership concern had come to an end. Both the daughter and the son would be the equal owners of the dwelling house and the business that she had left.

The separate property of either of the parents cannot be claimed by their children while the parents are alive. It must be remembered that despite the love and affection in this relationship the ownership of the property is exclusively with the owner and no relation of his or her howsoever close he/she may be, can ever demand a share in it by effecting a partition. Inheritance opens only on the demise of the intestate and not during his lifetime. An act of benevolence by permitting the children to stay with the parents in their property or spending money on them does not give them a legal right over the assets of the parents. In *Samadhi* v. *Arumugam*,[48] the court expressly turned down the claim of a daughter over the separate property of her father. The father had distributed his separate property during his lifetime but the daughter tried in vain to prove its character as ancestral property. The same was negated by the court.

Validity of marriage and Legitimacy of children

Inheritance rights flow in favour of the legally wedded spouse as also the legitimate children. Illegitimate children do not inherit from the father but are deemed to be related to the mother and have mutual inheritance rights. A woman therefore has to prove that a marriage existed between her and the deceased in order to claim inheritance from his property as his widow. In *Prabhavini Devi* v. *Sudha*,[49] it was

45 *Sushila Bai* v. *Rajkumari,* AIR 2017 (NOC) 375 (MP).
46 *Mrutunjay Mohapatra* v. *Prana Krushna Mohapatra,* AIR 2017 (NOC) 339 (Ori).
47 AIR 2017 (NOC) 482 (Cal).
48 AIR 2017 (NOC) 906 (Mad).
49 AIR 2017 (NOC) 704 (Ker).

held that if the woman was unable to prove that she was the legally wedded wife of the deceased, then she herself and the child born out of the relationship would not be entitled to get a share out of the property of the deceased. Here after the death of a Hindu man, his alleged wife claimed that they were married under a custom but was unable to prove the custom under which she claimed that her marriage was performed. The court held that since a valid marriage was not proved to have taken place between her and the deceased, she would not be termed as his widow and the child being illegitimate would not be entitled to inherit the property.

Suit for partition by the daughter/sister of coparcenary property

Post 2005, a daughter of a coparcener is included expressly as a coparcener in Mitakshara coparcenary in the same manner as a son. She also acquires a right by birth in the coparcenary property, is entitled to ask for partition and demarcation of her share in the property as also head the Hindu joint family as its Karta if she happens to be the senior most female in the family. If a partition suit is filed by a coparcener, his daughter is entitled to be impleaded in a suit for partition.[50] Thus if the coparcenary property is available after 2005, the right of the daughter to partition the property and claiming her exclusive share in the same cannot be denied to her. In *R Seethamma* v. *M Thimma Reddy*,[51] the issue was whether the right of a daughter who has become a coparcener be taken away by pleading execution of a Will of the undivided share in the coparcenary property? Here, a Hindu daughter filed a suit for partition claiming her half share in the joint family property held by her elder brother. Her father had died in 2006. The property originally was with her grandfather who had two sons. The property was partitioned as amongst all three, each taking one third share. Upon the death of the grandfather, part of his share came to her father and upon the death of her father and mother the share came to her and her brother. The brother contended that since the share had fallen to the father and himself as coparceners, the father had executed a registered Will in the year 1990, under which he had bequeathed his properties in favour of him and his two sons. Since the Will became effective in 2006 upon the demise of the father and was not challenged, he and his sons had become absolute owners of the property. The trial court framed the issue as: whether the daughter was or was not a coparcener and thus entitled to seek partition? Whether the suit property was partitioned and therefore the right of the daughter lost? Whether by executing and acting upon the Will, no property was left to be given to the daughter? The son had also claimed that before the land authorities, he and his father had made a declaration that they both were the owners of half each of the property. The daughter challenged the same and contended that such information was incorrect. On the issue as to whether the execution of Will before 20th December, 2004 would amount to a partition so as to take away the character of the property as joint family property, the

50 *Kalaivani* v. *Ramu,* AIR 2017 (NOC) 172 (Mad).
51 AIR 2017 Hyd 125.

court held that since the testator died in 2006 and the amendment came in 2005, the property bequeathed under Will would be available for partition and the daughter would have a right to claim the same. Therefore she was entitled to a preliminary decree for half share of the ancestral property.

Property partitioned prior to 2005

It is expressly provided in the Hindu Succession Amendment Act, 2005 that the daughter is not competent to re-open a partition that took place before December 20th 2004. Similarly, if the property vested in an heir prior to December 20, 2004, a daughter cannot claim a share in it. In *Balavant Rao* v. *Geeta*,[52] the death of a Hindu male having a son and a daughter took place in 1991 and his son took the property. Upon the daughter filing a claim for her share, under the amended Act, it was held that she cannot take the benefit of the amendment when the succession had already opened in 1991. However, it was not clear from the facts of the case, whether she was at all given a share upon the death of the father or not? As the law stood at the time of the death of the father, since he had died as an undivided coparcener, his interest should have gone under section 6 and daughter as a class-I heir should have received her share from the interest of the father. In *Kamaljit Mishra* v. *Suchitra Mishra*,[53] with respect to devolution of coparcenary interest in the joint family property prior to 2005, a Hindu male died as a member of an undivided coparcenary leaving behind a widow, two sons and three daughters. As per the legal provisions, a notional partition would get effected due to operation of law in view of explanation I of section 6 and the widow would be entitled to a one sixth share in the property. However, the sons had earlier claimed that a compromise had taken place that was within the knowledge of the mother as she had herself relinquished her share in their favour and therefore they were entitled to the complete property. The mother on the other hand, filed a suit for her share negating both the knowledge of any compromise as also the alleged relinquishment of her share. During the pendency of the suit challenging the compromise based partition, in which she was not given any share alleging compromise, her husband died. The court held that as the husband died, it is section 6 of the Act that would be attracted and her share would be determined according to that. They observed:[54]

> The plaintiff is not a coparcener. She is a class-I heir. She is not entitled to demand partition, but then if a partition was to take place between her husband and her sons, she would be entitled to receive a share equal to that of a son.

The court said that this Hindu man had died leaving behind his widow, sons and daughters and thus the proviso to section 6 had come into play and his interest in

52 AIR 2017 (NOC) 837 (Ker).
53 AIR 2017 (NOC) 231 (Ori).
54 *Id.* at para 15.

coparcenary property devolved by intestate succession under the Act and not by survivorship in view of proviso to section 6 of the Act. In light of this, the widow was held entitled to the share.

Marital Status of the mother

Marital based disqualifications mandated confiscation of the right of a widow in the inherited property from her husband and the same was to go to his other heirs in her presence. Her remarriage operated as a complete severance of her status from the family of her former husband. Under the Hindu Widow's Remarriage Act,[55] the succession rights of married women were forfeited upon her remarriage in the property of her husband or lineal descendant, after the death of her husband. She had only a limited estate in her husband's property as her widow and that terminated upon her death or remarriage. The situation continued till 1956, and with the enactment of the Hindu Succession Act, 1956, mother of an intestate was made a class-I heir without any disqualification or forfeiture of her rights upon her remarriage. A mother is a mother and her marital status became irrelevant. She might be married to intestate's father or had taken a divorce or was a widow or had remarried anybody else, none of them is now relevant as far as her inheritance rights were concerned. In *Atma Singh* v. *Gurmej Kaur*,[56] one Hindu man, A died in 1952, leaving being his widow, W, and three sons, S1, S2 and S3. W soon thereafter remarried. S1 died in 1972 and as he was unmarried and also issueless, his property was mutated in the name of his mother W, as his class-I heir. S2 filed a suit challenging this mutation on the ground that since in 1972, the Act of 1856 was not repealed and W had remarried before 1956, she was disentitled from inheriting the property of her son under the 1856 Act. Hence, the property should not go to her and he as his brother had a better right over the property. The issue before the Court was: whether the mother, by her remarriage under the Act of 1856, that provided for a forfeiture of her right in the property of her husband or the lineal descendant would be now prevented from inheriting the property of her son? The succession here had opened in 1972 after the death of the son but it was after the coming into operation of the 1956 Act. The Court held that since she was a class-I heir she would inherit the property and her remarriage would be immaterial as far as her succession rights are concerned in the property of her son. Right from the trial court to the apex court, her right to inherit the property of her son as a class-I heir was upheld. The court held that section 4 of the Hindu Succession Act, 1956, provides that the Act has an overriding effect and if any provision has been made in this Act, any provision that is inconsistent with the Act would cease to have any effect. Even otherwise for an heir to be disqualified from inheriting the property of the deceased, the clear legal provisions have been stipulated in the Act itself. Remarriage of a widow operated as a disqualification only when she wanted to inherit the property as such widow from her father in law or the grandfather in law as she ceases to be a member

55 Act 15 of 1856. s. 2 since repealed.

56 AIR 2017 SC 4604.

of the family, but the relationship between the mother and the child is blood relationship and remains unaffected by her marital status.

Female intestate

The continued diversified categories postulate triple sources of acquisitions of property in case of a female intestate and conservation of the property necessitates its reversion to the family from where it was sourced in the first instance by the female. Accordingly property that a daughter inherits from either of her parents in the capacity of their daughter reverts back to the heirs of the father in absence of her issue. The spouse of the deceased is not entitled to receive anything. In *Mottaiyandi Chettiar* v. *Saroja*,[57] a Hindu female died and the property that she left behind was inherited by her from her deceased father in the capacity of his daughter. On her death it was held that the property would revert back to the heirs of her father and the husband would be excluded from inheriting the property. No cause of action would survive for husband on her death to seek declaration of title over her property and all inherited properties of this female Hindu would be inherited by the heirs of her father. In such cases it is presumed that the property belonged to her deceased father and his heirs would be reckoned taking into account the provisions of sections 8 to 13. In *Karunanidhi* v. *Seetharama Naidu*,[58] an interesting issue arose. The reversion of the property is possible only in absence of the children and the children of the deceased children of a Hindu female. Their presence would not lead to reversion of the property to the heirs of the father but they themselves would be entitled to take the property as the rightful heirs of the deceased female. It is pertinent to note that all lineal descendants do not inherit from a Hindu woman in the first place as the inheritance in the first category that also has the effect of preventing the property from going to her natal family is limited only to her grandchildren. A child of a deceased grandchild, though a legitimate lineal descendant is neither a heir of first category nor an heir whose presence would lead to an alternate devolution of property. He is not termed as a direct heir to the deceased woman but is included in the category of 'heirs of her father,' as per the law prevailing prior to the amendment in 2005, Where a Hindu woman obtained absolute ownership in the property under a Will upon her death the property would go to her heirs. Her death was prior to the promulgation of the Amending Act of 2005. On this date the son of a predeceased daughter of a predeceased daughter was not a class-I heir to the property of a male intestate but was a class-II heir and was included subsequently in the class-I category. As on the day the succession opened he was not an heir he would not be competent to inherit the property because the amendment is prospective in nature. The claim here was from the daughter and son of a predeceased daughter of a pre deceased daughter of the father of the female intestate. Since the death of the female was in 1987, the benefit under the 2005 amendment could not have been taken by the plaintiffs due to the prospective nature of the amendment.

57 AIR 2017 (NOC) 726 (Mad).
58 AIR 2017 SC 1632.

Property inherited from husband or father-in law

In accordance with the laws of inheritance as they are applicable to the property of a female Hindu, the property that a Hindu woman inherits from either her deceased husband in the capacity of his widow or from the deceased father in law in the capacity of widow of his predeceased son, upon her dying issueless, this property reverts back to the family of her husband from whom or from whose father she had inherited the property. However, if the property vests in her, can she before her death gift it to anyone else. The answer appears to be in the affirmative as it is only upon her death the succession laws apply but her power to alienate the property once she acquires them through succession from her husband are not curtailed at all. In *Hari Ram* v. *Madan Lal*,[59] an issueless woman died leaving behind property that she had inherited from her husband, who had in turn inherited the property from his father. Before her death, she had entered into an unregistered compromise decree at the behest of the civil court in favour of her sister's son. The court held the gift as invalid on two counts. First, that a sister's son for an issueless widow is not considered a family member and the widow could not make a gift in his favour. Thus, property would revert back to her deceased husband's heirs. Second, that the document executing a gift was required to be compulsorily registered as it would end up creating new rights in favour of a person. The decree that was executed by W in favour of her sister's son was not valid as it was unregistered and law required it to be compulsorily registered. Thus the entire property was to go by succession and in that the heirs of her husband would be preferred to the son of the intestate's deceased sister.

The first argument that no gift of the property can be made in favour of the son of the deceased sister was incorrect as presently the widow inherits the property as an absolute owner and as an absolute owner she has full capacity to execute a gift in favour of anyone. It can be in favour of a relation, a friend or even for charity. Inheritance laws apply post death of a person and do not have any reflection on transfer that might have been executed inter-vivos.

> In *Suldeep* v. *Hiralal*,[60] a Hindu woman acquired property from her second husband after his death and then died leaving behind her grandson from her first marriage and the son of her second husband. The Chhattisgarh high court held that her property would devolve upon the heirs from her second husband and not on her grandson from her first marriage. Further observing that the source of the property in case of a female Hindu is very important he quoted from an earlier incorrect precedent[61]as:[62]

59 AIR 2017 P&H 69.

60 AIR 2017 Chh 164.

61 *Dhanishta Kalita* v. *Ramakanta Kalita,* AIR 2003 Gau 92.

62 *Id.* at para 17.

In view of the aforesaid principles, it is now settled that for applying the general rules of succession of the property of a Hindu female who dies intestate, the source of acquisition of her property is first required to be determined in order to apply the general rules of succession as defined under section 15 of the Act and that source as analysed would be the decisive factor for its applicability.

The court further noted that once the deceased woman inherited the property after the death of her husband she became an absolute owner of the property, but she had left behind the son of her son who was also substituted after her death during the pendency of litigation. Erroneously the court ruled that her grandson would not be entitled to her property but her husband's son would. It is extremely unfortunate that an error has been committed yet again by the Chhattisgarh high court in not merely understanding the law governing succession to the property of a female Hindu but also the clear provision that form part of section 15 of the Hindu Succession Act, 1956. The law clearly says that if a Hindu woman inherits property from her husband and then dies in absence of her son or daughter the property would revert back to the heirs of her husband from whom she had inherited the property.

Section 15 The Hindu Succession Act, 1956

15. General rules of succession in the case of female Hindus:
    (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,
    (a).....
    (2) Notwithstanding anything contained in sub-section (1),—
        (a) ..... any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and
        (b) Any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, *in the absence of any son or daughter of the deceased* (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

The term "any son or the daughter of the deceased" means her children or children of deceased children, and the legislature does not further provide that her children have to be from that husband from whom she had inherited the property. All her children from any husband including her illegitimate children are covered under the category of "any son or daughter of the deceased" and are entitled to succeed together irrespective of the source of the property available for succession. The disqualification operates not with respect the primary heirs but with respect to the other heirs. For

example, when she inherits the property from her parents and dies leaving behind her children and the husband, the husband is not entitled to inherit the property. Similarly, if she inherits the property from her husband, and remarries and then dies, the second husband cannot inherit the property but her children born from the second husband would. There is no demarcation as far as the children are concerned. The law is same in this respect irrespective of whether the deceased is a Hindu male or a female. In case a Hindu male dies leaving behind children from multiple wives whom he had married validly one after the other, all children inherit together. Similarly, if a female Hindu dies leaving behind children from different husbands whom she had married one after the other or even without a marriage or under a void marriage all of her children inherit and the source of the property is inconsequential. Unfortunately, the judge had here read non-existent provision and denied rightful claimant a share of the property.

Murderer disqualified

The disqualifications though limited in number presently prevent a person to inherit the property and the next in line of succession becomes entitled to take the property as if the disqualified person is dead. One of such disqualification relates to the murder of an intestate. Nearly all inheritance laws as a matter of public policy disqualify a murderer from inheriting the property of the person whom he has killed. Hindu law gives statutory shape to this rule. Often the issue becomes a contentious one as the accused may get a benefit of doubt from the criminal court due to insistence on proof beyond reasonable doubt. In such cases would such an acquittal lead to restoration of their inheritance rights? Is conviction a necessary requirement for him to be so disqualified, and secondly, even if it is proved that he did kill the intestate but did it under the circumstances that would not hold him guilty under section 302 but under any other section, would he still be deprived of his succession rights? In *Nirbhari Singh* v. *Financial Commissioner*,[63] the issue was: whether a person who commits murder of another inherit from him? It is a settled rule that the term "murderer" has to be understood in parlance as a person who commits murder or abets the commission of murder. This principle is also based on the principles of equity, justice and good conscience to exclude that person for being an heir of the person killed by him.

The interesting events of facts as also the issue emerged here was, is a conviction under section 302 of the IPC, essential to forfeit the succession rights of a person claiming the property of another whom he had murdered? If it was proved that he did murder the testator, but he did so under grave and sudden provocation that lifts his case out of section 302 IPC and brings it under section 304 IPC, so that the conviction is for culpable homicide not amounting to murder, will section 25 still be applicable? Here A was killed by B by inflicting a knife blow. The property of A was then taken by his natural heirs under succession and it was mutated as well in their name. An objection

63 AIR 2017 P&H 178.

was then filed by B with the authorities that A had executed a Will of his property in his favour and therefore the succession would not open in favour of the other natural heirs, and the property be mutated in his name, that was accordingly done. Now another application was filed by the natural heirs that B was disqualified to succeed to A's property having murdered him. The parties were asked to maintain the status quo and refrain from selling it till the verdict of the court. B was able to prove that though he had killed A, he had done so under grave and sudden provocation and therefore the life sentence/imprisonment awarded by the trial court was reduced to 10 years of rigorous imprisonment along with fine. His counsel argued that since he has not been charged under section 302 IPC for committing murder but under section 304, IPC for culpable homicide not amounting to murder, he can still succeed to the property. The court held that killing a person in itself would result in the forfeiture of the rights of succession and accordingly the claim of B was dismissed.

VIII CONCLUSION

The year 2017 saw some important deliberations and some incorrect judicial pronouncements. In all cases except one case under survey, adoption was fiercely pleaded to enforce property rights/claims even in light of express denials of the claim by the very adoptive parents whose child the claimant said that he was. The claims interestingly emanated from persons who were legally disqualified to be adopted as their age and marital status violated the written provisions under the Hindu Adoptions and Maintenance Act. Differential maintenance rules were taken cognizance of and applied by the courts in case of a major son and a major daughter, to the former denying maintenance but in case of later granting maintenance and even her marriage expenses. Commission of bigamy by women led to the declaration of their second marriages as void in two cases. The clear statutory provisions provided under the legislation for divorce by mutual consent were again twisted and considerably diluted by the courts inserting ambiguity and uncertainty. Mothers continued to have an upper hand in the custody battles though the court adopted a very stringent and much needed attitude in wake of the obstinate conduct of a mother violating the court's orders with impunity and went even to the extent of not hesitating of warning her of the possible if needed use of coercive force. Empowered and determined daughters enforced their rightful property rights as against the family members who tried to retain their shares illegally and without their consent. The courts again came up with an incorrect and unwarranted interpretation of section 15, to deprive the grandchild of a deceased Hindu woman of his rightful share in her property, in attempts to conserve the same within the family of her husband. Conversion of an offence from murder to culpable homicide not amounting to murder still, the court ruled would result in the forfeiture of the inheritance rights of a person labelling him to be disqualified heir.